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7
8 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 COUNTY OF CONVICTION
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11 In the Matter of the) Case No.: SS 1234567
12 Application of)
13 A. DEFENDANT,) **PETITION FOR WRIT OF HABEAS**
Petitioner,) **CORPUS; MEMORANDUM OF POINTS**
14) **AND AUTHORITIES; VERIFICATION**
15 For the Writ of)
Habeas Corpus)
16

17 PETITION FOR WRIT OF HABEAS CORPUS
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19 TO THE HONORABLE PRESIDING JUDGE OF
20 THE ABOVE ENTITLED COURT:
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1 **INTRODUCTION**

2 Petitioner A. Defendant, by and through his attorney Criminal Defense Attorney, hereby
3 petitions this Honorable Court for a Writ of Habeas Corpus to vacate and set aside his conviction
4 in this matter, whereby the respondent would be required to show why his continued incarceration
5 is just.

6 **PETITION**

7 Petitioner A. Defendant hereby petitions this Honorable Court for a Writ of Habeas Corpus to
8 vacate and set aside his conviction in this matter, whereby the respondent would be required to
9 show why his continued incarceration is just.

10 Petitioner alleges:

- 11 1. Petitioner A. Defendant is the party for whom this petition is intended and prosecuted. Mr.
12 Defendant is unlawfully restrained of his liberty, being imprisoned by J. Doe, Warden of
13 California Prison, and by the Department of Corrections of the State of California.
- 14 2. The People of the State of California, by and through the Office of the District Attorney
15 for the County of Conviction, are responsible for initiating and continuing the prosecution
16 described against petitioner in Paragraph 1, above, and have an interest in the outcome of
17 this writ proceeding. Thus, the People of the State of California are the Real Party in
18 Interest herein.
- 19 3. The charges against petitioner, as described in Paragraph 2, above, arose from the death of
20 petitioner’s 4-month-old son Defendant Jr. Mrs. Defendant on Date of Birth at City
21 Hospital in City, California. Mr. Defendant’s case came on for trial on Date Trial Started.
22 Pursuant to a negotiated agreement with the prosecution, petitioner waived jury trial and
23 agreed to a court trial, provided that Count (2) (violation of section 273 (a) (B)) be
24 dismissed against him. Instead, an amended Information charging murder, voluntary
25 manslaughter, and involuntary manslaughter would be filed.
- 26 An amended Information was filed on Date Amended Information Filed, charging murder
27 (Penal Code section 187(a)); voluntary manslaughter (Penal Code section 192 (a)); and
28 involuntary manslaughter (Penal Code section 192 (b)). A true copy of said information is

1 attached hereto as Exhibit “A,” and incorporated herein by reference as though fully set
2 forth.

3 4. Petitioner’s court trial began on Date Amended Information Filed and concluded on Date
4 Trial Ended, when the parties presented arguments and trial briefs. The Court then took
5 the matter under submission. On Sentencing Date, the Court found petitioner Defendant
6 guilty of second-degree murder, and denied petitioner’s request for probation. The Court
7 also sentenced Mr. Defendant to a term of 15 years to life in state prison.

8 5. Petitioner Defendant appealed the commitment to the California Court of Appeal, Sixth
9 District. Attorney Ann Appellate, Esq., 1111 1st Street, Another Town, CA 00000
10 represented petitioner for appeal. Ms. Appellate raised the following issues:

11 A. Appellant’s Conviction of Second Degree Murder Must Be Reversed Because It Is
12 Not Supported By Substantial Evidence As Required by the Due Process Clause of
the United States Constitution

13 B. As a Matter of Due Process of Law, *People v. Kelly* Should be Applied to Establish
14 the Reliability and General Acceptance of Evidence of Shaken Baby Syndrome
15 Evidence Before an Expert is Allowed to Testify

16 On Court of Appeal Decision Date, the Court of Appeal issued its decision in docket
17 number H000000, affirming Mr. Defendant’s conviction in this matter.

18 6. On Filing Date for Petition for Review, by and through his attorney Ann Appellate, Esq.,
19 Mr. Defendant filed a Petition for Review in the California Supreme Court. The Petition
20 for Review raised the following issues:

21 A. SBS Evidence Presented by the Prosecution Was Contradicted by the Defense So
22 That the Prosecution Evidence Upon Which the Verdict Rested Did Not Meet the
Due Process Standard for Substantial Evidence

23 B. As a Matter of Due Process of Law, *People v. Kelly* Should be Applied to Test the
24 Reliability and General Acceptance of Evidence of Shaken Baby Syndrome
25 Evidence Before an Expert is Allowed to Testify

26 On California Supreme Court Decision Date, the California Supreme Court issued its
27 decision in docket no. S000000 denying the Petition for Review.

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JURISDICTION

7. This petition is being filed in this Court pursuant to its original habeas corpus jurisdiction. (Cal. Const., art. VI, § 10; Cal. Pen. Code § 1473; Cal. Pen. Code § 1475.) Petitioner maintains that new evidence in the form of hospital error, combined with his trial counsel’s inadequate pretrial investigation deprived him of his due process rights to a fair trial. Penal Code section 1484 allows the Court to act as required in the interests of justice in a particular case. As such, Code of Civil Procedure section 187 provides

[w]hen jurisdiction is, by the Constitution or this Code, or by any other statute, conferred on a Court or judicial officer, all the means necessary to carry it into effect are also given; and in the exercise of this jurisdiction, if the course of proceeding be not specifically pointed out by this Code or the statute, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of this Code. (Cal. Code Civ. Proc. § 187.)

In addition, Code of Civil Procedure section 576 allows “[a]ny judge, at any time before or after commencement of trial, in the furtherance of justice, and upon such terms as may be proper, may allow the amendment of any pleading or pretrial conference order.” (Cal. Code Civ. Proc. § 576.)

PRELIMINARY ALLEGATIONS

8. At all times mentioned herein, petitioner has maintained that he did not cause the death of baby Defendant Jr.. Since petitioner Defendant’s trial and conviction, his habeas counsel has conducted further investigation, resulting in the discovery of evidence that exonerates petitioner from any culpability in the death of Defendant Jr. Mrs. Defendant. Petitioner’s habeas counsel learned of this evidence after consulting with the pediatrics Habeas Expert. A copy of the Declaration of Habeas Expert is attached to this petition and labeled as “Exhibit B.”

9. Based upon his review of the available medical records, Habeas Expert determined that Defendant Jr. likely died from an erroneous intubation procedure while in the ER. Specifically, Habeas Expert noted that the radiologist’s report concerning baby Defendant Jr.’s x-rays showed that the endotracheal tube physicians inserted was located in the right

1 lower lobe bronchus. (Exhibit B, page 6, lines 22 through 24 [hereinafter referred to as
2 “Exhibit B, Declaration of Habeas Expert {6: 22-24}.) A copy of the Dr. Radiologist’s x-
3 ray report is attached to this petition and labeled as “Exhibit C.”

4 According to Dr. Habeas Expert, physicians should insert the endotracheal tube into a
5 patient’s trachea. Dr. Radiologist’s report therefore indicates that hospital personnel
6 improperly inserted the endotracheal tube when treating baby Defendant Jr. As a result of
7 the improper placement of the tube, Defendant Jr. did not receive an adequate amount of
8 oxygen in order to breathe properly.

9 10. Petitioner also alleges that his trial counsel Defense Counsel was ineffective in failing to
10 present potentially exculpatory evidence by his failure to investigate regarding obvious
11 discrepancies between the medical findings and the police reports. For example, the police
12 report prepared by Officer Number One (see Exhibit J, Report by Officer Number One,
13 below) stated that the autopsy of Defendant Jr. occurred on Wrong Autopsy Date at 10:00
14 a.m. In contrast, Dr. Pathologist’s Postmortem Examination Report, as well as his trial
15 testimony shows that he started the autopsy on Actual Autopsy Date at 9:30 a.m. (See
16 Exhibit D, Postmortem Examination Report, and Exhibit K, Report by Officer Number
17 One, below). As Dr. Habeas Expert illustrates, this discrepancy is significant (Exhibit B,
18 Declaration of Habeas Expert{ 12: 18-22}.)

19 11. Pursuant to the provisions of California Evidence Code sections 452(b)(1), 453 and 459,
20 petitioner Defendant respectfully requests that this Court take judicial notice of the
21 superior court file in People v. A. Defendant, Conviction County Superior Court criminal
22 case no. SS 1234567, the file in the Second District Court of Appeal, case no. H00000, and
23 the file in the California Supreme Court, case no. S000000, comprising the direct appeal of
24 petitioner’s case in the trial court.

25 12. At this time, the petitioner has no plain, speedy, or adequate remedy at law to challenge the
26 illegality of the restraint of liberty complained of herein in this petition. Due to the fact
27 that there is no adequate remedy at law, petitioner hereby requests issuance of a writ of
28 habeas corpus.

1 **STATEMENT OF FACTS**

2 **Expert Testimony Concerning Shaken Baby Syndrome**

3 **A. Dr. Prosecutor’s Expert**

4 13. During petitioner’s trial, Dr. Prosecutor’s Expert, Chairman for the Pediatric Department at
5 Prosecution Expert’s Hospital testified for the prosecution. According to Prosecutor’s
6 Expert, Mr. Defendant’s admission to police that he first shook and then hugged Defendant
7 Jr. shortly before Defendant Jr. began having difficulty breathing was consistent with a
8 diagnosis for Shaken Baby Syndrome. However, Prosecutor’s Expert admitted, she noted
9 some bruises on baby Defendant Jr.’s body that were inconsistent with a finding of Shaken
10 Baby Syndrome. As a result, Prosecutor’s Expert could not determine the exact cause of
11 baby Defendant Jr.’s death.

12 **B. Dr. Trial Defense Expert**

13 14. The defense called Dr. Trial Defense Expert, a forensic pathologist and Assistant Coroner
14 in Different City, Different State, as a medical expert. Dr. Trial Defense Expert had
15 recently authored a study published in A Relevant Medical Journal entitled “Fatal Pediatric
16 Head Injuries Caused By Short-Distance Falls,” based upon a review of thousands of
17 incident reports, and an in-depth review of hundreds of child deaths. Based upon his
18 results, Dr. Trial Defense Expert concluded that several general assumptions regarding
19 Shaken Baby Syndrome are erroneous.

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1 15. In petitioner Defendant’s case, Dr. Trial Defense Expert felt that the lack of scientific
2 knowledge regarding the diagnosis of Shaken Baby Syndrome undermined the diagnosis in
3 this case. Indeed, Dr. Trial Defense Expert testified, it was impossible to determine
4 exactly how Defendant Jr. died:

5 There is no identifiable or demonstrable cause for his death. Defendant Jr.
6 has a head injury, but there’s no evidence that the head injury, in and of
7 itself, caused his death. In other words, there wasn’t any brain swelling;
8 the volume of the bleeding on the surface of the brain was too small to
9 have caused the death; he did not have any natural disease processes that I
10 could see, such as pneumonia or severe bronchitis or an inherited heart
11 disease that could have caused his death. I don’t know why he died. The
12 cause of his death is undetermined. (CT {1513: 2-16}).

13
14 Dr. Trial Defense Expert further testified that the autopsy and photographs taken of baby
15 Defendant Jr. did not show any evidence of swelling in the brain, as they did not depict the
16 normal injuries associated with brain swelling. In fact, Dr. Trial Defense Expert stated,
17 between three and four and a half times more blood would have hemorrhaged in Defendant
18 Jr.’s brain if he had suffered a subdural hematoma. (CT {1513: 17-28; 1514:1-28; 1515:
19 1-28; 1516: 1-9}.) Nor did Dr. Trial Defense Expert see any evidence that Defendant Jr.
20 suffered a brain stem injury. (CT {1517: 3-4}.)

21 **Physicians’ Failure to Verify Proper Placement of the Endotracheal Tube**

22 **A. Dr. D. Pathologist**

23 16. Pathologist D. Pathologist conducted the autopsy for baby Defendant Jr.. A copy of the
24 autopsy report dated Actual Autopsy Date is attached to this petition and labeled as
25 “Exhibit D.” As stated in the autopsy, Dr. Pathologist noticed a moderate amount of
26 unclotted blood around certain areas of the brain, as well as some hemorrhaging on
27 Defendant Jr.’s face, neck, shoulders and upper chest. (Exhibit D, Postmortem
28 Examination Report, page 1, paragraph 1.)

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1 Significantly, Dr. Pathologist noted that the endotracheal tube was still in baby Defendant
2 Jr.'s mouth as evidence of recent surgical intervention. However, he did not specify where
3 the tip of the tube was located. There is also no indication that Dr. Pathologist looked at
4 the x-rays or any (Exhibit D, Postmortem Examination Report, page 1, paragraph 1.)

5 17. Although he saw some bruises, Dr. Pathologist did not see any rib fractures when he
6 conducted his internal examination of baby Defendant Jr. Nor did he find any internal
7 injuries to the chest or abdomen. (Exhibit D, Postmortem Examination Report, page 2,
8 paragraph 1.) Dr. Pathologist also saw that the bones of the skull looked normal, without
9 any deformities or tumors. (Exhibit D, Postmortem Examination Report, page 4,
10 paragraph 2.) Subsequently, Dr. Pathologist determined that Defendant Jr. died from
11 Whiplash Shaken Infant Syndrome and Mechanical Asphyxia. (Exhibit D, Postmortem
12 Examination Report, page 5.)

13 18. At trial, Dr. Pathologist testified that he conducted baby Defendant Jr.'s autopsy on
14 September 28, 2000. At that time, Defendant Jr. was the normal size and weight for a baby
15 that age. (CT 523: 1-4.) However, Dr. Pathologist noticed petechial hemorrhages, which
16 he defined as capillaries or "very small broken blood vessels of the skin" causing red spots
17 on the skin.

18 According to Dr. Pathologist, petechial hemorrhages occur when the capillaries burst due
19 to increased pressure within them. Specifically, Dr. Pathologist found petechiae on various
20 places on Defendant Jr.'s body above the armpits. (CT 523: 18-28; 524: 1-19.) Dr.
21 Pathologist subsequently explained that petechiae occur "from cases where an individual
22 has had mechanical compression of the chest, extremely vigorously, such as in
23 resuscitation attempts." (CT 527: 18-20.)

24 19. During cross-examination, Dr. Pathologist testified that he noticed two petechial
25 hemorrhages were located on Defendant Jr.'s lungs, which he felt "could be explained on
26 the basis of compression of the chest." He also acknowledged that vigorous CPR efforts
27 could have caused the petechial hemorrhages above Defendant Jr.'s armpits. (CT 573: 14-
28 28; 574: 1-28; 575:1-13.)

1 20. Significantly, Dr. Pathologist noted the presence of the endotracheal tube in baby
2 Defendant Jr.'s Postmortem Examination Report. (Exhibit D, Postmortem Examination
3 Report, page 1, paragraph 2). However, he did not note the exact placement of the
4 endotracheal tube. (see Exhibit B, Declaration of Habeas Expert, {13: 1-9}.) During the
5 preliminary hearing in Mr. Defendant's case, Dr. Pathologist testified that he did not notice
6 any cuts or abrasions incurred by the endotracheal tube; however, he did not specify its
7 location in Defendant Jr.'s body. (Preliminary Hearing Transcript, 61: 14-21.) In addition,
8 neither side asked Dr. Pathologist about the endotracheal tube during Mr. Defendant's trial.

9 **B. Treating ER Physician**

10 21. On or about Treating ER Physician Interview Date, the Prosecution's Investigator
11 interviewed the Treating ER Physician, an emergency physician associated with City
12 Hospital. A copy of the Prosecution's Investigator's Treating ER Physician Interview
13 Date report concerning his interview with the Treating ER Physician is attached to this
14 petition and labeled as "Exhibit E." According to this report, Defendant Jr. "appeared gray
15 in color, and was not breathing and did not have a pulse." (Exhibit E, Prosecution's
16 Investigator's Interview with Treating ER Physician, page 1, paragraph 3) Consequently,
17 ER personnel began administering CPR. The Treating ER Physician also indicated that
18 ER personnel established an airway by inserting a tube in the lungs. ER personnel
19 simultaneously started an I.V. (Exhibit E, Prosecution's Investigator's Interview with
20 Treating ER Physician, page 1, paragraph 3) At one point, according to the Treating ER
21 Physician, Defendant Jr. had a pulse and was able to breathe; however, Defendant Jr. soon
22 stopped breathing and again had no pulse. (Exhibit E, Prosecution's Investigator's
23 Interview with Treating ER Physician, page 1, paragraph 3) The Treating ER Physician
24 subsequently stopped CPR and pronounced the baby dead. (Exhibit E, Prosecution's
25 Investigator's Interview with Treating ER Physician, page 1, paragraph 3)
26 The Treating ER Physician also stated that he attempted to look for petechial
27 hemorrhaging, but was unable to determine its existence. When he examined Defendant
28 Jr. a second time, The Treating ER Physician noticed bruising on the left side of the

1 forehead and back. (Exhibit E, Prosecution’s Investigator’s Interview with Treating ER
2 Physician, page 1, paragraph 3)

3 22. During Mr. Defendant’s trial, the Treating ER Physician testified that he initially tried to
4 resuscitate baby Defendant Jr., who appeared “very pale and cyanotic” due to lack of
5 oxygen. (CT 1329: 5-12.) Because Defendant Jr. was not breathing, the Treating ER
6 Physician used a device called a laryngoscope to place a breathing tube into Defendant
7 Jr.’s trachea. ER personnel simultaneously administered CPR. (CT 1329: 18-28.) In
8 addition, The Treating ER Physician testified, other colleagues intravenously administered
9 epinephrine and atropine. (CT 1330: 18-28.)

10 23. Subsequently, according to The Treating ER Physician, Defendant Jr. briefly had a pulse.
11 However, The Treating ER Physician stated, the pulse only appeared due to the
12 medications administered. Because the heart sustained damage due to lack of oxygen, it
13 would not maintain a normal rhythm. (CT 1331: 26-28; 1332: 1-16.) Notably, although
14 The Treating ER Physician testified regarding the manner in which Defendant Jr. received
15 CPR, neither side questioned him about using the laryngoscope to insert the breathing tube
16 into Defendant Jr.’s trachea. (see CT 1329.)

17 **C. Dr. D**

18 24. On Date of Interview with Dr. D., the Prosecution’s Investigator spoke with Dr. D about
19 baby Defendant Jr. A copy of the Prosecution’s Investigator’s Interview with Dr. D report
20 is attached to this petition and labeled as “Exhibit F.” Dr. D indicated that she worked at
21 City Hospital the night Defendant Jr. died. When Dr. D arrived, ER personnel were
22 administering CPR to baby Defendant Jr. (Exhibit F, Prosecution’s Investigator’s
23 Interview with Dr. D, page 1, paragraph 2.)

24 At that time, Dr. D indicated, Defendant Jr. did not exhibit signs of petechial
25 hemorrhaging. (Exhibit F, Prosecution’s Investigator’s Interview with Dr. D, page 1,
26 paragraph 2.) Significantly, according to the Prosecution’s Investigator’s report, “Dr. D
27 advised that at the end of CPR being performed was when the petechial hemorrhaging
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1 appeared and in her opinion was caused due to the CPR being performed.” (Exhibit F,
2 Prosecution’s Investigator’s Interview with Dr. D, page 1, paragraph 2.)

3 25. The Coroner’s Investigator also spoke with Dr. D. A copy of the Coroner’s Investigator’s
4 Report is attached to this petition and labeled as “Exhibit G.” As stated in the Coroner’s
5 Investigator’s report, Dr. D indicated that the blood on baby Defendant Jr.’s palate may
6 have been caused by the intubation. (Exhibit G, Report by Coroner’s Investigator, page 3,
7 paragraph 1.)

8 26. During Mr. Defendant’s trial, Dr. D stated that when she arrived, Defendant Jr. was
9 receiving chest compressions “and was intubated and on a breathing machine.” (CT 362:
10 8-9; 363: 14-16.) Notably, Dr. D testified that she did not notice any petechiae when she
11 initially examined baby Defendant Jr., and was unsure exactly when they appeared on
12 Defendant Jr.’s chest. (CT 370: 3-5.) However, when she examined Defendant Jr.’s body
13 after Dr. Pathologist had officially called his death, Dr. D testified that she noticed
14 petechiae across baby Defendant Jr.’s chest and recalled that petechiae may have been on
15 his neck. (CT 370: 25-28; 371: 1-2.) She also indicated that she reviewed x-rays of
16 Defendant Jr.’s body after another doctor ordered them. (CT 371: 3-14.)
17 During cross-examination, defense counsel asked Dr. D about removal of the intubation
18 tube The Treating ER Physician had inserted to help Defendant Jr. breathe. Dr. D testified
19 that she noticed blood on baby Defendant Jr.’s palate, which she indicated that she would
20 not have been able to see without at least moving the tube. Significantly, Dr. D stated that
21 the blood on Defendant Jr.’s palate might have been the result of intubation. She also
22 acknowledged that the force resulting from resuscitative measures could sometimes cause
23 trauma. (CT 391: 5-28; 392: 1-8.)

24 **D. The Third Doctor**

25 27. On Date of Interview with Third Doctor, the Prosecution’s Investigator interviewed Third
26 Doctor, Chief of Pediatrics for City Hospital. A copy of the Prosecution’s Investigator’s
27 report concerning his interview with the Third Doctor is attached to this petition and
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1 labeled as “Exhibit H.” Like Dr. D, the Third Doctor also indicated that Defendant Jr. was
2 receiving CPR when she arrived at the ER.

3 28. Notably, The Third Doctor recalled that Defendant Jr. had a CO2 level of 128. Normally,
4 The Third Doctor indicated, the CO2 level would be in the 30s. In addition, The Third
5 Doctor stated, Defendant Jr.’s CO2 level remained high despite the fact that baby
6 Defendant Jr. was receiving ventilation. (Exhibit H, Prosecution’s Investigator’s
7 Interview with the Third Doctor, page 1, paragraph 2.) Like Dr. D, The Third Doctor
8 indicated that she noticed the petechial hemorrhage after the Treating ER Physician
9 pronounced Defendant Jr.’s death. The Third Doctor later ordered x-rays of Defendant
10 Jr.’s body. (Exhibit H, Prosecution’s Investigator’s Interview with the Third Doctor, page
11 2, paragraph 3.)

12 29. The Third Doctor did not testify during either the preliminary hearing or the trial for Mr.
13 Defendant’s case.

14 **Prior Instances Where Baby Defendant Jr. Stopped Breathing**

15 30. On Date of Incident, Officer Number Two interviewed Mr. Defendant’s nephew MBT
16 (hereinafter referred to as “witness B.”) A copy of Officer Number Two’s Supplemental
17 Report concerning his interview with witness B is attached to this petition and labeled as
18 “Exhibit I.” According to Officer Number Two’ report,

19 B said there was another time that the baby died. He said this happened a
20 long time ago. He was at his aunt’s house in City. His uncle and grandparents
21 were also present. B said the baby had stopped breathing on this occasion
22 also. [Defendant Jr.’s mother] and Defendant had blown into the baby’s
23 mouth, which caused the baby to come back. B said the police or medical
24 personnel were not called. B said this first incident happened sometime ago....

25 B said these grandparents were present during first incident...”

26 (Exhibit I, Report by Officer Number Two, page 3, paragraph 2.)

27 31. On Date of Interview with Mrs. Defendant, the Prosecution’s Investigator interviewed
28 baby Defendant Jr.’s mother Mrs. Defendant. A copy of Prosecution’s Investigator’s
report concerning his interview with Mrs. Defendant is attached to this petition and labeled

1 as “Exhibit J.” Mrs. Defendant indicated that Defendant Jr. had stopped breathing on two
2 other occasions. (Exhibit J, Prosecution’s Investigator’s Interview with Mrs. Defendant,
3 page 5, paragraph 3.) According to Mrs. Defendant, petitioner Defendant once noted that
4 two-month-old Defendant Jr. was not breathing while changing him. Defendant Jr. began
5 breathing after Mr. Defendant blew into his son’s face. (Exhibit J, Prosecution’s
6 Investigator’s Interview with Mrs. Defendant, page 5, paragraph 3.) Mrs. Defendant also
7 indicated that she took baby Defendant Jr. for a doctor’s appointment a few days after this
8 incident. However, the doctor did not find anything wrong. (Exhibit J, Prosecution’s
9 Investigator’s Interview with Mrs. Defendant, page 5, paragraph 3.) Another time,
10 Defendant Jr. apparently stopped breathing while with his grandmother. (Exhibit J,
11 Prosecution’s Investigator’s Interview with Mrs. Defendant, page 5, paragraph 4.)

12 **The Conflicting Reports Concerning Baby Defendant Jr.’s Autopsy**

13 32. Conviction County Police Officer Number One attended Dr. Pathologist’s postmortem
14 examination of baby Defendant Jr.. A copy of Officer Number One’s supplemental report
15 dated Wrong Autopsy Date regarding the autopsy is attached to this petition and labeled as
16 “Exhibit K.” In contrast to Dr. Pathologist’s report, which was dated Actual Autopsy Date
17 at 9:30 a.m., Officer Number One’s report stated that baby Defendant Jr.’s autopsy
18 occurred on Wrong Autopsy Date at 10:00 a.m.

19 33. According to Officer Number One,

20 Dr. Pathologist examined the victim and it was determined the victim had injuries
21 to the right leg area (this being the knee), the right shoulder, the left hand, and he
22 had numerous spots on his head where he and appeared to have been struck and
23 surgery had been performed. The body was examined and Dr. Pathologist
24 determined the following:

24 Dr. Pathologist determined that the victim had several skull fractures which were
25 caused by blunt force trauma. He stated that the victim also had an injury to the
26 right shoulder where he had been struck by an object or had fallen down. He had
27 an injury to his right knee which had been caused by either falling to the ground or
28 being struck. (Exhibit K, Report by Officer Number One, page 1, paragraph 3-4.)

27 However, although Dr. Pathologist’s Postmortem Examination Report states that an
28 “[i]ntravenous catheter is present in the back of the left hand,” the report does not indicate

1 that Defendant Jr.sustained an injury to his right knee. (Exhibit D, Postmortem
2 Examination Report, page 1, paragraph 2; page 2, paragraphs 1-2, to page 3, paragraph 1.)

3 34. Moreover, Officer Number One reported that

4 Dr. Pathologist determined that the victim had several skull fractures
5 which were caused by blunt force trauma. He stated that the victim also
6 had an injury to the right shoulder where he had been struck by an object
7 or had fallen down. He had injury to his right knee which had been caused
8 by either falling to the ground or being struck. (Exhibit K, Report by
9 Officer Number One,, page 1, paragraph 4.)

10 However, the autopsy report does not mention skull fracture(s) or any injury to the right
11 knee. In fact, Dr. Pathologist determined that baby Defendant Jr.'s skull looked normal. In
12 addition, neither the medical records nor Dr. Pathologist's report or court testimony state
13 that Defendant Jr. suffered "numerous spots on his head where he had been struck".

14 (Exhibit D, Postmortem Examination Report, page 4, paragraph 2.); CT 520: 1-28 through
15 795: 1-28; see also Exhibit K, Report by Officer Number One, page 1, paragraph 3.)

16 35. Subsequently, Officer Number One stated

17 Dr. Pathologist, after examination of the head, determined that the victim
18 would not have survived from these injuries due to the mass damage which
19 had been done. One skull fracture went from complete left to right and the
20 other ones had cracked the skull in the outer portion. The victim also had his
21 left ear split wide open, and going all the way to the skull. (Exhibit K, Report
22 by Officer Number One, page 1, paragraph 7.)

23 Again, the Postmortem Examination Report does not indicate fractures to the skull. In
24 addition, Dr. Pathologist's report indicates that the left ear was apparently intact. (Exhibit
25 D, Postmortem Examination Report, page 4, paragraph 2.) In addition, Officer Number
26 One noted "[o]ne skull fracture went from complete left to right and the other ones had
27 cracked [sic] the skull in the outer portion. The victim also had his left ear split wide open,
28 going all the way to the skull." (Exhibit K, Report by Officer Number One, page 1,
paragraph 7.)

36. Officer Number One's report also noted "[f]urther examination of the victim revealed that
he had seven broken ribs on the left side of the body." (Exhibit K, Report by Officer

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Number One, page 1, paragraph 5.) In contrast, the autopsy report states: “No rib fractures or internal injuries of the organs of the chest or abdomen are observed, with the exception of occasional petechiae of the tops of both lungs.” (Exhibit D, Postmortem Examination Report, page 2, paragraph 2.)

37. Finally, Officer Number One’s report stated that Dr. Pathologist determined that the victim died of blunt force trauma. (Exhibit K, Report by Officer Number One, page 1, paragraph 8.) However, both the death certificate for Defendant Jr. (which is attached to this pleading as “Exhibit L,”) and Dr. Pathologist’s report concluded that Baby Defendant Jr. died from Whiplash Shaken Infant Syndrome & Mechanical Asphyxia. (Exhibit L; see also Exhibit D, Postmortem Examination Report, page 5.)

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38. Officer Number One did not testify during either the preliminary hearing or the trial for Mr. Defendant’s case.

PRAYER

WHEREFORE, petitioner prays for judgment as follows:

- 1. That a writ of habeas corpus be granted, directed to the Department of Corrections of the State of California commanding him or her to have the body of A. Defendant brought before this Court at a specified time;
- 2. That the sentence imposed on him is ordered reversed and set aside; and,
- 3. For any other and further relief as the court may deem proper.

Dated: _____

CRIMINAL DEFENSE ATTORNEY
Attorney for Petitioner
A. DEFENDANT

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5 Attorney for Defendant
6 A. DEFENDANT

7 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
8 COUNTY OF CONVICTION
9

10 In the Matter of the) Case No.: NR SS002270
11 Application of)
12 A. DEFENDANT,) MEMORANDUM OF POINTS AND
Petitioner,) AUTHORITIES IN SUPPORT OF PETITION
13) FOR WRIT OF HABEAS CORPUS
14 For the Writ of)
Habeas Corpus)

15
16 **I.**

17 **A PETITION FOR WRIT OF HABEAS CORPUS IS THE APPROPRIATE PROCEDURE**
18 **TO OBTAIN RELIEF FOR PETITIONER**

19 "Habeas corpus will lie to vindicate a claim that newly discovered evidence demonstrates a
20 prisoner is actually innocent." (*In re Hardy* (2007) 41 Cal.4th 977, 1016 [63 Cal. Rptr. 3d 845, 163
21 P.3d 853].) In addition, "[w]here the record does not illuminate the basis for the challenged acts
22 or omissions, a claim of ineffective assistance is more appropriately made in a petition for habeas
23 corpus. In habeas corpus proceedings, there is an opportunity in an evidentiary hearing to have
24 trial counsel fully describe his or her reasons for acting or failing to act in the manner complained
25 of. (*People v. Pope* (1979) 23 Cal.3d 412,426, quoting Cal. Pen. Code, §§ 1483 and 1484; e.g., *In*
26 *re Williams* (1969) 1 Cal.3d 168 [81 Cal.Rptr. 784, 460 P.2d 984].)

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1 In petitioner Defendant’s case, habeas counsel’s expert discovered that baby Defendant Jr.’s
2 medical records show that the endotracheal tube ER personnel inserted was located in the left
3 bronchus area, causing the left lung to collapse. Furthermore, the only medical record from the
4 day Defendant Jr. died that references the location of the endotracheal tube is the report prepared
5 by Dr. Radiologist. (see Exhibit C, Report by Dr. Radiologist, page 1, paragraphs 1-2.) With the
6 exception of the Postmortem Examination Report, which merely notes the existence of the
7 endotracheal tube, none of the other medical records note it. (see Exhibit D, Postmortem
8 Examination Report, page 1, paragraph 2.)

9 Petitioner also contends that his trial attorney deprived him of his constitutional rights to the
10 effective assistance of counsel by his failure to properly investigate the circumstances of Mr.
11 Defendant’s case. Numerous inconsistencies exist between Dr. Pathologist’s Postmortem
12 Examination Report and Officer Number One’s report concerning baby Defendant Jr.’s autopsy.
13 For example, the date of Officer Number One’s report concerning baby Defendant Jr.’s autopsy
14 directly contradicts the date specified on Dr. Pathologist’s autopsy report. (see Exhibit D,
15 Postmortem Examination Report, page 1, Exhibit K, page 1, paragraph 1.) As Habeas Expert’s
16 declaration states, the date and time of the autopsy is significant. (Exhibit B, Declaration of
17 Habeas Expert { 12: 18-22}.) These obvious discrepancies clearly should have alerted defense
18 counsel to the need for an independent investigation of the facts surrounding Mr. Defendant’s
19 case, as well as to the necessity of questioning Officer Number One during trial.

20 Finally, both B’s statement to Officer Number Two and Mrs. Defendant’s testimony during
21 trial regarding prior instances where baby Defendant Jr. had stopped breathing should have alerted
22 defense counsel to the necessity for obtaining additional medical expertise.

23 **II.**

24 **THE PETITION FOR WRIT OF HABEAS CORPUS IS NOT UNTIMELY**

25 To avoid a claim of untimeliness, a “petitioner has the burden of establishing (i) the absence of
26 substantial delay, (ii) good cause for the delay, or (iii) that the claim falls within an exception to
27 the bar of untimeliness.” (*In re Robbins* (1998) 18 Cal.4th 770, 780 [77 Cal.Rptr.2d 153; 959 P.2d
28 311]; *In re Gallego* (1998) 18 Cal.4th 825,831 [77 Cal.Rptr.2d 132; 959 P.2d 290].) Petitioner

1 Defendant maintains that good cause exists to justify the delay, and that his claim falls within an
2 exception to the bar of untimeliness.

3 **A. Good Cause for Delay**

4 Even where the filing of a Petition for Writ of Habeas Corpus is substantially delayed, the
5 Court may consider it on the merits if the petitioner can demonstrate “good cause” for doing so.
6 (*In re Robbins, supra*, 18 Cal.4th at p. 805.) The California Supreme Court has held that a
7 meritorious claim for relief may establish good cause for delay in presenting the claim. (*In re*
8 *Clark* (1993) 5 Cal.4th 750, 781, fn. 17 [21 Cal.Rptr.2d 509, 855 P.2d 729].) The declaration of
9 Criminal Defense Attorney, petitioner’s habeas counsel, is attached to this petition and labeled as
10 “Exhibit M.” Habeas counsel states that, due to the complexity of this case, he was only recently
11 able to obtain a report from pediatric Habeas Expert in this matter.

12 As will be explained, Habeas Expert discovered that the endotracheal tube ER personnel meant
13 to insert into baby Defendant Jr.’s trachea was improperly inserted into the lower left bronchus.
14 (Exhibit B, Declaration of Habeas Expert, {13: 1-9}.) Clearly, the discovery of evidence with the
15 potential to exonerate a defendant will excuse such a delay in filing. Hence, because Habeas
16 Expert’s findings are crucial to establish Mr. Defendant’s innocence, good cause exists for the
17 delay in filing the petition.

18 **B. Other Exceptions to the Bar for Untimeliness**

19 In general, the Court will deny an untimely petition without sufficient justification for the
20 delay. “The only exception to this rule are petitions which allege facts which, if proven, would
21 establish that a *fundamental* miscarriage of justice occurred as a result of the proceedings leading
22 to a conviction and/or sentence.” (*In re Clark, supra*, 5 Cal.4th at p.797, emphasis in the original.)
23 The *Robbins* Court viewed this exception to the bar of untimeliness as “[an] error of constitutional
24 magnitude led to a trial that was so fundamentally unfair that absent the error no reasonable judge
25 or jury would have convicted the petitioner”. (*In re Robbins, supra*, 18 Cal.4th at p. 811.)

26 In addition to the new evidence concerning the endotracheal tube physicians erroneously
27 inserted into baby Defendant Jr.’s lower left bronchus, defense counsel’s subpar investigation
28 deprived Mr. Defendant of several constitutional rights. Both the statement witness B provided to

1 Officer Number Two and the statement Mrs. Defendant provided to the Prosecution’s Investigator
2 described prior instances where baby Defendant Jr. had stopped breathing. Although petitioner
3 Defendant’s trial counsel had timely received both of these reports, there is no indication that he
4 made an effort to retain an applicable expert or otherwise conduct his own investigation

5 In addition, the blatant inconsistencies between Dr. Pathologist’s Postmortem Examination
6 Report and Officer Number One’s report of the autopsy should have alerted defense counsel to the
7 necessity of impeaching Officer Number One during trial. The failure to do so deprived petitioner
8 Defendant of his constitutional right to confront and cross-examine Officer Number One.
9 Consequently, by depriving Mr. Defendant of his rights to the effective assistance of counsel,
10 attorney Defense Counsel effectively deprived him of his constitutional right to a fair trial.

11 III.

12 **EXPERT ANALYSIS OF THE MEDICAL RECORDS LEAD TO THE DISCOVERY OF** 13 **EVIDENCE THAT REVEALS BABY DEFENDANT JR. DIED BECAUSE HE WAS NOT** 14 **PROPERLY INTUBATED**

15 California case law establishes that "a habeas corpus petitioner must first present newly
16 discovered evidence that raises doubt about his guilt; once this is done, he may introduce 'any
17 evidence not presented to the trial court and which is not merely cumulative in relation to evidence
18 which was presented at trial' . . . insofar as it assists in establishing his innocence." (*In re Hall*
19 (1981) 30 Cal. 3d 408, 420 [179 Cal.Rptr. 223; 637 P.2d 690].) Petitioner’s situation satisfies the
20 test articulated by the California Supreme Court in *In re Weber*, (1974) 11 Cal.3d 703, 724, which
21 specifies that “newly discovered evidence will not undermine the case of the prosecution so as to
22 warrant habeas corpus relief unless (1) the new evidence is conclusive, and (2) it points unerringly
23 to innocence.” (*In re Weber*, (1974) 11 Cal.3d 703, 724 [114 Cal. Rptr. 429, 523 P.2d 229].)

24 When he spoke with Prosecution’s Investigator from the District Attorney’s Office, the
25 Treating ER Physician indicated that he established an airway for Defendant Jr. by inserting a tube
26 through the lungs. (Exhibit E, Prosecution’s Investigator’s Interview with Treating ER Physician,
27 page 1, paragraph 3.) During Mr. Defendant’s trial, the Treating ER Physician testified that about
28 using a device called a laryngoscope to place a breathing tube into Defendant Jr.’s trachea. (CT

1 1329: 18-28.) As shown by the report prepared by Dr. Radiologist, baby Defendant Jr.'s x-ray
2 showed that the endotracheal tube was located in the left bronchus. Specifically, Dr. Radiologist
3 found that the "[e]ndotracheal tube tip [was in the] right lower lobe bronchus[sic] with right
4 perihilar opacity and left lung atelectasis [collapse of the lung]." (Exhibit C, Report by Dr.
5 Radiologist, page 1, paragraph 2.)

6 This fact, Habeas Expert indicates, is highly significant, as the improper placement of the
7 endotracheal tube caused Defendant Jr.'s left lung to collapse. (Exhibit B, Declaration of Habeas
8 Expert {6: 22-28; 7:1-11}.) According to medical experts,

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10 Intubation is a commonly performed medical procedure in which an artificial
11 airway is established in a patient to provide proper gas exchange. *It depends on the*
12 *proper insertion of the endotracheal tube into the trachea* instead of the esophagus.
13 The placement of the endotracheal tube into the esophagus can lead to death, brain
14 damage, insufflation of the stomach, damage to the epiglottis and does not correct
15 the improper gas exchange. Improper placement of the endotracheal tube can be
16 difficult to detect, and dramatically increases the intubation procedure time, often
17 leading to complications. ***This problem is significantly magnified in different***
airway cases such as those involving trauma or anatomical obstructions. (Pinskiy,
18 V.; Mori, N.; Harsh Shah; Dudhat, P.; Atlas, G. Capnography-Guided Intubation
19 (April 2006) Bioengineering Conference, 2006. Proceedings of the IEEE 32nd
20 Annual Northeast Volume, Issue 01-02, pp. 101 – 102, emphasis added.)

21 If done correctly, "[e]ndotracheal intubation (ETI) is a rapid, simple, safe and non surgical
22 technique that achieves all the goals of airway management." (Divatia J. V., Bhowmick K.,
23 *Complications Of Endotracheal Intubation and Other Airway Management Procedures* (2005)
24 49(4) *Indian J. Anaesth.* 308.)

25 Specifically, ETI "maintains airway patency, protects the lungs from aspiration and permits
26 leak free ventilation during mechanical ventilation, and remains the gold standard procedure for
27 airway management." (*Ibid.*) However, as Dr. Divatia and Dr. Bhowmick caution, "[b]oth ETI
28 and the use of the other airways are associated with complications, some of them life threatening."
(*Ibid.*) In fact, failing "to achieve oxygenation will result in death or hypoxic brain damage. (*Id.*
at 309.)

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1 For example, “[c]omplications are likely in infants, children and adult women, as they have a
2 relatively small larynx and trachea and are more prone to airway oedema [swelling and/or fluid
3 accumulation in the lungs].” (*Id.* at 308.) Specifically, bronchial intubation may result from an
4 improperly placed endotracheal tube. According to Drs. Divatia and Bhowmick, endobronchial
5 intubation occurs when the endotracheal tube is inserted into one of the “mainstream bronchi
6 [airway to the lungs].” (*Id.* at 309.) “Endobronchial intubation is most common when the
7 distance for the tube tip to be placed properly above the carina yet below the vocal cords is
8 minimal, as in small children.” (*Id.* at 309-310.) Consequently, “[t]he unintubated lung does not
9 contribute to gas exchange, and the large volume of blood flowing through this lung results in a
10 substantial right to left shunt resulting in hypoxia [a condition causing an inadequate supply of
11 oxygen in the blood].” (*Id.* at 310.)

12 In addition, as Drs. Divatia and Bhowmick found, “***properly placed tubes may change their***
13 ***position during head movement or repositioning of the patient.***” (*Ibid.*, emphasis added.)
14 During petitioner Defendant’s trial, Dr. D testified that, although she could not remember
15 removing the endotracheal tube, ***she or someone else had to at least move the tube in order to***
16 ***properly examine baby Defendant Jr.’s palate.*** She also admitted that faulty intubation may have
17 caused the blood on Defendant Jr.’s palate, and acknowledged that forceful resuscitation methods
18 could sometimes result in additional trauma. (CT 391: 5-28; 392: 1-8, see also Exhibit H, Report
19 by Conviction County Coroner’s Investigator, page 3, paragraph 1.)

20 Although Dr. D testified that she reviewed x-rays of baby Defendant Jr.’s body and indicated
21 that she may have moved the endotracheal tube to better examine Defendant Jr., she did not
22 specify where the tube was located. (CT 371: 3-14.) Nor is it clear whether she examined
23 Defendant Jr.’s body before or after reviewing his x-ray. (CT 371: 3-14.) The American College
24 of Emergency Physicians (ACEP) has endorsed several principles regarding the proper placement
25 of the endotracheal tube. A copy of the ACEP policy statement entitled “Verification of
26 Endotracheal Tube Placement” is attached to this petition and labeled as “Exhibit N.”
27 Significantly, the ACEP has stated that “[v]erification of endotracheal tube placement should be
28 completed in all intubated patients, and reconfirmation of endotracheal tube position ***should be***

1 *done in all patients when their clinical status changes*, or when there is any concern about proper
2 tube placement.” (Verification of Endotracheal Tube Placement (October 2001) American
3 College of Emergency Physicians <http://www.acep.org/practres.aspx?id=29846> [as of July 17,
4 2008], emphasis added)

5 In Mr. Defendant’s case, the Treating ER Physician’s, Dr. D’s and the Third Doctor’s
6 respective trial testimonies all indicated that baby Defendant Jr. was able to briefly breathe on his
7 own before additional resuscitation measures were needed. Clearly, Defendant Jr.’s vital signs
8 changed at this time. Nonetheless, neither the medical records nor each doctors’ respective
9 testimony to either the Prosecution’s Investigator or during trial indicate that attempts were made
10 to verify the position of the endotracheal tube.

11 Notably, neither the Third Doctor nor the Treating ER Physician mentioned any findings
12 regarding placement of the endotracheal tube, either during their interviews with the Prosecution’s
13 Investigator . Nor did the Treating ER Physician refer to the endotracheal tube when testifying at
14 Mr. Defendant’s trial, although he made a brief reference during the preliminary hearing.
15 (Preliminary Hearing Transcript, 61: 14-21.) In addition, although Dr. Pathologist’s autopsy
16 report indicates that the tube remained in Defendant Jr.’s body after death, Dr. Pathologist failed
17 to note the internal placement of the endotracheal tube. (Exhibit D, page 1, paragraph 2).

18 The presence of petechial hemorrhages on baby Defendant Jr.’s body was also significant.
19 When the Prosecution’s Investigator interviewed Dr. D, she indicated that the petechial
20 hemorrhages were initially not present. According to Dr, D, petechial hemorrhages occur by an
21 obstruction in an individual’s airway, which causes pressure on the veins inside the head. When
22 too much pressure occurs, the veins burst, causing petechial hemorrhages. (Exhibit F,
23 Prosecution’s Investigator ’s Interview with Dr. D., page 1, paragraph 2.)

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IV.

**TRIAL COUNSEL’S FAILURE TO RETAIN AN APPROPRIATE MEDICAL EXPERT
TO INVESTIGATE PRIOR INSTANCES WHERE BABY DEFENDANT JR.HAD
STOPPED BREATHING VIOLATED PETITIONER’S CONSTITUTIONAL RIGHTS TO
EFFECTIVE ASSISTANCE OF COUNSEL**

Because the concept of “innocent until proven guilty” is so vitally important, a criminal defendant is constitutionally entitled to representation by counsel, “for it is through counsel that the accused secures his other rights” and ensures a fair trial. (*Kimmelman v. Morrison* (1986) 477 U.S. 365, 377 [106 S.Ct 2574, 2584; 91 L.Ed.2d 305], citing *Maine v. Moulton*, (1985) 474 U. S. 159, 168-170 [106 S.Ct. 477. 88 L.Ed.2d 481]; *United States v. Cronin*, 466 U. S. 648, 653 [104 S.Ct. 2039. 80 L.Ed.2d 657].) “In other words, the right to counsel is the right to effective assistance of counsel.” (*Id.* at 377-387, [106 S.Ct. at 2584], citing, *Evitts v. Lucey* (1985) 469 U.S. 387, 395-96 [105 S.Ct. 830, 835-36; 83 L.Ed.2d 821]; *Strickland v. Washington*, (1984) 466 U.S. 668, 686 [104 S.Ct. 2052. 80 L.Ed.2d 674]; *United States v. Cronin, supra*, 466 U.S.at 654.) Both the United States Constitution and California Constitution also grant the accused the right to effective assistance of counsel in criminal cases. (*People v. Ledesma* (1987) 43 Cal.3d 171, 215 [233 Cal.Rptr. 404, 729 P.2d 839], citing 6th Amend.; Cal. Const., Art. I § 15.)

Habeas corpus relief is warranted where the defendant shows “(1) counsel’s representation was deficient, i.e., it fell below an objective standard of reasonableness under prevailing professional norms; and (2) counsel’s defective representation subjected the defense to prejudice, i.e., there is a reasonable probability that but for counsel’s failings, the result would have been more favorable.” (Citation) (*People v. Camilleri* (1990) 220 Cal.App.3d 1199, 1203; *Strickland, supra*, 466 US at 687, 691-694 [80 L.Ed.2d 674, 693, 696-98, 104 S.Ct. 2052, 2064, 2067-68]; *Ledesma supra*, 43 Cal.3d at pp. 216-218.) As such, the right to effective assistance of counsel “entitles [a defendant] to the ‘reasonably competent assistance of an attorney acting as his diligent conscientious advocate.’” (*In re Fields*, 51 Cal. 3d 1063; 1069, [800 P.2d 862; 865, 275 Cal. Rptr. 384, 38], citing *In re Cordero* (1988) 46 Cal.3d 161,180 [756 P.2d 1370; 249 Cal. Rptr. 342].) Hence, “[i]f counsel’s failure is crucial to a potentially meritorious defense, ‘the defendant has not

1 had the assistance to which he is entitled.” (*People v. Pope, supra*, 23 Cal.3d at 424-425, quoting
2 *In re Saunders* (1970) 2 Cal.3d 1033,1042 [88 Cal.Rptr. 633; 472 P.2d 921]..)

3 **A. Defense Counsel’s Duty to Retain an Expert In Order to Investigate Prior Incidents**
4 **Where Defendant Jr.Had Stopped Breathing**

5 As the *Strickland* Court found, “counsel has a duty to make reasonable investigations or to
6 make a reasonable decision that makes particular investigations unnecessary.” (*Strickland v,*
7 *Washington, supra*, 466 U.S. at 691.) The American Bar Association also dictates that “[d]efense
8 counsel should conduct a prompt investigation of the circumstances of the case and explore all
9 avenues leading to facts relevant to the merits of the case and the penalty in the event of
10 conviction.” (ABA Standards for Criminal Justice: Prosecution and Defense Function (3d ed.,
11 1993) Standard 4-4.1(a).) “It is well settled that under *Strickland*, ‘attorneys have considerable
12 latitude to make strategic decisions about what investigations to conduct ***once they have gathered***
13 ***sufficient evidence upon which to base their tactical choices.***’” (*Miller v. Terhune* (2007
14 E.D.C.A.) 510 F. Supp. 2d 486, 499, quoting *Jennings v. Woodford* (9th Cir. 2002) 290 F.3d 1006,
15 1014; *Strickland v, Washington, supra*, 466 U.S. at 691, emphasis added.) Consequently, “[a]
16 lawyer who fails adequately to investigate and introduce . . . [evidence] that demonstrate[s] his
17 client's factual innocence, or that raise[s] sufficient doubt as to that question to undermine
18 confidence in the verdict, renders deficient performance.” (*Duncan v. Ornoski* 2008 U.S. App.
19 LEXIS 13308, 29-30 [defense counsel's failure to investigate and subsequently present potentially
20 exculpatory serological evidence constituted deficient performance], quoting *Hart v. Gomez*, (9th
21 Cir. 1999) 174 F.3d 1067, 1070.)

22 Defense counsel’s obligation to investigate is therefore necessary in determining which experts
23 to consult. (*Caro v. Calderon* (9th Cir. 1998) 165 F.3d 1223,1226.) This is imperative to ensure
24 an accused’s right to due process and a fair trial, since “[e]xpert evidence is necessary on such
25 issues when lay people are unable to make a reasoned judgment alone.” (*Id.* at1227.) Indeed,
26 without a thorough understanding of the facts and the evidence, no attorney – no matter how well
27 schooled he or she is in the principles of law – can competently decide how to effectively assist or
28 advise a client.

1 In petitioner Defendant's case, both witness B and Mrs. Defendant discussed prior instances
2 where baby Defendant Jr. had stopped breathing. Clearly, knowledge of these incidents where
3 Defendant Jr. had stopped breathing should have alerted defense counsel that other possible causes
4 for Defendant Jr.'s death might exist. Indeed, according to Dr. Habeas Expert, this fact is
5 significant. (Exhibit B, Declaration of Dr. Habeas Expert {15: 24-28; 16: 1-2}.) Moreover,
6 attorney Defense Counsel should have recognized that the complexity of the evidence required
7 him to consult additional medical experts in order to properly understand and explain its
8 significance. (see *Caro v. Calderon, supra*, 165 F.3d at 1227.) After reviewing the available
9 evidence, a reasonable attorney would have realized that the fact Defendant Jr. suffered similar
10 symptoms in the past is highly significant.

11 **B. Prejudice Resulting From Defense Counsel's Failure to Retain an Appropriate Expert**

12 To satisfy the second prong of the *Strickland-Ledesma* test petitioner must show that "there is
13 a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding
14 would have been different. A reasonable probability is a probability sufficient to undermine
15 confidence in the outcome." (*Strickland v. Washington, supra*, 466 U.S. at 694.) In other words,
16 the petitioner must show that counsel's failure to act "renders the result of the trial unreliable or
17 the proceeding fundamentally unfair." (*Lockhart v. Fretwell*, (1993) 506 U.S. 364, 372,[113 S. Ct.
18 838, 122 L. Ed. 2d 180].)

19 As previously discussed, a reasonable attorney would have recognized that prior instances
20 where baby Defendant Jr. stopped breathing could be significant to petitioner's case. Although
21 defense counsel did retain Dr. Trial Defense Expert to testify about the fallacies inherent in
22 Shaken Baby Syndrome, there is no evidence that he consulted with experts skilled in other areas
23 of medicine to determine other possible causes of Defendant Jr.'s death. Indeed, evidence that
24 Defendant Jr. had previously experienced similar symptoms would have unquestionably cast
25 doubt on petitioner Defendant's culpability.

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V.

**TRIAL COUNSEL’S FAILURE TO INVESTIGATE THE DISCREPANCIES BETWEEN
DR. PATHOLOGIST’S REPORT AND OFFICER NUMBER ONE’S REPORT
DEPRIVED PETITIONER OF HIS FEDERAL AND STATE CONSTITUTIONAL RIGHTS
TO THE EFFECTIVE ASSISTANCE OF COUNSEL BY PRECLUDING
IMPEACHMENT OF OFFICER NUMBER ONE**

**A. Defense Counsel’s Duty to Investigate in Preparation for Impeachment of Material
Witnesses**

**1. Failure to Investigate Discrepancies Between Dr. Pathologist’s Postmortem
Report and Officer Number One’s Police Report**

Defense counsel’s duty to investigate pursuant to *Strickland* "includes the obligation to investigate all witnesses who may have information concerning his or her client's guilt or innocence." (*Towns v. Smith*, (6th Cir.2005) 395 F.3d 251, 258.) Furthermore, “*Strickland* does not establish that a cursory investigation automatically justifies a tactical decision with respect to sentencing strategy. Rather, a reviewing court must consider the reasonableness of the investigation said to support that strategy.” (*Wiggins v. Smith* (2003) 539 U.S. 510, 527 [123 S. Ct. 2527, 2538; 156 L. Ed. 2d 471, 489], citing *Strickland v. Washington*, *supra*, 466 U.S., at 691.)

A defendant proves the second part of the *Strickland Ledesma* test by showing “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” (*Strickland v. Washington*, *supra*, 466 US at 694.) A “reasonable probability” is “a probability sufficient to undermine confidence in the outcome.” (*Ibid.*) To determine the whether counsel's inadequate representation prejudiced a defendant, a reviewing court will “examine the evidence that could have been presented to the jury had counsel performed competently and compare that to the evidence that the jury actually heard.” (*Duncan v. Ornoski*, *supra*, 2008 U.S. App. LEXIS 13308, 46, citing *Bonin v. Calderon*, (9th Cir. 1995) 59 F.3d 815, 834.) “If the difference between the evidence that could have been presented and that which actually was presented is sufficient to "undermine confidence in the outcome" of the proceeding, the prejudice prong is satisfied. (*Id.*_at 46-47, quoting *Strickland v. Washington*, *supra*, 466 U.S. at 694.)

1 a. **The Reasonableness of Counsel’s Decision Not to Call Officer Number One as**
2 **a Witness During Trial**

3 Prior to trial, defense counsel had timely received both the police report by Officer Number
4 One, and Dr. Pathologist’s Postmortem Examination Report. Many of the inconsistencies were
5 blatantly obvious. For example, Officer Number One’s report stated that he attended baby
6 Defendant Jr.’s autopsy with Crime Scene Investigator on Wrong Autopsy Date. (Exhibit K,
7 Report by Officer Number One, page 1, paragraph 3.) This clearly contradicts Dr. Pathologists’
8 report, which states that he conducted the autopsy on the Actual Autopsy Date. (Exhibit D,
9 Postmortem Examination Report, page 1, paragraph 1; CT 522: 1-4.) As Habeas Expert indicates,
10 the date Dr. Pathologist conducted the autopsy is significant. (Exhibit B, Declaration of Habeas
11 Expert, {13: 25-28; 14: 1-6}.)

12 Here, even a cursory analysis of the discrepancies between Dr. Pathologist’s report and Officer
13 Number One’s report would have shown attorney Defense Counsel that additional investigation
14 was necessary to prepare a defense for Mr. Defendant. Defense counsel’s apparent failure to even
15 attempt to contact Officer Number One indicates that he “abandoned his investigation at an
16 unreasonable juncture, making a fully informed decision with respect to [whether to call Officer
17 Number One as a witness] impossible.” (*Wiggins v. Smith, supra*, 539 U.S. at 527-28.) Indeed,
18 there is no indication that trial counsel independently investigated Mr. Defendant’s case at all;
19 instead, defense counsel relied on reports from the prosecution’s investigator. Given the existence
20 of such glaring inconsistencies from readily available evidence, defense counsel’s decision not to
21 call Officer Number One as a material witness during trial cannot be considered reasonable.

22 b. **Prejudice Resulting From Defense Counsel’s Decision**

23 Petitioner contends that his trial counsel’s failure to call Officer Number One as a material
24 witness during trial prejudiced his case by depriving him his constitutional rights to confrontation.
25 It is well settled that an accused is constitutionally entitled to cross-examine a material witness
26 against him. (*Davis v. Alaska* (1974) 415 U.S. 308, 315-316 [39 L.Ed.2d 347, 94 S.Ct. 1105];
27 *Douglas v. Alabama* (1965) 380 U.S. 415, 418 [13 L.Ed.2d 934, 85 S.Ct. 1074].) Indeed, an
28 accused right to cross-examination is “an essential and fundamental requirement for the kind of

1 fair trial which is this country’s constitutional goal.” (*Pointer v. Texas* (1965) 380 U.S. 400, 405
2 [13 L.Ed.2d 923, 85 S.Ct. 1065].

3 Specifically, “the right to [cross-examine] includes the opportunity to show that a witness is
4 biased, or that the testimony is exaggerated or unbelievable.” (*Pennsylvania v. Ritchie* (1986) 480
5 U.S. 39, 51 [94 S.Ct. 40, 107 S.Ct. 989]; accord, *United States v. Abel* (1984) 469 U.S. 45, 50 [83
6 L.Ed.2d 450, 105 S.Ct. 465].) As a result, “[p]rejudice ensues from a denial of the opportunity to
7 put the weight of [the witness’s] testimony and his credibility to a test, without which the jury
8 cannot fairly appraise them.” (*Alford v. United States* (1930) 282 U.S. 687, 691-692 [75 L.Ed.2d
9 624, 51 S.Ct. 218].) Consequently, denial of the right to cross-examination effectively denies the
10 accused a fair trial. (*Ibid.*)

11 Without having interviewed or otherwise communicated with Officer Number One prior to
12 trial, defense counsel “was ill equipped to assess [his] credibility or persuasiveness as a witness,”
13 or to evaluate and weigh the risks and benefits of putting him on the stand. (*Towns v. Smith*,
14 *supra*, 395 F.3d at 402, quoting *Bryant v. Scott* (5th Cir. 1994) 28 F.3d 1411, 1419 (finding
15 ineffective assistance where counsel failed to interview a witness who admitted to committing the
16 crime and maintained that the defendant was not involved). In addition, while a reviewing court
17 "cannot presume prejudice from the mere fact of counsel's alleged inaction, . . . reversal is
18 compelled where appellant can demonstrate he was denied an adjudication on potentially
19 meritorious issues due to counsel's inadequate preparation.” (*People v. Bess* (1984) 153
20 Cal.App.3d 1053, 1060 [200 Cal.Rptr. 773], citing *People v. Jackson* (1980) 28 Cal.3d 264, 289
21 [168 Cal.Rptr. 603, 618 P.2d 149] *People v. Shaw* (1984) 35 Cal.3d 535 [198 Cal.Rptr. 788, 674
22 P.2d 759].)

23 Here, by failing to have Officer Number One testify, attorney Defense Counsel denied Mr.
24 Defendant the opportunity to impeach Officer Number One’s credibility. Had petitioner been able
25 to impeach Officer Number One, he would have been able to show that the prosecution had deeply
26 exaggerated the extent of baby Defendant Jr.’s injuries.

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CONCLUSION

The complexity of the medical issues involved in this case created the necessity for review by multiple experts. Evidence that ER personnel improperly inserted an endotracheal tube into baby Defendant Jr.'s bronchial area, rather than into his trachea clearly indicates that hospital error, rather than intentional abuse caused Defendant Jr.'s death. As Dr. Habeas Expert determined, the erroneous placement of the endotracheal tube caused baby Defendant Jr. to suffocate, shown by the abnormally high level of CO2 in Defendant Jr.'s body when he died.

Moreover, trial counsel's failure to properly investigate the circumstances of petitioner Defendant's case based upon readily available evidence created a fundamental miscarriage of justice. No reasonable explanation exists for attorney Defense Counsel to have failed to consult with additional experts, based on the interviews with witness B and Mrs. Defendant. Nor was it logical for counsel to ignore the discrepancies between Officer Number One's Supplemental Report and Dr. Pathologist's Postmortem Examination Report. Petitioner respectfully requests that his petition be decided on its merits.

For all the above-stated reasons, the sentence imposed on petitioner A. Defendant should be ordered reversed and set-aside.

Dated: _____

CRIMINAL DEFENSE ATTORNEY
Attorney for Petitioner
A. DEFENDANT

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VERIFICATION

STATE OF CALIFORNIA)
)
COUNTY OF SANTA CLARA,) ss.
_____)

I, Criminal Defense Attorney, hereby declare as follows:

- 1. I am an attorney licensed to practice law in the State of California.
- 2. I represent petitioner A. Defendant, who is confined in restraint of his liberty at the Correctional Training Facility located in Soledad, California.
- 3. I am authorized to file this petition for writ of habeas corpus on petitioner’s behalf. I make this verification because I believe it is more appropriate that I, rather than petitioner, verify the allegations contained in this petition. The claims are legal ones, based on the evidentiary record with which I am ore familiar than petitioner.
- 4. I have read the foregoing petition and its incorporated memorandum of points and authorities and exhibits. Pursuant to Penal Code section 1474, as construed by *In re Robbins* (1998) 18 Cal.4th 770, 783, fn. 5 (holding that verification by counsel satisfies the requirements of §1474), I declare that all allegations in the petition and memorandum not otherwise supported by citations to the record or other documents are true to the best of my knowledge, ability, and belief.

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

Executed in Anytown, California on July _____, 2008.

CRIMINAL DEFENSE ATTORNEY