SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF TEHAMA

IN RE LARRY POHLSCHNEIDER, Petitioner, On Habeas Corpus.	Case No. NCR54406

PETITIONER'S DENIAL AND ADDITIONAL EXHIBITS IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS

Linda Starr, #118789
Maitreya Badami, #173241
NORTHERN CALIFORNIA INNOCENCE PROJECT at Santa Clara University School of Law
900 Lafayette Street, Suite 105
Santa Clara, CA 95050
Telephone: (408) 551-3260
Facsimile:(408)554-5441

Thom Seaton, #62713
Attorney at Law
1012 Middlefield Rd
Berkeley, CA 94708
Telephone: (510) 204-9600

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Linda Starr, #118789
Maitreya Badami, #173241
NORTHERN CALIFORNIA
INNOCENCE PROJECT
at Santa Clara University School of Law
900 Lafayette Street, Suite 105
Santa Clara, CA 95050
Telephone: (408) 551-3260
Facsimile:(408)554-5440

Thom Seaton, #62713
Attorney at Law
1012 Middlefield Road
Berkeley, CA 94708
Telephone: (510) 204-9600

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TO THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF TEHAMA:

Larry Pohlschneider, through counsel, reasserts and incorporates by reference the facts and arguments made in the Petition for Writ of Habeas Corpus and the accompanying exhibits. Petitioner hereby submits this Denial and four additional exhibits, lettered Q, R, S, and T, so as to avoid duplication of the lettering used in exhibits filed with the Petition.

INTRODUCTION

This court's Order to Show Cause required the prosecution to file a Return to Petitioner's allegations and supporting exhibits, as they establish prima facie claims that his conviction was based on false testimony and was obtained in violation of his federal and state constitutional rights to due process of law and to the effective assistance of counsel. Respondent has not produced evidence sufficient to undermine those claims. The prosecution filed a general denial of the facts as alleged by Petitioner, but did not contradict each of the material issues of fact raised in the petition. Respondent half-heartedly contests Petitioner's allegations by disputing some of the facts upon which they are based and promising to prove its position at a hearing, relying on *People v. Duvall* (1995) 9 Cal.4th 464, 485. (Return at pp. 1, 4, 8, 17.)

None of Respondent's points is adequately supported with facts or legal argument sufficient to overcome Petitioner's prima facie claims; therefore, as conceded by the Respondent, an evidentiary hearing is required. Moreover, in considering Petitioner's argument that his conviction must be reversed because it is based on false testimony, this court must reject Respondent's argument because it relies on *In re Richards* (2012) 55 Cal.4th 948, and that case was intentionally overruled by the Legislature with its subsequent amendments to Penal Code section 1473. The new Penal Code subdivision permits Petitioner to allege that the scientific testimony presented at his trial was false, and to rely upon his own experts to prove that claim. (Pen. Code, § 1473, subd. (e)(1).)

Finally, this Court should grant relief on the ineffective assistance of counsel claim on the basis of the parties' papers alone. Respondent has conceded that trial counsel did not consult a medical expert or social scientist. That failure, which cannot be considered tactical or strategic under all the facts of this case, was ineffective on its face; the evidence submitted in support of the petition (and uncontradicted by Respondent) demonstrates that there is a reasonable probability that Petitioner would have achieved a better outcome had counsel consulted with relevant experts and presented the resultant testimony. (*In re Hill* (2011) 198 Cal.App.4th 1008, 1028, 1030

(in child sexual abuse case, based on its review of the record and Hill's witness declarations, court found ineffective assistance of counsel where counsel failed to consult a medical expert and it was reasonably probable that Hill "would have obtained a more favorable result at trial had his counsel not performed deficiently").)

This Denial will address Respondent's points as they relate to Petitioner's specific legal claims or Respondent's asserted procedural defense.

ARGUMENT

Respondent argues six points in the Return: the first two concern Petitioner's claim that his conviction rests on false "scientific" testimony; the third and fourth address the claim that the conviction rests on the unreliable pretrial accusations of the children; the fifth defends against Petitioner's claim of ineffective assistance of counsel; and the sixth raises a procedural defense of untimeliness. Each of Respondent's arguments fails.

I. RESPONDENT HAS FAILED TO REFUTE PETITIONER'S CLAIM THAT HIS CONVICTION RESTED ON FALSE EVIDENCE.

A. The Vovakes And Relyea Medical Testimony Were "False Evidence," Based On A Theory Undermined By Substantial Scientific Research.

1. Respondent's Reliance On An Overruled Case to Defend Against the False Evidence Claim Is Unavailing.

Relying on *In re Richards* (2012) 55 Cal.4th 948, 963, the prosecution asserts that Petitioner's evidence completely discrediting the medical testimony of Dr. Vovakes and Physician's Assistant (PA) Relyea did not render their testimony "false," but only presents a dispute between experts. (Return at pp. 4, 8.) *Richards* held that a habeas corpus petitioner was required to prove that the expert testimony introduced at trial was both superseded by subsequent scientific research *and* was "objectively untrue," and that that could not be done by presenting differing expert opinions. (*In re Richards, supra,* 55 Cal.4th at p. 963.)

In 2014, however, the Legislature abrogated *Richards* by enacting Chap. 623,

Stats. of 2014, introduced as Senate Bill 1058 and enacted into law, effective January 1, 2015. This law amended Penal Code section 1473 to include subdivision (e)(1), which now states, "For purposes of this section, '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." No longer must a habeas corpus petitioner prove that an expert's trial testimony was "objectively untrue."[1]

A Note in the *McGeorge Law Review* explained the liberalizing effect of the amendments to section 1473:

> In effect, Chapter 623 amends Penal Code section 1473 to reverse *Richards*. Chapter 623 explicitly defines "false evidence" for the purposes of a writ of habeas corpus to include repudiated expert testimony and expert testimony that is "undermined by later scientific research or technological advances." Under Chapter 623, courts will now apply the more liberal false evidence standard to writs of habeas corpus that are based on repudiated or undermined expert testimony. When this repudiated expert testimonial evidence is "substantially material or probative on the issue of guilt or punishment," courts will grant habeas relief. Chapter 623 does not limit the remaining grounds for which a convicted defendant can petition for a writ of habeas corpus nor does it change or create any additional liabilities for experts that testify or offer opinions.
>
> Senator Leno declared that the law's failure to treat repudiated lay and expert testimony the same was an "unjust distinction" and a "contradictory interpretation [that was] unreasonable and exacerbate[d] the problem of wrongful convictions." Chapter 623 makes it easier for petitioners to introduce repudiated or undermined expert testimony under the false evidence standard, eliminating the court's distinction between expert testimony and lay testimony.

(Natasha Machado, *Chapter 623: Giving the Wrongfully Convicted A Better*

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[1] In this case, the false "scientific" testimony that led to Mr. Pohlschneider's conviction would not have passed muster at the time of trial and could have been proven objectively untrue at the time, but for the failure of his defense attorney to consult with a medical or scientific expert. In any event, any argument that his claim is undermined by *Richards* must fail because the Legislature overruled that holding.

Chance at Review (2014) 46 McGeorge L. Rev. 387, 392 (Footnotes omitted.)) Thus, the correct analysis requires this Court to evaluate the scientific evidence Petitioner presents to determine whether the trial testimony of Respondent's purportedly scientific experts was actually false in light of established science. (Pen. Code, § 1473, subd. e)(1)).[2] Here, established medical science establishes that the testimony of PA Relyea and Dr. Vovakes certainly was false.

2. The Type of Markers Respondents' Medical Experts Observed Were Not Diagnostic of Sexual Abuse as Determined By Advances in Scientific Research.

Petitioner has previously submitted a declaration from Child Abuse Pediatrician Dr. James Crawford-Jakubiak, the Medical Director of the Center for Child Protection at the UCSF Benioff Children's Hospital in Oakland. (Exhibit F)[3] Dr. Crawford-Jakubiak, a specialist in child sexual abuse, examined the images upon which PA Relyea and Dr. Vovakes based their testimony, and has asserted unequivocally that the testimony of those medical professionals was false. (*Id.* at ¶ 34.) Respondent has submitted no new evidence to refute Dr. Crawford-Jakubiak's opinion and indeed would be hard-pressed to do so since that opinion is based on the widely accepted medical understanding that soundly rejects as false the assumptions upon which the testimony of Vovakes and Relyea was based. The conviction should be reversed because the false evidence was "'substantially material or probative on the issue of guilt or punishment.'" (Pen. Code, § 1473, subd. c; *In re Hall* (1981) 30 Cal. 3d 408, 424.)

(a) Physician's Assistant Relyea's Testimony Was False

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[2] Here, the scientific research which undermined the testimony of Dr. Vovakes and Physician's Assistant Relyea did not occur subsequent to their January 2000 trial testimony. This fact, however, does not render the trial testimony of Vovakes and Relyea any less false. If, for example, a conviction in 2000 rested on the theory that the world was flat, that testimony would not be any less "false" today simply because the theory that the world was flat had been discredited several hundred years ago.

[3] Petitioner will use the same Exhibit lettering convention that was used in the Petition. Four additional exhibits are attached to this Denial. They will be labeled with letters Q through T, so as not to duplicate any letters used in exhibits previously submitted.

PA Relyea testified that David showed physical signs that he had been sexually molested and that the molestation had occurred more recently than June, 2000, i.e. when Albert Harris was no longer in the home. PA Relyea identified four findings which she claimed supported her opinion that David had been recently abused: (1) incontinence of stool; (2) laxity of the anal sphincter muscle; (3) rugae or folds in the perianal area which were flattened; and (4) abrasions and excoriations. (RT 199:20-28.)

Dr. Crawford-Jakubiak's declaration explains that his review of the images of the anogenital examination establishes that, in fact, there was no evidence of a lax anal sphincter or flattened rugae; and that moreover, those findings (even if actually present) do *not* provide evidence of sexual abuse. As Dr. Crawford-Jakubiak observed: "[T]here is absolutely nothing in David's examination to suggest that he had suffered sexual molestation more recently than June 2000. The testimony of PA Relyea related to finding 'evidence' of recent sexual abuse, therefore, was simply false." (Exh. F at ¶ 34.)

Dr. Crawford-Jakubiak's opinions are supported by the findings of a 1989 study by Dr. John McCann and colleagues (a copy is attached as Exhibit Q), that underscores the falsity of the Relyea testimony. That study, based on an examination of children who had ***not*** suffered abuse found that (1) Anal sphincter dilation occurred in 49% of the children and, of those, stool was seen in 44% of the cases; (2) Laxity of the anal sphincter, resulting in dilation occurred in 49% of the children; (3) Flattened or smooth areas were discovered in 26% of the children and (4) Although "abrasions" or "excoriations" were not terminology utilized by Dr. McCann's team, erythema - skin redness - revealed a positive finding of 41% and pigmentation changes consistent with the "blue venous hue" described by Ms. Relyea in her medical report were found 30% of the time. Dr. McCann concluded:

> The number and variety of perianal physical findings found in this population of children was somewhat surprising. There were findings that occurred with such a high frequency that they appeared to be

> variants of normal . . . .
>
> The relatively high incidents of perianal soft tissue changes found in this study does not imply that these findings cannot be caused by sexual abuse. It only means that other etiologic factors must be considered before the specter of abuse is raised when unexplained perianal findings are encountered. While medical examiners must maintain a high index of suspicion in this era of unremitting sexual abuse, caution must be exercised during the search for the cause of soft tissue changes discovered in the ano-genital region of a child.

(Exh. Q at p. 189; see also *King v. Evans* (N.D. Cal. 2009) 621 F.Supp.2d 850, 862, n.5 (noting that the prosecution's expert had testified that "clinicians who gather evidence in medical-legal exams no longer pay any attention to clefts or notches in the hymen because the prevailing view is that these features are not evidence of abuse.").) The *King* court only noted, but did not rely upon, that testimony, because it needed to focus on the standards of practice in place at the time of King's trial, rather than his later habeas corpus evidentiary hearing.[4]

In 1989, Lee Coleman, M.D., a Berkeley psychiatrist, wrote an article, *Have We Been Misled*, published by the Institute for Psychological Therapies. (Coleman, 1 IPT 3 (1989)) (A copy is attached as Exhibit R.) Coleman reviewed the comments McCann made in January 1988 at a San Diego meeting sponsored by the Center for Child Protection of the San Diego Children's Hospital. Coleman notes that McCann found that indicia previously attributed to molestation are present in children who have not been abused. Indeed, fifty percent of the girls who had not been abused had conditions which previously had been deemed evidence of abuse. (Exh. R at p.7.)

Respondent submitted no evidence to contradict the unequivocal scientific evidence, instead placing continued reliance on Relyea's testimony and indicating an

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[4] If the Court were to determine that the false expert testimony does not meet the definition set out in the amended Penal Code section, because scientific research prior to the trial had *already* disclosed the errors in the testimony of the prosecution's experts, such a determination would provide strong additional support to Petitioner's ineffective assistance of counsel claim.

intent "to dispute the credibility of petitioner's expert and the findings he has rendered," thus conceding at least the need for an evidentiary hearing to resolve this issue.

(b) Dr. Vovakes' Testimony Was False

Respondent asserts that Dr. Vovakes never testified that his findings with respect to Ethel and Ashley were consistent with molestation occurring after June 2000, noting that Vovakes repeatedly stated he could not testify as to when the girls were most recently molested and argues that therefore Vovakes' testimony did not provide false evidence in support of the allegations that Petitioner sexually abused Ethel and Ashley. (Return at pp. 2-3.) In fact, on redirect examination, Dr. Vovakes testified that the medical evidence indicated that Ethel and Ashley "could have been molested after June." (RT 178:13), thereby implying 1) that the medical evidence indicated that there was abuse, which, as established by Dr. Crawford-Jakubiak and peer-reviewed studies, is false; and 2) that the medical evidence was in some way consistent with the children having been molested after the time when Harris was in the home, and therefore by Petitioner.

No dispute existed that Albert Harris had previously molested Ethel and Ashley. Neither at trial nor in this proceeding have Mr. Pohlschneider or Respondent contested that Harris molested the children. Thus the only reason for the prosecution to have presented the testimony of Dr. Vovakes was to provide evidence that the medical examination supported the allegations that Petitioner, too, had abused the children. Yet, any conclusion or intimation that the medical evidence supported this allegation is false.

Dr. Vovakes testified that he confirmed the abuse of Ethel and Ashley when he saw clefts in the hymens of the two girls. (RT 174:2-7, 175:27-28.) That testimony was based on understandings overturned by scientific studies published from 1988 into the early 1990s that found that various indicia of what previously had been diagnosed as proof of penetration actually appeared among girls who had not suffered abuse.

Dr. Crawford-Jakubiak, who examined the same colposcopic photographs of the girls which Dr. Vovakes had reviewed in November 2000, concluded, "[T]he

appearance of both Ashley's and Ethel's examinations is consistent with normal, uninjured genital anatomy. Their examinations do not 'confirm' that sexual abuse has occurred in the past. … The physical findings identified during their exams certainly should not have been relied upon as evidence that Larry Pohlschneider had molested either girl." (Exh. F at ¶¶ 24, 26, 28.)

In sum, both PA Relyea and Dr. Vovakes provided medical testimony in support of Petitioner's conviction that is demonstrably false. The conviction should be reversed because the false evidence was "'substantially material or probative on the issue of guilt or punishment.'" (Pen. Code, § 1473, subd.(c); *In re Hall, supra,* 30 Cal. 3d at p. 424 .)

B. There is a Reasonable Probability That, Absent the False Medical Testimony, Petitioner Would Have Been Acquitted.

In light of the fact that the children themselves testified that Petitioner had never abused them, it is reasonably probable that, in the absence of that false medical testimony, there would have been a more favorable outcome at trial. The prosecution attempts to minimize the importance of PA Relyea's findings and testimony that David was abused after June 2000, *i.e.* by Larry Pohlschneider, by contending that her testimony was ambiguous, since she used the word "suggest" rather than "conclusive" to describe the degree of certainty that David was molested after Albert Harris had left California. No honest and accurate review of Relyea's testimony can consider it anything other than pivotal to this conviction. The attempt to minimize the effect of the Relyea testimony – which at first blush would seem to reduce the strength of the prosecution's case – is really an attempt to whitewash trial counsel's failure to investigate the medical evidence or retain an expert to challenge the Relyea testimony. That effort fails.

Immediately after testifying that her finding that David was molested after June, 2000, was not "conclusive" and that the only conclusive finding "beyond a shadow of a doubt" would be evidence of sperm (RT 203:27-204:6), Relyea stated that it was "highly probable" that there had been recent molestation. (RT 204:7-8.) On redirect examination, she strengthened her testimony, as this exchange confirms:

> Q. . . . is it your expert opinion that the physical signs you saw in David do suggest a recent molestation?
>
> A. The physical signs that I saw on David at this point in time, the medical literature and in the professional, you know, body of knowledge that we have, that is the only reason for it, etiology, cause.

(RT 222:23- RT 223:1.)

The importance of the Relyea testimony cannot be overstated. In her closing argument, the prosecutor trumpeted the significance of the Relyea testimony, reminding the jury:

> Now, if you are so confused in your mind because of all of the recanting and the different interviews, I have one piece of evidence for you that you absolutely cannot ignore. And this is the physical examination of David. And if nothing else, if you cannot come to a conclusion, you simply cannot ignore this.
>
> * * *
>
> . . . this is 100% conclusive that this child was molested.

(RT 359:15-20, 360: 5-6.)

In light of the significance that the prosecution itself placed upon the false evidence at trial, there is a reasonable probability that without it, the outcome would have favored Petitioner.

II. RESPONDENT HAS FAILED TO REFUTE PETITIONER'S CLAIM THAT HIS CONVICTION VIOLATED DUE PROCESS BECAUSE IT RELIES UPON UNRELIABLE EVIDENCE.

A. Dr. Carlson Made Highly Misleading Assertions That Have Been Refuted By Scientific Studies.

Respondent's Return fails to refute Petitioner's assertions that the improper use of testimony relating to Childhood Sexual Abuse Accommodation Syndrome (CSAAS) resulted in a violation of his due process rights. The prosecution asserts that Dr. Carlson "was not asked to render an opinion as to whether the Victims were actually victims of abuse," acknowledging that such an opinion "would be clearly beyond an appropriate

opinion, even for an expert witness such as Dr. Carlson." (Return at p. 5.)

While CSAAS has several elements, the prosecution focused on the element of recantation – the contention by Dr. Carlson and proponents of the syndrome that abused children often retract their prior accusations and that, therefore, such retractions actually are consistent with the fact of abuse. Dr. Carlson referred to this characteristic of CSAAS as "flip-flopping" and testified that he had seen it "many times" in the abused children he had interviewed. While that testimony may have accurately reflected what he believed he saw in his own clinical experience, it was belied by the body of established scientific evidence in subsequent years. The implication that such recantations happen frequently or often is simply untrue.

Scientific studies have determined that only 9% of children who actually have sustained sexual abuse retract their prior accusations of abuse. "[R]ecantation rarely occurs among children who actually experienced sexual abuse." (Ex. N at ¶ 26.)

In 2005, Professor London and others published a paper, *Children's Disclosure Of Sexual Abuse: What Does The Research Tell Us About The Ways Children Tell?* Psychology, Public Policy & The Law, 11: 194-226 (London, Bruck, Ceci & Shuman, 2005). The paper reviewed the results of prior studies discussing the behavior of children who have been abused. Describing a key result of her 2005 paper, Dr. London confirmed that retraction by abused children is rare. Studies confirming that a particular characteristic (retraction) of CSAAS is rare undermine and therefore render false Dr. Carlson's prior testimony that the characteristic is *consistent or regularly associated* with childhood sexual abuse. (Pen. Code, § 1473, subd.(e)(1).)

Dr. Carlson's testimony that "some aspects of it [CSAAS] will always be there" (RT 41:8-9) was also false, unsupported by any scientific study. Dr. London points out, "There is no scientific justification to say that "some aspects" of CSAAS will "always be there." The notion that some aspect of CSAAS will be present in *all sexual abuse cases* was never put forth by Roland Summit, the originator of the concept of CSAAS, and certainly is not supported by the contemporary scientific literature (nor by the literature available in 2001)." (Exh. M at 7.)

Dr. Carlson's "easy target" testimony also was false. As Dr. London states, "There is no scientific literature on this issue. I have reviewed the literature on disclosure extensively, and I am unaware of any studies that have attempted to predict current disclosure rates according to past victimization rate." (Exh. M at 8.)

B. In The Absence of the Misleading CSAAS Evidence, There Is a Reasonable Probability That the Outcome Would Have Been More Favorable to Petitioner.

Respondent cites several cases to argue that California courts admit CSAAS testimony. Those same cases caution of the potentially unjust effects of improperly admitted CSAAS testimony and highlight the especially harmful effect of such testimony when not accompanied by limiting instructions. Respondent cites *People v. Bowker* (1988) 203 Cal.App.3d 385, a leading case permitting admission of CSAAS testimony. However, *Bowker*'s language actually supports Petitioner's claim that the CSAAS testimony here was misleading. In allowing admission of CSAAS for a limited purpose and constrained by a proper jury instruction, the *Bowker* court explained that the goal was "to provide the jury with relevant accurate information regarding 'recent findings of professional research on the subject of a victim's reaction to [child abuse]. …" (*Id.*, at 393.) Today, 17 years after *Bowker*, "recent findings of professional research on the subject of a victim's reaction to child abuse" have undermined and repudiated much of the research upon which Dr. Carlson relied.

In *Bowker*, the court noted that the expert "had constructed a 'scientific' framework into which the jury could pigeonhole the facts of the case. Thus, even though he was precluded from using CSAAS as a predictor of child abuse, the jury was free to superimpose these children on the same theory and conclude abuse had occurred." (*Bowker*, supra, at 395.) Here, the prosecutor's closing argument similarly superimposed Dr. Carlson's general clinical observations of other children onto Ethel, Ashley and David, in order to argue that Petitioner had abused these children. (RT 351:24-354:10.)

Further, as the court noted in *People v. Housely* (1992) 6 Cal.App.4th 947, 958 (also cited by Respondent) CSAAS testimony "may be unusually susceptible of being

misunderstood and misapplied by a jury, perhaps because the expert is being asked to offer an opinion on whether the victim's behavior was typical of abuse victims, an issue closely related to the ultimate question of whether abuse actually occurred." And as the court observed in *People v. Patino* (1994) 26 Cal.App.4th 1737, 1744, CSAAS expert testimony "can be highly prejudicial if not properly handled by the trial court."[5]

Given that the Court here did not provide a limiting instruction on the use of the CSAAS testimony, and the prosecution argued the false and misleading testimony of Dr. Carlson to superimpose the theory onto the actual victims in this case, the introduction of that evidence was harmful to Mr. Pohlschneider. In light of the fact that the alleged victims themselves testified that he was innocent, such improper use of scientific evidence could only have had a prejudicial impact.

C. Reliance on Coerced Pretrial Accusations to Establish Guilt Casts Fundamental Doubts On The Accuracy And Reliability Of The Proceedings and Violates Due Process.

1. The Children's Pretrial Accusations Were The Product of Improper Police Questioning And Were Highly Unreliable.

Respondent submits declarations from the officers involved in the coercive interviews of the children as evidence of its claim that the interviews were conducted properly. At most, the Return and the declarations of Magrini, Flowerdew and Strom create issues of fact to be resolved at an evidentiary hearing.

Petitioner rejects the notion that Dr. London "cherry picked" the interviews to demonstrate how improper and coercive they were. Her report contains page after page of excerpts from those interviews.

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[5] Respondent attacks Dr. London's criticism of Dr. Carlson's testimony that "some aspects of it [CSAAS] will always be there. Dr. London stated that Carlson's testimony was unsupported by contemporary scientific literature. (Return, 6:18-21.) Although Dr. Carlson cited instances in which CSAAS would not appear, such as sexual abuse at camp or a single incident of abuse by a father, those scenarios were not before the jury. This case involved alleged in-house continual sexual abuse and, as the Return concedes, Dr. Carlson did state that in those circumstances, some aspects of CSAAS "will always appear."

A few points are specifically worth noting. The November 16, 2000 interviews were not the first occasion in which the police had questioned the children, but in the earlier interviews (when the children said nothing about anyone other than Albert abusing them) the police did not suspect Petitioner. In those earlier interviews, not having been prompted to do so, the children never accused Petitioner. On November 16, 2000, the detectives questioned the children for hours before the children ever accused Larry Pohlschneider of abuse. On that day, the children arrived at the police station around 2:20 p.m. (Return, Exh. 10 at p. 24.) According to police, sometime between 2:20 and 4:39, during police questioning, Ashley and Ethel accused Petitioner of abuse. (*Id.* at pp. 24-25.) That no recording of those earlier questioning exists is of great concern to Professor London. She states:

> An overriding concern that I have about the credibility of the children's report in the present case *is what we do not see*. All of the children repeatedly denied any abuse by Larry, including during an interview at Ashley and Ethel's school the same day that the allegations eventually emerged. The children were also interviewed at the police department and continued to deny allegations during interviews that were not recorded.
>
> It was only after the denials turned to allegations that the interviewers brought the children up to the "Victim-Witness: facility and recorded the continued interviews. What kind of questions helped turn the children's denials of abuse against Larry into assents? These are the most important interviews to assess but these interviews are not recorded."

(Exh. L at 39.)[6]

The children's recorded interviews did not occur right away. David's recorded interview ended at 6:06 p.m. (Return, Exh. 9c at 25:26-27.) The videotaped interview of Ethel began at 8:16 p.m. and ended at 8:52. (Return, Exh. 9b at 2:1-5, 31:15.) Ashley's interview did not begin until 9:00 p.m. and it ended at 9:34 p.m. (Return, Exh. 9a at 2:6, 2:12.) Thus, these reports of the timing of the children's interviews demonstrate how long the children were detained by the police and subjected to intense

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[6] The interviews may have been recorded on audiotapes, but the tapes are missing.

questioning. At the outset of Ethel's interview the detectives discuss food, Detective Flowerdew remarking how good the hamburgers were. (Return, Exh. 9b at 2:11-12.) This provides circumstantial support for the now-adult children's assertions that they were questioned for hours without being fed.

Respondent does not contest that the detectives were biased when they began their interviews, as they were relying on the report of PA Relyea that the children had been molested after June 2000, *i.e.,* after Albert Harris left the state. That bias – which was understandable given that the police accepted Relyea's assertions as true – motivated the detectives to continue questioning the children until they accused Petitioner of abuse. Nor does Respondent contest the detectives' failure to follow-up on numerous significant contradictions among the children's statements.[7] These contradictory statements occurred within weeks of the last alleged abuse.

While the Return and supporting declarations attest to the use of proper interviewing techniques, Respondent does not address in any detail the plethora of examples of improper techniques chronicled by Professor London. One example suffices to undermine the defenses Respondent now advances. Recall that on October 8, 2000, Ceandy Curry, acting on Petitioner urging, reported to the police that she and Petitioner had found a nude photographs of two of the children. The children stated Albert Harris had taken the photograph and he was subsequently arrested and pled guilty to child sexual abuse.

Detective Magrini was part of the team that was investigating Albert Harris and knew that Ashley claimed Harris had taken the nude photos. Nonetheless, Detective Magrini interrogated Ashley about the nude photographs, challenging her denial that Larry ever took pictures. Detective Magrini's bias and disregard of the record clearly shaped Ashley's responses. The following colloquy captures the detective's

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[7] Each girl testified that each time she was abused, her sister was abused as well. Yet, Ethel stated that her abuse began on July 9 and ended prior to October 8, 2000, while Ashley stated she first witnessed Petitioner abuse Ethel around October 16, 2000 and

unrelenting attempt to extract accusations against Petitioner from the children:

> EM: Did Larry ever take pictures?
> AH: No.
> EM: No. Remember that picture that you guys found that you gave to the Police Officer (inaudible)?
> AH: Yea.
> EM: Who took that photo?
> AH: I actually thought it was Albert, but now that he's like Daddy Albert didn't like know that stuff, I really don't remember who it was.
> EM: ***I don't think Albert took it***.

(Return, Exh. 9a, 24:17-24 (Emphasis added).)

> EM: ***I don't think Albert took that picture. So if Albert didn't take it, who took it?***
> AH: A possibility is Larry.

(Return, Exh. 9a, 25:24-25 (Emphasis added).)

> EM: You think Larry might have taken it?
> AH: Why do you think that?
> AH: ***Because you say Albert didn't do it.***

(Return, Exh. 9a, 26:1-4 (emphasis added).)

In light of the obvious coercion and suggestiveness demonstrated by this single, highly typical, example, Respondent's general denial that the officers ran afoul of appropriate questioning methods is simply insufficient to overcome the *prima facie* assertion of error. The unreliable evidence had a prejudicial effect on the jury, because it provided the only direct evidence that Petitioner had abused the children. In its absence, in light of the children's exonerating testimony, he almost certainly would have been acquitted.

2. Dr. Michael Cassidy's Declaration Further Undermines The Reliability of the Children's Pretrial Accusations.

Respondent makes the irrelevant assertion that oncologist Michael Cassidy, MD

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two more times prior to November 1, 2000. David said he saw Petitioner abuse the girls; Ethel stated David was outside.

never examined Petitioner. Dr. Cassidy explicitly noted that fact in his declaration. It also is true that Dr. Cassidy could only describe what his experience and the literature in his field described as typical or common reactions to the chemotherapy Petitioner received in late May and on June 29, 2000. Dr. Cassidy's declaration is still highly relevant to the Court's assessment of the reliability of the children's pretrial accusations.[8]

Significantly, the People do not address, much less counter, Dr. Cassidy's statements describing the reactions usually associated with the two weeks following the same chemotherapy cocktail Mr. Pohlschneider received:

> "[T]he effects of the infusion of VIP on Mr. Pohlschneider would have been most severe during the two weeks following the chemotherapy infusions. Thus, the nausea, fatigue and lack of sexual drive would have been particularly severe during the two weeks following Mr. Pohlschneider's third infusion which probably was administered during the last days of May or the early days of June 2000 and during the two weeks following his fourth and final infusion which was administered on June 29, 2000.

(Exh. O at ¶ 18g.)

It was alleged that Petitioner first assaulted David on or about June 9, 2000 (RT 419:17-19) and first assaulted Ethel on or about July 9, 2000. (RT 419:4-7.) Thus, each of those assaults occurred within ten days of a chemotherapy infusion, as established by Petitioner's medical records; a time when the effects of the chemotherapy would have been most severe. Dr. Cassidy's statements, if accepted by the Court, cast grave doubts on the reliability of the children's testimony and undermine confidence in the verdict.

Moreover, Dr. Cassidy's description of reactions to chemotherapy corroborated testimony from family members and a caregiver who described the debilitation resulting from Petitioner's treatment. As Dr. Cassidy notes, it would not have been

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[8] Respondent, of course, has no problem with the use of Dr. Carlson's CSAAS testimony, despite the fact that Dr. Carlson did not interview the children but only described reactions to child abuse and what he had seen "many times."

terribly unusual for Petitioner to need a caregiver as late as mid-August 2000.[9]

The People make much of Detective Magrini's testimony that Ceandy Curry claimed during a December 2000 telephone call to the detective that Petitioner could maintain an erection for five minutes. Putting aside Curry's questionable credibility, there was no evidence about what time period she was describing. Moreover, allegations were that Petitioner (like Albert Harris) had engaged in serial sexual intercourse, assaulting the two girls one after each other multiple times. The allegations were of extreme and repeated physical abuse. Yet, the undisputed medical evidence is totally inconsistent with Petitioner being able to perpetrate that level of abuse. Magrini's testimony does nothing to contradict Dr. Cassidy.

In sum, the evidence provided by Dr. Cassidy further undermines the reliability of the children's pretrial statements. If such evidence had been introduced at the time of trial, it would have deterred the jury from relying on those accusations, and it is reasonably probable that they would have returned a verdict more favorable to Petitioner.

The deeply unreliable, coerced pretrial statements, alone would require reversal of Petitioner's convictions because they were substantially material or probative on the issue of his guilt. (*In re Hall*, *supra*, 30 Cal.3d at p. 424.) The Court should also consider the cumulative effect of the pervasive use of false and/or highly misleading evidence throughout Petitioner's trial. A conviction that rests largely on unreliable evidence violates due process. (*California v. Green* (1970) 399 U.S. 149, 189; *Simmons v. United States* (1968) 390 U.S. 377; *People v. Contreras* (1993) 17 Cal. App. 4th 813, 819.)

III. RESPONDENT HAS FAILED TO PRODUCE EVIDENCE SUFFICIENT TO REFUTE PETITIONER'S CLAIM THAT HE RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL AT HIS TRIAL.

[9] Contrary to respondent's contention, there is no contradiction between Dr. Cassidy's statement that it would be unusual to expect Mr. Pohlschneider to have needed a caregiver more than two months after his treatment and Mr. Pohlschneider's testimony that he could go to the bathroom in September. Being able to walk to the bathroom does not mean that Mr. Pohlschneider was entirely able to care for himself.

A. This Court Can Grant Relief on The Ineffective Assistance of Counsel Claim Without Holding An Evidentiary Hearing.

This court may issue a writ of habeas corpus on Petitioner's ineffective assistance of counsel claim based on the undisputed evidence that trial counsel (1) failed to investigate or retain an expert to refute the prosecution's medical evidence; (2) failed to investigate or retain an expert to refute the prosecution's CSAAS evidence to seek an instruction limiting CSAAS evidence; (3) failed to investigate or retain an expert to demonstrate the impropriety of the police interrogation techniques used to extract the pretrial accusations of Petitioner; and (4) failed to investigate or retain an expert to testify about effects of the chemotherapy Petitioner received. Respondent concedes that trial counsel failed to consult with or retain any of the above-listed experts. The trial record and the unrebutted written submissions by Dr. Crawford-Jakubiak, Professor London (on CSAAS) and Michael Rothschild support a finding of ineffective assistance and the prejudice necessary to grant the writ.

In a habeas corpus proceeding, the court is authorized to grant or deny a petition on the strength of the evidence presented in support of the Petition and the Return, where that evidence leaves unrebutted a claim or defense raised by one of the parties. (*People v. Romero* (1994) 8 Cal.4th 728.) Thus, In *In re Hill* (2011) 198 Cal.App.4th 1008, the court did not remand for an evidentiary hearing on the ineffective assistance of counsel claim, but reversed the conviction based on the record of the trial and declarations by trial counsel, a medical expert and a criminal defense expert. (*Hill, supra*, 198 Cal.App.4th 1008, 1017-1018, 1030.) Here, the Court has not only the declarations of a medical expert and criminal defense attorney, but also the declaration and report of Kamala London, Ph.D. regarding CSAAS and the declaration of Michael Cassidy, M.D. Thus, in the absence of evidence from Respondent sufficient to create a dispute of material facts, the Court need not hold such a hearing, but instead may grant relief based upon the existing record of this proceeding.

Respondent's attempt to justify trial counsel's utter abdication of his responsibility as an advocate fails. The argument that Mr. Hilligan best served

Petitioner's legal interests by eschewing investigations into the use of expert testimony and obtaining the earliest possible trial date, 69 days after Petitioner's arrest, is simply ludicrous in light of the evidence presented at Petitioner's trial. Only 75 days elapsed from Petitioner's arrest to the jury's verdict. No rational defense attorney could justify failure to consult with any scientific or medical experts under the circumstances presented in this case.

Before discussing each of trial counsel's prejudicial errors, we note that the need for an expert on two of the issues -- the CSAAS testimony and the physical examination testimony – is irrefutable. It is indisputable that both the indicia of CSAAS described by Dr. Carlson and the indicia of recent sexual abuse found by PA. Relyea are at least as consistent with the absence of abuse as with abuse. (See *Hill*, *supra*, 198 Cal.App.4th at p. 1017-1018.) The jury had no way to learn those critical facts other than from the testimony of defense experts (or, at a minimum, the informed preparation of scientifically supported cross-examinations) and the Court therefore may easily find prejudice as to those claims.

B. Respondent's Attempt To Justify Trial Counsel's Failure to Consult With Medical or Scientific Experts As A "Reasonable Strategic Decision" Is Unavailing.

The primary thrust of the Respondent's defense of the ineffective assistance of counsel claim is that trial counsel believed it was in his client's best interest to have the earliest possible trial so that the children would not, over time, change their testimony and accuse Petitioner of abuse at trial. Respondent's reliance on this transparently self-serving justification is misplaced. An unreasonable "tactical" decision, or one based upon insufficient investigation of the case, cannot be used to justify constitutionally deficient performance. Failure to consult with a relevant expert, when such expertise is critical to defending a claim, is not reasonable within the meaning of *Strickland v. Washington* (1984) 466 U.S. 668, 686-87. As the Supreme Court recently reaffirmed, "[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Hinton v. Alabama* (2014) ___ U.S. ___, 134 S.Ct., 1081, 1088 (citing *Strickland.*) *Hinton* vacated a death penalty sentence and murder

conviction on the basis of trial counsel's failure to consult with an expert.

1. Counsel's Failure to Consult with Medical and Scientific Experts In A Case Dependent on Medical and Psychological "Syndrome" Evidence Was Objectively Unreasonable.

The Return argues that Mr. Hilligan demanded a trial at the earliest possible opportunity because he would have known from discovery that the victims were recanting and counter-recanting in the days leading up to trial. (Return at 14.) The record indicates, however, that Mr. Hilligan would not have learned from discovery about the children's retractions until January 23, 2001, just one day before trial began, when the January 18 police report was provided to him. (RT 265: 26-266:6.) A copy is attached as Exhibit S.)

On January 24, 2001, the prosecution filed an *In Limine* Motion To Admit Expert Testimony Re: Child Sexual Abuse Accommodation Syndrome. (CSAAS). (CT 25-26.) The motion stated that the prosecution would be calling Dr. Ray Carlson as their expert. (CT 25.) The record therefore refutes Respondent's claim that Mr. Hilligan's actions and inaction were based on information he gleaned during discovery. His decisions to waive the preliminary hearing; to proceed to trial faster than in any case he had handled (Return, Exh. 5 at p. 2); and to forswear retaining any experts cannot have been based on the discovery he obtained from the prosecution at the eve of trial – two months ***after*** he had indicated that he would proceed to trial on a "time not waived" basis. Instead, it is clear that Mr. Hilligan's decision to obtain the earliest possible trial date preceded his knowledge about the children's recantations and, therefore, was not the product of informed trial strategy.

Moreover, Mr. Hilligan was admittedly familiar with Dr. Carlson and knew that the prosecution would counter the children's retractions with testimony that the children's retractions were actually *consistent* with the behavior of children who had sustained sexual abuse. (RT 39:10-12.) Yet, Mr. Hilligan did not seek a continuance to obtain an expert to counter the Carlson testimony and rehabilitate the children. Assuming that Mr. Hilligan learned of the children's retractions prior to January 23, 2001, he would have known at that time that the prosecution would

retain Dr. Carlson or another CSAAS expert to counter the children's retractions. Mr. Hilligan planned to assert his client's medical condition as part of his defense, yet he chose not to consult with Petitioner's oncologist or any other medical expert. Truly, he did nothing to prepare a meaningful defense for his client in light of the significance of medical and scientific evidence to the trial.

Whatever excuse Respondent may advance for Mr. Hilligan's failure to *retain* experts to at least counter the prosecution's CSAAS and medical evidence or to produce his own evidence in support of Petitioner's weak condition and poor health, Respondent has advanced no rational explanation for trial counsel's failure, at a minimum, *to investigate* the relevant science addressing the prosecution's contemplated CSAAS and medical testimony or the effects of Petitioner's chemotherapy. Such investigations would *not* necessarily have delayed the trial.

In re Hill, supra, was a childhood sexual abuse case in which the court held that trial counsel rendered deficient assistance to Mr. Hill by failing to consult and retain a medical expert. The court explained that any tactical or strategic choice must be informed by trial counsel's ***prior*** investigation:

> [A criminal defendant] can also reasonably expect that before counsel undertakes to act at all he will make a rational and informed decision on strategy and tactics founded on adequate investigation and preparation. If counsel fails to make such a decision, his action—no matter how unobjectionable in the abstract—is professionally deficient. Criminal defense counsel has the duty to investigate carefully all defenses of fact and of law that may be available to the defendant. The defendant can reasonably expect that before counsel undertakes to act, or not to act, counsel will make a rational and informed decision on strategy and tactics founded on adequate investigation and preparation. [T]o render reasonably competent assistance, an attorney bears certain basic responsibilities, including the *investigation of available defenses*. [S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. [A] *defense attorney who fails to investigate potentially exculpatory evidence, including evidence that might be used to impeach key prosecution witnesses, renders deficient representation.* [Citations.] California case law makes clear that counsel has an *obligation to investigate all*

> *possible defenses* and should not select a defense strategy without first carrying out an adequate investigation."
>
> ¶ [A] *defense attorney who fails to investigate potentially exculpatory evidence, including evidence that might be used to impeach key prosecution witnesses, renders deficient representation.* California case law makes clear that counsel has an *obligation to investigate all possible defenses* and should not select a defense strategy without first carrying out an adequate investigation.

(*In Re Hill*, *supra*, 198 Cal.App.4th at 1016-17, 1026 (italics in original; internal citations and quotation marks omitted.).)

Similarly, in *King v. Evans* (N.D. Cal. 2009) 621 F.Supp.2d 850, 860 the federal district court granted a petition for writ of habeas corpus, finding the petitioner had received ineffective assistance of counsel. That court reiterated the necessity of calling a defense expert in a child sexual assault case, noting that the need for a medical expert was especially compelling in this case because of the need to "interpret ambiguous physical evidence of purported sexual abuse." (*King, supra,* 621 F.Supp.2d at p. 860.) The *King* court also noted that "[W]hen the prosecutor's expert witness testifies about pivotal evidence or directly contradicts the defense theory, defense counsel's failure to present expert testimony on that matter may constitute deficient performance." (*Id.*)

Mr. Hilligan's limited cross examinations of Dr. Carlson, his failure to seek a limiting instruction on CSAAS, his failure to obtain the colposcopy photographs, failure to confront Dr. Vovakes and PA Relyea with scientific research which undermined their testimony; and failure to cross-examine the detectives about their interviewing techniques confirm that trial counsel failed to conduct an adequate investigation before embarking on a strategy (assuming such strategy existed) of obtaining the earliest possible trial date. (Exh. F at ¶ 33 ("[I]t would have been necessary for Mr. Hilligan, at the very minimum to have consulted a physician experienced in evaluating children who had disclosed that they had been sexually abused. Mr. Hilligan's cross examination indicated to me that he had obtained no such consultation.").)

2. But For Defense Counsel's Inadequate Performance, There Is A Reasonable Probability That Petitioner's Trial Would Have Had a More Favorable Outcome.

Respondent's reliance on *In re Avena* (1996) 12 Cal.4th 694, 728 is misplaced because in that case, there was overwhelming evidence of guilt. There, the court held that although defense counsel had provided only a "minimal" defense, the petitioner had failed to show prejudice. The Court noted, that it was "undisputed that he [trial counsel] was faced with a defendant with no apparent defense who had confessed to two first degree murders as well as a series of other serious crimes." In contrast, while Mr. Hilligan's efforts also were minimal, his client had the potential of a robust and successful defense. Moreover, substantial evidence existed, and exists, that his client was innocent.

Petitioner has shown that it is reasonably probable that he would have obtained a more favorable result had counsel not performed deficiently. (*In re Hill*, *supra*, 198 Cal.App.4th at p. 1030.) The Court may issue the writ based on the aggregate of Petitioner's claims that Mr. Hilligan rendered ineffective assistance (1) by failing to consult and retain a medical expert to counter the testimony of Dr. Vovakes and PA Relyea (2) by failing to consult and retain an expert to counter Dr. Carlson's CSAAS testimony and (3) by failing to consult and retain an oncologist to testify about the effects on a typical patient of the chemotherapy Petitioner received. Following *In re Hill*, the Court, without an evidentiary hearing, may decide that trial counsel failed to render effective assistance and thereby prejudiced Petitioner's right to a fair trial.

It is reasonably probable that testimony by Dr. Crawford-Jakubiak or another physician that no physical evidence existed that David had sustained sexual abuse after June 2000 and that the physical evidence did not show that the girls could have sustained such abuse after June 2000 would have resulted in a more favorable trial outcome for Mr. Pohlschneider. Moreover, as in *In re Hill*, the undermining of PA Relyea's testimony re David likely would have had a spillover effect on the prosecution's case against the girls. We cannot repeat enough that it was PA Relyea's

report that triggered the police investigation of Larry Pohlschneider.

Added to the failure to call a medical expert, the failure to retain an expert on CSAAS and an oncologist to address the effects of chemotherapy make the likelihood of a better outcome absent Mr. Hilligan's deficient performance even more likely. (*See, e.g. In re Jones* (1996) 13 Cal.4th 552, 588 ("[T]he cumulative effect of the ineffective assistance provided by defense counsel was prejudicial under the *Strickland* standard, and on that basis the judgment must be vacated in its entirety.").)

Trial counsel's performance was so deficient that it led to such a fundamentally unfair trial that no judge or jury would have convicted Petitioner but for that poor performance. PA Relyea's false testimony, that findings made during David's examination could only have been caused by sexual molestation was the initial falling domino that led all the remaining dominos to tumble. Petitioner's criminal defense expert, Michael Rothschild, exceptionally experienced in the defense of sexual abuse cases and active in the CLE efforts of the criminal defense bar, concludes his review of trial counsel's failure to consult or retain a medical expert with this comment: "Based on my review of the record and my personal experience, I can confidently state that had a qualified expert testified on Mr. Pohlschneider's behalf and detailed the defects in PA Relyea's findings and testimony, the jury would probably would have found that a reasonable doubt existed respecting the defendant's guilt." (Exh. P at p. 19.)

Testimony by a defense CSAAS expert would have explained to the jury that the children's recantations were ***not*** consistent with sexual abuse, and demonstrated that children who make initial accusations of sexual abuse after proper questioning very rarely recant those initial accusations. Michael Rothschild notes that trial counsel's failure to challenge the CSAAS testimony was "devastating (Exh.P at p. 8) and emphasizes, "**The prejudicial effect of the failure of Mr. Pohlschneider's trial counsel to consult or retain an expert cannot be overstated." (**Exh. P at 8(emphasis in original).) A limiting instruction would have buttressed that testimony, informing the jury that CSAAS research "begins with the assumption a molestation has occurred," but the jury "is to presume the defendant is innocent." (CALJIC 10:64.) The court further

would have instructed the jury that the jury may not treat the prosecution's CSAAS testimony as "proof that the alleged victim's molestation is true." (*Id.*)

Had the jury heard testimony from an oncologist that a person receiving Larry Pohlschneider's chemotherapy would have been exceptionally weak during the two weeks following a chemotherapy infusion, the jury likely would have found that Petitioner did not sexually abuse David and Ethel during the first days of June and July, respectively, *i.e.*, within two weeks of chemotherapy. Testimony by an expert on questioning children who may have been abused would have cast further doubt on the prosecution's case.

Mr. Rothschild states unequivocally that absent what he describes as Mr. Hilligan's "**Abject failure to properly represent his client before the trial jury**" (Exh. P at p. 4), a jury would not have convicted Mr. Pohlschneider. He states: **There is far more than a reasonable probability that, absent errors in both preparation for trial and the conduct of trial by attorney Thomas J. Hilligan, the jury would have had a reasonable doubt respecting Mr. Pohlschneider's guilt.** (Exh. P at p. 4 (emphasis in original).)

Taking the record which would have been created by competent counsel, this court may reasonably find that no jury or judge hearing the entire case would have concluded that the prosecution had proven Petitioner's guilt beyond of reasonable doubt.

III. THE PETITION WAS NOT UNTIMELY AND ANY UNTIMELINESS WAS EXCUSED.

Petitioner presented his claims in habeas corpus as soon as he had developed the necessary support for them. Petitioner has been in continuous custody from the date of his arrest on these charges through the present. He is and has been, at all relevant times, indigent and unable to retain counsel, investigators, or experts. Deeply prejudiced in his ability to obtain necessary medical evidence by his trial attorney's incompetence and his own incarceration, Petitioner required the support of counsel and medical and scientific experts to advance his claims. Ironically, the fact that the children recanted at trial,

testifying truthfully that Petitioner was innocent, actually increased the burden on Mr. Pohlschneider to unearth additional evidence of his innocence. Further investigation was required to find the improper procedures used by the police, the absence of any scientific bases for the medical reports that triggered the investigation of Mr. Pohlschneider, and the faulty science of the CSAAS expert. (*In re Gallego* (1998) 18 Cal.4th 825, 833.) Unlike cases in which a habeas corpus petitioner succeeds in establishing that another person committed a crime that did occur, here Petitioner was required to raise a prima facie case that no crime actually had occurred and therefore was required to go beyond the trial recantations of the children to establish his innocence.

The Northern California Innocence Project pursued Mr. Pohlschneider's investigation in as timely a fashion as possible, delayed by the difficulty of locating David prior to his majority and the fact that Ashley and Ethel both proved difficult to find. (Attached is Exhibit T, Supplemental Declaration of Maitreya Badami.) The children's permission was necessary in order to obtain access to their medical records and, critically, the photographic evidence that would allow a medical expert to review the validity of the prosecution's medical experts' opinions. (Exh. T.) NCIP does not pursue litigation in cases in which we have not developed substantial evidence of factual innocence and each of the steps in the investigation was necessary. (*Id.*) The petition was filed as soon as reasonably possible once all necessary evidence had been compiled. Neither Petitioner nor his counsel have any reason to delay action in this case. Our innocent client continues to sit in prison, a condition we would all greatly like to remedy.

Assuming arguendo that Petitioner has failed to justify the delay in the filing of this, his ***first*** petition, Petitioner notes that the California Supreme Court repeatedly has held that even when a petitioner has not shown good cause for the delay, the court will excuse such delay if "(i) that error of constitutional magnitude led to a trial that was so fundamentally unfair that absent the error no reasonable judge or jury would have convicted the petitioner; (ii) that the petitioner is actually innocent of the crime or

crimes of which he or she was convicted."[10] (*In re Sanders* (1999) 21 Cal.4th 697, 704;. *see also, In re Clark* (1993) 5 Cal.4th 750, 759.) Petitioner has made a substantial showing that he is actually innocent and, but for his counsel's many acts of incompetence and neglect, he would have been acquitted. (See discussion, *ante*, at pp.24-26.)

Petitioner understands that a court's major concern regarding a delayed habeas corpus petition is prejudice that may result from missing witnesses, physical evidence and faded memories. Those concerns are not present here. The now-adult children are available to testify about what occurred in the summer and fall of 2000 and what caused them to retract their initial accusations and then re-allege them after trial. Both sides have access to the coloscopic photographs, objective evidence which may be examined by any expert the prosecution may choose. Note also that both Dr. Carlson's CSAAS testimony and the Declaration of Michael Cassidy, M.D. were not based on an examination of either the children (Dr. Carlson) or Petitioner (Dr. Cassidy). Similarly, there is a transcript of the recorded children's interviews. It appears that the detectives' interviews of the children earlier in the day on November 16, 2000 had been lost by the date of trial. The police made no transcript of those interviews. Accordingly, the prosecution suffers no prejudice due to the passage of time.

CONCLUSION

Petitioner Larry Pohlschneider has for fourteen years suffered under an unwarranted conviction resulting from the manifest deprivation of his fundamental rights at trial. Although he was the person who reported the sexual abuse of the children by the actual perpetrator, due to false medical evidence, investigators came to believe that he had also molested the children. Due to that bias, the investigators conducted

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[10] Two other grounds for permitting Petitioner to proceed not withstanding an unexcused delay are not relevant here: "(iii) that the death penalty was imposed by a sentencing authority that had such a grossly misleading profile of the petitioner before it that, absent the trial error or omission, no reasonable judge or jury would have imposed a sentence of death; or (iv) that the petitioner was convicted or sentenced under an invalid statute." (*In re Sanders, supra*, 21 Cal.4th at p. 704.)

improperly coercive interviews of the already traumatized children, resulting in unreliable and false accusations against Petitioner. Although the children recanted their accusations and testified truthfully at Petitioner's trial, the prosecution undermined their trial testimony by relying upon misleading and scientifically unfounded psychological "syndrome" evidence to argue that their recantations were evidence that the children had been molested.

In light of that improperly used, misleading scientific evidence and the objectively false medical testimony, Petitioner had a reasonable expectation that counsel would prepare thoroughly and consult with critical medical and scientific experts. Counsel utterly abdicated his role as a zealous advocate, proceeding to trial in haste, waiving preliminary hearing, and consulting with no experts to prepare a defense. Despite the fact that his client had been undergoing debilitating chemotherapy treatments for testicular cancer at the time he allegedly began to molest three children, trial counsel did not see fit to consult with an oncologist. In light of counsel's utter abdication of his duty to provide reasonably competent representation, Petitioner was convicted. All of this, despite his factual innocence, which all three children, now grown and living entirely apart from one another, continue to profess. The only way this perfect storm of a wrongful conviction could have occurred is as the result of a series of grave violations of Petitioner's fundamental constitutional rights.

For the foregoing reasons, Petitioner respectfully submits that the petition for writ of habeas corpus must issue, and his convictions must be vacated. At a minimum, this Court must order an evidentiary hearing to determine the disputed material issues of fact that support Petitioner's claims without undue delay.

Respectfully submitted,

Northern California Innocence Project at
Santa Clara University School of Law

Maitreya Badami
Northern California Innocence Project,
for Petitioner,
Larry Pohlschneider

PROOF OF SERVICE

I declare that I am over the age of eighteen years, not a party to this action, and my business address is 900 Lafayette Street, Suite l05, Santa Clara, California, 95050.

On the date shown below I served the enclosed PETITIONER'S DENIAL IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS by United States mail, postage pre-paid, on the following:

Office of the Tehama County District Attorney
Attn: Allessio C. Larrabee, Deputy District Attorney
444 Oak Street - Room L
Red Bluff, CA 96080

Attorney General of California
1300 I Street
Sacramento, CA 95814-2963

Office of the San Bernadino County District Attorney
316 N. Mt. View Ave.
San Bernardino, CA 92415-0004

I declare under penalty of perjury under the laws of California that the foregoing is true and correct.

Executed on August 5, 2015, at Santa Clara, California.

Maitreya Badami