SUPREME COURT OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,	) Supreme Court
	) No. S249274
Plaintiff and Respondent,	)
	) Court of Appeal
v.	) No. E066388
	)
KIMBERLY LOUISE LONG,	) Superior Court
	) No. RIF113354
Defendant and Petitioner.	)
	)

APPEAL FROM THE SUPERIOR COURT OF RIVERSIDE COUNTY

Honorable Patrick F. Magers, Judge

PETITIONER'S BRIEF ON THE MERITS

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ISSUES PRESENTED

(1) Did defense counsel render ineffective assistance by failing to consult a qualified expert on determining time of death and failing to present evidence regarding defendant's clothing around the time of the crime?

(2) Did the decision of the Court of Appeal adhere to the controlling standards of appellate review?

ARGUMENT SUMMARY

For over 15 years, defendant Kimberly Long has consistently maintained her innocence of the second degree murder of her live in boyfriend, Oswaldo Conde. Defendant had been dating Conde for only six months when she found him in the early morning hours of October 6, 2003, lying motionless on the couch with fatal head wounds. It was a bloody crime scene in which the murderer would necessarily have gotten blood on their person during the killing, as there was blood splatter in a 360 degree direction around the room. In a murder case where there were no eyewitnesses to the crime, no confession, no murder weapon identified or found, and absolutely no forensic evidence tying defendant to the crime, it was critical that defense counsel present affirmative evidence that defendant could not, and did not, commit the crime. He failed to do so.

Defense counsel had available forensic pathologists who would have testified that, based upon all of the objective evidence regarding the victim's time of death, the victim was killed while defendant had an alibi and, therefore, she could not have committed the murder. In addition, the crime scene proved, and the prosecution argued, that the killer would necessarily have gotten blood on their person during the killing. Defense counsel had available to him evidence to prove defendant never changed her clothes that night and that the clothes she had worn the entire night had no blood on them, which proved she could have not have committed the murder. Yet defense counsel failed to investigate or prove either of these defenses.

At an evidentiary hearing ordered by this Court, defense counsel testified he had no valid tactical reason for his failure to pursue either of these defenses. A *Strickland* expert testified that an objectively reasonable defense attorney would have investigated and presented these defenses. After presiding over both of defendant's jury trials, and hearing all of the evidence presented at the evidentiary hearing, the trial court found defense counsel performed ineffectively and prejudicially harmed defendant when he failed to consult and present a qualified time of death expert, and failed to prove that, despite it being an incredibly bloody crime scene, defendant had no blood on her person or her clothes, and in fact had not changed her clothes that night.

The Court of Appeal reversed the trial court's ruling in an opinion which failed to adhere to the controlling standards of appellate review, as it did not give proper deference to the trial court's factual findings which were supported by substantial evidence, it did not apply the appropriate legal standards to the substantial evidence presented, and it often conflicted with well-established law. In doing so, the Court of Appeal erroneously reversed the decision of the trial court. In light of the true facts, and inferences drawn therefrom, along with established law, this Court should reverse and reinstate the trial court's decision granting defendant's petition for writ of habeas corpus.

STATEMENT OF FACTS

A. Facts From Defendant's Jury Trial

Defendant incorporates the statement of facts of the crime from the underlying petition for writ of habeas corpus filed in case number S224088, which are found in the Second Supplemental Clerk's Transcript, pages 28-52.

B. Facts From Defendant's Evidentiary Hearing[1]

1. Stipulations

The parties stipulated the trial court could take judicial notice of and consider the testimony, documents, and decisions in the record from defendant's prior trial in RIF113354, and the resulting post-conviction appeal and writ proceedings. (6 C.T. 1601-1603; 1 R.T. 178.) The trial court took judicial notice of the entire trial record in Riverside Superior Court Case number RIF113354, and Court of Appeal Case number E039986, and reviewed the October 8 and 9th video interviews of Jeff Dills. (6 C.T. 1608; 1 R.T. 178, 4 R.T. 411.)

2. Testimony of Pathologist, Dr. Zhongxue Hua, M.D.

Dr. Zhongxue Hua, M.D., is a forensic pathologist and neuropathologist; he is currently a forensic pathologist in Rockland and Nothampton County, New York. (1 R.T. 83-84.) He has been staff at the Jacobi Medical Center and North Central Bronx Hospital at the Albert Einstein College of Medicine where he practices neuropathology and has taught for 15

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1 For the purpose of brevity, defendant has only presented the evidentiary hearing evidence that is relevant to the time of death and clothes issues.

years. (1 R.T. 84) Dr. Hua has personally conducted at least 3,000 autopsies, and has reviewed at least 3,000 autopsies of other staff doctors. (1 R.T. 85.)

When at a crime scene, in order to estimate a time of death, Dr. Hua looks at multiple factors—scene environment, look of the body, room temperature, body temperature, if the body has any rigor, or stiffness; any lividity or livor in the body; or any evidence of decomposition. (1 R.T. 87.) Whatever estimation is initially made at the scene is then corroborated with a review of the autopsy findings. (1 R.T. 88.)

Lividity means a purplish discoloration of the skin due to the blood settling in the lower extremities. (1 R.T. 90.) In Dr. Hua's experience, a trained person should see lividity half an hour to an hour after death. (1 R.T. 92.)

After death, lividity depends on the position the body was in when it died. (1 R.T. 90.) If the body is lying on a bed, face up, the blood settles at the back of the body. (1 R.T. 90.) Non-fixed lividity means the purplish discoloration disappears if the area where lividity has set in is compressed. (1 R.T. 90-91.) Fixed lividity is when the purplish discoloration stays as is when compressed. (1 R.T. 91.) Lividity cannot become fixed in a matter of hours—it takes a minimum of eight to 12 hours to develop, and could take up to 24 hours after death to be set. (1 R.T. 91.)

Body decomposition and postmortem changes depend on what the body temperature was at death. (1 R.T. 89.) A temperature range of 98.5- 98.6 degrees is considered a normal body temperature in an indoor setting, and the body would lose about one to two degrees per hour. (1 R.T. 89-90.) If the

body was at a higher temperature than normal before death, the lividity would become fixed much earlier than usual. (1 R.T. 91.) Even then, the earliest time lividity would become fixed would be approximately eight to 12 hours after death. (1 R.T. 91.) Lividity is more difficult to observe in a dark skinned person. (1 R.T. 96.) Rigor, or rigidity can be seen as early as half an hour to one hour after death, but only in small muscles like the jaw, fingers, or joint areas. (1 R.T. 93-94.) After two hours, rigor can usually be seen in the big volume muscles, such as the elbow, thighs, and biceps. (1 R.T. 94.) Usually within eight to 12 hours after death, the body has reached its maximum stiffness, or "marked rigor". (1 R.T. 94.) After it reaches maximum rigor, the body will then take approximately the same amount of time (eight to 12 hours) for the rigor to break down. (1 R.T. 94-96.)

In preparation for his testimony, Dr. Hua reviewed numerous documents including the weather report for October 6, 2003, the Court of Appeal opinion following defendant's conviction, a transcript of the 911 call placed by defendant, crime scene photographs, firefighter Bruce Dahl's testimony, paramedic John Wilson's testimony, defendant's testimony, medical examiner Dr. Joseph Cohen's testimony, the victim's cell phone records, the coroner's investigation report, the autopsy report, autopsy photographs, the victim's toxicology report, transcripts and statements of neighbors, a declaration of Dr. Harry Bonnell, and reports by Dr. Cyril Wecht and Dr. Joseph Cohen. (1 R.T. 98.)

Based upon all this information and his training and experience, Dr. Hua estimated Conde's death occurred before 1:20 a.m. (1 R.T. 99.) This

determination was based on several factors—the EMS first responders' examination noted that, at 2:20 a.m., the victim's body was already cold, and they noted lividity and rigidity. (1 R.T. 99.) The EMS examination noticed that the arm area, which is a medium sized muscle, already had rigor. This could not happen within a matter of 30 minutes after death. (1 R.T. 103.)

Further, the deputy coroner's report indicated that, at 5:03 a.m., the victim's body already had almost fixed lividity, which at a minimum would have taken more than four hours to develop. (1 R.T. 99.) Also, at 5:03 a.m. no rigor was noted by the deputy coroner, which was significantly different than that the EMS examination which noted rigor. (1 R.T. 100.) The deputy coroner at the scene reported that at 5:03 a.m., lividity was almost fixed, and that the body had no rigor. (1 R.T. 103, 122.) Fixed lividity takes a minimum of eight to 12 hours after death to set, with a conservative estimate being eight hours. (1 R.T. 111-120.) It is nearly impossible for even an untrained person to not notice rigor in a body two hours after death. (1 R.T. 123.) Given all the information and evidence available to Dr. Hua, he believed it was extremely unlikely, almost impossible, for rigor not to have started three to four hours after the death in this case. (1 R.T. 123.)

Based on post rigor and lividity observations made by the deputy coroner and the EMS workers, who actually touched and examined the body, Dr. Hua found it was not medically possible for the victim to have died at 1:20 a.m. or later. (1 R.T. 137-138.) Dr. Hua determined Conde died long before 1:20 a.m. for several reasons. For one, fixed lividity should not occur and rigor should not have already been lost in less than four hours, as this would

mean the body had achieved full maximum rigor, and then broken. (1 R.T. 105.) If Conde had died at 1:30 a.m., it would be extremely unlikely that the body would have no rigor at 5:00 a.m. (1 R.T. 106.) It was very significant for the deputy coroner to observe almost fixed lividity and yet not observe any rigor around 5:00 a.m. (1 R.T. 107.) Two hours after death, rigor is impossible for even a layperson to miss. (1 R.T. 107.) The only interpretation Dr. Hua had of this observation was that the rigor had been broken by someone, or that the original estimation of three to four hours after death was not accurate. (1 R.T. 122.)

One of the paramedics, Bruce Dahl, observed some rigidity in the victim's upper extremities. (1 R.T. 125.) His skin was cold to touch. (1 R.T. 128.) There is a possibility the EMS workers may have broken rigor, and it may have started again after their interaction with the body. (1 R.T. 124.) If the EMS workers had broken all rigidity at around 2:20 a.m., it would be expected there would still be rigidity at 5:03 a.m. (1 R.T. 130-131.)

Dr. Hua weighed the EMS reports and the deputy coroner's reports more heavily in his evaluation of the evidence, as they conducted examinations of the body. (1 R.T. 114.) The main factors Hua considered were that lividity was almost fixed at 5:03 a.m., there was no rigor, and the EMS observations of rigor in the arm, which is a medium sized muscle. Rigor starts at the same time in all the muscles, however it is more easily observable in small muscles like the jaw. Rigor in the arm, a large muscle, has significant meaning because it takes much longer than half an hour to an hour after death to be noticeable. (1 R.T. 111-112.)

Dr. Hua weighed all the evidence together and did not look at one piece of evidence in isolation making his determination. (1 R.T. 116.) Dr. Hua found defendant's statement that the victim was still breathing as a less reliable form of evidence because she was heavily intoxicated at the time. (1 R.T. 115-116.) Hence, Dr. Hua considered defendant's 911 call one piece of evidence to be weighed against the other more objective evidence collected.

Dr. Hua believed Dr. Cohen, the prosecution's time of death expert, was not in a position to disregard the fact the deputy coroner observed almost fixed lividity at 5:03 a.m., as neither he nor Dr. Cohen were at the scene. (1 R.T. 109-110.) Dr. Hua did not agree with Dr. Cohen's assessment that it was just as likely the death occurred after 1:30 a.m. as before 1:30 a.m. (1 R.T. 110.)

Based on all the evidence, Dr. Hua's "conservative" conclusion was that the victim's death occurred long before 1:20 a.m. (1 R.T. 110, 113.) Dr. Hua agreed that it is remotely possible the death occurred after 1:30, in the sense that certainly anything is remotely possible. (1 R.T. 110.)

3. Testimony of Pathologist, Dr. Harry Bonnell, M.D.

Dr. Harry Bonnell is a forensic pathologist, and was the San Diego County chief medical examiner for approximately 10 years. (1 R.T. 148.) In order to determine time of death, Dr. Bonnell uses every bit of reliable information he has access to including the following: reliable eyewitnesses, loss of body core temperature, rigidity, lividity, and the time when the deceased was last seen or positively identified. (1 R.T. 149.) In preparation for his testimony, Dr. Bonnell reviewed the coroner's investigation report, the

autopsy report, toxicology report, phone records, police report, and the testimony of the responding paramedics and the defendant. (1 R.T. 152-153.)

Based on his review of the evidence, Dr. Bonnell concluded the following as to Conde's time of death: if the calls on his cell phone were made by Conde, and if the activity and noise in the garage that was heard by the neighbor was made by Conde, then the time of death would have had to have been approximately 12:30 a.m., which was the last time noise was heard in the garage. (1 R.T. 153.) But because those are not what Dr. Bonnell considers reliable facts, based upon the examination of the first responders, Dr. Bonnell believed Conde's time of death was closer to 11:00 p.m. (1 R.T. 153.)

The EMS responders found rigidity had developed on the left side of Conde's head and that the lividity in the nail beds was fixed. (1 R.T. 153.) Based solely on the factor that rigidity was already developing when Conde's body was examined at 2:20 a.m., Dr. Bonnell believed Conde would have had to have been dead well before 1:30 a.m. and a lot closer to 11:00 p.m. (1 R.T. 154.) Lividity in the fingernail which, when which pressed, does not disappear (i.e., nonblanching) indicates a minimum lapse of two hours since death, and probably closer to three to four hours. (1 R.T. 154.) If there was nonblanching lividity in the fingernail beds at 2:20 a.m., Conde was definitely dead by 12:20 a.m., if not sooner. (1 R.T. 154.)

The fact the EMS responders observed rigidity and fixed lividity in Conde's fingernail beds at 2:20 a.m. totally contradicts any theory that Conde could have died at 2:00 a.m. (1 R.T. 159.) Dr. Bonnell did not rely upon the fact that the EMS responders found Conde's body cold to touch because that

factor depends upon the body temperature of the paramedics, which was unknown. This factor is totally subjective and highly variable. (1 R.T. 159-160.) Skin being cool to the touch does not necessarily mean that the person has been dead for a long time. (1 R.T. 168.)

To Dr. Bonnell, the deputy coroner's report finding that rigor had not started at 5:03 a.m. was an erroneous interpretation of facts instead of an observation. (1 R.T. 156, 157, 164.) If rigidity was not present, this does not mean that it had not yet started, because it could equally mean that it had not yet set in. (1 R.T. 157.) If rigidity was there at 2:20 a.m., it would not surprise Dr. Bonnell that it already had passed at 7:00 a.m. (1 R.T. 157.) If rigidity had begun developing a bit more rapidly than usual by 2:00 a.m., which it could approximately two to three hours after death, then at 7:00 a.m., which could be eight to nine hours after death, it would be perfectly normal for it to have disappeared. The more quickly rigidity sets in, the more quickly it disappears. (1 R.T. 157.)

The deputy coroner also found that lividity was almost fixed. (1 R.T. 157.) Because he did not describe where this fixed lividity was located, this factor was not helpful to Dr. Bonnell in arriving at a time of death. (1 R.T. 157-158.) The fact the coroner said rigor had not started is helpful for the fact that rigor was not present—and knowing that it was present when the paramedics were there—meant to Dr. Bonnell that rigor had passed at the time the deputy coroner did his examination. (1 R.T. 158.)

Defendant's observation in the 911 call that Conde was breathing did not affect Dr. Bonnell's opinion because she may have been in shock and she

was intoxicated. (1 R.T. 169.) Based upon the first responders and coroner's observations, Dr. Bonnell concluded it was medically impossible for Conde to have died at 1:20 a.m. (1 R.T. 175-176.)

4. Testimony of Pathologist, Dr. Joseph Cohen, M.D.

Dr. Joseph Cohen has been a forensic pathologist for 22 years and has performed over 7,000 autopsies. (3 R.T. 412-413.) Dr. Cohen testified in defendant's two prior trials as a witness for the prosecution. (3 R.T. 414.)

In preparation for his testimony, Dr. Cohen reviewed his previous testimony, the autopsy report, toxicology report, coroner's investigator's report, crime scene photographs, first responder reports, transcript of defendant's 911 call, defendant's testimony, the testimony of neighbors, and the affidavits of Dr. Wecht, Dr. Hua, and Dr. Bonnell. (3 R.T. 415.) Dr. Cohen did not remember if he was asked to give an opinion about Conde's time of death during defendant's trial. (3 R.T. 416.)

Dr. Cohen believed an opinion on an accurate time of death could be given, but only within a range of time. (3 R.T. 417.) Dr. Cohen interpreted Dr. Bonnell's and Dr. Hua's opinions to be that Conde's death occurred between 11:00 p.m. and 12:30 a.m. (3 R.T. 418.)

Dr. Cohen agreed the deputy coroner must have performed his examination of the body between 5:03 a.m., when he arrived, and 7:13 a.m., when the body was removed from the scene. (3 R.T. 442,448- 450.) At 6:11 a.m., the deputy coroner noted the ambient temperature was fair. (3 R.T. 422.) Dr. Cohen believed this meant the interior temperature, where the body was found. (3 R.T. 423.) Lividity would have been progressing during this period

of time. (3 R.T. 450.) Skin temperature could be a reliable factor in assessing time of death. (3 R.T. 452.) A cold skin temperature does not necessarily mean that the internal body temperature was cold. (3 R.T. 430.) Dr. Cohen believed the deputy coroner's finding that rigor mortis was not apparent meant that rigor mortis had not yet started. (3 R.T. 419.) Dr. Cohen would expect some rigor mortis at four to six hours after death in most cases. It is not uncommon to have the absence of rigor mortis within an hour or two of death, depending on environmental conditions. (3 R.T. 419.)

Dr. Cohen had a problem with the deputy coroner's finding that "lividity was almost fixed." To Dr. Cohen, "almost fixed" would mean that exerting pressure on the areas of livor mortis may cause the area to blanch a bit, but generally, fixed lividity means that if you press on the lividity, it does not blanch. (3 R.T. 420.) Dr. Cohen was in strong disagreement that liver mortis would have been fixed or nearly fixed at the time of the deputy coroner investigator's examination. (3 R.T. 420.) Dr. Cohen did not believe it was possible for lividity to be fixed at 5:00 a.m. If it was almost fixed, then Dr. Cohen believed the death would have occurred at least eight to 24 hours prior to the deputy coroner's observations. (3 R.T. 421.) Pursuant to textbooks, generally fixed livor mortis takes eight to 12 hours, however very frequently cases are outside that range, in either direction. (3 R.T. 421.) Lividity can become apparent in less than 45 minutes. (3 R.T. 428.) Generally, it takes within 30 to 60 minutes and then it progresses. (3 R.T. 429.)

Dr. Cohen's opinion on whether the EMS responders could have broken the rigor, as opined by Dr. Hua, is that first responders generally do not

manipulate the decedent significantly enough to break rigor, unless they perform CPR, which Cohen did not believe happened in this case. (3 R.T. 424.) Dr. Cohen stated the breaking of rigor mortis would have to be done individually to each joint, because breaking the rigor mortis in one major joint has no effect on the other joints. (3 R.T. 425.) Because the deputy coroner did not observe rigor mortis, Dr. Cohen believed it had never developed. (3 R.T. 425.) Conversely, Dr. Cohen also testified rigor mortis can develop relatively quickly in certain situations, within minutes to an hour. (3 R.T. 425.) It is not impossible for a stiffening to be noticeable in less than an hour. (3 R.T. 426.)

Pressing on the fingernail bed of a dead person should cause blanching lividity. (3 R.T. 437-438.) Dr. Cohen did not believe that capillary refill in nail beds is a technique used to determine time of death. (3 R.T. 437-438.) Paramedic Wilson was referring to a form he had completed that night when he called it capillary refill, as the box on the form stated "Cap Refill." (3 R.T. 473.) When first responders press on a nail bed to check for lividity, if the nail bed does not blanch, then Dr. Cohen believes lividity could be fixed at that point. (3 R.T. 460.) When Wilson described the test he performed, he described that he pushed down on the nail bed and it did not turn white. (3 R.T. 474.)

Richard Gomes was the deputy coroner on this case. While Dr. Cohen was a pathologist for Riverside County, Dr. Cohen worked with Gomes on more than 100 cases, and he thought Gomes was one of the more detailed, quality investigators. (3 R.T. 445- 446.) Dr. Cohen believed Gomes' report in this case had inaccuracies in that Dr. Cohen had an issue with Gomes'

finding that livor mortis was nearly or almost fixed. Dr. Cohen did not believe lividity would become fixed within six or seven hours of death. (3 R.T. 446.) Dr. Cohen never discussed the issues he had with Gomes about his report when he previously reviewed the report and testified in this case. (3 R.T. 446-447.)

Dr. Cohen found the paramedics' observations of postmortem changes in this case relatively vague. (3 R.T. 472.) Dr. Cohen believed first responders are notorious for not being accurate in their impressions. (3 R.T. 457.) This opinion primarily refers to police officers, and then next paramedics and firefighters. (3 R.T. 458.) Generally, only someone with a lot of experience and training would notice these smaller postmortem changes that occur within minutes or an hour of death. (3 R.T. 475.) Dr. Cohen agreed that, if somebody has less training and is generally less accurate with their observations, rigor mortis and lividity would have to be more pronounced for them to actually notice it. (3 R.T. 458.) If the victim was breathing at 2:09 a.m., some livor mortis could be seen within five to 10 minutes after death. (3 R.T. 474.) It takes within an hour or two of death to be able to perceive rigor mortis. (3 R.T. 475.)

In addition to medical observations, another factor Dr. Cohen used to determine time of death is circumstantial evidence and witness accounts. (3 R.T. 431.) Dr. Cohen would consider defendant's statement to the 911 operator that she thought Conde was breathing, and give it weight as appropriate. (3 R.T. 432.) Dr. Cohen did not agree with Dr. Bonnell's opinion that Conde died sometime between 11:00 p.m. and 12:30 a.m. because he felt

that was too narrow of a time range, and that it was unreliable and inappropriate to put that type of time frame on a time of death estimate. (3 R.T. 433.) Dr. Cohen's opinion was that Conde could have died before or after 1:20 a.m., but he would not pin it down with any degree of certainty. (3 R.T. 434.) Dr. Cohen believed the other time of death opinions rendered in this case to be skewed because he believed them to be too inflexible. (3 R.T. 435.) The best opinion Dr. Cohen could arrive at is that it is just as likely that Conde's died before 1:20 a.m. as it was after 1:20 a.m. Conde could have died at 12:30 or 1 a.m. or 1:50 a.m. Dr. Cohen could not determine anything more accurate than that opinion. (3 R.T. 463.)

5. Testimony of Defense Counsel, Eric Keen

Eric Keen has been a Riverside County deputy public defender for 19 years. (2 R.T. 180.) He is currently a supervising deputy public defender. (2 R.T. 180.) He was defendant's trial attorney from 2003-2006 and, when he was assigned defendant's case, he had tried just two previous murder jury trials and had been a deputy public defender for six years. (2 R.T. 181.) During the time he was representing defendant, he was handling three attempted murder cases and six murder cases, including one capital case. (2 R.T. 182, 202.) The capital case, *People v. Leon*, went to trial in the beginning of January, 2007. Defendant's second jury reached a verdict at the end of December, 2006. (2 R.T. 183.) Keen was second chair on the Leon death penalty case for the first few years, and was lead counsel by the time it went to trial in January 2007. (2 R.T. 184.) Keen did not believe that his caseload ever prohibited from engaging in any kind of investigation he thought

appropriate. (2 R.T. 241.) Because it was a very bloody crime scene, and it was highly likely the perpetrator would have had blood on them, Keen presented defendant's testimony to attempt to prove she was wearing the same clothes during the day and night of the murder as when the police arrived at her house. (2 R.T. 191.) Keen was aware that in one of Jeff Dills's interviews with the police, Dills told the police what defendant had been wearing that night. (2 R.T. 1919.) Dills described defendant's clothes as a black shirt with rings on it and blue jeans and a tan jacket. (2 R.T. 192.) A picture of defendant's shirt which was confiscated by the police, matched the identification by Dills, specifically the rings on the shirt matched Dills's description (Defendant's G, photograph of shirt). (2 R.T. 192.) Dills also described that defendant was wearing low rider jeans and a tan jacket, both of which the police took from defendant on the night of the murder (Defendant's H, photograph of jeans; Defendant's I, photograph of tan jacket). (2 R.T. 192-193.)

Keen had Dills's statements he made to the police about defendant's clothes at the time of the preliminary hearing but he did not question Dills about it. (2 R.T. 193-194.) Keen did not have a tactical reason for his failure to question Dills during the preliminary hearing about the clothes she was wearing that night. (2 R.T. 194.)

Keen did not have a tactical reason for his failure to attempt to admit Dills's statements into evidence regarding the clothes defendant was wearing that night. (2 R.T. 195.) At the time, he thought he had enough evidence regarding what defendant was wearing simply from defendant's testimony and

from the officer that was with defendant after the murder. (2 R.T. 195.) Keen did not show the photographs of these clothes to the jury, although he now believes that the photographs in addition to Dills's description of the clothes would have helped to prove what defendant was wearing that night. (2 R.T. 193.) Looking back, he would now try to get Dills's statements regarding defendant's clothes into evidence because it would have bolstered the defense's argument and made the defense stronger. (2 R.T. 195-196.)

If Keen had an expert who would have testified that Conde was dead before 1:20 a.m., he would have presented the same defense as he did, but this evidence would have added a component to the defense. (2 R.T. 196.) Keen consulted Dr. Vomhof, a biochemist and physiologist with a Ph.D., who was a specialist in accident reconstruction, regarding the force necessary to cause the injuries to Conde. (2 R.T. 197, 246.) When Keen discovered Dr. Vomhof purported to be a time of death expert he spoke to him about that issue also. (2 R.T. 197.) Keen asked Dr. Vomhof to consult with Lisa DiMeo, whom he had retained as a forensic specialist to review the crime scene photographs, and to review the file Keen sent her. Keen was not certain which documents were provided to Dr. Vomhof. (2 R.T. 198.) He was not sure what documents he provided to DiMeo, but generally it would have been police reports, photographs, and the autopsy protocol. (2 R.T. 198.) Keen was not sure if Dr. Vomhof had reviewed the paramedic reports or coroner report when Keen consulted him regarding time of death in this case. (2 R.T. 198.) Keen spoke to Dr. Vomhof once or twice on the phone, but did not remember what they discussed. (2 R.T. 199.)

Keen never consulted a pathologist in this case. (2 R.T. 200.) Keen did not present time of death as part of the defense because he believed he could not establish the time of death prior to 1:30 a.m. His opinion was based on what Dr. Vomhof told him, and Keen's own experience, which was based on MCLE training and homicide seminars for attorneys. (2 R.T. 199.) Keen believed that anybody who testified regarding time of death would have to give a range of time, and that the times he was dealing with in defendant's case were too small, and that necessarily the range would encompass both the prosecution and defense theories. (2 R.T. 199.) If he were going to try this case today, he would seek out and consult a pathologist regarding time of death. (2 R.T. 252.)

Knowing that two pathologists have now opined that Conde was killed before 1:20 a.m., if Keen were trying the case today, he would consult other experts, and specifically a pathologist. (2 R.T. 201.) Keen believed the second jury compromised with its verdict in finding defendant guilty of second degree murder, and that if he had given those jurors who had wanted to find defendant not guilty more information, the case would have had a different result. (2 R.T. 201.)

Keen believed this case was a very close call for the jury and that he could have done more in her defense. (2 R.T. 205.) In Keen's declaration provided, he stated he failed in various aspects of his representation, and if he had not so failed, he believed defendant would have been acquitted. (RT 205; 3 2nd. Supp. C.T. 511-512.) Based on his cumulative failures, Keen conceded his representation of defendant was ineffective, and that it is reasonably

probable the trial would have ended in a different result if not for his failures. (2 R.T. 206.)

6. Testimony of *Strickland* Expert, Gary Gibson

Gary Gibson was a San Diego County deputy public defender from 1991 until his retirement in March 2016. (2 R.T. 281-282.) During that time, he was personally assigned 50-60 homicides, of which 15 went to trial. In addition, he worked on approximately 200-300 homicide cases, and represented six special circumstance murder cases. (2 R.T. 283.) Gibson has taught at California Western School of Law for 22 years, where he teaches courses in California evidence, forensic evidence, advanced criminal litigation, and California sentencing. (2 R.T. 287-288.)

Gibson reviewed all of the exhibits in this case, all of the filings regarding the petition for writ of habeas corpus, the police reports, the trial transcripts from the second trial, and the Riverside Public Defender's printouts of Keen's caseload between 2003-2006. (2 R.T. 289-290.) Under the system Gibson helped to develop for the San Diego Public Defender's officer to keep an attorney's caseload manageable, Gibson believes an attorney should not be assigned more than nine to ten homicides in one year. (2 R.T. 292-293.)

Gibson reviewed Keen's caseload during the time he represented defendant in her second trial. During this time, Keen had three active homicides, three active attempted murders, and an active death penalty murder. (2 R.T. 296.) Gibson believes this put Keen in an untenable position with regard to competently investigating and representing defendant's case fully, and in his opinion, the combination of Keen's inexperience and overload of

work acted to defendant's detriment. (2 R.T. 297.) On December 8, 2005, Keen was litigating issues on the capital case, Leon, and the Leon case went to trial on January 6, 2006. (2 R.T. 248, 342.)

With regard to the time of death, Gibson has had two homicide cases which have involved time of death, and he teaches time of death analysis in his forensic pathology class. (2 R.T. 300.) The only type of expert Gibson would consult on a time of death issue is a medical doctor, specifically a medical examiner. (2 R.T. 302.)

In Gibson's opinion, time of death was so critical in this case, a competent defense attorney would have sought out a qualified time of death expert. (2 R.T. 305.) Gibson did not believe Dr. Vomhof was qualified to give an opinion on time of death analysis, because he is not a medical doctor. (2 R.T. 304-405.) Keen was unreasonable in not knowing that Dr. Vomhof was not qualified to give an opinion, and for actually using him for an opinion on time of death. It was unreasonable for Keen to rely on Dr. Vomhof, who was hired as a biochemical engineer, for a time of death opinion. (2 R.T. 309.) Further, based upon the opinions formed by Dr. Cyril Wecht, Dr. Bonnell, Dr. Hua, and Dr. Cohen, Keen fell below the standard of care, because medical examiners were available to give their opinion on the time of death in this case, and he failed to consult a qualified medical examiner. (2 R.T. 310.) There was absolutely no valid tactical reason to not pursue a time of death inquiry in this case. (2 R.T. 340.)

Keen's failure to present evidence regarding the clothes defendant was wearing that night was one of the most crucial areas of the case that was not

presented effectively. (2 R.T. 312.) First, Keen failed to ask Dills about the clothes at the preliminary hearing, even though at that point he had Dills's statements to the police about what defendant was wearing that night. (2 R.T. 312.) Dills was the primary witness for the prosecution, because he was the only witness who established the prosecution's timeline. (2 R.T. 313.) It was not sufficient to only have defendant testify as to what she was wearing that night because a defense attorney should always look for some independent evidence to corroborate a defendant's statements. (2 R.T. 314.)

Based upon Gibson's experience with blood pattern analysis in the cases he has represented and the lectures he has prepared for the National Association of Criminal Defense Lawyers and International Association of Blood Pattern Analysts, Gibson believed it is incredibly likely that if an adequate demonstration or reenactment had been done, all experts would have reached the conclusion that the person who committed the murder would have had some blood on them. (2 R.T. 31.)

At the preliminary hearing, a reasonably competent attorney would have questioned Dills about his statements regarding the clothes defendant was wearing when he dropped her off at the house. If he had done so, Dills's statements would have come into evidence at trial under Evidence Code section 1291. (2 R.T. 317.) Further, a reasonably competent attorney would have attempted via an in limine motion to introduce Dills's statement regarding defendant's clothes into evidence. (2 R.T. 317.) The failure to either question Dills's about the clothes at the preliminary hearing, or to later seek to introduce his statements into evidence was below the standard of care

and was sufficiently prejudicial to undermine confidence in the verdict. (2 R.T. 320.) Combined together, Gibson believed Keen's failures were cumulatively catastrophic to defendant's case. (2 R.T. 320.)

7. Testimony of Defense Investigator, William Sylvester

William Sylvester is a retired San Bernardino County police officer, and has been an investigator with the Riverside Public Defender's Office since 2002. (3 R.T. 520.) He has worked on approximately 5 murder cases with Eric Keen. (3 R.T. 522.) Sylvester was assigned to defendant's case in 2004 and worked on it until her conviction in December 2005. (3 R.T. 522.) He and Keen had a lot of discussions on different ways to pursue the investigation of the case. (3 R.T. 523.) Although they discussed time of death as an issue, Keen never asked Sylvester to consult a time of death expert, and Keen never indicated to Sylvester that he had done any research regarding time of death. (3 R.T. 526, 554.)

The police did not collect all of the clothes defendant was wearing the night of the murder—specifically her shoes, her jacket and two party hats. Sylvester took these items and gave them to Lisa DiMeo to have them tested for blood spatter. They tested negative for the presence of any blood. (3 R.T. 540.) During his time investigating defendant's case, Sylvester was also working on the Leon death penalty case with Keen. (3 R.T. 538.) Sylvester spent a lot of time on the Leon case. (3 R.T. 538.) During the time leading up to defendant's second trial, Sylvester's case load was very heavy. Sylvester did not feel like he could put 100 percent into the vast majority of the cases he was working on during that time. (3 R.T. 539.) He believed the attorneys in

the Public Defenders office were overworked, and that it was impossible to do the amount of work they were assigned. (3 R.T. 539, 570.)

I.

DEFENSE COUNSEL WAS PREJUDICIALLY INEFFECTIVE WHEN HE FAILED TO CONSULT A QUALIFIED TIME OF DEATH EXPERT AND FAILED TO PRESENT EVIDENCE REGARDING DEFENDANT'S CLOTHES AROUND THE TIME OF THE CRIME

Beginning in 2014, Kimberly Long petitioned for habeas relief from her murder conviction, asserting her defense counsel rendered prejudicially ineffective assistance of counsel when he failed to consult a qualified forensic pathologist in relation to the victim's time of death and when he failed to present evidence regarding the clothing she was wearing around the time of the crime. Had defense counsel presented such evidence, it would have effectively eliminated the possibility that she was the killer. This Court issued an Order to Show Cause on the claims and remanded to the trial court for a determination on the merits.

Following an extensive evidentiary hearing, the trial court found defendant had proved her claims and that defense counsel had rendered prejudicial ineffective assistance of counsel by failing to consult with and present the testimony of a qualified time of death expert who would have placed the time of death at a time when defendant had an alibi. Further, the trial court found defense counsel rendered ineffective representation by failing to present evidence regarding the clothes defendant was wearing around the time of the crime. Although the Court of Appeal subsequently reversed the trial court's finding, the trial court was correct in determining defense counsel rendered ineffective assistance because had defense counsel effectively

represented defendant, defendant's jury would have been presented with a drastically different, and even weaker than it already was, prosecution case.

A. Law Applicable to Ineffective Assistance of Counsel Claims

A criminal defendant is entitled to effective assistance of counsel under the Sixth Amendment to the United States Constitution. (U.S. Const., 6th Amend.; *Strickland v. Washington* (1984) 466 U.S. 668, 684-686 [104 S.Ct. 2052, 80 L.Ed.2d 674] (*Strickland*).) To establish ineffective assistance of counsel, a defendant must establish that counsel's performance was deficient under an objective standard of reasonableness and that it is reasonably probable that a result more favorable to defendant would have occurred in the absence of counsel's failing. (*Strickland, supra*, 466 U.S. at pp. 687-688; *People v. Bolin* (1998) 18 Cal.4th 297, 333.) "A reasonable probability is a probability sufficient to undermine confidence in the outcome. [Citations.]" (*In re Harris* (1993) 5 Cal.4th 813, 833.) A hung jury resulting in mistrial is a more favorable result than a conviction. (*People v. Mason* (2013) 218 Cal.App.4th 818, 826.)

The ultimate purpose of this right is to protect the defendant's fundamental right to a trial that is both fair in its conduct and reliable in its results. (See, e.g., *Strickland, supra*, 466 U.S. at p. 685.) Specifically, it entitles her "to the reasonably competent assistance of an attorney acting as his diligent conscientious advocate." (*United States v. De Coster* (D.C. Cir. 1973) 487 F.2d 1197, 1202, italics omitted; see *Strickland, supra*, 466 U.S. at pp. 686-689.) Under this right, the defendant can reasonably expect that in the course of representation his counsel will undertake only those actions that a

reasonably competent attorney would undertake. But she can also reasonably expect that before counsel undertakes to act at all counsel will make a rational and informed decision on strategy and tactics founded on adequate investigation and preparation. (*In re Hall* (1981) 30 Cal.3d 408, 426, citing *People v. Frierson* (1979) 25 Cal.3d 142, 166; see also *Strickland, supra*, 466 U.S. at pp. 690, 691.) "If counsel fails to make such a decision, his action - no matter how unobjectionable in the abstract - is professionally deficient. [Citations.]" (*People v. Ledesma* (1987) 43 Cal.3d 171, 215.)

To establish ineffective assistance of counsel based on an alleged failure to investigate, a defendant "must prove that counsel failed to make particular investigations and that the omissions resulted in the denial of or inadequate presentation of a potentially meritorious defense." (*In re Sixto* (1989) 48 Cal.3d 1247, 1257.) Reasonable performance of counsel includes an adequate investigation of facts, consideration of viable theories, and development of evidence to support those theories. An attorney must make a reasonable investigation in preparing a case or make a reasonable decision not to conduct a particular investigation. (*Kenley v. Armontrout* (8th Cir. 1991) 937 F.2d 1298, 1304.) *Strickland* recognized an attorney's duty to provide reasonably effective assistance includes the "duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." (*Strickland, supra*, 466 U.S. at p. 691; see also ABA Stds. for Crim. Justice (3d ed. 1993) L. Std. 4-4.1(a) (["Defense counsel should conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case....".].) In

other words, before an attorney can make a reasonable strategic choice against pursuing a certain line of investigation, the attorney must obtain the facts needed to make the decision. (See *Kenley v. Armontrout, supra*, 937 F.2d at p. 1304.) An attorney's "'strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation.'" (ABA Stds. for Crim. Justice (3d ed. 1993) L. Std. 4-4.1(a), quoting *Strickland, supra*, 466 U.S. at pp. 690-691.)

Further, claims of ineffective assistance of counsel based on a failure to investigate "must be considered in light of the strength of the government's case." (*Eggleston v. United States* (9th Cir. 1986) 798 F.2d 374, 376.) "[A] verdict . . . only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." (*Strickland, supra*, 466 U.S. at p. 696; see also *Johnson v. Baldwin* (9th Cir. 1997) 114 F.3d 835, 838, quoting *Eggleston v. United States, supra,* 798 F.2d at p. 376 ["'[I]neffective assistance claims based on a duty to investigate must be considered in light of the strength of the government's case'"].)

When, as here, this Court found defendant's habeas corpus petition stated a prima facie showing that defendant is entitled to relief, the defendant then must "'prove, by a preponderance of the evidence, facts that establish a basis for relief on habeas corpus.'" [Citations.]" (*In re Champion* (2014) 58 Cal.4th 965, 1007.) Following an extensive evidentiary hearing, the trial court properly found defendant has done so in this case, and because the Court of

Appeal failed to adhere to the controlling standards of appellate review when it reversed the trial court's findings, the trial court's ruling must be upheld.

B. Defense Counsel Rendered Ineffective Assistance by Failing to Consult a Qualified Expert on Determining Time of Death

Defendant's conviction was reversed by the trial court, in part, because the trial court found her defense attorney rendered objectively ineffective representation when he failed to consult with and present the testimony of a qualified time of death expert who would have placed the time of death at a time when defendant had an alibi. (4 R.T. 736.)

At the evidentiary hearing, three forensic pathologists provided their expert opinion regarding Conde's time of death. Defendant presented two qualified forensic pathologists—Drs. Bonnell and Hua—who testified Conde's death occurred long before 1:20 a.m., the time Dills claimed he dropped defendant off at her house. Dr. Hua testified that based upon all available evidence, it was not medically possible for Conde to have died at 1:20 a.m. or later. (1 R.T. 137-138.) Dr. Hua's "conservative" conclusion was that the death occurred long before 1:20 a.m. (1 R.T. 110, 113.) Dr. Bonnell testified Conde's death was closer to 11:00 p.m. than 1:00 a.m., and that it was medically impossible for Conde to have died at 1:20 a.m. or after. (1 R.T. 153, 175-176.) Further, the prosecution's own witness, Dr. Cohen, testified that it was just as likely Conde could have died before 1:20 a.m. as after 1:20 a.m. (3 R.T. 434.)

At the same time, defense counsel provided no valid tactical reason for why he did not consult a qualified pathologist. (2 R.T. 201.) Defense counsel did not present time of death as part of the defense because he believed he

could not establish the time of death prior to 1:30 a.m. Even though he could not remember what they discussed, defense counsel testified his opinion was based on a conversation with Dr. Vomhof, a specialist in accident reconstruction, and defense counsel's own experience, which was based on unnamed MCLE training and homicide seminars for attorneys. (2 R.T. 197, 199, 246) If he were going to try this case today, defense counsel would have sought out and consulted a qualified forensic pathologist regarding time of death. (2 R.T. 252.)

In addition, defendant's *Strickland* expert, who had extensive experience in trying homicide cases, testified an objectively reasonable defense attorney would have consulted a qualified time of death expert, specifically a forensic pathologist, in this case, in order to properly investigate the time of death defense. (2 R.T. 304-405.) Based upon the opinions formed by Dr. Cyril Wecht, Dr. Bonnell, Dr. Hua, and Dr. Cohen, the *Strickland* expert testified defense counsel fell below the standard of care, because medical examiners were available to give their opinion on the time of death in this case, and he failed to consult a qualified medical examiner. (2 R.T. 310.) There was absolutely no valid tactical reason to not pursue a time of death inquiry in this case. (2 R.T. 340.)

It was based upon this evidence, including the expert opinions which the trial court found to be "credible, convincing, and compelling," that the trial court found defense counsel rendered constitutionally ineffective representation at defendant's trial for failing to investigate a time of death defense and failing to consult with and call a qualified forensic pathologist to

testify about the victim's time of death. Consistent with the trial court's finding, other convictions have been reversed on the basis of ineffective assistance of counsel for failure to present such time of death evidence. (See, e.g., *Elmore v. Ozmint* (4th Cir. 2011) 661 F.3d 783, 786, 808-809, 831-832, 851 [defense counsel ineffective for failing to hire an independent pathologist on issue of time of death, despite broad range of time of death estimate, where pathologist would have placed the most likely time of death, based solely on the autopsy evidence rather than a TV guide and the like, between 11:00 a.m. and 3:00 p.m. on January 17, a time frame when the defendant had an alibi]; *Rivas v. Fischer* (2d Cir. 2015) 780 F.3d 529, 547-549 [defense counsel ineffective for relying on uncorroborated alibi defense and failing to consult with a qualified forensic pathologist on victim's time of death]; *State ex rel. Bess v. Legursky* (W. Va. 1995) 465 S.E.2d 892, 899 [defense counsel ineffective for failing to present pathological expert who would have testified that the victim's time of death was inconsistent with the defendant's statements].)

Without presenting such credible, convincing, and compelling evidence to the jury, defendant was deprived of a meritorious defense, one that effectively eliminated her as the killer. Defense counsel failed to consult a qualified time of death expert before he made any decision as to the defense he presented, and because the time of the victim's death was crucial in this case, defense counsel could not have made an objectively reasonable and informed strategic decision when he decided not to pursue a time of death defense.

C. Defense Counsel Rendered Ineffective Assistance by Failing to Present Evidence Regarding Defendant's Clothes Around the Time of the Crime

Defendant's conviction was also reversed by the trial court, in part, because the trial court found defense counsel rendered objectively ineffective representation by failing to question Dills at the preliminary hearing about the clothing defendant was wearing that night, and by failing to prove the clothes collected by law enforcement from defendant on the night of the murder were the same clothes defendant was wearing prior to the murder. (4 R.T. 742-744.) The trial court found this issue pivotal because it was an extremely bloody crime scene and, based on the criminalist's testimony, there was no question the victim's blood would have gotten on the perpetrator's body or clothes during the attack. (4 R.T. 740-744.)

During defendant's jury trials, one of the main theories of the prosecution's case was that because it was such a bloody crime scene, the perpetrator of the crime necessarily would have gotten blood on them, therefore, because defendant had absolutely no blood on her, defendant must have killed Conde then changed her clothes before she called 911. (E039986 5 R.T. 1023-1024, 1032; see also E039986 1 C.T. 38 [Prosecutor: "at some point in time she had to change which might explain the absence of blood on her clothing"].) At trial, during closing argument, the prosecutor argued defendant must have changed her clothes: "[w]ho can tell us that those were the clothes that she was wearing that day? You didn't hear any evidence other than from her. You've got to rely upon her again that those were the clothes that she was wearing that day." (E039986 5 R.T. 1023-1024.) "She had taken

all that time to get the blood off of her, to make sure there was no blood on her, to clean up the scene . . . she had to clean up . . . to straighten up, to get rid of evidence." (E039986 5 R.T. 1023, 1032.) The prosecution even went so far as to argue to the jury defendant could have killed Conde and then jumped into the backyard Jacuzzi in order to get all the blood off of her. (E039986 R.T. 1107.) Yet, at the evidentiary hearing, defendant unequivocally proved, and the prosecution conceded, the fact defendant did not change her clothes that night. (4 R.T. 705.)

As early as the preliminary hearing, defense counsel had the clothes the police took from defendant on the night of the murder available to him, and had Dills' interrogation statements describing defendant's clothes, yet he did not question Dills about the clothes at the preliminary hearing. (2 R.T. 193-194.) Defense counsel testified he had no valid tactical reason for failing to question the main witness against defendant at the preliminary hearing regarding the clothes she was wearing that night, and for failing to attempt to prove up her clothes during her jury trial. (2 R.T. 194-195.)

In addition, defendant's *Strickland* expert testified defense counsel fell below the required standard of care and rendered ineffective assistance with respect to this issue with no valid tactical reason for his failures. (2 R.T. 320.) The *Strickland* expert testified defense counsel's failure to question Dills about defendant's clothes during the preliminary hearing was objectively unreasonable, as defense counsel had the information regarding Dills' statements and had access to the actual clothes, but failed to question Dills about the clothes and, therefore, failed to put Dills' statements into the record

at the preliminary hearing. This failure was objectively unreasonable because, when the People later introduced the preliminary hearing transcript under Evidence Code section 1291, the description of the clothes was not part of the record. (2 R.T. 312.) The *Strickland* expert emphasized defense counsel's failure at the preliminary hearing was critical, because Dills was the primary witness for the prosecution, he was the person who established the timeline, and yet his description of defendant's clothes was never introduced to the jury through his preliminary hearing testimony because of Keen's failure to question him about the clothes. (2 R.T. 313-314.) At trial, it was not sufficient to only have defendant testify as to what she was wearing that night because a defense attorney should always look for some independent evidence to corroborate the defendant's statements. (2 R.T. 314.) The *Strickland* expert testified that, had defense counsel performed as a reasonably competent attorney at the preliminary hearing, Dills' statements regarding defendant's clothes would have come into evidence under Evidence Code section 1291 at her jury trial. (2 R.T. 312-314.) Moreover, at trial, an objectively reasonable competent attorney would have attempted via an in limine motion to introduce Dills' statements regarding defendant's clothing into evidence. (2 R.T. 317.)

Accordingly, based upon this substantial evidence, the trial court found defense counsel rendered constitutionally ineffective representation at defendant's preliminary hearing and trial in failing to question Dills about the clothing and failing to present evidence regarding defendant's clothing around the time of the crime. Without presenting such evidence to the jury, defendant was deprived of a meritorious defense. Because the perpetrator would have

necessarily had the victim's blood on their person, the absence of the victim's blood on defendant's clothes eliminated her as the killer. Given the overriding importance of proving the clothing defendant was wearing that night, and defense counsel's failures with regard to this crucial evidence, defense counsel rendered objectively ineffective assistance in this respect.

D. Defendant Was Prejudiced by Defense Counsel's Failures Because There Is a Reasonable Probability That, Absent Counsel's Errors, the Result of the Proceeding Would Have Been Different

In this case, prejudice is easily demonstrated. The trial court's findings were clearly supported by substantial evidence within the context of all of the evidence presented at defendant's jury trial and the evidentiary hearing. In view of the fact that the prosecution did not have an overwhelmingly strong case, the trial court properly found defendant was prejudiced by trial counsel's failure to properly investigate or introduce time of death evidence, and properly found defense counsel's performance with regard to his failure to prove up defendant's clothing was constitutionally inadequate and prejudicial, as the failure was not based upon adequate investigation and preparation. (R.T. 747-748)

The Court of Appeal made no prejudice determination in this case because it concluded defense counsel provided effective assistance when he failed to properly investigate a time of death defense and failed to prove up the clothes defendant was wearing. (Op. p. 77) Because the Court of Appeal made no prejudice determination, this Court's review of the prejudice prong of defendant's claim is de novo. (*Rompilla v. Beard* (2005) 545 U.S. 374, 390 [125 S.Ct. 2456, 162 L.Ed.2d 360].) ["Because the state courts found the

representation adequate, they never reached the issue of prejudice, and so we examine this element of the *Strickland* claim de novo, [citation omitted] . . . ."]; *Jones v. Ryan* (9th Cir. 2009) 583 F.3d 626, 640-641, cert. granted, judgment vacated (2011) 563 U.S. 932 [131 S.Ct. 2091, 179 L.Ed.2d 886].)

In determining prejudice in an ineffective assistance of counsel claim, the habeas court must compare the actual trial with the hypothetical trial that would have taken place had counsel performed competently. (*In re Ross* (1995) 10 Cal.4th 184, 205; *In re Hardy* (2007) 41 Cal.4th 977, 1025.) This requires knowledge of the full evidence that was presented at trial, not just the evidence that was presented at the habeas corpus hearing. (*Ibid.*) In some cases, a single error can prejudice the right of a defendant to a fair trial which will support a conclusion that effective assistance was not afforded. (*Smith v. Murray* (1986) 477 U.S. 527, 535 [106 S.Ct. 2661, 91 L.Ed.2d 434]; *Murray v. Carrier* (1986) 477 U.S. 478, 496 [106 S.Ct. 2639, 91 L.Ed.2d 397]; *United States v. Cronic* (1984) 466 U.S. 648, 657, fn. 20 [104 S.Ct. 2039, 80 L.Ed.2d 657].)

Prejudice must be evaluated in the context of the strength of the prosecution's case. (*Eggleston v. United States, supra*, 798 F.2d. at p. 376.) As this Court explained prejudice in this context, "After weighing the available evidence, its strength and the strength of the evidence the prosecution presented at trial [citation], can we conclude defendant has shown prejudice? That is, has he shown a probability of prejudice 'sufficient to undermine confidence in the outcome' [citations]" (*In re Hardy, supra*, 41

Cal.4th at p. 1025.) A hung jury resulting in mistrial is a more favorable result than a conviction. (*People v. Mason, supra*, 218 Cal.App.4th at p. 826.)

Prejudice is readily proven in this case. Defendant presented two forensic pathologists who determined Conde's death occurred before 1:20 a.m. Dr. Zhongxue Hua testified that based upon all of the available evidence, including the post rigor and lividity observations made by the deputy coroner and the EMS workers, who actually touched and examined Conde's body, it was not medically possible for Conde to have died at 1:20 a.m. or later. (1 RT 137-138) Hua's conservative conclusion was that the death occurred long before 1:20 a.m. (1 RT 110, 113) Further, Dr. Harry Bonnell testified Conde's death was closer to 11 p.m. than 1 a.m., and that it was medically impossible for Conde to have died at 1:20 a.m. or after. (1 RT 153, 175-176) The prosecution's expert forensic pathologist, Dr. Cohen's testimony was that at best, it was just as likely Conde could have died before 1:20 a.m. as after 1:20 a.m. Cohen would not pin this time down with any degree of certainty. (3 RT 434) Cohen stated the best opinion he could arrive at is that it was just as likely Conde died before 1:20 a.m. as it was that he died after 1:20 a.m. (3 RT 463) As this opinion does not prove beyond a reasonable doubt the murder occurred after Dills claimed he dropped defendant off at the house (around 1:20 -1:30 a.m.), this evidence does nothing to disprove defendant's potential time of death defense.

The prosecution's case hinged on the timing of Conde's death; if Conde was dead before Dills dropped defendant off at her house around 1:20 a.m. as he claimed, she would have had no opportunity to kill Conde because she was

with Dills at that time. So critical was the timing to the prosecution's case that, when paramedic John Wilson testified Conde had been dead for longer than a matter of minutes, the prosecutor immediately asked, "Mr. Wilson, when you say the death did not happen within a matter of minutes, it's not one of your responsibilities to determine time of death; is that correct?" (E039986 2 R.T. 266.) Even in the absolute best case scenario for the prosecution, defendant would have had a mere 49 minutes to kill Conde and so skillfully dispose of all evidence such that absolutely no physical evidence linking her to the crime was ever found. So short was this time frame that the Ninth Circuit Court of Appeals' concurring opinion noted "it would have been virtually impossible for the defendant to commit the crime. . ." (*Long v. Johnson*, (9th. Cir. 2013) 736 F.3d. 891, 897.)

Further, the trial court's finding that defense counsel was prejudicially ineffective when he failed to present evidence regarding defendant's clothing is supported by the substantial evidence presented regarding this subject at both the trial and the evidentiary hearing. Specifically, the trial court made the following findings regarding the impact of defense counsel's failures on defendant's defense:

"In the portion of Dills' interview describing exactly what defendant was wearing before the murder, the unique and unusual clothes, it would have independently corroborated defendant's testimony. The only reasonable inference a juror could draw would be that she didn't change clothes, which would be in complete contradiction to the People's theory of the murder. Therefore, there is a reasonable probability that a result more favorable to the

defendant would have occurred and, therefore, defense counsel's deficient performance resulted in prejudice to the defendant." (4 R.T. 747-748.) In making its ruling regarding Dills' statements, the following findings by the trial court are important to consider in understating the gravity of defense counsel's failures, and the weakness of the prosecution's case against defendant:

"Anyway, there is case law in which the trial court could rely upon in this particular case – unusual case –and the issue of clothing being highly relevant to a crucial issue. And under the circumstance, Mr. Dills gave a statement with substantial reasons to assume its reliability because the prosecution's entire case was based upon the statement of Mr. Dills saying that he had dropped her off between 1:20 and 1:30. But for the evidence introduced by the People, relied upon by the People – but for that evidence, the Court would have dismissed this case under 1118.1. So obviously the People's cornerstone to their prosecution was the reliability of Mr. Dills." (4 R.T. 746)

Even before the admission of the new evidence presented by defendant at the evidentiary hearing, this case was a very close call, as the evidence supporting this murder conviction, the most serious charge of all, was slight, at best. It was a purely circumstantial case with absolutely no physical evidence tying defendant to the murder and no overwhelming evidence of guilt. So weak was the prosecution's case that nine of the twelve jurors in defendant's original trial voted for acquittal. (1 R.T. 4.) Further, the two alternate jurors in defendant's second trial specifically stated they would have acquitted defendant. (5 R.T. 1125; 2 C.T. 347, 355.) Moreover, the jury in

defendant's case hastily decided her guilt, not surprisingly, because jurors were held over the Christmas break for deliberations. (E039986 5 R.T. 1119-1120; 2 C.T. 332-333, 336-337 [deliberations commenced at approximately 10:00 a.m. on December 23, 2005 and ended at approximately 4:30 p.m., then reconvened on December 27, 2005 at 9:06 a.m. whereupon the jury reached a verdict at 9:17 a.m.].) Such a time-line indicates the jury may have made a hasty decision in order to be relieved for the holiday.

Even the trial court who presided over both of defendant's jury trials felt compelled to comment that, had defendant's trial been a bench trial, it would have acquitted her. (5 R.T. 1148-1149.) And during the evidentiary hearing the trial court specifically stated, "...the prosecution's entire case was based upon the statement of Mr. Dills saying that he had dropped her off between 1:20 and 1:30. But for the evidence introduced by the People, relied upon by the People – but for that evidence, the Court would have dismissed this case under 1118.1" (4 R.T. 746.) Further, in ruling on her actual innocence claim, the trial court stated, "[c]onsidering all the evidence, the Court finds it highly unlikely that the defendant committed the crime, but evaluating and weighing all of the evidence in this case, the Court finds that the high standard of proof to satisfy an actual innocence claim has not been met." (3 R.T. 748-751.)

This sentiment has been echoed by judges in defendant's federal appeals. In its opinion on defendant's federal sufficiency of the evidence claim, the Ninth Circuit Court of Appeals stated, "we might have entertained reasonable doubt if we were the jury, or we might have found the evidence to

be insufficient if we were sitting as the reviewing court on direct appeal," and the concurring opinion noted, "I have grave doubts about whether the State has convicted the right person in this case. Those doubts stem from the fact that it would have been virtually impossible for the defendant to commit the crime." (*Long v. Johnson, supra*, 736 F.3d at p. 897.) Hence, a modest amount of evidence raising reasonable doubt would have been enough to tip the scales in favor of a mistrial or even acquittal in this case.

The evidence upon which defendant's conviction has been upheld was slight, at best. In the face of the undisputed evidence presented that defendant did not change her clothes, the prosecution had no rational choice at the evidentiary hearing but to concede that she did not change her clothes. (4 R.T. 705.) The fact the prosecution conceded defendant did not change her clothes is fatal to the prosecution's case because the prosecution's own evidence makes clear the killer would have had Conde's blood all over their clothing and body. Defendant presented two time of death experts who both testified Conde was dead long before she was ever home, and at a time when defendant had an alibi. And even the prosecution's time of death expert would have testified there was a 50/50 chance Conde died prior to 1:20 a.m. - this testimony alone would certainly be enough to meet the reasonable doubt threshold in a murder case.

This is not a case where the evidence of the defendant's guilt was so overwhelming or multilayered as to render defense counsel's failures harmless. Defense counsel's failure to present a time of death defense expert who would have testified the victim died before defendant could have ever arrived home,

and failure to present evidence which in fact proved defendant did not change her clothes, and had no blood on her amidst an incredibly bloody crime scene, was nothing short of catastrophic to defendant's defense.

Had defense counsel performed adequately and competently, defendant's defense as presented to defendant's jury clearly would not have solely hinged on defendant's uncoorborated statements as to what happened that night. Instead, her defense would have been based upon scientific time of death evidence presented by expert pathologists, and corroborating statements and evidence which proved her testimony was true that she did not change her clothes that night. The only reason the jury was provided defendant's uncorroborated statements as her main defense was because of trial counsel's numerous cataclysmal failures.

If defense counsel had properly consulted and presented a time of death expert opinion and proved up defendant's clothing, the jury undeniably would have seen a drastically different, and an even more significantly weaker than it already was, prosecution case. The evidence against defendant is entirely circumstantial and not substantial. There is an absolute lack of any forensic evidence connecting appellant to the crime, despite the bloody disarray at the scene. There were no eyewitnesses to the crime, no confession, and no murder weapon was found. Jeff Dills, the prosecution's star witness, and the only person who contradicted defendant's time line regarding events, died prior to trial. The reading of his preliminary hearing at trial rendered the jury unable to judge his demeanor and veracity, and precluded a thorough cross-examination based on all discovery in this case. Considering the nature and

extent of defense counsel's inadequate performance, and the evidentiary weaknesses in the prosecution's case, it does not follow that her trial would have yielded the same result had counsel competently performed his duties. There is more than a reasonable probability the outcome of the trial would have been different but for the cumulative impact of defense counsel's numerous failings.

However, in this habeas proceeding, defendant's burden, while substantial, did not require that she establish her innocence or even demonstrate "that counsel's deficient conduct more likely than not altered the outcome of the case." (See *Strickland, supra*, 466 U.S. at p. 693.) In order to establish prejudice, defendant needed only show that had the time of death evidence been presented to the jury, and/or that had the fact that defendant did not change her clothes been presented to the jury, there is a reasonable probability that at least one juror would have harbored reasonable doubt with respect to defendant's guilt. (*Strickland, supra,* 466 U.S. at p. 694.) Defendant has more than met this burden. Counsel's errors undermine confidence in the outcome of the trial, and the trial court's judgment must be affirmed.

II.

THE DECISION OF THE COURT OF APPEAL REVERSING THE TRIAL COURT'S GRANT OF HABEAS RELIEF FAILED TO ADHERE TO THE CONTROLLING STANDARDS OF APPELLATE REVIEW

In overturning the trial court's grant of habeas relief, the Court of Appeal did not adhere to the controlling standards of appellate review. Instead, the appellate court incorrectly applied the de novo standard of review to the entirety of defendant's claims (both the facts and the law), giving no deference whatsoever to the trial court's findings. (Opinion, p. 47.) The Court of Appeal disregarded the trial court's findings which were supported by substantial evidence, and found defense counsel effectively represented defendant. As will be further discussed below, the Court of Appeal's reasons in overturning the trial court's ruling did not adhere to the controlling standards of appellate review and, when viewed under the proper standard, were not supported by the facts or the law. Accordingly, its decision overturning the trial court's grant of habeas relief must be reversed.

A. The Court of Appeal Applied the Incorrect Standard of Appellate Review in this Case

A claim of ineffective assistance of counsel involves a mixed question of law and fact—findings about counsel's failures are questions of fact, and whether those failings amounted to deficient performance, and whether the defendant was prejudiced by the deficient performance are mixed question of law and fact. (*Strickland, supra,* 466 U.S. at p. 698 ["both the performance and prejudice components of the ineffectiveness inquiry are mixed questions of law and fact"]; *In re Resendiz* (2001) 25 Cal.4th 230, 248-249, abrogated on other grounds in *Padilla v. Kentucky* (2010) 599 U.S. 356 [ineffective

assistance of counsel claim presented a mixed question of law and fact].) Both parties, in briefing before the Court of Appeal, directed the Court of Appeal to the applicable standard of appellate review for mixed questions of law and fact as set forth in *In re Collins* (2001) 86 Cal.App.4th 1176. (See Opinion, p. 46.) The standard is as follows:

> This court applies the substantial evidence test to the trial court's resolution of pure questions of fact and independently reviews questions of law, such as the selection of the controlling rule. With respect to mixed questions of law and fact, this court reviews the trial court's application of law to fact under a deferential clearly erroneous standard if the inquiry is predominantly factual. But when the application of law to fact is predominantly legal, such as when it implicates constitutional rights and the exercise of judgment about the values underlying legal principles, this court's review is de novo. [Citations.]

(*In re Collins, supra*, 86 Cal.App.4th at p. 1181; see *In re Pratt* (1999) 69 Cal.App.4th 1294, 1315, 1317-1319, 1322 [in reviewing grant of habeas, the appellate court accepted the trial court's factual resolutions as supported by substantial evidence, independently assessed the uncontradicted facts, and independently applied the facts to the law]; see also *Application of Higgins* (1962) 199 Cal.App.2d 1, 10 [the power to weigh the evidence rests with the trial court, and the review by the Court of Appeal is limited to the determination as to whether there was any substantial evidence before the trial court to sustain its judgment].)

A claim of ineffective assistance of counsel is necessarily predominantly factually or credibility based, and thus the reviewing court should give even more deference to the trial court's findings. "Although the trial court's determination of deficient performance is a mixed question of fact and law [citation], we defer to that determination where, as here, it is

"predominantly factual or credibility based. [Citations.] [Citation]" (*People v. Callahan* (2004) 124 Cal.App.4th 198, 211.) An ineffective assistance of counsel claim involves analysis of the facts (defense counsel's performance) and application of those facts to the law (whether that performance was deficient and whether it prejudiced the defendant).

For example, in determining whether counsel's performance was deficient, the trial court looks to prevailing professional norms which are typically established through the testimony of a *Strickland* expert, not through some reliance on a law which articulates the standard of professional norms. Thus, this inquiry is fundamentally factual. Similarly, in assessing prejudice, the trial court examines the facts at trial, the facts which were not introduced at trial due to defense counsel's failures, and examines the closeness of the case to determine whether defense counsel's failures prejudiced the defendant.

Accordingly, because a claim of ineffective assistance of counsel is necessarily predominantly factual, appellate review should be deferential. (*People v. Callahan, supra*, 124 Cal.App.4th at p. 211.) "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (*U.S. v. U.S. Gypsum Co.* (1948) 333 U.S. 364, 395 [68 S.Ct. 525, 542, 92 L.Ed. 746].)

A deferential standard of review for ineffective assistance of counsel claims is appropriate because the trial court has a unique ability to evaluate whether defense counsel performed competently in a criminal case tried before it. (*People v. Callahan, supra*, 124 Cal.App.4th at p. 211; see also *People v.*

Fosselman (1983) 33 Cal.3d 572, 582 ["It is undeniable that trial judges are particularly well suited to observe courtroom performance and to rule on the adequacy of counsel in criminal cases tried before them."]; *People v. Andrade* (2000) 79 Cal.App.4th 651, 660 ["'the trial court is in the best position to make an initial determination, and intelligently evaluate whether counsel's acts or omissions were those of a reasonably competent attorney'"]; *People v. Wallin* (1981) 124 Cal.App.3d 479, 483 ["The trial judge is the one best situated to determine the competency of defendant's trial counsel."]; *People v. Aubrey* (1999) 70 Cal.App.4th 1088, 1104, disapproved on other grounds in *People v. Rubalcava* (2000) 23 Cal.4th 322, 334, fn. 8.) Because of the trial court's unique positioning, were the Court of Appeal "to second-guess the trial court's findings in this regard, [it] would emasculate the constitutional protections conferred in the exercise of the trial court's duty to ensure that all criminal trials are conducted with solicitude for the essential rights of the accused." (*People v. Callahan, supra*, 124 Cal.App.4th at p. 211, internal citations omitted.)

Hence, the applicable standard of review in assessing the People's appeal after a habeas grant on an ineffective assistance of counsel claim should be as follows: (1) the reviewing court upholds the trial court's factual findings if supported by substantial evidence; and (2) the reviewing court applies the clearly erroneous standard of review to the question of whether the established facts demonstrate counsel was constitutionally ineffective. (*In re Collins, supra*, 86 Cal.App.4th at p. 1181.)

This Court must uphold the trial court's ruling that defense counsel provided prejudicially ineffective assistance because the Court of Appeal failed to apply the proper standard of review to the mixed questions of facts and law when it applied the de novo standard of review, because the inquiry in this case was predominantly factual. Because the Court of Appeal applied the de novo standard of review, it failed to give proper deference to the trial court's factual findings which were supported by substantial evidence, and erred when it failed to apply the clearly erroneous standard of review to the mixed questions of law and fact.

As will be shown, *infra,* even if this Court were to find the Court of Appeal correctly chose the de novo standard of review for mixed questions of law and fact, the trial court's order must be upheld because the Court of Appeal erred in applying that standard. Specifically, it failed to accept the trial court's factual resolutions as supported by substantial evidence when it failed to give the trial court's factual findings deference, failed to resolve conflicts in favor of defendant, and failed to view the evidence most strongly in favor of the order below.

B. Had the Court of Appeal Adhered to the Correct Controlling Standard of Appellate Review, it Could Not Have Reversed the Trial Court's Grant of Habeas Relief

Had the Court of Appeal adhered to the correct controlling standard of appellate review, it could not have reversed the trial court's grant of habeas relief because substantial evidence supported the trial court's factual findings and its legal conclusions were not clearly erroneous.

1. Failure to Present Time of Death Testimony

In deciding whether defense counsel was objectively ineffective when he failed to consult with and present the testimony of a qualified time of death expert, the trial court found:

> The first claim, failure to consult a time of death expert, and the preliminary question - - the evidence presented to the Court - - was whether or not defense counsel actually consulted a time of death expert.
>
> In this particular case, defense counsel testified the only expert he consulted regarding time of death was an individual by the name of Daniel Vomhof. He holds a Ph.D. in biochemistry. He is a not a forensic pathologist or medical examiner. He does not have a medical degree.
>
> There is nothing in his curriculum vitae that would indicate that he is qualified to perform this assessment, and I have reviewed his curriculum vitae, Exhibit N in evidence, and in reviewing his resume, the Court finds that he's not a qualified expert to render an opinion regarding time of death.
>
> In this particular case, defense counsel indicated that he initially contacted this particular expert not on the time of death issue, but to determine whether or not the subject of necessary force to cause the injuries to Mr. Conde could have been caused by his client, and I guess that's based upon the expert's background in biomechanics.
>
> Apparently as some point during his discussion with this expert, the time of death was discussed, and again the Court finds that defense counsel has failed to consult a qualified time of death expert. No attempt was made to contact any forensic pathologist or medical examiner or any pathologist, for that matter, or any other qualified expert to render an opinion on time of death in this case.
>
> In this hearing, Dr. Bonnell, and Dr. Hua, have testified before this Court, and they concluded to a reasonable degree of medical certainty that the postmortem changes observed in the victim's body could not have occurred in less than one hour. Neither forensic pathologist could give an exact timing of the victim's death. However, both forensic pathologists testified in this court that the victim's death occurred significantly earlier than 1:20

> a.m., the earliest time the prosecution could place the defendant at the scene. Their observation were based upon postmortem changes by the first responders as well as the deputy coroner's report – and that would be Mr. Gomes.
>
> Hearing their testimony, this Court finds both opinions to be credible, convincing, and compelling. Their testimony indicates such qualified medical opinions were available at the time of trial and defense counsel failed to seek out medical experts to address the issue. The Court finds that defense counsel's performance fell below an objective standard of reasonableness when he failed to consult and present the testimony of a qualified time of death expert.
>
> In making this ruling, I'm not saying that he should have contacted these two particular experts, but it's apparent to the Court that these qualified opinions did exist in the medical field, and there was no effort to contact or secure the testimony of such experts.
>
> If such expert would have testified, it would have put the victim's time of death at a time when petitioner could not have committed the crime, if believed by the jury. Obviously, it's always a question of fact for the jury to either accept or reject the testimony of a witness that testifies, including an expert.

(4 R.T. 735-737.)

Thus, the trial court made the following factual determinations to which the Court of Appeal was bound, if supported by substantial evidence: (1) Dr. Vomhof was not a qualified expert for rendering an opinion on time of death; (2) defense counsel failed to consult a qualified time of death expert and made no effort to even find one; (3) a competent attorney would have consulted a time of death expert;[2] (4) expert testimony on the subject was available to

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2 Despite the fact the Court of Appeal found the trial court's analysis failed to directly answer the question at issue—"the issue is whether a reasonable attorney would have made the same decision as Keen" (Opinion, p. 53), the trial court specifically stated "[t]he Court finds that defense counsel's performance fell below an objective standard of reasonableness

defense counsel, had he sought it out; (5) the testimonies of Drs. Hua and Bonnell were credible; (6) the testimonies of Drs. Hua and Bonnell placed the victim's time of death before 1:20 a.m.; (7) such testimony would have placed the victim's time of death at a time defendant could not have committed the crime.

a. Substantial evidence supports the trial court's factual findings

Substantial evidence supported the trial court's factual findings with respect to the time of death claim. As noted above, Dr. Vomhof had no qualifications to render an opinion on time of death. (2 R.T. 197, 246.) Defense counsel admitted to failing to consult a qualified time of death expert, offered no tactical reason for failing to do so, and testified that, in hindsight, he would have consulted with and called such an expert. (2 R.T. 199-201, 252.) Defendant's *Strickland* expert testified that there was no conceivable tactical reason for this failure and defense counsel's performance fell below the standard of care for competent representation. (2 R.T. 304-305, 309-310, 340.) Two qualified forensic pathologists credibly testified Conde's death occurred long before 1:20 a.m., the earliest defendant could be placed on the scene. (1 R.T. 110, 113, 137-138, 153, 175-176.) Further, the prosecution's own witness, Dr. Cohen, testified that it was just as likely Conde could have died before 1:20 a.m. as after 1:20 a.m. (3 R.T. 434.)

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when he failed to consult and present the testimony of a qualified time of death expert." (4 R.T. 736-767).

b. The trial court's finding of deficient performance was not clearly erroneous

The trial court's ultimate legal finding of deficient performance was not clearly erroneous. Because defendant had an alibi up until 1:20 a.m., a medical opinion placing the time of death before that time period (or even raising doubt about it within one juror) was critical to the defense. Both Drs. Hua and Bonnell provided critical, credible, substantial testimony that in their expert medical opinion, Conde was dead before 1:20 a.m. Even the People's own expert's testimony demonstrated how critical this evidence was to the defense. Certainly it is reasonably probable that a time of death that had a 50% chance of occurring before defendant arrived home could be enough to instill reasonable doubt in the mind of at least one juror. As explained *supra*, at pages 31-32, consistent with the trial court's finding, other convictions have been reversed on the basis of ineffective assistance of counsel for failure to present such time of death evidence. (See, e.g., *Elmore v. Ozmint, supra,* 661 F.3d 783; *Rivas v. Fischer, supra,* 780 F.3d 529; *Bess v. Legursky, supra,* 465 S.E.2d 892.)

2. Failure to Prove Defendant's Clothes

In deciding whether defense counsel was objectively ineffective when he failed to present evidence of defendant's clothes around the time of the crime, the trial court stated:

> The last category regarding ineffective assistance of counsel is his failure to prove defendant did not change her clothes – pivotal issue in this case.
>
> The evidence presented to the jury in the second trial as well as the first trial:

The evidence presented to the jury demonstrated it was an extremely bloody crime scene. There is no question the perpetrator would have the victim's blood on her person. Although the People have now argued in this hearing that it is possible for a perpetrator to not have blood on her clothes, this Court finds this theory unlikely and not consistent with the crime scene as described by Daniel Verdugo in his trial testimony.

I think it's worth noting at this point what his particular description was. I have it up here.

Mr. Verdugo testified that he was a 20-year veteran of the Corona Police Department. He was a crime scene technician, and he had worked many, many, many different homicide scenes – I forget the exact number, but I think maybe it was about 400 – anyway, a well-experienced individual. And Mr. Verdugo responded to the crime scene and indicated in part of his testimony – I'm just going to read part of it to give the flavor of what he observed.

"In this particular case, I was able to find blood 360 degrees from where the victim was. This blood was on every wall in the living room. There was also some blood that I noticed on the carpet and some items on the floor, but oddly enough there was not blood on the ceiling" And he concluded from that there were horizontal strikes to the victim and not vertical strikes, which would have resulted in blood spatter on the ceiling.

"Question: I am understanding you correctly, form the position in which you observed Mr. Conde, you found blood evidence 360 degrees around his body: correct?"

And this was basically his testimony - -the first trial as well, but, anyway, this was a very bloody crime scene, and as I just indicated, the Court finds that the People's theory that she possibly did not have blood on her is not consistent with a crime scene as described by Mr. Verdugo. (R.T. 740 - 742.)

In both trials, the People argued that the petitioner was a liar and gave three specific examples: Her clothing, her shoes, and her purse. People argued petitioner killed Mr. Conde and changed her clothes before the paramedics arrived, including the police.

Petitioner testified at trial, the first and second trial that she didn't change her clothes, but defense counsel failed to present any corroboration of those self-serving statements regarding her clothes or her purse or her shoes. And this was true in the first

trial as well, the first trial being, basically the same theory in the second trial, that the defendant had an opportunity to change her clothes because the perpetrator of this homicide undoubtedly would have had blood on their person or on their clothes.

Mrs. Long testified that she didn't change her clothes, which gave the prosecution the opportunity in closing argument to argue that she's a liar, don't believe her, there's no corroboration of that. The only evidence that she didn't change her clothes is, obviously, her testimony, which you can't believe.

At this hearing, the petitioner has presented evidence that her clothes she wore the night of the murder matched the clothes collected by the police after the murder. Specifically witness Jeffrey Dills had provided a description of petitioner's clothes to the police. The parties admitted the police interview of Mr. Dills as evidence in this case. Dills' description of the clothes matched the exact description of the clothes taken from petitioner after the murder.

Dills was never questioned by defense counsel at the preliminary hearing about what clothes petitioner was wearing while he was with her the night of the murder.

Further, after Mr. Dills' untimely death, defense counsel did not seek to introduce Dills' description of the clothes at petitioner's trial, and as far as Mr. Dills' company that evening, it was not a generic description of clothing that we often hear – for example, light colored shirt or bright colored pants. This was a very specific description of very unique and distinctive clothing, and of course this was in his interview with police, which was tape-recorded and video-recorded. And at the preliminary hearing, Mr. Dills basically testified concerning what time he dropped off Miss Long the night of the murder, was not questioned at all about the clothing description, and because Mr. Dills was killed in a traffic accident prior to trial, the preliminary hearing transcript was admitted. So the testimony of Mr. Dills that the jury heard basically dealt with Miss Long, what they did that evening, and dropping her off at her home between 1:20 and 1:30 without ever any mention of what clothing she was wearing.

Defense counsel admitted that he failed to ask Dills about petitioner's clothes at the preliminary hearing and failed to admit Dills' statements to the police regarding what clothing petitioner was wearing prior to the murder. Defense counsel admitted that he had no tactical reason for doing so.

> The Court finds the issue of whether petitioner changed her clothes is a significant issue in this case. If petitioner did not change her clothes, there's a reasonable inference from the evidence that she is not the killer. Hence, it was pivotal that defense counsel establish that Miss Long did not change her clothes. Accordingly, this Court finds defense counsel's performance fell below an objective standard of reasonableness when he failed to prove petitioner did not change her clothes.

(4 R.T. 742-744.)

Anecdotally, the trial court provided an explanation as to how Dills' statements could have in fact come before the jury if defense counsel had attempted to admit them into evidence "...in giving this case much thought, it occurs to the Court that there were two possible grounds for admissibility." (4 R.T. 744.) The trial court explained the statements could have either been admitted into evidence as non-hearsay circumstantial inference evidence, or admitted under the due process hearsay exception as contemplated by the United States Supreme Court in *Chambers v. Mississippi* (1973) 410 U.S. 284 [93 S.Ct. 1038, 35 L.Ed.2d 297] and the rule which was an outgrowth of this case, Federal Rules of Evidence Rule 807. (4 R.T. 744-746.) In making its ruling, the trial court stressed the importance of the evidence and why, if presented with the statements, the trial court would have allowed the statements into evidence:

> [T]here is case law which the trial court could rely upon in this particular case for this decision – unusual case – and the issue of clothes being highly relevant to a crucial issue. And under the circumstances, Mr. Dills gave a statement with substantial reasons to assume its reliability because the prosecution's entire case was based upon the statement of Mr. Dills saying that he dropped her off between 1:20 and 1:30. But for that evidence introduced by the People, relied upon by the People – but for that evidence, the Court would have dismissed this case under 1118.1. So obviously the People's cornerstone to their prosecution was the reliability of Mr. Dills.

(4 R.T. 746.)

Hence, the trial court made the following factual determinations which the Court of Appeal was bound by, if supported by substantial evidence: (1) the crime scene was extremely bloody; (2) the perpetrator would have had the victim's blood on their person; (3) defendant testified she did not change her clothes; (4) the People argued that defendant was a liar and that she did change her clothes; (5) defense counsel did not present any evidence corroborating the fact that defendant did not change her clothes; (6) the clothes collected by police matched the description of the clothes worn by defendant earlier in the day; (7) defense counsel did not question Dills about the clothes at the preliminary hearing; (8) defense counsel did not seek to have Dills's description of the clothes admitted at defendant's trial; (9) defense counsel had no tactical reason for his failures; and (10) if defendant did not change her clothes, she is not the killer.

a. Substantial evidence supports the trial court's factual findings

Substantial evidence demonstrated the crime scene was bloody. Criminalist Verdugo examined the crime scene first hand and concluded that every wall in the living room had blood on it. Verdugo established that there was blood on every wall of the living room in a 360 degree radius. (3 R.T. 517, 519, 530; 4 R.T. 851, 867-868.) Because velocity was involved there was a fine mist of blood not necessarily visible in the photos of the crime scene—there was a misting of blood on the table, blood on the curtains, the coffee table, the blinds, the television, a door behind the couch that led into the

garage, some baseball bats by the front door, and a washing machine inside the garage. (2 R.T. 411, 414; 3 R.T. 484-485, 495-498, 509, 524, 546-548, 553; 4 R.T. 853; 1 C.T. 91-92, 102, 106.) Given the bloody crime scene, the perpetrator would have had the victim's blood on their person.

Substantial evidence also showed defendant was wearing the same clothes before the murder, as after the murder, thus establishing she did not change her clothes. Dills told the police what defendant had been wearing that night. (2 R.T. 1919.) Dills described defendant's clothes as a black shirt with rings on it and blue jeans and a tan jacket. (2 R.T. 192.) A picture of defendant's shirt, which was confiscated by the police, matched the identification by Dills. Specifically the rings on the shirt matched Dills's description (Defendant's G, photograph of shirt). (2 R.T. 192.) Dills also described that defendant was wearing low rider jeans and a tan jacket, both of which the police took from defendant on the night of the murder (Defendant's H, photograph of jeans; Defendant's I, photograph of tan jacket). (2 R.T. 192-193.)

Substantial evidence showed defense counsel had no tactical reason for his failures to question Dills about defendant's clothes at the preliminary hearing or attempt to admit Dills's statements into evidence regarding the clothes defendant was wearing that night via a motion in limine, after Dills died prior to defendant's jury trial, as defense counsel himself admitted he had no tactical reason. (2 R.T. 194, 195.) As early as the preliminary hearing, defense counsel had the clothes the police took from defendant on the night of the murder available to him, and had Dills' interrogation statements describing

petitioner's clothes, yet he did not question Dills about the clothing at the preliminary hearing. (2 R.T. 193-194.) Defense counsel testified he had no tactical reason for his failure to question Dills during the preliminary hearing about the clothes petitioner was wearing that night. (2 R.T. 194, 195.) He did not show the photographs of defendant's clothes to the jury, although he testified at the evidentiary hearing he believed the photographs in addition to Dills's description of the clothes would have helped to prove the clothes defendant was actually wearing that night. (2 R.T. 193.) Defense counsel testified that looking back, he would now try to get Dills's statements about defendant's clothes into evidence because it would have bolstered the defense's argument and made the defense stronger. (2 R.T. 195-196.)

Additionally, defendant's *Strickland* expert testified an objectively reasonable competent attorney would have questioned Dills about defendant's clothes at the preliminary hearing, and attempted via an in limine motion to introduce Jeff Dills's statement regarding defendant's clothes into evidence. (2 R.T. 312, 317.) The *Strickland* expert testified defense counsel's failure to present evidence regarding the clothes defendant was wearing that night was one of the most crucial areas of the case that was not presented effectively. (2 R.T. 312.) Dills was the primary witness for the prosecution, because he was the only witness who established the prosecution's timeline. (2 R.T. 313.) It was not sufficient to only have defendant testify as to what she was wearing that night because a defense attorney should always look for some independent evidence to corroborate the defendant's statements. (2 R.T. 314.) The *Strickland* expert testified that the failure to either question Dills's about the

clothes at the preliminary hearing, or to later seek to introduce his statements into evidence was below the standard of care for a reasonably competent defense attorney. (2 R.T. 320.)

b. The trial court's finding of deficient performance was not clearly erroneous

The trial court's ultimate legal finding of deficient performance was not clearly erroneous. In light of the evidence adduced at trial and in the habeas proceedings below, it is undisputed that the perpetrator would have had the victim's blood on their person. As such, it was critical that the defense prove defendant not only did not have blood on her person, but that she did not change clothes. Had he done so either by eliciting the testimony from Dills at the preliminary hearing or by way of in limine motion after Dills's untimely death before defendant's trial, the jury would have heard evidence that made it impossible for her to have been the perpetrator of this murder. Hence, the trial court's finding of deficient performance was not clearly erroneous.

C. Even If the Court of Appeal Identified the Correct Controlling Standard of Appellate Review, it Still Erred in its Application

Even under a de novo standard of review, in an appeal from an order granting a petition for habeas corpus after an evidentiary hearing, basic principles of appellate review apply. (*In re Douglas* (2011) 200 Cal.App.4th 236, 242.) When applying the de novo standard of review, the appellate court must accept the trial court's factual resolutions when supported by substantial evidence, then independently assess the uncontradicted facts, and independently apply the facts to the law. (See *In re Pratt, supra*, 69 Cal.App.4th at pp. 1315, 1317-1319, 1322; *In re Hardy, supra*, 41 Cal.4th at

p. 993 [it is well established that, in a habeas corpus matter, higher courts give "great weight" to a trial court judge's factual findings "that are supported by substantial evidence. [Citations.]"]; *In re Thomas* (2006) 37 Cal.4th 1249, 1256 [higher courts must accord considerable deference to a trial court's assessment of witnesses' credibility because the trial court judge "has the opportunity to observe the witnesses' demeanor and manner of testifying."].) Further, on a People's appeal from an order in a habeas corpus proceeding, evidence must be taken most strongly in favor of order appealed from, and conflicts must be resolved in favor of defendant, not the People. (*In re Garcia* (1977) 67 Cal.App.3d 60, 65; *Ex parte Gutierrez* (1954) 122 Cal.App.2d 661, 664.)

1. Failure to Present Time of Death Testimony

Even if this Court were to find the Court of Appeal applied the correct legal standard in applying the de novo standard of review to the time of death issue, the Court of Appeal erred when it failed to give the trial court's factual findings proper deference, ignored uncontroverted facts which established defense counsel's ineffectiveness, misapplied applicable law, failed to view the evidence most strongly in favor of the order appealed from, and failed to resolve any conflicts in favor of defendant.

a. The Court of Appeal failed to give the trial court's factual findings deference

Although the Court of Appeal was bound by the trial court's factual findings where supported by substantial evidence, the Court of Appeal only mentioned the "substantial evidence" standard, which applies to the trial court's factual findings in passing and failed to analyze the trial court's factual

findings under this standard. (Opinion, pp. 45-46.) Instead, the Court of Appeal made its own factual findings without giving proper deference to the trial court. Specifically, the Court of Appeal did not give proper deference to the trial court's findings that defense counsel did not have a basis to form nor an actual tactical reason for failing to present the evidence regarding the victim's time of death, and it did not give deference to the trial court's credibility determinations of the experts. The Court of Appeal erred because the trial court's findings were supported by substantial evidence.

(1) *Substantial evidence shows defense counsel did not have the basis to form a valid tactical reason for his failure*

In concluding that defense counsel rendered objectively effective representation, the Court of Appeal found defense counsel's decision to not pursue a time of death defense was informed and reasonable based upon: (1) classes and seminars that defense counsel claimed he attended which explained a time of death expert cannot pinpoint a precise time of death but rather give a time span, or a window of time when the death occurred; and (2) his knowledge that the prosecution would argue defendant had a maximum of 49 minutes to complete the killing. (Opinion, p. 54.) The Court of Appeal found defense counsel had an objectively valid, tactical reason for failing for present the time of death evidence—specifically because the time of death would be given in a broad range of time it therefore would not be helpful to the defense. (Opinion, pp. 48-52.) The problem with the Court of Appeal's analysis it that it is based on a theory that defense counsel was actually aware of the range of times given by various time of death experts, and that he then made an

informed, tactical decision to pursue another defense. The substantial evidence demonstrated this was not the case.

"Reasonable performance of counsel includes an adequate investigation of facts, consideration of viable theories, and development of evidence to support those theories. An attorney must make a reasonable investigation in preparing a case or make a reasonable decision not to conduct a particular investigation. [Citation.] Before an attorney can make a reasonable strategic choice against pursuing a certain line of investigation, the attorney must obtain the facts needed to make the decision. [Citation.] An attorney's ' " 'strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation.' " ' [Citation.] Although we generally give great deference to an attorney's informed strategic choices, we closely scrutinize an attorney's preparatory activities." [Citation.] (*Foster v. Lockhart* (8th Cir.1993) 9 F.3d 722, 726.) "Because '[r]epresentation of an accused murderer is a mammoth responsibility' [citation], the 'seriousness of the charges against the defendant is a factor that must be considered in assessing counsel's performance.' [Citation.]" (*In re Jones* (1996) 13 Cal.4th 552, 566.)

Strickland teaches that "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." (*Strickland*, *supra*, 466 U.S. at p. 691.) Counsel must make a reasonable determination that further investigation is unnecessary, or else his performance is deficient. (*Id.* at p. 699.) On the other

hand, a decision not to investigate is unreasonable where counsel "d[oes] not even take the first step of interviewing witnesses or requesting records" or "ignore[s] pertinent avenues for investigation of which he should have been aware." (*Porter v. McCollum* (2009) 558 U.S. 30, 39-40 [130 S.Ct. 447, 175 L.Ed.2d 398].) Thus, where decisions not to investigate are based on inattention, rather than on tactical considerations, counsel is ineffective. For example, in *Wiggins v. Smith*, the Supreme Court upheld the defendant's ineffective assistance of counsel claim where there was no objectively reasonable basis for counsel's failure to investigate mitigating evidence, noting that the "record of the actual. . .proceedings underscores the unreasonableness of counsel's conduct by suggesting that their failure to investigate thoroughly resulted from inattention, not reasoned strategic judgment." (*Wiggins v. Smith*, (2003) 539 U.S. 510, 526; see also *Hart v. Gomez* (9th Cir.1999) 174 F.3d 1067, 1070 ["A lawyer who fails adequately to investigate, and to introduce into evidence, [information] that demonstrate[s] his client's factual innocence, or that raise[s] sufficient doubt as to that question to undermine confidence in the verdict, renders deficient performance."].)

Here, defense counsel could not have made any reasonably informed decision regarding a time of death defense because he admitted he failed to consult a qualified time of death expert before he made this decision. (2 R.T. 200.) Defense counsel had absolutely no idea of any possible range of time of death prior to making his decision not to present such a defense because he failed to reasonably investigate the defense in the first place. Without knowing

the size of the time span of the time of death, an objectively reasonable attorney absolutely could not rule out time of death as a viable defense. If the time of death window is outside the window of opportunity, how could any objectively reasonable attorney disregard this possible defense? Without properly investigating the time of death and determining what that time of death time span would be based upon an expert's opinion, it could not be objectively reasonable to disregard this defense. Under prevailing professional norms in the circumstances of this case, effective trial counsel, acting reasonably, would have, at a bare minimum, properly researched the potential time of death defense before concluding that it was not a viable defense. The *Strickland* expert confirmed that one cannot have a tactical reason to not present a defense when counsel does not have the facts to support that decision.[3] (2 R.T. 302.) Under prevailing professional norms in the circumstances of this case, effective defense counsel, acting reasonably, would have, at a bare minimum, properly researched the potential time of death defense and consulted with a qualified time of death expert before concluding that it was not a viable defense. (2 R.T. 302, 305, 310.) Accordingly, the trial court's finding that defense counsel did not perform competently was supported by substantial evidence.

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3 The Court of Appeal suggests that, all that is required of a defense attorney is to attend a few, unnamed MCLE classes and to have a vague conversation with a biomechanical engineer (2 R.T. 197, 199), to be competent in time of death issues. If this is true, the standard for representation of criminal defendants in a murder case has been thoroughly eroded.

(2) *Substantial evidence shows defense counsel did not have a tactical reason for his failure to present the time of death defense because Dr. Bonnell was credible*

The Court of Appeal found because there was conflicting evidence about rigor mortis, a time of death expert giving a definitive time of death would not sound credible to a jury and therefore would be insufficient to raise a reasonable doubt. The Court of Appeal found that, because Dr. Bonnell's opinion "failed to account for or disregarded evidence relating to the post-1:30 time frame," his testimony would not have been credible. (Opinion, p. 52.) Specifically, the Court of Appeal faulted Dr. Bonnell for not considering "Juanita's testimony reflecting she heard the victim in his garage at 1:30 a.m. Bonnell did not review defendant's statements reflecting she was a nurse and observed the victim breathing at 2:09 a.m. Bonnell opined that Gomes's report, reflecting rigidity had not started at 5:03 a.m., was incorrect, so he did not rely upon it. Bonnell explained that he relied upon the paramedics' report that lividity and rigor had set in at 2:20 a.m." (Opinion, p. 50.) As such, his opinion may not have sounded logical or credible. Because of this, the Court of Appeal found an objectively reasonable attorney could conclude that relying upon a time of death defense would be inadequate in this case. (Opinion, p. 51.) However, these conclusions do not giver proper deference to the trial court and are factually and legally flawed.

Here, the trial court found the time of death expert testimony placed the time of death at a time when defendant had an alibi and that finding was supported by substantial evidence. (4 R.T. 737.) Two qualified forensic

pathologists credibly testified Conde's death occurred long before 1:20 a.m., the earliest defendant could be placed on the scene. (1 R.T. 110, 113, 137-138, 153, 175-176.) The trial court was equipped to evaluate Dr. Bonnell's credibility in light of the issues raised in the opinion and the trial court found Dr. Bonnell's expert opinion "to be credible, convincing, and compelling." (4 R.T. 736; see also CALCRIM No. 332 [" In evaluating the believability of an expert witness ... consider the expert's knowledge, skill, experience, training, and education, the reasons the expert gave for any opinion, and the facts or information on which the expert relied in reaching that opinion. You must decide whether information on which the expert relied was true and accurate. You may disregard any opinion that you find unbelievable, unreasonable, or unsupported by the evidence."].) Contrary to the Court of Appeal's opinion that Dr. Bonnell's opinion would not have sounded logical or credible to the trier of fact, the Court of Appeal had to give deference to the trial court's credibility finding and that factual finding was that Dr. Bonnell was credible. (See *In re Thomas*, *supra*, 37 Cal.4th at p. 1256.) It failed to do so.

Additionally, the Court of Appeal's decision conflicts with the facts that show Dr. Bonnell considered all relevant information, it defies the role of an expert who is free to rely upon whatever evidence the expert deems appropriate, and it ignores the logical reasons why Dr. Bonnell disregarded some evidence. It is well established that an expert is free to rely on the evidence he or she deems pertinent in forming his or her opinion. (See *Micro Chemical, Inc. v. Lextron, Inc.* (Fed. Cir. 2003) 317 F.3d 1387, 1392-1393.)

Hence, it was appropriate for Dr. Bonnell, just as Dr. Hua had done, to give little to no weight to defendant's statement that Conde was "breathing" because she was intoxicated, a body could not be breathing if there was objective signs of body decomposition (lividity and rigor), and there was more reliable, objective scientific information on which to base an opinion. (1 R.T. 115-116, 129, 143.) For similar reasons, Juanita Sandoval's statement about hearing Conde is not as reliable of an indicator of time of death as are the actual objective physical changes in the body. (1 R.T. 135-136, 143-144.) People are oftentimes mistaken on what they have seen or heard and Juanita Sandoval was not even interviewed about the murder until nearly 20 days after it occurred. Thus, her statement was not a reliable indicator of time of death.

Despite the Court of Appeal's finding to the contrary, it also was proper for Dr. Bonnell, as an expert, to rely on the information he deemed appropriate. He properly disregarded Gomes's report. After all, it appears Gomes was wrong about his observation of no rigor in the body. Although several first responders observed rigor, Gomes stated that rigor has not started. (1 R.T. 104, 122.) Gomes statement is problematic because it was not an objective "observation" about the state of the body, but rather a subjective "interpretation" of the state of decomposition. (1 R.T. 130, 134.) Further, Gomes was wrong in his claim that rigor had not started because it would have been medically impossible for rigor not to have started by the time he observed the body. (1 R.T. 145.) Rigor starts immediately and is noticeable to a trained eye (like Gomes) in about a half hour to an hour. (1 R.T. 104, 123, 126.)

Rigor is noticeable to a lay person in two to five hours and there is certainly more than two hours between 2:20 a.m. (when first responders noticed rigor) and 5:03 a.m. (when Gomes arrived on the scene). (1 R.T. 106, 126.) If there truly was no rigor when Gomes viewed the body, then the only objective, scientific explanation is that rigor had passed, and the time of death was even longer before –between 16 and 24 hours prior to Gomes' observation. (1 R.T. 108-109.) The only other objective scientific explanation was that rigor was broken by the first responders. (1 R.T. 108, 122, 124.) However, given that Dr. Pastener noted the body was in full rigor on October 7, 2003, it is clear Gomes was simply wrong. Lending credence to this issue is the fact that Gomes did not even write his report until May 12, 2004, months after the murder. (See C.T. Supp. 155 ["*Report prepared by: Deputy Coroner Richard Gomes UN2109 05/12/2004*"].)

b. The Court of Appeal ignored uncontroverted facts which established defense counsel's ineffectiveness

In the analysis portion of the opinion regarding defense counsel's failure to investigate or present time of death evidence, the Court of Appeal opinion fails to address or even acknowledge the *Strickland* expert's testimony regarding the prevailing professional norms in a murder defense in California. The opinion completely disregards the fact the *Strickland* expert provided evidence regarding the standards for an objectively reasonable attorney, how an objectively reasonable attorney would have represented defendant in this case, and how defense counsel fell below the standard of care. (See 2 R.T. 305, 312-314, 317, 340; cf. *Hamilton v. Ayers* (9th Cir. 2009) 583 F.3d 1100,

1129-1130 [district court clearly erred in relying on testimony of defendant's counsel and rejecting testimony of *Strickland* expert regarding standard of care]; see also *Allen v. Calderon* (9th Cir. 2005) 395 F.3d 979, 1001-1002.)

In the *Strickland* expert's opinion, time of death was so critical in this case that a competent defense attorney would have sought out and consulted a qualified time of death expert. (2 R.T. 305.) In the recitation of the evidence presented at the evidentiary hearing, the opinion acknowledges that this expert "opined that defense counsel's rejection of the time of death defense fell below a reasonable standard of care." (Opinion, p. 37.) However, this in actuality is only a portion of the evidence presented by this expert. More specifically, and more importantly completely neglected by the opinion's analysis, the *Strickland* expert testified the fact defense counsel rejected even primarily investigating whether he should present a time of death defense fell below prevailing standards—specifically the *Strickland* expert testified "that you don't even check as to whether that's a viable defense, it is objectively below the standard of care. A reasonable, experienced lawyer would not and should not have done that." (2 R.T. 310.) The *Strickland* expert's opinion is in line with applicable case law which holds the failure to investigate constitutes incompetence when investigation would have led to witnesses that potentially would be beneficial to the defendant. (See *People v. Jackson* (1980) 28 Cal.3d 264, 289; *Hendricks v. Calderon* (9th Cir.1995) 70 F.3d 1032, 1040, disapproved of on other grounds in *People v. Cromer* (2001) 24 Cal.4th 889; ABA Stds. for Crim. Justice (3d ed.1993) std. 4-4.1, com. to std. 4-4.1, p. 182.)

c. The Court of Appeal misunderstood defense counsel's duty in presenting the time of death evidence

The Court of Appeal found that, because a time of death estimate necessarily involves a window of time, the window of time in this case (maximum 49 minutes) was to too narrow to generate a reasonable doubt, and it was therefore objectively reasonable for defense counsel to not investigate a time of death defense. (Opinion, pp. 48, 52.) The Court of Appeal was incorrect.

The issue for the defense was not whether there was a broad range for the actual time of death given by the experts. Rather, the crucial issue was whether the defense could establish, or at least raise reasonable doubt within one juror, that the death did not occur after 1:20 a.m. All three of the experts presented at the evidentiary hearing, whom the finder of fact personally observed and found credible, and whom the Court of Appeal erroneously did not give deference to, provided that requisite information. Dr. Hua concluded death was "long before 1:20 a.m." (1 R.T. 99, 110, 133-134, 145.) Dr. Hua testified there was "no medical evidence" to support the proposition that death occurred after 1:20 a.m. and that it was medically impossible, based on the facts, that the victim died after 1:20 a.m. (1 R.T. 110,138.) Dr. Bonnell opined it was medically impossible for Conde to have died at or after 1:20 a.m. (1 R.T. 175-176.) Even the People's expert, Dr. Cohen opined Conde could have died before or after 1:30 a.m., based on the medical findings. (3 R.T. 463.)

Regardless of the broad ranges of time of death estimates or the narrow window of time in this case, the fact that experts opined Conde died when defendant had an alibi was sufficient to demonstrate defense counsel was ineffective in failing to present such evidence to the jury. Moreover, even the People's expert's testimony gave a 50% chance Conde died when defendant had an alibi, which would certainly be enough to meet the reasonable doubt threshold in a murder case.

d. The Court of Appeal erred in finding the defenses of third party culpability and time of death were mutually exclusive

The Court of Appeal found "[a] reasonable attorney could view the case in the same manner as defense counsel-given the 49 minute window of opportunity argued by the prosecution and the range of times given by the experts, the better defense strategy was to focus on Lovejoy rather than the timing of the death." (Opinion, p. 54) The Court of Appeal's conclusion that defense counsel was objectively reasonable when he failed to investigate or present the time of death defense, because the better strategy was to focus on a defense of third-party culpability, logically fails because the defenses were not mutually exclusive. Instead, given the time ranges found, these defenses actually complemented one another.

A tactical decision to pursue one defense does not excuse failure to present another defense that "would bolster rather than detract from [the primary defense]." (*Lawrence v. Armontrout*, (8th Cir.1990) 900 F.2d 127, 130.) In *Foster v. Lockhart, supra*, 9 F.3d 722, the Eighth Circuit Court of Appeals found the attorney's presentation of an alibi defense did not excuse

his failure to investigate further and present evidence of defendant's impotency. Contrary to the reasoning of the defendant's attorney, the Eighth Circuit found an impotency defense would have reinforced the alibi defense by showing it was even more unlikely the defendant raped the victim. "As the district court aptly noted, Foster's attorney 'focused only on whether [Foster possibly] could have committed the crime and not on whether or not it was likely he could have committed the crime.' [Citation.] Like the district court, we conclude Foster's attorney did not investigate Foster's impotency enough to make a reasonable decision not to present the defense at trial. Thus, the attorney's performance was deficient." (*Foster v. Lockhart, supra,* 9 F.3d 722 at p. 726; see also *Williams v. Taylor* (2000) 529 U.S. 362, 364 [120 S.Ct. 1495, 146 L.Ed.2d. 389] [the Court rejected any suggestion that a decision to focus on one potentially reasonable trial strategy–in that case, defendant's voluntary confession–was "justified by a tactical decision" when "counsel did not fulfill their obligation to conduct a thorough investigation of the defendant's background."].)

Similarly, here the defenses of third party culpability and time of death complemented one another, and despite the Court of Appeal's finding to the contrary, defense counsel's presentation of a third party culpability defense did not excuse his failure to investigate and present evidence of the time of death defense, which would have proven that it was even more unlikely defendant committed the crime. Defense counsel did not investigate the time of death

defense sufficiently to make an objectively reasonable decision not to present the defense at trial.

e. Conclusion

Defense counsel's failure to consult a qualified time of death expert in this case, a case which relied almost entirely on the fact that if defendant were guilty, she would have had to accomplish an unfathomable list of tasks in a very short time frame, cannot be characterized as an objectively reasonable exercise of professional judgment. The trial court's rulings regarding the time of death evidence presented were clearly supported by substantial evidence and relevant legal authority. The Court of Appeal's reversal of the trial court's decision relied upon erroneous or unsupported facts, its ultimate conclusion did not give proper deference to the trial court, and it was not supported by prevailing law.

2. Failure to Elicit Evidence About or Prove Defendant Did Not Change Her Clothes

Even if this Court were to find the Court of Appeal applied the correct legal standard in applying the de novo standard of review to the clothing issue, the Court of Appeal again failed to give deference to the trial court's factual findings with respect to the clothing and its significance, ignored uncontroverted facts establishing defense counsel's ineffectiveness, misapplied applicable law, failed to view the evidence most strongly in favor of the order appealed from, and failed to resolve any conflicts in favor of defendant.

a. The Court of Appeal failed to give the trial court's factual findings deference

The Court of Appeal did not apply the substantial evidence standard to the trial court's factual findings with respect to the clothing issue. Instead, as it did with the time of death issue, the Court of Appeal made its own factual findings without giving proper deference to the trial court. Specifically, the Court of Appeal did not give proper deference to the trial court's findings that the perpetrator would have had blood on their person and that defense counsel had no tactical reason for failing to elicit or introduce this evidence. The Court of Appeal erred because the trial court's findings were supported by substantial evidence.

(1) *The Court of Appeal failed to give deference to the trial court's finding that the perpetrator would have had the victim's blood on their person*

In determining that defense counsel did not render ineffective assistance, the Court of Appeal found, "it is possible that if the killer were standing to the northwest of the victim, then no blood would have landed on the killer."[4] (Opinion, p. 43.) This conclusion failed to give proper deference

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4 This "bloodless" theory adopted by the Court of Appeal arose after defendant proved, and the People conceded defendant did not change her clothes. (4 R.T. 705.) After the People conceded defendant did not change her clothes, the People then claimed the perpetrator could have committed the crime without getting blood on their person by pointing to Verdugo's testimony that a helmet on the floor behind the victim's body did not have blood on it. (4 R.T. 705.) This argument fails because the baseboard behind the helmet was spattered with blood, and if the helmet was there during the attack, the assailant or assailants blocked the projection of blood spatter and ***would in fact had to have had blood on him or her***. (E039986 3 R.T. 572,

to the trial court's factual finding on the issue which was supported by substantial evidence.

The trial court specifically found that based on all of the evidence, the only reasonable inference was that the perpetrator would have had blood on them. "There is no question the perpetrator would have the victim's blood on her person. Although the People have now argued in this hearing that it is possible for a perpetrator to not have blood on her clothes, this Court finds this theory unlikely and not consistent with the crime scene as described by Daniel Verdugo in his trial testimony." (4 R.T. 741.) "[T]he Court finds that the People's theory that she possibly did not have blood on her is **not consistent** with a crime scene as described by Mr. Verdugo." (4 R.T. 742, emphasis added). Such a factual finding was appropriate because the criminalist at the scene objectively observed and concluded that every wall in the living room had blood on it. Criminalist Verdugo established that there was blood on every wall of the living room in a 360 degree radius. (3 R.T. 517, 519, 530; 4 R.T. 851, 867-868.) Because velocity was involved there was a fine mist of blood not necessarily visible in the photos of the crime scene. There was a misting of blood on the table, blood on the curtains, the coffee table, the blinds, the television, a door behind the couch that led into the garage, some baseball bats by the front door, and a washing machine inside the garage. (2

575.) The People also claimed that a DOJ report supported its new theory, but this report actually concluded the lack of information, "***preclude rendering a meaningful opinion as to the presence or absence of blood spatter on the assailant.***" (emphasis in original) (2 C.T. 347-348.) Both arguments were rejected by the trial court. (R.T. 741.)

R.T. 411, 414; 3 R.T. 484-485, 495-498, 509, 524, 546-548, 553; 4 R.T. 853; 1 C.T. 91-92, 102, 106.)

On the other hand, the Court of Appeal's determination that it was possible for the perpetrator to not have the victim's blood on their person is problematic because the only evidence presented which supports this factual finding was a comment at the evidentiary hearing by defense counsel during his cross examination and by investigator Bill Sylvester. Neither defense counsel nor Sylvester actually visited the crime scene and their testimony directly contradicted the evidence provided by the criminalist in this case. Additionally, defense counsel completely contradicted his off-the cuff comment that the perpetrator might not have had blood on their person when he also testified that he believed the perpetrator most definitely would have had blood on them, stating there was blood splatter literally all over the room. (2 R.T. 267.) In making its finding that it was possible for the perpetrator to not have blood on them, the Court of Appeal did not recognize or reconcile this contradiction, nor apply the correct standard in resolving conflicts in favor of defendant. Further, in its analysis pertaining to the clothes issue, the Court of Appeal failed to acknowledge or even mention criminalist Verdugo's substantial testimony about the bloody crime scene.

The trial court's finding was supported by the substantial evidence presented and thus should have been taken most strongly in favor of the order appealed from, and any conflicts should have been resolved in favor of defendant, not the People. (*In re Garcia, supra*, 67 Cal.App.3d at p. 65.) The

Court of Appeal failed to adhere to the controlling standards of appellate review when it found the killer could have committed the murder and not gotten blood on their person, as this finding is unsupported by the actual record of evidence.

(2) *The Court of Appeal failed to give deference to the trial court's finding that defense counsel did not have a valid tactical reason for failing to elicit this evidence at the preliminary hearing*

The Court of Appeal found defense counsel had a valid tactical reason for not questioning Dills about the clothes during the preliminary hearing:

> At the preliminary hearing, the prosecutor conceded that '[w]hen the defendant was taken to the police station later that evening, she is wearing an outfit which is similar in description to the outfit that she was wearing when she left Mr. Dills's residence.' The prosecutor explained that the difference in clothing was that defendant was wearing panties when police arrived, but not when she left Dills's house. Given the prosecution's theory of the evidence-that defendant's clothes matched the description given by Dills, Defense counsel had no reason to question Dills about defendant's clothes. In other words, if Defense counsel questioned Dills about the clothing, Defense counsel would hope for the answer already given by the prosecutor-that the clothing described by Dills was such a close match to the clothes seized by police that defendant's panties were the only item that could prove a change of clothes occurred. Thus, a reasonable attorney would not have questioned Dills about defendant's clothing.

(Opinion, p. 61.)

However, the evidentiary claim that defendant put her underwear back on at some point during the time she left Dills's house to the time the police arrived was merely an argument made during the preliminary hearing by the prosecution and not at all part of the actual record of evidence. Nowhere in the transcripts of this case is it documented nor is there any evidentiary support

for the contention defendant put her underwear back on when she left Dills's house. In fact, the entirety of the evidence in the record on this issue proves the contrary is true. Defendant said she left her underwear at Dills's house (see C.T. 132, 188); no underwear was collected by the police when they seized all of the clothes she was wearing (see C.T. 320 - property log of the evidence seized from defendant); Dills said defendant left her underwear off and he never mentioned that she took her underwear with her back home (see 2 C.T. Supp. 413.) Indeed, the prosecution's argument as to why the evidence regarding defendant's underwear was relevant was redacted from the transcript that was read to defendant's jury, (4 C.T. 174-175) and the prosecution never made this argument again, which proves the argument has no evidentiary basis.

Hence, this Court of Appeal's findings are not only factually inaccurate, but contradicted by the actual record. The fact the decision of the Court of Appeal actually relies upon the prosecution's argument at the preliminary hearing[5] which has absolutely no actual evidentiary support in the record further demonstrates the Court of Appeal failed to adhere to the controlling standards of appellate review, as the Court failed to give any deference to the trial court's factual findings which were supported by substantial evidence—both defense counsel and the *Strickland* expert testified there was no tactical reason—and instead relied upon a version of facts with no

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5 Which argument, should be noted, was abandoned by the prosecution after the preliminary hearing, never mentioned again during any of the trial court proceedings, and actually stricken from the record before the preliminary hearing transcript was read to the jury. (4 C.T. 174-175)

evidentiary support in the record in order to attempt to create a valid tactical reason for defense counsel's failure at the preliminary hearing.

b. The Court of Appeal erred in determining defense counsel did not have a duty to present evidence defendant did not change her clothes

The Court of Appeal found defense counsel did not render ineffective assistance because "there was no direct evidence offered by the prosecution that defendant was wearing different clothes, a reasonable attorney could have decided not to seek admission of the hearsay statement." (Opinion, p. 63, emphasis added.) The opinion further found "the trial court fails to explain how the issue is significant, when the prosecution presented no evidence on this issue...." (Opinion, p. 66)

In so holding, the Court of Appeal failed to adhere to the controlling standards of appellate review as it disregarded the trial court's findings which were supported by substantial evidence and appeared to rely upon a false legal premise that evidence is only relevant and important if it is presented by the prosecution. Although the People did not present any direct evidence that defendant changed her clothes, they certainly argued it by way of inference. (See, e.g., E039986 5 R.T. 1023-1024, 1032; see also E039986 1 C.T. 38 [Prosecutor: "at some point in time she had to change which might explain the absence of blood on her clothing"]; E039986 5 R.T. 1023-1024 ["[w]ho can tell us that those were the clothes that she was wearing that day? You didn't hear any evidence other than from her. You've got to rely upon her again that those were the clothes that she was wearing that day"].)

By repeatedly relying upon the fact the prosecution presented no direct evidence regarding defendant's clothes as somehow bearing importance of the relevancy of the evidence to the defense, the Court of Appeal circumvented what is the duty of defense counsel. Indeed, often times the most crucial and relevant evidence to a case is solely presented by defense counsel in defense of a defendant—to wit, alibi evidence. Evidence of a defendant's alibi is not presented by the prosecution, and yet it is often the most crucial evidence presented in a criminal case on behalf of the defendant. (See *People v. Rodriguez* (1977) 73 Cal.App.3d 1023, 1031 [where identification is the sole disputed issue, and the defense of misidentification rests in significant part upon an alibi, the alibi defense is unquestionably crucial].) Further, incompetence of defense counsel includes where defense counsel fails to interview and call eyewitnesses who would rebut the prosecution's evidence. (*People v. Bess* (1984) 153 Cal.App.3d 1053, 1060.) Here, evidence that defendant did not change her clothes was just as crucial, if not even more crucial, than alibi evidence. That the prosecution presented no evidence regarding defendant's clothes bears zero import on the relevancy and critical nature of the evidence for the defense case. What was relevant was defense counsel's duty to prove defendant did not change her clothes. In its reliance upon an entirely irrelevant factor—that the prosecution did not present direct evidence of defendant's clothes in finding defense counsel's decision to not seek to have the evidence admitted was objectively reasonable—the Court of Appeal failed to adhere to the controlling standards of appellate review.

c. The Court of Appeal erroneously determined defense counsel had presented the testimony of Officer Welde to prove the clothes

The opinion states defense counsel testified that in order to establish defendant did not change her clothes, defense counsel presented defendant's testimony and Officer Welde's testimony. (Opinion, p. 37.) Contrary to the opinion, defense counsel did not present Officer Welde's testimony to prove that defendant did not change her clothes that night. Nor could he. Officer Welde would have no idea what defendant was wearing while she was out and about the night prior to the murder and whether she had changed out of those clothes. In fact, when questioned as to why he presented the officer's testimony, defense counsel clarified the reason he called Officer Welde was to ask her if defendant had smelled of shampoo or had cleaned herself with soap, or if she was wet. (2 R.T. 191.) Officer Welde's testimony had no relevancy to a change of clothes, and the Court of Appeal's reliance upon it was misplaced.

d. The Court of Appeal ignored uncontroverted *Strickland* expert testimony about defense counsel's deficiencies

The Court of Appeal found defense counsel's failure to question Dills about the clothes at the preliminary hearing was objectively reasonable in part because "..a preliminary hearing is not a trial; and...Defense counsel had no reason to expect Dills would die prior to trial." (Opinion pp. 61-62.) This conclusion runs afoul of the law and of the uncontroverted testimony of defendant's *Strickland* expert.

Defense counsel's failure to question the key prosecution witness regarding one of the most, if not the most, crucial aspect of a murder case during a preliminary hearing cannot be found to be reasonable simply for the reason a preliminary hearing is not as extensive as an actual jury trial and because defense counsel does not expect that witness to die before trial. Indeed, the very existence of Evidence Code section 1291 dictates that defense counsel act competently at a preliminary hearing and thoroughly cross examine key witnesses regarding important aspects of the case for the very scenario which occurred in this case—if the main witness in a case dies or is otherwise found to be unavailable for trial, the preliminary hearing testimony of that witness can be entered into evidence by the prosecution at the defendant's jury trial. An objectively reasonable defense attorney must be aware of this rule of evidence and conform their performance at a preliminary hearing accordingly. To find it was reasonable for a defense attorney to not thoroughly cross examine the main witness in a murder case regarding a crucial aspect of the case at the preliminary hearing because defense counsel had no reason to expect that key witness in the case would "die prior to trial" cannot be the state of the law for objectively competent representation of a criminal defendant in a murder case in California.

In addition, as with the time of death issue, the Court of Appeal opinion completely disregarded the substantial evidence presented which demonstrated an objectively reasonable attorney in a murder case should know how to argue the admissibility of the statements in question. (2 R.T. 317.) The *Strickland*

expert testified that an objectively reasonable competent attorney would have questioned Dills at the preliminary hearing about his statements regarding the clothes defendant was wearing when he dropped her off at the house. Had defense counsel done so, Dills's statements would have come into evidence at defendant's trial under Evidence Code section 1291. (2 R.T. 317.) What is more, the *Strickland* expert testified that a reasonably competent attorney would have attempted via an in limine motion to introduce Dills's statement regarding defendant's clothes into evidence. (2 R.T. 317.)

Despite this evidence presented, the Court of Appeal failed to adhere to the controlling standards of appellate review when it did not acknowledge or address this evidence at all when it reversed the trial court's findings on this issue.

e. The Court of Appeal improperly shifted the burden to defendant and disregarded uncontroverted *Strickland* expert testimony which demonstrated defense counsel's conduct fell below the requisite standard of care

The Court of Appeal also failed to adhere to the controlling standards of appellate review when it shifted the burden of proof onto defendant, as the prevailing party on appeal, when it found "Defendant's reliance on Keen's testimony that he did not have a tactical reason for (1) not questioning Dills about the clothing at the preliminary hearing, and (2) not moving the court to admit Dills's statement is not sufficient to conclude that Keen was ineffective. Defendant must also explain why Keen's actions were objectively unreasonable - why no competent attorney could have failed to question Dills

or failed to move the trial court to admit Dills's statement [citation]. Because (1) defendant does not explain why no reasonably competent attorney could have acted in the same manner as Keen, and (2) we have concluded *ante* that a reasonably competent attorney could have made the same decisions as Keen, we find defendant's argument to be unpersuasive." (Opinion pp. 76-77.)

This burden shifting onto the prevailing party below was erroneous, as defendant clearly had already satisfied her burden of proof in the lower court, by proving by a preponderance of the evidence that defense counsel was objectively ineffective in his representation of defendant. Contrary to the Court of Appeal's finding, as the prevailing party below it was not defendant's burden on appeal to prove that defense counsel was objectively ineffective on appeal, but rather the appealing party's burden to prove why defense counsel was in fact objectively reasonable when he failed to question Dills at the preliminary hearing and failed to attempt to prove up defendant's clothes at trial. (See *Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) The Court of Appeal's erroneous shifting of the burden of proof onto the prevailing party below demonstrates yet another manner in which the Court of Appeal failed to adhere to the controlling standards of review. Moreover, the prosecution could not meet this burden as there was substantial evidence presented at the evidentiary hearing regarding Dills's actions and why they were objectively unreasonable, specifically the substantial and uncontroverted testimony of the *Strickland* expert who specifically testified to defense counsel's failures.

The *Strickland* expert testified defense counsel's failure to present evidence regarding the clothes defendant was wearing that night was one of the most crucial areas of the case that was not presented effectively. (2 R.T. 312.) First, defense counsel failed to ask Dills about defendant's clothes at the preliminary hearing, even though at that point he had Dills' statements to the police about what defendant was wearing that night. (2 R.T. 312.) Dills was the primary witness for the prosecution, because he was the only witness who established the prosecution's timeline. (2 R.T. 313.) It was not sufficient to only have defendant testify as to what she was wearing that night because a defense attorney should always look for some independent evidence to corroborate the defendant's statements. (2 R.T. 314.)

Based upon the *Strickland* expert's experience with blood pattern analysis in the cases he has represented and the lectures he has prepared for the National Association of Criminal Defense Lawyers and the International Association of Blood Pattern Analysts, the *Strickland* expert believed it is incredibly likely that if an adequate demonstration or reenactment had been done, all experts would have reached the conclusion that the person who committed the murder would have had some blood on them. (2 R.T. 31.)

At the preliminary hearing, a reasonably competent attorney would have questioned Dills about his statements regarding the clothes defendant was wearing when he dropped her off at the house. If he had done so, Dills's statements would have come into evidence at trial under Evidence Code section 1291. (2 R.T. 317.) Further, a reasonably competent attorney would

have attempted via an in limine motion to introduce Dills's statement regarding defendant's clothes into evidence. (2 R.T. 317.) The Court of Appeal's complete failure to recognize any of this evidence and its burden shifting onto the prevailing party below demonstrates the Court's lack of adherence to the controlling standards of appellate review.

Further, this case is unique in that the trial court that presided over both of defendant's jury trials and ruled on all the motions specifically stated that if the statements had been proffered, the trial court would have allowed the statements into evidence under the due process exception because the prosecution's entire case was based on Dills's reliability and truthfulness, and the trial court found to not do so would be to deprive defendant of her due process rights. (4 R.T. 745-746.) Hence, there was absolutely no excuse for defense counsel's failure to even attempt to get Dills's interview admitted into evidence, and defendant proved by a preponderance of the evidence and objectively reasonable attorney would have done so in this case. And yet, the Court of Appeal disregarded the substantial evidence presented and the relevant law relating to these statements when it reversed the trial court's finding.

d. The Court of Appeal erroneously concluded there was no hearsay exception to allow Dills's statement into evidence

The Court of Appeal failed to adhere to the controlling standards of appellate review when it erroneously found there was no hearsay exception to allow Dills' statements into evidence. (Opinion, pp. 63, 66.) Specifically, the

opinion found "[t]he evidence reflects there was no direct legal authority for admitting Dills's out of court statement. It is objectively reasonable for an attorney not to move the trial court to admit hearsay evidence for which there is not exception for admissibility." (Opinion, p. 66.)

Contrary to the Court of Appeal's finding, and as the trial court explained in its ruling, there is an exception to allow the hearsay statements into evidence in this case, specifically, the due process hearsay exception as promulgated by the United States Supreme Court in *Chambers v. Mississippi, supra*, 410 U.S. 284. In fact, the statements made in this case by Dills to the police officers were similar to the statements that were allowed into evidence in *Chambers*, and an objectively reasonable attorney in a murder case should know how to argue all relevant and applicable exceptions to the hearsay rule. Specifically, Dills's statements to the police regarding defendant's clothes were similar to the statements that were found admissible in *Chambers v Mississippi, supra*, because they have an inherent indicia of reliability. Dills's statements regarding defendant's clothes were critical to the defense; they were made as a formal statement to government officials, and the declarant would have reasonably expected the statements to be used prosecutorially. (*Chambers v. Mississippi, supra*, 410 U.S. at p. 298.)

In finding defense counsel was objectively reasonable when he did not attempt to enter Dills's statements into evidence, the Court of Appeal found "[d]efendant's argument places too great an expectation on the shoulders of a reasonable attorney. A reasonable attorney can be expected to make

arguments that are within the law, but we do not expect a reasonable attorney to necessarily advance the law." (Opinion, p. 75.) Yet *Chambers v. Mississippi, supra*, was published in 1973. Clearly, this is long standing, well known, United States Supreme Court precedent, not an advance in the law. An objectively reasonable defense attorney in a murder case should know how to argue various aspects of a long standing Supreme Court case in a motion in limine. To find otherwise simply abrogates any duty of defense counsel to know how to litigate long standing evidentiary rules and laws.

Moreover, "[T]he trial court is the gatekeeper of the evidence to which the jury is exposed." (*People v. Dean* (2009) 174 Cal.App.4th 186, 199.) "[T]he trial court has wide latitude in ruling upon the admissibility of evidence and those rulings will not be upset unless there is a clear showing of abuse of discretion." (*Ibid.*) Additionally, the California Evidence Code and its provisions "are to be liberally construed with a view to effecting its objects and promoting justice." (Evid. Code, § 2.) "All questions of law (including ... the admissibility of evidence, and other rules of evidence) are to be decided by the court." (Evid. Code, § 310.)

Unlike the Federal Rules of Evidence, California's Evidence Code does not include a "catchall" hearsay exception based on "indicia of reliability." (*People v. Gonzales* (2012) 54 Cal.4th 1234, 1289, fn. 24; *In re Cindy L.* (1997) 17 Cal.4th 15, 27-28; see Fed. Rules Evid., rule 807.) However, this Court has recognized that decisional law may provide authority for an exception and courts have the authority to recognize nonstatutory exceptions

to the hearsay rule. (*People v. Ayala* (2000) 23 Cal.4th 225, 268 ["exceptions to the hearsay rule are not limited to those enumerated in the Evidence Code; they may also be found in ... decisional law"]; *People v. Spriggs* (1964) 60 Cal.2d 868, 874 [courts have recognized exceptions to the exclusionary rule in addition to those exceptions expressed in the statutes].)

In addition, "it may [] be appropriate for courts to create hearsay exceptions for classes of evidence for which there is a substantial need, and which possess an intrinsic reliability that enable them to surmount constitutional and other objections that generally apply to hearsay evidence." (*In re Cindy L., supra,* 17 Cal.4th at p. 28.) This case presents such a class of evidence as contemplated by this Court in *In re Cindy L, supra*, - where a witness died before trial and had made a statement absolutely critical to the defense case which was not elicited during the preliminary hearing. And where the trial court who presided over both of defendant's jury trials specifically made an advisory ruling finding that had the evidence been brought before the trial court, the court would have allowed the statement into evidence because to not do so would be a violation of defendant's due process rights.

In addition, admitting the statement would not have violated any of defendant's constitutional rights. After all, the Confrontation Clause of the Sixth Amendment to the United States Constitution provides that "in all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." (U.S. Const., 6th Amend.) Because defendant would be the proponent of the statement, there would be no counter concerns

about a potential Sixth Amendment violation. Further, it is clearly apparent the prosecution had no issue with Dills's credibility since the prosecution based its' entire case around Dills' statement as to what time he dropped defendant off at her house. Combined with their mandated duty to seek justice and promote a fair trial, there could be no opposition from the prosecution. (ABA Model Rules Prof. Conduct, rule 3.8.) The trial court's findings regarding defense counsel's failure to admit Dills' statements were supported by substantial evidence and applicable legal authority and must be upheld.

Finally, the Court of Appeal's conclusion regarding the level of knowledge required of an objectively reasonable defense counsel in a murder case conflicts with this Court's requirement that, in assessing ineffective assistance of counsel claims, the court must consider the seriousness of the charges against defendant. (*In re Jones, supra*, 13 Cal.4th at p. 566; *In re Hill* (2011) 198 Cal.App.4th 1008, 1017.) Because "[r]epresentation of an accused murderer is a mammoth responsibility" the "seriousness of the charges against the defendant is a factor that must be considered in assessing counsel's performance." (*In re Jones, supra*, 13 Cal.4th at p. 566.) Certainly, a reasonably competent defense attorney in a murder trial should have the knowledge in order to litigate prevailing, long standing United States Supreme Court law and be able to make the argument that to exclude the statements would be a violation of defendant's due process rights. The Court of Appeal's finding to the contrary is diametric to all prevailing professional norms for a criminal defense attorney in a murder case, and the opinion must be reversed.

CONCLUSION

For all the foregoing reasons, defendant respectfully request this Court reverse the Court of Appeal's decision, and reinstate the trial court's judgment.

Dated: January 15, 2019.

Respectfully submitted,

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6 In consultation with Alissa Bjerkhoel, Staff Attorney, California Innocence Project

CERTIFICATION OF WORD COUNT

Pursuant to California Rules of Court, rule 8.204(c)(1), I certify this brief contains 24,814 words, excluding the Table of Contents and Table of Authorities, according to the WordPerfect X7 word-processing program which generated this brief.

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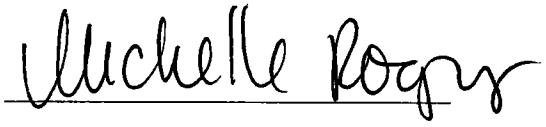

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Case: People v. Kimberly Louise Long

CA Supreme Court No. S249274
Court of Appeal No.: E066388
Superior Court No. RIF113354

I, Xyra Jaime, declare: I am employed in the County of San Diego, CA. I am over 18 years of age and not a party to the within entitled cause; my business address is 555 West Beech Street, Suite 300, San Diego, California 92101-2939.

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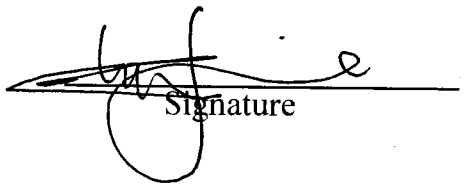
I declare under penalty of perjury that the foregoing is true and correct, and this declaration was executed at San Diego, California, on January 15, 2019.

Xyra Jaime
Declarant



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