Appendix I

Fundamental jurisdictional defects, like constitutional defects, do not become irremediable when a judgment of conviction becomes final, even after affirmance on appeal. [Citation.] However, the petitioner must show that the defect so fatally infected the regularity of the trial and conviction as to violate the fundamental aspects of fairness and result in a miscarriage of justice. [Citation.]"

(Id. at pp. 825-826).

Petitioner will now emphasize the substance of his alleged constitutional defects which fatally infected the regularity of the trial. The overwhelming evidence of guilt certain to be argued by Respondent ignores the fact that if the complaining witnesses were untruthful, then

the propensity evidence used to support the witnesses testimony is irrelevant. A lie is just that, a lie. So when one considers that a contradiction is not an inconsistent statement, the in ference is that one of the contradictory statements is not true. Thus, the failures of the prosecutor to correct and clarify the contradictions before the jury were fatally defective.

Not only did the prosecutor fail to pursue the truth, he appeared to understand the untruths when he argued to the jury, "Let's do a People's case overview... We have the twins emotional disclosures to friends before the runaway by [redacted] and then later

said, "Look at the prior disclosures to friends. Now with regard to [redacted] possibly [redacted], we have disclosures essentially about being raped and molested by [Petitioner] for a year, maybe more, prior to [redacted] running away. The girls were consistent that they — or the witnesses were consistent that the girls said they were told not to tell anybody." (Transcript currently unavailable.) And then, when the prosecutor changed tack, he seemed to understand the problems with his argument.

And these problems were made manifest by the testimony of the prosecutor's own witnesses. [redacted] specifically implied that she told her friends prior to her initial disclosure to her CPS

Caseworker, Alex Ellis, [redacted] testified at the preliminary hearing that she had never told her friends of sexual abuse. (See EXHIBIT(S) 488:13-489:8, and 571:19-27). Then mere minutes later at trial, [redacted] testifies on direct that she did not tell [redacted] or Tyler until after she told Alex Ellis. (EXHIBIT(S) 821:18-822:6).

The prosecutor appeared to recognize this glaring contradiction when he asked [redacted] ("to make sure we're clear"), if she had told any of her friends prior to the June 26, 2007 runaway incident about sexual abuses occurring. [redacted] said, "No." This issue may be dispositive in that not only was [redacted] contradicting her friends

statements and eventual testimony, she was contradicting herself.

The prosecutor then made an apparent attempt to rectify the situation when he asked [redacted] "After you ran away, who was the first person that you told of your friends about the sexual abuse?" [redacted] replied, [redacted] Then, a few questions later, the prosecutor misstated [redacted] previous answer when he asked her, "Before Alex, was [redacted] the only person you told about being sexually abused by Mike other than the previous statements regarding your mother and sister?" [redacted] replied, "No. There was no one else." (EXHIBIT 6, 822:4-6, and 822:16-19 [note the contradiction related to after Alex and before Alex]).

What brings this colloquy into focus would be [redacted] earlier testimony where she was asked by the prosecutor, "You have given some statements today that are inconsistent with some statements you've given previously either at the preliminary hearing or during your interview with Karen Smart; is that correct?" [redacted] said, "Yes." It can be circumstantially inferred that the prosecutor knew there were substantial contradictions and was attempting to reframe them as inconsistent statements, even "fresh complaints." The evidence of this is that the prosecutor specifically failed to mention [redacted] May 16, 2008 supplemental interview with Det. Ruttkowski. During this interview [redacted] unequivocally stated, "No. I only told Alex." (EXHIBIT 54419).

Detective Rutkowski also asked [redacted] about an incident which occurred on August 3, 2007. He asked [redacted] directly, "Didn't those kids know?" [redacted] replied, "No." (EXHIBIT 546: 24-25).

Det. Rutkowski then asked [redacted] "You didn't say there's the pervert or --?" [redacted] replied, "No." Det. Rutkowski pressed her on this point and asked, "'Cause I thought he yelled at you and accosted all you guys." [redacted] responded, "Yeah. He yelled at me, but they -- those boys that were with me, they didn't know anything that happened until like -- the only thing they know is he was

[inaudible]. But they didn't know he--,"
"Any of the details," Det. Rutkowski
interjected and [redacted] agreed, "Yeah."
(EXHIBIT 547: 1-10) This use of the
term "those boys" by [redacted] is the
genesis of Petitioner's use of this
term to refer to [redacted] and
[redacted] who were [redacted] and [redacted]
boyfriends respectively.

And one must consider the inferences
which flow from the fact that [redacted]
and [redacted] both gave interviews and
testified that they knew of [redacted] and
[redacted] sexual abuse claims long before
the girls reported sexual abuse to the
authorities. "Those boys" specifically
told this to the prosecutor in an

interview conducted after the trial began. This interview occured in the district attorney's conference room on November 6, 2009. (EXHIBIT(S) 205: 5-11, 205: 1-15, and 227: 1-11).

And it is [redacted] and [redacted] use of the word "rape" which warrants further discussion, especially when one considers that Petitioner was both acquitted and convicted of raping [redacted] under a "first time" and "last time" amended information. This is because further analysis demonstrates the prevarications in plain terms.

During the trial, [redacted] vehemently objected to any questioning which involved her claims that she was raped. (see EXHIBIT 980: 5-8). In fact, the jury foreman, [redacted] submitted a sworn

declaration into the record in order to clarify his statements given to defense counsel. The clarification was in response to the supporting declaration filed by defense counsel in the motion for new trial which was based in part on juror misconduct. In the jury foreman's sworn declaration, he specifically noted that [redacted] declared in Court, at trial, "I never said I was raped." (EXHIBIT 164). Twice.

So when one puts all of this into context, there were some substantial and material contradictions being presented to the jury and the prosecutor had a duty to be sure there were none. (Cf. Hernandez v. Lewis 2020 U.S. Dist.

LEXIS 80902; Morris v. Ylst (9th Cir. 2006) 447 F.3d 735, 744 [When a prosecutor suspects perjury, the prosecutor must at least investigate. the duty to act is not discharged by attempting to finesse the problem by pressing ahead without a diligent and good faith attempt to resolve it. A prosecutor cannot avoid this obligation by refusing to search for the truth and remaining willfully ignorant of the facts]).

And there was no way for Petitioner to raise these issues for many years due to his inability to access the documentary evidence, much less assess it and determine the viable bases for his claims and then present them to the Court. As a corollary component to this inability, is the fact that Petitioner has steadfastly maintained his

innocence despite attractive plea offers, and has consistently stated his claims in general terms, since his March 10, 2010 postconviction Marsden hearing.

Ultimately it is the Marsden hearing, and Petitioner's pursuit of an IAC claim, which has caused his procedural defaults in the past. The instant petition is not based on ineffective assistance of counsel though. However, it is worth pointing out that under United States v. Cronic (1984) 466 U.S. 648, the Supreme Court of the United States held that prejudice is presumed when counsel is available to a defendant, but even a fully competent attorney would be unable to provide effective assistance

given particular circumstances, such as in this case before this Court. (See id. at pp. 659-660).

As a direct and legal result of the prosecutor's acts and omissions in this case, it was simply impossible for appointed counsel to overcome the multiplicity of deceptive and reprehensible methods used by the prosecutor to prevent a proper consideration by the jurors as to the veracity of the accusers in the case. This is a structural defect.

2. Substantial Delay

Substantial delay is the benchmark determinant used by the courts to assess the timeliness of a habeas petition presented to a state court. This is a

what Ms. Schultz testified about what he does. If you get in his way, if you are going to go to the authorities, he is going to use threats to keep you in line. And Mr. Harris kept these girls quiet for years through threats. Years.

Look at the prior disclosures to friends. Now, with regard to [redacted] possibly [redacted] we have disclosures essentially about being raped and molested by Mike for a year maybe more prior to [redacted] running away. The girls were consistent that they -- or these witnesses were consistent that the girls said they were told not to tell anybody.

Before I get to the next point, if this is all a scam, all a plan by [redacted] and [redacted] to frame Mr. Harris, if that is what this is about, how come it started way back with the disclosure of [redacted] How do we explain? [redacted] talked about seventh grade. A year and a half, maybe two years prior on the bus. Okay?

Is that when the plan started? Were they thinking that far ahead as far as [redacted] goes? Was she thinking that far ahead in that period of time that far back?

In 2007, the twins initially denied telling these friends. Remember the interviews with the cops, that question, "Did you tell anybody else?" "No." What should we expect of these two girls? Remember, I think it is reasonable to assume that these girls didn't like authority, didn't like cops. And what would be the last thing that, when you look at these girls,

the last thing that they would want to do? What would be the reasonably last thing they would want when they testified about this, getting their friends involved.

So yes, were they deceptive with the police on that issue. Yes, they were. But they had higher priorities for themselves at that time. And priority number one wasn't dragging their friends into this thing.

Do you think it is fair to say that the girls were -- I'll use the term testing the waters. They wanted to see how much they could disclose, to have the evidence come out about what Mr. Harris was doing to them, but they didn't have to get their friends involved. They weren't going to do it. That is understandable, given the background of these girls, the fact that they don't have solid relationships with adults.

So their peer groups become really their close knit group. That is the people they trust. And there was evidence all over this trial that exhibited that. The letters, the sneaking out to go be with them. Those were people that they trusted. And they weren't going to violate that trust, and that is why they didn't initially say, "Let me tell you about all my friends I told, and you can go interview them. I" don't think that is really what they wanted to do.

The importance of these prior disclosures is it destroys the idea that there was a deceptive plan by the twins to frame the defendant. It eviscerates it. If you think about

it, twins are going to lie to their friends about all this? The people that they trust most? And then their friends would maybe find out they were lying essentially. That runs counter to the way they view their friends and why they want to protect their friends.

The gradual disclosures to CPS counselors and law enforcement after [redacted] ran away. Remember [redacted] and the evidence. She initiates the process, and she says, "I knew I had to finally tell people what really happened."

[redacted] earns of [redacted] disclosures, and she tells. That is consistent with the way these two girls are personality wise. It was clear [redacted] was more reluctant to bring it out than [redacted] was. [redacted] admitted to that.

Regarding the disclosures to CPS, neither of the girls tell a lot details. That is reasonable. Both gradually disclose to the counselor, give overview statements about the abuse. That's reasonable. Crying. They are emotional as they let out the little bits. Years of abuse. Is it reasonable to expect a full accounting of it all right at the beginning? Absolutely no, not to these initial people involved in their case.

Is it reasonable to expect some inconsistencies? Of course. Of course. We have had traumatic events occur over the course of the years, and when you think about memory, think about how we commonly remember events, if you have an event that

letter or something about me moving back with her.

Q. Ms. Hankel asked you about never telling your dad Mike was molesting you; correct?

A. Correct.

Q. Why not? Why didn't you tell your dad?

A. Well, I was scared if I told anyone what Mike would do to me. I didn't want to tell my dad. I didn't want my dad to do something stupid.

Q. What do you think your dad might do if he found out Mike was molesting you?

A. Probably go hurt Mike really bad. I didn't want my dad to get thrown in jail.

Q. You gave -- you have given statements, both here and to law enforcement, that you hadn't told friends about what Mike had done to you; correct?

A. Correct.

Q. And so is it fair to say that you did not tell the truth about telling your friends about what happened?

Is that fair to say?

A. That is.

Q. Why did you not want to tell law enforcement or anybody else that you had disclosed to your friends?

A. Because it was embarrassing, you know, just having my friends know. And I didn't --

Q. What was it about -- when you were asked, did you

tell any of your friends, why didn't you want us in law enforcement, in other words, Karen Smart or John Rutkowski, CPS to know that your friends knew?

A. I didn't want them to get involved -- my friends, to get involved in this. I didn't want them to have to be involved in all of this.

Q. Were you trying to protect your friends?

A. Yes.

Q. You were questioned at the preliminary hearing regarding some journal; do you recall that?

A. Yes.

Q. Did you write in any place that you remember now entries into any journals about -- even remotely about what Mr. Harris was doing to you sexually?

A. I did.

Q. And did Deputy Rutkowski or Investigator Rutkowski come and see you after Mike was in jail and show you some journals?

A. Yes.

Q. Did he ask you to look at the journals and see if there was any mention of the abuse by Mike in these journals?

A. Yes.

Q. Let me show you what has been marked as Exhibit 36.

Judge, it is an evidence property bag that contains three notebooks.

EXHIBIT 489

there's been a lot of testimony here today, so I don't want to re-ask a question that's been asked already, but what -- well, let me ask it this way: You have discussed these allegations of molestation with [redacted] correct?

A. Yes.

Q. Is that in a conversation that you've had with [redacted] ongoing so that there's been more than one such conversation?

A. Yes.

Q. Is it the kind of thing that you've been discussing with [redacted] pretty much since you were 11 years old?

A. Yes.

Q. Have you discussed any of the allegations in any detail at all with the foster parent or parents that you're living with?

A. No.

Q. Have you discussed any of the details of the allegations of molest with any of your friends?

A. No.

Q. At any time?

A. No.

Q. Have you ever told your friends, apart from a discussion, have you ever told any of your friends at any time that Mike Harris was molesting you?

A. No.

Q. Or that he was a molester?

A. No. I just said he's a weirdo.

Q. You just said he was a weirdo but no further or specific identification?

A. No.

Q. Do you recall who it was, which of your friends you told he was a weirdo?

A. My friends, most of them.

Q. More than one?

A. Yes.

Q. No description of why you were describing him as a weirdo?

A. Because they always asked why we weren't allowed to hang out with boys, why he would get pissed off or why we liked boys and just hanging out with boys.

Q. And you said, "Because he's a weirdo"?

A. Yes.

Q. Fair enough. And if I understood your testimony correctly, and there was a lot of it so I apologize if I misunderstood, but I think I heard you testify that Mr. Harris never ejaculated during these events; is that correct?

A. That's correct.

MR. GEPHART: Can I take a minute, Judge? I think I'm getting close to being done.

THE COURT: Yeah. Gather your thoughts.

(Pause in proceedings.)

(A discussion was held off the record between defense counsel and the defendant.)

In re Harris 095

EXHIBIT 572

470

A. No.

Q. Did you plan to do that?

A. No.

Q. Did you scheme to do that?

A. No.

Q. Did you scheme and plan to give inconsistent answers in these different interviews?

A. No.

Q. Tell me again who your boyfriend was just before you ran away?

MS. HANKEL: Objection. Asked and answered. Cumulative.

THE COURT: Seems to me it has been asked and answered, and if you are asking her to tell you again, you know it has been asked and answered.

MR. GRAHAM: Well, I want to set the stage, but I want to understand.

Q. BY MR. GRAHAM: Who were you hanging out with just before you ran away?

A. [redacted] and [redacted]

Q. And of those two, who did you tell about any kind of sexual abuse by Mr. Harris?

A. Neither of them at that time, until after I told Alex Ellis.

Q. I just want to make sure we're clear. Did you tell

any of your friends prior to June 26th of '07 about sexual abuse?

A. No.

Q. After you ran away, who was the first person that you told of your friends about the sexual abuse?

A. [redacted]

Q. And what did you tell him?

A. I told him that Mike had touched me in a wrong way.

Q. Why did you feel at that time that you could tell him?

A. Because I -- I don't know. Because I knew I was finally out of the home, and I felt a little bit safer.

Q. Who was the next friend that you told, if there was one?

A. I don't remember who the next person was.

Q. Before Alex, was [redacted] the only person you told about being sexually abused by Mike other than the previous statements regarding your mother and sister?

A. No. There was no one else.

Q. So we go [redacted]hen Alex, and then who is the next person you told?

A. I don't remember who the next person was.

Q. Who was the next friend that you told after you spoke with Alex?

A. [redacted] I think it was.

[Audio Dialogue begins at 0:00:19]

DET. RUTKOWSKI: Yeah, might as well.

UNIDENTIFIED FEMALE: Okay.

[redacted] So what are you talking to me about?

DET. RUTKOWSKI: Following up -- don't shut it, unless somebody comes in.

UNIDENTIFIED FEMALE: [inaudible]

DET. RUTKOWSKI: Unless you feel more comfortable.

What are you practicing from prom night?

[laughter]

[redacted] That's gonna be me when I get drunk and drink too much.

UNIDENTIFIED FEMALE: [inaudible]

DET. RUTKOWSKI: Don't get drunk at your age. What am I doing? I don't know. 16th -- 8, 1730.

UNIDENTIFIED FEMALE: She's giddy. She's a little --

DET. RUTKOWSKI: She's weird. Yeah.

UNIDENTIFIED FEMALE: [inaudible]

DET. RUTKOWSKI: Smoking reefers or something.

[redacted] High -- I'm high off life.

UNIDENTIFIED FEMALE: That's right.

DET. RUTKOWSKI: Yeah, you should be.

Who --

[redacted] Who --

DET. RUTKOWSKI: -- did you tell about Mike being a pervert

In re Harris 098
EXHIBIT 543

or whatever before he was arrested?

[redacted] I think I told Alex.

DET. RUTKOWSKI: That's it?

[redacted] I think so.

DET. RUTKOWSKI: No friends? Well, who was sending him the email, saying we know who this is, you --

[redacted] Oh. I didn't -- I didn't tell that person that.

DET. RUTKOWSKI: Okay. Did you tell anybody?

[redacted] No. I only told Alex.

DET. RUTKOWSKI: Not even your mother?

[redacted] No. Oh -- oh, I forgot about that. I thought you meant when [inaudible].

DET. RUTKOWSKI: Okay. So --

[redacted] Yeah, I didn't --

DET. RUTKOWSKI: -- the only person you talked to about what Mike was doing to you was your mother?

[redacted] Mm-hmm.

DET. RUTKOWSKI: Okay.

[redacted] [inaudible]

DET. RUTKOWSKI: [inaudible] You win.

And then --

[redacted] Is that a camera?

DET. RUTKOWSKI: Duh. Are you now or were you then on birth control?

[redacted] No.

Trisha the other day.

DET. RUTKOWSKI: Bishop? Chalfant?

[redacted] Wilkerson.

DET. RUTKOWSKI: Wilkerson. Do you know her phone number?

[redacted] Not anymore.

DET. RUTKOWSKI: Okay.

[redacted] [inaudible]

DET. RUTKOWSKI: Who else? Who else?

[redacted] The mom, Trisha -- Trish Jackson.

DET. RUTKOWSKI: Trish. Was that her foster lady?

[redacted] That was [redacted]

UNIDENTIFIED FEMALE: That was [redacted]

DET. RUTKOWSKI: Oh.

UNIDENTIFIED FEMALE: But yes, the one that you remember.

DET. RUTKOWSKI: Anybody else?

[redacted] I don't think so.

DET. RUTKOWSKI: Were you there when Mike got served the Restraining Orders, when you guys were walking on the sidewalk with a bunch of kids?

[redacted] Oh, yeah, that was me.

DET. RUTKOWSKI: And -- and he -- okay. So didn't those kids know?

[redacted] Hmm?

DET. RUTKOWSKI: Didn't those kids know?

[redacted] No.

In re Harris 100

EXHIBIT 546

DET. RUTKOWSKI: You didn't say there's the pervert or --?

[redacted] No.

DET. RUTKOWSKI: 'Cause I thought he yelled at you and accosted all you guys.

[redacted] Yeah. He yelled at me, but they -- those boys that were with me, they didn't know anything that happened until like -- the only thing they knew is he was [inaudible]. But they didn't know he --

DET. RUTKOWSKI: Any of the details.

[redacted] Yeah.

DET. RUTKOWSKI: How many times did you tell your mother, do you think, during the years that he abused you?

[redacted] [inaudible]?

DET. RUTKOWSKI: Yes.

[redacted] Once.

DET. RUTKOWSKI: Just once?

[redacted] Mm-hmm.

DET. RUTKOWSKI: Was that closer to the beginning of when it started with him, or closer to the end?

[redacted] Closer to the beginning.

DET. RUTKOWSKI: Was it your diaries that I went and got? And we're missing one; right?

[redacted] Mm-hmm. They're actually missing pages, too.

DET. RUTKOWSKI: Pages out of the ones that I did get?

[redacted] That you have.

[redacted] Mike -- Mike -- Mike raped me when I was real young.

DETECTIVE 1: Okay. And did she give you any indication of what she meant by that?

[redacted] Um -- touching -- um --

DETECTIVE 1: But, I mean, did she -- did she say this or were you just speculating?

[redacted] She -- she said this.

DETECTIVE 1: Okay. What -- what did she say?

[redacted] Mike -- Mike used to rape me when I was real young.

DETECTIVE 1: Okay. And did she talk about things that -- that -- that he did? 'Cause we use the word "rape" and, you know -- and all that.

[redacted] Putting -- putting his hand down her pants, touching -- touching her chest, that -- yeah, I think that was about it.

DETECTIVE 1: So, when you heard that she said the word "rape" --

[redacted] Mm-hmm.

DETECTIVE 1: -- and is that the word you remember her using?

[redacted] Mm-hmm.

DETECTIVE 1: That's yes?

[redacted] Mm-hmm.

[Dialogue begins at 00:00:00]

DETECTIVE 1: Um -- can you -- we're going to record this because I can't take notes fast enough when people write; okay?

[redacted] That's cool.

DETECTIVE 1: All right. Uh -- we're here in the D.A.'s conference room with Therese Hankel, Todd Graham and Wade McHannon [phonetic]. And your full name is what?

[redacted]

DETECTIVE 1: [redacted]

MS. HANKEL: And it's November 6th.

DETECTIVE 1: Yep, 2009. All right, [redacted] -- uh -- your name has been mentioned in this trial quite a few times. And -- why don't you tell -- why don't we start off with -- when did you first meet either one of the -- the twins?

[redacted] I met [redacted] around Mule Days of '07.

DETECTIVE 1: Mule Days. So that's --

[redacted] So, that's May.

DETECTIVE 1: May of '07?

[redacted] Yeah.

DETECTIVE 1: Okay. And prior to you meeting [redacted] had you ever met [redacted]

[redacted] No.

DETECTIVE 1: And, at that time, where were you going to school?

[redacted] I was going to Bishop Union High School.

In re Harris 103

EXHIBIT 203

of a more personal nature?

[redacted] Yeah, she started telling me that her mom and Mike were pretty abusive verbally and mentally and -- that Mike's hit her before and -- her and her sister before and -- about a month after we hooked up she told me that he had raped her. Her and her sister.

DETECTIVE 1: All right. So -- when is Mule Days, what's that day? Do you know?

DETECTIVE 2: Weekend in May; last weekend in May.

DETECTIVE 1: Last weekend in May? Okay.

[redacted] Yeah.

DETECTIVE 1: So, about a month after that, is -- is when she said what?

[redacted] That he raped her and her sister. That they were both verbally and physical abusive.

DETECTIVE 1: So this -- is this -- you know when she ran away? You know when that happened?

[redacted] Probably mid summer of '07. So, probably August.

DETECTIVE 1: Okay.

[redacted] Mid-August.

DETECTIVE 1: Now, are you sure of that, or you just don't know?

[redacted]hat -- that's just from -- I mean it was so long ago --

DETECTIVE 1: Okay.

DET. RUTKOWSKI: No?

[redacted] Nope.

DET. RUTKOWSKI: Okay. It's okay.

Did you tell anybody during the time you lived with Mr. Harris and your mom and he was fooling around with you guys, who -- did you tell anybody that he was doing anything?

[redacted] My mom.

DET. RUTKOWSKI: Just your mom?

[redacted] Yeah.

DET. RUTKOWSKI: Okay. How many times did you tell her?

[redacted] A couple times. She [inaudible].

DET. RUTKOWSKI: Now, did you keep diaries, too, like your sister?

[redacted] No.

DET. RUTKOWSKI: No?

[redacted] Hmm-hm.

DET. RUTKOWSKI: Did you know your sister did?

[redacted] Mm-hmm.

DET. RUTKOWSKI: And did you know there was stuff in there about what Harris was doing?

[redacted] [shakes head side to side]

DET. RUTKOWSKI: Okay.

[End VTS_01.2; begin VTS_01.3]

DET. RUTKOWSKI: After you were separated from Mr. Harris, did you tell -- who did you tell about what he was doing?

In re Harris 105
EXHIBIT 553

[redacted] Nobody. Just Alex.

DET. RUTKOWSKI: Just Alex?

[redacted] Yeah.

DET. RUTKOWSKI: How about your -- the first set of foster parents?

[redacted] [inaudible]

DET. RUTKOWSKI: Okay. How about --

[redacted] I told my second [inaudible].

DET. RUTKOWSKI: Okay. So you have Alex and your second set of foster parents.

[redacted] Mm-hmm.

DET. RUTKOWSKI: And their kids or anything? Any of their kids?

[redacted] Hmm-hm.

DET. RUTKOWSKI: Okay. What's their kids names?

[redacted]

DET. RUTKOWSKI: [redacted]

[redacted] [inaudible]

DET. RUTKOWSKI: Okay. And then how about other friends?

[redacted] [inaudible]

DET. RUTKOWSKI: [inaudible] Who told whatever the kid was that emailed Harris and said we know who you are, you're a pervert?

[redacted]

DET. RUTKOWSKI: [redacted] did?

In re Harris 106
EXHIBIT 554

Q. BY MS. HANKEL: Today you testified about what a boner is.

Do you remember that?

A. Yes.

Q. And you testified about a particular incident in the Chalfant trailer where you said that my client tried to rape you.

A. Did I say the word "rape"?

Q. You may have said that he tried to stick his penis in you, and that he stuck it in you this far. Maybe I misunderstood, maybe that wasn't the phraseology that you used. But you testified to a rape and you testified --

MR. GRAHAM: I am going to object as misstating the testimony. I think there is a misstatement here by counsel.

THE COURT: What is the misstatement?

MR. GRAHAM: I don't think this witness has used the word "rape." I think it is a characterization by counsel, and we are having, at the very least, a miscommunication here on that term.

THE COURT: We are not going to fight over semantics. She can ask the question and phrase it the way she chooses. It is her prerogative. Overruled.

Q. BY MS. HANKEL: And you testified in response to Mr. Graham's question --

THE COURT: Wait a second. What we are not going to do

Appendix J

STEVEN C. GABAEFF, M.D., F.A.A.E.M.
DIPLOMAT EMERITUS AMERICAN BOARD OF EMERGENCY MEDICINE
265 CLEAR RIDGE DR.
HEALDSBURG, CA 95448

April 1, 2023

To whom it many concern:

I have been asked to prepare a packet in support of motion for review of medical findings in the case of Michael Jay Harris CDCR# ADO793. I am doing this work pro bono at this time.

I was an expert consultant in the original trial and concluded that the videos of the exam by nurse in this case were misinterpreted and evidence of penetration falsely testified to, when no evidence of penetration was seen by me or is present. Penetration is quite damaging as the attached photo surveys (Attachment 3 and 4) show. These dramatic findings are constant in real penetration and obvious, leaving scarred deformed tissue and contorted anatomy as the follow-up images in the exhibits show. The twins in this case did not have findings consistent with penetration, thereby making their accusations unsupported. Their mental health issues are clear in the notes I have attacked that were taken as I was reviewing the discovery. Subsequent behaviors (away from the family) support this notion of mental instability, unrestrained anger and aggression, and a confused and changing history that is highly suspicious of fabrication, False accusations are common in studies of rape victims where 16% of all rape accusations over 9 years, for all comers, where shown in a study by Slaughter[i] and validated by police investigation. There are likely to be more than the police would publically identify. Quinn in studying false accusations in custody cases (which this at least indirectly relevant to this case) was 22%[ii].

[i] Slaughter L, et. al.. Patterns of genital injury in female sexual assault victims. Amer J. of Obstetric and Gycecology. 1997; 176: 609-616

[ii] Quinn KM. The credibility of children's allegations of sexual abuse. Behavioral Sciences & the Law Volume 6, Issue 2, pages 181–199, 1988

In re Harris 109

The Credibility of Children's Allegations of Sexual Abuse

Kathleen M. Quinn, M.D.

Sexual abuse, the fastest growing type of abuse complaint, often raises issues concerning the credibility of individual allegations. This paper discusses historical, developmental, and societal factors affecting children's credibility and recommended assessment methods that maximize a child's capacity to relate his or her experience. Clinical factors leading to false allegations are discussed.

I have consulted on 1500 sexual assault cases and was a previous director of a SART program in San Diego in the late 90's for the San Diego Police Department. I have been a consultant in 5000+ abuse cases over 33 years and testified in court 500+ times. I have publishe 6 peer reviewed articles on false allegations of abuse.

The packet contains my original notes (attachment (A) 1), and abstract summary of key points from those notes (A 2) two photo surveys of the actual damage produced by rape of children and the residual findings (A 3 and 4), and article by child abuse MD's used in court of cases like this, that falsely represents that pregnant females do not have evidence of penetration with commentary (A 5 and 6), an article by a Swedish scientific panel charges with evaluating the reliability and evidentiary value of the child abuse literature (A7), and a summary comparing my notes regarding the video of the exams done on the girls around the time of the allegations (OCJPs) (A 8). I believe that an honest and objective analysis of the video will reveal that the allegations by the alleged victims are suspicious, if not proof of, false allegations and fabrication. The records reflect and the mental health history of the twins reveals inconsistencies and anger that define motive to lie and secondary goals to separate from their mother. Strange and concerning interactions with others outside the family unit are included in my notes and the summery of my notes that support the lack of credibility of the twins that were ignored in the initial proceedings.

Please contact me if there are any questions. 916 342-4835, stevengabaeff@gmail.com .

Steven Gabaeff, MD, FAAEM, FACEP

ADDENDUM- ADDING A 9 ONE OF MY PEER REVIEWED ARTICLES IN LEGAL MEDICINE

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A-9

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Exploring the controversy in child abuse pediatrics and false accusations of abuse

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ABSTRACT

There is a controversy in child abuse pediatrics between an established corps of child abuse pediatricians aligned with hospital colleagues and law enforcement, and a multi-specialty challenger group of doctors and other medical professionals working with public interest lawyers. The latter group questions the scientific validity of the core beliefs of child abuse pediatricians and believes that there are a substantial number of false accusations of abuse occurring. An unproven primary hypothesis, crafted around 1975 by a small group of pediatricians with an interest in child abuse, lies at the foundation of child abuse pediatrics. With no scientific study, it was hypothesized that subdural hemorrhage (SDH) and retinal hemorrhage (RH) were diagnostic of shaking abuse. That hypothesis became the so-called "shaken baby syndrome." Through the period 1975–1985, in a coordinated manner, these child abuse specialists coalesced under the American Academy of Pediatrics and began working with district attorneys and social workers, informing them of the ways in which their hypothesis could be applied to prosecutions of child abuse and life-altering social service interventions. In a legal context, using then-prevailing evidentiary rules which treated scientific expert testimony as valid if it was "generally accepted" in the field, they represented falsely that there was general acceptance of their hypothesis and therefore it was valid science. As the ability to convict based on this unproven prime hypothesis (SDH and RH equals abuse) increased, some defense attorneys were professionally compelled by their own doubts to reach out to experts from other fields with experience with SDH and RH, trauma, and biomechanics, for second opinions. Medical and legal challenges to the established thinking soon emerged, based on both old and new evidenced-based literature. As the intensity of the controversy increased, the probability of false accusation became more apparent and the need to address the issue more pressing. Since false accusations of child abuse are themselves abusive, efforts to eliminate such false accusations must continue.

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1. Background

There is a controversy in child abuse pediatrics. A relatively small corps of physicians (about 350 board certified child abuse pediatricians) stands in opposition to a challenger group (numbering about 120). These two groups together comprise the medical professionals at the core of the academic disagreements discussed herein. Together they represent the very small number of professionals most familiar with the relevant literature concerning child abuse who are qualified to offer commentary on these issues.

In the United States, around 1975 modern child abuse pediatrics developed around a small group of self-selected pediatricians who had an interest in child abuse and a desire to cultivate this area of pediatrics into a specialty. This group assumed, based on no independent scientific study, that the presence of subdural hemorrhage (SDH) was a diagnostic sign of abusive shaking of a child, commonly called the shaken baby syndrome (SBS). As the number of work-ups for child abuse based on the presence of SDH increased, the common association of SDH and small hemorrhages in the retina, retinal hemorrhage (RH), was noted in the eyes in the patients diagnosed as having been abusively shaken. These RH, an almost constant co-finding with SDH, then generated a second unproven hypothesis: vitreous traction. At that time and since, the child abuse pediatricians chose to disregard existing scientific literature [1–3], some of which dated back to 1900, which accounted for RH in the context of SDH based on increased pressure within the skull known to impact the retinal capillaries, termed "Terson's Syndrome." Instead, the new hypothesis posited that shaking produces traction on the retina by the jelly of eye (the vitreous) resulting in torn sub-retinal capillaries that formed small discreet hemorrhages. Vitreous traction was never tested with any scientific methodology and was never proven in animal models. Episodes of repeated forceful abusive shaking caught on nanny-cams, with immediate examination thereafter, had no RH or SDH [5]. Although unproven, this second purported diagnostic finding of shaking abuse was added to SDH, and RH was included in their prime hypothesis: SDH and RH in combination as diagnostic of shaking abuse/SBS.

In spite of the fact that the prime hypothesis had never been scientifically tested, and was never true, it quickly gained traction with prosecutors. The conviction rate in the first decade of its use was >94% [7]; when evidence was presented, with apparent certainty, by authority figures to police, social workers, judges, and/or juries, it was easy to convict caregivers of SBS. With such success (and a lack of defense experts versed in the issues), a powerful wave swept over the country under the rubric of protecting children. The pace of accusing and convicting, using the prime hypothesis, increased. Furthermore, the child abuse community began to tout, completely unscientifically, that the ability to convict in court provided validation of the SBS hypothesis. Within the legal system, this argument worked.

To under-informed or uninformed professionals, the media, and the public, the prime hypothesis and SBS became accepted based, not on science, but by who was promoting it. As prominent authority figures already anointed with titles and powerful positions in academic institutions, child abuse pediatricians were able, unchallenged, to say that SDH and RH was diagnostic of SBS/child abuse and that the presence of these findings proved that "abuse and only abuse" was the etiology of the findings. Their ideas were accepted on blind faith in the institutions that supported them and their credentials. The child abuse pediatricians soon found a collegial and warm welcome among police, prosecutors, and the social service system, and a marked increase in stature and power within the legal community and over almost all of their medical colleagues, who in key specialties (ophthalmology and radiology), for unknown reasons, became like-minded in their acceptance of the prime hypothesis. These colleagues appear to have done so without any scientifically valid research within their own fields. They accepted the prime hypothesis in much the same way as others, on unwarranted blind faith in the American Academy of Pediatrics (AAP) and their own child abuse colleagues. Efforts to export the American approach to diagnosing and prosecuting child abuse have been successful in England, but have met resistance in other countries who favor more rigorous scientific standards (discussed below).

To be clear, real child abuse and false accusations of child abuse are completely separate medically and have little to do with each other from any legitimate forensic perspective. Those working in the field or in emergency departments see real child abuse and its tragic consequences. Real child abuse is not the issue. Focusing on the increasing number of false accusations of abuse and decreasing and eliminating them is the purpose of this article.

2. Clinical and pathological observations

2.1. Subdural hemorrhage (SDH)

SDH is bleeding around the brain from physical or metabolic damage to the capillary layer of the outer covering of the brain: the dura. SDH has been known since the beginning of medicine to have many different etiologies. In modern times, birth-related trauma and complications, central nervous system (CNS) infections [8], and accidents are the most common causes of SDH [9]. Other more rare problems surfaced from time to time as well [10]. In 1975 however, it was decided, again without any basis, that other causes of SDH such as those mentioned above could be disregarded or dismissed without a meaningful differential diagnosis or work-up, in favor of the newly crafted prime hypothesis. The child abuse pediatricians promoted in a forensic framework that SDH and RH, in the absence of major trauma (commonly referred to by the child abuse pediatricians as equivalent of a 40 mph car crash or a two-story fall), could **only** be caused by human shaking and are therefore diagnostic of shaking abuse/SBS. As noted above, this hypothesis was never tested, and both then and now exceeds the limits of science. It remains unproven by any valid scientific methodology and, in fact, is believed to be false by many informed professionals; some willing to speak up and others, not.

2.2. Retinal hemorrhage (RH)

What was known (and disregarded) in 1975 was that SDH (one of many causes of increased pressure in the head), predictably causes RH when a threshold degree of increased pressure is present. In the restricted space of the head of babies, or any patient with SDH, the blood and inflammation associated with SDH causes

increased intracranial pressure (ICP). It was later established that increased ICP raised intraocular pressure as well [11]. This occurs via hydraulic transmission of pressure via the fluid around the brain (the cerebrospinal fluid) throughout the CNS and down the optic nerve sheath; the sheath being a contiguous extension of the dura around the brain. When the pressures reach levels higher than the low baseline intravascular pressures in the veins and capillaries of the CNS (brain, spine and eyes) the capillaries are compressed due to the increased external pressure being greater than the intra-capillary pressure. Under these conditions, flow through the capillaries and low pressure veins decreases or can stop.

It is this lack of oxygen from the decreased flow though the capillary beds that results in damaged capillaries in the eye, brain, and dura [3]; under these conditions the single-cell-layer-thin capillary walls break down and leak, causing hemorrhages. The severity of the oxygen deprivation, as noted in cases studies regarding ophthalmologic forensic pathology [12], determines the extent and volume of the hemorrhage and anatomic disruption; not the degree of shaking.

3. Early child abuse pediatrics

In about 1975, the first child abuse specialists began an impassioned effort to establish the prime hypothesis as diagnostic of abuse. They sought to establish a field of child abuse pediatrics based almost exclusively on the prime hypothesis and to establish the legal bona fides of the core crafters of the prime hypothesis. This group of self-designated child abuse "specialists" convinced the AAP to set up the Committee on Child Abuse and Neglect (COCAN) with themselves as key members of that committee.

The child abuse pediatrician became the linchpin in a successful child abuse prosecution; in so doing they took on the conflicting roles of health care provider, investigator, medical expert, accuser, key prosecution witness, promoter of the prime hypothesis, and defender of their own past medical decision making regarding abuse. Without their testimony regarding the prime hypothesis there could be no convictions. When caregivers provided other etiologies of the finding, which undermined the prime hypothesis, they would state or imply that these individuals were liars [13].

In a short time, they added new, also flawed ideas. Examples are: the notion that short falls cannot cause serious injuries; something known to not be true [see below]. Or abusive shaking jostles limbs to causes long bone proximal and distal, chip and bucket handle fractures: something that is biomechanically implausible, clinically and pathologically inconsistent with real fractures, and disregards that these findings are conventional vitamin D deficiency/infantile rickets findings, an evolving epidemic in the newborn population [10]. The new ideas, actually new unproven hypotheses, were equally likely to be accepted by legal professionals eager to improve conviction rates. This is exactly what happened.

As the number of cases of SDH and RH, more correctly referred to as retino-subdural hemorrhage of infancy [14], increased for reasons that would not be known for 30 years (discussed below), the number of accused caregivers increased as well. As these flawed principles spread among children's hospitals from the core group to other like-minded pediatricians, the number of self-proclaimed child abuse specialists also increased. The hypothesis gained a pseudo-scientific patina, and when delivered by authoritative figures in a continuing education paradigm, became regarded as unquestioned medical teaching. The prime hypothesis was advanced in large scale conferences, primarily directed at law enforcement and social services, with thousands of participants. The general body of medicine had no specific knowledge of the pathophysiology of child abuse, or of the findings in the context of child abuse. Many of the other doctors in that era, and even now, in spite of having seen SDH and RH in their practices in other contexts for their entire careers, were averse to participating in the legal system and readily deferred to the newly minted child abuse "specialists."

4. Forensic issues

For about the first ten years (1975–1985), the child abuse pediatricians effectively operated under the medical radar, outside of the body of medicine, and subject to no independent scrutiny; the ability to get convictions was honed into an effective child abuse prosecution system. The momentum and cloak of moral authority generated in that period still hinders meaningful evaluation of the prime hypothesis, advocated by many as appropriate, that could be done under the auspices of established and objective scientific bodies, to resolve the crisis of false accusations.

Soon, adjunct entities within law enforcement and lay people (all equally incapable of evaluating the validity of what they were being told about SDH, RH and SBS by the child abuse authorities), assisted in building what is effectively a massive child abuse "establishment." Because each participant in child abuse prosecution is inherently invested in past decisions based on the prime hypothesis, diligent efforts have been made to maintain the status quo of the last 40 years. With thousands of individuals in jail based on testimony grounded on the prime hypothesis, a conflict of interest of monumental magnitude exists. Failure to integrate new science allows the perpetuation of false accusations based on allegiance to the status quo, which now account for a very high percentage of all contested prosecutions of abuse. It also allows for the avoidance of dealing with the legal and psychological impact of tens of thousands of misdiagnoses of abuse by the establishment child abuse pediatricians over four decades.

5. The challengers

Through the 1980s, as the number of cases increased and the convictions mounted, the improbability of abuse by many of those accused became more apparent to the attorneys defending them. Some of these defendants, seemingly decent, loving caregivers, did not fit the profile of abusers by any stretch of the imagination. In this context, the defense attorneys, unlike their district attorney (DA) counterparts, became more suspicious of the allegations leveled against their clients, and began to search for second opinions from specialists, in other relevant fields, who had experience with the findings used in the prime hypothesis.

Meaningful challenges to the core principle of child abuse pediatrics began in 1985 with biomechanical challenges. Shaking forces could be measured: forces in accidental household falls, a common cause of SDH and RH, were also studied. Household falls/accidents were a common history given by caregivers presenting with babies that had retino-subdural hemorrhage of infancy, and these histories were being dismissed out of hand by the establishment doctors, in favor of abuse, without biomechanical analysis. For the first time objective data from physics demonstrated that the prime hypothesis was likely invalid.

5.1. Lack of objective evidence and presumptions of guilt

In essentially every case of shaking abuse, there are consistently no outside objective witnesses to any abuse or other events related to the abuse. The caregiver is assumed by the child abuse pediatricians to (1) have "snapped" under the speculative stress of common child care occurrences (often with zero evidence of prior such behavior), (2) then shook the baby in an abusive way, and (3) in the absence of a confession, was declared, or inferred to be,

a liar who was concocting a story to try to cover acts of abuse [13,15].

In spite of no real evidence of "snapping" occurring among experienced or loving caregivers in the social science literature, and in spite of studies showing how improbable it is [16], the concept of snapping and shaking, integral to almost all accusations of child abuse, continued to go unquestioned by authorities, even those who normally demonstrated better informed investigative instincts (e.g. the police). Social histories of defendants who were exemplary for love and caring were considered irrelevant; "anyone can snap" was the rationale. The probability of a previously loving caregiver snapping, however, was well under 1 in 10,000; a probability from a legal or medical perspective, without objective witness evidence, which must be regarded as essentially zero. When witnesses were present during the speculative acts of abuse and reported they saw no abuse, their observations were dismissed as well, and they too were directly or indirectly accused of lying and conspiracy to conceal abuse. In cases where falls were witnessed, the child abuse specialists invented and promoted the notion of the virtual absolute insufficiency of witnessed household falls to cause serious injury [13,17]. They pronounced that only 40 mph car crashes and 2 story falls could cause SDH and RH, an astonishingly incorrect statement [18,19].

Such words and the concepts, distributed through the AAP more like talking points rather than proven science (since they were false), emerged to publicly discredit any history of a household accidental falls or other more probable causes as the etiology of the prime findings (SDH and RH).

The child abuse pediatricians have convinced the authorities that they, the child abuse specialists, should just be believed and charges filed. The legal system, under these circumstances, becomes the tool converting a child abuse pediatrician's beliefs into convictions.

5.2. Studies disproving SBS

As old new and old research was being brought forward by the challengers to the establishment showing the insufficiency of shaking to cause retino-subdural hemorrhage in infancy, the crafters of the original theory, instead of evaluating the new research, doubled down on their past thinking. They took an aggressive and decidedly non-scientific defensive posture to any challenges to the prime hypothesis. Their out of hand dismissal of short falls and accidents as an etiology raised doubts; biomechanical analysis of short falls and head impacts had begun.

When the biomechanics became involved, the first scientific testing was done. The biomechanics already knew that a tiny percentage of all short falls caused serious injuries [19]. They knew intuitively that no human could recreate the forces of a 40 mph car crash or second story fall; they soon proved by experimentation that the notion that a human shaking a child can produce forces equivalent to a 40 mph car crash or a second story fall was nonsense. Biomechanical testing shows that human shaking, at its strongest, generates 1/60th of the force (~10 g or 10 times the force of gravity) of a 40 mph car crash (which generates ~600 g or 600 times the force of gravity). Studies, stating such were published [19,20] and efforts to immediately discredit the generally unassailable biophysics began by the child abuse pediatric establishment, primarily by saying the laws of physics did not apply to humans. (There is also irony in the contradictory reliance on biomechanics and biophysics used in other safety initiatives advanced by the AAP, e.g., helmets and car seat design.)

Soon other doctors with specialized experience with the findings (e.g., radiology, emergency medicine, forensic pathology) became involved. Research emerged which rendered the prime hypothesis and many other aspects of child abuse pediatrics suspect and likely invalid; the basis on which abuse had been diagnosed for decades (the prime hypothesis and SBS) began to be no longer regarded as viable.

6. False confessions of shaking

By 1985 the predictable high conviction rate used to validate abuse, was augmented by supposed large numbers of "confessions of shaking." Many parents trained in first-aid, preparing for a new baby, where taught to determine if a child was unconscious and needed cardiopulmonary resuscitation (CPR), with these precise "CPR for infants" instructions from the National Institute of Health (NIH):

> **"Check for alertness. Shake or tap the infant gently. See if the infant moves or makes a noise"...CPR guidelines published by the NIH at** [illegible].

These resuscitative shakes, commonly reported during apparent life threatening events that generate medical encounters and abuse evaluations, became the most common "confession of shaking." When later measured by biomechanics, these resuscitative "shakes" where found to generate forces so low that they were less than those seen in many common child care situations (e.g., in play and normal consoling behaviors). These forces were measured at about 1/100th to 1/30th (1–3 g) of the minimal force known to cause intracranial injury (~100 g).

However, in emotionally charged circumstances, when shaking was mentioned in any context at all (bouncing, picking up and putting down, consoling behaviors, rocking, resuscitation, etc.), the statements were considered by the child abuse pediatricians, police, and DA to be confessions of abusive shaking [21]. These false "confessions", in the most unscientific of ways, then began to serve as further supposed validation for the unproven prime hypothesis. Ease of conviction and then false "confessions" of shaking were both being offered as scientific proof, and are still being promoted as validation of the prime hypothesis by the pediatricians exerting control of child abuse pediatrics through AAP and COCAN.

7. Pediatric child abuse literature

In large part, the controversy continues to be fueled by the constant flow of child abuse literature specifically designed to be used in court to counter specific testimony by challengers disputing some aspect of the prime hypothesis. Published false statements in the child abuse literature about the relevance and/or irrelevance of alternative etiologies to abuse are quickly and widely disseminated with the cooperation of like-minded doctors/editors of journals relevant to abuse. This is accomplished by publishing methodologically flawed studies (discussed below) and then refusing to publish valid critiques.

The consistent use of data collected from hospital databases of children who, previously and remotely were diagnosed as abused, with a high percentage likely to have been misdiagnosed as abused, is a constant component of the flawed methodology. The approach yields the lowest grade studies [22], the "observational study." In this class of study, the archetype of the child abuse research, the investigator can only note (observe) the diagnoses made by others on the study subjects; the author(s) play no role in making the diagnosis to the study subjects; nor is any scientifically valid methodology applied to validate the observations of others: did abuse really occur or was it a false accusation using the prime hypothesis or other flawed construct to diagnose abuse? This makes observational studies extremely vulnerable to methodological problems, false conclusions, and in the case of child abuse

research, circular logic. If SDH and RH are widely misused to diagnose abuse then only circular logic can lead to the conclusion that their presence proves abuse. It is problematic as well, that even when legal conclusions are "not guilty", hospital records maintain the case as abuse, and the legal conclusions and their implications are not documented in the records being used to gather "abused" subjects. Any real validation of abuse is impossible in these observational studies, because abuse was assumed to be present at the outset based on the prime hypothesis. Such a flawed methodology leads, of course, to unreliable output. Yet that output can be repeated in court over and over, in a convincing fashion, to persuade individuals unversed in the analysis of scientific literature that the prime hypothesis and/or other unproven hypotheses are true.

Recently the criteria for assuming actual abuse has occurred (true or not) according to the AAP in such studies, was defined in a study by Cowley et al. [23], published 7-25-15 in Pediatrics the journal of the AAP, which stated at page 298 in Table 1.

Quality standards for confirmation of abusive injury. Only Studies Ranked 1 or 2 included. . .[in which 1 and 2 were]

1. **Abuse confirmed at case conference or civil, family or criminal court proceedings, admitted by perpetrator, or independently witnessed.**

2. **Abuse confirmed by stated criteria, including multidisciplinary assessment.**

Regarding the criteria the following information is relevant:

1. The case conferences are populated by the multispecialty teams in children's hospitals. The teams are comprised and led by the very child abuse pediatricians who crafted the prime hypothesis or, if younger, through training, have come to believe it. These are the very establishment doctors who are being challenged, continue to rely on the prime hypothesis to misdiagnose abuse, and are deeply invested in maintaining the status quo.
2. The assumption that abuse by a child's caregiver must be real because they have been convicted of abuse in court, a place where abuse of authority regularly trumps genuine scientific discourse, is not justified or accurate.
3. False confessions (admissions by perpetrators) are well documented as common [24], and often coerced or fabricated.
4. Multidisciplinary assessments in children's hospitals are impacted by "Groupthink" [24], a dysfunctional group dynamic identified by Irving Janis at Yale in 1972. Within an institution, like-minded participants, members of a multidisciplinary child abuse program, are selected because they agree with each other. When Groupthink is operative, the desire for conformity leads to dysfunctional decision making. Consensus trumps critical evaluation of alternative ideas. A sense of invulnerability, active suppression of dissent both inside and outside the group using "mind guards" (self-appointed members who shield the group from dissenting information and outside input), augment isolation. The rationalizing of warnings that might challenge the group's assumptions, the use of loyalty, and the punishing of disloyalty, all prevent alternative thinking. The group functions with an unquestioned sense of morality, belief in invulnerability, inflated certainty, and illusions of unanimity among group members where silence is viewed as agreement. Underrating of opponents; stereotyping those who oppose to the group as weak, evil, biased, spiteful, impotent, or stupid, can lead to dehumanizing actions being taken against opponents. Confirmation bias results. Decisions made in such a multi-disciplinary framework need further scrutiny.

As one can see the criteria to accept that a correct diagnosis of abuse was reached in these observational studies are as flawed as the studies themselves. The journals that consistently publish these flawed studies are some of those most widely read in pediatrics and most focused on child abuse. One could argue that these journals are also invested in validating past editorial decisions, supporting the past practices of child abuse pediatricians and like-minded colleagues, and defending the core "knowledge" of modern child abuse pediatrics, right or wrong.

Peer reviewers, working with these editors, collectively have abdicated their primary responsibility to assure only scientifically valid evidence-based research is published. Instead they bring scientifically flawed observational studies to the fore [25]: literature that often seems designed more to assist in court presentations to get convictions [26], than to advance science. Instead of contributing to scientific accuracy and the elimination of false accusations of abuse, this literature instead seems intended to obfuscate emerging science. Emerging science, if openly discussed and more widely accepted, could permanently alter the landscape in child abuse pediatrics and disrupt the established ideas of the old and new promoters of modern child abuse pediatrics, virtually all children's hospitals, the AAP, and the entire child abuse "establishment." Instead, the body of literature in child abuse pediatrics, cited by Justice Ginsberg in a published Supreme Court dissent as methodologically flawed [27], continues to be defended on the basis of its volume and the repetition of the prime hypothesis.

Any objective science which undermines current child abuse pediatric thinking is diligently monitored as it is released and systematically attacked through committees and publications, operating in concert with the AAP, by child abuse pediatricians who specialize in such biased criticism [28–30].

8. Evolving science

After 1985, the challengers persisted, got more organized, and became aware of published legal decisions reversing convictions of abuse, primarily based on acknowledging the emergence of new science. Those deeply impacted by seeing the injustice of loving non-abusive caregivers being convicted of child abuse with false science, also become involved in studying the relevant science applicable to child abuse pediatrics, doing so from a multispecialty perspective [30,31]. Legal scholars studied and published important legal decisions [32] and white papers [33,34] integrating the law and science into persuasive arguments against the validity of the prime hypothesis. The reliance on evidence based medicine, and the integration of old and new peer-reviewed science [35], soon made it clear the prime hypothesis was false. The challengers and other professionals discovered other medical problems, relatively common and well known, that could produce the findings which were being used to misdiagnose abuse. Over time, even the establishment pediatricians acknowledged that the findings occur in multiple other entities and included it in their writings [36].

The challengers, medical professions from difference specialties (emergency medicine, radiology, forensic pathology, neuropathology, ophthalmology, biomechanics, neurosurgery, neurology, orthopedics, pediatrics, and endocrinology), brought specialty knowledge to the issues that extended beyond the scope of the core curriculum of child abuse pediatrics or the training of the old and new child abuse pediatricians.

The new science was ground-breaking. Examples include neuro-pathologic studies of brain anatomy and behavior with medical problems and trauma that emerged from the challengers [37,38]. The new science, though, was immediately attacked by distorting the findings, attacking the integrity of the authors, or dismissing plausible explanations as too rare to be worthy of

consideration. Shaking, back then, was being alleged in almost all cases where retino-subdural hemorrhage of infancy was present and effectively that has not changed over 40 years.

Furthermore, other contributing nonabuse etiologies for the findings, like vitamin D deficiency infantile rickets, were not identified for decades to come. Other established etiologies for cases of retino-subdural hemorrhage of infancy were documented as far back as 1953 [39] and included birth trauma, accidental injury, CNS infections, cerebral thrombosis, prematurity, and twin gestations. These are still not being included in meaningful differential diagnoses, and have not been appreciated as contributing to the increased number of abuse diagnoses.

As the challengers continued to find existing science that undermined the establishment and new science evolved that did the same, the controversy expanded as well. Unfortunately, it often did so in a decidedly nonscientific framework. New terms and new hypothesis about the clinical and pathologic findings emerged that were in short order shown to be invalid indicators of abuse and abandoned [40]; each move provoked by an effort to buttress the prime hypothesis and to blunt criticism. New terminology was put into use that was more vague and more prejudicial [41]. SBS became shaken impact, acceleration/deceleration, rotational injury, non-accidental trauma and/or abusive head trauma. These terms are imprecise, ill-defined, not supported by biomechanical analysis, unquantified, and prejudicial in that they imply intent and mechanism. They were touted to provide more "clarity in the courtroom" [41] when, in fact, they did exactly the opposite, allowing any amalgamation (often referred to as a 'constellation') of non-diagnostic findings to be called definitive evidence of abuse.

Another approach was the "rarity argument", used when an event known to occur only in small numbers occurs. Events that are rare, by definition, will predictably occur in at some rate each year, yet the rarity argument is couched in such a way that each occurrence can be dismissed as implausible because it is rare. Making such an argument is a cognitive and logical error [17]. Mischaracterizing or dismissing known medical problems that occur at small but predictable rates, yielding a predictable number of cases, is not justified merely just because they are infrequent. For example, short falls as a cause of serious injury or death have been, and still are being, disregarded as a possible etiology of SDH, RH, and fractures ascribed to abuse. However, rarity obviously connotes that cases that are rare will occur, and at a constant rate, and if dismissed as implausible because they are rare, then each rare case of the rare event, when seen, will be misdiagnosed. Furthermore, if the population is large enough, the rare event will occur in high absolute numbers leading to multiple misdiagnoses. For example, in the United States with a birth rate of 4 million babies a year, using the 1 in 2 million fatality figure as the frequency of death from household falls [17], accepted by the child abuse community, when applied to say 8 million vulnerable infants, 1–2 years old and other children, predicts that, at a minimum, there will be 4 deaths a day or 1460 deaths from falls a year. There will be many more with clinically significant injury from household falls that will seek medical care. These numbers should not be disregarded with only approximately 3000–4000 child abuse prosecutions per year in the United States [13,42], many with caregivers describing histories of short falls.

The high frequency of birth trauma and complications [9] based in part on the re-emergence of an epidemic of vitamin D deficiency [10,43] and its complications and the predictable occurrence of a significant number of CNS infections [3]; all which produce the same findings (SDH and RH), are being dismissed as alternative diagnoses to abuse because they are supposedly rare and not worthy of inclusion in a meaningful differential diagnosis. This is improper and leads to false accusations of abuse.

Other disease entities, some that occur by the millions per year for some of the categories of alternative etiologies (i.e. vitamin D deficiency manifesting as infantile rickets), are also dismissed out of hand as invalid etiologies without scientific basis.

Abuse of authority, calling for the disregard of any and all challenge to pediatric dogma [44], no matter the content of the challenge [45] has become a widely used tactic as well. Challengers have been subjected to relentless and organized ad hominem (personal) attacks [46]. Efforts to open scientific dialogue have consistently been rejected. The rise of a "law and order" mentality in the 1980s (lasting into the present) has further deterred any impulse on the part of law enforcement, governmental agencies, or neutral scientific bodies, such as the National Institute of Health or the National Science Foundation, to explore the issues involved.

Generally, the "establishment's" response to any challenges has been reflexive rejection of any science that undermined their codified fund of knowledge, their past decisions, and their prior misdiagnoses. Any notion of disabusing themselves of past thinking and decisions, or any acceptance of new science to explain findings that conflicted with prior decisions represents a grave conflict of interest for the current establishment, a group still populated by many of the early self-designated specialists. Undoing the American version of modern child abuse pediatrics, with tens of thousands in jail after false convictions based on the prime hypothesis, is a daunting task, although more enlightened legal systems in Canada [47] and Sweden [48] have stepped up to the challenge. Sweden stands out after a governmental task force, populated with most prominent of medical professionals in Sweden, and the Swedish Supreme Court has declared that it can be concluded that, "in general terms, the scientific evidence for the diagnosis of violent shaking has turned out to be uncertain" and of no legal value. In the United States, various courts [27,32] have made it clear that uncertainty, doubt, and insufficiency of scientific evidence as to most aspects of child abuse pediatrics, describes the current state of things. Recently a Federal judge, in a published decision said "a claim of SBS is more an article of faith than a proposition of science." [32]

9. Evidentiary standards

Evidentiary standards define what can be represented as expert opinion in court testimony.

At first, the prime hypothesis was just assumed to be true. That appears based on the presumptions of scientific integrity by those who espoused it. The logical and scientific necessity of using a valid scientific methodology to prove that it is true, before being allowed to say it is true, however, was not met. In court, the issue of scientific proof was pushed to the side as irrelevant. Courts allowed the new child abuse specialists to repeat the prime hypothesis carte blanche to juries and dependency court judges: people without tools to dispute or analyze what they were being told. The notion that doctors, often acting in concert and all misdiagnosing abuse, their institutions, and the AAP could all be wrong, was unfathomable. The child abuse pediatricians have been able to benefit from this misplaced trust to say what they please and to expect that whatever it said, will be given weight and believed, scientifically warranted or not.

Furthermore, the evidence rules evolving in that time frame, referred to as Kelly-Frye or the generally accepted standard [49], were absolutely insufficient to be used in child abuse medicine. The set-up allowed the child abuse specialists to represent that there was "general acceptance" in the larger body of medicine regarding their ideas about abuse to allow judges to formally validate this new "science" (the prime hypothesis) and their "expert" opinions in court. While general acceptance, the essence of Kelly-Frye, is modestly applicable to some general areas of medicine, it was misrepresentation to the courts that a hundred or so child abuse pediatricians of that era, with similar motivations and

thinking, the new child abuse "specialists," were, or represented the "general body of medicine."

Later evidence rules (Daubert [30]) required research via a scientific methodology to reach valid scientific conclusions before any expert testimony about the conclusions could be presented. Daubert analysis, which is only now being applied more widely, would reveal that no valid scientific methodology was ever used, or could prove that the prime hypothesis was valid.

To this day methodological scientific analysis in child abuse research is relegated to "not necessary" by the current corps of child abuse professionals. With this latitude, the number of misdiagnoses of abuse has increased. The large number of false confessions of shaking [28], continued high conviction rates, the volume of flawed literature to support the prime hypothesis, and the misuse of "general acceptance", remain the primary arguments that the entire field is valid; arguments that continue to drive this tragedy of false accusations and convictions forward.

10. Conclusion

Any objective and uninvested professional party exerting a modest effort to study the issues on their own will see that the challengers' introduction of alternative etiologies, the use of common sense thinking, probability analyses, exposure of a methodologically flawed body of scientific literature, and a commitment to justice, light a path from the nightmare of false accusations of abuse to greater accuracy and precision in diagnosing abuse, presumably our collective goal.

Over time, there has been sufficient evidence presented by the challengers that demonstrates the false certainty of misdiagnosed abuse; the tension between the "establishment" and the challengers has never been higher. The collapse of the "establishment's" ability to convict innocent caregivers of abuse using non-evidenced-based pronouncements of guilt may represent the only means available at this time to resolve this crisis of false accusations. The satanic ritual abuse and multi-victim, multi-perpetrator cases of alleged abuse of the late 80s and early 90s, advanced by many of the same pediatricians working in child abuse today, stopped being filed only after the DAs could no longer attain convictions. In the profound absence of professional dialogue, the invalidity of the current situation may need to be proven in court before the tragedy of false accusations of abuse can end. Since the misdiagnosis of child abuse is a form of abuse caused by a physician (iatrogenic abuse), and most often results in the destruction of innocent families, the incarceration of innocent caregivers, and the separation of children from parents, this form of iatrogenic abuse must be stopped.

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[1] [illegible]

[2] [illegible]

[3] [illegible]

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soiling so I presume this is documentation. You can see this brown material here is stool in this area. It's normal appearing and this is not that uncommon of a situation on anyone.

Q. I'm now depicting on the ELMO pictures three and four of Exhibit 70. Doctor, can you tell me what these pictures depict?

A. This is the girl on her side so the pictures are not in the right orientation, because if you look at the video, the pictures are -- it's all sideways.

This is the catheter that she used to help do the exam. This is another genital picture of the vaginal opening. You can see the abundant amount of hymeneal tissue. It's hard to decipher this in this particular one so let's go on to the next one.

Q. I am now putting on the ELMO pictures five and six of Exhibit 70.

A. So this was actually -- this side is down in the real -- in the actual video. This picture's quite helpful about what I want to talk about. This is --

THE COURT: Can you refer to them by number, please?

THE WITNESS: Yes, sir.

This is number five. Number five shows the posterior hymeneal rim, which is, you know, quite

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FORMER JUROR & JURY FOREMAN

SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF MONO

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, vs. MICHAEL JAY HARRIS, Defendant	Case No.: MFE07004358 DECLARATION AND STATEMENT PRESENTING FACTUAL INFORMATION INTO THE RECORD POST-VERDICT IN CLARIFICATION OF THE AMENDED NOTICE OF MOTION AND MOTION FOR NEW TRIAL

TO THE PLAINTIFF, THE PEOPLE OF THE STATE OF CALIFORNIA, AND TO THEIR ATTORNEYS OF RECORD, THE DISTRICT ATTORNEY'S OFFICE OF MONO COUNTY; TO THE DEFENDANT AND DEFENDANT'S COUNSEL, THERESE M. HANKEL, ATTORNEY AT LAW; TO THE HONORABLE JUDGE DAVID L. DEVORE, AND TO THE CLERK OF THE ABOVE-ENTITLED COURT:

1. I, Larry Petrisky, do declare and will testify under oath, that the following statement is factual and true. Nothing stated herein should be construed as diminishing the defendant's rights and arguments on appeal, nor diminishing the defendant's right to assert jury error and error of fact. Nor is this

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responsive in any way to defendant's process of appeal or arguments on appeal.

2. I served as a juror and jury foreman in the above felony trial from October 2009 to December 2009. I was present at all proceedings and deliberations and chaired the deliberations in reaching the verdicts.

3. In the Amended Notice of Motion and Motion for New Trial, filed in this case on February 26, 2010, by the Attorney for the Defendant, Therese M. Hankel, page 7 lines 22-23, it is stated that "the jurors were confused by the manner in which the case was charged and by the 'first time, last time' instructions."

To put this in context, it should read "some jurors were confused" and that "some jurors wanted to apply a common-sense standard that 'more than ten times' was sufficient to grant a first time/last time conviction". Rather than try to impose a consensus understanding of first time/last time, I asked for clarification from the bench. And the standard we adopted was that every specific charge had to be proven by very specific evidence or testimony, and that 'more than ten times' was not specific enough as to age, location and alleged act.

4. In the Amended Notice of Motion and Motion for New Trial, page 7 lines 25-26, it is stated that "the jury did not believe that [redacted] was raped by the defendant."

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To put this in context, it should read "When deliberations reached the rape charges, the jury foreman took a defense advocacy position and began the discussion by stating, 'I think the prosecution proved the rape on [redacted], but didn't charge it, and they charged two counts of rape on [redacted] and didn't prove it. And I don't think the medical exams are gonna prove rape. The victim twice in court declared, "I never said I was raped!" So I am not inclined to give the DA the rape charges and I am not backing down unless you can show me that The People proved to us in open court that this charge was true. And I'm going to take the same stand on the next charge.'"

5. In the Amended Notice of Motion and Motion for New Trial, page 7 lines 30-31 and page 8 line 1, it is stated that "while the jury had asked to view certain medical evidence on a dvd during deliberations, they did not, in fact, review the evidence, as the means by which to do so was not immediately available to them."

To put this in context, a minority of the jury wanted to see if the victims were examined on their sides, as asserted by the defense witness Dr. Gabaeff, who was strongly denounced by Deputy District Attorney Todd Graham. But since no verdict was reached on any charge based on the SART examinations, the jury reached a unanimous decision that there was no probative value in viewing the video and, when it was finally made available to the jury to view, there was another unanimous decision to not view the video.

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6. In the Amended Notice of Motion and Motion for New Trial, page 8 lines 1-5, it is stated that "The juror related that he was under pressure by his employers, 'to get back and do his job.' The juror noted that just prior to going into deliberations, he intended to write a memo to the Clerk of Court regarding the pressure being brought to bear upon him, pursuant to the advice of former Mono County Superior Court Clerk Margaret White, but did not have time to do so."

To put this in context, <u>all</u> jurors felt enormous pressures in this case: from family, from employers, from friends. As an employee of the court, however, I had additional pressures to balance, including the fact that my boss represents the court and what she says to me could skewer or prejudice me as a juror, so when her normal "boss talk" could be interpreted as pressuring me to "finish quickly" or to give me an insight that no other juror had, I had to block her out. Nothing she said was "reportable" under the judge's instructions, but I wanted to know if there was a polite way to make her measure what she was saying to a juror who happened to be a court employee. Margaret White gave me sound advice which I did not carry out because the jury went into deliberation. Disclosing my contact with Ms. White to Attorney Hankel was a matter of conscience and honor, for which I remain accountable. As to the various stresses felt by jury members, none of them affected our duties as jurors. We placed jury service above all other demands on our lives.

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Respectfully submitted,

Larry Petrisky
Former Juror, Jury Foreman

Date: March 19, 2010

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Thank you.

MS. HANKEL: Thank you.

(Recess.)

(The following proceedings were had in open court, outside the hearing and presence of the jury:)

THE COURT: We'll return to the record in the matter of People vs. Harris.

Counsel and Mr. Harris are present. The jury is not.

We've received Jury Inquiries No. 4 and 5, and counsel and I have been in consultation on these. The first, Inquiry 4, asks for a laptop/DVD player, and we have identified that they want to look at one of the videodisc displays relating to a physical exam, and the only way we're going to be able to do that is bring them into the courtroom and run it on the screen as it was during the evidentiary phase.

The other inquiry is No. 5, and it reads -- it's in two parts. I'm going to read it in its entirety.

It reads as follows: Quote, Read back of testimony by [redacted] as to Defendant's hand touching breast in Bishop; testimony by [redacted] as to Defendant's hand touching vagina in Chalfant in Mom's bedroom; testimony by [redacted] as to Defendant's hand touching breast in Chalfant in Mom's bedroom -- specific as to

doing that to you?

A. "Does this feel good?")

THE COURT: All right. I believe that concludes the identified sections that we believe are responsive to Jury Inquiry No. 5.

MR. GRAHAM: Regarding --

THE COURT: What?

MR. GRAHAM: Regarding the video, we need a little bit more time for setup.

THE COURT: All right. Ladies and gentlemen, apparently we're still not set up with the video, although we've been trying hard for the last two hours. Would you like to take a break, be released and to go and come back? Would you like us to send out for lunch again for you?

Mr. Xxxxx, would you survey your fellow jurors and let us know what your pleasure is.

JURY FOREPERSON: We'd like to work through lunch, Your Honor.

THE COURT: Do you want us to order sandwiches, pizza?

JURY FOREPERSON: Pizza.

THE COURT: We'll order you some pizza and some salads.

JURY FOREPERSON: Thank you, Your Honor.

THE COURT: How long is it going to take you now to set this up? I thought you had it done.

MR. GRAHAM: Well, Hector was expressing some issues on this computer. So we're going to try another computer.

THE COURT: Okay, folks. Can we ask you to go back to the jury room until we get this firmly fixed up, and we'll get some lunch ordered for you.

JUROR NO. 5: Your Honor?

THE COURT: Yes, ma'am.

JUROR NO. 5: We're wondering, most Fridays you left at 3:00. So we're kind of wondering what our situation is today.

THE COURT: I'll stay as long as you want to stay and deliberate.

(The following proceedings were had in open court, outside the hearing and presence of the jury:)

THE COURT: All right. The jury has left the room, and we're off the record.

(Recess.)

verdicts in this case by a means other than a fair expression of opinion on the part of all the jurors, including statements that the jurors "didn't believe much of the [redacted] wins' testimony due to the numerous contradictions in the same," that the jurors "were confused by the manner in which the case was charged and by the "first time, last time" instructions;" that the jurors "did not believe that the medical evidence relating to the [redacted] twins, (the SART exams) supported repeated penetration of the twins;" that the jurors "did not believe that [redacted] was raped by Defendant;" and that the jurors "did not understand whether the "last time" could also refer to the "first time," it, indeed, it was the "last time," in which defendant had touched a victim. The juror stated that the jury "wasn't going to give the DA the rapes, since they had already given the DA other felony charges against the Defendant." He also noted that although the jury had specifically requested to look at a DVD of [redacted] to ascertain if she had been examined on her side, when no device with which to review the DVD was immediately available, the jury rushed ahead, and disregarded this evidence.

4. After this lengthy trial the jury deliberated only a day and a half.

5. The juror noted that he felt under extreme pressure to "get back to work," and is facing disciplinary measures by the Court for reasons related to this trial.

6. The juror noted that many persons on the jury wanted to conduct outside investigations to ascertain "the truth" of various evidence presented by the witnesses in this case.

7. After retiring for the night, on the second day of deliberations, the jury reached its verdicts in this case.

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Appendix K

prima facie claim for relief requires more than a statement that it is so.

In this informal reply, Petitioner will address each of Respondent's contentions in turn below, and will supplement his explanation and justification for exception to any procedural defaults considered. Petitioner will explain in broad terms why his claims should be reviewed de novo due to the fact that they are in no way successive.

A. Legal Principles on Habeas Review

The State Constitution guarantees that a person improperly deprived of his or her liberty has a right to petition the courts for a writ of habeas

Corpus. (See Cal. Const. art. I, § 11, In re Clark (1993) 4 Cal. 5th 750, 764). And while Respondent contends that "there is no due process right to collateral review at all" (Informal Response (hereinafter "Inf. Resp.") page 2:10-11) and cites Ryan v Gonzales (2013) 568 U.S. 57, 67, and In re Clark, supra, 4 Cal. 5th at p. 764 fn. 2, this contention sidesteps the real issue here.

That issue is that the California Supreme Court has addressed this very issue in the case of In re Harris (1993) 5 Cal. 4th 813 (which is a companion case to In re Clark). In Harris, the Court discussed In re Waltreus (1965) 62 Cal. 2d 218 and its reference to the state Legislature's creation of

an "elaborate appellate system in which a criminal defendant may present his or her claims for relief from alleged trial errors." (In re Harris, supra, 5 Cal. 4th at p. 827).

Distinguishable here is the fact that the appellate system is designed to exclusively examine the record on appeal for alleged trial errors. It is not designed to, nor is it capable of deciding matters extrinsic to the record on appeal. Extrinsic errors must be resolved through habeas.

Critical to Petitioner's contentions would be the fact that habeas is a discretionary power given to and vested in the courts to exercise

as law and justice require. [Cf. Brown v. Davenport (2022) 142 S. Ct. 1510, and People v. Booth (2016) 3 Cal. 5th 1284, 1312 [When habeas corpus relief is warranted, our power is not limited to either discharging the petitioner from, or remanding him to, custody [Citations], but extend[s] to disposing of him "as the justice of the case may require]).

For these reasons, a brief mention must be made regarding the prima facie finding necessary for an OSC to issue. The language used in Rule 4.551(c) of the California Rules of Court uses the term "entitled" when there is no legal entitlement to habeas relief; it is a discretionary power to be used as law and justice require. Petitioner

Contends that he is nevertheless entitled to present his instant petition to the Court. He has done so in a way which casts light on the totality of the record, both extrinsic and intrinsic, in order for a proper de novo review to occur. This is because whenever new evidence is presented, through habeas, the court must "consider only the new evidence identified by the petitioner and the trial record. We do not consider other evidence outside the record." (See In re Sagin (2019) 39 Cal. App. 5th 570, 579-580 fn. 2).

Returning to the legislatively created appellate process, the State of California is entitled to timely repose in its legally obtained

convictions. But the convictions obtained in this case most assuredly were not obtained legally. Petitioner contends this has been demonstrated in the habeas petition before the Court, Further, according to the case of Shinn v. Ramirez (2022) 142 S. Ct. 1718, habeas is a matter for the States to decide. It is only if and when a state court misinterprets or misapplies federal law to the facts of a case that the federal courts will review the matter. (See id. at pp. 1737-1738). The Shinn Court esfablishes that evidentiary support for habeas claims related to extrinsic evidence must be developed in the state court.

Between Brown v. Davenport and Shinn v. Ramirez, the Supreme Court of the United States has clearly held that the States have an absolute right to comity and finality, but they are also responsible for the provision of the orderly administration of justice and must abide all laws as clearly determined by them. (See Brown v. Davenport, supra, 142 S.Ct. at p. 1525). That being said, there are relevant State laws related to the use of habeas within California.

Petitioner attempted to use State law when, immediately upon conviction and sentencing, he began raising claims of ineffective assistance of counsel in order to get to the

bottom of why he was convicted when he knew he was innocent. Due to the fact that Petitioner was unable to access his attorney-client case file, the transcripts of the case, and Lexis, he was thwarted by the actions of the state to adequately present his colorable claims of error to the courts. Thus, the extrinsic facts presented through ineffective assistance of Counsel claims were never considered on their own merits, which denied proper federal review. The pivotal issue in this argument is that Petitioner has not changed his factual allegations in any manner since his initial Marsden hearing on March 10, 2010. Therefore his claims of error currently before the Court

have never been considered on their own merits, nor have they changed, and so they must not be considered successive.

This then is the crux of the initial matter before the Court: Does Petitioner have a right to a merits based determination of his newly discovered claims based on the operative factual allegations never before considered on their merits, or is the State permitted to procedurally (and systemically) bar them?

Respondent's focus on the issue of wasting this Court's valuable and limited resources as being their cause for asking the Court to decline any consideration

of the instant petition is striking in its ambivalence towards the substance of the petition. Specifically, Respondent cites Curl v. Superior Court (1990) 51 Cal. 3d 1292, 1304; and Harrington v. Richter (2011) 562 U.S. 86, 91. But these two cases are somewhat at odds with each other. Respondent uses Curl to emphasize the "strong presumption of constitutional regularity" yet ignores the detailed dicta in Harrington regarding the presumption of correctness attached to state court convictions which may be rebutted by clear and convincing evidence and may be overcome by a more likely explanation for a state court's decision. (See Harrington v. Richter, supra, 562 U.S. at pp. 99-100).

Petitioner is deeply disturbed by Respondent's focus on the "staggering number" of habeas petitions and the inherent need of this Court to deny review of the instant petition because of this fact. Petitioner invites the Court to consider the possibility that Respondent wants the instant petition to disappear because it specifically attacks the prosecution team. Regardless, the fact remains, habeas is permitted by law. This Court may issue an Order to Show Cause if the claims which have been presented, were to be proven true, and that law and justice require that Respondent formally respond to those claims.

Appendix L

product related to his personal interviews with the accusers in this case pursuant to People v. Superior Court (Jones) (2021) 12 Cal. 5th 348, 361-362.

3. Prosecutorial Misconduct

Apart from Petitioner's inability to present a complete defense at trial, the prosecutor's presentation of false testimony, which was material to the findings of guilt, must be analyzed under fundamental fairness doctrine. The Ninth Circuit Court of Appeals has recently concluded that the constitutional requirement of due process of law is not satisfied where a conviction was obtained by the presentation of testimony known to the prosecuting authorities to be false.

(See Dickey v. Davis (9th. Cir. 2023) 69 F.4th 624, 636).

> The principle that a State may not knowingly use false evidence, including false testimony, to obtain a tainted conviction ... does not cease to apply merely because the false testimony goes only to the credibility of the witness. (Napue v. Illinois (1959) 360 U.S. 264] at 269).

(Ibid.)

The United States Supreme Court has been consistent on this point. In the case of United States v. Agurs (1976) 427 U.S. 97, the Court wrote in dicta, "the materiality analysis for a Napue violation requires that a conviction "must be set aside if there is any reasonable likelihood

that the false testimony could have affected the judgment of the jury." (Id. at p. 103). (emphasis added.)

Of course, the California Supreme Court has also spoken to this issue recently in People v. Parker (2022) 13 Cal. 5th 1, when it decided that: "A defendant's conviction will not be reversed for prosecutorial misconduct ... unless it is reasonably probable that a result more favorable to the defendant would have been reached without the misconduct. [Citations.]" (Id. at p. 72). (emphasis added.)

The Parker decision is inconsistent with the United States Supreme Court in that the would have Standard is the Brady Standard while the could have standard is the Napue Standard.

And even though the deceptive and reprehensible methods standard is binding on a State claim, it is not the argument to the jury which is the challenged act here; the challenged act is the presentation of false evidence. [redacted] (See Auto Equity Sales, Inc. v. Superior Court (1962) 57 Cal.2d 450, 455 [the court is obligated to follow decisions of courts of superior jurisdiction]; Cf. Hernandez v. Lewis, Supra, at LEXIS pp. 7-8).

The knowing, or should have known component of the analysis of a prosecutorial misconduct claim [redacted] is dispositive. The prosecutor in this case interviewed [redacted] and [redacted] ("those boys") on November 6, 2009 and both emphatically said that [redacted] and [redacted] each told them of sexual

abuses at the hands of Petitioner, far in advance of their initial disclosures. The disconcerting problem faced by Respondent is that [redacted] beligerantly told the Court she never said she was raped. And both girls repeatedly stated they never told their friends until after they made their initial disclosures to Alex Ellis. (See EXHIBIT(S) 203:5-10, 205:14, 224:20-22, and 227:1-11).

Because these substantial and material claims are contained within the instant petition and because Respondent ~~has~~ failed to rebut, or even respond to them, law and justice require an Order to Show Cause to issue in order to allow Respondent an additional opportunity to formally place these

claims in dispute through a return, or stipulate to an immediate release of Petitioner from his illegal restraint.

C. Required Candor in Factual Assertions

Respondent's insinuations that Petitioner does not "actually know what he is talking about" (Inf. Resp. p. 4:3) are belied by the opening sentence of the discussion portion of the informal response: "To the best of Mono County District Attorney's office knowledge ...." (Inf. Resp. p. 2:5). The reality is that the prosecutor of the criminal case in dispute here, was challenged by Petitioner to provide his man-

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Appendix M

Cal Pen Code § 1473

Deering's California Codes are current through the 2022 Regular Session.

Deering's California Codes Annotated > PENAL CODE (§§ 1 — 34370) > Part 2 Of Criminal Procedure (§§ 681 — 1620) > Title 12 Of Special Proceedings of a Criminal Nature (Chs. 1 — 5) > Chapter 1 Of the Writ of Habeas Corpus (§§ 1473 — 1509.1)

§ *1473*. Who may prosecute writ; False evidence; Dispute over expert testimony

(a) A person unlawfully imprisoned or restrained of their liberty, under any pretense, may prosecute a writ of habeas corpus to inquire into the cause of the imprisonment or restraint.

(b) A writ of habeas corpus may be prosecuted for, but not limited to, the following reasons:

(1) False evidence that is substantially material or probative on the issue of guilt or punishment was introduced against a person at a hearing or trial relating to the person's incarceration.

(2) False physical evidence, believed by a person to be factual, probative, or material on the issue of guilt, which was known by the person at the time of entering a plea of guilty, which was a material factor directly related to the plea of guilty by the person.

(3)

(A) New evidence exists that is credible, material, presented without substantial delay, and of such decisive force and value that it would have more likely than not changed the outcome at trial.

(B) For purposes of this section, "new evidence" means evidence that has been discovered after trial, that could not have been discovered prior to trial by the exercise of due diligence, and is admissible and not merely cumulative, corroborative, collateral, or impeaching.

(4) A significant dispute has emerged or further developed in the petitioner's favor regarding expert medical, scientific, or forensic testimony that was introduced at trial and contributed to the conviction, such that it would have more likely than not changed the outcome at trial.

(A) For purposes of this section, the expert medical, scientific, or forensic testimony includes the expert's conclusion or the scientific, forensic, or medical facts upon which their opinion is based.

(B) For purposes of this section, the significant dispute may be as to the reliability or validity of the diagnosis, technique, methods, theories, research, or studies upon which a medical, scientific or forensic expert based their testimony.

(C) Under this section, a significant dispute can be established by credible expert testimony or declaration, or by peer reviewed literature showing that experts in the relevant medical, scientific, or forensic community, substantial in number or expertise, have concluded that developments have occurred that undermine the reliability or validity of the diagnosis, technique, methods, theories, research, or studies upon which a medical, scientific, or forensic expert based their testimony.

(D) In assessing whether a dispute is significant, the court shall give great weight to evidence that a consensus has developed in the relevant medical, scientific, or forensic community undermining the reliability or validity of the diagnosis, technique, methods, theories, research, or studies upon which a medical, scientific, or forensic expert based their testimony or that there is a lack of consensus as to the reliability or validity of the diagnosis, technique, methods, theories, research, or studies upon which a medical, scientific, or forensic expert based their testimony.

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(E) The significant dispute must have emerged or further developed within the relevant medical, scientific, or forensic community, which includes the scientific community and all fields of scientific knowledge on which those fields or disciplines rely and shall not be limited to practitioners or proponents of a particular scientific or technical field or discipline.

(F) If the petitioner makes a prima facie showing that they are entitled to relief, the court shall issue an order to show cause why relief shall not be granted. To obtain relief, all the elements of this paragraph must be established by a preponderance of the evidence.

(G) This section does not change the existing procedures for habeas relief.

(c) Any allegation that the prosecution knew or should have known of the false nature of the evidence referred to in paragraphs (1) and (2) of subdivision (b) is immaterial to the prosecution of a writ of habeas corpus brought pursuant to paragraph (1) or (2) of subdivision (b).

(d) This section does not limit the grounds for which a writ of habeas corpus may be prosecuted or preclude the use of any other remedies.

(e)

(1) For purposes of this section, "false evidence" includes opinions of experts that have either been repudiated by the expert who originally provided the opinion at a hearing or trial or that have been undermined by the state of scientific knowledge or later scientific research or technological advances.

(2) This section does not create additional liabilities, beyond those already recognized, for an expert who repudiates the original opinion provided at a hearing or trial or whose opinion has been undermined by scientific research, technological advancements, or because of a reasonable dispute within the expert's relevant scientific community as to the validity of the methods, theories, research, or studies upon which the expert based their opinion.

(f) Notwithstanding any other law, a writ of habeas corpus may also be prosecuted after judgment has been entered based on evidence that a criminal conviction or sentence was sought, obtained, or imposed in violation of subdivision (a) of Section 745, if that section applies based on the date of judgment as provided in subdivision (k) of Section 745. A petition raising a claim of this nature for the first time, or on the basis of new discovery provided by the state or other new evidence that could not have been previously known by the petitioner with due diligence, shall not be deemed a successive or abusive petition. If the petitioner has a habeas corpus petition pending in state court, but it has not yet been decided, the petitioner may amend the existing petition with a claim that the petitioner's conviction or sentence was sought, obtained, or imposed in violation of subdivision (a) of Section 745. The petition shall state if the petitioner requests appointment of counsel and the court shall appoint counsel if the petitioner cannot afford counsel and either the petition alleges facts that would establish a violation of subdivision (a) of Section 745 or the State Public Defender requests counsel be appointed. Newly appointed counsel may amend a petition filed before their appointment. The court shall review a petition raising a claim pursuant to Section 745 and shall determine if the petitioner has made a prima facie showing of entitlement to relief. If the petitioner makes a prima facie showing that the petitioner is entitled to relief, the court shall issue an order to show cause why relief shall not be granted and hold an evidentiary hearing, unless the state declines to show cause. The defendant may appear remotely, and the court may conduct the hearing through the use of remote technology, unless counsel indicates that the defendant's presence in court is needed. If the court determines that the petitioner has not established a prima facie showing of entitlement to relief, the court shall state the factual and legal basis for its conclusion on the record or issue a written order detailing the factual and legal basis for its conclusion.

History

Enacted 1872. Amended Code Amdts 1873–74 ch 614 § 86; Stats 1975 ch 1047 § 2; Stats 2014 ch 623 § 1 (SB 1058), effective January 1, 2015; Stats 2016 ch 785 § 1 (SB 1134), effective January 1, 2017; Stats 2020 ch 317 §

4 (AB 2542), effective January 1, 2021; Stats 2022 ch 739 § 3 (AB 256), effective January 1, 2023; Stats 2022 ch 982 § 1.5 (SB 467), effective January 1, 2023 (ch 982 prevails).

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Appendix N

California Rules of Court

(Revised January 1, 2022)

Rule 4.551. Habeas corpus proceedings

(a) Petition; form and court ruling

(1) Except as provided in (2), the petition must be on the *Petition for Writ of Habeas Corpus* (form HC-001).

(2) For good cause, a court may also accept for filing a petition that does not comply with (a)(1). A petition submitted by an attorney need not be on the Judicial Council form. However, a petition that is not on the Judicial Council form must comply with Penal Code section 1474 and must contain the pertinent information specified in the *Petition for Writ of Habeas Corpus* (form HC-001), including the information required regarding other petitions, motions, or applications filed in any court with respect to the conviction, commitment, or issue.

(3)

(A) On filing, the clerk of the court must immediately deliver the petition to the presiding judge or his or her designee. The court must rule on a petition for writ of habeas corpus within 60 days after the petition is filed.

(B) If the court fails to rule on the petition within 60 days of its filing, the petitioner may file a notice and request for ruling.

(i) The petitioner's notice and request for ruling must include a declaration stating the date the petition was filed and the date of the notice and request for ruling, and indicating that the petitioner has not received a ruling on the petition. A copy of the original petition must be attached to the notice and request for ruling.

(ii) If the presiding judge or his or her designee determines that the notice is complete and the court has failed to rule, the presiding judge or his or her designee must assign the petition to a judge and calendar the matter for a decision without appearances within 30 days of the filing of the notice and request for ruling. If the judge assigned by the presiding judge rules on the petition before the date the petition is calendared for decision, the matter may be taken off calendar.

(4) For the purposes of (a)(3), the court rules on the petition by:

(A) Issuing an order to show cause under (c);

(B) Denying the petition for writ of habeas corpus; or

(C) Requesting an informal response to the petition for writ of habeas corpus under (b).

(5) The court must issue an order to show cause or deny the petition within 45 days after receipt of an informal response requested under (b).

(Subd (a) amended effective January 22, 2019; previously amended effective January 1, 2002, January 1, 2004, January 1, 2007, and January 1, 2009.)

(b) Informal response

(1) Before passing on the petition, the court may request an informal response from:

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(A) The respondent or real pa[illegible]n interest; or

(B) The custodian of any record pertaining to the petitioner's case, directing the custodian to produce the record or a certified copy to be filed with the clerk of the court.

(2) A copy of the request must be sent to the petitioner. The informal response, if any, must be served on the petitioner by the party of whom the request is made. The informal response must be in writing and must be served and filed within 15 days. If any informal response is filed, the court must notify the petitioner that he or she may reply to the informal response within 15 days from the date of service of the response on the petitioner. If the informal response consists of records or copies of records, a copy of every record and document furnished to the court must be furnished to the petitioner.

(3) After receiving an informal response, the court may not deny the petition until the petitioner has filed a timely reply to the informal response or the 15-day period provided for a reply under (b)(2) has expired.

(Subd (b) amended effective January 1, 2007; adopted effective January 1, 2002.)

(c) Order to show cause

(1) The court must issue an order to show cause if the petitioner has made a prima facie showing that he or she is entitled to relief. In doing so, the court takes petitioner's factual allegations as true and makes a preliminary assessment regarding whether the petitioner would be entitled to relief if his or her factual allegations were proved. If so, the court must issue an order to show cause.

(2) On issuing an order to show cause, the court must appoint counsel for any unrepresented petitioner who desires but cannot afford counsel.

(3) An order to show cause is a determination that the petitioner has made a showing that he or she may be entitled to relief. It does not grant the relief sought in the petition.

(Subd (c) amended effective January 1, 2007; adopted effective January 1, 2002.)

(d) Return

If an order to show cause is issued as provided in (c), the respondent may, within 30 days thereafter, file a return. Any material allegation of the petition not controverted by the return is deemed admitted for purposes of the proceeding. The return must comply with Penal Code section 1480 and must be served on the petitioner.

(Subd (d) amended effective January 1, 2007; repealed and adopted effective January 1, 2002; previously amended effective January 1, 2004.)

(e) Denial

Within 30 days after service and filing of a return, the petitioner may file a denial. Any material allegation of the return not denied is deemed admitted for purposes of the proceeding. Any denial must comply with Penal Code section 1484 and must be served on the respondent.

(Subd (e) amended and relettered effective January 1, 2002; adopted as subd (b) effective January 1, 1982.)

(f) Evidentiary hearing; when required

Within 30 days after the filing of any denial or, if none is filed, after the expiration of the time for filing a denial, the court must either grant or deny the relief sought by the petition or order an evidentiary hearing. An evidentiary hearing is required if, after considering the verified petition, the return, any denial, any affidavits or declarations under penalty of perjury, and matters of which judicial notice may be taken, the court finds there is a reasonable likelihood that the petitioner may be entitled to relief and the petitioner's entitlement to relief depends on the resolution of an issue of fact. The petitioner must be produced at the evidentiary hearing unless the court, for good cause, directs otherwise.

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(Subd (f) amended and relettered eff[illegible] January 1, 2002; adopted as subd (c) ef[illegible]e January 1, 1982.)

(g) Reasons for denial of petition

Any order denying a petition for writ of habeas corpus must contain a brief statement of the reasons for the denial. An order only declaring the petition to be "denied" is insufficient.

(Subd (g) amended and relettered effective January 1, 2002; adopted as subd (e) effective January 1, 1982.)

(h) Extending or shortening time

On motion of any party or on the court's own motion, for good cause stated in the order, the court may shorten or extend the time for doing any act under this rule. A copy of the order must be mailed to each party.

(Subd (h) amended and relettered effective January 1, 2002; adopted as subd (f) effective January 1, 1982.)

Rule 4.551 amended effective January 22, 2019; adopted as rule 260 effective January 1, 1982; previously renumbered as rule 4.500 effective January 1, 2001; previously amended and renumbered effective January 1, 2002; previously amended effective January 1, 2004, January 1, 2007, and January 1, 2009.

Advisory Committee Comment

The court must appoint counsel on the issuance of an order to show cause. (*In re Clark* (1993) 5 Cal.4th 750, 780 and *People v. Shipman* (1965) 62 Cal.2d 226, 231-232.) The Court of Appeal has held that under Penal Code section 987.2, counties bear the expense of appointed counsel in a habeas corpus proceeding challenging the underlying conviction. (*Charlton v. Superior Court* (1979) 93 Cal.App.3d 858, 862.) Penal Code section 987.2 authorizes appointment of the public defender, or private counsel if there is no public defender available, for indigents in criminal proceedings.

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