IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,

v.

KIMBERLY LOUISE LONG,
Defendant and Petitioner.

S249274

Fourth Appellate District, Division Two, No. E066388
Riverside County Superior Court No. RIF113354
The Honorable Patrick F. Magers, Judge

ANSWER BRIEF ON THE MERITS

MICHAEL A. HESTRIN
District Attorney
County of Riverside

ALAN D. TATE
Senior Deputy District Attorney
County of Riverside

3960 Orange Street
Riverside, California, 92501
Telephone: (951) 955-5400
(951) 955-0126
Fax: (951) 955-9566
Email: atate@rivcoda.org
State Bar No. 172413
Attorneys for Respondent

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. KIMBERLY LOUISE LONG, Defendant and Petitioner.	CASE NO. S249274 ANSWER BRIEF ON THE MERITS

TO: THE HONORABLE TANI G. CANTIL-SAKAUYE, CHIEF JUSTICE, AND HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF CALIFORNIA:

INTRODUCTION

Pending in the superior court at this Court's direction was a petition for writ of habeas corpus challenging petitioner's murder conviction resulting from the 2003 bludgeoning death of Ozzy Conde, in the City of Corona.[1] Petitioner was Ozzy's girlfriend, and Ozzy lived in petitioner's

[1] Concurrent with the filing of appellant's opening brief in the court of appeal, respondent filed a request for that court to take judicial notice of its file in petitioner's criminal appeal in case number E039986, including the transcripts from both of petitioner's earlier trials. Citations herein simply to the RT or CT with volume number are to the transcripts filed in the appeal from the grant of the habeas petitions. Citations to the RT or CT prefaced by a "1st" or "2nd" reference those transcripts from petitioner's first and second trials which were the subject of her earlier appeal in case number E039986. As demonstrated in the request for judicial notice, the parties below relied on these transcripts, stipulated that Judge Magers could take judicial notice of and consider the testimony, documents, and decisions in the record from petitioner's trial and post-conviction appeals and collateral proceedings, and Judge Magers expressly stated he considered such matters. (1RT 75, 79, 178, 4RT 411; Def. Exh. E.

rented home. Following a long day of drinking alcoholic beverages, petitioner – a violent drunk and self-admitted "asshole" (1st 1CT Supp. 119, 125, 166; 2nd 4RT 684) – became extremely upset with Ozzy and struck him repeatedly and threw numerous items at him. Petitioner then went to the home of Jeff Dills where she ingested Vicodin (2nd 5RT 959) and engaged in sexual conduct, during which petitioner expressed her hatred for Ozzy and a desire to "kick his ass." After petitioner lied about needing to return home, Dills took petitioner home. Approximately 49 minutes after arriving home, petitioner called the police in purported hysterics and reported finding Ozzy dying on the living room couch.

Both before and during trial, petitioner tried to divert responsibility for the murder to her husband, Joe Bugarski, or to Ozzy's ex-girlfriend, Shiana Lovejoy. But they both had credible alibis and no real opportunity or motive to brutally murder Ozzy. (3CT 793; 4CT 840-841.) Ultimately, petitioner was convicted of second degree murder, and following affirmance of her conviction by the court of appeal, and her surrender after being a fugitive, she was imprisoned for a period of 15 years to life. Though the trial judge – the Honorable Patrick F. Magers – stated he would have acquitted petitioner had it been a bench trial, he twice denied petitioner's motions for acquittal, denied petitioner's motion for dismissal following the first mistrial, denied petitioner's motions for new trial or to reduce the conviction to voluntary manslaughter, and denied petitioner's request that probation be granted. (Ret. Exh. 4, 1st 3RT 375-377, 4RT 860-866; 1st 1CT 120-133, 381; Supp. CT 73; 2nd 1RT 7-8, 5RT 980-982, 1148-1153, 1185, 1221.)

This Court denied review, the federal district court denied relief on federal habeas corpus review, and the Ninth Circuit rejected petitioner's appellate claims. (Ret. Exhs. 1, 2, 3.) Then petitioner misrepresented the evidence and trial record in an attempt to challenge her conviction by way

of habeas corpus. The superior court and the court of appeal rejected her claims, but this Court remanded the matter back to the superior court for a hearing on certain issues, and that court – Judge Magers – found ineffective assistance with respect to two issues, vacated petitioner's conviction, and ordered a new trial. (4RT 733-755.)

However, in light of the actual record, and because of the overwhelming and convincing nature and quality of the evidence of petitioner's guilt and the reasonable representation by her trial counsel, the court of appeal found that Judge Magers erred in granting relief on habeas corpus. This Court must reject petitioner's distractions and misrepresentations and affirm the court of appeal.

ISSUES

I. 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?

II. Did the decision of the Court of Appeal adhere to the controlling standards of appellate review?

STATEMENT OF FACTS[2]

The following is derived directly from the Statement of Facts from the court of appeal's unpublished opinion in *People v. Kimberly Louise*

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[2] Petitioner fails to include a statement of facts, and instead incorporates her statement of facts from her petition. (POBM 13.) However, the statement of facts in her petition is inconsistent with her own testimony, and largely and unanimously rejected by the trial jury. (2d Supp. CT 28-52; see 2nd 5RT 1152 [trial judge states "jury obviously disbelieved Miss Long, which was their province to do"].) Respondent cannot address all of the inconsistencies, but for example, petitioner admitted during her own testimony she was upset with Ozzy before the murder (2nd 4RT 613-614, 5RT 968), she had an argument with Ozzy just hours before his murder in their driveway (2nd 4RT 616, 691), she cursed, threw things at, and hit Ozzy during the argument (2nd 4RT 692-693, 5RT 962), she had been violent with Ozzy on a prior occasion (2nd 4RT 694), she had been violent with Bugarski on a prior occasion and hit him in the head (2nd 4RT 695, 720), she admitted to using a baseball bat as a weapon previously (2nd 4RT 722), she lied to Dills about her children coming home (2nd 4RT 617, 650, 656, 5RT 965, 969), she admitted to saying just a short time before the murder she could kick Ozzy's "ass" (2nd 4RT 618, 656, 689, 5RT 969), she admitted to touching Ozzy's body and trying to pull him up (2nd 4RT 628, 637, 642, 645, 700, 702, 5RT 965), despite being an emergency room nurse she declined to assist Ozzy in any way (2nd 4RT 639-642, 711, 5RT 959, 963, 970-972), Ozzy was still breathing when petitioner arrived home (2nd 4RT 642-643, 711-712, 734-735, 5RT 963), petitioner was mad at Ozzy because he was not paying any expenses and she wanted him out of the house (2nd 4RT 647-648, 655), petitioner was an alcoholic (2nd 4RT 648), she twice had sex with Dills during her relationship with Ozzy (2nd 4RT 651-652, 5RT 958, 969), she lied about not drinking at Dills' house and admitted taking Vicodin before the murder (2nd 5RT 959), she admitted her house had not been ransacked as she had claimed (2nd 4RT 699), she admitted to lying to the police about sexual contact with Dills (2nd 4RT 730, 5RT 944, 946-947), she admitted there was no reason why Dills would lie to the police about the time he dropped off petitioner (2nd 4RT 732-733), she asserted she loved Ozzy but admitted to cheating on him with both Dills and Bugarski (2nd 5RT 961), and significantly, she admitted she was an "asshole (2nd 4RT 684).

Additionally, in her 911 call, petitioner expressly stated Ozzy was breathing (1CT 210, 213), and in other statements to the police, petitioner asserted that she and Ozzy had no enemies (1CT Supp. 6, 11, 49, 145, 179), Ozzy was not involved in gangs (1CT Supp. 6, 69-70), Ozzy was breathing when petitioner got home (1CT Supp. 9, 31, 141), there were no issues between Bugarski and Ozzy because Bugarski was a "big wimp" (1CT Supp. 57), she acknowledged hitting Bugarski on a prior occasion with a phone (1CT Supp. 165), and she again repeatedly admitted she was an "asshole" (1CT Supp. 124, 166, 174, 209, 216, 219, 234).

Long, case number E039986, filed November 21, 2008 (2008 WL 4958575):

> On October 5, 2003, starting at between 10:00 and 11:00 a.m., [petitioner], her live-in boyfriend Ozzy, and Jeffrey Dills (Dills)[FN4] spent the day riding motorcycles and visiting restaurants and bars. [Petitioner] estimated that she drank 12 beers and 10 shots of hard liquor over the course of the day. While at a bar called Maverick's [petitioner] and Ozzy began to argue over her being too flirtatious. [Petitioner] was crying and got "very upset," and Dills persuaded a friend of his to take her home. When Ozzy arrived home, he and [petitioner] continued their argument in the driveway in front of the house. [Petitioner] told Ozzy that he was a loser and did not pay his fair share and she told him that she wanted him out of her house. [Petitioner] became violent and began hitting Ozzy with things and throwing things at him. At a certain point, Dills became concerned that Ozzy might hit [petitioner] back so he intervened. [Petitioner] decided that she wanted to leave and went with Dills to his house, approximately two and one-half to three miles away. [Petitioner] estimated that it took 10 to 15 minutes to get there.
>
> FN4. Jeff Dills had testified at the preliminary hearing, but died in a traffic accident prior to trial. The transcript of his preliminary testimony was read at trial.
>
> At Dills's house [petitioner] and Dills had a drink and got into his spa. [Petitioner] wore her panties and either her bra or something that Dills gave her to wear. She continued to complain about Ozzy not paying his fair share and she and Dills began kissing. The two then went into Dills's bedroom where he performed oral sex on her. [Petitioner] "stopped everything" and told Dills that she had to go home because she had forgotten that her ex-husband was supposed to drop off the children, even though she knew that the children were not at her home. While getting dressed [petitioner] said that she was so mad at Ozzy she could "kick his ass."
>
> Dills estimated that he dropped [petitioner] off at her house at 1:20 a.m. As he approached her home he turned off his motorcycle and coasted in so as not to wake Ozzy or the neighbors. [Petitioner] could not find her cell phone and Dills turned his headlight up into the bushes where she had earlier

thrown her things at Ozzy to see if she could find it. He saw her enter the house-she was silhouetted by a light that was on in the back of the house. Dills then started his motorcycle and drove away, returning to his house, where he noticed that it was 1:36 a.m. as he was setting his alarm. At 1:20 to 1:30 a.m., [petitioner]'s neighbor heard a loud motorcycle going down the road.

At 2:09 a.m. [petitioner] called 911 to report that she just got home, that something had happened to Ozzy, that he had blood all over his face and that something had happened to her house. She hung up and called back indicating that despite being an emergency room nurse, she could not render any medical aid. Officers arrived at the house at 2:14 a.m. and found [petitioner] in the middle of the street. She told officers that her boyfriend was bleeding, but was upset, frantic and otherwise non-responsive to questioning. She did not appear to be injured or to have any blood on her person or clothing.

When the police entered the house they found Ozzy sitting on the couch with what appeared to be some kind of head trauma. They then proceeded to search the house to ensure there was no one else inside. At approximately 2:20 a.m. paramedics were allowed into the home and it was determined that Ozzy was deceased. The paramedics concluded from what they found at the scene that death had not occurred within minutes of their arrival. It was later determined that Ozzy had died from blunt force trauma that caused a hinge fracture to the back of his skull. The implement used was a long, slender object like a large stick, bat or golf club, and there were from three to eight impacts to Ozzy's head. The injury could have been inflicted by any healthy adult and would have resulted in loss of consciousness and death within 10 to 15 minutes. Ozzy's body did not demonstrate any defensive wounds and he was attacked where he was found.

When officers conducted their search of the house, they found that the sliding glass door from the kitchen to the back yard was open, but they found no signs of forced entry there or into the garage. The spa in the back yard was uncovered, running and warm. There was a broken glass and some coins scattered on the kitchen floor, and a telephone was on the floor as well. A set of keys that allowed officers to search [petitioner]'s vehicle were found hanging on a rack

in the kitchen, where [petitioner] told police to look for them. There was a hair clip, a purse or pocketbook and a cell phone on the kitchen counter. There was also an empty champagne bottle and a plastic cup in the trash. There was a pair of sandals, a helmet and a hat on the floor near the couch where Ozzy was found. A jacket and another hat were also found on a throw rug on the floor. No blood was found on any of these items. Officers attempted to find the murder weapon, but despite there having been numerous items that could have been used, there were none that appeared to have been used to commit the crime. There were two baseball bats near the door but they appeared to have been there at the time of the crime because of blood spatter patterns on them. Blood evidence was found on the couch where Ozzy was found, on all four walls around Ozzy's body and on a table near him. However, no blood was found in the kitchen or in the hall leading to the bedrooms.

Police also searched outside the home, around the neighborhood and in nearby storm drains but found nothing of evidentiary value.

[Petitioner] was taken to the police station where an officer sat with her for several hours while the investigation at the house continued. This officer also did not notice any blood on [petitioner's] person or clothing. [Petitioner] told that officer that if Ozzy's ex-girlfriend had anything to do with what happened she would retaliate against her. [Petitioner] mentioned that she had checked her home for her children, who she said were supposed to have been there (even though she knew they were not), but was not worried because she knew that they were with their father. [Petitioner] also told that officer that her house had been ransacked, though investigating officers did not find that to be so.

[Petitioner] was interviewed by police on the morning of October 6, 2003, and again on October 9, 2003. She told police that Ozzy's ex-girlfriend, Shiana Lovejoy (Lovejoy), would have done something like this because she had vandalized their property and made threats against herself and Ozzy in the recent past. [Petitioner] stated that when she got home from Dills's house she walked in and saw Ozzy lying on the couch. She knew something was wrong so she turned on the light and saw he was injured. [Petitioner] had carried two party hats inside with her and had kicked off her shoes as

she entered. Ozzy was gurgling, which she believed indicated he was breathing at the time. She then called 911. She ran around the house screaming, hung up on 911, ran outside, then called 911 again. She took her jacket off and tossed it in the floor when the 911 operator asked her to help Ozzy. She then ran outside where she was found by police. [Petitioner] also told police that her shotgun, car keys and stereo were missing.

[Petitioner] was arrested on November 10, 2003.

(3CT 789-792; 4CT 836-838.)

STATEMENT OF THE CASE

In a felony complaint filed November 13, 2003, petitioner was charged with the October 6, 2003, murder of Oswaldo "Ozzy" Conde. (1CT 1.) Following a preliminary hearing and holding order on April 9, 2004, the People filed an information on April 22, 2004, charging the same murder. (1CT 2.) Petitioner pleaded not guilty. (3CT 786.)

The matter proceeded to jury trial on February 2, 2005, before Judge Magers, with petitioner represented by Deputy Public Defender Eric Keen. (3CT 786.) On February 22, 2005, the court declared a mistrial due to the jurors' inability to reach a unanimous verdict. (4CT 836.) On March 11, 2005, Judge Magers denied petitioner's motion to dismiss the murder charge. (3CT 786.)

On December 1, 2005, the matter proceeded to jury trial for a second time before Judge Magers, and petitioner was again represented by Deputy Public Defender Keen. (3CT 786.) On December 22, 2005, Judge Magers denied petitioner's Penal Code section 1118.1 motion for dismissal. (3CT 786.) On December 27, 2005, the jury returned a verdict of guilty to second degree murder. (4CT 836.) On January 24, 2006, Judge Magers

denied petitioner's motion for new trial, and her motion to reduce the offense to voluntary manslaughter.[3] (3CT 786.)

On February 24, 2006, Judge Magers denied probation and sentenced petitioner to state prison for 15 years to life. (3CT 786; 4CT 836; 1RT 31.) The court permitted petitioner to be released on $100,000 bail, on conditions she drink no alcohol, have no negative contact with anyone in the community, and not leave Riverside County. (3CT 786; 1RT 33.)

Petitioner appealed her conviction and judgment to the court of appeal in case number E039986, represented by attorney Michelle Rogers. (4CT 836.) In an unpublished opinion filed November 21, 2008, the court of appeal rejected petitioner's various claims of error and affirmed the judgment. (4CT 836-855.) This Court thereafter denied review in an order filed February 25, 2008. (4CT 857.)

On March 13, 2009, Judge Magers held a hearing on the remittitur, petitioner failed to appear as promised, and Judge Magers ordered petitioner's bail forfeited, and issued a warrant for her arrest. (4CT 859-863.) Investigators from the District Attorney's Office, the Corona Police Department, and the United States Marshal Service initiated a search for petitioner, and telephone records demonstrated she had been actively on her cellphone, she had a boyfriend who was a Hessian Motorcycle Gang member, and that petitioner was likely in a remote area outside of Riverside County. (4CT 865-872.) Ultimately, petitioner surrendered herself on March 23, 2009, and the Honorable Judge Christian F. Thierbach ordered petitioner to begin serving her prison sentence. (1CT 5; 4CT 874-878; 1RT 34.)

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[3] Mr. Keen and respondent personally had previously asked the court not to instruct the jury on voluntary manslaughter as a "tactical decision." (3CT 786.)

Petitioner further challenged her conviction and judgment in the United States District Court for the Central District of California. In a judgment filed April 19, 2012, in case number ED CV 10-277-PSG (SP), the Honorable Judge Philip S. Gutierrez adopted the Report and Recommendation of Magistrate Judge Sheri Pym rejecting petitioner's various claims of error. (4CT 880-906.) Thereafter, in an order and opinion filed January 23, 2014, in case number 12-55820, a panel of the United States Court of Appeals for the Ninth Circuit rejected petitioner's related appellate claims. (4CT 908-922.)

While the federal matters were pending, on May 3, 2012, petitioner filed a motion to have some of the evidence from her case tested for DNA. (1CT 18-245; 2CT 246-350.) Following a response by the People, on August 3, 2012, the motion was granted in its entirety. (2CT 351-414, 433-434; 1RT 45.)

Thereafter, on January 27, 2014, petitioner filed a petition for writ of habeas corpus in the Riverside County Superior Court in case number RIC1400760 alleging six claims of ineffective assistance of counsel, two claims of prosecutorial misconduct, and a freestanding claim of actual innocence. (See 1st Supp. CT volumes 1 and 2.) Following an informal response and a reply, on May 14, 2014, the Honorable Judge Helios J. Hernandez denied the petition. (4CT 924-927.) On December 12, 2014, petitioner filed a similar petition in the court of appeal in case number E062484, and the court of appeal summarily denied the petition in an order filed January 12, 2015. (4CT 929.)

On January 28, 2015, petitioner filed a petition for writ of habeas corpus in this Court, again alleging six claims of ineffective assistance of counsel, two claims of prosecutorial misconduct, and a freestanding claim of actual innocence. (2d Supp. 1CT 1-133; 2d Supp. 2CT 134-440; 2d Supp. 3CT 441-670; 2d Supp. 4CT 671-895.) In an En Banc order filed

August 26, 2015, this Court ordered the "Secretary of the Department of Corrections and Rehabilitation . . . to show cause before the Riverside County Superior Court, when the matter is placed on calendar, why trial counsel was not ineffective in his failure to: consult a time-of-death expert, investigate DNA evidence, present evidence petitioner did not change her clothes, and present evidence of the victim's application for a restraining order, and why petitioner is not actually innocent of the crime as petitioner claims in grounds (I)(A)(1), (2), (3), (4), and (III)." (2CT 436, 474; 4CT 931-932.)

However, before the Return was due, on September 16, 2015, petitioner filed a second motion to have DNA testing conducted again on the same evidence previously requested and approved. (2CT 437-545; 3CT 546-601.) Judge Magers then granted an unopposed motion to stay the habeas corpus proceeding pending resolution of the DNA motion. (3CT 668.) Following a response to petitioner's DNA motion (3CT 602-665), on October 16, 2015, Judge Magers granted the motion in its entirety, and agreed the People's return would be due 30 days after receipt of the final DNA results (3CT 668-675; 1RT 69).

On October 19, 2015, respondent lodged with the superior court a compact disk containing electronic copies of the reporter's transcripts for both of petitioner's trials, and electronic copies of the consolidated clerk's transcripts for both trials. (4CT 833-834; see 1RT 75.)

On October 29, 2015, Judge Magers denied petitioner's motion for release on bail pending the outcome of the instant habeas corpus proceeding. (3CT 676-753, 757; 4CT 865-872.)

On February 2, 2016, after receiving only some of the DNA results ordered, petitioner filed a motion to vacate the superior court's most recent order for DNA testing. (3CT 758-773.) Following non-opposition by

respondent, on February 8, 2016, Judge Magers vacated the order with respect to the outstanding DNA testing. (3CT 774.)

On March 9, 2016, respondent filed in the superior court a return to the Supreme Court habeas corpus petition in accordance with this Court's order. (3CT 776-825.) Included with the return was 56 exhibits. (4CT 826-1119; 5CT 1120-1397; 6CT 1398-1478.) On April 11, 2016, petitioner filed a denial to the return, and included various additional exhibits. (6CT 1479-1585.)

On May 6, 2016, the parties stipulated that Judge Magers could take judicial notice of and consider the testimony, documents, and decisions in the record from petitioner's trial and post-conviction appeals and other proceedings. (6CT 1601-1603.)

An evidentiary hearing on the claims was initiated on June 6, 2016, before Judge Magers. (6CT 1608.) Following four days of testimony and argument (7CT 1924-1927, 1931-1932), on June 10, 2016, Judge Magers found ineffective assistance of counsel, vacated petitioner's conviction and judgment, and ordered a new trial. At the same time, Judge Magers rejected petitioner's claim of actual innocence, but permitted her release on $50,000 bail. (7CT 1953-1954.)

On July 7, 2016, the People filed a notice of appeal. (7CT 1957.) Petitioner also filed a notice of appeal on July 8, 2016, attempting to challenge the court's denial of the actual innocence claim. (7CT 1959.) In an order filed October 21, 2016, the court of appeal dismissed petitioner's appeal as non-appealable.

On May 3, 2018, the court of appeal filed its opinion in case number E066388 reversing the grant of habeas corpus relief and remanding the matter back to the trial court to reinstate the judgment and address petitioner's custody status. (Slip Opn.) This Court granted petitioner's

petition for review on August 22, 2018, and accepted for filing petitioner's oversize opening brief on the merits on March 25, 2019. ("POBM.")

ARGUMENT

I

PETITIONER'S ASSERTIONS THAT THE DECISION OF THE COURT OF APPEAL REVERSING THE SUPERIOR COURT'S GRANT OF HABEAS CORPUS RELIEF FAILED TO ADHERE TO CONTROLLING STANDARDS OF REVIEW IS FORFEITED BECAUSE IT WAS NOT DISPUTED ON APPEAL OR RAISED IN PETITIONER'S PETITION FOR REHEARING

The court of appeal reversed the superior court's order granting habeas corpus relief to petitioner. It did so after setting forth the appropriate standard of review as the de novo standard citing primarily to *In re Collins* (2001) 86 Cal.App.4th 1176, 1181. As noted by the court of appeal, this was the case cited by both petitioner and respondent for the appropriate standard of review. (Slip Opn. at pp. 45-47 ["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"].)

Petitioner filed a petition for rehearing in the court of appeal and therein argued rehearing had to be granted because the opinion relied "upon erroneous or inaccurate factual findings and inferences that disregard the substantial evidence presented below and that cannot reasonably be deduced from the evidence presented," the opinion "ignores uncontroverted evidence that trial counsel fell below the standard of care required by the constitution," the opinion "relies upon erroneous or inaccurate factual findings and inferences that disregard the substantial evidence presented below and that cannot reasonably be deduced from the evidence presented," and the opinion "ignores uncontroverted evidence that trial counsel fell below the standard of care required by the constitution." (Pet. Reh'g., E066388, filed May 18, 2018, at pp. 2-3.) In the summary of the argument, petitioner asserted "[r]ehearing should be granted because the opinion contains erroneous and/or inaccurate fact or factual representations,"

"disregards important evidence presented by defendant in the proceedings below," and "fails to recognize that the constitutional standard of care for a criminal defense attorney in a murder case was established through the uncontroverted testimony of a *Strickland* expert and that defense counsel admitted he acted below the standard of care and had no tactical reason for so acting."[4] (*Id.* at p. 10.)

There was no discussion of the standard of review in the petition for rehearing, nor any citation to *In re Collins*. Nor did petitioner cite *People v. Callahan* (2004) 124 Cal.App.4th 198, relied upon so heavily in her opening brief on the merits to assert the proper standard of review should be "deferential" and that the court of appeal had to apply the "clearly erroneous standard of review to the question of whether the established facts demonstrate counsel was constitutionally ineffective." (POBM 53-56.)

In her petition for rehearing, petitioner correctly noted that if "a party disagrees with the court of appeal's selection of the facts or identification of the applicable law, the party can point out the deficiencies in the opinion in a petition for rehearing." (Pet. Reh'g, E066388, at p. 9, citing *People v. Garcia* (2002) 97 Cal.App.4th 847, 854-855.) Yet, there is no allegation contained therein that the court of appeal misidentified the applicable standard of review. Petitioner cited California Rules of Court, rule 8.500(c)(2), noting the need to petition for review with respect to potential factual misstatements in the court of appeal opinion, but ignored rule 8.500(c)(1) observing that as "a policy matter" "the Supreme Court normally will not consider an issue that the petitioner failed to timely raise in the Court of Appeal." (See *People v. Collins* (2010) 49 Cal.4th 175, 256, fn. 35 [this Court declined to review two issues in a capital case that were not presented to court of appeal in petition for rehearing].) Petitioner also

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[4] *Strickland v. Washington* (1984) 466 U.S. 668, 698.

did not challenge the court of appeal's determination of the appropriate standard of review in her petition for review.

In *People v. Estrada* (1995) 11 Cal.4th 568, this Court found a defendant failed to preserve for review his claim that "reckless indifference to human life," as used in the felony-murder special circumstance and applied in a first-degree murder prosecution to a defendant who was not the actual killer, was too vague to comport with due process and the proscription against cruel and unusual punishment because it was raised for first time in his opening brief to the Supreme Court. (*Id.* at pp. 580-581.) Likewise, the defendant in *People v. Villa* (2009) 45 Cal.4th 1063, forfeited his arguments in this Court that he was entitled to a writ of error coram nobis and to vacate his plea for lack of warning regarding the immigration consequences of his guilty plea, by failing to raise the issues in a petition for review or in an answer to the People's petition for review. (*Id.* at p. 1076.)

Although respondent can and will address petitioner's new claim herein, the failure to raise it in the court of appeal serves an injustice to that panel and prevents it from addressing this aspect of petitioner's contention in the first instance. This cannot have been an oversight because petitioner has been represented by a team of very experienced criminal defense attorneys who are advocating expressly that a purportedly less-experienced defense attorney was ineffective in petitioner's underlying trial. Considering petitioner cited rule 8.500 in her petition for rehearing, her failure to raise this new claim in the court of appeal can be deemed nothing other than an improper attempt to gain a tactical advantage in this Court based on purported error in a complex 77-page opinion without permitting the court of appeal to address potential deficiencies in its opinion.

Respondent acknowledges that it was this Court that identified this potential issue for review. But, based on the foregoing, this Court should decline to review this belated claim for the first time now.

II
PETITIONER FAILS TO DEMONSTRATE THAT THE DECISION OF THE COURT OF APPEAL REVERSING THE SUPERIOR COURT'S GRANT OF HABEAS RELIEF FAILED TO ADHERE TO THE CONTROLLING STANDARDS OF APPELLATE REVIEW

Under her second major claim heading, petitioner asserts that the decision of the court of appeal reversing the superior court's grant of habeas corpus relief failed to adhere to the controlling standards of appellate review. (PBM 53-99.) The court of appeal's discussion of the standard of review it applied is as follows:

> In reviewing an appeal from the grant of a writ of habeas corpus, the trial court's conclusions of law and its resolution of mixed questions of law and fact are subject to de novo review. Mixed questions include whether counsel's assistance was ineffective and whether the ineffective assistance resulted in prejudice to the defendant. The trial court's findings of fact are reviewed under the substantial evidence standard of review. (*In re Marquez* [(1992) 1 Cal.4th 584, 603]; *In re Resendiz* (2001) 25 Cal.4th 230, 248-249, abrogated in part on other grounds in *Padilla v. Kentucky* (2010) 559 U.S. 356, 370; *People v. Jones* (2010) 186 Cal.App.4th 216, 235-236; *In re Alcox* (2006) 137 Cal.App.4th 657, 664-665.)
>
> The People contend mixed questions of law and fact are reviewed under the clearly erroneous standard of review. The People cite to *In re Collins* (2001) 86 Cal.App.4th 1176, 1181 (*Collins*) for the standard of review. [Petitioner] contends mixed questions of law and fact that are predominately factual are reviewed under the clearly erroneous standard, while mixed questions that are predominately legal are reviewed under the de novo standard. Defendant does not explain whether the questions in this case are predominately legal or predominately factual. [Petitioner] cites to *Collins* for the standard of review.

> *Collins*, the case to which the parties cite for the standard of review, provides, "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." (*Collins*, *supra*, 86 Cal.App.4th at p. 1181.)
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> Defendant's habeas petition was based upon her federal constitutional right to effective assistance of counsel under the Sixth Amendment. In other words, this case concerns one of defendant's constitutional rights.
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> Further, the issue of whether defendant received ineffective assistance requires "the exercise of judgment about the values underlying legal principles" (*Collins*, *supra*, 86 Cal.App.4th at p. 1181), because the court must consider what an objectively reasonable attorney would have done in this case. The court is not focused on the factual inquiry of what Keen did or failed to do. Rather, the court is focused on the constitutional inquiry of what an objectively reasonable attorney would have done. (*In re Reno* (2012) 55 Cal.4th 428, 464-465 (*Reno*).) This inquiry requires the exercise of judgment about what it means to render effective assistance in the context of the facts of this case.
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> Therefore, because defendant's constitutional rights are implicated and the case requires the exercise of judgment about the values underlying legal principles, the de novo standard is applicable to the mixed questions of law and fact. (See *In re Taylor* (2015) 60 Cal.4th 1019, 1035 [applying the de novo standard to constitutional questions "in light of the factual record made below"]; see also *People v. Louis* (1986) 42 Cal.3d 969, 987 [de novo review is favored when a mixed question involves constitutional rights].)

(Slip Opn. at pp. 45-47.)

The People asserted below that independent review is the proper standard of review for questions of law. (AOB at p. 14, 38.) Petitioner

asserted below that "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." (RB at p. 54, citing *In re Collins*, *supra*, 86 Cal.App.4th at p. 1181.) For the first time now, petitioner asserts the "appellate court incorrectly applied the de novo standard of review to the entirety of [petitioner's] claims (both facts and the law), giving no deference whatsoever to the trial court's findings." (POBM 53.)

However, as will be shown, with the exception of some factual findings that are completely unsupported by the record, the vast majority of the facts of Keen's representation are undisputed, and the only real questions involved whether based on those established facts, defense trial counsel was ineffective with respect time-of-death evidence and clothing evidence. A summary of the evidence presented during the evidentiary hearing is necessary to that analysis.

A. Relevant Proceedings

It had been the People's theory based on the interview statements and testimony of Jeffrey Dills that petitioner arrived home at approximately 1:20 a.m., and uncontradicted evidence demonstrated petitioner called 911 and reported Ozzy still breathing at 2:09 a.m. (1RT 115.) Petitioner was an experienced emergency room nurse at the time she made the 911 call. (1RT 115, 2RT 229-230.) First responders purportedly saw a little bit of lividity on Ozzy's arms and face, and some rigidity in his upper extremities at approximately 2:20 a.m., and the coroner's investigator purportedly observed "almost fixed lividity" and no rigidity sometime after 5:03 a.m. (1RT 110-112, 2RT 233-234; Peo. Exh. 1.) Petitioner's first trial ended in a hung jury, and she was convicted of second degree murder following her second trial. (2RT 201, 239, 241.)

The parties made various evidentiary stipulations regarding testimony of Lisa DiMeo and Alissa Bjerkhoel, DNA testing results, and Judge Magers agreed to review the original trial record and view the video recordings of Dills' interviews with law enforcement. (1RT 176-178.)

1. Dr. Zhong Xue Hua

With respect to the time-of-death issue, petitioner elicited testimony from two medical experts. Dr. Zhong Xue Hua testified that the determination of time-of-death is generally a scene investigation, is just an estimation, and is not meant to be precise.[5] (1RT 86-91, 133, 146.) Some lividity can be seen and rigidity can be noticed approximately 30 minutes after death. (1RT 92-93, 102-103.) After reviewing various evidence including the observations of the first responders at approximately 2:20 a.m., and Long's 911 transcript and testimony reporting Ozzy still being alive at 2:09 a.m., Dr. Hua estimated Ozzy died "long, long before" 1:20 a.m. (1RT 97-100, 105-106, 113, 133-134.)

Dr. Hua put little weight on the deputy coroner's observations because they implied no rigidity had occurred more than four hours after the death, and it was unclear when his observations were made. (1RT 103-105, 117-120, 122, 131.) Ultimately, Dr. Hua concluded it was "possible" that Ozzy's death occurred after 1:30 a.m., and opined that the post-mortem changes observed by the paramedics could have occurred within 30 minutes of death – but then inconsistently opined it was "medically impossible" for Ozzy to have died after 1:20 a.m. (1RT 110, 120, 122, 127, 138.) Dr. Hua gave no weight to petitioner's statements during the 911 call or her testimony because she was "drunk," though there was nothing in those statements that showed she did not have a clear mind. (1RT 142-144.)

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[5] Dr. Hua was not licensed to practice medicine in California and had never testified as an expert in California. (1RT 113-114.)

2. Dr. Harry Bonnell

Dr. Harry Bonnell also testified on petitioner's behalf.[6] He had reviewed petitioner's testimony asserting Ozzy was alive at 2:09 a.m., the deputy coroner's report, and concluded Ozzy died between 11:00 p.m. and 12:30 a.m. – but it could have happened outside that period. (1RT 152-153, 173; but see 1RT 168 [asserting he did *not* read petitioner's testimony].) He relied mostly on the first responders' observations, because the deputy coroner was obviously in error in reporting no rigidity four to eight hours after death. (1RT 156-157, 163-164, 166, 175.)

Though the observations of the first responders could have occurred within 30 minutes of death, it was not possible for Ozzy to have died after 1:20 a.m. (1RT 154, 162, 167, 174, 176.) Dr. Bonnell had no knowledge that petitioner was a nurse, but would not rely on her observations of Ozzy breathing because petitioner was intoxicated and may have been in shock. (1RT 168-169.) However, for those same reasons, it would be inappropriate to rely on her denial of killing Ozzy. (1RT 169.) Dr. Bonnell opined a drunk can correctly perceive that someone is beaten, injured, and bleeding, but cannot reliably perceive that someone is breathing. (1RT 170.)

Dr. Bonnell was licensed to practice medicine in California, but had obtained a voluntary service waiver of registration fees based on his assertion he was not making any money from the practice of medicine. (1RT 171.) He admitted he still had a few paid cases, but asserted that providing expert witness testimony was not practicing medicine. (1RT 148, 172.) Dr. Bonnell also admitted providing opinions on a website for

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[6] Dr. Bonnell had been the Chief Deputy Medical Examiner for San Diego County, but was fired many years ago and since that time had performed almost no autopsies and had almost never testified for the prosecution in a criminal case. (1RT 148, 166-167; 2RT 335.)

parents of murdered children, and one of those opinions was that the "[d]etermination of time of death is one of the hardest things that forensic pathologists face, and the idea of narrowing it down exactly is seen only in Hollywood movies and fiction." (1RT 173.)

3. Dr. Joseph Cohen

Dr. Cohen was a forensic pathologist formerly employed by Riverside County, who had done over 7,000 autopsies and was still actively practicing and regularly testifying in Northern California. (3RT 412-414; Peo. Exh. 12.) He regularly provides expert testimony for both sides in criminal and civil cases, and does the majority of his consultations for criminal defense attorneys. (3RT 414.) Dr. Cohen was a witness during petitioner's trials on the issue of manner of death, but was never asked to provide an opinion on time-of-death. (3RT 414, 416.) In preparation for his testimony in the evidentiary hearing, he reviewed his earlier testimony, the autopsy report, the toxicology report, the coroner's investigator's report, the opinions of Dr. Hua, Dr. Bonnell, and Dr. Cyril Wecht, the paramedics' accounts, photographs, the 911 transcript, and the testimony of neighbor Juanita Sandoval. (3RT 415.) For this hearing, Dr. Cohen was asked by respondent to provide an opinion on time-of-death and whether the death occurred before 1:20 a.m. (3RT 417.) If the opinion was that Ozzy's death occurred before 1:20 a.m., the District Attorney was going to concede habeas corpus relief. (3RT 417.)

Based on the records and available evidence, Dr. Cohen concluded an accurate time-of-death could not be determined. (3RT 417.) The first responders purportedly saw some rigidity in the arms, but first responders are notoriously inaccurate. (3RT 456-457.) The Deputy Coroner observed no rigidity and almost fixed lividity sometime after 5:03 a.m., but that was essentially impossible. (3RT 419-421, 440, 446-447, 450, 464, 467; Peo.

Exh. 1.) It was extremely unlikely that the first responders broke the rigidity because each joint would have to be manipulated separately. (3RT 424-425.) But, some rigidity can be apparent in 30 to 60 minutes after death, skin can be cool immediately after death, and lividity can occur in less than 45 minutes after death. (3RT 426-429, 463, 474-475.) A core body temperature can help estimate time-of-death, but no such measurement was taken. (3RT 430.) Witness accounts, if reliable, can be relied upon, and here petitioner said Ozzy was still breathing at 2:09 a.m. and neighbor Sandoval heard Ozzy alive at 1:30 a.m. (3RT 431-432, 454-455.)

Dr. Cohen was unable to agree with Dr. Bonnell that the death occurred between 11:00 p.m. and 12:30 a.m. (3RT 433.) The available evidence was not reliable enough to render that narrow of an opinion. (3RT 434.) The lack of capillary refill in the nail beds cannot be used to reliably determine time-of-death. (3RT 436-438, 459-463, 471-472.) In Dr. Cohen's opinion, Ozzy's death could have occurred before or after 1:20 a.m., and potentially as late as 1:30 or 1:45 a.m. (3RT 434, 463.) An opinion that death could not have occurred after 1:20 a.m. is "ludicrous." (3RT 435.) If the available evidence is vague as it is here, the resulting opinion must be conservative – and result in a broader range. (3RT 435, 472.) A medical doctor is generally the best qualified to give an opinion on time-of-death, but often a Deputy Coroner can be more accurate. (3RT 441-442, 469-470.)

If Dr. Cohen had been asked for an opinion in 2005 on the time-of-death, it would have been the same as he provided here. (3RT 472.)

4. Defense Attorney Eric Keen

Petitioner's trial attorney Eric Keen was also called as a witness by petitioner following his refusal to be interviewed by respondent in advance

of the hearing. (2RT 180, 206.) He had been a deputy public defender since 1997, he represented petitioner from 2003 through 2006, and he had previously defended two homicide cases to verdict prior to representing petitioner. (2RT 181-182.) He was handling a death penalty case at the same time he was handling petitioner's case, and it ultimately went to trial after petitioner's conviction. (2RT 182, 240.) The death penalty case had been prepared for trial prior to petitioner's second trial, and co-counsel was also assigned to assist in the death penalty case. (2RT 184, 240.) Keen had an investigator, Bill Sylvester, assigned for both petitioner's case and the death penalty case. (2RT 185, 239.) Keen believed he was fully prepared for petitioner's defense and did not recall Sylvester lacking sufficient resources for investigation. (2RT 241.)

In petitioner's trials, the issue was identity, and in the second trial, Keen attempted to portray Lovejoy as the killer. (2RT 209-211.) He attempted to raise a reasonable doubt by presenting evidence that there was insufficient time to commit the crime and conceal the evidence. (2RT 210.) Petitioner was not always honest with Keen in preparing for trial, and he was good at determining when a client was not telling the truth. (2RT 236, 265; Peo. Exh. 7.) Keen did not recall having any difficulties obtaining approval for appropriate experts for petitioner's defense. (2RT 237-238.)

Keen also believed the perpetrator should have had blood on him or her. (2RT 190, 213.) Though the prosecutor argued petitioner changed her clothes, Keen disputed that with petitioner's testimony. (2RT 190, 216.) In hindsight, he believed Dills' statements to police describing petitioner's clothing would have corroborated petitioner, but he did not attempt to elicit those statements and believed it was unnecessary given other evidence. (2RT 192-195.) However, he was also aware of a Department of Justice report (Peo. Exh. 4) opining that it was impossible to conclude whether the perpetrator would have had blood on him or her, and if he had presented

additional evidence that petitioner had not changed her clothes, the prosecution could have called the DOJ witness to cast doubt on whether blood would have been on the perpetrator. (2RT 213-214, 266, 269, 275.)

At the same time, Keen acknowledged that the defense expert *did not* opine that the perpetrator necessarily got blood on him or her. (2RT 215, 267.) Indeed, there was no blood on petitioner's helmet, but there was also no blood on the floor under the helmet. (2RT 269, 273; Peo. Exhs. 9, 10, 11.) Based on the blood spatter, someone could have stood to the northwest of the body and minimized the chance of getting hit with blood spatter. (2RT 274.) Plus, although this was a bloody crime scene and petitioner had been walking or running through it, she appeared to have no blood on her at all. (2RT 218, 270.)

With respect to time-of-death, Keen believed it was an issue, and he actually consulted a time-of-death expert prior to trial. (2RT 196-197, 229.) Dr. Daniel Vomhof was a physiologist and a biochemist, who held himself out as providing expert opinions on time-of-death. (2RT 197, 246; see Def. Exh. N.) Dr. Vomhof had been recommended by another expert, and Keen spoke to him on the telephone. (2RT 198-199, 277.) Keen was not aware of any requirement that only a medical doctor or pathologist can provide an opinion on time-of-death. (2RT 247.) Keen did not remember everything Dr. Vomhof said, but was confident Dr. Vomhof was unable to conclude that the death necessarily occurred prior to 1:20 a.m. (2RT 199, 247.) Keen did not believe he could find an expert who could testify that Ozzy necessarily died before 1:30 a.m. and decided time-of-death was not going to be the defense. (2RT 248, 259, 277.) He did not consult a pathologist, but if he was defending the case today, he would consult a pathologist. (2RT 200-201.)

Keen was also aware that petitioner was an emergency room nurse, and he believed her statements that Ozzy was still breathing when she got

home and called 911. (2RT 229-231, 253, 264-265.) In fact, petitioner herself never doubted her observation that Ozzy was still breathing. (2RT 230.) In addition, witness Juanita Sandoval heard Ozzy in his garage at 1:30 a.m. (2RT 231, 255, 265.)

Keen thought Lovejoy was the best third-party suspect at the time of trial, and he should have used Ozzy's restraining order application to impeach Lovejoy. (2RT 189-190, 223-224; Def. Exh. M.) He also did not use family court documents, but realized he had them in his possession at the time of trial. (2RT 223-225; Def. Exh. P.) However, he acknowledged eliciting evidence contained in the restraining order application and referring to the restraining order during court proceedings. (2RT 223-224.) Indeed, Lovejoy essentially admitted during her testimony all of the allegations listed in the restraining order application. (2RT 226-227.)

Keen was aware at the time of this hearing that the cigarette butt found at the scene had been tested for DNA, and if he had to do the trial over, he would have it tested. (2RT 186-187, 218-220.) He never thought about having the speaker wires tested for DNA, but thought having unknown DNA on the wire might be beneficial. (2RT 188, 220.) But, he also admitted the speakers were not preserved and if someone else's DNA was found on the wires a year and a half after the murder, it would have had little relevance. (2RT 221, 263.) Keen believed it was logical to argue to the jury that it was the prosecution's burden to have DNA testing done. (2RT 222.)

Keen admitted making a motion for new trial and admitted asking Judge Magers to reduce the conviction to voluntary manslaughter – with petitioner's knowledge. (2RT 242-243.) Keen believed the jury compromised because the crime was actually a first degree murder, but the jury may have had a doubt about intent due to possible intoxication. (2RT

248-249.) Keen did not recall any complaints about his performance following the hung jury at the end of the first trial. (2RT 244.)

In any event, Keen believed his failures caused petitioner's conviction, but he had not gone through any remedial training to address his failures, nor did he reach out to the prosecution to assist in obtaining relief for petitioner. (2RT 205-206, 243.) Keen declined attempts by the prosecution to talk about the issues in this case because he believed he owed a duty of loyalty to petitioner. (2RT 206-208.)

5. Investigator William Sylvester

Investigator William Sylvester was the assigned investigator in petitioner's homicide case and spoke regularly with petitioner at home and at the office. (3RT 520, 524, 545-546.) He dealt with one of the defense experts and remembered talking about time-of-death with Keen. (3RT 524-526.) Sylvester had no problem communicating with Keen, and Keen had an open-door policy. (3RT 545.) If Sylvester found evidence incriminating petitioner, he would have provided it to Keen, but not to the prosecution. (3RT 545.) Petitioner was cooperative, but if she had any concerns or questions, Sylvester would take them to Keen. (3RT 546, 548.) On at least one occasion, petitioner was untruthful in an apparent attempt to protect Bugarski. (3RT 548-549; Peo. Exh. 7.) It was not unusual for criminal defendants to lie. (3RT 549.) Keen never prevented any line of investigation and no expert requests were ever denied. (3RT 561-562.) Though Keen was also assigned a death penalty case, another attorney was assigned to assist Keen in that matter. (3RT 568-570.)

Petitioner's trials took place in February and December of 2005. (3RT 543.) Keen attempted to blame Bugarski for the murder during the first trial, and the jury was unable to reach a verdict, with nine jurors voting not guilty. (3RT 546-547.) Bugarski had an alibi that was corroborated by

his girlfriend. (3RT 566.) That was a limited victory because acquittals in homicide cases are uncommon. (3RT 548.) In Sylvester's opinion, there was a woeful lack of evidence demonstrating petitioner's guilt. (3RT 538.)

Petitioner called 911 at 2:09 a.m. and reported that Ozzy was still breathing. (3RT 554-555.) At no time did petitioner ever question her belief that Ozzy was still alive when she returned home. (3RT 555.) Significantly, petitioner reported her shotgun stolen before she was told that it was missing. (3RT 564.) Sylvester believed he should have sought testing of the cigarette butt. (3RT 524.) Such DNA testing would have required approval, but it was not a difficult process. (3RT 558.)

Sylvester believed both Joe Bugarski and Shiana Lovejoy were potential perpetrators of the murder. (3RT 527-528.) Lovejoy's alibi could not be positively confirmed, and Bugarski had been stalking petitioner and may have had property taken from her home. (3RT 528, 532, 536, 563.) Sylvester requested family law documents from the Orange County Superior Court, and obtained restraining order documents from the Riverside County Superior Court. (3RT 531, 553.)

Sylvester obtained petitioner's shoes, jacket, and party hats, and they all tested negative for blood. (3RT 540.) The police found no blood on petitioner's remaining clothing. (3RT 540.) However, nothing in the defense expert's report regarding the crime scene analysis concluded that the perpetrator would have necessarily gotten blood on him or her. (3RT 550.) Although the prosecution's theory was that petitioner changed her clothes, based on the available reports, the prosecution could have argued that the perpetrator did not receive any blood spatter. (3RT 551-552; Peo. Exh. 4.) The defense expert's report indicated most of the blood was to the north and northeast of the victim, and there were areas around the victim – including where petitioner's helmet had been found – where there was no

blood. (3RT 559-560.) All of this evidence would have been considered in preparing the defense. (3RT 561.)

6. Defense Attorney Gary Gibson

Gary Gibson had been a deputy public defender in San Diego County from 1991 through March of 2016, and had personally handled 50 to 60 homicides, taking 15 to trial. (2RT 281-283.) In San Diego County, a deputy public defender assigned a capital case would handle no other cases while the capital case was active, but he admitted having no knowledge of similar practices in other counties. (2RT 287, 293, 297-298, 341-343.)

Gibson was hired as a "*Strickland*" expert in this case, and reviewed the petition and exhibits, the return and exhibits, all the police reports, the trial transcripts from the second trial, the reports of the forensic pathologists, and records of Keen's caseload. (2RT 289-290, 305, 321-323.) He opined that Keen's mistakes in petitioner's case were understandable given Keen's caseload, but that the hung jury as a result of the first trial was a favorable outcome. (2RT 300, 329, 348.) However, nothing in the *Strickland* case requires comparing performance to best-case practices or evaluating performance based on caseload. (2RT 343.)

At the time of petitioner's second trial, Keen had assigned to him three active homicides, three attempts, and a capital case. (2RT 296.) Gibson opined that under California Rules of Court, rule 4.117, Keen was not qualified to handle the capital case, but then admitted on cross-examination that there was an exception to those qualifications for deputy public defenders. (2RT 284, 296, 324-326.)

According to Gibson, when time-of-death is at issue, only a medical doctor (or possibly a doctor of osteopath), can provide a valid opinion. (2RT 302, 336-338.) However, providing an expert opinion on time-of-

death is *not* practicing medicine. (2RT 336.) In San Diego County, an expert can be retained based solely on a showing that "It won't hurt the case," but he was not sure if that was sufficient in all counties. (2RT 333.) A review of Dr. Vomhof's CV failed to show anything that qualified him as an expert on time-of-death despite his express representation he provides opinions on time-of-death and his affiliation with the "American Board of Forensic Medicine." (2RT 303-304; Def. Exh. N.) According to Gibson, any lawyer would know not to talk to Dr. Vomhof about time-of-death. (2RT 305.) To be effective, a defense attorney must thoroughly investigate the background of a proposed expert. (2RT 332.) Specifically, Keen performed unreasonably in relying on Dr. Vomhof. (2RT 309.) Gibson noted that even Dr. Cohen's opinion rendered it possible that the death occurred before petitioner would have been home. (2RT 310.)

With respect to Dr. Bonnell, Gibson was aware he had been fired from the San Diego County Coroner's Office and had been impeached previously for being fired for fraud. With respect to Dr. Hua, Gibson lacked any knowledge whether he had ever testified before in California or was qualified to practice medicine in California. (2RT 335.) It would be unusual to fly an expert like Dr. Hua in from New York to provide testimony in a criminal case. (2RT 336.)

Based on the *Strickland* case itself, courts must give deference to tactical decisions by defense attorneys, a defense attorney can reasonably rely on client statements to inform strategy, and any tactical decisions must be evaluated based on the information available at the time. (2RT 327, 330, 339.) *Strickland* requires "reasonably effective assistance," and not infallibility. (2RT 328.) However, despite petitioner's statements and testimony that Ozzy was breathing and had an open-airway, Gibson opined petitioner was obviously mistaken. (2RT 327-328.)

A defense attorney is not necessarily ineffective just because a defendant is found guilty, but in Gibson's opinion, failure to consult a legitimate time-of-death expert and introduce evidence tending to show petitioner was not home when the murder occurred was prejudicial to petitioner's case. (2RT 319, 329.)

With respect to whether petitioner had changed her clothing, Keen performed deficiently in not questioning Dills during the preliminary hearing about the clothing petitioner had been wearing. (2RT 312-313.) However, had Keen better established that petitioner had not changed her clothing, the prosecutor may have changed his theory and argued the perpetrator simply did not get blood on him or her. (2RT 315-316.) Keen was further deficient in not attempting to introduce at trial Dills' interview statements about petitioner's clothing, despite the lack of a recognized hearsay exception. (2RT 317.) Gibson opined that Keen's failure to successfully introduce Dills' description of the petitioner's clothing was prejudicial to petitioner's case. (2RT 320.)

Gibson also opined Keen performed deficiently in failing to have the cigarette butt tested, but it was not as clear with respect to failing to test the speaker wires. (2RT 307-308.) Keen also performed deficiently with respect to failing to introduce the hearsay restraining order application. (2RT 311.) However, Gibson did not think Keen's errors with respect to the DNA or restraining order application were prejudicial. (2RT 317-318.)

The clothing evidence, the potential time-of-death evidence, the restraining order application, and the DNA evidence were all available to Keen at the time of trial with reasonable diligence and were *not* "new evidence." (2RT 331.)

7. Appellate Attorney Michelle Rogers

Michelle Rogers was the staff attorney at Appellate Defenders who handled petitioner's appeal following her conviction.[7] (2RT 353-356.) She felt she owed her allegiance to petitioner during the appeal, she had been an advocate for petitioner, personally chose petitioner's case to handle on appeal, and advocated for petitioner before the Innocence Project. (2RT 370.) Indeed, she admitted that if petitioner had ever said anything incriminating, Rogers would not share that information with the prosecution. (2RT 371.)

Rogers reviewed the transcripts from both trials, and based on the first responders' testimony, believed time-of-death should have been an issue at trial despite petitioner's statements that Ozzy was still breathing and a responding officer's observation that Ozzy was actively bleeding. (2RT 357, 371-372, 374-376, 400.) She also thought the cigarette butt found at the crime scene should have been tested for DNA. (2RT 358.)

Rogers contacted Keen and obtained from him the defense file used at trial. (2RT 357, 359, 396.) There were no notations in Keen's file about investigating time-of-death. (2RT 367.) In speaking to Keen, he said he did not think he could exclude petitioner as the perpetrator based on time-of-death evidence, but Rogers never expressly asked Keen if he consulted a time-of-death expert. (2RT 367, 398.) Keen also did not think the cigarette butt had any evidentiary value, and he did not think he could introduce Dills out-of-court description of petitioner's clothing. Rogers admitted there was no authority supporting its admission. (2RT 368-369, 398.)

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[7] Rogers has also been handling the instant appeal on behalf of petitioner. The court of appeal below inquired whether Rogers' dual responsibilities created a conflict, and after input by the parties, concluded there was no conflict. (Slip Opn. at p. 40, fn. 4.)

Rogers never asked petitioner whether she was confident Ozzy was still breathing at the time petitioner returned home. (2RT 372.) Rogers never asked Keen about the restraining order application. (2RT 398.)

Rogers believed the trial court may have admitted Dills' hearsay statements about petitioner's clothing on the basis of due process principles. (2RT 378.) Rogers believed that DNA testing of the cigarette butt may have been beneficial even though other people were in the house, it was not obviously placed as the result of a struggle, and the actual testing that took place after trial only referenced an "unknown male." (2RT 379-381.) Rogers also acknowledged the speaker wires had not been preserved for testing and had been in possession of a third-person for one-and-a-half years before they were collected. (2RT 382.) Rogers acknowledged that Lovejoy admitted most of the allegations included in the restraining order application. (2RT 384.) She also acknowledged that the only direct evidence at trial about petitioner's clothing was her testimony denying that she had changed her clothing, and the defense expert did not conclude that the perpetrator necessarily would have gotten blood on him or her. (2RT 386-387.)

Rogers acknowledged the hung jury after the first trial and that acquittals in homicide cases are rare. (2RT 387-388.) Contrary to Gibson's opinion, Rogers believed petitioner would have had a better outcome in the second trial had the DNA results from the cigarette butt and the family law documents been admitted. (2RT 389-390.) However, Rogers also admitted that petitioner lied to the police, and also asked Dills to lie to the police. (2RT 391.) Rogers acknowledged prior violent conduct by petitioner toward Bugarski. (2RT 393.) Significantly, Rogers acknowledged that the jury could have acquitted petitioner had they simply believed her. (2RT 392.)

Rogers did not file a habeas corpus petition because she thought she was going to prevail on appeal. (2RT 363. 394.) But, when petitioner's judgment was affirmed on appeal, Rogers felt this case would be better handled by the Innocence Project. (2RT 363-364, 395.) Significantly, Rogers opined that time-of-death was a potential issue in this case not based on assistance from a medical professional, but based on the facts and a simple Google search. (2RT 375-376.)

Rogers believed petitioner was factually innocent, but acknowledged the standard was difficult to meet. (2RT 397.)

8. Forensic Psychologist Catherine Barrett[8]

Catherine Barrett was a clinical forensic psychologist and an adjunct professor at the University of Southern California who teaches law and ethics. (3RT 477-479, 516-517.) She was contacted during the habeas proceedings and asked to research normative responses to trauma specifically based on someone who may have witnessed a homicide of a loved one. (3RT 479-480, 496.) She also researched how intoxication can affect the ability of a first responder to react, behave, or perceive such a traumatic situation. (3RT 480.) As a result, she put together a "research article" addressing these subjects. (3RT 481; Peo. Exh. 13.)

In Barrett's opinion, there is a wide range of ways someone can respond to grief, trauma, or stressful situations. (3RT 481, 506, 514.) It could be complete affect to a perception that the deceased victim is still alive. (3RT 482-483, 486, 490, 493, 505.) Barrett referred to this person as a "co-victim" who can have a "roller-coaster" of emotions including

[8] For reasons that will become clear after reading the summary of Barrett's testimony, her testimony was never mentioned in the court of appeal's opinion, nor mentioned in petitioner's petition for review or opening brief on the merits. It is the People's opinion Barrett attempted to perpetrate a fraud on the court.

trauma, grief, rage, shock, or others. (3RT 482-485.) A co-victim's response may be affected by a personal relationship with the victim. (3RT 490-491.) Alcohol can also affect judgment or perception. (3RT 487-488, 493, 508.) A first-responder such as a nurse also may not respond as trained when a victim is a loved-one. (3RT 509-510.)

Barrett listened to petitioner's 911 call, and petitioner being upset and angry is consistent with her research. (3RT 491-492.) Barrett admitted however, that a wide range of responses is also likely for someone who is not intoxicated, or a co-victim, or a first responder. (3RT 494, 501.) And the perpetrator of a violent crime – even against a loved one – might have a wide array of reactions including no reaction, being hysterical, blaming someone else, being sorry, or pretending to get help for the victim. (3RT 495, 507, 512, 515.) Barrett's research results were not very surprising, and could be summarized as "anything is possible." (3RT 508, 510, 514.)

With respect to the "research article" Barrett drafted for the habeas proceeding (Peo. Exh. 13), it had a bibliography, but was undated. (3RT 496.) Though it was a "research article" rather than an expert report, it had not been published and the headings coincided directly with petitioner's theory of the case: Reactions to the death of a loved one, alcohol levels and judgment, and duty to act, inability to act. (3RT 497, 500.) The bibliography contained 11 citations that were not discussed in the article. (3RT 498-499, 506.) Barrett was unaware of those errors and maintained the article was not modified from a greater article. (3RT 500.) Then, Barrett ultimately admitted the research article was written with petitioner's case in mind, though there was no indication of that fact in the article. (3RT 497, 500-501, 506.)

Barrett specifically cited an *Ursano and Fullerton* article for the conclusion that a person who stumbles upon the death of a loved one might be "convinced that the victim is alive, terrified, and screaming." (3RT

501.) However, the reference to *Ursano and Fullerton* was buried in an unrelated citation in the bibliography. (3RT 502.) When confronted with the cited *Ursano and Fullerton* article (Peo. Exh. 14), Barrett admitted it had to do with military disaster workers responding to a mass disaster, and those workers being able to look at a victim's face and realize that the victim was alive when he or she suffered the violent death. (3RT 503-505.) The cited article did not involve loved ones, the victims were dead, and none of the workers actually perceived the dead victims as being alive. (3RT 519.) Barrett admitted in the context of her ethics training that it was not ethical to misrepresent the findings of a research article in her own research article. (3RT 517.)

Barrett was unable to opine whether petitioner was lying or mistaken when she reported at 2:09 a.m. that Ozzy was breathing. (3RT 512.) Barrett had no information about petitioner's actual level of intoxication when she arrived home and was aware that petitioner said she "sobered up" at Dills' house. (3RT 513.) Committing a brutal murder can cause the perpetrator trauma, stress, a desire to blame someone else or to pretend to provide aid, or to simply cover up the act. (3RT 514.)

9. Petitioner Kimberly Long

In 2003, petitioner was a licensed vocational nurse at the Corona Regional Hospital emergency room. (3RT 573-574, 603; 4RT 622.) She had been married to Bugarski for about four years until they separated in early 2003 based on a number of issues. (3RT 578, 581; 4RT 623-624.) At that point, Bugarski moved in with his girlfriend. (4RT 624, 631.) During her marriage to Bugarski, petitioner had affairs with others, including Ozzy and Dills. (4RT 629, 632, 657, 669.) She said she might have cheated because she was a "dumbshit." (4RT 669.)

Petitioner admitted drinking alcohol excessively, and also admitted prior physical and verbal altercations with Bugarski, including one where she struck Bugarski in the head with a phone. (3RT 578-579, 582-583; 4RT 625-628, 633, 657.) Petitioner described herself as a "nasty drunk" and a "fucking asshole" when she drinks. (4RT 630, 663, 668.) In fact, petitioner was a totally different person when she is drunk. (4RT 668-669.) Petitioner might have threatened to kill Bugarski on one occasion. (4RT 630.)

After petitioner had been dating Ozzy for a short time, he moved into petitioner's rented home in Corona in the spring of 2003. (3RT 584-585, 595.) Petitioner had been lying to Bugarski about her relationship with Ozzy. (3RT 587, 632.) Ozzy had a former relationship with Shiana Lovejoy, and she made harassing phone calls and sent a threatening letter. (3RT 585-586, 596; 4RT 641.) Ozzy sought a restraining order against Lovejoy. (3RT 597-598, 600; 4RT 639.) Petitioner called Lovejoy to taunt her about the restraining order and threatened to take Lovejoy's children. (3RT 600; 4RT 641-642.)

Ozzy was a passive person who never hit petitioner, and he had no enemies. (4RT 634, 640-641, 664.) Petitioner was unaware of any violence between Ozzy and Lovejoy. (4RT 640.)

Petitioner admitted physically assaulting Ozzy on at least one occasion prior to the night of his death. (3RT 587-588; 4RT 626.) Petitioner was always drunk when she got into physical altercations. (4RT 626.) Ozzy was not paying his fair share of expenses around the house. (4RT 638.)

Petitioner had ingested a lot of alcohol during the day before Ozzy's murder, and ingested some Vicodin and orange liqueur at Dills' house. (3RT 591-592.) Prior to that, she had been barhopping and drinking all day, and spent about $450 on alcohol that weekend. (3RT 609; 4RT 628.)

She drank so much alcohol that day she described herself as an "asshole," "obnoxious," and a "jerk." (4RT 656.) Although she testified at trial that she "sobered up" at Dills' house, that was not true. (4RT 656.) She was wearing blue jeans, a black shirt with ringlets, a black belt, large sandals, and carried a matching purse and a couple Lowenbrau hats. (3RT 609-613; 4RT 650-651.)

While barhopping, petitioner got into an argument with Ozzy. (4RT 653.) When they returned home late that evening, the argument continued in the driveway, and petitioner assaulted Ozzy. (4RT 653-654.) Petitioner was still drunk. (4RT 663.) Petitioner actually struck Ozzy with a purse and helmet, and this was just a couple hours before his death. (4RT 655.) Petitioner told Ozzy he was not going into the house and that he had to move out. (4RT 653-654.) When Ozzy did not leave, petitioner left to go home with Dills. (4RT 654, 657.)

While at Dills' house, petitioner took off her clothes to go into the spa with Dills. (3RT 615.) Petitioner later lied to Dills and said she had to go home because her children were supposed to be there. (4RT 654.) Petitioner also expressly told Dills that she wanted to "kick" Ozzy's "ass." (4RT 654.)

According to petitioner, when she got home, she saw Ozzy, and thought he had been in a fight. (3RT 601, 614.) Petitioner touched Ozzy and tried to pull him up by his right arm. (3RT 601.) Petitioner panicked and was not sure if Ozzy was breathing. (3RT 602-604; 4RT 645.) Although petitioner had training for emergency medical aid and had handled head trauma, she had no such training to assist a loved-one even though family are treated the same as strangers. (3RT 603-605; 4RT 647, 655, 669.) Petitioner called 911 without providing any medical assistance to Ozzy. (3RT 604-605; 4RT 646.) Petitioner told the 911 operator that Ozzy was still breathing. (4RT 642.)

Petitioner lied to the police about her sexual conduct with Dills, and she also asked Dills to lie to the police about that subject. (3RT 593.) Petitioner did not change her clothes after she got home. (3RT 616.) Although Dills and others were smokers and were in petitioner's home before the murder, the cigarette butt on the coffee table did not belong to petitioner or Ozzy. (3RT 593; 4RT 673.)

Missing from the home were a stereo, a change bowl, her car keys, a shotgun, and a pee wee motorcycle – none of which had any significant monetary or sentimental value. (3RT 606-608; 4RT 636-637, 648-649.) Petitioner did not deny reporting the shotgun stolen before being told by police it was missing. (4RT 666.) When talking to the police, petitioner referred to Bugarski as a "wimp," and she discouraged Sylvester from blaming Bugarski for the murder. (4RT 631-632.) Petitioner admitted that one of the trial exhibit crime scene photographs showed the strap of her purse in the living room, but denied ever seeing that photograph during trial. (3RT 616-617; Def. Exh K.) .

Leading up to her trial, petitioner met with Investigator Sylvester on a regular basis, but only met with Keen a few times. (3RT 589; 4RT 634.) She watched all of the available interview videos with Sylvester, and he was very easy to get ahold of. (4RT 635.) Petitioner maintained she asked Keen to test the cigarette butt for DNA, but he did not do so. (3RT 594; 4RT 672.) She also maintained she specifically asked Keen to introduce Dills' pretrial statement describing petitioner's clothing, but he did not do so. (4RT 671.) Dills testified truthfully during the preliminary examination, but the only fact he got wrong was that he dropped petitioner off at home at 1:20 a.m. (4RT 660-661.)

Petitioner testified at both trials, probably testified that Ozzy was breathing at the first trial, and would have testified in the same manner during the second trial. (4RT 643-644, 647.) Petitioner admitted she

testified at trial that she did not do CPR on Ozzy because it was inappropriate to do CPR on someone who was breathing. (4RT 645.) Petitioner never contradicted or questioned her testimony that Ozzy was breathing. (4RT 644.) Petitioner did not think Ozzy was dead at the time, but in hindsight believes now that he was dead. (3RT 606; 4RT 647.)

During petitioner's first trial, she testified she called 911 within 30 seconds of arriving home, but now she admits that was lie. (4RT 657, 659.) She testified to that fact simply to be consistent with her statement to the police. (4RT 658.) Petitioner also expressly, but erroneously, testified that the trial prosecutor was in her garage shortly after the murder. (4RT 662.) Petitioner was scared during trial and felt she did not have a voice. (4RT 666.)

Petitioner denied killing Ozzy and staging the crime scene. (3RT 588, 609.) Petitioner did not remember if she agreed with Keen to ask the court to reduce the murder conviction to voluntary manslaughter. (4RT 674.)

10. Habeas Ruling

The parties argued whether Keen was ineffective, and also argued whether petitioner met her burden to demonstrate actual innocence. (4RT 676-731.) Respondent acknowledged its theory at trial was that petitioner changed her clothing after the murder; however, after a reevaluation of the evidence, respondent believed petitioner simply got no blood on her clothing and expert reports corroborated that conclusion. (4RT 704, 717, 730.)

With respect to the time-of-death issue, Judge Magers found that Keen did consult Dr. Vomhof on this issue, but there was nothing in his CV to show he was qualified to make this assessment. (4RT 735; see Def. Exh. N.) Judge Magers concluded Dr. Vomhof was not qualified, and Keen

made no effort to consult a medical examiner or a pathologist. (4RT 736.) Judge Magers found that Drs. Bonnell and Hua both testified that the observed post-mortem changes could not have occurred in less than an hour. (4RT 736.) Judge Magers found both opinions credible, convincing, and compelling, and found Keen performed deficiently in this respect, but also acknowledged that the jury could have disbelieved these witnesses. (4RT 736-737.)

Judge Magers found petitioner's clothing and whether she changed it to be a pivotal issue. (4RT 740.) He found no question that the perpetrator would have had blood on him or her. (4RT 741.) If petitioner had no blood on her clothing, it was a reasonable inference she was not the killer. (4RT 744.)

Judge Magers found Dills' out-of-court statements to police describing petitioner's clothing were admissible without a specific hearsay exception, and that Keen performed deficiently in failing to elicit those statements at trial. (4RT 744-746.)

Judge Magers also found Keen performed deficiently in failing to conduct DNA testing of physical evidence and failing to utilize the available family law documents at trial. (4RT 737-740.)

With respect to prejudice, Judge Magers found no prejudice with respect to the DNA or family law documents, but did find petitioner was prejudiced as a result of the failure to present time-of-death evidence or Dills' statements describing petitioner's clothing before the murder. (4RT 747-748, 751.)

Judge Magers rejected petitioner's claim of actual innocence, and in doing so found Dr. Cohen to be a highly qualified and experienced medical examiner, and that the jury could have believed him over the defense experts. (4RT 748-751.)

Judge Magers vacated petitioner's conviction, ordered a new trial, and released petitioner on bail. (4RT 751-755.) Significantly, Judge Magers never found petitioner's hearing testimony credible.

B. Contrary To Petitioner's Assertions, Judge Magers' Most Significant Factual Findings And Legal Conclusions Lack Foundation

As will be discussed more thoroughly below, factual findings are clearly entitled to deference if supported by substantial evidence. However, legal questions and mixed questions of law and fact including questions about constitutional rights are evaluated under a de novo standard of review. (See *In re Collins, supra,* 86 Cal.App.4th at p. 1181.) As noted, most of the facts are undisputed, but whether those facts support findings of deficient performance or prejudice was the issue before the court of appeal. And as will be seen, many of Judge Magers' most significant findings lack the requisite evidentiary support or legal authority.

1. Dr. Vomhof's CV

Judge Magers expressly found there was nothing in Dr. Vomhof's CV to show he was qualified to offer an opinion on time-of-death. (4RT 735.) That is incorrect. Dr. Vomhof's CV was admitted into evidence as Defense Exhibit N, and was discussed and available to the court for review. (3RT 618; 4RT 709.) According to that CV, Dr. Vomhof represented himself as "forensic consultant" who has certifications in a number of fields including "forensic medicine." Among other degrees, he had a Ph.D in biochemistry and physiology, and a B.A. in chemistry. He had at least some formal education in forensic medicine from New York University in 1979 and 1980, and was Board Certified in Forensic Medicine with the American Board of Forensic Medicine. Significantly, he held himself out as providing testimony on "Time and Cause of Death." (Exh. N.)

Judge Magers' finding that there was nothing in Dr. Vomhof's CV to show he was qualified to offer an opinion on time-of-death is simply not supported by substantial evidence. Significantly, Dr. Bonnell even testified that providing an opinion on time-of-death is not practicing medicine, and according to attorney Michelle Rogers, she was able to preliminarily research time-of-death without the assistance of a medical doctor. (1RT 148, 172; 2RT 375-376.) Without the benefit now of years of additional investigation, it was reasonable for Keen to consult Dr. Vomhof on time-of-death, the opinion he obtained from Dr. Vomhof was similar to the opinion of Dr. Cohen, and there is no legal authority – just an opinion of a purported *Strickland* expert – limiting such inquiries to medical doctors.

Dr. Vomhof's CV did tend to show he was qualified to provide an opinion on time-of-death.

2. Testimony of Drs. Bonnell and Hua

Judge Magers found that Drs. Bonnell and Hua both testified that the observed post-mortem changes could not have occurred in less than an hour. (4RT 736.) Not true. In fact, though Dr. Hua offered the ultimate medical opinion that Ozzy's death occurred "long, long before" 1:20 a.m. (without explaining what that meant), he admitted on cross-examination that Ozzy's death could have occurred after 1:30 a.m. based on the observed post-mortem changes. (1RT 92-93, 102-103, 110, 120, 127, 138.) Likewise, though Dr. Bonnell provided the unyielding conclusion that Ozzy could not have died after 1:20 a.m., he expressly admitted that the rigidity and lividity observed by the paramedics at 2:20 a.m. could have been observed within 30 minutes of death. (1RT 154, 162, 176.)

Judge Magers expressly found both opinions credible, convincing, and compelling, but at the same time acknowledged that the jury could have disbelieved these witnesses. (4RT 736-737.) Indeed, disbelief was

appropriate because Dr. Hua expressly relied on the deputy coroner's observations at 5:03 a.m. (1RT 117), and Dr. Bonnell testified that if an expert relied on the deputy coroner's observations at 5:03 a.m., the resulting opinion would be inaccurate (1RT 167). And Judge Magers found Dr. Cohen to be not only credible, but highly qualified and experienced, and Dr. Cohen testified it was just as likely Ozzy died after 1:20 a.m. as before. (3RT 434, 463; 4RT 751.) And all three experts admitted the available evidence was vague or inaccurate, and it was not possible to render an accurate opinion on time-of-death. (1RT 104, 118-120, 122, 157-159, 164, 166, 173, 175; 3RT 417, 434.) Not to be forgotten are petitioner's own statements and testimony – as an experienced emergency room nurse – that Ozzy was breathing at 2:09 a.m. when she summoned the police. (1st 1CT 210, 213; 1st 3RT 580, 4RT 651-652, 676; 1CT Supp. 9, 31, 141; 2nd 4RT 642, 711-712, 734, 963.)

Judge Magers' finding that the observed post-mortem changes could not have occurred in less than an hour is not supported by substantial evidence.

3. Petitioner's Clothing

Judge Magers found there was no question that the perpetrator of this murder would have gotten blood on him or her. (4RT 741.) However, this was purely supposition, and it was not supported by substantial evidence. To the contrary, the defense had an expert analyze the crime scene photographs, including the blood spatter, and nowhere in the resulting report did that expert conclude that the perpetrator must have gotten blood on his or her clothing. (See Peo. Exh. 8; Def. Exh. C; 2RT 246.) On the other hand, an expert from the Department of Justice was expressly asked to give an opinion on whether the perpetrator would have gotten blood on him or her, and he was not able to conclude one way or the

other. (See Peo. Exh. 4; 2RT 213-214.) Neither of these witnesses testified at trial, and instead Judge Magers relied on the testimony of a criminalist who perfunctorily testified – without detail – that there was blood 360 degrees around the body. (4RT 741.) But that opinion ignored that much of the blood would have been cast off from the murder weapon and dispersed away from the perpetrator, and other evidence that most of the blood was dispersed in only a couple of directions from the victim and none was on the ground near petitioner's helmet. (2RT 273-274.)

Contrary to Judge Magers' conclusory finding, whether the perpetrator got blood on his or her clothing is something that has not and cannot be determined.

4. Dills' Out-Of-Court Statements

Judge Magers found Dills' out-of-court statements to police describing petitioner's clothing were admissible without a specific hearsay exception. (4RT 744-746; Peo. Exhs. 2-3.) Aside from being a self-described side note, Judge Magers admitted that there was no applicable hearsay exception that would permit the admission of Dills' out-of-court statements to the police. (4RT 744.) However, he then described the possibility of admissibility based on a tortured analysis as non-hearsay, but then presumably the statement would not have come in for the truth of the assertion. (4RT 745.) Judge Magers then recognized Supreme Court authority permitting deviation from the Evidence Code based on due process principles. (4RT 745-746.) But, under either principle, the admissibility would have had to be litigated with the People provided an opportunity to be heard, and that never happened in this case. And of course, the defense would have had to argue Dills' pretrial statements to the police describing the clothing were trustworthy while at the same time arguing his preliminary hearing testimony about the time petitioner arrived

home was not trustworthy. As noted by the court of appeal, "Dill's statement was not made under particularly reliable circumstances" and petitioner actually argued in her respondent's brief that "Dills was not subjected to meaningful cross-examination with full discovery, and there were numerous questions left open concerning Dills' level of intoxication and possible motivation to lie, i.e., he was a suspect in the murder." (Slip Opn. at pp. 72, 74, fn. 8.)

Accordingly, Judge Magers' preemptive ruling on the admissibility of this hearsay evidence – described by him as unnecessary to his ruling – is simply inaccurate and inappropriate.

C. A Determination Of Counsel's Ineffectiveness Is Not A Mixed Question Of Law And Fact

Petitioner asserts that a claim of ineffective assistance of counsel involves a mixed question of law and fact (PBOM 53-54), and a claim of ineffective assistance of counsel is "necessarily predominantly factually or credibility based, and thus a reviewing court should give even more deference to the trial court's findings" (PBOM 54). Citing *People v. Callahan, supra,* 124 Cal.App.4th 198, for the first time in any proceeding, petitioner asserts that "because a claim of ineffective assistance of counsel is necessarily predominantly factual, appellate review should be deferential" and a "deferential standard of review for ineffective assistance 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." (PBOM 55, citing *People v. Callahan, supra,* 124 Cal.App.4th at p. 211.)[9] Accordingly, petitioner now asserts the applicable standard of

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[9] As noted, in the court below, petitioner cited *In re Collins, supra,* 86 Cal.App.4th at page 1181 for the proposition that "when the application of law to fact is predominantly legal, such as when it implicates constitutional

review in assessing the People's appeal of a habeas grant on the basis of ineffective assistance of counsel is: "(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."[10] (PBOM 56, citing *In re Collins*, *supra*, 86 Cal.App.4th at p. 1181.) Petitioner is wrong.

This Court has regularly agreed with the court of appeal here that determinations of whether a counsel performed deficiently, and whether the defendant was prejudiced as a result, are legal questions entitled to de novo

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rights and the exercise of judgment about the values underlying legal principles, this court's review is de novo." (RB 54.)

[10] Petitioner asserts, without citation, that making a determination of deficient performance is based on testimony of a *Strickland* expert, rather than reliance on case law, so it is fundamentally factual. (PBOM 55.) Respondent disagrees. The *Strickland* expert provides an *opinion* that is only as valuable as the information upon which it is based. (See *People v. Sanchez* (2016) 63 Cal.4th 665, 675 [factfinder free to reject expert opinion as unsound, based on faulty reasoning or analysis, or based on unreliable information].) As summarized above, the *Strickland* expert in this case admitted having no knowledge of case assignment practices in counties other than San Diego (2RT 287, 293, 297-298, 341-343), admitted that nothing in the *Strickland* case requires comparing performance to best-case practices or evaluating performance based on caseload (2RT 343), asserted that only a medical doctor (or possibly a doctor of osteopath) can provide a valid opinion on time-of-death even though providing such an opinion is not practicing medicine (2RT 302, 336-338), and admitted based on the *Strickland* case itself that courts must give deference to tactical decisions by defense attorneys, a defense attorney can reasonably rely on client statements to inform strategy, and any tactical decisions must be evaluated based on the information available at the time (2RT 327, 330, 339). He further admitted *Strickland* requires "reasonably effective assistance," and not infallibility. (2RT 328.) This expert's opinion was a legal, not factual, opinion. It is for the court to decide the issue of effective assistance (*In re Ross* (1995) 10 Cal.4th 184, 214-215), and a court is not bound by expert opinion (*In re Avena* (1996) 12 Cal.4th 694, 721).

review. (See, e.g., *In re Avena, supra,* 12 Cal.4th at p. 720 ["Such conclusions of law by the referee [reasonableness of counsel's representation] are subject to independent review by this court and are not given the ordinary deference we show to *factual findings* by a referee"]; *In re Ross, supra,* 10 Cal.4th at p. 201 ["conclusions of law, or of mixed questions of law and fact, are subject to independent review. Mixed questions include whether counsel's performance was deficient and whether the deficiency prejudiced the defense"]; *People v. Mayfield* (1993) 5 Cal.4th 142, 199 ["On questions of mixed law and fact or of a purely legal nature, however, we reach our conclusions on the basis of an independent review of the record and the law. . . . Both any deficiency in counsel's performance and any prejudice occasioned thereby are mixed questions of law and fact"]; *In re Marquez* (1992) 1 Cal.4th 584, 603 ["referee's conclusions of law are subject to independent review, as is his resolution of mixed questions of law and fact. . . . 'Mixed questions "include the ultimate issue, whether assistance was ineffective, and its components, whether counsel's performance was inadequate and whether such inadequacy prejudiced the defense."'"].)

The United States Supreme Court's decisions on the appropriate standard of review for findings of ineffective assistance are in accord. (See *Strickland v. Washington, supra,* 466 U.S. at p. 698 ["a state court conclusion that counsel rendered effective assistance is not a finding of fact binding on the federal court to the extent stated by 28 U.S.C. § 2254(d). Ineffectiveness is not a question of 'basic, primary, or historical fac[t],'" and "both the performance and prejudice components of the ineffectiveness inquiry are mixed questions of law and fact"]; *Miller v. Fenton* (1985) 474 U.S. 104 [a federal court entertaining a state prisoner's application for habeas relief must exercise its independent judgment when deciding both

questions of constitutional law and mixed constitutional questions (*i.e.*, application of constitutional law to fact)].)

In *Callahan*, Division Six of the Second Appellate District addressed the propriety of a trial court granting a new trial based on ineffective assistance of counsel. The People appealed and the court of appeal referenced this Court's opinion in *People v. Ault* (2004) 33 Cal.4th 1250, 1255, dealing with a grant of a new trial motion based on misconduct, and concluded that the abuse of discretion standard from that case should apply to the review of a new trial motion based on ineffective assistance of counsel. (*People v. Callahan*, *supra*, 124 Cal.App.4th at p. 201.) The court concluded that this "result is consistent with the recognition that trial courts are uniquely qualified to evaluate the performance of trial counsel." (*Ibid.*) However, *Callahan* primarily involved fact and credibility determinations, and of course, it dealt with an evaluation of trial performance before judgment.

Indeed, relying on *Ault*, the *Callahan* court noted that "the trial court's statutory power to order a new trial before a final judgment is entered promotes judicial efficiency by obviating the need for an appellate reversal or collateral attack." (*Id.* at p. 209, citing *Ault*, *supra*, 33 Cal.4th at p. 1271.) In rejecting the People's argument that independent review should govern the determination of whether counsel was deficient, it again noted the context of that case as a motion for new trial and observed the "trial court serves as a 'gatekeeper' on a motion for new trial. It opens the gate only rarely, a testament to the fact that the vast majority of trials resulting in conviction are fairly conducted." (*Id.* at p. 210, citing *Ault*, *supra*, 33 Cal.4th at p. 1271, fn.14.) The conclusion was grounded on the trial court's ability to make "first-hand" observations in open court, which the trial judge was positioned best to interpret. (*Id.* at p. 210, citing *Ault*, *supra*, 33 Cal.4th at p. 1267.) But the same reasoning does not apply here

where Judge Magers – though the trial judge 11 years earlier, did not reach his conclusion of deficient performance and prejudice based on his observations of Keen during his representation of petitioner.

Furthermore, it was the trial judge's findings of witness credibility in *Callahan* that forced the appellate court to utilize an abuse of discretion standard in evaluating the grant of the new trial motion: "No matter how carefully we examine the record, no matter how thoughtful our reflections, we cannot evaluate the credibility of any witness to the same degree and with the same insight as the trial judge. In this respect, the trial court's finding of deficient performance was not qualitatively different from its finding of prejudice. In determining whether counsel's performance was deficient, we must accept all factual and credibility findings that are supported by substantial evidence." (*Id.* at pp. 210-211.) However, in the instant case, credibility was not an issue with Judge Magers finding both the prosecution and defense experts credible (while admitting the defense experts could be disbelieved by a jury) (4RT 736-737, 748-751), and no finding with respect to petitioner's testimony (who admitted lying to the police and during trial testimony (3RT 393; 4RT 657-659)), and no finding with respect to other defense witnesses such as Catherine Barrett who falsified a research article for the evidentiary hearing (3RT 517).

Simply stated, a determination of ineffective assistance of counsel during a motion for new trial necessarily involves more factual and credibility determinations than the typical claim years later on habeas corpus. Indeed, as set forth above, there were very few factual disagreements in the evidentiary hearing, and credibility was a very insignificant issue. It was the established and almost uncontradicted facts that needed to be evaluated on the basis of legal authorities for determinations of whether Keen's performance was deficient, and whether in the context of all of the evidence, any such deficiency or deficiencies

resulted in prejudice. Those are legal questions as set forth above properly reviewed under a de novo standard, and not "predominantly factually or credibility based" questions on which petitioner asserts her deferential standard of review should apply. (PBOM 54.)

Moreover, unlike in *People v. Callahan, supra,* 124 Cal.App.4th 198, here Keen's actions did not leave petitioner without a defense. (*Id.* at p. 215 ["without that evidence she effectively had no defense to the charged crimes"].) Instead, Keen made reasonable tactical choices based on the law and available facts to attack the People's case without unnecessarily challenging petitioner's credibility. Petitioner is simply wrong that the court of appeal failed to adhere to and utilize the proper standards of review in evaluating Judge Magers' decision to overturn a final judgment on the basis of ineffective assistance of counsel.

To the extent this claim is cognizable despite petitioner's failure to raise it below, it must be rejected.

III
PETITIONER FAILED TO DEMONSTRATE THAT TRIAL COUNSEL WAS PREJUDICIALLY INEFFECTIVE WHEN HE PURPORTEDLY FAILED TO CONSULT A QUALIFIED TIME-OF-DEATH EXPERT AND FAILED TO PRESENT EVIDENCE REGARDING DEFENDANT'S CLOTHES AROUND THE TIME OF THE MURDER

Under her first major claim heading, petitioner asserts that her trial counsel was prejudicially ineffective when he failed to consult a qualified time-of-death expert and failed to present evidence regarding petitioner's clothes around the time of the crime. (PBM 34-52.) Judge Magers committed legal error in finding deficient performance and prejudice without placing Keen's conduct in the context of the trial evidence, and the court of appeal appropriately reversed Judge Magers' ruling in this respect.

A. General Authorities Relating To Ineffective Assistance Of Counsel

In order to demonstrate ineffective assistance of counsel, a defendant has the burden to demonstrate not only deficient performance of his counsel, but prejudice as a result. (*Strickland*, *supra*, 466 U.S. at pp. 688-694.) Trial counsel's representation of a defendant is constitutionally deficient if it falls "below an objective standard of reasonableness," and but for counsel's deficient performance, there is a reasonable probability that the outcome of the proceeding would have been different. (*Strickland*, *supra*, 466 U.S. at p. 688.)

As to the first component of an ineffective assistance claim, "[a] court reviewing the conduct of counsel must in hindsight give great deference to counsel's tactical decisions. [Citation.]" (*People v. Holt* (1997) 15 Cal.4th 619, 703.) "Judicial scrutiny of counsel's performance must be highly deferential. [A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance..." (*Strickland*, *supra*, 466 U.S. at p. 689, citation omitted.)

> Competent counsel is not required to make all conceivable motions or to leave an exhaustive paper trail for the sake of the record. Rather, competent counsel should realistically examine the case, the evidence, and the issues, and pursue those avenues of defense that, to their best and reasonable professional judgment seem appropriate under the circumstances.

(*People v. Freeman* (1994) 8 Cal.4th 450, 509.) Thus, whenever counsel's conduct can be reasonably attributed to sound strategy, a reviewing court will presume that the conduct was the result of a competent tactical decision, and defendant must overcome that presumption to establish ineffective assistance. (*Ibid.*; see also *People v. Ray* (1996) 13 Cal.4th 313,

349 [defendant bears burden of showing "the lack of a rational tactical purpose for the challenged act or omission"].)

As to the second component of an ineffective assistance claim, prejudice is established if the defendant shows a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. (*Williams v. Taylor* (2000) 529 U.S. 362 394; *Strickland, supra*, 466 U.S. at pp. 693-694; *People v. Ledesma* (1987) 43 Cal.3d 171, 217-218.) "A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Strickland, supra*, 466 U.S. at p. 694.) Prejudice must be established as "a demonstrable reality not simply speculation as to the effect of the errors or omissions of counsel." (*In re Clark* (1993) 5 Cal.4th 750, 766 [internal quotation marks omitted].) A reviewing court may adjudicate a claim of ineffective assistance of counsel on the ground of lack of sufficient prejudice without determining whether counsel's performance was deficient. (*Strickland, supra*, 466 U.S. at p. 697; *People v. Cox* (1991) 53 Cal.3d 618, 656; *People v. Ledesma* (1987) 43 Cal.3d 171, 216-217, 233.)

The burden of sustaining a claim of ineffective representation is on the defendant; "The proof . . . must be a demonstrable reality and not a speculative matter . . . ." (*People v. Karis* (1988) 46 Cal.3d 612, 656.) Under either analysis, a court must defer to counsel's reasonable tactical decisions and indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. (*People v. Lucas* (1995) 12 Cal.4th 415, 436-437; see *Strickland, supra*, 466 U.S. at p. 690.)

B. Keen's Performance Was Constitutionally Adequate

Keen might have performed deficiently had he argued against petitioner's interests or conceded to petitioner's guilt during argument.

(See *People v. Gurule* (2002) 28 Cal.4th 557, 611; *People v. Diggs* (1986) 177 Cal.App.3d 958, 970.) Had he failed to argue petitioner's only available defense to the jury he might have been ineffective. (See *People v. Diggs*, *supra*, 177 Cal.App.3d at pp. 968, 970.) Similarly, had Keen offered an "incoherent" closing argument, that could have constituted ineffective assistance. (See *People v. Diggs*, *supra*, 177 Cal.App.3d at pp. 967, 970-971.) But Keen did none of those things.

Keen's reasonable tactical decisions cannot provide the basis for a finding of ineffective assistance, and his decision-making must be evaluated in the context of the evidence including petitioner's own statements and testimony – testimony that she now may admit was in significant ways inaccurate. (*People v. Hart* (1999) 20 Cal.4th 546, 623-624; see 3RT 593 [admitted lying to police].) That evidence, as set forth more thoroughly in the Statement of Facts, included petitioner's repeated statements and testimony that Ozzy was still alive when she got home.

Indeed, there is no question that a trial attorney's tactics may be legitimately based on considerations that do not appear on the record, including confidential communications with the client. (See *People v. Lucas*, *supra*, 12 Cal.4th at p. 443.) And ultimately, good trial tactics may demand complete candor with the jury. (See *People v. Gurule*, *supra*, 28 Cal.4th at p. 612; *People v. Jackson* (1980) 28 Cal.3d 264, 293.) This case involved substantial evidence, and considerations that may have been important to petitioner, though somewhat detrimental to a successful defense. It should not be concluded that Keen performed deficiently and to petitioner's prejudice under these circumstances. Indeed, it was Keen who earned a hung jury at the conclusion of the first trial.

And here, it is unquestionable Keen consulted on time-of-death with Dr. Vomhof who held himself out as an expert on time-of-death, and Dr. Vomhof provided an opinion – likely similar to that of Dr. Cohen – that

Ozzy's death could not be proven to have occurred prior to petitioner's arrival home at 1:20 a.m. (2RT 199.) Combined with petitioner's 911 call and unwavering testimony that Ozzy was still alive at 2:09 a.m., it was not unreasonable for Keen to attempt to rely on an argument that petitioner lacked the time to commit the crime and dispose of the evidence. Indeed, considering petitioner's unwavering opinion that Ozzy was breathing when she got home, it would have been a risky avenue of defense to rely on equivocal time-of-death evidence. (See *Iaea v. Sunn* (9th Cir. 1986) 800 F.2d 861, 865, fn. 4 [counsel does not have a duty to pursue every factual line of defense when counsel reasonably believes defendant's interests would not be advanced].)

And with respect to Keen's failure to attempt to introduce Dills' out-of-court statements describing petitioner's clothing before the murder, the parties, as well as Judge Magers, acknowledged such statements are presumptively hearsay and that no Evidence Code exception applies to readily permit their introduction. Though more than a decade later habeas counsel asserts that a due process argument could have been made for the statements' admission, and Judge Magers divined some type of non-hearsay analysis for the statements' admission, that cannot compel a conclusion that Keen performed deficiently in this respect. The only direct *evidence* regarding whether petitioner changed her clothes was her own testimony denying doing so, and it was only contradicted by the prosecutor's *argument* that petitioner must have changed her clothes.

Indeed, Keen elicited during trial that there was absolutely no blood on petitioner's clothing, shoes, and helmet (2nd 3RT 465, 527-529, 536-539, 572-573), and elicited from petitioner herself she was wearing the same clothing the morning after the murder that she wore when she arrived home from Dills' house (2nd 4RT 604, 609, 629-630). Thereafter, Keen argued based on this evidence that there was no blood on petitioner's

clothes, shoes, helmet, hats, jacket, face, and hair, and there was no wet shower or shampoo smell. (2nd 5RT 1058.) Keen addressed the prosecutor's argument about what petitioner was wearing and pointed out that the People had the burden of proof and there was no evidence disputing petitioner's testimony that she was wearing the same clothes. (2nd 5RT 1074.) And in any event, had it become more credible through Dills' statements that Long had not changed her clothes, as it admittedly did during the evidentiary hearing, the People had a DOJ expert who could have testified based on the blood spatter (and the fact much of the blood would have been cast off the weapon) that the perpetrator did not necessarily get blood on his or her clothing. (See Peo. Exh. 4; see 2RT 316 [petitioner's *Strickland* expert agreed the prosecutor could have changed theories].)

This is not a situation where Keen entirely failed to subject the prosecution's case to any meaningful adversarial testing. (Cf. *United States v. Cronic* (1984) 466 U.S. 648, 659.) Instead, the record shows effective questioning of prosecution and defense witnesses, a multipronged defense appropriate to challenge the prosecution's theory, and an appropriate closing argument asserting petitioner's innocence and addressing the issues and evidence in the case. Considering the entirety of Keen's performance, including his thorough closing argument – and the lack of any authority requiring a consultation with a medical doctor on time-of-death, or the lack of an applicable hearsay exception for Dills' out-of-court statements – it is impossible to conclude that Keen's performance fell below an objective standard of reasonableness under prevailing professional norms. Indeed, it is inappropriate to focus on what could have been done rather than focusing on the reasonableness of what counsel did. (See *Babbitt v. Calderon* (9th Cir. 1998) 151 F.3d 1170, 1174.) As the court of appeal properly held, the question is not what the best lawyer would have done or even what most

good lawyers would have done, but whether some reasonable lawyer at trial could have acted in the circumstances as defense counsel. (See *Coleman v. Calderon* (9th Cir. 1998) 150 F.3d 1105, 1113, rev'd on other grounds, *Calderon v. Coleman* (1998) 525 U.S. 141 (per curiam).)

Judge Magers' legal conclusions to the contrary ignored the evidence and applicable principles, and necessarily constituted legal error subject to appropriate reversal by the court of appeal.

C. The Asserted Failures By Keen Did Not Prejudice Petitioner

With *no* discussion of the substantial evidence of petitioner's guilt or her obvious lack of credibility, Judge Magers found that petitioner was prejudiced by Keen's failure to introduce Dills' statements describing petitioner's clothing before the murder, or properly investigating and introducing time-of-death evidence. (RT 747-748.) However, this conclusion was simply not supported in the context of all the evidence. "The question of prejudice is inherently fact and case specific; it is for the courts to decide after reviewing the facts of the specific case, and is not based upon expert witnesses called by either party or testimony about what hypothetical juries may do in hypothetical situations." (*In re Ross*, *supra*, 10 Cal.4th at pp. 214-215.) The court is not required to consider the testimony of attorney expert witnesses (*Strickland* experts), nor are they required to allow such testimony. (*In re Ross*, *supra*, 10 Cal.4th at p. 215.) And while a court may consider attorney expert testimony, it is not bound by it. (*In re Avena*, *supra*, 12 Cal.4th at p. 721.)

Admittedly, Dills' out-of-court statements to the police shortly after the murder did describe petitioner wearing clothing before the murder that was similar to or the same as what she had been wearing after the murder. And also admittedly, it was the prosecution theory during trial that petitioner must have changed her clothing after the murder, and because the

crime scene was her own home, she had clothing readily available into which she could change. Indeed, as the court of appeal noted in affirming petitioner's judgment, petitioner "could have changed into anything in her closet in a very short period of time." (See *People v. Long*, 2008 WL4958575, *11; Return Exh. 2.) Of course, if petitioner did not change her clothing, and there was no blood on her clothing, the inference could be that petitioner may not have committed the murder. But, additional evidence was presented at the evidentiary hearing, and the prosecution theory properly refocused as a result.

Indeed, at the time of trial, there was a DOJ expert report concluding that it was unclear whether the perpetrator of the murder would have gotten blood on him or her. (Exh. 4; 2RT 213-214.) Additionally, the defense hired an expert to analyze the crime scene photographs, including the blood spatter, who did not render an opinion that the perpetrator necessarily would have gotten blood on him or her. (Peo. Exh. 8; Def. Exh. C.; 2RT 267-269; 3RT 550.) Though criminalist Verdugo perfunctorily testified that there was blood 360 degrees around the body, other evidence challenged that broad conclusion, and it did not take into account that much of that blood would have been cast-off from the weapon and directed away from the perpetrator rather than toward him or her. (2RT 269, 273, 387; 3RT 559.)

The only direct evidence of whether petitioner changed her clothing was her testimony denying doing so. It is quite possible the jury disbelieved that testimony, but had additional evidence been presented to corroborate petitioner's testimony in this respect, other witnesses were available to dispute the speculation that the perpetrator got blood on him or her, and this and other evidence was available to clarify criminalist Verdugo's testimony about blood in 360 degrees around the body. (2RT 269, 273, 387; 3RT 559.)

Moreover, and significantly, the lack of blood on petitioner's clothing was actually evidence of her guilt, because she admitted touching Ozzy and was moving around in a bloody crime scene. (3RT 601, 646.) Furthermore, as an experienced emergency room nurse, petitioner should have rendered some treatment, but then inexplicably got absolutely no blood on her despite blood being all over the scene. (2nd 4RT 637, 642, 645, 700, 712, 5RT 931.) Accordingly, based on the trial evidence and the evidence presented at the evidentiary hearing, to conclude petitioner was prejudiced due to the lack of corroborating evidence about her clothing is simply speculative and cannot support a finding of prejudice. Indeed, her own appellate attorney admitted that petitioner could have been acquitted if the jury had simply believed her testimony. (2RT 392.)

Likewise, with respect to the lack of time-of-death evidence, Judge Magers seemed to find this to be significant, but in doing so ignored substantial evidence demonstrating such evidence would not have assisted petitioner. As a starting point, it was petitioner herself – an experienced emergency room nurse – who told 911, told the police, and testified in both trials – without any hesitation – that Ozzy was breathing at 2:09 a.m. when the 911 call was placed. (1st 1CT 210, 213; 1st 3RT 580, 4RT 651-652, 676; 1CT Supp. 9, 31, 141; 2nd 4RT 642, 711-712, 734, 963.) Indeed, petitioner testified during both trials she saw Ozzy's chest moving, and she expressly did not initiate CPR because he was breathing. (1st 3RT 580; 2nd 4RT 643, 734.) With respect to petitioner's reference to Ozzy "gurgling," Dr. Cohen testified during the first trial it was very unlikely a body would "gurgle" after death. (1st 2RT 356.) Moreover, petitioner herself told another officer that Ozzy was *bleeding*. (2nd 1RT 182, 191.)

Significantly, the People do not believe Ozzy was alive at 2:09 a.m., but the evidence does not support a simple inebriated mistake as urged by petitioner. Rather, this was another of many lies to cover up the brutal

murder and make it appear petitioner actually wanted to assist Ozzy. Moreover, had time-of-death evidence been presented through witnesses such as Dr. Hua or Dr. Cohen, it would not have excluded petitioner's ability to commit the murder, and had it been presented through a witness such as Dr. Bonnell, he would have been impeached with his own prior statements. (1RT 173 ["[d]etermination of time of death is one of the hardest things that forensic pathologists face, and the idea of narrowing it down exactly is seen only in Hollywood movies and fiction"].)

In contrast to the foregoing potentially conflicting evidence, the court of appeal previously found the trial evidence supporting petitioner's guilt to be substantial. There was a "physically violent quarrel between [petitioner] and Ozzy on the evening of the murder" and petitioner "hit Ozzy with her purse, her helmet and a novelty hat that she was carrying." Petitioner "told Ozzy that he was a loser, was not paying his share and complained that he did not have a job. She told Ozzy that they were through, that she wanted him out of her house and she asked him to leave." Additionally, "[w]hile at Dills's house [petitioner] continued to complain about Ozzy not doing enough. She stated that she was tired of him not paying for his share and that she had to pay for everything. Further, at the time she decided to leave Dills's to return home [petitioner] stated she was still angry enough with Ozzy that she could 'kick his ass.'" The court of appeal concluded that the evidence showed that petitioner "was very angry with Ozzy at the time of the murder, angry enough to have been physically violent with him, as she had a tendency to be." (3CT 792-793; 4CT 839-840.)

The court of appeal also addressed petitioner's claim that the evidence demonstrated no more than simple motive and opportunity, and rejected it based on the trial evidence: "[Petitioner's] neighbor, Phillip Virga did not hear Otto, [petitioner's] dog, bark the night of the murder.

Otto would bark when someone went on [petitioner's] property. No one else reported hearing Otto bark that night. Later, Otto barked and howled at the police investigator. In addition, the officers found no signs of forced entry into the house" and "[t]here were no defensive wounds found on Ozzy's body, who was attacked where he sat on the couch. All of this evidence suggests that whoever murdered Ozzy was known to him and to Otto." The court of appeal also noted that petitioner "had items available to her similar to those that were likely used to commit the crime, that were missing after the murder" and "there was evidence that demonstrated consciousness of guilt in that [petitioner] had attempted to make it appear as if she could not have committed the crime and she made an effort to direct suspicion away from herself." Additionally, petitioner "was trying to hide the fact that she had been very angry with Ozzy the night of the murder, evidencing a consciousness of guilt" and "was attempting to make it look like robbery had been the motive for the crime, also evidencing a consciousness of guilt." Significantly, petitioner "testified that she went in and out of the house at least twice and ran frantically throughout the house. [Petitioner] also testified and told police that she put her hands on Ozzy, yet there was no blood tracked around and there was no blood found on" petitioner, and despite petitioner being "barefoot and that she did not realize there was broken glass on the kitchen floor. However, there is no evidence that she cut her feet in her frantic haste to call 911." The court of appeal also noted that petitioner "testified she never found the keys to her car. She denied that the keys with the shamrock on them that were found hanging in the kitchen were hers despite her having shamrock tattoos and a shamrock on her motorcycle helmet" and "[s]he could not explain why, having just located [her cellphone], she did not use her cell phone to call 911 when she found Ozzy or why she had lied to the police about not having her phone." (3CT 794-796; 4CT 841-843.)

Finally, the court of appeal also addressed petitioner's claim that she simply lacked sufficient time to commit the crime and eliminate the evidence, and thoroughly rejected it as well based on the evidence: "[A] reasonable jury could have decided [petitioner] had ample time to perform the acts necessary to support her conviction. First, Dills testified that he was in bed setting his alarm at 1:36 a.m. After dropping [petitioner] off at her house Dills drove to his home two and one-half to three miles away, which he estimated took 10 minutes, put his motorcycle in the foyer, got undressed and went to bed, which he estimated took him two to three minutes. He estimated that he dropped [petitioner] off between 1:20 and 1:30. Based upon the balance of his testimony the jury could reasonably have believed the time was closer to 1:20 when he left [petitioner]'s house. [Petitioner] did not call 911 until 2:09. That left [petitioner] with a window of 49 minutes, not 39 as she contends." With respect to her alleged intoxication, petitioner "was sober enough to search through the bushes to find her cell phone. She also stated that she started to sober up at Dills's house enough to realize that she didn't want to be having sex with him. Further, she described herself as a drunk and a recovering alcoholic. From that and the other evidence about how much alcohol she consumed, the jury could have reasonably inferred that she could function well enough to have done what was necessary, even while intoxicated." Not to be forgotten, petitioner "repeatedly admitted 'I'm a fucking asshole when I drink,' when asked about her violent behavior with domestic partners in the past" and the "jury could reasonably have inferred that as soon as [petitioner] got home, still angry enough at Ozzy to 'kick his ass,' and found the empty champagne bottle she turned into the violent 'asshole' that she admitted she could be." Indeed, petitioner "would not have had to go far to get a weapon since there were baseball bats and golf clubs in the house and garage. This all could have taken place in a very short period of time. It would not be

unreasonable for the jury to conclude that Ozzy was dead by 1:30." Additionally, "[t]here is evidence from which a jury could have inferred that [petitioner] did not have to drive very far at all to dispose of any incriminating evidence and the allegedly stolen items," "there is evidence that the items taken from the house were gathered in a hurry," and "there was testimony from the forensic technician who photographed the crime scene stating how it would have been possible for [petitioner's] helmet to have been in place where he found it at the time of the murder and not have blood spatter on it." And with respect to petitioner's argument there was no forensic evidence linking her to the crime, the court of appeal observed that "the fact that there was no forensic evidence linking her to the crime could have been reasonably viewed by the jury as evidence (1) that her story regarding the events of the evening was not plausible and (2) that she had indeed tried to cover her tracks because she, and the things that she supposedly casually dropped about when she did not know there was blood all over the room, were cleaner than they should have been." (3CT 796-798; 4CT 844-845.)

Given the significant evidence of petitioner's guilt – completely undiscussed by Judge Magers or petitioner – it is extremely unlikely that changes in trial strategy would have affected the outcome of the trial. Stated differently, it is not reasonably probable that the jury would have reached a different result in the absence of asserted errors of counsel. (See *United States v. Cronic*, *supra*, 466 U.S. at pp. 656-657 [Sixth Amendment does not require counsel to do what is impossible or unethical, and to create a non-existent defense is not required and may disserve the interests of the client by attempting a useless charade].)

The court of appeal had already thoroughly evaluated the trial evidence during appeal, and Judge Magers took judicial notice of the trial record and the court of appeal's opinion affirming the judgment. Any new

evidence arising from the evidentiary hearing had to be considered in the context of all the trial evidence and the reasonable inferences, but Judge Magers made no attempt to do so. Evaluated in that context, nothing more than speculation supports a conclusion that the admission of equivocal time-of-death evidence or additional evidence about petitioner's clothing would have resulted in a more favorable outcome for petitioner. The issue here was not scientific evidence or blood spatter evidence, it was petitioner's credibility. (2RT 392.) Judge Magers' conclusion to the contrary ignored previous conclusions, applicable law, and the available evidence.

IV
THE COURT OF APPEAL'S OPINION IS CONSISTENT WITH THE LAW, THE FACTS, AND THE APPROPRIATE STANDARDS OF APPELLATE REVIEW

The court of appeal began its 77-page opinion summarizing the procedural and factual history of this case, including some of the evidence presented at the first trial, the evidence presented at the second trial, counsels' closing arguments, the motion for new trial, the appeal, a federal writ petition and federal appeal, the state habeas proceedings and all the documents filed therein, and the evidence presented during the evidentiary hearing. (Slip Opn. at pp. 2-43.) The court of appeal also summarized Judge Magers' ruling in granting habeas corpus relief. (Slip Opn. at p. 44.) Petitioner does not appear to challenge these summaries as either incomplete or inaccurate. The court of appeal then set forth the controlling law regarding ineffective assistance of counsel and the standard of appellate review as more thoroughly discussed above. (Slip Opn. at pp. 44-47.) Under separate headings, the court of appeal then analyzed respondent's contentions and Judge Magers' rulings.

A. Time of Death Expert

The court of appeal noted it was evaluating Keen's representation with respect to time-of-death evidence based on the circumstances at the time of trial. (Slip Opn. at p. 47.) This Court held in *In re Marquez*, *supra*, 1 Cal.4th 584, held that deference must be given to tactical decisions and "every effort [must] be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." (*Id.* at p. 603, citing *Strickland*, *supra*, 466 U.S. at p. 689.) The court of appeal then summarized Keen's testimony as deciding not to rely on time-of-death evidence because such evidence could not narrow down the time-of-death to a period when petitioner was not at home. (Slip Opn. at p. 48; see 2RT 197-199, 248, 259.) The court of appeal discussed the testimony of Drs. Hua, Bonnell, and Cohen (Slip Opn. at pp. 48-52), and concluded Keen's representation in this respect was reasonable:

> In sum, Keen chose to not pursue a time of death defense based upon his knowledge that times of death are given in ranges and his conclusion that the 49–minute window of time at issue in this case (from 1:20 to 2:09) was too narrow to generate a reasonable doubt. The evidence given by Doctors Hua and Cohen support Keen's assessment that times of death are given in broad ranges. The evidence given by Dr. Bonnell was problematic in that he failed to review or disregarded evidence relating to the post-1:20 timeframe. As a result, an attorney could reasonably conclude that reliance upon expert testimony, such as Bonnell's, would have been a risky defense strategy because a jury could reasonably view such testimony with skepticism and therefore it would be unlikely to raise a reasonable doubt. Keen's decision to not pursue a time of death defense was rational. Keen's representation of defendant did not fall below an objective standard of reasonableness.

(Slip Opn. at p. 52.) The court of appeal then summarized Judge Magers's ruling in this respect and noted that he found both experts credible, and observed that Judge Magers failed to directly answer the appropriate question. (Slip Opn. at pp. 52-53.)

The court of appeal identified the issue as "not whether a jury might have believed an expert such as Dr. Hua or Dr. Bonnell. The issue is whether a reasonable attorney would have made the same decision as Keen." (Slip Opn. at p. 53, citing *In re Reno* (2012) 55 Cal.4th 428, 464-465 ["the omission of a claim, whether tactical or inadvertent, does not of itself demonstrate ineffectiveness unless it was *objectively unreasonable*"].) The court of appeal then held:

> Keen was correct that time of death experts cannot pinpoint a precise time of death and therefore they give timespans for when the death occurred. Given that defendant had been heard arguing with the victim on the night the victim died, a reasonable defense attorney could choose to focus the jury on another suspect, e.g., Lovejoy. A reasonable defense attorney could look at the case and conclude that even with expert testimony reflecting the victim died at 12:30 a.m., the jury might still believe defendant was the killer because Dills lied or did not accurately recall when he took defendant home, and therefore, the best strategy for raising a reasonable doubt is to focus on another person who was also angry at the victim at the time of the killing and who had an alibi that could be called into question, e.g., Lovejoy.
>
> We disagree with the trial court's conclusion that no reasonable attorney would have failed to present expert time of death evidence to the jury. A reasonable attorney could view the case in the same manner as Keen—given the 49–minute window of opportunity argued by the prosecution and the range of times given by experts, the better defense strategy was to focus on Lovejoy rather than the timing of the death.

(Slip Opn. at pp. 53-54.)

The court of appeal noted petitioner's disagreement with this conclusion, but based on an additional summary of Keen's testimony,

found his decision not to rely on time-of-death evidence was informed and could have been made by a reasonable attorney. (Slip Opn. at pp. 54-55.) This conclusion is unquestionably sound given the reasons and evidence set forth above, and must be upheld especially given it was petitioner herself – an emergency room nurse – who maintained to law enforcement and in her testimony at two trials, that Ozzy was alive when petitioner got home from Dills' house. (1st 1CT 210, 213; 1st 3RT 580, 4RT 651-652, 676; 1CT Supp. 9, 31, 141; 2nd 4RT 642, 711-712, 734, 963.) To present an expert witness to testify that petitioner was wrong about this very elementary fact, yet she was right about every other exculpatory explanation, would have been objectively unreasonable at the time of trial.

B. Clothing

The court of appeal summarized the evidence relating to the clothing issue, including counsels' closing arguments, and Keen's testimony with respect to why he did not seek to admit Dills' statement about petitioner's clothes into evidence at trial as he "didn't think there was any way [he] could have gotten that in" and believing petitioner's and Officer Welde's testimony was sufficient on the issue. (Slip Opn. at pp. 55-57; see 2RT 194-195.) It also noted petitioner's appellate attorney, Rogers, testified there was no legal authority directly allowing the admission of Dills' hearsay statement. (Slip Opn. at pp. 57-58; see 2RT 398.) The court of appeal observed Dills' preliminary hearing testimony was read at trial because Dills had unexpectedly died in a motorcycle accident, and Keen did not question Dills about petitioner's clothing during the preliminary hearing. Keen expressly testified during the evidentiary hearing that he did not believe the clothing was a significant issue because "it was a preliminary hearing" (see 2RT 194), and Judge Magers even acknowledged

that cross-examination during preliminary hearings is routinely "not extensive" and he was "not faulting anyone." (Slip Opn. at p. 58.)

After noting the purpose of a preliminary hearing is to merely determine whether a defendant should be held for trial, the court of appeal cited *People v. Vinson* (1969) 268 Cal.App.2d 672, at page 676, acknowledging that cross-examination during preliminary hearing "is seldom adequate" and "is seldom a searching exploration into the witness'[s] motives or other facets of his testimony," and "experienced trial lawyers often defer cross-examination entirely until the time of trial when it is most effective." (Slip Opn. at pp. 59-60.) The court of appeal then quoted some of Dills' preliminary hearing testimony regarding petitioner's underwear, and noting the prosecutor's concession that petitioner was wearing when she went to the station an outfit "similar in description to the outfit she was wearing when she left Mr. Dills's residence." (Slip Opn. at pp. 60-61.) Reasonably, the court of appeal observed, "[g]iven the prosecution's theory of the evidence – that [petitioner's] clothes matched the description given by Dills, Keen had no reason to question Dills about [petitioner's] clothes" and thus "a reasonable attorney would not have questioned Dills about [petitioner's] clothing." It also observed the obvious: "Dills died in a motorcycle accident . . . unexpectedly," and therefore it "was reasonable that Keen did not question Dills about every detail of the case." (Slip Opn. at p. 61.) Accordingly, Keen's performance at the preliminary hearings was objectively reasonable. (Slip Opn. at p. 62.)

The court of appeal then went on to analyze Keen's performance at trial with respect to petitioner's clothing, and in doing so defined "hearsay evidence" and noted the question was not what the "best" or a "good" lawyer would have done, but whether a "reasonable lawyer" would have acted in the manner in which Keen did. (Slip Opn. at p. 62, citing *People v.*

Jones (2010) 186 Cal.App.4th 216, 235, which in turn cited *Coleman v. Calderon*, *supra*, 150 F.3d at p. 1113.) The court of appeal also then found Dills' description of petitioner's clothing to police was hearsay because it was "an out-of-court statement," it would have been offered to "prove what she wore on October 5," and thus it "would be offered for its truth." The court of appeal noted that petitioner's own appellate attorney testified "there is no direct legal authority for admitting the hearsay that is Dills's statement." (Slip Opn. at p. 62; see 2RT 398.) Based on this, the court of appeal appropriately held "a reasonable attorney could have decided not to seek admission of the hearsay statement" and specifically that "Keen's decision to not seek to have that hearsay admitted fell within an objective standard of reasonableness." (Slip Opn. at p. 63.)

The court of appeal then summarized Judge Magers' ruling in this matter including his speculation (because it was not supported by evidence) that there "is no question the perpetrator would have the victim's blood on her person." (Slip Opn. at p. 63.) Judge Magers noted the People's theory that petitioner was a liar (which she admitted during the evidentiary hearing), and defense counsel's failure to corroborate petitioner's testimony she had not changed her clothing. (Slip Opn. at pp. 63-64.) He then noted that during the evidentiary hearing, additional evidence was presented that the clothes petitioner was wearing on the night of the murder matched the clothes collected by the police after the murders, and that after Dills' unexpected death, Keen did not attempt to introduce Dills out-of-court statements describing petitioner's clothing. (Slip Opn. at pp. 64-65.) Judge Magers then found the issue of whether petitioner changed her clothes to be a "significant issue" and that Keen's performance "fell below an objective standard of reasonableness when he failed to prove [petitioner] did not change her clothes." (Slip Opn. at p. 65.)

The court of appeal then observed how Judge Magers failed to explain how the issue was significant when "the prosecution presented no evidence on the issue, e.g., no testimony from Tabitha or security footage from the Maverick regarding [petitioner's] clothes." In any event, the court of appeal also concluded that even if the issue was significant, Judge Magers further failed to explain why it was "unreasonable for an attorney to decide not to seek admittance of hearsay. The evidence reflects there was no direct legal authority for admitting Dills' 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 no exception for admissibility." (Slip Opn. at p. 66.) This is obviously a correct conclusion based on the facts. (See *People v. Sanchez*, *supra*, 63 Cal.4th 665, 684 [hearsay must be "admitted through an applicable hearsay exception"].)

In an effort to thoroughly analyze Judge Magers' ruling, the court of appeal also addressed Judge Magers' advisory ruling that was self-described as a "side-note." (Slip Opn. at p. 66.) Judge Magers purportedly identified three bases on which Dills' out-of-court statements could have been admitted at trial. The first was a convoluted explanation of introducing Dills' statements "to show Mr. Dills' specific knowledge of clothing through a hearsay introduction, which would lead to a circumstantial inference of the fact that she was wearing the same clothing when contacted by police. The inference would be that she didn't change her clothes. Nonhearsay." (Slip Opn. at p. 67.) The second was under *Chambers v. Mississippi* (1973) 410 U.S. 284, in that despite the lack of a hearsay exception, Keen could have argued the statements were reliable and that due process compelled their admission. (Slip Opn. at pp. 67-68.) In the context of this second avenue, Judge Magers observed that the "cornerstone to their prosecution was the reliability of Mr. Dills." The third was Federal Rule of Evidence, rule 807, and as a result of the availability of

these theories, Judge Magers again found Keen performed deficiently. (Slip Opn. at p. 68.)

In analyzing this advisory ruling, the court of appeal again defined hearsay and concluded that no matter how the admission of Dills' statement was justified, petitioner would still be offering it for its truth, and as a result, it was still hearsay. (Slip Opn. at pp. 68-69.) Judge Magers failed "to explain how the statement is not hearsay." (Slip Opn. at p. 69.) And since Judge Magers failed to explain how Dills' statement did not constitute hearsay, the court of appeal reasonably concluded Keen did not perform deficiently for failing to try to make the same argument. "A reasonable attorney could see (1) that the statement was hearsay, and (2) that the prosecution presented no evidence to contradict [petitioner's] testimony that she did not change her clothes, and therefore not move the court to admit the inadmissible hearsay evidence." (Slip Opn. at p. 69.) Judge Magers was actually trying to hold Keen to a higher standard than Judge Magers himself, and accordingly, this conclusion of the court of appeal is eminently reasonable.

With respect to the *Chambers v. Mississippi*, *supra*, theory, the court of appeal summarized the facts underlying the case, the ruling, and its reasoning. (Slip Opn. at pp. 69-70.) There, the defendant sought to introduce testimony of three other witnesses who heard a third-person admit to shooting a police officer. The state had no hearsay exception for statements made against one's penal interests, and the evidence was excluded. (Slip Opn. at p. 70.) The Supreme Court discussed the development of exceptions to the hearsay rule for statements made under circumstances that tend to assure reliability, and found the excluded statements sought to be admitted by Chambers should have been admitted. (Slip Opn. at p. 71.) However, the court of appeal here did not find the

principles discussed in *Chambers* supported admission of Dills' statements. Indeed,

> Dills's description of defendant's clothing was not made under circumstances that indicate trustworthiness. Dills's statement was not made spontaneously; rather, it was made in response to an unidentified police officer asking Dills, "What, what was she wearing?" Dills was being interviewed a second time because the officers wanted to "clear up some things." The hearsay was in Dills's penal interest because defendant provided Dills an alibi. Dills's version of events explained why he should not be a suspect—he was with defendant at his house, and never entered defendant's house after being at the Maverick. If Dills told the officer that defendant had been wearing a dress on October 5, i.e., her clothes did not match, then officers might look at how the dress was disposed of. Officers might look to whether Dills was involved in the crime, either by being present during the killing or aiding in the disposal of the clothes and weapon(s). By telling the officer that defendant's October 6 clothes matched her October 5 clothes, the police might instead focus on forensic testing of the October 6 clothes, thus freeing Dills from any implication in the crime.

(Slip Opn. at pp. 71-72.) Accordingly, as the court of appeal found, a "reasonable attorney could view the evidence as inadmissible under California law and not meeting the *Chambers v. Mississippi* exception, and therefore elect to not raise the issue with the trial court." (Slip Opn. at p. 72.) This is unquestionably reasonable considering the defense at the same time was arguing Dills was wrong about the time he claimed to have brought petitioner home. (See 2nd 5RT 1051, 1071; 4RT 661.)

With respect to utilizing Federal Rules of Evidence, rule 807, which is a catch-all hearsay exception, the court of appeal held the trial court was bound by the California Evidence Code, not the Federal Rules of Evidence. (Slip Opn. at pp. 72-73.) For that reason alone, the court of appeal found it reasonable for an attorney not to argue for the admissibility of evidence in a state court proceeding based on federal rules. (Slip Opn. at p. 73.) Indeed,

"to the extent one may look to the trial court's advisory ruling as providing a reason for Keen's performance being deficient, we find such reasoning to be unpersuasive because a reasonable attorney could choose not to argue a motion based upon Federal Rules of Evidence rule 807 in state court." (Slip Opn. at p. 73.)

The court of appeal did not end its analysis there. It specifically addressed petitioner's argument that since "the prosecution relied on Dills' preliminary hearing testimony in proving its case, the prosecution would not have been able to reasonably argue that Dills's police interview lacked credibility." (Slip Opn. at p. 73.) In doing so, the court of appeal expressly ignored petitioner's contradictory assertion in her respondent's brief that "Dills was not subjected to meaningful cross-examination with full discovery, and there were numerous questions left open concerning Dills' level of intoxication and possible motivation to lie, i.e., he was a suspect in the murder." (Slip Opn. at p. 73, fn. 8; see RB 95-96.) The court of appeal then reiterated it was not looking at what the best defense attorneys would have done, but whether an objectively reasonable attorney would have made a motion to admit Dills' statement under *Chambers v. Mississippi*. (Slip Opn. at p. 74.) It found a reasonable attorney could conclude Dills' statement was not reliable, and further explained:

> It would be a particularly skillful attorney that would argue beyond the factors of *Chambers v. Mississippi*. The attorney would need to argue that, despite the circumstances of Dills's interview not being particularly reliable, because the prosecution is utilizing Dills's preliminary hearing testimony (which was given in court, under oath, and subject to cross-examination) his police interview should be admissible. Such an argument goes beyond *Chambers v. Mississippi*, which focuses on the circumstances of the statement; to argue the use of other statements/testimony by the same witness makes all statements by that witness, including hearsay, admissible. (*Chambers v. Mississippi*, *supra*, 410 U.S. at pp. 298–301.) Defendant'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; again, we are looking at reasonable attorneys, not the best attorneys. Accordingly, we find defendant's argument to be unpersuasive.

(Slip Opn. at pp. 74-75.)

Again, the court of appeal went even further and addressed Keen's own admissions during the evidentiary hearing that he had no tactical reason for failing to question Dills at the preliminary hearing about petitioner's clothing, and move in the trial court to admit Dills' statement to police about petitioner's clothing. (Slip Opn. at p. 75.) And in doing so, the court of appeal relied on this Court's opinion in *In re Reno*, *supra*, 55 Cal.4th 428, for the proposition that failing to act in a certain manner is not ineffective unless it was also objectively unreasonable to act in that manner. (Slip Opn. at pp. 75-76, citing *In re Reno*, *supra*, at pp. 464-465.) Although the record disclosed Keen's admission he had no tactical reason to question Dills about petitioner's clothing at the preliminary hearing and move to admit Dills' statement during trial, the record controverted that assertion. Keen, in fact, also testified he did not question Dills about the clothing because "[i]t was a preliminary hearing" and he did not make the evidentiary motion because he thought there was sufficient uncontradicted evidence on the subject. (See 2RT 194-195.) The court of appeal also noted that on the basis of the chosen defense argument, "evidence of Dills's observations about [petitioner's] clothes were unnecessary." (Slip Opn. at p. 76; see 2nd 5RT 1045-1051, 1055 [blaming Lovejoy for murder].)

The court of appeal expressly found Keen's testimony about lacking tactical reasons was insufficient to carry petitioner's burden. The court of appeal observed that petitioner additionally had the burden to demonstrate Keen's actions "were objectively unreasonable – why no reasonably

competent attorney could have failed to question Dills or failed to move the trial court to admit Dills's statement." (Slip Opn. at pp. 76-77.) And since petitioner failed to meet that burden, the court of appeal found petitioner's claim of deficient performance – relying on Keen's admissions – to be unpersuasive. (Slip Opn. at p. 77.) This is a reasonable conclusion and supported by the authorities discussed above and in the court of appeal's opinion.

C. Prejudice

The court of appeal did not address prejudice because it found petitioner did not demonstrate deficient performance. (Slip. Opn. at p. 77.) Petitioner asserts prejudice is easily demonstrated, and she makes this assertion without ever discussing the actual evidence presented at trial, her own statements to the police, or her testimony at both trials. (POBM 44-52.) Indeed, she even admits that prejudice "requires knowledge of the full evidence that was presented at trial, not just the evidence that was presented at the habeas corpus hearing." (POBM 45, citing *In re Ross*, *supra*, 10 Cal.4th at p. 205.) Respondent has provided thorough summaries of the trial testimony, and petitioner's own statements and testimony, and will not repeat it all here. As shown, petitioner's conviction did not result from mistakes made by her trial counsel; her guilt was demonstrated by her own pattern of violence and deceit. (3RT 593; 4RT 626, 632-633, 642-644, 654-657, 663, 668.)

Petitioner asserts she presented two experts who both "determined" Ozzy's death occurred before petitioner got home. (POBM 46.) Not true. The experts provided "opinions," the opinions were actually equivocal or failed to consider evidence that contradicted their conclusions, and even Judge Magers agreed the jury could have rejected the expert opinions. (See 1RT 110 [Dr. Hua testified death could have occurred after 1:30 a.m.], 134

[Dr. Hua would not rely on witness who heard victim speaking at 1:30 a.m.], 152 [Dr. Bonnell did not read 911 transcript describing Ozzy alive at 2:09 a.m.], 1RT 166 [Dr. Bonnell did not rely on deputy coroner's observations], 168 [Dr. Bonnell did not read Long's testimony], 173 [Dr. Bonnell admits determining accurate time of death only occurs in movies].) Petitioner cites a Ninth Circuit concurring opinion finding it would be virtually impossible for petitioner to have committed the murder (POBM 47), but it is difficult to know what all evidence was considered by that court, and significantly, it was a *concurring* judge who made that observation in the context of all three judges finding sufficient evidence to support petitioner's conviction. (See *Long v. Johnson* (9th Cir. 2013) 736 F.3d 891.)

Petitioner reiterates that had Dills' pretrial statements been admitted regarding petitioner's clothing it would have contradicted the People's theory of the case that petitioner changed her clothing. (POBM 47-48.) But, this again this ignores the potential availability of similar clothing to change into in her own house, and the availability of expert testimony opining it was unclear whether the perpetrator necessarily got blood on his or her clothing. (2RT 213-214, 316; 3RT 559-560; Peo. Exh. 4.) And not to be forgotten is the necessary defense argument that the jury could not trust Dills with respect to the time he brought petitioner home, while at the same time needing to rely on Dills' pretrial statements about petitioner's clothing.

Petitioner asserts the prosecution's case was weak, and a circumstantial case with absolutely no physical evidence tying petitioner to the murder and no overwhelming evidence of guilt. (POBM 48.) Yet, circumstantial evidence is unquestionably sufficient to demonstrate guilt, and the court of appeal has previously found sufficient evidence here, followed by similar findings in the federal district court and federal court of

appeals based on the same record. This evidence is quoted in the Statement of Facts herein and is virtually ignored by petitioner. Petitioner asserts "[s]o weak was the prosecution's case that nine of the twelve jurors in [petitioner's] original trial voted for acquittal," but nowhere does petitioner acknowledge the jury viewed the entirety of petitioner's interviews in the second trial – demonstrating it was petitioner's own statements and actions that compelled her conviction. (See 2RT 392 [petitioner's appellate attorney acknowledging petitioner could have been acquitted had the jury simply believed her].)

Petitioner asserts that the two alternate jurors would have acquitted her, but the value of such opinions without the benefit of deliberations is truly nil. (POBM 48.) Petitioner asserts the jurors "hastily decided her guilt" because they "were held over the Christmas break for deliberations." (POBM 49.) Yet, no such evidence was ever presented in the habeas proceeding, and it seems such a conclusion would have been more logical had the jury returned a verdict *before* the Christmas break. Petitioner reemphasizes Judge Magers' expression he would have acquitted had it been a jury trial, but this is the same judge who denied a motion for acquittal, a motion to reduce the conviction to voluntary manslaughter, a motion for new trial, and more recently a request to declare petitioner factually innocent. (Ret. Exh. 4, 1st 3RT 375-377, 4RT 860-866; 1st 1CT 120-133, 381; Supp. CT 73; 2nd 1RT 7-8, 5RT 980-982, 1148-1153, 1185, 1221.) Judge Magers also could have dismissed the charges in the interest of justice had he actually felt strongly about petitioner's innocence, but considering her admissions of deceit and past violence during the evidentiary hearing there is little chance dismissal of murder charges under these facts could ever be in the interest of justice.

Petitioner asserts the fact the prosecution conceded at the evidentiary hearing that petitioner 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." (POBM 50.) This is simply not true and relying on nothing more than Judge Magers' speculation. There was evidence there was blood "360 degrees" around the room, but that had to be considered in the context of much of that blood having been cast-off from the weapon and other uncontradicted evidence there was no blood in some areas of the room. (See 2RT 269, 273, 387; 3RT 559-560.) Additionally, a DOJ report was presented during the evidentiary hearing that could not conclude that the perpetrator would have had blood on him or her, and a defense report prepared for trial was not inconsistent. (See 2RT 213-214, 246, 267; Peo. Exhs. 4, 8.)

Keen did consult an expert who held himself out as qualified to give opinions on time-of-death, and the opinion received was remarkably similar to the opinion rendered by Dr. Cohen. Dr. Hua's opinion was equivocal and almost incomprehensible (1RT 110, 120, 134-135, 138), and Dr. Bonnell's testimony ignored all inconsistent evidence and his own prior representation that determining time of death is one of the hardest things a medical expert can do (1RT 152, 162, 166-168, 173-174). As petitioner points out, a determination of prejudice must be conducted based on all of the available evidence, and that is something Judge Magers completely failed to do. The evidence – from the trials and from the evidentiary hearing – was considered by the court of appeal and is again before this Court, and because presentation of the clothing and time-of-death evidence would not necessarily have benefitted petitioner, the court of appeal was correct in rejecting Judge Magers' perfunctory conclusions to the contrary and simply reversing him based on the lack of deficient performance.

CONCLUSION

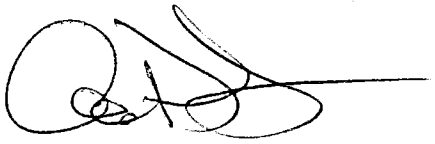
It cannot be forgotten that it was petitioner, an emergency room nurse, who until the evidentiary hearing always maintained Ozzy was alive when she called 911 – contrary to the so-called defense expert opinions. It was also petitioner who was running around barefoot in a bloody and glass-strewn crime scene and who admittedly touched Ozzy – yet got absolutely no blood on her. It was petitioner who had battered Ozzy just hours before his death, had a history of being violent when drinking alcohol, and who admitted just minutes before returning home she was so mad at Ozzy she could kick his "ass."

The court of appeal saw through the smokescreen of deceit and distractions, applied the proper standards of review, and finally held petitioner to the proper burden for overturning her conviction on the basis of ineffective assistance of counsel. That ruling must be affirmed.

Dated: June 20, 2019

Respectfully submitted,

MICHAEL A. HESTRIN
District Attorney
Riverside County



ALAN D. TATE
Senior Deputy District Attorney

CERTIFICATE OF WORD COUNT
CASE NO. S249274

The text of the **ANSWER BRIEF ON THE MERITS** consists of 24,593 words as counted by the Microsoft Word program used to generate the **ANSWER BRIEF ON THE MERITS.**

Executed on June 20, 2019.

Respectfully submitted,

MICHAEL A. HESTRIN
District Attorney
Riverside County

ALAN D. TATE
Senior Deputy District Attorney

DECLARATION OF ELECTRONIC SERVICE

Case Name: *People v. Kimberly Louise Long*
Case No.: S249274 (E066388/RIF113354)

I, the undersigned, declare:

I am employed in the County of Riverside, over the age of 18 years and not a party to the within action.

My business address is 3960 Orange Street, Riverside, California.

My electronic service address is Appellate-Unit@RivCoDa.org.

That on June 20, 2019, I served a copy of the within, **RESPONDENT'S ANSWER BRIEF ON THE MERITS**, by electronically filing a copy of this document in the California Supreme Court via the TrueFiling website (www.truefiling.com) and electronically serving the following parties:

MICHELLE ROGERS
Attorney for Kimberly Long
Appellate Defenders, Inc.
mcr@adi-sandiego.com

HON. PATRICK MAGERS
Riverside County Superior Court
appealsteam@riverside.courts.ca.gov

Attorney General's Office
sdag.docketing@doj.ca.gov

Court of Appeal
Fourth Appellate District
Division Two
E070996
(via TrueFiling)

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

Dated: June 20, 2019

KELLY HULEN, DECLARANT