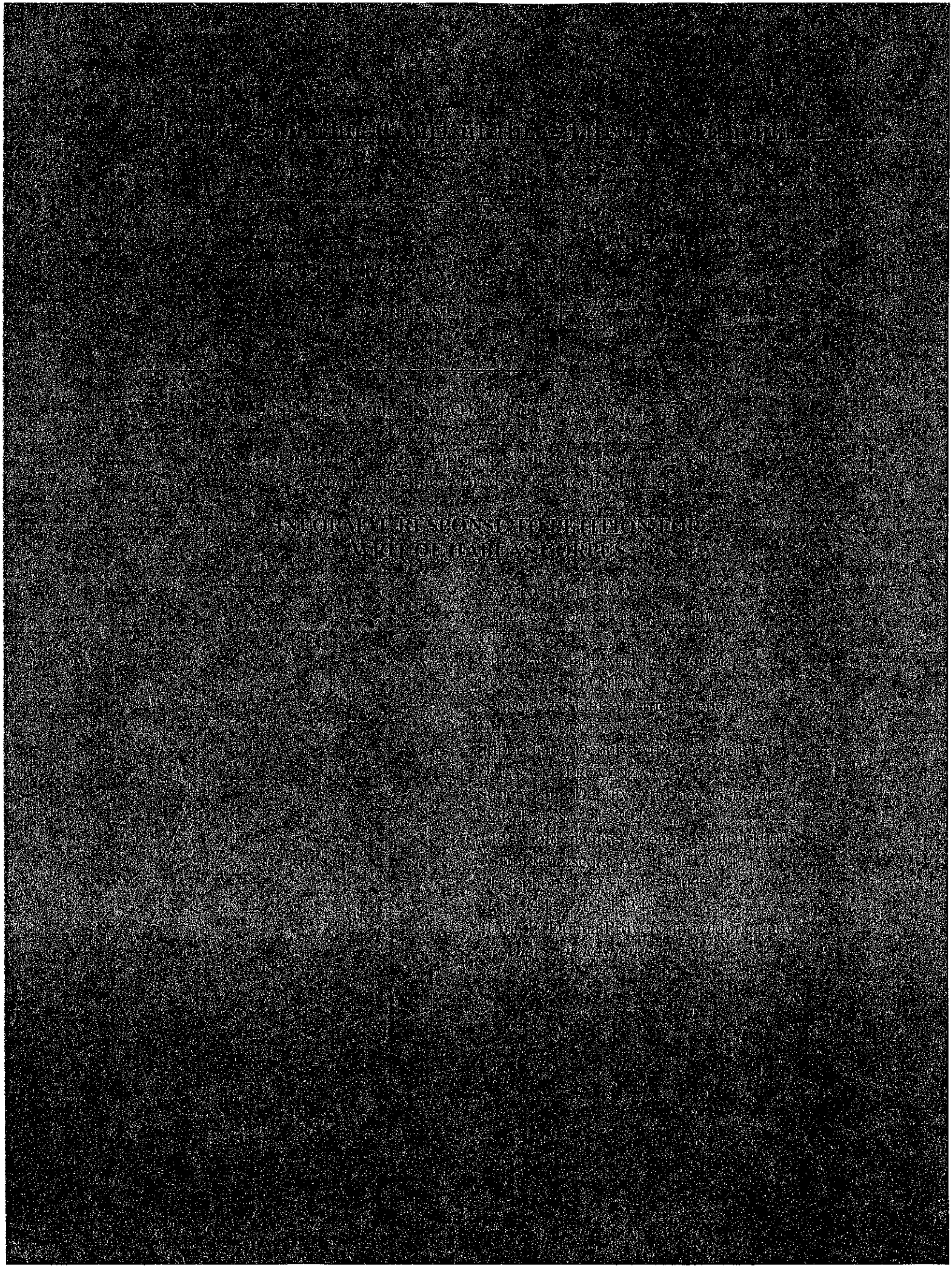

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INTRODUCTION

Petitioner, Scott Lee Peterson, was convicted of the 2002 first degree murder of his wife Laci Denise Peterson and the second degree murder of their unborn son Conner. (Pen. Code, § 187, subd. (a).) The jury also found true the special circumstance of multiple murder. (§§ 187, 190.2, subd. (a)(3).)

Following the penalty phase, the jury returned a verdict of death. The automatic appeal from that judgment is currently pending in this Court. (*People v. Scott Lee Peterson*, Case No. S132449.) Peterson's opening brief on appeal was filed on July 5, 2012. The People's brief was filed on January 26, 2015. The reply brief was filed on July 23, 2015.

On November 23, 2015, Peterson filed this petition for writ of habeas corpus. The Court requested an informal response on November 24, 2015.

STATEMENT OF FACTS

The facts of this case are set forth in detail at pages 6 through 166 of the People's brief on direct appeal, which we incorporate by reference here. We also include a brief synopsis, which follows.

Laci was married to Scott Peterson and eight months pregnant with the couple's first child, when she disappeared on Christmas Eve 2002. She was 27 years old at the time.

During the course of the investigation into Laci's disappearance, Peterson told authorities that he left their home in Modesto on Christmas Eve morning and went fishing by himself on San Francisco Bay. It was later discovered that he had purchased the boat he used that day about two weeks before Laci disappeared. According to Peterson, when he returned home late that afternoon on December 24, Laci was missing.

Over the agonizing weeks that followed for Laci's family and friends, Peterson portrayed himself as a concerned husband and father-to-be.

However, unbeknownst to anyone, he had been involved in an extramarital affair. Peterson's paramour Amber Frey did not know that he was married. Initially, Peterson told Frey that he was single, childless, and in the market for a soul mate. But, when Frey's best friend discovered that Peterson was married and told Frey, Frey confronted him with his lie. Peterson changed his story and told Frey that he was, in fact, married. However, he explained that he had "lost" his wife. Peterson said that he had not revealed the fact that he was married because the loss of his wife was very difficult for him to discuss. Eventually, Frey discovered that Peterson was the husband of the missing Modesto woman and immediately contacted authorities.

Early in 2003, as the investigation into Laci's disappearance continued, Peterson sold Laci's car, subscribed to pornography channels, looked into selling the couple's home—furnishings included, closed down his warehouse, stopped mail delivery to the home, and converted Conner's nursery into a de facto storage room. Around this time, Peterson also made numerous trips to the Berkeley Marina in different rented vehicles. Police surveillance revealed that Peterson never stopped to talk to anyone at the marina; he merely drove around the perimeter of the marina. He lied about his whereabouts to family and friends.

In mid-April 2003, Laci's and Conner's bodies washed ashore on the San Francisco Bay shoreline a short distance from each other and not far from the area where Peterson said he was fishing on the day Laci and Conner disappeared. At the time the bodies were discovered, and not yet identified, Peterson was huddled with his family in the San Diego area. Despite being told about the discovery, Peterson made no effort to travel back to the Bay Area in the event the bodies were determined to be those of Laci and Conner.

Peterson was arrested on April 18, 2003, while he was on his way to meet family members for a golf outing. He had altered his appearance.

Authorities also discovered that Peterson had $15,000 in cash in his possession along with outdoor survival gear.

STANDARD OF REVIEW

In California, "it is the trial that is the main arena" for determining guilt or innocence and whether the death penalty should be imposed. (*In re Robbins* (1998) 18 Cal.4th 770, 777.) And "[i]t is the appeal that provides the basic and primary means for raising challenges to the fairness of the trial." (*Ibid.*) Habeas corpus, on the other hand, "is an extraordinary, limited remedy against a presumptively fair and valid judgment." (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1260; accord *Robbins, supra*, 18 Cal.4th at p. 777; *People v. Duvall* (1995) 9 Cal.4th 464, 474; *In re Clark* (1993) 5 Cal.4th 750, 764, 776.) Its availability "must be tempered by the necessity of giving due consideration to the interest of the public in the orderly and reasonably prompt implementation of its laws and to the important public interest in the finality of judgments." (*Robbins, supra*, at p. 778.)

"Postconviction habeas corpus attack on the validity of a judgment of conviction is limited to challenges based on newly discovered evidence, claims going to the jurisdiction of the court, and claims of constitutional dimension." (*In re Clark, supra,* 5 Cal.4th at pp. 766-767.) Habeas relief is not available for claims which could have been raised on direct appeal, or to relitigate claims that were previously raised. (*In re Dixon* (1953) 41 Cal.2d 756, 759; *In re Waltreus* (1965) 62 Cal.2d 218, 225.)

A petitioner bears "a heavy burden" to plead sufficient grounds for relief. (*People v. Viscotti* (1996) 14 Cal.4th 325, 351.) Before an order to show cause will issue on a petition for writ of habeas corpus, the petitioner must allege specific facts which establish a prima facie case. (*In re Sassounian* (1995) 9 Cal.4th 535, 547.) To satisfy this burden, a petitioner must plead with particularity the facts supporting each claim and include

reasonably available documentary evidence. (*People v. Duvall, supra*, 9 Cal.4th at p. 474; *In re Harris* (1993) 5 Cal.4th 813, 827, fn. 5; *In re Clark, supra*, 5 Cal.4th at p. 781, fn. 6.) The petitioner "must set forth specific facts which, if true, would require issuance of the writ," and a petition that fails in this regard must be summarily denied for failure to state a prima facie case for relief. (*People v. Gonzalez, supra*, 51 Cal.3d at p. 1258.) Mere conclusory allegations are insufficient, especially when, as here, the petition is prepared by counsel. (*Ibid.*; *People v. Karis* (1988) 46 Cal.3d 612, 656.) Such inadequately supported claims "do not warrant relief, let alone an evidentiary hearing." (*Karis, supra*, 46 Cal.3d at p. 656.)

A petition is judged on the factual allegations contained within it, without reference to the possibility of supplementing the claims with facts to be developed later. (*In re Clark, supra*, 5 Cal.4th at p. 781, fn. 16.) Only if the court determines that a petitioner has alleged facts which, if true, state a prima facie case for relief and that the petitioner has supported his or her allegations with all available documents and affidavits does the court institute a proceeding by issuing an order to show cause why the writ should not be granted. (*Ibid.*; see *People v. Duvall, supra*, 9 Cal.4th at pp. 474-475; *People v. Romero* (1994) 8 Cal.4th 728, 737-740.) If the petition fails to state a prima facie case for relief, it should be summarily denied. (*Romero, supra*, 8 Cal.4th at p. 737.)

To assist it in determining the factual sufficiency of the petition, this Court has requested an informal response from the People. The purpose of the informal response is to identify petitions which should be summarily dismissed without the need for formal pleadings or an evidentiary hearing. (*In re Bacigalupo* (2012) 55 Cal.4th 312, 332; *People v. Romero, supra*, 8 Cal.4th at p. 737.) Accordingly, the informal response need not provide documentary evidence to controvert the factual allegations of the petition, but may instead be limited to legal arguments with respect to perceived

flaws on the face of the petition. (*In re Robbins*, 18 Cal.4th at p. 798, fn. 20; *People v. Romero, supra*, at pp. 740-742, 745 & fn. 11.) As will be discussed in addressing each claim *post*, Peterson fails to state a prima facie case for relief and/or fails to provide all reasonably available documentary evidence in support of his claims. Thus, the instant petition should be summarily denied.[1]

TIMELINESS

In California, a habeas petition must be filed without substantial delay. (*In re Reno* (2012) 55 Cal.4th 428, 460.) "A petition for a writ of habeas corpus [in a capital case] will be presumed to be filed without substantial delay if it is filed within 180 days after the final due date for the filing of appellant's reply brief on the direct appeal or within 36 months after appointment of habeas corpus counsel, whichever is later." (Cal. Supreme Ct. Policies Regarding Cases Arising From Judgments of Death, policy 3, timeliness std. 1-1.1.) In this case, habeas counsel was appointed on February 18, 2010, and the reply brief on direct appeal was filed on July 23, 2015. Because the petition was filed on November 23, 2015, less than six months after the filing of the reply brief in the automatic appeal, it is presumptively timely.

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[1] If this Court summarily denies the petition, the People respectfully request that the Court do so on procedural grounds, if warranted, with citations to the applicable procedural bars and claims, and on the merits. Such an order would facilitate deference to this Court's application of procedural bars in any subsequent federal habeas corpus litigation in this case as well as other California cases. Such an order would also minimize the possibility of subsequent de novo review on federal habeas corpus, as federal habeas courts must defer to a state-court merits determination. (28 U.S.C., § 2254, subds. (d)(1)-(2).)

CLAIMS FOR RELIEF

Before proceeding to the merits of Peterson's claims, the People urge this Court to limit its evaluation of the petition to the facts now before this Court. Peterson relies on facts set forth in the petition, and also suggests throughout the petition, in support of numerous of its claims, that there may be other facts yet to be developed which support his claims. Without regard for the potential existence of other undisclosed facts, the petition is to be determined solely by what is actually before the Court when the petition is considered. (*People v. Duvall, supra*, 9 Cal.4th at p. 474; *In re Clark, supra*, 5 Cal.4th at p. 781, fn. 16.) Further, although Peterson asserts throughout his petition that he has not been provided with adequate funding and a reasonable opportunity for full investigation to support his claims, his petition fails to support the need for such discovery.

I. PETERSON'S CLAIM THAT A JUROR CONCEALED BIAS DURING VOIR DIRE FAILS TO STATE A PRIMA FACIE CASE FOR RELIEF

Peterson asserts in Claim One that Juror No. 7 intentionally concealed information during voir dire that would have been the basis for a meritorious challenge for cause or, in the alternative, a peremptory challenge by the defense.[2] As a result, he contends that his rights under the state Constitution were violated, as well as his rights to a fair and impartial jury, the effective assistance of counsel, and reliable guilt and penalty determinations under the federal Constitution, as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments.[3]

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[2] Although Peterson refers to the juror by name, respondent will continue to refer to her as Juror No. 7. (See Code Civ. Proc., §§ 206, 237.)

[3] To the extent that Peterson claims a Fifth Amendment due process violation, he fails to state a valid claim. The Fifth Amendment Due Process Clause applies only to the federal government, not the states. (See *Public*

(continued...)

The People specifically and generally controvert all of Peterson's factual and legal claims and allegations in Claim One as set forth in the petition at pages 96 through 108, and in the supporting memorandum of points and authorities,[4] unless otherwise expressly and specifically conceded herein, and state that Peterson has failed to make a prima facie showing that Juror No. 7 lied or concealed pertinent information in the first instance. However, if she did, such concealment was not tantamount to actual bias on her part that prejudiced Peterson.

A. General Principles of Applicable Law

Criminal defendants have a constitutional right to a trial by unbiased, impartial jurors. (U.S. Const., 6th and 14th Amends.; Cal. Const., art. I, § 16; *Irvin v. Dowd* (1961) 366 U.S. 717, 722; *In re Hitchings* (1993) 6 Cal.4th 97, 110.) Thus, a conviction cannot stand if even one juror was improperly influenced. (*People v. Holloway* (1990) 50 Cal.3d 1098, 1112, disapproved on other grounds in *People v. Stansbury* (1995) 9 Cal.4th 824, 830, fn. 1.) "Due process means a jury composed of persons capable and willing to decide the case solely on the evidence before it . . . ." (*Smith v. Phillips* (1982) 455 U.S. 209, 217.) The jury's verdict must be based only

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(...continued)
Utilities Comm'n v. Pollak (1952) 343 U.S. 451, 461 [strictures of Fifth Amendment due process apply only to actions of federal government]; *Moose Lodge No. 107 v. Irvis* (1972) 407 U.S. 163, 172-173 [Fourteenth Amendment Due Process Clause applies to actions of the states]; *Warren v. Government Nat. Mort. Ass'n* (8th Cir. 1980) 611 F.2d 1229, 1232 [Fifth Amendment Due Process Clause applies to the federal government, while Fourteenth Amendment Due Process Clause applies to the states].)

[4] Peterson's first 10 claims are supported by a separate volume containing a memorandum of points and authorities. Although the memorandum is subdivided into six sections, several of Peterson's claims have been subsumed within one section. The People refer to the memorandum as appropriate.

on the evidence presented at trial in order to satisfy the defendant's due process rights. (*In re Boyette* (2013) 56 Cal.4th 866, 890.)

Voir dire examination serves to protect a defendant's constitutional rights "by exposing possible biases, both known and unknown, on the part of the potential jurors." (*McDonough Power Equipment, Inc. v. Greenwood et al.* (1984) 464 U.S. 548, 554.) Lying about or omitting material facts during voir dire can demonstrate prejudgment of the case, and thus, actual bias. (See *People v. Nesler* (1997) 16 Cal.4th 561, 585-586, 588.) A juror who conceals relevant facts or gives false answers during voir dire commits misconduct. (*In re Boyette, supra*, 56 Cal.4th at p. 889; *In re Hitchings, supra*, 6 Cal.4th at p. 111.) False or misleading voir dire answers "eviscerate a party's statutory right to exercise a peremptory challenge and remove a prospective juror the party believes cannot be fair and impartial." (*In re Hitchings,* at pp. 110-112; see also *In re Boyette,* at p. 889.)

> Under California law, if a juror concealed actual bias that would have constituted grounds for a challenge for cause during jury selection or discharge during trial, the juror's concealed bias constitutes misconduct that warrants a new trial under Penal Code section 1181, subdivision 3. (*People v. Nesler, supra*, 16 Cal.4th at p. 581.) Actual bias that supports an attack on a verdict is similar to actual bias warranting a juror's disqualification. (*Ibid.*) "Actual bias" means "the existence of a state of mind on the part of the juror in reference to the case, or to any of the parties, which will prevent the juror from acting with entire impartiality, and without prejudice to the substantial rights of any party."

(*People v. Nesler, supra*, 16 Cal.4th at p. 581, quoting Cal. Code of Civ. Proc., § 225, subd. (b)(1)(C).) In other words, the test asks not whether the juror would have been stricken by one of the parties, but whether the juror's concealment (or nondisclosure) evidences bias. (*In re Boyette, supra*, 56 Cal.4th at pp. 889-890.)

However, this Court has held that "good faith when answering voir dire questions is the most significant indicator that there was no bias" and that "an honest mistake on voir dire cannot disturb a judgment in the absence of proof that the juror's wrong or incomplete answer hid the juror's actual bias." (*In re Hamilton* (1999) 20 Cal.4th 273, 300; see also *People v. Merriman* (2014) 60 Cal.4th 1, 97; *In re Boyette, supra*, 56 Cal.4th at p. 890.) Courts "must be tolerant, as jurors may forget incidents long buried in their minds, misunderstand a question or bend the truth a bit to avoid embarrassment." (*Boyette, supra*, at pp. 880-881.)

B. Peterson Has Failed to Make a Prima Facie Showing That Juror No. 7 Committed Misconduct by Concealing Information during Voir Dire

Peterson alleges that Juror No. 7[5] intentionally concealed her involvement in a lawsuit and in a criminal case and that her lies evinced a bias against him that would have supported a challenge for cause.

We disagree. First, the petition does not establish that Juror No. 7 intentionally lied or concealed information. Further, even if Juror No. 7's challenged answers or omission were a dubious interpretation of the relevant inquiry, Peterson has not carried his burden to show actual bias.

Peterson first calls into question the juror's answers to questions in the juror questionnaire concerning her participation in lawsuits, or lack thereof. The relevant facts underlying Peterson's claim are as follows. On November 27, 2000, Juror No. 7 applied for a civil protective order because

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[5] This juror (assigned prospective juror no. 6756) was originally Alternate Juror No. 2. She replaced the original Juror No. 7 (no. 6869). (Case No. S132449 (Automatic Appeal) 19CT 5990; 112RT 20775.) Peterson has requested the Court take judicial notice of the certified record in the related automatic appeal. (Petn. at p. 15.) The People join in the request, pursuant to Evidence Code section 452, subdivision (d), and refer to the direct appeal record when necessary to adequately respond to Peterson's claims.

her former boyfriend's ex-girlfriend (Ms. Kinsey) was engaging in harassing and threatening conduct. (Petn. Exh.[6] 45; Habeas Corpus Petition ("HCP") at pp. 905-910.) At the time, Juror No. 7 was nearly five months pregnant. (Exh. 45; HCP at p. 908.) The San Mateo County Superior Court issued a temporary restraining order that day. (Exh. 45; HCP at pp. 903-904.) On December 13, 2000, after a hearing, the court issued a three-year no-contact order. (Exh. 45; HCP at pp. 912-914.)

Peterson characterizes the aforementioned legal proceeding as a "lawsuit" so as to argue that Juror No. 7 lied in response to questionnaire numbers 54a and 54b and during voir dire. (Petn. at pp. 96, 99; Mem. at p. 5.) Question number 54a asked if the juror had been involved in a lawsuit other than divorce proceedings. Juror No. 7 answered no. (Exh. 45; HCP at p. 889.) If the answer was affirmative to question 54a, 54b then asked whether the juror was the plaintiff, defendant, or both. Presumably, having answered question 54a in the negative, Juror No. 7 left 54b blank because it was inapplicable. (Exh. 45; HCP at p. 890.)

While Peterson may be technically correct that a "lawsuit" generally describes a process in which a court resolves a disagreement between parties, that does not mean that Juror No. 7 would necessarily have interpreted it that way. In common parlance, a lawsuit could reasonably be understood as an action in which one person sues another for money, property etc. "[J]urors are not necessarily experts in English usage. Called as they are from all walks of life, many may be uncertain as to the meaning of terms which are relatively easily understood by lawyers and judges." (*McDonough Power Equip. v. Greenwood et al., supra*, 464 U.S. at p. 555.) It seems untenable to expect that Juror No. 7, whose background did not

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[6] References to exhibits are to those provided by Peterson in support of his petition, unless otherwise noted (i.e., trial exhibits).

include any professional training in law, law enforcement, or criminology (Exhibit 45; HCP at pages 886 through 888), would have understood that seeking a restraining order was considered a lawsuit.[7] This Court has held that "good faith when answering voir dire questions is the most significant indicator that there was no bias" (*In re Hamilton, supra*, 20 Cal.4th at p. 300) and "an honest mistake on voir dire cannot disturb a judgment in the absence of proof that the juror's wrong or incomplete answer hid the juror's actual bias" (*ibid.*). Here, Juror No. 7's questionnaire responses, while perhaps not comporting with technically correct legal jargon, are not indicative of purposeful concealment or deceit.

Next, Peterson alleges that Juror No. 7 lied in her answers to question numbers 72 and 74 in the questionnaire, which inquired about the juror's involvement in trials as a party, witness, or interested observer. Peterson contends that Juror No. 7 and her then boyfriend were involved in a criminal case that arose out of the circumstances surrounding Ms. Kinsey's harassment of Juror No. 7 and her boyfriend. (Petn. at pp. 99, 101.) The basis for this assertion appears to be a portion of Ms. Kinsey's statement filed in the San Mateo County Superior Court in response to Juror No. 7's application for a restraining order: "As a result of my actions I was punished for vandalism and served one week in the Elmwood facility at

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[7] During voir dire, Juror No. 7 explained that she worked at a law firm between careers, but the firm "went under." (Exh. 46; HCP at p. 936.) The record offers no insight into the nature of her work there or the duration of her employment at the firm. Juror 7 explained that her training and background was in the medical field (although she wanted to be a lawyer when she "was growing up as a kid"). (*Ibid.*) At the time of trial, Juror No. 7 was working in a bank. (Exh. 44; HCP at p. 887; Exh. 46; HCP at p. 936.)

Santa Clara County jail." (Exh. 45; HCP at p. 916.)[8] Notably, Peterson includes no documentation proving Juror No. 7's involvement in a related criminal trial in Santa Clara County. His tacit assertion that Juror No. 7 was a victim and witness in a criminal trial is founded on mere speculation. Peterson has not shown that Ms. Kinsey's conviction for vandalism, and subsequent punishment, were obtained by way of a trial, which involved Juror No. 7. It is just as likely that Ms. Kinsey's conviction was obtained by plea. Therefore, Peterson's contention that Juror No. 7 lied when responding in the negative to question number 72 regarding participation in a trial (Exhibit 44 at page 894) is without substance. Similarly, there was no intentional concealment on the part of Juror No. 7 when she answered in the negative to question number 74, which asked whether she or any family member or close friend had been a victim or witness to any crime. (Exh. 44; HCP at p. 894.) Peterson's contention presupposes that Juror No. 7 would have understood Ms. Kinsey's harassment to be a crime. In some instances, it certainly can rise to that level, but Peterson offers nothing here to demonstrate that Juror No. 7 would have necessarily understood that to be the case.

Further, we note that nearly four years elapsed between the time of the events in 2000 and when Juror No. 7 completed her questionnaire in March 2004. Beyond Juror No. 7's reasonable interpretation of the questions at issue, the possibility exists that she had forgotten the incident by the time of trial. (*In re Boyette, supra,* 56 Cal.4th at pp. 880-881 [courts "must be tolerant, as jurors may forget incidents long buried in their minds . . . ."].)

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[8] At the time Juror No. 7 filed her application for a restraining order, she was living in East Palo Alto in San Mateo County. (Exh. 45; HCP at p. 905.) The incident occurred at her previous address in Mountain View in Santa Clara County. (Exh. 45; HCP at p. 919.)

In any event, Peterson has not demonstrated misconduct on Juror No. 7's part owing to lies or intentional concealment of material facts.

C. There Is No Substantial Likelihood That Juror No. 7 Harbored Actual Bias Against Peterson

Even crediting Peterson's claim that Juror No. 7 committed misconduct and improperly concealed material information during voir dire, there is no substantial likelihood that she was actually biased against Peterson.

Where misconduct has occurred, there is a rebuttable presumption that it was prejudicial. (*People v. Holloway, supra,* 50 Cal.3d at pp. 1108-1109.) Whether a defendant suffered prejudice from juror misconduct, "is a mixed question of law and fact subject to an appellate court's independent determination." (*People v. Nesler, supra*, 16 Cal.4th at p. 582.) Thus, this Court must determine whether any juror was unable to put aside any preconceived opinions and to render a verdict based solely upon the evidence received at trial. (*Id.* at pp. 582-583.) A "verdict will only be set aside if there appears to be a substantial likelihood of juror bias." (*People v. Loker* (2008) 44 Cal.4th 691, 747.) That is, the presumption of prejudice is rebutted and the verdict will stand if the entire record and the surrounding circumstances, indicate "there is no reasonable probability of prejudice, i.e., no substantial likelihood that one or more jurors were actually biased against the defendant." (*In re Hamilton, supra*, 20 Cal.4th at p. 296; see *McDonough Power Equipment, Inc. v. Greenwood et al., supra*, 464 U.S. at pp. 555-556 [an honest yet mistaken answer to a question on voir dire rarely amounts to a constitutional violation, and even an intentionally dishonest answer is not fatal provided that the falsehood does not reflect a lack of impartiality].) The standard is objective. (*In re Hamilton, supra*, at p. 296.)

Applying this standard, the information that Juror No. 7 did not disclose was such that there was no substantial likelihood of actual bias. As a threshold matter, Peterson's framing of the issue strays far from reality. Peterson states that Juror No. 7 had "personally experienced the threat of losing a child . . . ." (Petn. at p. 106.) To say that this is hyperbole, would be an understatement. Nothing in the documents that Peterson has provided with his petition supports such an assertion. If Ms. Kinsey's actions truly endangered Juror No. 7 and the life of her unborn child, one would reasonably expect Peterson to have appended relevant criminal records from Santa Clara County showing attempted murder, criminal threats, or assault charges. Instead, it appears that the events merely gave rise to prosecution of Ms. Kinsey for vandalism, a crime involving the property of Juror No. 7's landlord. The distinction between Peterson's characterization of the events and reality is an important one, as we explain *post*.

As evidence of Juror No. 7's actual bias against him, Peterson points to Juror No. 7's willingness to sit on the jury despite the fact that her employer would only pay her for two weeks of her time away from work. (Petn. at p. 101.) However, Peterson's trial counsel, seemingly anxious to keep Juror No. 7 in the mix at that time, explained that her attitude was not at all unusual: "[W]e've got a couple of others who have said the same thing." (Exh. 46; HCP at p. 925.) In fact, Juror No. 7 explained to the court during voir dire that she had discussed the financial implications with her family and they had worked it out. (Exh. 46; HCP at p. 935.)

Additionally, one can readily imagine reasons, apart from Peterson's conjecture that Juror No. 7 was out to convict him, that Juror No. 7 would have been interested in serving. For example, as we pointed out above, Juror No. 7's questionnaire revealed that when she was younger, she wanted to be a lawyer. Also, she had taken a citizen's police academy class. (Exh. 44; HCP at p. 888.) One can hardly imagine a more

interesting case at the time for someone with an interest in the law. Further, given the notoriety of the case, no doubt there were many potential jurors who were attracted to the prospect of serving on such a high-profile case, notwithstanding the significant imposition on their professional and personal lives. Indeed, Juror No. 7 may well have been willing to sacrifice some income in the short term in exchange for the singular experience of engaging in her civic duty on such a grand scale. Such an attitude is not necessarily coextensive with bias. As long as a juror is not motivated to serve as a result of bias for or against a party, the law does not concern itself with a prospective juror's motivation to participate.

To establish the fact that Juror No. 7 actually endured financial hardship while serving on the jury, Peterson cites to the book authored by several of the jurors, including Juror No. 7: "We, The Jury." (Exh. 8.) Specifically, Peterson cites to a passage in the book that discusses one juror loaning Juror No. 7 money. (Mem. at p. 6.) As an initial matter, the book is comprised of multiple levels of hearsay and, as such, does not constitute competent evidence to prove juror misconduct. (See *In re Fields* (1990) 51 Cal.3d 1063, 1070 [unless the issue has been conceded by respondent, habeas corpus relief cannot be granted on the basis of inadmissible hearsay].) Facts must be alleged in a manner that makes the declarant liable for perjury if the allegations are false. (*People v. McCarthy* (1986) 176 Cal.App.3d 593, 597 [factual allegations in a habeas petition must be "in such form that perjury may be assigned upon the allegations if they are false"].) The right to compulsory process does not encompass the "right to offer testimony that is incompetent, privileged, or otherwise inadmissible

under standard rules of evidence." (*Taylor v. Illinois* (1988) 484 U.S. 400, 410.)[9]

With respect to Juror No. 7's other questionnaire responses, there is nothing remotely suggestive of actual bias on her part. She answered that she had not formed any preliminary opinions about the case and that she did not have enough information to decide, at that juncture, whether Peterson was guilty or innocent. (Exh. 44; HCP at p. 897.) Juror No. 7 answered that she could be fair to both sides and was capable of rendering a verdict of guilt or non-guilt. (Exh. 44; HCP at p. 898.) As for the death penalty, Juror No. 7 made plain that her vote would depend on the evidence and she would be amenable to voting for death or life without parole but only "'if'" the evidence supported it "without a doubt." (Exh. 44; HCP at p. 899.)

Nor is there anything in the voir dire of Juror No. 7 that suggests she concealed actual bias against Peterson. The prosecutor questioned Juror No. 7 about her attitude toward law enforcement given that her older brother had been in and out of prison. The juror explained that she had visited San Quentin "all the time" to see her brother. (Exh. 46; HCP at p. 941.) Yet, she harbored no negative attitude toward law enforcement. (Exh. 46; HCP at p. 943.) The prosecutor also asked Juror No. 7 about a tattoo displayed on her arm. The juror volunteered that she actually had nine tattoos in all. (Exh. 46; HCP at p. 945.) She acknowledged that some people tended to form opinions about her because of her tattoos. (*Ibid.*) Juror No. 7 explained that she considered herself open-minded and fair. (Exh. 46; HCP at pp. 946-947.) She elaborated: "Because I know what it's

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[9] If the Court were to ascribe evidentiary legitimacy to the book, we are obligated to point out a passage that states that Juror No. 7's employer ultimately agreed to pay her salary and medical benefits for the duration of the trial. (Exh. 8; HCP at p. 244.)

like to be judged, and I know what it's like to be prejudged before somebody actually, you know -- how many times have you walked in a room and someone has automatically pinned you for a certain type of person and that's completely opposite of how you are." (Exh. 46; HCP at p. 947.) Juror No. 7 assured defense counsel that she was open to the possibility that Peterson, although charged with murder, had not committed the crimes. (Exh. 46; HCP at p. 950 ["I'm open to hear anything . . . I mean this is somebody's life."].) She harbored no suspicion that appellant was guilty. (Exh. 46; HCP at p. 951.) Juror No. 7 abided by the principle that the burden of proof was entirely with the prosecution. (Exh. 46; HCP at pp. 952-953.)

Next, Peterson purportedly delves into Juror No. 7's mental processes, and those of other jurors, during deliberations to try and demonstrate Juror No. 7's bias. Relying on multiple levels of unsworn hearsay statements in "We, The Jury," Peterson argues that Juror No. 7 was one of two holdout jurors for a conviction of first degree murder involving Conner's death, which showed that she had a personal bias involving crimes against the unborn based on her experience with Ms. Kinsey. (Exh. 8; Petn. at p. 103; Mem. at p. 7.) As we have argued, the hearsay statements contained in the book do not suffice to carry Peterson's evidentiary burden. (*In re Fields, supra,* 51 Cal.3d at p. 1070.)

However, beyond issues pertaining to the hearsay nature of the proffer, Peterson is foreclosed from delving into the mental processes by which the verdicts were obtained because he has not demonstrated an exception—including the intentional concealment of bias—to the prohibition.

Evidence Code section 1150 provides:

> Upon an inquiry as to the validity of a verdict, any otherwise admissible evidence may be received as to statements made, or

> conduct, conditions, or events occurring, either within or without the jury room, of such a character as is likely to have influenced the verdict improperly. No evidence is admissible to show the effect of such statement, conduct, condition, or event upon a juror either in influencing him [or her] to assent to or dissent from the verdict or concerning the mental processes by which it was determined.

"Evidence Code section 1150, as a matter of policy, 'excludes evidence of the subjective reasoning processes of jurors to impeach their verdicts.' [Citation]." (*People v. Tafoya* (2007) 42 Cal.4th 147, 195; *People v. Beeler* (1995) 9 Cal.4th 953, 1017 ["Evidence Code section 1150 prohibits postverdict inquiries into a juror's mental processes"].)

> [W]ith narrow exceptions, evidence that the internal thought processes of one or more jurors were biased is not admissible to impeach a verdict. The jury's impartiality may be challenged by evidence of 'statements made, or conduct, conditions, or events occurring, either within or without the jury room, of such a character as it likely to have influenced the verdict improperly,' but 'no evidence is admissible to show that [actual] effect of such statement, conduct, condition, or event upon a juror . . . or concerning the mental processes by which [the verdict] is determined." (Evid. Code, § 1150, subd. (a) [ ] [citation]. [¶] When the overt event is a direct violation of the oaths, duties, and admonitions imposed on actual or prospective jurors, such as when a juror conceals bias on voir dire, consciously receives outside information, discussed the case with nonjurors, or shares improper information with other jurors, the event is called juror misconduct. [Citations.]

(*In re Hamilton, supra*, 20 Cal.4th at pp. 293-294.)

In further support of his claim that Juror No. 7 concealed bias, Peterson presents excerpts from various letters which Juror No. 7 purportedly wrote to Peterson between 2005 and 2007, after the trial was concluded. (Petn. at pp. 103-106; Mem. at pp. 7-10.) Notably, the instant petition is unaccompanied by a declaration from Peterson that he received the letters and that they were represented to be from Juror No. 7, or any

other attempt at authentication. Also, Peterson explains that he has selected only certain letters of the approximately 28 letters that Juror No. 7 sent to him.[10] (Petn. at p. 103.) With respect to these communications, the unsworn and unauthenticated nature of the letters renders them unreliable and this Court should not consider them. (*People v. McCarthy, supra*, 176 Cal.App.3d at p. 597.)

Nonetheless, we are duty-bound to point out that Peterson culls only those passages that relate to Conner and parenting, but the subjects broached in the letters were wide-ranging. The letters discuss Laci, Peterson's marriage, Laci's family (her mother in particular), Juror No. 7's feelings about being on the jury, and the struggles she was experiencing in her life at the time. (Exh. 47; HCP at pp. 957-978.) All in all, the letters can be fairly said to depict an effort to try and comprehend why Peterson, with so much going for him, went so far as to murder his wife and child. There is nothing in the letters, if they are valid, that demonstrates actual bias.

Peterson next offers his trial counsel's supplemental declaration that had counsel known that Juror No. 7 "had been the victim of threats of violence against her life and the life of her unborn child," he would have challenged her for cause or, failing that, exercised a peremptory. (Exh 49; HCP at p. 982; Petn. at p. 107.) However, that is not the standard. The determination to be made is not whether the juror would have been stricken by one of the parties, but whether the juror's concealment (or nondisclosure) evidences bias. (*In re Boyette, supra*, 56 Cal.4th at pp. 889-890.) Nor do the People share trial counsel's optimism that the trial court

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[10] It would also appear that Peterson responded to Juror No. 7 at some point. (Exh. 47; HCP at p. 976.)

would have sustained a challenge for cause with respect to Juror 7 had the details of Ms. Kinsey's harassment of Juror No. 7 been disclosed.

To demonstrate prejudicial misconduct resulting from Juror No. 7's nondisclosure, Peterson cites the cases of *People v. Blackwell* (1987) 191 Cal.App.3d 925, 928 [during specific questioning on voir dire juror concealment of her experience with domestic violence and alcoholism held prejudicial misconduct]; and *People v. Diaz* (1984) 152 Cal.App.3d 926, 930 [prejudicial misconduct held where juror concealed victim of a crime of "this kind"].) (Mem. at pp. 12-14.) *Blackwell* and *Diaz* do not advance Peterson's cause.

Reviewing courts consider the extent of similarity between the juror's experience and the subject case. (See, e.g., *Blackwell, supra*, 191 Cal.App.3d at p. 928 [concealment juror also a battered wife constituted misconduct]; *People v. Kelly* (1986) 185 Cal.App.3d 118, 128 [juror's child abuse experience was of such a "minor nature" considered nonprejudicial in a child abuse case]; *People v. Diaz, supra*, 152 Cal.App.3d at p. 931 [juror concealment of attempted rape at knifepoint in assault with a deadly weapon case constituted prejudicial misconduct].)

The striking dissimilarity between the circumstances involving Juror No. 7's restraining order application and hearing with respect to Ms. Kinsey's actions and Peterson's murder of his wife and child distinguishes the situation here from the prejudicial juror misconduct in *Blackwell* and *Diaz*. The defendant in *Blackwell* was convicted of murdering her husband. She presented a defense of "'battered wife syndrome.'" (*Blackwell, supra*, 191 Cal.App.3d at p. 927.) After the verdict was rendered, it was discovered that a female juror failed to reveal during voir dire that she had been a victim of domestic violence. (*Id.* at p. 928.) Under the circumstances of the case, the reviewing court determined that prejudice could not be rebutted: "[The defendant's] defense was that her husband's

abusive conduct caused her to entertain an honest, even if unreasonable, belief in the necessity to defend herself against imminent bodily injury. [Citation.] Juror R.'s affidavit reveals her bias: when confronted with a situation similar to [the defendant's], she was able to escape an abusive husband without resort to physical violence or self-defense. She felt that if she could do so appellant should have governed herself accordingly. As a consequence, the presumption of prejudice is even stronger." (*Id.* at p. 931; see *People v. Diaz, supra*, 152 Cal.App.3d at pp. 930-932 [in trial on assault with a deadly weapon charge, court should have discharged juror after learning on the last day of trial that she had been a victim of a knifepoint attack and had concealed that fact during voir dire].)In an ambitious attempt to show similarity between Juror No. 7's purported concealment and his crimes, Peterson persists in his characterization of Ms. Kinsey's actions as "a threat to the life of [Juror No. 7's] unborn child." (Mem. at p. 17.) First, even charitably construing Peterson's characterization of the events involving Juror No. 7 as life-threatening, in Peterson's crimes, he dispensed with any threats and went straight to cold-blooded murder. Therefore, for him to equate his actions with those of Ms. Kinsey borders on the ridiculous; the two events are not remotely similar. Second, a close reading of Juror No. 7's statement about the incident in support of her request for a restraining order reveals that she was concerned about her pregnancy owing to the stress of the events, which caused Juror No. 7 to have early contractions. (Exh. 45; HCP at 908.) There is absolutely nothing to support Peterson's contention that Ms. Kinsey threatened Juror No. 7's life or that of her unborn child. Therefore, contrary to Peterson's argument, there is no close connection between the facts of Peterson's case and those facts attendant to Juror No. 7's experience with Ms. Kinsey. (See Mem. at p. 16, citing *Hunley v. Godinez* (N.D.Ill. 1992) 784 F.Supp. 522.)

For these same reasons, Peterson's reliance on *Dyer v. Calderon* (9th Cir. 1998) 151 F.3d 970, 973-983, is unavailing. (Mem. at pp. 15-16.) The case is distinguishable on its facts and, therefore, unpersuasive. In *Dyer*, a juror responded "no" to questions asking whether a relative or close friend had ever been a victim of any type of crime or had been accused of any offense save for a traffic offense. However, the juror did not disclose that her brother had been murdered in a very similar execution-style manner to that which the defendant was accused of carrying out in the murders of his victims. Additionally, the juror did not disclose that her estranged husband had been arrested for rape. Once the omissions were discovered, the juror's explanation to the trial court was that the killing of her brother was an accident, but the court file, which was in the trial court's possession, indicated that the juror's brother was pistol whipped four times and then shot in the back of the head. Again, Juror No. 7's alleged omission pales in comparison to the misconduct at issue in *Dyer*. A reviewing court faced with the issue of concealment and bias also considers whether a juror disclosed the similar experience to other jurors. (See, e.g., *People v. Kelly, supra*, 185 Cal.App.3d at p. 128 [fact juror did not reveal bias to other jurors a factor in determination of no prejudice].) There exists no credible evidence showing that Juror No. 7 ever disclosed her experience with Ms. Kinsey to others on the jury so as to call the verdicts into question.

In light of the foregoing authority and argument, if Juror No. 7 committed misconduct by failing to disclose the circumstances leading her to secure a restraining order, there is no substantial likelihood that Peterson was prejudiced by actual bias. (See *Boyette, supra*, 56 Cal.4th at pp. 889-890 [juror's concealment of criminal history and substance abuse issues of himself and his close family members was not prejudicial because concealment did not suggest actual bias]; *People v. Green* (1995) 31 Cal.App.4th 1001, 1017-1020 [presumption of prejudice arising from

juror's concealment of criminal record, including felony conviction, in jury questionnaire adequately rebutted where juror's status as ex-felon did not affect his ability to be impartial and the trial court found juror had no actual bias against defendant]; *People v. Kelly, supra,* 185 Cal.App.3d at p. 121 [because juror never asked whether victim of child molestation, no prejudicial misconduct in abuse case]; *People v. Jackson* (1985) 168 Cal.App.3d 700, 702 [concealment personally involved in prior identical litigation not intentional because jurors asked unspecific, unartfully drawn, "catch-all" questions].) Last, the direct appeal in this case raises claims that involved the conduct of certain jurors. As the trial court had occasion to investigate such matters, nowhere in the record of those proceedings is there any indication that Juror No. 7 was a "biased adjudicator" (*People v. Nestler, supra*, 16 Cal.4th at p. 579) on Peterson's jury. For these reasons, he has failed to state a prima facie claim demonstrating a violation of state or federal law on this basis.

II. PETERSON'S CLAIM THAT THE PROSECUTOR ADDUCED MATERIALLY FALSE EVIDENCE REGARDING CONNER'S FETAL AGE AT THE TIME OF HIS DEATH FAILS TO STATE A PRIMA FACIE CASE FOR RELIEF

Peterson contends in Claim Two that the prosecution relied on false evidence presented through the expert testimony of Dr. Greggory DeVore concerning Conner's age as it related to the time of his death. As a result, Peterson alleges that his statutory rights under Penal Code section 1473 were violated, as well as his federal constitutional rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments.

The People specifically and generally controvert all of Peterson's factual and legal claims and allegations in Claim Two as set forth in the petition at pages 109 through 116, and supporting memorandum of points and authorities, unless otherwise expressly and specifically conceded herein, and state that Peterson has failed to make a prima facie showing that

the prosecution presented false testimony or that it was reasonably likely that such testimony, if false, affected the judgment.

A. The Claim Is Procedurally Barred Because It Should Have Been Raised on Direct Appeal

This claim could have, and should have, been raised on direct appeal. Habeas relief is not available for claims which could have been raised on direct appeal. (*In re Dixon, supra,* 41 Cal.2d at p. 759; see also *In re Seaton, supra,* 34 Cal.4th at p. 200 ["just as a defendant generally may not raise on appeal a claim not raised at trial . . . , a defendant should not be allowed to raise on habeas corpus an issue that could have been presented at trial," for otherwise, "the main purpose of the forfeiture rule—to encourage prompt correction of trial errors and thereby avoid unnecessary retrials—would be defeated."].)

Here, while it is certainly true that Dr. Jeanty's declaration (petition exhibit number seven) in support of Peterson's claim was not part of the trial record, it should not insulate Peterson from the procedural bar because the key facts underlying Peterson's argument—that the testimony of prosecution expert Dr. DeVore regarding Conner's gestational age and estimated date of death was false—were part of the trial record. The purported concerns raised by Jeanty's declaration about this testimony were brought out at trial during defense counsel's thorough and searching cross-examination of DeVore with respect to the studies and formulas he used to arrive at his measurements and conclusions, including those of Jeanty, and limitations associated with his findings. (95RT 17914-17915, 17917, 17919, 17920, 17921,17925-17926.) Similarly, during presentation of the defense expert, Dr. March, Peterson's trial counsel questioned him at some length about these formulas or reference standards, including those advanced by Jeanty. (106RT 19763, 19767-19768, 19771.) During cross-examination, March elaborated on what, in his professional opinion, were

the infirmities associated with DeVore's use of Jeanty's formula. (106RT 19812-19814, 19830, 19834, 19837, 19857.)

In light of this record, Jeanty's declaration merely corroborates evidence adduced at trial and the defense theory that DeVore's estimates were inaccurate. Because the factual predicate for this claim was contained in the trial record, there is no reason that it could not have been brought on direct appeal. Therefore, this claim is barred. If not barred, Peterson has nonetheless failed to demonstrate a prima facie case.

B. General Principles of Applicable Law

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

Prosecutorial misconduct of this type violates a defendant's federal due process rights and requires a reversal of the conviction "if (1) the testimony was actually false, (2) the prosecutor knew it was false, and (3) the false testimony was material (i.e., there is a reasonable likelihood that the false testimony could have affected the judgment). [Citation.]" (*Dow v. Virga* (9th Cir. 2013) 729 F.3d 1041, 1048.)

Under California law, Penal Code section 1473, subdivision (b)(1) provides that a writ of habeas corpus may be prosecuted if "[f]alse evidence that is substantially material or probative on the issue of guilt or punishment was introduced against a person at any hearing or trial relating to his incarceration . . . ." (See also *In re Richards* (2012) 55 Cal.4th 948, 961 (*Richards I*).) Section 1473, subdivision (e)(1) states that "'false evidence' shall include opinions of experts that have either been repudiated by the expert who originally provided the opinion at a hearing or trial or

that have been undermined by later scientific research or technological advances."

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

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

C. Peterson Has Failed to Make a Prima Facie Showing That the Prosecution Presented Materially False Testimony

At trial, Peterson's defense to the charges was that someone other than him killed Laci and Conner, e.g., homeless people in the neighborhood, or burglars of a nearby residence. In support of that defense, Peterson attempted to undermine the testimony of the prosecution's expert witness Dr. DeVore who estimated the time of Conner's death to be approximately December 23. The defense called its own expert, Dr. March, to posit that the earliest Conner could have died was December 28, which necessarily meant that Laci was alive at that time. This, in turn,

undermined the prosecution's theory that Peterson murdered Laci and Conner on the night of December 23 or early on December 24. In other words, if Laci was alive after the morning of December 24, Peterson was not the murderer. (110RT 20475-20478.)

As the testimony recounted below reveals, the experts arrived at different conclusions using different information. There is nothing deceptive or false about that. In fact, disagreement among parties' experts is commonplace. With respect to Peterson's claim as it concerns his federal constitutional rights, even if DeVore's testimony was patently false, there is no evidence demonstrating—or even suggesting—that the prosecution knew it to be so. In any event, it is not reasonably likely that DeVore's testimony, if false, affected the verdicts.

1. *Dr. DeVore's relevant trial testimony*

Dr. DeVore was uniquely qualified to offer an opinion as to Conner's gestational age and the approximate date that he died. DeVore was a specialist in high-risk obstetrics and maternal-fetal medicine. (95RT 17861.) He attended medical school at the University of Utah and completed his residency at Yale University where he also did a fellowship in maternal-fetal medicine. (95RT 17856.) DeVore treated about 6,000 pregnant patients each year. (95RT 17858.) He estimated that he had conducted 75,000 ultrasound examinations of pregnant women in his career. (95RT 17859, 17933.) DeVore had published in excess of 100 peer-reviewed articles and had authored chapters in at least 25 medical textbooks. (95RT 17859-17860.)

DeVore reviewed Laci's obstetric medical records, as well as the prosecution's forensic anthropologist's (Dr. Galloway's) report and conclusions. (95RT 17861, 17872.) DeVore explained the importance of the first-trimester ultrasound in determining the baby's age and the estimated time of conception. (95RT 17877-17880.) In his opinion, the

first ultrasound measurements were the "gold standard" to use as reference points and ensured greater accuracy in determining the age of the fetus. (95RT 17864, 17946-17947.) The question to be answered was how much did Conner grow since the first-trimester ultrasound and what that growth meant in terms of Conner's age as it related to the time of his death. (95RT 17955.)

DeVore took three separate measurements of Conner's femur bone using a method that was very similar to the first-trimester ultrasound. (95RT 17868-17870, 17888-17889.) DeVore's measurements resulted in a "very, very good" correlation with the ultrasound measurements. (95RT 17869.)

He also compared his measurement results to Dr. Galloway's and the difference was quite small. In DeVore's opinion, it was a "very precise correlation" despite the fact that he and Galloway used different approaches. (95RT 17871-17872, 17916.) DeVore explained that the study upon which Galloway based her interpretation of her measurements involved babies who had died due to some pathology, which would have affected growth rates. (95RT 17914.)

DeVore estimated the date of Conner's death to be December 23, 2002. (95RT 17881.) Using the femur bone measurement from the first ultrasound as a reference point, as well as the three measurements DeVore obtained himself, the doctor initially determined three estimated dates of death that were within a three-day range: December 21, 2002, based on a measurement of 64 millimeters and a gestational age of 32 weeks 8 days; December 23, based on a measurement of 64.7 millimeters and a gestational age of 32 weeks 6 days; and December 24, based on a measurement of 65 millimeters and a gestational age of 33 weeks 2 days. DeVore averaged these measurements to arrive at a date of December 23,

based on 64.5 millimeters and a gestational age of 33 weeks 1 day. (95RT 17880-17883, 17960.)

During cross-examination, DeVore explained that ultrasound manufacturers had a choice of which equation to use to determine gestational age as it was depicted on the instrument screen. The equations were based on studies conducted by different authors, including Drs. Hadlock, Robinson, and Jeanty. (95RT 17894-17896.) General Electric, the manufacturer of the ultrasound instrument used during Laci's examinations, permitted the user to select from different equations to make measurements. (95RT 17896.) To measure crown-rump length, the instrument used an equation developed by Robinson and for measuring the length of the femur, the instrument had been programmed to use Hadlock's formula. (95RT 17896, 17903, 17948-17949.) Jeanty's formula was not employed during the ultrasound examinations of Laci. (95RT 17915.)

DeVore acknowledged that depending on whose study or formula the user selected, the measurement results for the femur bone would differ. (95RT 17897, 17925.) For example, using Hadlock's equation, Conner's date of death was estimated to be December 22, while using Jeanty's study would put the estimated date of death at December 23. (95RT 17898.) Hadlock's and Robinson's studies were based on ultrasound measurements (i.e., live fetuses in utero), while forensic anthropologist Galloway employed a different formula derived from Dr. Sherwood's study, which is the only study that used deceased babies. (95RT 17900-17903, 17925.) Sherwood's study was based on the date of the mother's last menstrual period. (95RT 17902.)

DeVore's calculations were based on Jeanty's equation. Using that reference standard, the 32-millimeter crown-rump measurement was equal to 20 weeks 1 day. (95RT 17915, 17921.)

DeVore acknowledged that if he had used Dr. Yip's[11] measurements of Conner's femur based on the second trimester ultrasound, Conner's estimated date of death would be December 28. (95RT 17937.) DeVore explained that the difference was a matter of professional interpretation. (95RT 17940.) He elaborated:

> So I believe that the date, age of the fetus is based upon the crown-rump i[s] the most accurate and, therefore, the prediction of the death date is based upon that key piece of information.
>
> Where we differ, what you're asking me is the date, the age of the fetus has now been changed on the second ultrasound examination, therefore, locking of the age of the fetus and using the second ultrasound examination, then plays the date of birth using the equations that we usually use, all three of them, and the dates later than what I suggested when I wrote them on the board, and that's a correct statement that that interpretation will be that. So the key issue is how old was this fetus.

(95RT 17942.)

Using Yip's determination of gestational age, one would add four days to DeVore's estimated dates of death of December 21, December 23, and December 24, resulting in an averaged date of December 27. (95RT 17943.) DeVore was of the opinion that the first ultrasound was more reliable because it was closer to the start of conception. (95RT 17946.) The first trimester measurement matched Laci's last menstrual period within one day. (95RT 17947-17948.)

DeVore also acknowledged that the date of conception would affect the baby's age. (95RT 17963.) In this case, the date of conception was estimated to be May 20, which was two weeks after Laci's last menstrual cycle on May 6. (95RT 17963.) If the actual conception date was either before or after May 20, that would have affected DeVore's calculations.

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[11] Yip was one of the physicians that treated Laci during her pregnancy.

(95RT 17963-17964.) Defense counsel then asked if it was possible that Conner's date of death could be further out into January. (95RT 17964.) DeVore explained for that to be the case "you'd have a very abnormal fetus from these measurements from the examination . . . ." (95RT 17964.)

2. *Relevant defense expert testimony*

Dr. Charles March testified as the defense expert on Conner's gestational age as it related to the time of his death. March's expertise and practice involved the areas of gynecology, reproductive endocrinology, and infertility. (106RT 19759.) He had published about 110 papers in scientific journals and authored more than 80 textbook chapters. (106RT 19759.) March was on the faculty of the University of Southern California for 30 years. (106RT 19760.) He was acquainted with the prosecution's expert DeVore because they had previously worked together. (106RT 19789.)

Having reviewed the relevant reports and testimony, including that of DeVore (106RT 19762-19763), March explained that he did not dispute the measurements used to establish Conner's age and estimated date of death (106RT 19783). Indeed, March agreed that DeVore's measurements were nearly identical to those generated by Dr. Galloway the forensic anthropologist. (106RT 19838-19839.) However, March disagreed with the fundamental premise relied upon by DeVore that Conner's gestational age could be accurately projected based on measurements from Laci's first-trimester ultrasound from July 2002. (106RT 19770.)

March used the findings from the second ultrasound and Yip's recalculations of Conner's age at that time, which shifted the due date by six days from February 10, 2003, to February 16. (106RT 19779, 19785.) Based on the measurements from the second ultrasound, March concluded that on December 23, 2002, Conner's gestational age was 32 weeks 2 days, not 33 weeks 1 day—six days younger than the timeframe DeVore

estimated. (106RT 19779.) March theorized that even if Conner's gestational age was as DeVore estimated, Conner's date of death at the earliest, would have been December 29, 2002. (106RT 19779-19780, 19848-19849.) At the latest end of the range, March opined that Conner could have died in mid-January. (106RT 19783, 19786-19787.)

March's conclusions were also based on a different date of conception—June 9, 2002—than that used by Dr. DeVore. (106RT 19796-19800.) That was the day Laci's friend Renee Tomlinson said Laci called to say she was pregnant. March acknowledged the June 9 date was nowhere in Laci's medical records. (106RT 19798-19800.) Using June 9 as the date of conception meant that March's estimate was 9 or 10 days later than the generally accepted computation of taking the date of the woman's last menstrual period and adding two weeks. (106RT 19811, 19856.) March acknowledged his conclusions rested on the assumption that the day Laci called Tomlinson was the same day Laci took the pregnancy test. (106RT 19801-19802.) He conceded there was no evidence establishing what day Laci actually took the pregnancy test. (106RT 19804.) In any event, March clarified that the date of conception was of minimal importance to his conclusions. (106RT 19843-19844.)

March also pointed out that DeVore neglected to incorporate several other measurements which were available from the second ultrasound conducted by Yip, focusing instead solely on Conner's femur measurement. (106RT 19771, 19784-19785.)

With respect to DeVore's use of Jeanty's formula to arrive at his conclusions, March first observed that it was impossible to pinpoint a specific date of death utilizing any reference standard, including Jeanty's. (106RT 19768.) This was true even if the date of conception could be accurately identified, such as in the case of in vitro fertilization. (106RT 19775.)

March explained that it was not DeVore's measurements with which he took issue, it was the fact that DeVore used only Jeanty's formula and applied it to those measurements:

> Doctor DeVore took three measurements. One gave him a death date of December 21st. Another one gave him a date of December 23rd. Both of those we know are impossible. So the day that comes back now is December 24th. Two of his measurements, I agree that one was 64, one was 64.5, and one was 65. I agreed to those measurements.[12] I agree they were 64, 64 and a half and 65. 100 percent, there is no disagreement. But interpretation, there DeVore says we got to go with only one person. Jeanty.
>
> Jeanty is the one who gets to this December 24th and 22nd day. If you look at Jeanty, though, Jeanty also did what to come up with knows [*sic*] measurements? He, as a single investigator, Doctor Jeanty did all of the measurements himself, all with the same machine. Jeanty has reported that if he used multiple different machines, the error can be a low of three, a high of six days. Jeanty has reported since he created that formula, that there are different growth rates, and that female fetuses' femurs grow more rapidly in utero than males. That was not taken into account, because there was no sex in the initial study of Jeanty of his 46 patients.
>
> The fact is that with the singular exception of Doctor DeVore who says -- he says, it's my day, everybody else accept that.
>
> In a biologic system there are ranges. Robinson does. Hadlock does. Jeanty, in his formula that he looked at, that he developed for femoral length the same. It's only Greg DeVore.
>
> Do I buy Greg DeVore's measurements? Yes, sir, I absolutely do. Do I buy his interpretation? No, sir, it's 100 percent totally wrong. He's not taking the information.
>
> All of those variables – [defense counsel], when he was speaking about examining Doctor DeVore, asked about what

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[12] March confirmed that DeVore's measurements were "impeccable." (106RT 19783.)

about December 28th as a date. And Doctor Devore kind of grudgingly gave him December 28th.

Doctor DeVore also, in response to a question from [defense counsel] said, you are changing things. What you are giving me is apples and oranges.

Different machines, different doctors. One with tissue. One living. One dead. That's not apples and oranges, sir. That's a fruit salad. You can't do it. You can't do it.

(106RT 19813-19814.)

3. *Dr. DeVore's testimony was not objectively false*

Peterson endeavors to transform what is, in essence, a reasonable disagreement among credible experts into false evidence. At best, Peterson's concerns merely highlight the subjective component of expert opinion testimony. Rebuttable expert testimony is not the equivalent of perjured or otherwise false testimony.

In *Richards I, supra*, 55 Cal.4th 948, the Court explained the considerations at issue when determining whether an expert witness has presented false testimony: "Given, on the one hand, the subjective component of expert opinion testimony, and, on the other hand, the possibility that advances in science and technology might prove an earlier-held opinion to be objectively untrue, it is critical to define what precisely is meant by 'false' when the false evidence standard of Penal Code section 1473 is applied to expert opinion testimony." (*Id.* at p. 962.) "[W]hen new expert opinion testimony is offered that criticizes or casts doubt on opinion testimony given at trial, one has not necessarily established that the opinion at trial was false. Rather, in that situation one has merely demonstrated the subjective component of expert opinion testimony." (*Id.* at p. 963.) "If, and only if, a preponderance of the evidence shows that an expert opinion stated at trial was objectively untrue, the false evidence standard applies. In that narrow circumstance, if it is reasonably probable that the invalid

opinion given at trial affected the verdict, then habeas corpus relief is appropriate." (*Ibid.*)

Ultimately, in holding that the petitioner had failed to establish the falsity of the expert testimony, the Court pointed out that even though other experts disagreed with, or were critical of, the opinion rendered by the prosecution's expert witness such disagreement or criticism "does not by itself establish that his opinion was false." (*Richards I, supra,* 55 Cal.4th at p. 964.) As the Court observed, "opinion testimony often includes a subjective component, and good faith disagreements among credible experts are commonplace." (*Ibid.*) This was especially true in cases where "as here, the opinion being proved false was highly tentative at the outset (asserting that petitioner's dentition is 'consistent with' the bite mark) and the opinions being used to prove its falsity are equally tentative (asserting, for example, that the expert 'would tend to rule out [petitioner]')." (*Id.* at p. 965, fn. 5.)

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

Here, in the same way, Peterson's complaints about DeVore's testimony amounts to nothing more than a difference of subjective expert opinions. Specifically, Peterson contends, based on Jeanty's declaration,

that DeVore used the wrong formula and chose to apply it to the measurement of only one of Conner's three long bones. The end result being an inaccurate estimate of gestational age as it related to the timeframe of Conner's death. (Petn. at pp. 113-115; Mem. at pp. 22-25.) According to Jeanty, utilizing the correct formula, measuring three bones instead of one, and averaging the results, he arrived at the correct date of Conner's death of January 3, 2003. (Exh. 7; HCP at pp. 59, 62.) This result supported Peterson's defense that Laci was alive well past December 24, which meant that he was not the murderer.

As a threshold matter, we note that the defense's trial expert, March, appears to be in disagreement with Peterson's new habeas expert, Jeanty, as to an estimated date of death. March made abundantly clear that it was impossible to pinpoint a specific date of death utilizing any reference standard, including Jeanty's. (106RT 19768.) March testified that the earliest Conner could have died was December 29 and the latest end of the range was mid-January—a span of almost three weeks. (106RT 19779-19780, 19783, 19786-19787,19848-19849.) Yet, like DeVore, Jeanty explains in his declaration that he averaged three dates, albeit different ones (December 30, January 3, January 5) derived from bone measurements, and arrived at an estimated date of death of January 3. (Exh. 7; HCP at pp. 23-25.)

It would also appear that Jeanty's findings on gestational age, differ from those of Galloway, the prosecution's forensic anthropologist, who estimated Conner's gestational age to be somewhere between 33 and 38 weeks—a span of six weeks. (92RT 17529-17530.) She explained the reasons why she could not narrow that timeframe, citing several unknown variables. (92RT 17533-17534.) Jeanty, on the other hand, opines that Conner's gestational age at the time of his death ranged from 238 days to

244 days—a much shorter time span than that estimated by Galloway. (Exh. 7; HCP at pp. 23-25.)

Thus, there exist subjective differences between not only Jeanty's conclusions and those of DeVore, but also between Jeanty and March and Jeanty and Galloway. DeVore's testimony was subjectively different from Jeanty's methodology and opinion, but not any more objectively false than Jeanty's statements and conclusions in his declaration. In short, we are dealing here with differences of opinions among experts involving a matter that was difficult to pinpoint with any degree of accuracy.

Indeed, even Jeanty's declaration suggests that there was nothing deceitful or false about DeVore's testimony. Jeanty describes DeVore's use of the formula in question as "inappropriate in this instance" because the formula was not devised for a situation where the date of gestation is known. (Exh. 7; HCP at p. 60.) Jeanty goes on to explain that "the more accurate method" would be to use growth percentiles for projecting gestational age.[13] (Exh. 7; HCP at p. 60.) Jeanty did not say that utilizing growth percentiles is the only method that can be used when the date of gestation is known; he is merely opining that it is "more accurate" than the formula DeVore used.

Along these same lines, Jeanty states that "it is generally agreed" that "it is more accurate" to measure more than one long bone to determine

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[13] Based on Galloway's testimony, it is questionable whether growth percentiles are a more accurate predictor of gestational age when the unborn child's mother was deceased and submerged in San Francisco Bay for nearly four months. (See 92RT 17533 [explaining that if the mother was in an adverse environment with poor nutritional levels and disease, the baby was typically shorter, which caused for some variation from the studies].) This is not to suggest that Jeanty has offered false theories or conclusions in his declaration, only that testimony was adduced at trial that suggests some subjective disagreement with Jeanty's opinion.

gestational age, as opposed to DeVore using only one long bone measurement. (Exh. 7; HCP at p. 62.) Quoting from his article, Jeanty explains that "'using more than one bone allows us to have more confidence in the GA [gestational age] obtained . . . .'" (Exh. 7; HCP at p. 62.) Again, Jeanty's differences with DeVore amount to a disagreement between experts about the best and most accurate way to arrive at a reliable estimate of gestational age. Such disagreement does not mean that DeVore's testimony was patently false.

Even when Jeanty opines that DeVore used "the wrong formula," this does not establish that DeVore lied. "An honest error in expert opinion is not perjury even though further diligence and study might have revealed the error." (*In re Imbler* (1963) 60 Cal.2d 554, 567; see also *Henry v. Ryan* (9th Cir. 2013) 720 F.3d 1073, 1084 [although detective's testimony about his own actions at the crime scene was contradicted by defense experts, defendant "provided no evidence that [the detective] knew his testimony was inaccurate at the time he presented it, rather than [his] recollection merely being mistaken, inaccurate or rebuttable. [Defendant's] conclusory assertion that, because [the detective] must have known where he stepped while investigating the crime scene, any testimony inconsistent with the truth must be not only inaccurate but also perjured does not constitute evidence sufficient to make out a *Napue* claim."].)

Further, in distinguishing his own approach from that employed by DeVore, defense trial expert March observed that "not everyone marches to the tune of the Jeanty drummer []." (106RT 19837.) In other words, in March's view, there were other reference standards (i.e., those authored by Hadlock or Robinson) that would have resulted in more reliable conclusions. Even General Electric, the manufacturer of the ultrasound instrument used to examine Laci, permitted the operator to select from

among different reference standards. (95RT 17896.) All that to say, reasonable subjective differences among experts are for the jury to weigh.

Last, with regard to the operation of Penal Code section 1473, DeVore has not repudiated his own opinion, nor has his opinion been undermined by subsequent scientific or technological advances. (See *In re Richards* (2016) 63 Cal.4th 291, 311 (*Richards II*) [expert's trial testimony that suspected bite mark on murder victim's hand was consistent with dentition of defendant's lower teeth was false evidence under section 1473 because expert later repudiated his opinion and subsequent technological advances undermined the testimony].)

4. *There is no evidence that the prosecution knowingly presented false evidence.*

For the purpose of demonstrating a violation of his federal due process rights, Peterson must also show that the prosecution knowingly presented evidence that was false. (*Dow v. Virga, supra,* 729 F.3d at p. 1048.)

As we have demonstrated, there was nothing false about the challenged testimony. As the Ninth Circuit Court of Appeals explained with respect to affidavits from new experts in support of a habeas petition:

> To the extent that this new testimony contradicts the prosecution's expert testimony, it's simply a difference in opinion—not false testimony. See, e.g., *United States v. Workinger*, 90 F.3d 1409, 1416 (9th Cir. 1996); *Harris v. Vasquez,* 949 F.2d 1497, 1524 (9th Cir. 1991) (as amended); cf. *Sistrunk v. Armenakis*, 292 F.3d 669, 675 & n.7 (9th Cir. 2002) (en banc) (overstating the conclusions of a study was not a lie). We have found due process violations from the introduction of false testimony only where a fact witness told lies (even unknowingly so) or the prosecution relied on phony documents. See, e.g., *Phillips v. Ornoski*, 673 F.3d 1168, 1183-86 (9th Cir. 2012); *Maxwell v. Roe*, 628 F.3d 486, 506 (9th Cir. 2010); *Hall v. Dir. of Corr.,* 343 F.3d 976, 981-85 (9th Cir. 2003). Neither is the case here.

(*Gimenez v. Ochoa* (9th Cir. 2016) 821 F.3d 1136, 1142-1143.)

Even assuming there was some actual falsity in DeVore's testimony, nothing in the record suggests, let alone demonstrates, that the prosecution knew or should have known this to be the case when eliciting the testimony at trial. DeVore's February 2004 report, provided to the prosecution in preparation for his testimony, foreshadows no potential fallacy in his methodology or conclusions. (Exh. 25; HCP at pp. 409-412.) Nor was there anything in DeVore's background that might signal that he was unqualified to offer a credible expert opinion on gestational age. Quite the contrary, his credentials were extraordinarily impressive. (95RT 17856-17861.) And, there was nothing in DeVore's trial testimony that should have alerted the prosecution to the prospect that he had offered false testimony. March's subjective disagreement with DeVore's testimony—a commonplace occurrence between experts on opposing sides of the case (*Richards I, supra*, 55 Cal.4th at p. 964)—is of no moment in that regard. Without evidence that the prosecutor knew Devore's testimony was objectively false, mere inconsistencies in (or disagreements with) such evidence does not establish that the prosecutor violated Peterson's federal due process rights by knowingly presenting false testimony. (See, e.g., *United States v. Sherlock* (9th Cir. 1989) 962 F.2d 1349, 1364 [mere inconsistencies in witness testimony insufficient to establish prosecutor's knowing use of perjured testimony].)

Comparing Peterson's allegations of prosecutorial misconduct in this case to that in *Phillips v. Ornoski* (9th Cir. 2012) 673 F.3d 1168, demonstrates the failed nature of Peterson's challenge. *Phillips* was a capital habeas case. Phillips's girlfriend Sharon Colman testified against him at trial, offering crucial testimony that he committed murder during the commission of a robbery. However, when Phillip's trial counsel asked Colman if she was receiving any benefit for testifying, she said no. As it

turned out, this was false. Unbeknownst to Colman, her attorney worked out an agreement with the prosecution that all charges against Colman would be dropped in exchange for her testimony. Colman's attorney subsequently encouraged her to testify. Colman was purposefully not told of the deal so she would not have to admit to it under cross-examination and could truthfully testify that she had received no offers of leniency. During his closing argument, the prosecutor underscored that Colman was not promised anything. The Ninth Circuit held that Colman was basically tricked into lying, and "that a witness may have been unaware of the agreement entered into on his behalf may mean that his testimony denying the existence of such an agreement is not knowingly false or perjured, but it does not mean it is not false nonetheless." (*Id.* at p. 1184.) In fact, "[t]he prosecutor's effort to 'insulate' Colman from her own immunity agreement was a deliberate effort to deceive the jury—a ruse that flagrantly violated basic due process principles." (*Ibid.*)

This case is readily distinguishable from *Phillips*. The false testimony in *Phillips* was not only deliberately false, it was deliberately misleading. The Ninth Circuit labeled it as deceptive and pernicious, and likened it to the "covert subornation of perjury." (*Phillips*, *supra*, 673 F.3d at p. 1185.) Peterson offers nothing in the record to support that DeVore's testimony was deliberately false or that the prosecution purposefully engaged in deception. In short, there is no resemblance between the facts of *Phillips* and those at issue here.

5. *Based on the totality of the circumstances, it is not reasonably probable that Dr. DeVore's testimony, if false, affected the jury's verdicts.*

Even if DeVore's testimony was objectively false in some regard, based on the totality of the circumstances, it is not reasonably probable that the testimony affected the jury's verdicts. (*In re Malone, supra*, 12 Cal.4th

at pp. 965-966; *In re Bell, supra*, 42 Cal.4th at p. 637; *In re Cox, supra*, 30 Cal.4th at pp. 1008-1009.)

First, Jeanty's criticisms of DeVore's methodology and conclusions were presented at trial through defense counsel's exhaustive cross-examination of DeVore and the presentation of defense expert March's contrary opinion. For example, as we stated above, March posited that the earliest Conner could have died was December 29 and the latest was mid-January. (106RT 19783, 19786-19787.) Indeed, March's mid-January estimate exceeded not only DeVore's, but also Jeanty's. Additionally, Jeanty's criticism of DeVore's decision to use only one measurement (the femur) when additional measurements were possible, which, arguably, would have refined the accuracy of DeVore's conclusions, was also before the jury given March's testimony on the subject. (106RT 19771, 19784-19785.) Further, March articulated his pointed disagreement with DeVore's use of Jeanty's 1984 article and reference standard, as does Jeanty in his declaration. (106RT 19813-19814.) In short, Jeanty's critique of DeVore's methodology and conclusions is cumulative to the evidence that was before the jury and Jeanty's declaration here adds little, if anything, in further attempts to undermine DeVore's testimony.

Moreover, considering the testimony of Galloway, the prosecution's forensic anthropologist, and that of March, it was no doubt clear to the jury that trying to pinpoint the specific date of Conner's death with reliable accuracy was impossible; all of the experts talked in terms of a date range (Galloway and March) or an average computed from several possible dates (DeVore and Jeanty). This was owing to the variables, known and unknown, such as the actual date of conception, the rate of Conner's growth under certain adverse conditions attending Laci's death, whether measurements were derived from the first or second ultrasound, and which formula or equation was used to compute Conner's gestational growth. We

reprise the Court's observation in *Richards I, supra*, 55 Cal.4th at pp. 964-965, that "good faith disagreements among credible experts are commonplace," especially in cases where "the opinion being proved false was highly tentative at the outset . . . and the opinions being used to prove its falsity are equally tentative . . . ." Pinpointing the exact date of Conner's death was a "highly tentative" endeavor, as evidenced by the testimony of the expert witnesses for the parties in this case. It is not reasonably probable that the jurors surmised otherwise.[14]

Apart from DeVore's testimony on Conner's gestational age as it related to the estimated time of Conner's death, the prosecution presented compelling evidence that pointed to Peterson having murdered Laci and Conner sometime after 8:30 p.m. on December 23, when Sharon Rocha last spoke to Laci, or during the early morning hours of December 24. Peterson took his solo trip to San Francisco Bay later in the morning on December 24. Neighbor Karen Servas saw the Peterson's dog loose in the street around 10:18 a.m. on December 24. Despite Peterson being in phone contact with his paramour Amber Frey in the days immediately preceding December 24, on that day, Frey did not hear from Peterson. Galloway's testimony was that Laci's and Conner's bodies had been in the Bay between three and six months prior to the time they were discovered in mid-April 2003. This timeframe was consistent, albeit not determinative, with the murders having occurred on December 23 or 24. Forensic pathologist, Dr. Peterson, concluded that, given the condition of Laci's body, including the presence of barnacles, she had been in a marine environment for some time. He opined that it had been a matter of months

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[14] Insofar as Peterson continues to rely on multiple levels of hearsay derived from the book, "We, The Jury" (petition at pages 115 and 116), we maintain our objection to its consideration as competent evidence.

since Laci died. Galloway's estimate of Conner's gestational age was consistent with Conner having died on or about December 23 or 24. So, while the evidence did not establish with certainty the actual date that Conner died, the gravamen of the facts adduced on the issue were entirely consistent with the prosecution's theory of when Peterson committed the murders. "'[T]he usual rule, that "evidence must be taken most strongly in support of the order appealed from and conflicts must be resolved in favor of respondent," is applicable on habeas corpus review.'" (*In re Pratt* (1999) 69 Cal.App.4th 1294, 1314.)

Beyond evidence of a temporal nature, there was overwhelming other evidence that Peterson committed the murders of his wife and son. We incorporate by reference here the numerous inculpatory facts detailed at pages 307 through 312 of the People's brief in the pending automatic appeal, which conclusively demonstrate Peterson's guilt.

Accordingly, Peterson has failed to establish a prima facie case of prosecutorial misconduct involving the presentation of false evidence as it relates to Dr. DeVore's testimony. His claim should be rejected.

III. PETERSON'S CLAIM THAT HE WAS DENIED THE EFFECTIVE ASSISTANCE OF TRIAL COUNSEL BECAUSE COUNSEL FAILED TO PRESENT EXPERT TESTIMONY IN THE AREA OF FETAL BIOMETRY FAILS TO STATE A PRIMA FACIE CASE FOR RELIEF

Peterson asserts in Claim Three that he was deprived of the effective assistance of counsel during the guilt-phase trial because counsel made a tactical decision to retain the services of Dr. March and present him as the defense expert in fetal biometry instead of a different expert who, in

hindsight, may have been better.[15] Peterson contends that trial counsel's purported failings in this regard violated his Fifth, Sixth, Eighth, and Fourteenth Amendment rights under the federal Constitution.

The People specifically and generally controvert all of Peterson's factual and legal claims and allegations in Claim Three as set forth at pages 117 through 122 of the petition, as well as the relevant portion of the supporting memorandum, unless otherwise expressly and specifically conceded herein, and state that Peterson has failed to make a prima facie showing that he is entitled to relief on Claim Three.

A. General Principles of Applicable Law

To show his right to the effective assistance of counsel was violated, Peterson is required to demonstrate both that counsel's performance was deficient when measured against the standard of a reasonably competent attorney, and that counsel's deficient performance resulted in prejudice in that it undermined the proper functioning of the adversarial process to the degree the trial cannot be relied on as having produced a just result. (*People v. Lucas* (2014) 60 Cal.4th 153, 305, disapproved on another point in *People v. Romero and Self* (2015) 62 Cal.4th 1, 53, fn. 19; see also *Strickland v. Washington* (1984) 466 U.S. 668, 686.)

Where trial counsel's performance was so deficient that the People's case was not "subjected to meaningful adversarial testing," a showing of prejudice is not required; otherwise, the petitioner must show there is a reasonable probability that, but for counsel's unprofessional errors and/or omissions, the trial would have resulted in a more favorable outcome. (*People v. Carrasco, supra*, 59 Cal.4th at p. 982; *In re Visciotti* (1996) 14

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[15] Peterson employs the term "fetal biometry" in describing this line of expert testimony, which encompasses fetal development. We abide his use of the term.

Cal.4th 325, 351-352.) A "reasonable probability is defined as one that undermines confidence in the verdict." (*People v. Carrasco, supra*, 59 Cal.4th at p. 982, internal quotations and citation omitted; see also *In re Hardy* (2007) 41 Cal.4th 977, 1018-1019.) This Court may reject claims that counsel rendered ineffective assistance if the petitioner fails to show prejudice without reaching the question of whether counsel's performance was adequate. (*People v. Lucas, supra*, 60 Cal.4th at p. 305; *People v. Carrasco, supra*, at p. 982.)

In *In re Jones* (1996) 13 Cal.4th 552, the Court explained the deference accorded the decisions and tactics of trial counsel:

> Our review of counsel's performance is a deferential one. (*In re Cordero* (1988) 46 Cal.3d 161, 180 [249 Cal. Rptr. 342, 756 P.2d 1370].) "It is all too tempting for a defendant to secondguess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. [Citation.] A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' [Citation.]" (*Strickland v. Washington* (1984) 466 U.S. 668, 689 [80 L. Ed. 2d 674, 694-695, 104 S. Ct. 2052].)

(*Id.* at p. 561.)

A cognizable attack under the Sixth Amendment must focus on counsel's actual performance, identifying not only one or more respects in which it was actually substandard, but specifying the ways in which it occasioned the defendant actual prejudice. (See *Strickland v. Washington, supra*, 466 U.S. at p. 687 [discussing two-pronged test—requiring proof of

both substandard performance and prejudice—for claims of ineffective assistance].) Peterson's failure to do either is fatal to his claim.

B. Peterson Has Failed to Make a Prima Facie Showing That Trial Counsel Was Constitutionally Ineffective for Failing to Consult an Additional, or Different, Defense Expert on Conner's Gestational Age

Peterson has failed to make a prima facie showing that his trial counsel was constitutionally ineffective for failing to consult an additional—or different—expert on gestational age, given the strong presumption that trial counsel's tactical decision to call March was reasonable, as well as the deference accorded to counsel's tactical decisions. Nor can Peterson show prejudice from counsel's decisions with respect to this expert testimony.

1. *Peterson has not shown deficient performance*

It is well recognized that effective representation requires counsel to adequately investigate, prepare, and present the defense. (*In re Fields* (1990) 51 Cal.3d 1063, 1069; *People v. Ledesma* (1987) 43 Cal.3d 171, 215.) "[C]ompetent counsel should realistically examine the case, the evidence, and the issues, and pursue those avenues of defense that, to their best and reasonable professional judgment, seem appropriate under the circumstances." (*People v. Freeman* (1994) 8 Cal.4th 450, 509.) "To establish that investigative omissions were constitutionally ineffective assistance, defendant must show at the outset that 'counsel knew or should have known' further investigation might turn up materially favorable evidence." (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1244.) Since "the range of constitutionally adequate assistance is broad, . . . a court must accord presumptive deference to counsel's choices about how to allocate available time and resources in his or her client's behalf." (*Id.* at p. 1252.) "Counsel may make reasonable and informed decisions about how far to

pursue particular lines of investigation. Strategic choices based upon reasonable investigation are not incompetent simply because the investigation was less than exhaustive." (*Ibid.*)

In this case, the record demonstrates that trial counsel's performance with respect to the issue of fetal biometry expert testimony comported with constitutional demands. In his petition, Peterson states, "Rather than consult a qualified expert, defense counsel introduced the testimony of Charles March, MD, . . ." (Petn. at p. 119.) However, trial counsel did consult qualified experts, including March. In support of the July 2004 defense application for funds under Penal Code section 987.9, trial counsel submitted a declaration in which he stated that he had contacted several experts to assist in the preparation and presentation of Peterson's defense, some of whom had already provided assistance. (Supp. Clerk's Transcript ("Supp.CT") Pen. Code, § 987.9 Fund Requests, at p. 9.)[16]

Specifically, trial counsel explained that he had consulted not only March, but also two noted experts: forensic pathologist Dr. Cyril Wecht and "world-renown[ed]" criminalist Dr. Henry Lee. (Supp.CT 14.) With regard to Wecht, counsel explained that the doctor's testimony was "critical to determine the time and manner of death for both Laci and Conner." (Supp.CT 14.) The defense had expended nearly $20,000 in funds with respect to Dr. Wecht's assistance. (*Ibid.*) As for Lee, counsel stated that Lee's testimony was also "critical to determine the time and manner of death for both Laci and Conner." (*Ibid.*) The defense had expended

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[16] The supplemental Clerk's Transcript was lodged with the Court on September 25, 2015, in the related automatic appeal, case number S132449. The parties stipulated to the trial court unsealing these documents and the related portion of the Reporter's Transcript ("Supp.RT [7/27/04]"). The Stanislaus County Superior Court ordered the limited unsealing of the documents on August 10, 2015. (Supp.CT 79-80.)

approximately $13,000 for Lee's work on the case at that juncture. (*Ibid.*; see also Supp.RT [7/27/04] 30.) While Peterson may counter that neither of these noted authorities testified as experts in fetal biometry, the fact remains that in discharging his constitutional obligation to represent Peterson effectively, trial counsel solicited the doctors' expertise on the timing issues related to Conner's death.

Notably, it is likewise evident from trial counsel's declaration that, at the time he consulted March and retained the doctor's services for trial, counsel had determined that the doctor was qualified to testify on the subject of Conner's gestational age as it related to the time of his death:

> Dr. March is an OBGYN . . . [his] testimony is critical to the defense because the baby had grown considerably since Laci's disappearance on the 24th. It is expected Dr. March will be called to testify during trial. *Dr. March is qualified to perform the described work* . . . The defense has previously used Dr. March on this case. Dr. March reviewed several reports concerning Laci and the baby, and has reviewed testimony from the preliminary hearing . . . .

(Supp.CT 15, italics added.) During the July 27, 2004 hearing on the defense funding requests, Peterson's trial counsel explained the import of March's involvement:

> Dr. March. He's an OB-GYN. Obviously that is a critical issue in the case as to the age of the baby at the time of death. He will work for $210 an hour, which is substantially less than his normal rate. I anticipate he's got 50 hours worth of work. He needs to sit in and listen to three separate experts . . . .

(Supp.RT [7/27/04] 31-32 [referring to prosecution witnesses Drs. DeVore, Peterson, and Galloway].)

Trial counsel's unreserved favorable opinion of March's abilities at the time of trial conflicts with that portion of counsel's post hoc declaration in support of the present petition wherein he now states that he "recognized that March was not the best expert we could have gotten" (Exh. 4; HCP at

p. 19), and that March was lacking in expertise (Exhibit 4; HCP at p. 20). Peterson's newfound disenchantment with March's expertise is also belied by March's considerable credentials, which are detailed in section II.C.2., *ante*, as well as the fact that March had previously testified as an expert in reproductive endocrinology and as a doctor specializing in obstetrics. (106RT 19760-19761.)

As Peterson points out, his trial counsel blames the prosecution for the alleged state of affairs asserting that the defense had inadequate notice of DeVore's testimony, which adversely impacted counsel's ability to find a reputable expert on the issue. (Mem. at p. 121.) However, this assertion is somewhat suspect given that the expert testimony in fetal biometry was not presented until late in the trial. Peterson's trial counsel states that the prosecution advised the defense on February 17, 2004, of its intention to call DeVore as an expert witness. (Exh. 4; HCP at p. 17.) Yet, DeVore did not testify until late September 2004—over seven months later (95RT 17854), while March testified in late October 2004 (106RT 19758). This suggests the defense team had adequate time to find a qualified expert, which it did in Dr. March.

Additionally, the Penal Code section 987.9 records reveal that the defense team had no difficulty retaining the assistance of well-known experts like Drs. Wecht and Lee. It is therefore unfathomable that Peterson's trial counsel would truly have considered retaining March if the doctor was unqualified. This is especially true in light of counsel's earlier declaration characterizing March as qualified to offer an expert opinion with respect to Conner's age as it related to the time of his death.

The fact that Dr. Jeanty, in the hindsight afforded by a collateral attack on the judgment, may have offered different, or what Peterson may now consider better, testimony does not weigh in favor of granting Peterson the relief he seeks:

> It is therefore no surprise that not many applications claiming ineffective assistance of counsel are granted. "Nor will the court consider on the merits successive petitions attacking the competence of trial or prior habeas corpus counsel which reflect nothing more than the ability of present counsel with the benefit of hindsight, additional time and investigative services, and newly retained experts, to demonstrate that a different or better defense could have been mounted had trial counsel or prior habeas corpus counsel had similar advantages . . . ." (*In re Clark*, *supra*, 5 Cal.4th at p. 780.)

(*Rose v. Superior Court* (2000) 81 Cal.App.4th 564, 571-572; see also *Hinton v. Alabama* (2014) 571 U.S. ___ [134 S.Ct. 1081, 1089] ["The selection of an expert witness is a paradigmatic example of the type of 'strategic choic[e]' that, when made 'after thorough investigation of [the] law and facts,' is 'virtually unchallengeable'"]; *People v. Williams* (1988) 44 Cal.3d 883, 945 [explaining that competent representation does not demand that counsel seek repetitive expert analysis "until an expert is found who will offer a supportive opinion"]; see also *People v. Adkins* (2002) 103 Cal.App.4th 942, 952 [explaining that "defense counsel is not remiss for failing to present additional scientific or medical evidence rather than relying on the opinions of the prosecution experts where there is no cause to suspect that additional expert testimony or evidence would lead to a different conclusion"].) In short, Peterson's trial counsel, despite endeavoring to gently fall on the sword here, performed in accord with constitutional mandates.

Also, insofar as Peterson condemns his trial counsel for not exposing "the numerous flaws" in DeVore's testimony (petition at page 122), the assignment of fault is without merit. As we detailed in section II.C.5, *ante*, defense counsel conducted a thorough and searching cross-examination of DeVore. Therefore, Peterson's characterization of DeVore's testimony as having been "uncontradicted" (petition at page 122) is baseless.

In sum, Peterson has failed to show that his trial counsel's representation was so deficient that the People's case was not "subjected to meaningful adversarial testing." (*People v. Carrasco, supra*, 59 Cal.4th at p. 982.) To the contrary, the record demonstrates that trial counsel made a reasonable tactical decision to retain the services of March to counter the testimony of the prosecution's expert.

2. *Peterson has not demonstrated prejudice*

Even if counsel's representation was somehow deficient in this regard, Peterson has not established prejudice. To demonstrate prejudice, Peterson must show a reasonable probability that he would have received a more favorable result had counsel's performance not been deficient. (*Strickland, supra*, 466 U.S. at pp. 693-694; *People v. Ledesma, supra*, 43 Cal.3d at pp. 217-218.) "The likelihood of a different result must be substantial, not just conceivable." (*Harrington v. Richter* (2011) 562 U.S. 86, 112.) As we demonstrate in section II.C.5., *ante*, considering the testimony of all of the experts presented by the parties on the issue of Conner's gestational age, it was evident that trying to pinpoint the specific date of Conner's death with reliable accuracy was impossible. Jeanty's opinion, if presented in place of, or in addition to, that of March, would not have altered this calculus. Moreover, as discussed in section II.C.5., the prosecution presented compelling evidence, apart from the expert testimony at issue here, that established the timeframe of the murders as it supported Peterson's guilt.[17] In short, Peterson has failed to demonstrate that the jury's verdicts on the issue of guilt would have been more favorable to him.

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[17] We note our continuing opposition to Peterson's contention that the Court can, and should, consider hearsay statements contained in the book, "We, The Jury." (See Mem. at p. 121.)

For these same reasons, there is no reasonable probability that the jury's subsequent verdict in favor of death was affected.

Accordingly, Peterson has failed to establish a prima facie case of ineffective assistance of counsel as it relates to the expert testimony involving the estimated timeframe of Conner's death based on his gestational age. His claim should be rejected.

IV. PETERSON'S CLAIM THAT THE PROSECUTOR PRESENTED FALSE EVIDENCE REGARDING THE TRAILING DOG'S DETECTION OF LACI'S SCENT AT THE MARINA FAILS TO STATE A PRIMA FACIE CASE FOR RELIEF

Peterson contends in Claim Four that the prosecution relied on false evidence when it presented expert testimony that a trailing dog detected Laci's scent at the Berkeley Marina. As such, Peterson further alleges that his rights under Penal Code section 1473 were violated, as well as his federal constitutional rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments. The People specifically and generally controvert all of Peterson's factual and legal claims and allegations in Claim Four as set forth in the petition at pages 123 through 143, and supporting memorandum of points and authorities, unless otherwise expressly and specifically conceded in this response. Peterson has failed to make a prima facie showing that the prosecution presented false testimony or that it was reasonably likely that such testimony, if false, affected the judgment.

A. General Principles of Applicable Law

We incorporate by reference the relevant legal principles cited in section II.A., *ante*.

B. The Claim Is Procedurally Barred Because It Should Have Been Raised on Direct Appeal

This claim could have, and should have, been raised on direct appeal. Habeas relief is not available for claims which could have been raised on

direct appeal. (*In re Dixon, supra*, 41 Cal.2d at p. 759; see *also In re Seaton, supra,* 34 Cal.4th at p. 200 ["just as a defendant generally may not raise on appeal a claim not raised at trial . . . , a defendant should not be allowed to raise on habeas corpus an issue that could have been presented at trial," for otherwise, "the main purpose of the forfeiture rule—to encourage prompt correction of trial errors and thereby avoid unnecessary retrials—would be defeated."].)

The fact that Peterson has presented declarations from dog scent experts, Dr. Lawrence Myers[18] and Andrew Rebmann, should not insulate him from the procedural bar because the purported concerns raised by the declarations were brought out at the pretrial hearing on the dog trailing evidence, as well as at trial during defense counsel's painstaking and meticulous cross-examination of the prosecution's witnesses Eloise Anderson and Captain Christopher Boyer, as we discuss, *post.* Thus, the trial record demonstrates that any alleged deception on the part of the prosecution's dog scent witnesses could have been exposed and with it, any presentation of false testimony by the prosecution.

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[18] Although inconclusive, the record of the Penal Code section 987.9 proceedings suggests that the defense may have considered utilizing the services of Myers during the pendency of the trial. Peterson describes Myers as a "world-renowned expert on the subject of canine scent detection" who teaches in Alabama. (Petn. at p. 132.) In the hearing on Peterson's application for section 987.9 funds, defense counsel explained that he evaluated several different dog scent experts including Mr. Oust (spelled "Aust" elsewhere in the record) and Rebmann. (Supp.RT [7/27/04] 18.) Counsel also stated that the defense had considered using the services of an expert from Alabama. (Supp.RT [7/27/04] 20.) Defense counsel explained that he had previously used the services of the expert from Alabama, who charged $20,000 for one day of testimony, and "was not that impressive." (Supp.RT [7/27/04] 20.) Beyond the fact that Myers and the unidentified expert are from Alabama, it is likely that a world-renowned expert would be able to command a goodly sum for his or her assistance.

Additionally, this claim is essentially an attack on the trial court's discretion in admitting such evidence as being sufficiently reliable to permit its presentation to the jury. (See, e.g., Petn. at p. 133 [dog handler Anderson's testimony was "completely unreliable"].) Peterson has challenged the admission of this testimony on various grounds in his automatic appeal. (See AOB at pp. 179-238, case no. S132449.) The gravamen of the claim here, being essentially the same, should preclude its consideration.

C. Peterson Has Failed to Make a Prima Facie Showing that the Prosecution Presented Materially False Testimony

There was nothing false about the prosecution's presentation of the dog scent detection testimony. Peterson's claim is predicated on the opinions of Myers and Rebmann, the gist of which is that "Trimble" (the certified search and rescue dog) was not properly trained to do non-contact trail scent detection and, consequently, her detection of Laci's scent at the marina was unreliable and should not have been presented.

Put in relevant context, Myers and Rebmann essentially dispute the certification Trimble received from the California Rescue Dog Association (CARDA), as well the authorization from the state's Office of Emergency Services and the Contra Costa County Sheriff's Department permitting Trimble and her handler, Eloise Anderson, to participate in search and rescue efforts. At bottom then, this claim is about a difference of opinion among experts—those that worked with Trimble and certified her and Peterson's post-conviction experts. Such disagreement between experts does not establish that the dog trailing testimony was false. (See *Richards I, supra*, 55 Cal.4th at p. 964.)

1. *Relevant prosecution evidence*[19]

On December 28, 2002, searchers combed the Berkeley Marina shoreline on foot looking for Laci. (52RT 10205; 84RT 15933.) Directed by Captain Boyer, Senior Emergency Planning Coordinator for the Contra Costa County Sheriff's Department, K-9 search teams checked the entry and exit points of the boat launch area of the marina for Laci's scent. (52RT 10205; 84RT 15890; 84RT 15997.)

One of the K-9 search teams was Anderson and Trimble. (84RT 15933-15934, 16077-16078.) Anderson was a member of the Contra Costa County Sheriff's Search and Rescue team and had been training dogs for search and rescue since 1990. (84RT 16023, 16025.) Trimble was a Labrador Retriever whose pedigree included five generations of working dogs. Her father was a titled field trial champion and her mother was a certified search dog. (84RT 16030, 16031.)

Anderson explained that trailing dogs, including Trimble, were trained beginning when they were puppies with the level of difficulty of their training exercises gradually increasing over time. (84RT 16031-16035.) Anderson detailed Trimble's numerous training exercises which were conducted beginning in October 1999 and continuing through September 2002. (84RT 16057-16069.)

Trimble was certified by CARDA in February 2002. (84RT 16050, 16055.) Based on that certification, Trimble and Anderson were authorized to work with the state's Office of Emergency Services and the Contra Costa

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[19] In addition to the trial testimony set forth here, an extensive pretrial hearing was conducted on many of the same issues raised by the declarations of Myers and Rebmann. We incorporate by reference that testimony here. (See recitation of hearing testimony, RB at pp. 271-289, case no. S132449.) In subsequent sections, we refer to both the pretrial and trial testimony.

County Sheriff's Department Search and Rescue team. (84RT 16055.) Trimble's training was an ongoing process even after certification. (84RT 16056.)

On December 28, at the Berkeley Marina, Anderson used Laci's sunglasses as a scent item for Trimble. Captain Boyer had collected the sunglasses from the residence at Covena. (84RT 15933-15934, 16077-16078.) After scenting Trimble with Laci's sunglasses, Anderson had Trimble check two possible entry areas ("choke points") into the marina. (84RT 16079.) Trimble detected no scent in the vegetation surrounding the first area searched. (84RT 16079-10680.) Nor did Trimble indicate a scent trail near the bathroom area. (84RT 16084.)[20] Anderson presented the scent article to Trimble again and directed the dog to the other entry area to the marina. (84RT 16080.) This time, Trimble alerted to Laci's scent by pulling steadily on her line and maintaining a level head position all the way out to a pylon at the edge of the water. Once there, Trimble gave Anderson the indication that it was the end of the trail. (84RT 16080-16081, 16085.)

As detailed below, another K-9 trailing team checked the east area of the marina near the bathrooms using Laci's pink slipper as a scent item, but the dog did not detect Laci's scent. (84RT 15997, 16000-16001, 16005.)

2. *Summary of defense evidence*

Ronald Seitz and his certified trailing dog "T.J." were also called out to the Berkeley Marina on December 28, as part of a mutual aid request. (105RT 19603-19604.) Captain Boyer instructed Seitz to have T.J. work from a scent article associated with Laci to see if T.J. picked up a scent

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[20] Anderson explained that Trimble was trained to return to Anderson's left side if she did not detect a trail, which the dog did in these initial endeavors. (84RT 16084.)

trail. (105RT 19607.) Seitz elected to use a pink slipper after asking some preliminary questions. (105RT 19608.) Seitz was told the glasses case[21] was a spare and so Seitz thought the slipper would offer a better scent. (105RT 19613.)

With regard to scent articles, Seitz said that, generally speaking, he was concerned about cross-contamination in any situation where a scent article was touched by anyone other than the dog handler. (105RT 19624.) However, with reference to the particular scent articles used at the marina, Seitz offered that he did not have any specific information that suggested the articles were cross-contaminated with another person's scent besides Laci's. (105RT 19625.) Seitz opted for the pink slipper because he thought it was the item least likely to have been contaminated. (105RT 19626.) Seitz acknowledged that even if appellant had handled Laci's sunglasses, the predominant or strongest scent on the glasses would still be Laci's. (105RT 19657.) If there was contamination on the article and the source of the contamination was present (i.e., Peterson), Seitz would expect the dog to follow the trail of the source of the contamination. (105RT 19657.) However, since Seitz had no information suggesting there was cross-contamination on the sunglasses or the case, he could not speculate on whether his dog would have followed Peterson's trail out of the marina. (105RT 19658.)

At the marina, Seitz chose to lead T.J. to the boat ramp area because he believed that it was the area least likely to be intruded upon by vehicles, which could potentially degrade any scent that was present. (105RT 19610.) However, Seitz acknowledged that a viable alternative search strategy would have been to work the choke points of the parking lot area at

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[21] Presumably, Seitz was referring to the case containing Laci's sunglasses, which was the scent item used by Anderson and Trimble.

the marina adjacent to the boat launch area (105RT 19661), as Anderson did with Trimble. Seitz worked T.J. for about 90 seconds along the mouth of the boat ramp area on both sides. (105RT 19615, 19651.) T.J. did not alert in those areas. (105RT 19611.)

Seitz was aware that Anderson worked Trimble in the same area using a different scent item and Trimble had alerted. Seitz had opined that either dog could have been accurate on that particular day. (105RT 19662.) Dogs had different abilities and those abilities could vary from day to day. (105RT 19663.) Seitz estimated that T.J.—like most trailing dogs—was accurate about 70 to 80 percent of the time. (105RT 19640.) In any event, Seitz was clear that the efficacy of the dog's efforts was directly related to the competence of the handler's interpretation of the dog's behavior. (105RT 19629.)

With respect to scent theory, Seitz explained that while trailing dogs could certainly pick up the scent of a live person days after the person had passed through a given area, he had not seen anything in the scientific literature suggesting that someone who is deceased could still give off residual scent that could be detected by a trailing dog. (105RT 19619-10620.) Yet, Seitz accepted that "[t]here probably is residual scent" that comes from the body. (105RT 19646.) Also, clothing on a dead body might contain residual scent. (105RT 19635.) Seitz further acknowledged that, under certain conditions, it was possible for a dog to trail an individual who was traveling in a vehicle. (105RT 19641.) If the individual were in a truck or boat, it was possible the person's scent might leave a trail. (105RT 19645.)

3. *The testimony was not objectively false*

The Court should reject Peterson's attempt to equate issues pertaining to the reliability and admission of dog trailing evidence—and the weight to be accorded such evidence—with the prosecution's presentation of

evidence that was objectively false. There was nothing false about the dog trailing testimony, as we demonstrate, *post*. Instead, this claim, founded as it is on the opinions of experts presented in a post-conviction context, amounts to nothing more than disagreement with, and criticism of, not only prosecution expert witnesses, but also, impliedly, the organizations that deemed Trimble qualified to participate in search and rescue efforts. Such disagreement or criticism does not by itself establish that the evidence was false. (See *Richards I, supra*, 55 Cal.4th at p. 964.)

Presenting the declarations of Myers and Rebmann, Peterson contends that the lack of double-blind or randomization exercises in Trimble's training undermined the reliability of the dog's trailing skills. (Petn. at pp. 134-138.) Double-blind meaning that both the handler and the dog do not know whether a scent is present or the location of a trail. Randomization includes multiple areas for searching, but only one area contains the subject scent. (Petn. at p. 134.) Peterson states that these types of exercises are important because they address the possibility that the dog's detection may be influenced by handler cues. (Petn. at p. 135.)

These concerns, as they impacted issues of reliability, were explored extensively at the pretrial hearing on the dog trailing evidence and during trial. For example, testimony was adduced that addressed the competency of dog handlers and whether it was possible that handlers could consciously, or unconsciously, influence the trailing behaviors of their canine co-workers, thereby undermining the reliability of the dog's scent detection, including whether it was a factor in this case. (8RT 1558-1560 [hearing testimony]; 84RT 15943, 15944, 15946 [trial testimony].) In his declaration, Myers states that Trimble's training exercises "were neither double-blind nor randomized." (Exh. 6; HCP at p. 47.) He is mistaken. Eloise Anderson's testimony made clear that Trimble's training included

double-blind trails—where the trail was unknown to both handler and canine:

> So we do [] blind trials with them. What we call blind trails, meaning *neither the handler or the dog knows* -- well, the dog, hopefully, knows where the trail is. *The handler does not know where the trail is.*

(84RT 16039, italics added.)

As for Myers's concerns about randomization exercises, which guard against false positives (exhibit 6 at page 47), Trimble participated in exercises where she had to distinguish between multiple scent trails only one of which involved the search subject. (8RT 1501-1502.) One such situation involved a married couple where the wife was the subject and her husband was the decoy. (8RT 1506-1507.) In another exercise, Trimble followed a six-mile bike trail where the subject was traveling with two decoys with whom Trimble was familiar. At the end of the trail, Trimble correctly identified the subject. (84RT 16068.)

Peterson contends that because Boyer did not instruct Anderson to have Trimble search other randomly selected areas at the marina where Laci's scent was known not to be,[22] the results were unreliable because they did not account for a false-positive result. (Petn. at pp. 139-140; Mem. at p. 31.) That is not true. As Anderson explained, she took Trimble to various areas around the marina parking lot and boat launch area after scenting the dog with Laci's sunglasses. After exploring the first entry area, including vegetation in the area, Trimble gave Anderson the sign that she did not detect Laci's scent. (84RT 16078-16080.) This result, in and of itself, demonstrates that Trimble was able to differentiate between areas in the marina where Laci's scent was present and where it was not.

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[22] It is unclear how anyone—other than Peterson—would have known for certain where Laci's scent was, or was not, at the marina.

For his part, Rebmann takes issue with whether a dog is capable of detecting a person's scent if they were transported by a vehicle (a vehicle trail). (Exh. 5; HCP at pp. 38-39.) The point is not relevant here. This claim concerns the detection of Laci's scent at the marina. The evidence was uncontroverted that Peterson drove to the marina. The prosecution's theory was that he transported Laci's body there and then launched the boat with Laci's body in it from the pier. Trimble detected Laci's scent at the marina and followed the scent onto the pier and stopped at the point at which the pier ended at the water. (8RT 1521 [pretrial testimony]; 84RT 16080-16081, 16085 [trial testimony].) It can be reasonably presumed that Peterson did not drive his truck, or the boat, along the pier and out to the pylon at the end of the pier. In other words, this was not a vehicle trail; it was a non-contact scent trail. Rebmann agrees that it was a non-contact trail (exhibit 5 at page 39), but he presents the circumstances as involving the trailing of a vehicle, including a boat.[23] The evidence does not support that characterization. Trimble did not trail Peterson's vehicle from Modesto to the Berkeley Marina by detecting Laci's scent along the various roads leading from one location to the other.

Even if the circumstances on December 28 could be construed as involving Trimble's trailing of a vehicle, Trimble's training exercises included the successful completion of non-contact trails left by subjects who had traveled all or part of the route on bicycles and, in at least two exercises, in a car. (8RT 1499, 1502, 1503, 1504; 84RT 16063, 16064-16069; 85RT 16138.) Presumably overlooking Trimble's successful

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[23] Peterson makes a similar contention in the direct appeal. (See AOB at p. 204 [dog scent evidence should have been excluded pursuant to *People v. Kelly* (1976) 17 Cal.3d 24, because non-contact vehicle trailing of a deceased person in a marine environment is a "novel" technique or procedure].)

completion of these exercises, Rebmann states that "it had not been demonstrated that Trimble proved capable of following non-contact trails. (Exh. 5; HCP at p. 40.) Instead, Rebmann focuses on an exercise that Trimble performed in his presence at a seminar in 2002 and asserts that Trimble "failed the test." (Exh. 5; HCP at p. 39.) Whether Trimble failed that test is debatable, as we explain below.

At trial, during defense counsel's cross-examination of handler Anderson, counsel asked her numerous questions about the exercise that Rebmann observed, which counsel positioned as a test to see if Trimble could trail a vehicle. In fact, counsel played the videotape of the exercise for the jury and his questioning purported to show that Trimble failed the test. (85RT 16116-16131.)

However, on redirect questioning, Anderson explained that the exercise was not a vehicle trail; it was a contact trail and then the subject got into a vehicle. (85RT 16140.) The goal of the exercise was for the handler to be able to read the dog to determine at what point the person got into the vehicle. (85RT 16141.)[24] However, Anderson wanted to take it farther and see if Trimble would be able to follow the heavily trafficked vehicle trail back to the meeting hall. (85RT 16141.) She knew there was a high probability that Trimble would not be able to do it because the subject had driven in and out of the road a couple of times that day. (85RT

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[24] Anderson explained that she had taken numerous cadaver dog seminars presented by Rebmann, but only one trailing seminar with him. (85RT 16109-16110.) Boyer was also familiar with Rebmann as the latter's primary expertise was in the area of cadaver dog searches, as opposed to trailing dog searches. (84RT 16010-16011.) Therefore, when Peterson states that Rebmann "is a leading expert in the field" (petition at page 140), although the field is not specified, it is most likely that his expertise focuses on canine cadaver searches. Rebmann stated that he authored "'The Cadaver Dog Handbook.'" (Exh. 5; HCP at p. 37.)

16141.) Anderson estimated there were between 7 and 10 vehicle trails overlaid on that particular stretch of roadway involving the same subject. (85RT 16141.) In interpreting her dog's behavior, Anderson opined that Trimble turned and crossed the street where the vehicle had turned around. (85RT 16141.) Anderson further explained that, as depicted in the video, Trimble was barking at Anderson in frustration because of the difficulty of the task. (85RT 16142.) At that juncture, Anderson gave Trimble a "gentle correction" to get her to stop barking and instructed Trimble to get back to work. (85RT 16142.) Notably, what the defense video did not depict (it faded out at that point) was that Trimble continued to work the trail, went back to the building in which the seminar was occurring, and tagged the subject. (85RT 16142-16143.)

As for Peterson's assertion, presented through the declarations of Myers and Rebmann, that the lack of a "missing member" exercise on December 28 tainted the reliability of the search results, the contention is without merit. Captain Boyer explained that a "missing member test" addressed potential issues of contamination of a scent article. The methodology involved bringing the potential contaminator to the scene and have the dog scent the person as a means of ensuring that the dog did not trail the contaminated scent instead of the subject's scent. (84RT 16006-16008.)

Hearing testimony established that the scent item Anderson used with Trimble—Laci's sunglasses—were in a case when Boyer collected them. He explained that he handled the sunglasses case while wearing latex gloves. (9RT 1714, 1717, 1720.) Even if appellant had touched the sunglasses case, it was the sunglasses themselves that Anderson used to scent Trimble. (8RT 1517.) As Anderson explained, the sunglasses were a particularly good scent item because they would have contained Laci's skin oils or make-up. (8RT 1580.)

Although a missing member test was not conducted on December 28 by bringing Peterson to the marina (84RT 16006-16007), Boyer maintained contamination was not an issue in this case where Laci's scent on the articles predominated any other scent that may have been present (84RT 16016-16018). Trailing dogs, including Trimble, were trained to follow the predominant scent. (84RT 16014, 16018.) Also, Anderson explained that Trimble's training included working with contaminated scent articles. (84RT 16046.) However, because there was no evidence that anyone other than Laci touched the sunglasses, including Peterson, there was no need to do a missing member test. (85RT 16133.)

Rebmann opines that the four-day "delay" between Laci's disappearance and the canine search at the marina, as well as the environmental conditions, undermined the reliability of Trimble's detection of Laci's scent. (Exh. 5; HCP at pp. 38, 41.) Myers's declaration specifies similar concerns. (Exh. 6; HCP at pp. 48-49.) Their concerns are misplaced here. Trimble's CARDA certification included, among other things, her successful completion of a number of trails, the oldest of which was 96 hours. (7RT 1472.) Beyond that she had successfully completed multiple trailing exercises where the trail was laid down in excess of four days before the exercise. (8RT 1491 [5 days], 1498-1499 [6 days], 1501 [14 days].)

As for the impact of environmental conditions on a trailing dog's ability to follow a scent, the hearing and trial testimony addressed, in general terms, scent theory and how various conditions impacted the diffusion and dissemination of skin rafts. (8RT 1592-1595; 9RT 1688,

1792-1793; 84RT 15966-15974.)[25] Moreover, Trimble's training included exposure to an array of environmental variables: shopping mall (8 RT 1505), commuter station (8RT 1495-1496), grass median, parking lot, and park (8RT 1491), vehicle traffic and asphalt (7RT 1477; 8RT 1489-1490), and outdoor wilderness areas (8RT 1498-1499). Some of the outdoor trails were impacted by heavy rains (8RT 1491), and strong winds (8RT 1503-1504).

Further, Anderson opined that there were no adverse environmental factors at the marina on December 28, which would have complicated Trimble's ability to trail Laci's scent. (8RT 1618.) Even if wind had been a factor, Anderson explained that Contra Costa County, where Trimble and Anderson worked, was subject to strong cross-winds. (8RT 1504.) Therefore, wind was nothing new to Trimble. Anderson also stated that Trimble was capable of working either side of a trail when it was windy—up-wind or down-wind. (8RT 1592-1593.) And, Boyer testified that, in some instances, the wind actually created a trail for the dog to follow. (9RT 1794.)

Insofar as Rebmann cites to dog handler Seitz and his canine having searched the same area with negative results as casting doubt on Trimble's detection of Laci's scent (exhibit 5 at page 41), we note that Rebmann does not account for an important variable: Seitz chose to use a different scent item—Laci's slipper. As explained by Anderson, not all scent items are the same in terms of the strength of the scent present.

In light of the foregoing facts and argument, the criticisms Peterson offers in his petition and supporting memorandum and exhibits amount to,

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[25] Boyer mentioned both Meyers's work, as well as Rebmann's, in support of his explanation of the existence of the science of scent theory. (84RT 15952-15954.)

at best, a difference of opinion among experts. (See *In re Swain, supra*, 34 Cal.2d at p. 302.) Nor has Peterson shown that the prosecution dog trailing experts later repudiated their testimony or that new technological advances render the testimony false. (See *Richards II, supra*, 63 Cal.4th at p. 311.) For these reasons, Peterson has not carried his burden to state a prima facie case for relief founded on Penal Code section 1473.

4. *There is no evidence that the prosecution knowingly presented false evidence.*

To sustain his claim of a federal constitutional violation of due process based on presentation of false evidence, as we have stated, Peterson must make a prima facie showing that, not only was the dog trailing testimony false, but that the prosecution knew it to be false. (*Dow v. Virga, supra*, 729 F.3d at p. 1048.) Peterson has not done so. He offers no evidence suggesting, for example, that a prosecution witness lied, that the prosecution relied on false documents, or that the dog trailing evidence was so profoundly lacking in reliability that the prosecution should have been on notice that it was false. (See *Gimenez v. Ochoa, supra*, 821 F.3d at pp. 1142-1143.) Nothing in the record, or in the declarations of Myers or Rebmann, suggest "covert subornation of perjury." (See *Phillips v. Ornoski, supra,* 673 F.3d at p. 1185.)

5. *Based on the totality of the circumstances, it is not reasonably probable that the dog trailing testimony, if false, affected the jury's verdicts.*

Even if the dog trailing testimony was objectively false in some regard, based on the totality of the circumstances, it is not reasonably probable that the testimony affected the jury's verdicts. (*In re Malone, supra*, 12 Cal.4th at pp. 965-966; *In re Bell, supra*, 42 Cal.4th at p. 637; *In re Cox, supra*, 30 Cal.4th at pp. 1008-1009.)

First, the complaints that Myers and Rebmann assert in their respective declarations were addressed during trial as we explained, *ante*. These purported infirmities in the reliability of Trimble's search at the marina were thoroughly exploited by defense counsel during cross-examination of prosecution witnesses Anderson and Boyer. (85RT 16103-16133, 16144-16146 [Anderson]; 84RT 15935-16011, 16020 [Boyer].) There is nothing new here that would call into question the reliability of the jury's verdicts insofar as it may have been influenced by the dog trailing testimony.

Additionally, the defense called dog handler Seitz during its case to talk about Seitz's dog's inability to detect Laci's scent at the marina. (105RT 19603-19629.) This was an attempt to neutralize any residual value the prosecution may have derived from Anderson's and Boyer's testimony after defense counsel's cross-examination.

Further, the jury was instructed with CALJIC number 2.16, which made clear that the dog trailing evidence was not sufficient by itself to prove Peterson's guilt. (111RT 20549.) The instruction also stated that the dog trailing evidence needed to be independently corroborated before it could be considered reliable and used to infer Peterson's guilt. In according any weight to the trailing evidence, the jury had to first consider six separate factors, with an additional catch-all factor. (111RT 20549-20550.) Last, aside from the dog trailing testimony, as we summarized at pages 306 through 313 of the People's brief in the automatic appeal, there was overwhelming evidence of Peterson's guilt. While Trimble's detection of Laci's scent supported the prosecution's theory that Peterson transported Laci's body to the marina, its evidentiary force paled in comparison to the fact that Laci's and Conner's bodies were discovered along the San Francisco Bay shoreline not far from where Peterson said he had been fishing.

V. PETERSON'S CLAIM THAT HE WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE COUNSEL FAILED TO PRESENT EXPERT TESTIMONY IN THE AREA OF DOG SCENT IDENTIFICATION FAILS TO STATE A PRIMA FACIE CASE FOR RELIEF

Peterson asserts in Claim Five that he was deprived of his Fifth, Sixth, Eighth, and Fourteenth Amendment rights because his trial counsel rendered ineffective assistance during the guilt-phase trial by failing to present expert testimony to impeach the prosecution's dog trailing testimony at the Evidence Code section 402 hearing on the issue and at trial. He contends that counsel's ineffectiveness permitted the presentation of unreliable prosecution evidence which, in turn, undermines the reliability of the death judgment.

The People specifically and generally controvert all of Peterson's factual and legal claims and allegations in Claim Five as set forth at pages 144 through 153 of the petition, as well as the relevant portion of the supporting memorandum, unless otherwise expressly and specifically conceded herein, and state that Peterson has failed to make a prima facie showing that he is entitled to relief on Claim Five.

A. General Principles of Applicable Law

We incorporate by reference the legal principles set forth in section III.A., *ante*.

B. Peterson Has Failed to Make a Prima Facie Showing That Trial Counsel Was Constitutionally Ineffective for Failing to Present Expert Testimony on Dog Trailing Evidence as Additional Impeachment Evidence

Given the deference accorded trial counsel's tactical decisions, Peterson has failed to make a prima facie showing that his trial counsel was constitutionally ineffective for failing to present additional impeachment

evidence in the form of Rebmann's testimony with respect to reliability of the prosecution's dog trailing evidence.

Nor can Peterson show prejudice. He overstates the importance of the dog trailing evidence. In any event, the criticisms Rebmann articulated in his declaration, as they concern issues of reliability of the dog trailing evidence, were addressed through counsel's cross-examination of the prosecution witnesses.

1. ***Background***

In support of the July 2004 defense application for funds under Penal Code section 987.9, trial counsel stated in his declaration that he had contacted two experts in dog-tracking evidence: Aust and Rebmann. (Supp.CT 11-12.) Defense counsel explained that he anticipated the prosecution's presentation of such evidence and, therefore, expert assistance was necessary to "test the reliability of these dogs and the procedures utilized while tracking." (Supp.CT 11, 12.) Both individuals had, by that point, consulted on the case and Rebmann had provided assistance at the section 402 hearing on the dog trailing evidence. Counsel explained that, if the evidence was deemed admissible, Rebmann would be needed for trial. (Supp.CT 11-12; Supp.RT 18-20.) During the hearing on the application for funds, counsel also explained that he had consulted two other experts, including one expert from Alabama who, in a different case, charged $20,000 for what ended up being one day of testimony, as we mentioned previously. (Supp.RT 20.)

At the conclusion of the 402 hearing, despite not calling Rebmann to testify, defense counsel was successful in excluding the majority of the dog trailing testimony, including all of the vehicle trailing testimony. Specifically, counsel persuaded the trial court to exclude the testimony concerning the efforts of Anderson and Trimble, as well as those of Cindee Valentin and her dog "Merlin," insofar as the dogs detected Laci's scent

along roadways in Modesto leading to Peterson's warehouse and then west toward San Francisco Bay (i.e., vehicle trails). (See 10RT 1980-2004.)

2. *Peterson has not demonstrated that counsel's performance was constitutionally adequate*

Peterson has not demonstrated that trial counsel's tactical decisions with respect to presentation of expert testimony on issues pertaining to dog trailing scent identification were not objectively reasonable or competently rendered.

"[C]ounsel's decisionmaking must be evaluated in the context of the available facts." (*People v. Bolin* (1998) 18 Cal.4th 297, 333.) "Whether to call certain witnesses is . . . a matter of trial tactics, unless the decision results from unreasonable failure to investigate." (*Id.* at p. 334) A reviewing court generally will not "second guess" this decision. (*People v. Mitcham* (1992) 1 Cal.4th 1027, 1058-1059.)

a. Hearing

In his declaration, Peterson's trial counsel explains that he retained Rebmann's services to counter the prosecution's attempt to present dog scent detection testimony. (Petn. Exh. 4; HCP at p. 26.) Counsel states that the reason he did not call Rebmann at the 402 hearing was because he believed that the testimony was unnecessary since, in his estimation, California law "was so clear on this point . . . ." (Exh. 4; HCP at p. 28.) In fact, as counsel points out, somewhat immodestly: "As I predicted . . . the judge excluded testimony of dog scent detection at Scott's warehouse and along Highway 132." (Exh. 4; HCP at p. 28.) Counsel is right to boast. The excluded testimony was far more damaging to Peterson's defense than the testimony concerning Trimble's trailing efforts at the marina. The vehicle trailing evidence was important because it linked Peterson to the transportation of Laci's body in and around Modesto. The same is true with respect to the scent detection at Peterson's warehouse, where he

housed his boat. The vehicle trailing and warehouse scent testimony represented a link in the evidentiary chain between Laci's disappearance from their home in Modesto on December 24—an undisputed fact—to Peterson's presence at the marina on December 24—an undisputed fact.

On the other hand, Trimble's detection of Laci's scent at the marina was not earth-shattering testimony given the evidence adduced as to the discovery of Laci's and Conner's bodies along the Bay shoreline, as well as what was revealed by the condition of their bodies. Indeed, the corroborative nature of the discovery of the bodies was determinative to the trial court's admission of the marina dog trailing evidence. (10RT 2000-2004.) Not even Rebmann could have refuted the probative force of that corroboration if he was called to testify at the pretrial hearing. And, the fact that the trial court disagreed with Peterson's counsel's assessment of whether the marina scent detection evidence should have been admitted does not constitute deficient performance of counsel.

Given trial counsel's consultation with numerous dog scent experts, including his retention of the services of Rebmann, and trial counsel's considerable efforts and ensuing success at the 402 hearing, Peterson has not rebutted the presumption that his trial counsel made an objectively reasonable tactical decision not to call Rebmann as a witness for the purpose of further impeaching the reliability of the prosecution's dog scent testimony. (See *Strickland v. Washington, supra,* 466 U.S. at p. 689.)

b. Trial

Trial counsel explains that he did not believe Rebmann's trial testimony was necessary. In counsel's view, he had valuable impeachment evidence, which was the videotape of Trimble's trailing exercise at one of Rebmann's seminars. (Exh. 4; HCP at p. 29.) Counsel was of the opinion that Trimble failed the test and he cross-examined Anderson about it extensively, as we explained above. At the time, counsel believed that the

videotape "caused Anderson to lose credibility with the jury" and additional impeachment evidence was unnecessary. (Exh. 4; HCP at pp. 29-30.)

Counsel's tactical decision not to call Rebmann (or Myers for that matter) at trial was objectively reasonable in light of other evidence relating to the reliability—or purported lack thereof—with respect to Trimble's efforts at the marina. In addition to the videotape of Trimble's seminar exercise, counsel called Seitz as a defense witness who testified that his trailing dog T.J. did not detect Laci's scent at the marina. Peterson's trial counsel argued this as impeachment evidence in his summation:

> Mr. Seitz was there, and he said: When my dog finds a specific scent, then it follows that particular trail, so if there was a presence of scent there, I would have expected a dog to lead me in a direction away from that sort of perpendicular line, either toward the water, or away from the water. [¶] Seitz was there. Seitz was there the same -- or actually before Anderson. Seitz's dog found nothing.

(110RT 20438.)

> The only dog that was out there that gave you anything was this woman's dog [referring to Ms. Anderson and Trimble]. 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.

(110RT 20440.)

Had Peterson's trial counsel called Mr. Rebmann or Dr. Myers to testify, it would have been cumulative criticism and the prosecution would have, no doubt, undermined such testimony by highlighting Trimble's certification by CARDA and OES's authorization permitting Anderson and Trimble to participate in search and rescue endeavors.

In sum, counsel's tactical decision to consult Rebmann but not call him to testify, as well as counsel's decision not to retain the services of Myers, were objectively reasonable choices and entitled to deference. (See

People v. Bolin, supra, 18 Cal.4th at p. 334 [decision to call certain witnesses is a matter of trial tactics]; *People v. Mitcham, supra,* 1 Cal.4th at pp. 1058-1059 [reviewing court generally will not "second guess" this decision].)

3. *Peterson has not shown prejudice*

Even if defense counsel's representation fell below an objectively reasonable level of competency, Peterson has failed to demonstrate a prima facie case of prejudice—that he would have received a more favorable guilt-phase outcome had counsel's performance not been deficient. (See *Strickland, supra*, 466 U.S. at pp. 693-694.)

Peterson's claim is founded on the infirm premise that the dog trailing testimony was "one of the strongest pieces of evidence the state presented to obtain its conviction" and was of "central importance" to the prosecution's case. (Petn. at pp. 144, 145.) As we explained in section IV.C.5., *ante*, the dog trailing testimony was helpful, but not vital, to the prosecution's case. As we have explained, the challenged evidence was not nearly as compelling as the discovery of Laci's and Conner's bodies along the Bay shoreline near the area where Peterson had admittedly been on Christmas Eve.

Further, Rebmann's criticisms were largely, if not entirely, addressed through defense counsel's comprehensive and pointed cross-examination of the prosecution witnesses, as we set forth in section IV.C.5., *ante*. Therefore, Peterson's assertion that his trial counsel did not expose "numerous flaws" in the dog trailing testimony (petition at page 153) is plainly mistaken.

Last, for the reasons set forth above, and in section IV. *ante*, the marina dog trailing evidence was reliable and, therefore, insofar as the jury may have accorded the evidence any weight, reversal of the resulting death judgment is unwarranted under the Eighth Amendment.

VI. PETERSON'S CLAIM THAT THE PROSECUTION PRESENTED FALSE EVIDENCE REGARDING THE MIGRATION OF LACI'S AND CONNER'S BODIES TO THE SHORE FAILS TO STATE A PRIMA FACIE CASE FOR RELIEF

Peterson contends in Claim Six that the prosecution relied on false evidence when it presented the testimony of Dr. Ralph Cheng, an expert in hydrology, as it concerned the migration of Laci's and Conner's bodies to shore. As such, Peterson further alleges that his rights under Penal Code section 1473 were violated, as well as his federal constitutional rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments.

The People specifically and generally controvert all of Peterson's factual and legal claims and allegations in Claim Six as set forth in the petition at pages 154 through 173, and supporting memorandum of points and authorities, unless otherwise expressly and specifically conceded herein, and state that Peterson has failed to make a prima facie showing that the prosecution presented false testimony or that it was reasonably likely that such testimony, if false, affected the judgment.

A. General Principles of Applicable Law

We incorporate by reference the relevant legal principles cited in section II.A., *ante*.

B. Peterson Has Failed to Make a Prima Facie Showing that the Prosecution Presented Materially False Testimony

There was nothing false about the prosecution's presentation of Cheng's testimony. Peterson's claim is predicated on the post-conviction opinion of Professor Rusty Feagin, the gravamen of which is that Cheng's testimony about the possible trajectory of Conner's body to shore—most importantly it's inception point—while plausible, did not allow for other possibilities. As with other issues raised in the petition concerning expert testimony, this claim represents nothing more than a subjective difference

of opinion among experts. Such disagreement does not necessarily establish Cheng's testimony was objectively false. (See *Richards I, supra*, 55 Cal.4th at p. 964.)

1. ***Relevant testimony***

Doctor Ralph Cheng was a senior research hydrologist for the U.S. Geological Survey ("USGS"). Cheng's considerable credentials are detailed in the record.[26] (100RT 18859-18863.) The primary focus of Cheng's research with the USGS was studying the "hydraulics" or physical processes of how water moved in San Francisco Bay. (100RT 18860, 18864-18865.)

At the outset of his testimony, Cheng provided an overview of tidal action and water currents and how they were influenced by astronomical forces. (100RT 18866-18868; People's Exh. No. 283.) He explained that there were two high tides and two low tides each day and that the rise and fall of tides along the shoreline was more extreme in the spring. (100RT 18870-18871; 101RT 18889-18890.) The magnitude of the tidal current was generally proportional to the depth of the water; water moved fastest in shallow areas. (100RT 18878.)

As for San Francisco Bay, Cheng stated that the current was strongest where the water was deepest, which was underneath the Golden Gate. (100RT 18878.) He also discussed the effects of seasonal wind patterns on the Bay, particularly, how winds affect the wave motion of water in the Bay, which, in turn, transmitted energy downward to the bottom. (100RT 18880-18882.) This wave energy affected the movement of objects in the water. (100RT 18878; 101RT 18891.) Assembling all of this

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[26] At the hearing on the defense application for funding under Penal Code section 987.9, with respect to this area of expertise, defense counsel observed, "[T]here's only three people, basically, who do what these guys do. Cheng is one." (Supp.RT 22.)

information—tides, tidal currents, winds, and waves—researchers were able to predict the movement of water in San Francisco Bay and, accordingly, the movement of objects in the water, with a certain degree of accuracy. (101RT 18891.)

With regard to this case, Cheng recounted that the Modesto Police Department contacted him in February 2003 to see if he could assist authorities locate Laci's body by explaining how things moved through the waters in the Bay. (101RT 18891-18892, 18922.) Cheng directed the jurors' attention to the presentation slide that summarized the wave and tidal conditions near the Richmond area for the time period beginning on December 23, 2002, through December 25, 2002. (101RT 18892; People's Exh. No. 283; 12Supp.CT Exhs. 2755.) He explained that, around noon on December 24 the wind was very weak on the Bay, which was a typical winter pattern. At the time, the tide was rising bringing ocean water flowing into the Bay. (101RT 18893-18894; People's Exh. No. 283; 12Supp.CT Exhs. 2756.) Cheng noted that his chart was based on data from the Bay Air Quality Management District, which collected such data continuously. (101RT 18892, 18893.)

Cheng's next slide documented the tides and winds near Richmond for the time period when Laci's and Conner's bodies washed ashore in mid-April 2003. Specifically, the chart showed data for the time period beginning on April 11 and continuing through April 13. (People's Exh. No. 283; 12Supp.CT Exhs. 2757.) Cheng described how, in spring, water levels went to extremes: low tides were exceedingly low and high tides were exceedingly high. (101RT 18895.) He pointed out that, during this time, it was very windy with winds exceeding 40 knots and sustained winds averaging around 20 knots. (101RT 18896.) And, shortly after noon on April 12, there was also the occurrence of a very low tide. (101RT 18896.) The wind, which Cheng opined was of "quite a magnitude," produced a

significant amount of energy in the water. (101RT 18896, 18897.) The wind energy permeated the shallower areas of the Bay stirring up the sediment at the bottom. (101RT 18898.) The areas along the shore where Laci's and Conner's bodies were recovered were "very, very shallow." (101RT 18902.) In Cheng's opinion, this weather event would have produced enough energy in the shallower portions of the Bay to move a body. (101RT 18906.)

Cheng clarified that in trying to assist authorities in February 2003—before Laci's and Conner's bodies were recovered—he was working with some degree of uncertainty as to the specific location where Laci's body started its travel in the Bay. (101RT 18900.) Nonetheless, Cheng was able to reconstruct the tides and currents in the Bay "within a reasonable degree of accuracy." (101RT 18900.) However, because the initial position of Laci's body was not precise, Cheng could not predict the path that Laci's body would have traveled in the Bay. (101RT 18900.)

After Laci's and Conner's bodies were discovered, authorities returned to Cheng to see if he could work backward from the location where the bodies washed ashore to determine where Laci's body may have been deposited in the Bay. With that information, authorities could concentrate their search for additional evidence, such as weights or limbs. (101RT 18900-18901, 18907, 18940.) Cheng explained that, while the information available to him had "improved," such calculations still involved some uncertainty. (101RT 18901.) He then detailed how he created a "Progressive Vector Diagram" to narrow down the area. (101RT 18904-18905; People's Exh. No. 284; 12Supp.CT Exhs. 2760.) Cheng charted hour-to-hour movement based on a wind-drift estimation mathematical formula. (101RT 18909-18910.) The formula utilized data from the U.S. Army Corps of Engineers Coastal Engineering Handbook. (101RT 18910.) Cheng acknowledged that, while he was able to narrow

down the area where the bodies may have started their travel in the Bay, he could not refine it to a matter of inches or even feet. (101RT 18912.) His task was complicated by the fact that two bodies of different mass were recovered, which meant that, when they drifted in the Bay, they may have behaved differently. (101RT 18913.)

Cheng was able to determine a probable track for Conner's body, but not Laci's. (101RT 18925, 18942, 18944.) This was owing to several circumstances including the investigative assumption that Laci's body was likely weighted down by anchors initially, which would have caused her body to behave differently in the water than Conner's. (101RT 18942.) Also, being heavier than Conner's body, Laci's body could have been resting on the bottom of the Bay. (101RT 18925.)

Based on Cheng's calculations, the larger area he identified was approximately a quarter-mile by one and three-quarters mile. He broke this area down into smaller quarter-mile sections or grids, with one particular grid being the target area. (101RT 18912; People's Exh. No. 284.) Cheng described this area as "lying right in the middle distance between Berkeley Marina and Brooks Island, roughly." (101RT 18915.) He qualified: "It's not a deterministic prediction, but it's a highest probability" (101RT 18914), based on "assumptions and scientific data" (101RT 18920). The map containing Cheng's conclusions corresponded to the area of the Bay depicted in People's Exhibit number 215. (101RT 18908.) Additionally, Cheng's research and calculations revealed that, had Laci's body had been placed into deeper waters in the Bay, it would not have migrated to the Berkeley Flat area. (101RT 18917.)

Although Cheng acknowledged that his research did not include the specific study of the movement of human bodies in the Bay, he had studied the movement of "drifters" in the Bay. Drifters were floating devices that could be weighted to assess the action of currents at varying depths.

(101RT 18926, 18938.) Typically, the drifters were weighted at zero so that they were of neutral density in the water. (101RT 18945.)

Cheng explained that he was quite familiar with the principles of fluid mechanics as they involved the movement of objects through air and that these same principles were generally applicable to movement of objects in water. (101RT 18938 ["a law of similitudes"].)

2. *Dr. Cheng's testimony was not objectively false*

Through his tender of Professor Feagin's declaration, Peterson attempts to show the prosecution presented false evidence. However, Feagin's assertions and conclusions amount to nothing more than a subjective disagreement among credible experts—far from demonstrating the prosecution presented false evidence. As we have stated, rebuttable expert testimony is not the equivalent of perjured or otherwise false testimony. (See *Richards I, supra,* 55 Cal.4th at pp. 962-964; *United States v. Workinger, supra,* 90 F.3d at p. 1416.)

Significantly, Feagin agrees that Cheng's conclusion about the trajectory of Conner's body, including the point of origination south of Brooks Island, is "plausible." (Petn. Exh. 9; HCP at p. 292.) Indeed, Feagin has concluded that there are three locations from which Laci's and Conner's bodies may have started moving toward shore; one of those locations is the area identified by Cheng. (Petn. at p. 170 ["Dr. Cheng offered only one of these three scenarios"].) That being the case, it is curious that Peterson would accuse the prosecution of presenting false evidence when Feagin agrees that Cheng's conclusion was one plausible scenario.

Peterson's complaint appears to be that Cheng should have identified additional areas from which the bodies' path to shore could have originated. (Petn. at p. 172.) However, Cheng's vector diagram was based on objective data relating to environmental factors impacting the Bay during the relevant

time period. It was also predicated on certain investigatory assumptions provided by law enforcement. (101RT 18942.) In that regard, there was nothing suspect about Cheng's conclusions. Peterson has presented no evidence to suggest that Cheng intentionally omitted other possibilities.

In apparent recognition of the validity of Cheng's methodology, Peterson endeavors to cast Cheng's conclusions as false by questioning the objective data upon which his conclusions were based. Challenging Cheng's testimony as to when the bodies may have started moving toward shore, Peterson asserts that the record does not disclose the source for Cheng's statement that the winds were at 40 knots on April 12. (Petn. at p. 169 ["It is unclear where this value comes from"].)[27] However, a close reading of the record suggests that the measurement was based on data compiled by the Bay Area Air Quality Management District in Richmond, "not far from the area of interest." (101RT 18892, 18928; see also People's Exh. Nos. 283, 284; 12Supp.CT Exhs. 2757.) Using a wind-drift estimation mathematical formula from the U.S. Army Corps of Engineers Coastal Engineering Handbook, Cheng plotted a progressive vector diagram to narrow down the area in question. (101RT 18904-18910.) Therefore, contrary to Peterson's suggestion, Cheng's conclusion that the bodies moved during the storm event on April 12 was supported by statistical data routinely generated by reliable sources.

Peterson, citing Feagin, also contends that Cheng's conclusions are based on the infirm premise that bodies in the water will move at the same speed as the water itself. (Petn. at pp. 171-172; Petn. Exh. 9; HCP at p. 293.) However, neither the professor nor Peterson point to anything in the

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[27] Feagin's data shows that winds reached as high as 30 knots on April 12. (Petn. Exh. 9; HCP at p. 294.) This would seem to contradict his assertion that the wind event in late March was "equally strong." (*Ibid.*; see HCP at p. 300 [highest data peak appears to be less than 25 knots].)

record to substantiate this claim. In fact, Feagin acknowledges that he is, in effect, guessing that that was an underlying premise for Cheng's conclusions. (Exh. 9; HCP at p. 293 ["Dr. Cheng then *appears* to assume . . . ."], italics added.) The professor goes on to say, "*To the extent that* Dr. Cheng's vector-chart . . . 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, that chart *may* be inaccurate." (HCP at p. 293, italics added.) Feagin having hedged his bets in this regard, undermines Peterson's claim that Cheng's testimony was false. It boggles one's mind to try and grasp how Cheng's testimony that Professor Feagin opines "may be inaccurate" based on Feagin's unsubstantiated assumptions about Cheng's methodology, but that is not necessarily inaccurate, can be objectively false.

Even were it true that Cheng did not differentiate between the velocity of water itself and objects in the water, in this instance, that would be of little consequence because the object at issue was an infant's body, not a cargo ship. Cheng did not overreach; he testified that he could not offer a trajectory for Laci's body because there were certain operative assumptions, such as the weighting of Laci's body, which would have caused her body to behave differently. (101RT 18925, 18942, 18944, 18942.)

Nor does Cheng's declaration contradict or repudiate his trial testimony. (See *Richards II*, *supra*, 63 Cal.4th at p. 309.) In his declaration, Cheng states that although "no one can pin-point the starting location of the bodies movement," he maintains, based on "a high probability," the bodies would have started drifting along the vector path he testified to at trial. (Petn. Exh. 10; HCP at p. 327; People's Exh. No. 284.) At trial, Cheng explained at length that his conclusion involved some

uncertainty and was not a deterministic prediction. (101RT 18901,18914.) The path that he charted as to the movement and trajectory of Conner's body was the "highest probability." (101RT 18914.) Cheng never stated that it was the only path. Therefore, there was nothing objectively untrue about Cheng's testimony.

Comparing the circumstances here with those in *Richards II*, provides further support for our position. In that case, the defendant was convicted of the brutal murder of his wife. Among the victim's numerous injuries was a crescent-shaped lesion on her right hand, which was initially suspected to be a bite mark. (*Richards II, supra*, 63 Cal.4th at p. 300.) The prosecution expert, a dentist and forensic odontologist, opined that the lesion was consistent with the petitioner's lower teeth and explained in detail the reasons for his conclusion. (*Id.* at p. 301.) Subsequently, in 2007, in connection with the petitioner's habeas corpus petition, the expert provided a declaration in which he stated, with respect to his trial testimony, that the percentage that he assigned to the occurrence of defendant's particular dental irregularity in the general population was "'not scientifically accurate.'" (*Id.* at p. 305.) He stated, "'With the benefit of all of the photographs [of the crime scene and the victim's injuries], and with my added experience, I would not now testify as I did in 1997,' and 'I cannot now say with certainty that the injury on the victim's hand is a human bite mark.'" (*Ibid.*) Declarations from other forensic dentistry experts explained that new scientific methods (computer software which allowed for correction of the distortion inherent in the photograph of the injury) allowed for a more accurate assessment of the lesion and cast "'significant doubt that the hand injury is even a bitemark.'" (*Id.* at p. 306.) At an evidentiary hearing in 2009, the expert in question testified, "'My opinion today is that [petitioner's] teeth . . . are not consistent with the lesion on the hand.'" (*Ibid.*) In light of the expert's recantation of his

expert testimony and the technological advances which permitted a more accurate assessment of the injury, this Court found the challenged testimony to be false under section 1473. (*Id.* at p. 311.)

Here, beyond the fact that Cheng's declaration in no way repudiates his trial testimony, Peterson has presented no evidence that new scientific techniques have been developed since 2004 that would significantly enable a more accurate assessment of the trajectory of Conner's or Laci's bodies to shore, including the point of origination.

Contrary to Feagin's suggestion, Cheng's testimony was not rendered objectively false owing to the absence of suggested alternative theories by the prosecution or defense. There was no obligation on the part of Cheng to suggest an "alternative scenario" not involving Peterson's known location on the Bay if Cheng, based on his expertise, believed that he had arrived at the migration path that was of the highest probability.

Finally, we again note that while here in a post-conviction context Peterson assails the validity of Cheng's expertise and testimony on this issue, the defense attempted to retain Cheng's services, as was revealed in the hearing on the defense application for funding under Penal Code section 987.9. (Supp.RT 22.)

In short, the lack of absolute certainty in expert testimony is not the functional equivalent of false or perjured testimony.

3. *There is no evidence that the prosecution knowingly presented false evidence*

To sustain his claim of a violation of due process based on presentation of false evidence, as we have stated, Peterson must make a prima facie showing that not only was Cheng's testimony false, but that the prosecution knew it to be so. (*Dow v. Virga, supra*, 729 F.3d at p. 1048.) Peterson has not made the necessary showing. He offers no evidence suggesting, for example, that Cheng lied, that the prosecution relied on

false documents, or that Cheng's expert testimony was so profoundly lacking in reliability that the prosecution should have known that it was false. (See *Gimenez v. Ochoa*, *supra*, 821 F.3d at pp. 1142-1143.) Nothing in the record, or in Feagin's declaration, amounts to "covert subornation of perjury." (See *Phillips v. Ornoski, supra*, 673 F.3d at p. 1185.)

4. *Based on the totality of the circumstances, it is not reasonably probable that Dr. Cheng's testimony, if false, affected the jury's verdicts*

Even were Cheng's testimony found to be objectively false, Peterson has not shown a reasonable probability that the outcome of the trial would have been more favorable to him had the challenged testimony been excluded.

> Our courts have held that "'[f]alse evidence is "substantially material or probative" if it is "of such significance that it may have affected the outcome," in the sense that "with reasonable probability it could have affected the outcome ...." [Citation.] In other words, false evidence passes the indicated threshold if there is a "reasonable probability" that, had it not been introduced, the result would have been different. [Citation.] The requisite "reasonable probability," we believe, is such as undermines the reviewing court's confidence in the outcome.'" ([*In re*] *Malone* [1996], *supra*, 12 Cal.4th [935] at p. 965, italics added by Malone, quoting *In re Wright* [1978], supra, 78 Cal.App.3d 788, 814.) This required showing of prejudice is the same as the reasonably probable test for state law error established under *People v. Watson* (1956) 46 Cal.2d 818, 836 [299 P.2d 243]. (*Wright, supra*, 78 Cal.App.3d at p. 812.) We make such a determination based on the totality of the relevant circumstances. (*Malone, supra*, 12 Cal.4th at p. 965.)

(*Richards II*, *supra*, 63 Cal.4th at pp. 312-313.)

Peterson states that "[a]part 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 [Peterson] was fishing."

(Petn. at p. 156.) Therefore, Peterson argues that Cheng's testimony falsely limited the area from which the bodies' path to shore originated and was, thus, prejudicial. (Petn. at p. 173.)

We disagree. As Peterson acknowledges, Laci's body was found about 2000 yards—a little more than a mile—from his known location on the Bay near Brooks Island. Additionally, Conner's body was discovered approximately 3,000 yards away from the same area near Brooks Island. (Petn. at p. 156.) That evidence was of such inculpatory force, that Cheng's testimony was, at best, corroborative.

Moreover, there was other evidence connecting Peterson's specific location on the Bay to the bodies. Dr. Galloway, the forensic anthropologist, estimated that the bodies had been in the Bay between three and six months, which corresponded with the timing of Peterson's visit to the Bay in late December. (109RT 20277-20278.) Additionally, Dr. Peterson, the forensic pathologist, testified to the condition of Laci's and Conner's bodies, which tended to show that Laci's body had been in the Bay for a matter of months (92RT 17471), and that it was likely that Conner's body was released from Laci's after her body had been degraded over time from the environmental factors in the Bay (92RT 17453-17354). In short, there was no "evidentiary chasm" (petition at page 154), or dots that needed connecting (petition at page 155). The location and condition of the bodies essentially represented a direct line—both physical and temporal—to the place where Peterson told the police he had been fishing on Christmas Eve.

No doubt Cheng's testimony was helpful in explaining how Conner's and Laci's bodies would have remained in the Bay for several winter months and then come ashore during a springtime weather event with strong winds. Yet, this portion of Cheng's testimony was largely inconsequential in terms of its inculpatory effect.

Further, during cross-examination and argument, defense counsel highlighted the fact that searchers found no evidence, such as anchors or body parts, in the area identified by Cheng (66RT 12809-12819; 110RT 20484-20485), arguably minimizing the probative force of Cheng's testimony. Indeed, counsel elicited from Cheng that his "final conclusion" was "probable but not precise." (101RT 18930-18931.)

Peterson's citation to *Alcorta v. Texas* (1957) 355 U.S. 28, does not aid his argument. In *Alcorta*, the prosecutor knew that a witness had been having sexual intercourse with the defendant's wife. He told the witness "he should not volunteer any information about such intercourse but if specifically asked about it to answer truthfully." (*Id.* at p. 31.) When the prosecutor asked him about his relationship with the defendant's wife, the paramour said he had driven her home from work a couple of times; he testified they were not in love and had not been on dates. (*Id.* at pp. 31-32.) The high court held that this testimony gave the jury a false impression, in violation of due process, because the defense theory had been that the defendant killed his wife in a heat of passion after seeing her kiss her lover. (*Id.* at p. 32.)

Conversely, here, Peterson has not demonstrated that Cheng lied or otherwise shaded the truth in such a manner to render his testimony objectively false. Accordingly, Peterson has failed to show that the prosecution presented perjured testimony or otherwise neglected to correct a witness's false testimony.

Further, while it is certainly true that Peterson's defense included the supposition that he did not murder Laci and Conner and thereafter deposit Laci's body in the Bay near Brooks Island, the defense also implicitly, if not explicitly, suggested that Peterson may have been framed since his alibi and location on the Bay were widely reported in the media. (110RT 20483-20484.) The inference being that the real killer deposited Laci's and

Conner's bodies in that location. That said, Cheng's testimony was not prejudicial because it did not tend to "squarely" refute that particular aspect of Peterson's defense. (See *Alcorta, supra,* 355 U.S. at p. 31.)

VII. PETERSON'S CLAIM THAT HE WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL WITH RESPECT TO EXPERT TESTIMONY ON MOVEMENT OF BODIES IN BAY WATERS FAILS TO STATE A PRIMA FACIE CASE FOR RELIEF

Peterson asserts in Claim Seven that he was deprived of his Fifth, Sixth, Eighth, and Fourteenth Amendment rights as he received ineffective assistance of counsel during the guilt-phase trial because counsel failed to present expert testimony to impeach "one of the strongest pieces of evidence the state presented . . . ." (Petn. at p. 174.) Peterson also contends that this failing permitted the jury to base its verdict on unreliable evidence, which undermined the reliability of the death judgment.

The People specifically and generally controvert all of Peterson's factual and legal claims and allegations in Claim Seven as set forth at pages 174 through 178 of the petition, as well as the relevant portion of the supporting memorandum, unless otherwise expressly and specifically conceded herein, and state that Peterson has failed to make a prima facie showing that he is entitled to relief on Claim Seven.

A. General Principles of Applicable Law

We incorporate by reference the legal principles set forth in section III.A., *ante*.

B. Peterson Has Failed to Make a Prima Facie Case Showing That Trial Counsel Was Constitutionally Ineffective for Failing to Present Expert Testimony on Movement of Bodies in Water or Otherwise Competently Impeach Dr. Cheng's Testimony

Given the deference accorded to trial counsel's tactical decisions, Peterson has failed to make a prima facie showing that his trial counsel was

constitutionally ineffective for failing to call an expert witness to opine on the movement of bodies in the water or otherwise competently impeach Dr. Cheng's testimony.

With respect to his claim that counsel's purported failures resulted in prejudice, we first point out that Peterson inaccurately frames his argument by overstating the importance of Cheng's testimony, as we maintain in section VI., *ante*. Additionally, Peterson's trial counsel's cross-examination of Cheng and counsel's subsequent argument on the subject reasonably attempted to rebut any probative value Cheng's testimony embodied.

1. *Background*

In support of the July 2004 defense application for funds under Penal Code section 987.9, trial counsel's declaration stated that he had contacted Christopher Kitting who was an expert in oceanography and expected to testify on the matter of how, when, and where Laci's body was deposited into the Bay. (Supp.CT 12.)

After the trial court approved disbursement of funds for Dr. Kitting's services (Supp.CT 29), Peterson's trial counsel requested that some of the funds allocated for Kitting's services be reallocated to pay a different expert as Kitting's work on the case would not require expenditure of the full amount previously allocated (Supp.CT 39). Counsel's subsequent correspondence with the court suggests that the defense continued to retain Kitting's services during the pendency of Cheng's testimony: "Dr. Kitting has billed about $3,000 so far. The prosecution's expert is currently testifying so the remaining amount of his billing is unclear, especially until the cross-examination is over." (Supp.CT 41.)[28]

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[28] Although Cheng is not named, we contend it is a reasonable inference that Cheng was, in fact, the expert to whom counsel was

(continued...)

During the hearing on the application for funds, as we stated in section VI., *ante*, defense counsel explained that there were only three experts in the area of hydrology as it concerned the movement of water into and within the Bay, Cheng being one of them. (Supp.RT 22.) Defense counsel explained that the defense had contacted Cheng, but "as soon as we contacted him, he contacted the prosecution and they hired him." (Supp.RT 22.)

However, in his post-conviction declaration, Peterson's trial counsel now states that "it was apparent to [him] that Dr. Cheng was not an expert in the movement of bodies in the water . . . Dr. Cheng's lack of expertise was so clear that I did not believe his expert testimony would be admitted by any court in California." (Exh. 4; HCP at p. 22.)

Counsel goes on to explain that he consulted Kitting who explained that given the existence of numerous variables, "it would be difficult to replicate the precise factors involved in the initial migration of the bodies to shore." (Exh. 4; HCP at p. 22.) Counsel states that he did not "proceed further" with an expert or have an expert testify because he believed that Cheng's testimony was subject to exclusion on *Kelly-Frye* grounds.[29] (Exh. 4; HCP at pp. 22-23, 24.) Counsel states that had he believed the trial court would find Cheng qualified to testify on movement of bodies in the water, he would have retained an expert such as Professor Feagin "to review

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(...continued)
referring. This is supported by the fact that counsel's memorandum to the trial court, dated October 3, 2004, coincides with the dates of Cheng's trial testimony. We note that Peterson's trial counsel states in his declaration that his last contact with Kitting was in late summer 2004. (Exh. 4; HCP at p. 22.) However, counsel's declaration does not disclose whether any other member of the defense team maintained contact with Kitting.

[29] *People v. Kelly* (1976) 17 Cal.3d 24 and *Frye v. United States* (D.C. Cir. 1923) 293 F. 1013.

Cheng's opinion and testify to rebut it. I did not make a tactical decision not to investigate or present an expert in this area." (Exh. 4; HCP at pp. 23-24.)

2. *Peterson has not demonstrated deficient performance*

Peterson contends that his trial counsel failed to consult an expert on the movement of bodies in the water or otherwise adequately investigate the matter. (Mem. at pp. 63-67.) Yet, Peterson acknowledges that his trial counsel contacted Dr. Kitting to explore this very issue. (Mem. at p. 65.) In fact, the 987.9 records suggest that Kitting continued to assist the defense through the cross-examination of Cheng. It is anomalous then that Peterson's trial counsel states that he would have retained what would amount to a second expert in this field. According to the 987.9 funding records, the defense contacted Cheng, but Cheng called the prosecution and the prosecution retained his services. So, the defense retained the services of the second expert on their list who was Kitting. Kitting assisted the defense through the taking of Cheng's testimony. The fact that counsel now says that he might have utilized the services of what, according to the record, would be a second expert does not demonstrate that his representation fell below objective standards of reasonableness.

Additionally, it makes sense that counsel would not call Kitting to testify to the perceived infirmities with trying to plot the course of either Laci's or Conner's bodies' migration to shore. During his testimony, Cheng freely acknowledged that he could not estimate a point of origin or path for Laci and that the point of origin and path of Conner's body in the water could not be precisely determined; he reiterates this in his declaration. Certainly, had the defense called its own expert to repeat those points it would have done little, if anything, to illuminate the issue. (See *People v. Bolin* (1998) 18 Cal.4th 297, 334 [whether to call certain

witnesses is a matter of trial tactics, unless the decision results from unreasonable failure to investigate]; see also *People v. Mitcham* (1992) 1 Cal.4th 1027, 1059 ["[t]he decisions whether . . . to put on witnesses are matters of trial tactics and strategy which a reviewing court generally may not second-guess"].) That being so, calling such an expert may have only served to highlight the strongest evidence against Peterson—the place where the bodies came to shore and what the condition of the bodies revealed about the timing of the events in question.

Counsel's statement in his declaration that he did not proceed further with an expert seems to be in conflict with what the record discloses was the continued retention of Kitting's services at least through September 24, 2004, when counsel stated that "[i]t may be that Dr. Kitting's hours will not exceed the remaining amount." (Supp.CT 39.) This certainly suggests that at that time Kitting's services were still being utilized by the defense. In fact, the record supports that Kitting continued to assist the defense in a consultative capacity during Cheng's testimony. (Supp.CT 41.)

Further, in service of explaining why he did not retain an expert "such as Dr. Feagin," counsel states that he did not expect that Cheng would be permitted to testify. (Petn. Exh. 4; HCP at p. 24.) Beyond the record establishing that the defense already had Kitting on retainer, we note that trial counsel's post-conviction criticism of Cheng stands in stark contrast to his positive view of Cheng at the time of trial. Moreover, the fact that Peterson went to the trouble of securing a declaration from Cheng to clarify his testimony would also counter the couched assertion that Cheng had no business being on the witness stand and that he believed that "Dr. Cheng's lack of expertise was so clear." (Petn. Exh. 4; HCP at p. 22.)

In sum, Peterson has failed to show that his trial counsel failed to consult an expert in this area or otherwise failed to adequately investigate what a defense expert could contribute to this area of inquiry. Quite the

opposite, the record affirmatively shows that trial counsel did, in fact, consult an expert and apparently retained the services of that expert through cross-examination of Cheng.

3. *Peterson has not shown prejudice*

Even if counsel's performance fell below objectively reasonable standards, Peterson has not shown a reasonable probability that he would have received a more favorable result otherwise. (*Strickland, supra,* 466 U.S. at pp. 693-694; *People v. Ledesma, supra,* 43 Cal.3d at pp. 217-218.) "The likelihood of a different result must be substantial, not just conceivable." (*Harrington v. Richter, supra,* 562 U.S. at p. 112.) For the reasons stated in section VI.B.4., *ante*, Cheng's testimony was of nominal inculpatory value.

Additionally, if defense counsel had retained and called Feagin to testify that the path of Laci's and Conner's bodies could have originated in any one of three general areas, including the area on the Bay where Peterson admitted he had been the morning that his pregnant wife disappeared (e.g., see Petn. Exh. 9; HCP at pp. 291-292 [Decl. Feagin]), it is not reasonably probable—indeed, highly improbable—that he would have enjoyed a more favorable outcome. On the contrary, such testimony, would reasonably be viewed as inculpatory since one of the areas identified was the location where Peterson had been on the morning of Christmas Eve. For these same reasons, there is no reasonable probability that the jury's decision in favor of death was affected.

Nor is it reasonably probable that offering Kitting's testimony would have resulted in a more favorable verdict for Peterson. Given that Kitting assisted the defense through the taking of Cheng's testimony, it is reasonable to infer that any infirmities in Cheng's qualifications or conclusions were exposed through trial counsel's voir dire and cross-examination of Cheng. Indeed, defense counsel's searching cross-

examination of Cheng challenged the witness's qualifications and conclusions. (See generally 100RT 18863-18866 [voir dire]; 101RT 18917-18934 [cross-examination].) "[N]ormally the decision to what extent and how to cross-examine witnesses comes within the wide range of tactical decisions competent counsel must make." (*People v. Cleveland* (2004) 32 Cal.4th 704, 746.) Therefore, Kitting's testimony would have offered little, if any, additional value in aid of Peterson's defense.

Accordingly, Peterson has failed to establish a prima facie case of ineffective assistance of counsel as it relates to the expert testimony involving the movement of water in the Bay and the path that Conner's body took before being deposited onto the shoreline.

VIII. PETERSON'S CLAIM THAT HE WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE COUNSEL MADE UNFULFILLED PROMISES DURING OPENING STATEMENT FAILS TO STATE A PRIMA FACIE CASE FOR RELIEF

Peterson asserts in Claim Eight that he was deprived of his Fifth, Sixth, Eighth, and Fourteenth Amendment rights owing to the ineffective assistance of counsel during the guilt-phase trial because counsel made unfulfilled promises during his opening statement involving three categories of purportedly exculpatory evidence: 1) witnesses who saw Laci walking her dog after Peterson left for the marina; 2) a witness who saw a pregnant woman associated with a white or tan van several days after Laci's disappearance; and, 3) witnesses who saw Peterson put his boat in the water at the marina.

The People specifically and generally controvert all of Peterson's factual and legal claims and allegations in Claim Eight as set forth at pages 179 through 185 of the petition, as well as the relevant portion of the supporting memorandum, unless otherwise expressly and specifically conceded herein, and state that Peterson has failed to make a prima facie showing that he is entitled to relief on Claim Eight.

A. General Principles of Applicable Law

We incorporate by reference the legal principles set forth in section III.A., *ante*.

B. Peterson Has Failed to Make a Prima Facie Showing That Trial Counsel's Actions Were Objectively Unreasonable with Respect to Counsel's Opening Statement

Peterson complains that his trial counsel made promises in his opening statement to present exculpatory evidence, which counsel subsequently failed to present.

On the contrary, the record demonstrates that, with respect to the three categories of supposedly exculpatory evidence, counsel did not promise that the defense would present such testimony. Furthermore, even if counsel's opening remarks could be charitably construed as promises, counsel delivered on those promises through testimony elicited during his cross-examination of prosecution witnesses.

1. *Laci sightings in the neighborhood*

In the relevant portion of his opening statement, Peterson's trial counsel stated that "there were a number of witnesses who came forward to say that they saw Laci with [her dog]" on the morning of December 24. (44RT 8643.) Counsel went on to describe the circumstances surrounding the witnesses' purported sightings of Laci that morning. (44RT 8643-8648.) With respect to one of these witnesses, counsel stated that the defense was able to locate her and "finally convince her to come forward." (44RT 8645.) As to another of these witnesses, counsel stated, "I think the evidence is going to show . . . ." (44RT 8646.)

Here, upon close scrutiny of counsel's opening remarks, it is evident that he chose his words carefully and made no promise that the defense would present testimony involving the purported eyewitness sightings of

Laci and her dog. The closest that counsel came to anything remotely resembling a promise was the statement that the defense had located one of these witnesses and convinced her to come forward. Yet, that is a far cry from promising the defense would present such testimony.[30]

To highlight this point, we invite a comparison of the challenged remarks with another comment by counsel during his opening statement, which makes clear that counsel chose his words carefully with respect to anticipated defense testimony. Counsel mentioned Dr. Yip, one of the doctors who treated Laci during her pregnancy: "We do have Dr. Yip who will come in here and testify. . . ." (44RT 8642-8643.) That seems more like a promise.[31] Given this context then, counsel's challenged remarks permit the reasonable inference that a witness "com[ing] forward" was not tantamount to testifying on behalf of the defense. If anything, the reference likely meant making one's self known to authorities. Therefore, this was not a situation where a "'juror will naturally speculate why the witness backed out . . . .'" (Mem. at p. 86, citing *Saesee v. McDonald* (9th Cir. 2013) 725 F.3d 1045.)

In any event, even if counsel's remarks evinced a promise, "[i]neffective assistance of counsel is not demonstrated simply because the evidence at trial does not mirror counsel's opening statement. 'Forgoing the presentation of testimony or evidence promised in an opening statement

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[30] In his declaration, Peterson's trial counsel states: "I gave an opening statement in which I told the jury that it would hear from several witnesses who would testify to seeing Laci walking her dog . . . after Scott left the house to go fishing . . . ." (Exh. 4; HCP at p. 30, citing 44RT 8643 et seq.) We disagree with counsel's characterization of the record insofar as it seems to suggest that he affirmatively told the jury the defense would be presenting numerous witnesses whose testimony would exonerate Peterson.

[31] Dr. Yip did not testify for the defense or the prosecution.

can be a reasonable tactical decision, depending on the circumstances of the case.' [Citation.]" (*People v. Carrasco*, *supra*, 59 Cal.4th at p. 987.) An attorney may have valid tactical reasons for changing strategy during trial, and promising certain evidence during opening statement and then electing not to present that evidence is not ineffective assistance per se. (*People v. Burnett* (2003) 110 Cal.App.4th 868, 884-885.) The inquiry into such claims is fact-based and depends on the circumstances of the case. (*People v. Stanley* (2006) 39 Cal.4th 913, 955.)

That said, defense counsel managed to bring out much of the information about purported sightings of Laci through cross-examination of Detective Craig Grogan. (See, e.g., 98RT 18476-18511 [sightings by Grace Wolf, Tony Freitas, Homer and Helen Maldonado, Cathy Albert].) In the case of Mr. Maldonado, counsel even elicited information contained in an interview report authored by Peterson's investigator, Mr. Emoian, in which Maldonado and his wife related that they were at a gas station in Modesto on Christmas Eve morning and saw Laci walking her dog and a van was nearby. (98RT 18494-18498.) In so doing, the purported eyewitnesses were not subject to cross-examination by the prosecution and, therefore, the information could not be attacked directly. Thus, there was a tactical justification for counsel's decision to proceed in the manner described.

2. *Homeless individuals and mystery van in the neighborhood*

Peterson asserts that, in his trial counsel's opening statement, counsel "told the jury that it would hear from a witness who saw a white or tan van several days after December 24" and "saw a pregnant woman" who was pulled into the van by "a homeless man." (Petn. at p. 182, citing 44RT 8647.)

We disagree with Peterson's interpretation of the record; there was no promise of defense testimony in this regard. Counsel stated, "[T]hey've [referring to the prosecution] got three witnesses who saw a suspicious van in the neighborhood that morning . . . Just within the last eleven days the prosecution turned over to us [] an interview . . . of a witness who within two days to three days of the 24th saw, about five miles away from here, once again a white or cream colored van with a man who appeared to be homeless or scruffy . . . ." (44RT 8646-8647.) Counsel stated that the man was holding a woman who looked "just like Laci." (44RT 8647.) This witness "gave a report to the police" and "the police did nothing about that." (44RT 8647.) "The eyewitnesses here, the eyewitness within two days seeing Laci being pulled into a van, corroborates -- or will corroborate the evidence, I believe -- that the baby lived longer than December 24th and, ergo, Laci lived longer than December 24th." (44RT 8648.)

The aforementioned remarks can hardly be construed as a promise that the defense would present such testimony. Instead, counsel's remarks were in keeping with the defense tactic to bring out this information through prosecution witnesses under the theory that the defense was attempting to show that investigators did not adequately pursue leads.

Ultimately, however, counsel was permitted to elicit a great deal of hearsay about eyewitnesses who supposedly had seen Laci walking her dog that morning. For example, during defense counsel's cross-examination of Detective Grogan, counsel elicited Tom Harshman's account of seeing a woman resembling Laci who was forced into a van by a homeless man. (98RT 18501-18511.) And, during counsel's questioning of prosecution witness Detective Brocchini, a hearsay statement was elicited that Kristin Reed—a neighbor and friend of Laci and Peterson (58RT 11397)—said during an interview in September 2003 (59RT 11530), that, although she was not sure, she may have seen a blue or brown van on Covena in the

morning on December 24, around 9:39 when Reed left to go to the gym. (58RT 11399-11402.) Counsel also elicited testimony from Grogan that three witnesses reported seeing a van on Covena on December 24. (98RT 18501-18503.)

3. *Witnesses who saw Peterson at the marina*

Peterson states that his trial counsel "told the jury that it would hear testimony from witnesses at the Berkeley Marina who 'saw him put the boat in the water.'" (Petn. at p. 183, citing 44RT 8605.) But, that is not what counsel said in his opening statement. Properly recounted, here is the relevant portion:

> And he also hired an investigator to go and search for witnesses that would have seen him at the boat launch, because, as you saw yesterday from that marina picture, as you are putting that boat into the water, it's -- when you see this boat -- my guess is we are going to have a jury view, and we'll go all out to the marina -- you are going to be stunned by the fact that when you get over there, that when you are putting that boat into the water, there is no way that there is -- if there is a pregnant dead woman with weights in it, that you would not see it.
>
> In fact, those witnesses have been located. And witnesses who were there, who saw him put the boat into the water, were located. In fact, one of them remarked that he laughed at Scott, because he kind of hit one of the pylons there as he was trying to back it into the water -- the boat into the water.

(44RT 8605.)

During defense counsel's cross-examination of Grogan, counsel asked him about Peterson's statements that there were individuals at the marina who saw him backing the boat up to the launch. (96RT 18123-18124.) Through this questioning, testimony was elicited that Peterson had purportedly hired a private investigator to try and find and interview possible witnesses who were at the marina (96RT 18124), and one person

at the marina laughed at Peterson as he tried to launch his boat, but actually backed into the pier or some pylons (96RT 18124).

Further, through cross-examination of a long-time marina employee, the defense attempted to establish that there were people who lived on their boats at the marina (live-aboards) who would have been in a position to see Peterson launching his boat and whether it appeared there was a body in the boat. (62RT 12071-12074.)

Iin sum, it certainly may be true that the gravamen of trial counsel's opening statement was such that it gave the jurors the impression that when all was said and done they would find that the prosecution had not proven its case. That is de rigueur for criminal defense attorneys. However, the fact that the jurors disagreed with trial counsel's position is not the equivalent of counsel having made unfulfilled promises that rose to the level of a constitutional violation.

C. Peterson Has Not Demonstrated Prejudice

As we explained above, much of the information about which Peterson complains was actually before the jury—albeit hearsay elicited from prosecution witnesses. Therefore, there was no gap in the defense theory of the case that was somehow exploited by the prosecution.

However, even if defense counsel's actions somehow constitute a failure to present certain evidence described in the opening statement for which counsel had no tactical justification, and which fell below the normal range of professional competence, it is not reasonably probable the jury would have reached different verdicts in the absence of the error. (*People v. Stanley, supra*, 39 Cal.4th at p. 955.)

For example, with respect to witnesses who supposedly saw Laci around the time of her disappearance, the prosecution called numerous witnesses in its case-in-chief to demonstrate that there may have been pregnant women, including some with dark hair like Laci's, walking alone

or with their dogs in the area of La Loma park that morning, none of whom was Laci Peterson. (87RT 16705-16714 [witness C. Van Sandt], 16732-16736, 16740-16741 [M. Dempewolf], 16743-16749 [J. Visola-Prescott], 16753-16755 [E. Guptill], 16760-16763 [J. Lear]; 88RT 16802-16807 [K. Westphal], 16815-16818 [P. Mewhinney], 16830-16832 [J. Lee], 16835-16837 [D. Merenda], 16843-16845 [M. Martinez]).

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

As for any suggestion that homeless individuals—including any associated with a van—were responsible for Laci's disappearance, the prosecution presented evidence in the form of Susan Medina's testimony (the Peterson's neighbor) that she did not see any homeless individuals on Covena before she and her husband left their house around 10:30 on Christmas Eve morning. (49RT 9593, 9645-9646.) Additionally, La Loma area neighbor Jill Lear explained that she walked her dog regularly around the Dry Creek Park area. During her walks she would see people who were homeless, but they never bothered her. (87RT 16760-16763.)

Further, Laci's neighbor and friend Kristin Reed explained that her recollection of seeing a van on Covena on Christmas Eve morning could just as easily have been due to the power of suggestion generated by something she had read in the media. (58RT 11402-11403; 59RT 11530;

99RT 18680.) Indeed, a couple of prosecution witnesses reported nothing out of the ordinary on the Peterson's street on Christmas Eve morning. Brian Lee left his home around 10:00 a.m. to go for a run, reaching Covena around 10:15. (88RT 16824.) He "didn't see a soul." (88RT 16825.) Kim Westphal was walking with a neighbor that morning. Westphal estimated they reached Covena around 10:50, and walked past the Peterson residence. There was no activity on the street at the time. (88RT 16807.)

With respect to potential witnesses at the marina, the prosecution presented testimony from Berkeley Marina employees who worked on December 24 2002, and observed that it was a cold, cloudy, windy, and somewhat rainy day on the Bay. (62RT 12065, 12088, 12111.) There were very few people at the marina. (62RT 12066, 12083, 12099.) Christmas Eve was typically a slow day, with few, if any, boaters. (62RT 12066, 12086-12087, 12095-12096, 12133.) There were no bookings for fishing trips out of the marina that day (62RT 12100), and only three boat launch fees were collected from December 23 through December 27 (62RT 12108). The import of this evidence was that there were few people at the marina that day, if any, who would have noticed Peterson launching his boat.

Insofar as Peterson contends that he was prejudiced by the prosecutor having argued the absence of any credible witness sightings of Laci (petition at pages 181 through 183), this aspect of the prosecutor's argument was not relied upon to convict Peterson. Rather, it was tangential to the evidence that established Peterson's guilt, namely, his expressed wanderlust and desire to be responsibility-free which he conveyed to his mistress as the birth of his son neared; buying a boat mere weeks before Laci's disappearance; "fishing" with the wrong gear on Christmas Eve morning in inclement weather; surreptitious trips to the marina in various rented vehicles after Laci's disappearance; lies to friends and family

concerning his whereabouts on numerous occasions; the sale of Laci's car and inquiry into selling their home, including furnishings, just weeks after Laci's disappearance; subscribing to pornography channels while the search for Laci was ongoing; Laci's and Conner's bodies washing ashore not far from Peterson's location on the Bay; the condition of the bodies correlated with the timing of Laci's disappearance; and, Peterson's disguised appearance and possession of survival gear and copious amounts of cash at the time of his arrest. (See RB at pp. 307-313.)

In light of this evidence, it is not reasonably probable that the outcome of the trial would have been more favorable for Peterson had trial counsel refrained from making the complained-of comments in his opening statement or had he called the witnesses mentioned during opening statement. (*Strickland, supra*, 466 U.S. at pp. 694-695.)[32]

IX. PETERSON'S CLAIM THAT HE WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE COUNSEL CHOSE NOT TO PRESENT TESTIMONY FROM SEVERAL INDIVIDUALS WHO CLAIMED TO HAVE SEEN LACI ON THE MORNING OF DECEMBER 24 FAILS TO STATE A PRIMA FACIE CASE FOR RELIEF

Peterson asserts in Claim Nine that he was deprived of his Fifth, Sixth, Eighth, and Fourteenth Amendment rights owing to the ineffective assistance of counsel during the guilt-phase trial because counsel failed to present testimony from a number of individuals who believed they saw Laci Peterson on the morning of December 24.

The People specifically and generally controvert all of Peterson's factual and legal claims and allegations in Claim Nine as set forth at pages

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[32] In arguing that he was prejudiced by his trial counsel's unfulfilled promises, Peterson again cites to unsworn and unreliable hearsay statements excerpted from the book "We, The Jury." (Mem. at pp. 88-90; Exh. 8.) We maintain that Peterson cannot rely on these hearsay statements to carry his evidentiary burden. (*In re Fields, supra*, 51 Cal.3d at p. 1070.)

186 through 199 of the petition, as well as the relevant portion of the supporting memorandum, unless otherwise expressly and specifically conceded herein, and state that Peterson has failed to make a prima facie showing that he is entitled to relief on Claim Nine.

A. General Principles of Applicable Law

We incorporate by reference the legal principles set forth in section III.A., *ante*.

B. Peterson Has Failed to Make a Prima Facie Showing of Deficient Performance or Prejudice

The gravamen of Peterson's claim is that his trial counsel should have called certain witnesses whose testimony would have showed that Laci was walking in the neighborhood after Peterson set out for the Berkeley Marina, thus establishing that she was still alive at that time and, therefore, Peterson was not the murderer. In support of his claim, Peterson has included declarations from several such individuals, along with that of his trial counsel.

Peterson has not carried his burden to demonstrate a prima facie case of ineffective assistance in that his trial counsel's performance was objectively unreasonable or, if it was, that he suffered prejudice as a result.

First, with respect to counsel's performance, as counsel explains in his declaration, he and other members of the defense team interviewed potential witnesses who said they saw Laci walking her dog after 10:18 a.m., on December 24. (Petn. Exh. 4; HCP at pp. 30-31.) However, because their statements conflicted with Karen Servas's testimony about the timeline, counsel thought it possible the jury would find the witnesses "were either mistaken or not credible." (*Id.* at 31.)[33] Peterson cannot show

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[33] Servas was the Peterson's next-door-neighbor. She testified that on the morning of December 24, around 10:18, she was backing out of her (continued...)

that this tactical decision was objectively unreasonable given that Servas's testimony was informed by other evidence, such as store receipts and cell phone records from December 24. (48RT 9434-9438; 102RT 19051, 19121-19122; People's Exh. Nos. 28, 29.)

In his declaration, counsel further states that, had he known about the existence of a handwritten police report in which the Peterson's mail carrier Russell Graybill told investigators that he delivered a package to the Peterson's around 10:30 a.m., and found the backyard gate open and the dog not inside, he "would have made a different evaluation of the credibility of the witnesses who claimed to have seen Laci . . . and would have called these witnesses to testify as promised in [his] opening statement." (Petn. Exh. 4; HCP at pp. 22-23.) Yet, counsel's statements about what he would have done differently, offered as they are with the benefit of hindsight, are not the standard by which his performance is assessed. "'A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.'. . ." (*In re Jackson* (1992) 3 Cal.4th 578, 601; see also *People v. Frausto* (1982) 135 Cal.App.3d 129,

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(...continued)
driveway when she noticed McKenzie, the Peterson's dog, standing in the street with his leash on. (48RT 9412-9423.) This seemed unusual to Servas who was acquainted with McKenzie. (48RT 9428-9429, 9481.) Servas got out of her car and tried the Peterson's front gate, but it was locked. (48RT 9424.) Laci's car was in the driveway; appellant's truck was not there. (48RT 9424-9425.) There was no apparent activity at the house. (48RT 9428.) Servas found the side gate to the residence open, so she put McKenzie in the backyard and closed the gate. (48RT 9424, 9428, 9457.) Servas initially told police she left her home around 10:30 a.m., but after checking her store receipts and cell phone records from December 24, she was able to more accurately pinpoint the timeframe. (48RT 9434-9438; 102RT 19051, 19121-19122; People's Exh. Nos. 28, 29.)

139 ["[m]erely tactical errors by counsel are not deemed reversible [citation], for the decisions of counsel in the midst of trial cannot be second-guessed by the hindsight of an appellate court [citation]."].)

Even if counsel's decision to refrain from calling these witnesses to testify was objectively unreasonable, Peterson has not demonstrated prejudice. First, there exists a fundamental flaw upon which trial counsel's declaration is founded. As mentioned, counsel states that, at the time of trial, he was unaware of mail carrier Graybill's observation that while Graybill was at the Peterson residence sometime around 10:30 on Christmas Eve morning, he saw that the gate was open and McKenzie was not in the yard. (Petn. Exh. 3; HCP at p. 8; Exh. 4; HCP at pp. 31-34.)

However, Graybill's statements and testimony contain apparent contradictions or inaccuracies, which call into question the reliability of his observations about the Peterson's residence. For example, in his declaration in support of the petition Graybill states that the open gate and absence of barking "*caught my attention* because normally McKenzie would bark at me when I delivered the mail." (Petn. Exh. 2; HCP at p. 6, italics added.)[34] Graybill goes on to state that "[n]either the prosecutor nor the defense asked me whether or not the gate was open or McKenzie barked on the morning of December 24, 2002." (HCP at p. 7.) While Graybill is technically correct, he *was* asked about his observations about the Peterson's residence. During trial, the following exchange occurred between the prosecutor and Graybill concerning the state of the Peterson's residence on Christmas Eve morning, including the subject of McKenzie's

[34] Karen Servas testified that McKenzie did not bark when she grabbed his leash and led him from the street to the Peterson's backyard. (48RT 9458.)

presence (which itself followed a fair amount of testimony about dogs in the neighborhood):

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

(49RT 9568.)

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

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

(49RT 9569, italics added.) On cross-examination, Graybill repeated that there was nothing out of the ordinary at the Peterson's that morning. (49RT 9574.) Thus, Graybill's statement in his declaration and in his December 27, 2002 interview with investigators that he observed something that morning at the Peterson's which caught his attention is contradicted by his trial testimony. His statements are also contradicted by the account he gave to District Attorney Investigator Bertalotto on December 30, 2002, in which Graybill reported that he did not notice anything peculiar or out of the ordinary at the Peterson's residence when he delivered the mail on the morning of December 24. (Petn. Exh. 17; HCP at p. 357.)

Additionally, Peterson's trial counsel states in his declaration that Graybill reported to police that he delivered a package to the Peterson home around 10:30 a.m. on December 24, at the time he made his observations.

(Petn. Exh. 4; HCP at pp. 31-32.) However, according to the handwritten police report, Graybill did not tell authorities that he delivered a package to the Peterson's home around 10:30 a.m. He reported being there around 10:30 to 10:45, but made no mention of delivering a package. (Petn. Exh. 3; HCP at p. 8.) In fact, at trial, Graybill testified that he could not recall delivering a package to the Peterson's on December 24. (49RT 9574.) He had checked his records and found that he may have done so on December 27 or 28. (49RT 9574-9575.)

Given these discrepancies with respect to Graybill's observations about the Peterson's residence on the morning of December 24, even if Peterson's trial counsel had been aware of the December 27, 2002 handwritten police report, its probative value was negligible.

Moreover, the purported sightings of Laci, as recounted in the relevant declarations, are also unreliable for various reasons. One of the purported sightings of Laci that Peterson includes by way of declaration is that of Mr. Aguilar. (Petn. Exh. 13.) However, Aguilar is not certain that he saw Laci after 10:30 a.m. He states, "I cannot be sure of the time but it was between 9:30 and 11:00 a.m. (Petn. Exh. 13; HCP at p. 336.) Aguilar further states that he approached a reporter at Laci's vigil and told the reporter that he saw Laci. In his declaration he says, "I can't explain why I did not report this to police other than I thought they would come to me." (HCP at p. 337.) Yet, Aguilar does not explain why the police would have come to him. And, insofar as he states that his wife also saw Laci out walking on Christmas Eve morning, the unsworn hearsay statement is unreliable.

William Mitchell's declaration suffers from this same hearsay infirmity. In his declaration, Mitchell recounts his wife's observation of "'[a] beautiful lady [] going by with a nice dog.'" (Petn. Exh. 14; HCP at p. 340.) Mitchell saw the dog, but not the lady. (*Ibid.*) He states that they

called police once Laci's disappearance found its way into news accounts, but the police never called them back. (*Id.* at p. 341.)

As for Anita Azevedo, her declaration states that she saw Laci walking her dog on the morning of December 23, 2002, not December 24. (Petn. Exh. 15; HCP at p. 344.)

With regard to Grace Wolf's declaration, as we explained in Claim VIII, *ante*, Wolf's purported sighting of Laci was broached during defense counsel's cross-examination of Detective Grogan. (98RT 18475-18489.) Counsel's questioning concerned Wolf's claimed sighting of Laci on the morning of December 24. (98RT 18476.) However, Wolf's declaration makes clear that she did not see Laci walking on that morning. (Petn. Exh. 16; HCP at p. 347.)

Diana Campos's declaration that she saw Laci and her dog around 10:45 a.m. on the Dry Creek trail in La Loma Park (petition exhibit 12 at page 331) is contradicted by trial testimony.[35] First, considerable evidence was adduced that Laci was in no physical condition to walk on the park trail. (See RB at pp. 112-114 [detailing testimony on Laci's compromised physical condition].) Second, the trail itself was steep, uneven, and "[v]ery, very rough" making it difficult for a pregnant woman to negotiate. (48RT 9357-9358; 87RT 16751-16752.) Third, as explained in section VIII.C., *ante*, there may have been pregnant women, including some with dark hair like Laci's, walking alone or with their dogs in the area of La Loma park that morning, none of whom was Laci.

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[35] In her declaration, Campos acknowledges that she told a defense investigator that she saw Laci at 9:40 a.m. However, Campos maintains that her statement about the timing was coerced by the defense investigator and conflicts with information she related to police. (Exh. 12; HCP at pp. 331-332.)

Last, as has been determined, Graybill was delivering mail in the La Loma neighborhood, including on Covena Street on the morning of December 24. (49RT 9555-9558; People's Exh. No. 33) Although he knew who Laci was (49RT 9567), he did not report seeing her out walking in the neighborhood that morning. And, as the prosecutor detailed in his closing remarks, there were plenty of people out and about in the neighborhood that morning, including in the park, who reported seeing nothing unusual or troubling at the time in question. (109RT 20316-20319.)[36]

In sum, there were sound tactical reasons for counsel's decision not to call these individuals to testify: either the testimony was irrelevant to Laci's whereabouts on the morning of December 24 or it was readily contradicted by credible evidence. "The decision whether to call certain witnesses is a 'matter[] of trial tactics and strategy which a reviewing court generally may not second-guess.' [Citation.]" (*People v. Carrasco*, *supra*, 59 Cal.4th at p. 989.)

In any event, even if trial counsel should have called these individuals to testify, it would not have resulted in a more favorable outcome for Peterson, for the reasons explained here and in section VIII.C., *ante*. Nor was this a close case, as Peterson contends. (Mem. at pp. 90-91 ["the jury struggled mightily"].) There is nothing about the length of jury deliberations that suggests this case was close. The guilt phase lasted nearly six months, with approximately 200 witnesses having testified, and

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[36] For example, the prosecutor explained that the evidence showed that the Medina's left their house around 10:32 on the morning of December 24. (109RT 20318.) The Peterson's dog, McKenzie, was not in the street. This corroborated Karen Servas's account that she found McKenzie in the street at 10:18 a.m. and returned him to the Peterson's yard and secured him there. (109RT 20318-20319.)

the prosecution's case was founded on circumstantial evidence. The fact that deliberations occurred over a nine-day period is hardly indicative of prejudice. "Rather than proving the case was close, the length of the deliberations suggests the jury conscientiously performed its duty. [Citation.]" (*People v. Carpenter* (1997) 15 Cal.4th 312, 422.)

X. PETERSON'S CLAIM THAT HE WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE COUNSEL DID NOT INVESTIGATE OR PRESENT EXCULPATORY EVIDENCE ABOUT A NEIGHBORHOOD BURGLARY FAILS TO STATE A PRIMA FACIE CASE FOR RELIEF

Peterson asserts in Claim Ten that he was deprived of his Fifth, Sixth, Eighth, and Fourteenth Amendment rights owing to the ineffective assistance of trial counsel because counsel failed to adequately pursue a tip about a burglary that occurred near the Peterson residence or present allegedly exculpatory evidence relating to that burglary.

The People specifically and generally controvert all of Peterson's factual and legal claims and allegations in Claim Ten as set forth at pages 200 through 214 of the petition, as well as the relevant portion of the supporting memorandum, unless otherwise expressly and specifically conceded herein, and state that Peterson has failed to make a prima facie showing that he is entitled to relief on Claim Ten.

A. General Principles of Applicable Law

We incorporate by reference the legal principles set forth in section III.A., *ante*.

B. Background

1. *Burglary*

Susan and Rodolfo Medina resided at 516 Covena, across the street from the Peterson's. (49RT 9582-9583, 9585, 9617.) The Medina's left town on Christmas Eve morning around 10:30. When they returned home

on December 26, they discovered their house had been burglarized while they were gone. (49RT 9602-9608.) The burglars forced entry into the home. (49RT 9721.) The master bedroom was somewhat ransacked and items were stolen, including a large safe. (49RT 9712, 9716.) According to the investigating patrol officer, it was a typical grab-and-go robbery. (49RT 9716.) Police were looking for an older light brown or tan van that might be associated with the burglary. (52RT 10238-10240.) Two individuals were eventually arrested and most of the Medina's property was recovered. (53RT 10335-10337.) Officer Michael Hicks of the Modesto Police Department assisted in the investigation of the burglary. (108RT 20049.) A confidential informant provided information to a department detective, which led police to the arrest of suspect Steven Todd and an accomplice. (108RT 20055.)

Hicks interviewed Todd. (107RT 20015.) At the outset, Todd volunteered that the burglary had no connection to the missing woman with the baby. (107RT 20016.) Although Todd was initially confused about the date he and his cohort committed the Medina burglary, the investigation confirmed that it occurred on the morning of December 26, 2002. (107RT 20017-20018.) Todd targeted the Medina residence because one car was missing from the driveway and there was mail in their mailbox. (107RT 20018-20023; 108RT 20057.) Hicks observed that both suspects were "very willing" to share information about the burglary. (108RT 20053.) However, investigators found nothing that connected the burglary to Laci's disappearance. (53RT 10360-10361.)

2. *Motion for a new trial based on newly discovered evidence*

In the February 2005 motion for a new trial, the defense argued, among other grounds, that new evidence was discovered which suggested Todd encountered Laci when he was burglarizing the Medina's house on

December 24 and that he verbally threatened her. (20CT 6255.) If true, this would suggest that Laci was alive after 10:30 a.m. when the Medina's left their residence, and that Todd may have been responsible for Laci's disappearance.

As the motion explained, about six to eight weeks before Peterson's trial concluded, the prosecution provided the defense with a letter from an inmate at a correctional facility in Modesto who claimed to have information about Laci's disappearance. The inmate gave the defense investigator, Carl Jensen, several names, which ultimately led to another inmate named Shawn Tenbrink who was imprisoned at the California Rehabilitation Center in Norco. The defense motion alleged that inmate Shawn Tenbrink had a phone conversation with his brother Adam about a month after Laci's disappearance. In that conversation, Adam told Shawn that "Laci walked up on Stephen Todd while he was burglarizing the house next door and that he had verbally threatened her." (20CT 6255.)[37]

The prosecution's opposition included a declaration from Lieutenant Xavier Aponte, who worked at the Norco facility during the relevant time period. Aponte explained that a dorm officer at the facility, who was monitoring Shawn Tenbrink's conversations, heard Shawn discussing Laci's disappearance with his brother Adam. Aponte listened to a recording of the conversation[38]:

> I listened to this recording and heard Adam Tenbrink tell Shawn Tenbrink something about the Laci Peterson case. Adam said he was told by someone, presumably Steven Todd as his name was

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[37] The motion only used the Tenbrink brothers' initials. Todd is referred to as "Stephen" Todd.

[38] Aponte searched for the audiotape, but was unable to locate it in the archives. The recording system at the administrative facility had changed. He tried to access the previous system but the system's recordings no longer existed. (20CT 6435.)

> mentioned during the call, that Laci Peterson had seen Todd and others committing a burglary in the neighborhood. Adam's statement to Shawn did not sound as though Adam was present at the burglary, nor that he had any first hand knowledge of the facts. Shawn's only knowledge of the incident sounded as though it was based only on Adam's statement.

(20CT 6434.)

Aponte listened to the recorded call and then phoned Modesto police. His call was recorded on a tip sheet and dated January 22, 2003. (20CT 6435.) The tip read, "'RECEIVED INFO FROM SHAWN TENBRINK (INMATE) HE SPOKE TO BROTHER ADAM WHO SAID STEVE TODD SAID LACI WITNESSED HIM BREAKING IN. COULD NOT GIVE DATES OR TIME.'" (20CT 6380.) The tip was provided to Peterson's trial team on May 14, 2003—five months prior to the preliminary hearing. (20CT 6380, 6384.)

Subsequently, Aponte facilitated a phone interview between a Modesto Police Department detective and Shawn Tenbrink. (20CT 6434.) Aponte monitored the call during which, "Shawn Tenbrink denied any knowledge about Laci Peterson's disappearance, and was not very cooperative with the detective." (20CT 6434.)

Defense investigator Jensen located Adam Tenbrink who stated that he and Todd were close friends and that Todd approached Adam on the evening of December 24, 2002, about helping him with a burglary that "was already started." (20CT 6255.)

In denying Peterson's motion for a new trial, as relevant here, the trial court found the information about Todd, the Tenbrinks, and the burglary was not necessarily newly discovered since the prosecution turned the tip over to the defense in May 2003. (121RT 21787.) The court also found the information had little credibility or value given the evidence which established that Laci had already disappeared by the time the Medina's left

their residence on December 24 and, accordingly, by the time of the burglary.[39] (120RT 21788; see also 49RT 9590-9591.)

C. Discussion

Peterson contends that his trial counsel rendered ineffective assistance by failing to adequately investigate the aforementioned tip. He argues that evidence existed that Laci confronted Todd during the burglary and that this occurred after Peterson had already left for the Berkeley Marina on the morning of December 24. Peterson claims that his trial counsel should have presented this evidence.

We disagree. As we explain, Peterson's defense team pursued this avenue and, presumably, found it wanting. Even if there was some objectively deficient aspect of counsel's performance, Peterson has not demonstrated prejudice.

First, on the matter of Peterson's trial counsel's performance, most notably, in the prosecution opposition to the new trial motion, the prosecutor stated, "Todd was listed as a witness on the main witness list provided to the jurors and was in Redwood City available to testify." (20CT 6384.)[40] In fact, Peterson points out that a defense witness file existed for Todd. (Petn. at p. 210.) The reasonable inference is that Todd was on the defense witness list. Therefore, the record suggests that counsel made a tactical decision not to call Todd as a witness. Counsel has offered no explanation to the contrary. (See Petn. Exh. 4; HCP at pp. 9-34.) "[I]f the record contains no explanation for the challenged behavior, an appellate court will reject the claim of ineffective assistance 'unless counsel was

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[39] Peterson criticizes the trial court's decision insofar as it was based on the prosecution's evidence concerning the timeline. (Petn. at pp. 213-214; see also Claim Nine.)

[40] The trial court sealed the witness lists at the request of the parties. (17CT 5464.)

asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation . . . ." (*People v. Cudjo* (1993) 6 Cal.4th 585, 623.) There are at least two satisfactory explanations for why Peterson's trial counsel did not call Steven Todd as a witness: 1) the burglary was committed on December 26, as investigators determined (107RT 20017-20018); and/or 2) Todd did not encounter Laci Peterson regardless of when he burglarized the Medina's residence. Trial counsel's silence is telling here. We note that in his declaration, counsel speaks freely about most of the issues raised in the petition that challenge his representation of Peterson. However, he says nothing about his decision not to call Todd as a defense witness. Given this state of the record, Peterson has not demonstrated deficient performance.

Nor has Peterson demonstrated prejudice. As stated, the credible evidence adduced at trial established that the burglary occurred on the morning of December 26. (107RT 20017-20018.) Laci went missing on the morning of December 24. However, even if the burglary occurred on December 24, it occurred after the Medina's left and the mail was delivered. Steven Todd stated that there was one car missing from the driveway and there was mail in the Medina's mailbox.[41] (107RT 20018-20023; 108RT 20057.) As explained previously, the uncontradicted evidence at trial was that Laci was gone by then, given that neighbor Karen Servas found Laci's dog in the street, unattended, at 10:18 a.m. (48RT 9412-9423.) Additionally, insofar as Peterson directs the court's attention to a statement Diane Jackson made to an investigating officer that she witnessed the burglary on the morning of December 24 (petition at page

[41] As explained previously, according to mail carrier Graybill's testimony, he delivered mail to Covena between 10:30 and 10:45 a.m.

202), Jackson stated the time of the burglary was 11:40 a.m. (99RT 18563). Again, if true, Laci had disappeared prior to that time.

Last, the declaration from Shawn Tenbrink contains inadmissible hearsay and is, therefore, not a basis for granting relief. (See *In re Fields*, *supra*, 51 Cal.3d at p. 1070 [unless the issue has been conceded by respondent, habeas corpus relief cannot be granted on the basis of inadmissible hearsay].) Tenbrink, who, at the time of his declaration, was serving a 13-month sentence for a parole violation, stated that he recalled a phone conversation which he had with his brother Adam in January 2003. (Petn. Exh. 34; HCP at p. 432.) During that conversation, Shawn recounted that Adam told him that he knew who "robbed the house across the street from the Petersons" [referring to the Medina's residence]. (*Ibid.*) Shawn states that "Adam said someone told him that Laci had seen Todd rob the house." (*Ibid.*) The declaration contains multiple levels of hearsay, including a statement made by an unidentified individual. It is insufficient support for Peterson's claim.

Peterson cites four actions he believes his trial counsel should have taken with respect to Lieutenant Aponte's tip. (Petn. at p. 211.) First, Peterson contends that his counsel should have interviewed Aponte sooner than December 2004 (i.e., prior to the guilt-phase verdicts being rendered). (*Ibid.*) Peterson's contention lacks merit. The essence of Aponte's tip was that Todd allegedly confronted Laci during the burglary. Even assuming the burglary did, in fact, occur on the morning of December 24, as we have pointed out, the defense had Todd on its witness list. Therefore, the timing of the Aponte interview, having occurred after the guilt-phase verdicts were rendered, is of no consequence since the defense had Todd at its disposal during the guilt phase. The timing of events with respect to the tip support this assertion. The prosecution turned over the tip on May 14, 2003. (20CT 6380.) Defense investigator Jensen made a note about the tip on

June 25, 2004. (Petn. Exh. 35; HCP at p. 433.) The defense case began on October 18, 2004. (19CT 5939.) The jury returned its guilt phase verdicts on November 12, 2004. (20CT 6133.) Given that Todd was on the defense witness list, and in light of this timeline establishing the defense had the information and investigated it, the reasonable inference is that Peterson's trial counsel vetted Todd and found that he would not be helpful to Peterson's defense. (See *Strickland, supra*, 466 U.S. at p. 691 ["strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation"]; *Rompilla v. Beard* (2005) 545 U.S. 374, 383 ["the duty to investigate does not force defense lawyers to scour the globe on the off chance something will turn up; reasonably diligent counsel may draw a line when they have good reason to think further investigation would be a waste"]; *Harrington v. Richter, supra*, 562 U.S. at p. 107 ["Counsel was entitled to formulate a strategy that was reasonable at the time and to balance limited resources in accord with effective trial tactics and strategies"].)

Second, Peterson contends that counsel should have obtained the recording of the telephone call between Shawn and Adam Tenbrink. (Petn. at p. 211.) As stated, the prosecution disclosed the tip to the defense on May 14, 2003. (20CT 6380.) However, as Lieutenant Aponte explained in his declaration appended to the prosecution's opposition to the motion for a new trial, the administration building at Norco that housed the recording system was condemned and, in March or April 2003, the administrative offices were moved to a new building. The system for recording inmate conversations also changed. (20CT 6435.) He was unable to retrieve any recordings from the old system. (*Ibid.*) Therefore, since the

defensereceived the information in May 2003, it is unclear that a recording still existed for the defense to secure at that time. In any event, Peterson has essentially recreated the conversation by virtue of his tender of Shawn Tenbrink's declaration in which Shawn recounts the conversation. (Petn. Exh. 34; HCP at p. 432.) For the reasons stated above, the declaration does not advance Peterson's claim.

Peterson's remaining points are that counsel should have interviewed the Tenbrink brothers prior to the conclusion of the guilt phase. (Petn. at p. 211.) Given the contents of Shawn's declaration, he would not have been permitted to testify to Adam's statements, absent some hearsay exception. With respect to Adam in particular, there is no suggestion by Peterson that Adam's account of the conversation might differ from his brother's attribution in exculpatory effect. In short, the conversation is of little probative value.

In any event, the defense had burglar Todd at the ready and opted not to call him as a witness at trial. Given these circumstances, Peterson has failed to show an error of constitutional dimension on the part of his trial counsel. Nor has Peterson demonstrated prejudice owing to any purported failing of counsel. Peterson's claim thus fails.

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

Peterson asserts in Claim Eleven that he was deprived of his Fifth, Sixth, Eighth, and Fourteenth Amendment rights due to the cumulative effect of the errors alleged in the petition, and in Peterson's direct appeal.

The People specifically and generally controvert all of Peterson's factual and legal claims and allegations in Claim Eleven as set forth at pages 215 through 218 of the petition, unless otherwise expressly and specifically conceded herein, and state that Peterson has failed to make a prima facie showing that he is entitled to relief on Claim Eleven.

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

Insofar as Peterson incorporates certain claims of error from the automatic appeal (petition at pages 215 through 217 citing claims V through XIII), we reprise here, and incorporate by reference, our corresponding arguments from the relevant portions of the People's brief in the direct appeal that there was no error with respect to these claims (see RB at pages 238 through 450). To the extent that the Court denies Peterson's automatic appeal claims on the merits, they are barred from consideration here. (*In re Reno* (2012) 55 Cal.4th 428, 483 ["[C]laims previously rejected on their substantive merits—i.e., this court found no legal error—cannot logically be used to support a cumulative error claim because we have already found there was no error to cumulate."].)

XII. PETERSON'S CLAIM THAT THE CALIFORNIA DEATH PENALTY STATUTE FAILS TO ADEQUATELY NARROW THE GROUP OF ELIGIBLE DEFENDANTS FAILS TO STATE A PRIMA FACIE CASE FOR RELIEF

Peterson asserts in Claim Twelve that California's death penalty framework violates his rights under the federal and state Constitutions, other state law, and international law. Peterson generally asserts that the California death penalty statute fails to adequately narrow the group of murderers subject to the death penalty.

The People specifically and generally controvert all of Peterson's factual and legal claims and allegations in Claim Twelve as set forth at

pages 219 through 229 of the petition, unless otherwise expressly and specifically conceded herein, and state that Peterson has failed to make a prima facie showing that he is entitled to relief on Claim Twelve.

As an initial matter, with respect to Peterson's specific claims challenging California's death penalty framework, generally or as applied, insofar as these claims are duplicative of claims raised in the pending automatic appeal (see Appellant's Opening Brief at pages 108 through 116, and 424 through 426), relief is barred under *In re Waltreus, supra*, 62 Cal.2d at p. 225 and *People v. Mayfield* (1993) 5 Cal.4th 220, 224-227 (writ may be denied where an appeal is pending in another court, or in the same court, which raises the same point or where the same point could have been raised). To the extent that the claims in this petition are more detailed than those raised in the direct appeal, they could, and should, have been raised on direct appeal and, therefore, are similarly barred. Habeas cannot substitute for, or supplement, Peterson's pending appeal. (*In re Dixon, supra*, 41 Cal.2d at p. 759; *In re Seaton* (2004) 34 Cal.4th 193, 199-200; see also *France v. Superior Court* (1927) 201 Cal. 122, 131.)

In support of his claim, Peterson relies heavily on the same biased and unreliable studies by Professors Baldus and Shatz (both of whom are renowned anti-death penalty advocates) typically offered in habeas petitions. This Court has repeatedly rejected such claims, and Peterson offers no persuasive reason for reconsidering those prior decisions. (See, e.g., *People v. Johnson* (2015) 61 Cal.4th 734; *People v. Cunningham* (2015) 61 Cal.4th 609, 671; *People v. Charles* (2015) 61 Cal.4th 308, 336.)

This claim should be denied.

XIII. PETERSON'S CLAIM THAT DEATH SENTENCES ARE UNCONSTITUTIONALLY DEPENDENT ON THE COUNTY WHERE A DEFENDANT IS CHARGED FAILS TO STATE A PRIMA FACIE CASE FOR RELIEF

Peterson asserts in Claim Thirteen that California's death penalty framework violates his rights under the federal and state Constitutions, other state law, and international law because selection of those who receive the death penalty is dependent upon the county where the trial occurs. He also asserts that this, combined with the overly inclusive nature of the death penalty statutory scheme, renders his death judgment unconstitutional.

The People specifically and generally controvert all of Peterson's factual and legal claims and allegations in Claim Thirteen as set forth at pages 230 through 232 of the petition, unless otherwise expressly and specifically conceded herein, and state that Peterson has failed to make a prima facie showing that he is entitled to relief on Claim Thirteen.

Both this Court and the United States Supreme Court have repeatedly rejected claims that the exercise of prosecutorial discretion in charging renders our capital punishment system unconstitutional. (See *Proffitt v. Florida* (1976) 428 U.S. 242, 254; *Gregg v. Georgia* (1976) 428 U.S. 153, 199; *People v. Vines* (2011) 51 Cal.4th 830, 889; *People v. Gutierrez* (2009) 45 Cal.4th 789, 833; *People v. Keenan* (1988) 46 Cal.3d 478, 505.)

As Peterson offers no persuasive reason to have the Court reconsider its prior decisions, this claim should be denied.

XIV. PETERSON'S CLAIM THAT THE DEATH QUALIFICATION OF THE JURORS WAS UNCONSTITUTIONAL FAILS TO STATE A PRIMA FACIE CASE FOR RELIEF

Peterson asserts in Claim Fourteen that the removal of jurors based upon their views on the death penalty violates his rights under the state and

federal Constitutions, as well as applicable protections afforded under international law.

The People specifically and generally controvert all of Peterson's factual and legal claims and allegations in Claim Fourteen as set forth at pages 233 through 238 of the petition, unless otherwise expressly and specifically conceded herein, and state that Peterson has failed to make a prima facie showing that he is entitled to relief on Claim Fourteen.

In support of his argument, Peterson incorporates the facts and allegations set forth in Claim II of his opening brief and the reply brief in the automatic appeal. (Petn. at p. 234.) Accordingly, we incorporate by reference our response to Claim II (see Respondent's Brief at pages 197 through 202) and dispute Peterson's contention that death qualification of jurors generally, and as applied in this case, constitutes structural error requiring reversal of the convictions, special circumstance findings, and death sentence. Likewise, we contest Peterson's argument that he has demonstrated that the death qualification process in this case had a substantial and injurious effect on the determination of the jury's verdicts and findings.

Both this Court and the United States Supreme Court have repeatedly denied relief on such claims and Peterson offers nothing specific to his case warranting reconsideration of those prior holdings. (See *Lockhart v. McCree* (1986) 476 U.S. 162, 176-177; *People v. Capistrano* (2014) 59 Cal.4th 830, 864; *People v. Taylor* (2010) 48 Cal.4th 574, 602; *People v. Pinholster* (1992) 1 Cal.4th 865, 913 [death qualification of the jury does not result ia death-oriented jury], overruled on other grounds, *People v. Williams* (2010) 49 Cal.4th 405, 459.)

Peterson offers no persuasive reason to have the Court reconsider its prior decisions. This claim should be denied.

XV. PETERSON'S CLAIM THAT THE DEATH PENALTY AS ADMINISTERED IN CALIFORNIA IS CRUEL AND UNUSUAL FAILS TO STATE A PRIMA FACIE CASE FOR RELIEF

Claim Fifteen is essentially a policy argument for Peterson's assertion that this Court should declare the death penalty unconstitutional, citing to international norms, commutations by the former Governor of Illinois, and exonerations of prisoners on death row.

The People specifically and generally controvert all of Peterson's factual and legal claims and allegations in Claim Fifteen as set forth at pages 239 through 245 of the petition, unless otherwise expressly and specifically conceded herein, and state that Peterson has failed to make a prima facie showing that he is entitled to relief on Claim Fifteen.

This Court has repeatedly held that California's death penalty is constitutional. (See, e.g., *People v. Whalen* (2013) 56 Cal.4th 1, 92 ["Finally, because California does not employ the death penalty as a regular punishment for substantial numbers of crimes, its imposition does not violate international norms of decency rendering it violative of the Eighth Amendment."], internal quotation marks omitted.) Moreover, the United States Supreme Court has recently reaffirmed that imposition of the death penalty does not violate the Constitution. (*Glossip v. Gross* (2015) 576 U.S. ___, [135 S.Ct. 2726, 2732] [". . . it is settled that capital punishment is constitutional . . . ."].)

Peterson offers nothing specific to his case to warrant a reconsideration of this Court's prior holdings, therefore he has failed to state a prima facie claim for relief on this basis.

XVI. PETERSON'S CLAIM THAT IMPEDIMENTS IN THE POST-TRIAL PROCESS RENDER HIS CONVICTIONS AND SENTENCE UNRELIABLE AND UNCONSTITUTIONAL FAILS TO STATE A PRIMA FACIE CASE FOR RELIEF

This claim consists of largely conclusory and generalized complaints of delay in appointment of counsel and inadequate funding for appellate and post-conviction review. Although complaining that he was denied the effective assistance of counsel due to a delay in the appointment of current counsel for both the direct appeal and habeas corpus, Peterson fails to demonstrate a nexus between his complaints about delay, or inadequate funding for that matter, to specific items of evidence or witnesses who were rendered unavailable to him. His claim is therefore inadequately pled. (See *People v. Duvall, supra*, 9 Cal.4th at p. 474; *People v. Karis, supra*, 46 Cal.3d at p. 565.)

In any event, the People specifically and generally controvert all of Peterson's factual and legal claims and allegations in Claim Sixteen as set forth at pages 246 through 251 of the petition, unless otherwise expressly and specifically conceded herein, and state that Peterson has failed to make a prima facie showing that he is entitled to relief on Claim Sixteen.

Inasmuch as Peterson cites the names of three potential witnesses and asserts that the lack of subpoena power has hampered his ability to discover important facts about the case (petition at pages 250 and 251), we note that any evidentiary issues implicated with respect to these individuals have been vetted, as we explained with regard to Claim Ten, *ante*. The defense suggestion that Laci Peterson confronted Steven Todd, one of the burglars of the Medina residence, was argued as newly discovered evidence in support of the defense motion for a new trial. Aside from the fact that the trial court expressed its view that the information was not necessarily newly discovered since the prosecution turned over the information to the defense in May 2003 (121RT 21787), the court found the information had little

credibility or value given the fact that Laci had already disappeared by the time the Medina's left their residence on December 24 and, accordingly, by the time of the burglary. (120RT 21788; see also 49RT 9590-9591.)

Also, as we explained above, the record in the automatic appeal demonstrates that Todd was on the witness list and available to testify, but was not called by the defense. (20CT 6384.) We also point out that, while Adam Tenbrink has apparently refused to speak with Peterson's investigator, as we explained in Claim Ten, *ante*, his brother Shawn provided a declaration recounting the conversation he had with Adam. (Petn. Exh. 34; HCP at p. 432.) There is nothing in that conversation that calls the jury's verdicts and findings into question. Given this state of the record, Peterson's contention that the lack of subpoena power and other investigative resources has hampered his ability to discover important facts about the case is unsubstantiated.

As this Court noted in *In re Reno, supra,* 55 Cal.4th at p. 472, California provides generous public funds (up to $50,000) for the initial investigation of habeas corpus claims, a sum that although "may not be sufficient for counsel to comply with the ABA Guidelines' directive to reinvestigate the entire case from the ground up (nor is it intended to be sufficient in that regard), it should suffice for counsel to investigate potentially meritorious issues outside the record . . . ." (*Id.* at pp. 471-472.) This Court also stated, "[p]etitioner's allegations regarding the denial of investigative funds are wholly inadequate to satisfy his pleading burden, as he fails to state he 'timely file[d] a request for funding of a *specific* proposed investigation, fully disclosing all asserted triggering information in support of the proposed investigation.' (*In re Gallego, supra*, 18 Cal.4th at p. 828, 77 Cal.Rptr.2d 132, 959 P.2d 290, italics added.)" (*Id.* at p. 471.) Thus, this portion of the claim also fails to satisfy this Court's pleading requirements.

In all events, this claim should be denied for failure to demonstrate a prima facie case for the relief Peterson seeks.

XVII. PETERSON'S CLAIM THAT CALIFORNIA'S DEATH PENALTY SYSTEM VIOLATES STATE AND FEDERAL LAW BECAUSE IT IS COMPROMISED BY DELAY AND ARBITRARINESS FAILS TO STATE A PRIMA FACIE CASE FOR RELIEF

Peterson claims that delays inherent in this Court's appellate and post-conviction review of capital cases result in arbitrary imposition of the death penalty in violation of his federal and state constitutional rights, other state laws, and international law.

The People specifically and generally controvert all of Peterson's factual and legal claims and allegations in Claim Seventeen as set forth at pages 252 through 262 of the petition, unless otherwise expressly and specifically conceded herein, and state that Peterson has failed to make a prima facie showing that he is entitled to relief on Claim Seventeen.

In support of his claim, Peterson relies heavily on a 2014 federal district court decision, *Jones v. Chappell* (C.D. Cal. 2014) 31 F.Supp.3d 1050.[42] This Court has considered the reasoning and holding of *Jones v. Chappell* and has rejected it. (*People v. Seumanu* (2015) 61 Cal.4th 1293, 1368-1375.) In *Seumanu,* the Court began by taking judicial notice of certain materials considered by the *Jones* court and also cited in the present petition, including the Report of the California Commission on the Fair Administration of Justice (see petition exhibit 42), articles, and certain websites. (*Id.* at pp. 1372-1373.) The Court further assumed that the facts found by the *Jones* court were true. (*Id.* at pp. 1373, 1375.) Finally, this

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[42] The United States Court of Appeals for the Ninth Circuit reversed the district court in *Jones v. Chappell* on the ground that Jones sought a new constitutional rule, which is barred on federal habeas review. (*Jones v. Davis* (9th Cir. 2015) 806 F.3d 538, 546-553, citing *Teague v. Lane* (1989) 489 U.S. 288). Peterson, too, would find the claim barred in federal court.

Court assumed for purposes of its decision that "*Furman v. Georgia, supra*, 408 U.S. 238, and its progeny are not limited to the earlier selection process from among the class of all murderers, but prohibit as well arbitrariness in the selection for execution from among those already adjudged guilty and deserving of the death penalty." (*Id.* at pp. 1373-1374; see also *id.* at p. 1375.)

This Court maintained that:

> [A]llowing each case the necessary time, based on its individual facts and circumstances, to permit this court's careful examination of the claims raised is the opposite of a system of random and arbitrary review. As one federal appellate court has stated: "The essential point for our purposes, of course, is whether or not the Eighth Amendment is being violated. We believe that delay in capital cases is too long. But delay, in large part, is a function of the desire of our courts, state and federal, to get it right, to explore exhaustively, or at least sufficiently, any argument that might save someone's life." (*Chambers v. Bowersox* (8th Cir. 1998) 157 F.3d 560, 570, fn. omitted; see *Zant v. Stephens* (1983) 462 U.S. 862, 885 ["although not every imperfection in the deliberative process is sufficient, even in a capital case, to set aside a state court judgment, the severity of the sentence mandates careful scrutiny in the review of any colorable claim of error."].)

(*People v. Seumanu, supra*, 61 Cal.4th at p. 1375.)

The Court further explained:

> Our conclusion would be different were the California Department of Corrections and Rehabilitation to ask all capital inmates who have exhausted their appeals to draw straws or roll dice to determine who would be the first in line for execution. But the record in this case does not demonstrate such arbitrariness. Unquestionably, some delay occurs while this court locates and appoints qualified appellate counsel, permits those appointed attorneys to prepare detailed briefs, allows the Attorney General to respond, and then carefully evaluates the arguments raised, holds oral argument, and prepares a written opinion. Further delays occur when this court locates and appoints qualified counsel for habeas corpus, allows ample time for counsel to prepare a petition, and then evaluates the resulting

> petition and successive petitions. But such delays are the product of "a constitutional safeguard, not a constitutional defect [citations], because [they] assure [ ] careful review of the defendant's conviction and sentence." (*People v. Anderson, supra*, 25 Cal.4th at p. 606.)

(*People v. Seumanu, supra*, 61 Cal.4th at p. 1374.)[43] This Court concluded that the defendant had not "on this record demonstrated that delays in implementing the death penalty under California law have rendered that penalty impermissibly arbitrary." (*Id.* at p. 1375.)

Peterson is hard-pressed to demonstrate unreasonable delay in this case. With respect to the proceedings in the lower court, Peterson was arrested in April 2003, within a few days of the discovery of Laci's and Conner's bodies. He was subsequently charged with capital murder. His preliminary hearing was conducted in late October and early November 2003. In December 2003 and January 2004, the parties litigated the defense motion to change venue, which was successful. While the litigation of extensive pretrial motions was ongoing, jury selection began in March 2004. The trial court vetted approximately 1,250 jurors over a three-month period. The presentation of evidence commenced in early June 2004. The jurors heard testimony from nearly 200 witnesses at the guilt and penalty phases of the trial. The jurors reached verdicts in December 2004. Sentence was imposed in March 2005 after the trial court heard the defense motion for a new trial and modification of the verdict.

On automatic appeal of the death judgment, Peterson sought appointment of counsel in January 2009, which the Court granted within a matter of months. Peterson filed his opening brief three years later in July 2012. Our brief was filed in January 2015, a few months ahead of the

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[43] *Jones*, of course, was never binding on this Court. (See *People v. Williams* (2013) 56 Cal.4th 630, 668.)

scheduled filing date. The reply brief was filed in July 2015. The instant petition for habeas relief was filed approximately four months later in November 2015.

On this record, and under *People v. Seumanu*, Peterson's claim based on *Jones* fails to state a prima facie basis for relief.

XVIII. PETERSON'S CLAIM THAT THE USE OF LETHAL INJECTION RENDERS HIS SENTENCE ILLEGAL FAILS TO STATE A PRIMA FACIE CASE FOR RELIEF AND IS NOT RIPE FOR REVIEW GIVEN THE CURRENT LACK OF AN APPROVED STATE PROTOCOL

Peterson asserts that the use of lethal injection violates his federal and state constitutional rights, as well as international law.

The People specifically and generally controvert all of Peterson's factual and legal claims and allegations in Claim Eighteen as set forth at pages 263 through 272 of the petition, unless otherwise expressly and specifically conceded herein, and state that Peterson has failed to make a prima facie showing that he is entitled to relief on Claim Eighteen.

Peterson asserts that the use of lethal injection will in all cases render his execution unconstitutional, because "[i]t is impossible to develop a method of execution by lethal injection that will work flawlessly in all persons . . . ." (Petn. at p. 272.) This Court has repeatedly rejected this claim. (See *People v. Salcido* (2008) 44 Cal.4th 93, 169-170, and cases cited therein.) Moreover, the United States Supreme Court has recently reaffirmed the use of lethal injection, noting that "some risk of pain is inherent in any method of execution." (*Glossip, supra*, 135 S.Ct. at p. 2733.) The high court went on to reiterate the standard for demonstrating an Eighth Amendment violation enunciated in *Baze v. Rees* (2008) 553 U.S. 35, holding that a petitioner must

> establish that the method presents a risk that is "'sure or very likely to cause serious illness and needless suffering,' and give rise to 'sufficiently imminent dangers.'" [citation]. To prevail

> on such a claim, "there must be a 'substantial risk of serious harm,' an 'objectively intolerable risk of harm' that prevents prison officials from pleading that they were 'subjectively blameless for purposes of the Eighth Amendment.'" [citation].

(*Glossip v. Gross, supra*, 135 S. Ct. at p. 2737.)

Finally, to the extent that Peterson seeks to challenge any future execution protocol, this claim is unripe as there is not currently a valid protocol in place in California. Habeas corpus may not be used to challenge the validity of anticipated future action. (*In re Drake* (1951) 38 Cal.2d 195, 198.)

Peterson has failed to state a prima facie claim for relief on this basis.

XIX. PETERSON'S CLAIM THAT CALIFORNIA'S DEATH PENALTY STATUTE VIOLATES INTERNATIONAL LAW FAILS TO STATE A PRIMA FACIE CASE FOR RELIEF

Peterson's last contention is that the state's death penalty violates international norms of humanity and decency.

The People specifically and generally controvert all of Peterson's factual and legal claims and allegations in Claim Nineteen as set forth at pages 273 through 276 of the petition, unless otherwise expressly and specifically conceded herein, and state that Peterson has failed to make a prima facie showing that he is entitled to relief on Claim Nineteen.

This Court has regularly denied relief on claims of this type. (See, e.g., *People v. Hajek and Vo* (2014) 58 Cal.4th 1144, 1253; *People v. Brady* (2010) 50 Cal.4th 547, 690-591; *People v. Hamilton* (2009) 45 Cal.4th 863, 961.) Peterson offers nothing specific to his case to warrant a reconsideration of those decisions. Peterson has failed to state a prima facie claim for relief on this basis.

CONCLUSION

Based on the foregoing, the People respectfully request the Petition for Writ of Habeas Corpus be denied without the issuance of an order to show cause.

Dated: August 10, 2017

Respectfully submitted,

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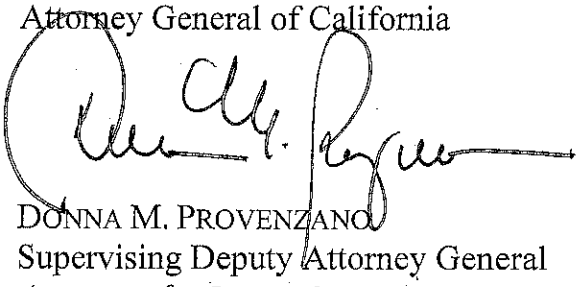
CERTIFICATE OF COMPLIANCE

I certify that the attached INFORMAL RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS uses a 13 point Times New Roman font and contains 40,582 words.

Dated: August 10, 2017

XAVIER BECERRA
Attorney General of California



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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **In re Scott Lee Peterson**
No.: **S230782**
I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On August 10, 2017, I served the attached **INFORMAL RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

Cliff Gardner (2 copies mailed)
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Berkeley, CA 94702

Lawrence A. Gibbs
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San Mateo County Superior Court
Main Courthouse-Hall of Justice
400 County Center
Redwood City, CA 94063-1655

The Honorable Stephen Wagstaffe
District Attorney
San Mateo County District Attorney's Office
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Redwood City, CA 94063

Stanislaus County Superior Court
Main Courthouse, Criminal, Appeals, Probate,
Family Law & IV-D
P.O. Box 1098
Modesto, CA 95353-1098

The Honorable Birgit Fladager
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Stanislaus County District Attorney's Office
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Michael J. Herseck, Executive Director
Habeas Corpus Resource Center
303 Second Street
San Francisco, CA 94107

Capital Appellate Project
101 Second Street, Suite 600
San Francisco, CA 94105-3647

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on August 10, 2017, at San Francisco, California.

Nelly Guerrero
Declarant

N. Guerrero
Signature

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