

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION ONE

In re Richard Eric Ross,) Case No. _____
Petitioner)
) Related Appeal
On Habeas Corpus) No. D066786
)
) Superior Court No.
) No. SCD 241238
)
_____)

SUPERIOR COURT OF SAN DIEGO COUNTY

Hon. Kenneth K. So, Judge

PETITION FOR WRIT OF HABEAS CORPUS
WITH MEMORANDUM OF SUPPORTING
POINTS AND AUTHORITIES AND EXHIBITS

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Topical Index

Table of Authorities	iii
Introduction	1
Prayer for Relief	17
Verification	18
Memorandum of Supporting Points and Authorities	19
Argument	19
I Trial counsel rendered ineffective assistance by failing to present expert medical testimony showing the SART protocol as described by the police officer was wrong and the truth about the allegations could easily have been determined with medical exams	19
Conclusion	34
Certificate of Compliance	36
Declaration of Service	37
Exhibit A — Declaration of Dr. Steven Gabaeff	
Exhibit B — Declaration of Attorney Euketa Oliver	
Exhibit C — Declaration of Attorney Bob Boyce	
Exhibit D — Declaration of Attorney Patrick Morgan Ford	

Table of Authorities

Cases

<i>Padilla v. Kentucky</i> (2010) 559 U.S. 356	24
<i>Strickland v. Washington</i> (1984) 466 U.S. 668	23, 24
<i>Gersten v. Senkowski</i> (2nd Cir. 2005) 426 F.3d 588	26
<i>In re Fields</i> (1990) 51 Cal.3d 1063	24
<i>In re Hill</i> (2011) 198 Cal.App.4th 1008	28
<i>In re Lucas</i> (2004) 33 Cal.4th 682	25
<i>In re Neely</i> (1993) 6 Cal.4th 901	24, 25
<i>In re Vargas</i> (2000) 83 Cal.App.4th 1134	25
<i>Michael T. v. Commissioner of Corrections</i> (2010) 122 Conn.App. 416	27
<i>People v. Jones</i> (2010) 186 Cal.App.4th 216	25
<i>People v. Ledesma</i> (1987) 43 Cal.3d 171	23, 24
<i>People v. Wimberly</i> (1992) 5 Cal.App.4th 773	34

Statutes

Penal Code

section 288.7	3
section 288.7, subd.(b)	3
section 288, subd.(a)	3
section 288, subd.(b)	3
section 667.61, subds.(b)(c) and (e)	4
section 1474	17

United States Constitution

Sixth Amendment	23
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California Constitution

Article 1, section 15	23
-----------------------	----

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Introduction

The present issue is whether a trial lawyer renders ineffective assistance by failing to present an expert witness whose testimony would debunk the state's theory at trial.

In the present case, two young girls alleged that petitioner had sexually penetrated their vaginas at various times. The police officer in charge of the investigation refused to order a medical exam of the girls

because of the Sexual Assault Response Team (SART) protocol suggesting such exams were not mandatory where the last claimed penetration occurred more than 72 hours earlier.

The prosecution presented no physical evidence to support the girls' claims and the parties were left to argue at trial that the issue was a credibility contest between the two young alleged victims and petitioner. The problem is the physical exams of the girls would have shown whether or not the allegations were true, and if Sergeant Lopez correctly recited the SART protocol, it was wrong.

A child abuse pediatrics expert would have explained to the jury that the girls' claims would have been easily verified or shown to be false. Trial counsel spoke with a doctor who assured her this was true. But counsel made no effort to present an expert witness or otherwise provide affirmative evidence to explain this fact. Instead, she asked a couple of questions when cross-examining the state's police investigator and social worker who acknowledged that it was possible an exam would have confirmed the claims.

Physical evidence proving or disproving the allegations existed in this case — the lead investigator simply chose not to look into it. Trial counsel rendered ineffective assistance by failing to present an expert

witness who would have explained this critical point to the jury. The error resulted in a life prison sentence for a man who's never been in trouble before and is likely innocent of the present charges.

I

Petitioner was charged by way of an amended information with 10 counts of having sexual intercourse, penetration or sodomy with two girls under the age of 10 in violation of Penal Code section 288.7, subd.(b), (counts one, four, five, seven, eight, 10, 12, 14, 15, 17). He was also charged with one forcible lewd act in violation of section 288, subd.(b) (count two) and seven counts of lewd acts with children pursuant to section 288, subd.(a). (1 CT 46-52.)

II

Petitioner who was 43 years old, had no prior criminal record, and when given the test the state uses to measure the risk of reoffending if released on probation, he scored a one out of 10, which is the lowest possible risk for reoffending. (2 CT 374, 378.)

III

A jury acquitted petitioner of the section 288.7 offenses charged in counts eight and 17, and the section 288(a) offenses charged in counts nine and 18. (2 CT 451, 453, 462, 463.) The jury also convicted

petitioner of one count of attempted sexual penetration of a minor as a lesser included offense of sexual penetration. (2 CT 445.) The jury convicted petitioner of the offenses charged in counts two through seven, and counts 10 through 16. (2 CT 444-450, 454-461.) The jury also found that as to counts two, six, nine, 11 and 16, the offenses involved more than one victim for purposes of the one strike law, section 667.61, subds.(b)(c) and (e). (2 CT 445, 446, 449, 453, 455, 457, 460, 463.)

IV

The trial court later denied petitioner's motion for new trial, and sentenced him to 120 years-to-life plus 17 years. (2 CT 466-467.)

V

Petitioner was a single man, a college graduate with a successful 12 year career in the Navy. (2 CT 376-377.) He was the real estate agent of Tami and Allan, who were Breanna's parents. One night after a wedding party, petitioner had three-way sex with Tami and Allan, and shortly thereafter Tami divorced Allan to be with petitioner. (2 RT 287-288.) Allan testified that he held no grudge against petitioner and didn't dislike him, but petitioner testified at the hearing on the new trial motion that Allan hated him. (2 RT 289-290; 4RT 623-624.)

Allan's new wife, Melissa (mother of Hannah) also disliked petitioner. (2 RT 250.) Petitioner and Tami were making plans to relocate out of California and take Breanna with them. (2 RT 290.)

VI

The trial involved claims by petitioner's stepdaughter Breanna, and her stepsister Hannah, that petitioner had molested them. Allegations included multiple acts of vaginal penetration with petitioner's finger, tongue, penis and a vibrator. (1 CT 170, 174-175.) In one claim of penile penetration, Breanna claimed that petitioner "peed" inside her vagina, (a claim the prosecutor would argue established ejaculation) and she said that it hurt when he placed the vibrator inside her vagina. (1 CT 170, 174-175; 3 RT 545.)

Both of the girls spent substantial time at petitioner's house and on May 21st, 2012, nine year-old Hannah claimed petitioner had inserted his finger inside of her vagina after pulling down her pants. (3 RT 367.) Seven year-old Breanna was in the bed at the same time but didn't notice any improper touching. (2 RT 124, 209.)

VII

Hannah then called her stepfather, Allan, who got Hannah's mother and drove to petitioner's house. (2 RT 278-279.) Hannah's

mother, Melissa, called the police who met them at petitioner's house.
(2 RT 279-280.)

VIII

The police did not interview the girls at the time, and instead arranged an interview nine days later with a social worker from the Palomar Child Abuse Program. (2 RT 311-312.)

IX

When petitioner was interviewed by police on the scene, he denied any wrongdoing and immediately asked that police conduct a DNA or medical test on Hannah to prove he had not touched her improperly. (4 RT 621.) No tests were ordered and instead, Hannah's aunt (who was also present) drove Hannah directly to a community swimming pool to swim, an act that would have washed away any DNA evidence. (2 CT 373; 4 RT 621.)

X

The police sergeant in charge of the investigation ordered a forensic interview of both Hannah and Breanna on May 30th, 2012. During the interview, Hannah told the social worker that nine days earlier petitioner had inserted his finger inside her vagina. (1 CT 130.)

XI

Breanna claimed during her interview that when she was seven years old, petitioner had penetrated her vagina at various times with his finger, his penis, his tongue and a vibrator. (1 CT 170, 174-175.) She claimed he once “peed” inside her when he penetrated her with his penis and that another time he caused pain when he inserted the vibrator inside of her. (1 CT 174-176.)

XII

The social worker acknowledged that she didn’t believe some of Breanna’s claims and thought Breanna was merely repeating things other people told her to say. (3 RT 362.) She must also have rejected Hannah’s claim that petitioner had touched her inappropriately in the past because she asked several questions about the incident, received confusing answers from Hannah and charges were not filed as to that claim. (1 CT 138-144.) Breanna also told the investigator that Hannah lied occasionally, and Allan acknowledged at trial that Hannah was known to lie. (1 CT 189; 2 RT 292.)

XIII

The lead investigator on the case, Sergeant Lopez of the San Diego County Sheriff’s Department, determined after the social worker interviews that he would not order medical exams because the standard

SART protocol calls for exams to be done within 72 hours of any touching, and beyond that time frame there would have to be a “significant injury” to warrant a physical exam. (2 RT 313, 318, 322.) He testified that after nine days, the chance of finding DNA evidence in the alleged victim is greatly reduced, putting young girls through a medical exam can be “traumatizing” and he didn’t like to do it “if I don’t believe there’s going to be findings.” (2 RT 313, 320.)

XIV

Petitioner’s trial counsel cross-examined Sergeant Lopez who acknowledged that a physical exam after 72 hours might yield evidence of scratches, cuts or bruising in addition to DNA, but said the possibility of finding such evidence after nine days was “limited.” (2 RT 445.)

XV

The social worker who conducted the forensic interviews testified that medical exams are often performed right after the interview at Palomar Hospital — right down the hall, if a child claims that she was penetrated. (3 RT 366.) She noted such exams can take place months or years after a claimed incident, and that the team in this case suggested that a medical exam be performed following the forensic

interviews. (3 RT 364-368.)

XVI

The defense presented a single witness at trial, Tami R., who was Breanna's mother and petitioner's girlfriend whose direct and cross-examination were done in less than two pages of the reporter's transcript, and focused on the single question of whether petitioner had a scar on his leg. (3 RT 427-428.)

XVII

During closing argument, defense counsel argued the prosecution had not proved its case beyond a reasonable doubt focusing largely on the fact that Allan (Breanna's father) hated petitioner for ruining his marriage even though Allan denied hating him, the girls' stories were full of inconsistencies, Breanna had seen petitioner and Tami having sex, found sex toys in the drawers and had seen pornography on the computer, and so she knew more about sex than other children her age. (3 RT 568-569.) Counsel also commented that it would help to have had a medical exam done and it made no sense to schedule the interview nine days out in light of the lead investigator's reliance on the 72-hour rule. (3 RT 563-564.) She further commented that the social worker testified medical exams are sometimes given months or years after an

allegation, and that an exam was recommended in this case. (3 RT 564-565.)

XVIII

The prosecutor did not refer to the lack of a medical exam during her opening argument. She mentioned the issue briefly during her rebuttal saying that a medical exam may have shown nothing at all, and “certainly” would not have shown evidence of an oral copulation that occurred years earlier. (3 RT 575.) The prosecutor warned the jurors not to speculate as to what an exam might have shown, and the jury must decide the case “based on what we have, what happened.” (3 RT 576.)

XIX

While preparing for trial, defense counsel spoke briefly with Dr. Deborah Fitzgerald, an obstetrician and gynecologist the public defenders office had used as an expert witness in the past. Dr. Fitzgerald confirmed that an exam most likely would have shown whether there had been vaginal penetration (by fingers, penis or vibrator). (Exh. B, p. 2.) Nevertheless, counsel failed to present Dr. Fitzgerald or any medical expert to give testimony on the medical issue that would have rebutted the police officer’s conclusion that an exam

wasn't necessary after 72 hours.

XX

Petitioner has appealed his convictions to this court and filed the appellant's opening brief on June 23rd, 2015, raising the sole issue of ineffective assistance of trial counsel for the reasons argued in a motion for a new trial — primarily trial counsel's failure to present available evidence supporting the conclusion that the accusers were lying.

XXI

Petitioner, while preparing the present habeas petition alleging an additional claim of ineffective assistance contacted Dr. Steven Gabaeff, an expert on child abuse pediatrics. Dr. Gabaeff reviewed trial transcripts and petitioner's opening appellate brief, which summarized the facts of the case.

XXII

Dr. Gabaeff concludes "there can be no excuse for not conducting the medical exam after two young girls claimed to have been vaginally penetrated multiple times. If the defendant committed the acts he was accused of, it is virtually certain the medical exam would have shown it." (Exh. A, p. 5.) "Absent evidence of physical penetration, their stories of penetration would be shown to be false." (Exh. A, p. 5.)

XXIII

Dr. Gabaeff explained and illustrated through photographs how residual scar tissue remains years after tissue is torn from a vaginal penetration and this scar tissue can be easily seen in a medical exam. (Exh. A, p. 4.)

XXIV

Dr. Gabaeff made additional observations and conclusions regarding Sergeant Lopez's decision not to have the accusers examined by a doctor. He noted that:

1. Any time a child claims to have been raped as a result of sexual intercourse, the young accuser should be tested for sexually transmitted disease for her own protection. (Exh. A, p. 5.)
2. Medical examinations of young girls in these circumstances "are like pelvic exams and are not that 'uncomfortable,' often causing no discomfort at all." (Exh. A, p. 3.) He states that assuming there is a moment of discomfort, this cannot justify foregoing the exam in a case where an accused is facing a life prison term. (Exh. A, p. 3.)
3. SART teams trained in San Diego where he was once a

supervisor, which include physicians, police, prosecutors and social workers are at times “overzealous” in an effort to charge and convict an accused suspect. The process, when improperly applied has led to the conviction of many people who were later found innocent, and are often based on statements not supported by physical evidence, or in the worst cases, absent any physical evidence that abuse occurred. (Exh. A, p. 1.)

4. Studies show that false accusations rates in these cases can be as high as 16 to 22 percent, and the scientific method, which is objective by nature, is designed to identify false accusations, but this method only works where the parties are not seeking a particular result. (Exh. A, p. 1.)

5. Red flags in the present case include the fact that Breanna’s biological father (Allan) and Hannah’s mother (Melissa) had an implied or stated animus toward petitioner, they spent a significant amount of unsupervised time with the girls in the days leading up to the social worker’s interview, and Hannah was taken by a relative almost immediately after alleging abuse on May 21st, to a swimming pool — an act that would have corrupted

significant available evidence (it was never determined whether this was done intentionally to obfuscate the situation or out of ignorance). (Exh A, p. 5.)

XXV

Trial counsel was asked to explain whether she consulted with medical experts regarding the sergeant's decision to forgo a physical exam, and why she did not call a medical expert to explain that this SART policy (no mandatory physical exam after 72 hours) was wrong and denied the accused a chance to establish his innocence with medical evidence. (Exh. D.)

XXVI

Trial counsel submitted a declaration stating that while preparing the defense, she spoke with two lawyers in her office who suggested that she consult with Dr. Deborah Fitzgerald, and that she then called Dr. Fitzgerald and asked whether a physical exam should have been performed in this case. Dr. Fitzgerald told counsel she no longer worked as an expert witness or testified in criminal trials, but she noted in the brief telephone conversation that a physical exam should have been done if the child claimed to have been penetrated, because there would have been evidence of such an event if there had

been sexual penetration, especially with an erect penis. (Exh. B.)

XXVII

Trial counsel did not call Dr. Fitzgerald or any other medical expert to the stand because no exam had been done by the state so “there was no evidence for a doctor to explain or challenge.” Because there was no evidence for a doctor to explain or challenge, counsel made the tactical decision to address the issue by cross-examining the state’s witnesses and arguing the issue briefly during closing argument. (Exh. B.)

XXVIII

Bob Boyce, a San Diego attorney and criminal law specialist known for his expertise in defending people accused of child abuse and molestation concludes that trial counsel’s failure to call an expert witness in this case was beneath the standard of reasonably competent counsel. This is so because jurors have an especially difficult time remaining objective in child sex abuse cases, and in all cases where a child claims to have been penetrated, counsel must scrutinize the SART doctor’s conclusions following a medical exam. And if a child claims to have been penetrated and there was no medical exam, counsel must present an expert to explain the impact of the state’s failure to test the

child. (Exh. C, p.2, para. 5.)

XXIX

Petitioner's direct appeal of the underlying convictions is pending before this court in Case No. D066786. The issue in the appeal is whether trial counsel rendered ineffective assistance in failing to present other strong available evidence showing the accusing girls were lying. The claim was litigated in a new trial motion. (4 RT 615-734.)

XXX

Petitioner is currently incarcerated at the Pleasant Valley State Prison in Coalinga, California.

XXXI

Petitioner has no other adequate remedy at law as the factual basis for the present issue falls outside the record on appeal.

XXXII

Petitioner is represented in the direct appeal by attorney Patrick Morgan Ford, 1901 First Avenue, Ste. 400, San Diego, CA 92101. California State Bar Number 114398. Email address is ljlegal@sbcglobal.net.

XXXIII

Other than the appeal, there are no other petitions, applications

or motions on file with respect to this case in any court.

XXXIX

Petitioner hereby moves to consolidate the action with the underlying appeal and incorporate by reference all documents filed in that case.

Prayer for Relief

Petitioner respectfully prays that: following the issuance of an order to show cause and an evidentiary hearing should the court deem one appropriate, a writ of habeas corpus be issued directing that all convictions be set aside.

Dated: 10/27/15

Respectfully submitted

s/Patrick Morgan Ford
Patrick Morgan Ford
Attorney for Petitioner
RICHARD ERIC ROSS

Verification

I, Patrick Morgan Ford, declare as follows:

I am an attorney licensed to practice before the courts of the State of California and have my office located in San Diego, County, California.

I am the attorney for petitioner herein and am authorized to file this petition. Petitioner is unable to personally execute this verification due to his confinement at Pleasant Valley State Prison in Coalinga, California.

Because I am more familiar with the matters alleged, I am filing this petition pursuant to Penal Code section 1474. I have drafted this petition and know its contents.

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

Dated: 10/27/15

Respectfully submitted,

s/Patrick Morgan Ford
PATRICK MORGAN FORD
Attorney for Petitioner
RICHARD ERIC ROSS

Memorandum of Supporting Points and Authorities

Argument

I

Trial counsel rendered ineffective assistance by failing to present expert medical testimony showing the SART protocol as described by the police officer was wrong and the truth about the allegations could easily have been determined with medical exams.

Background

Petitioner had an affair with Allan's wife Tami, and she left Allan for petitioner resulting in a 50-50 custody arrangement with Breanna. (2 RT 287-288, 290.) Allan also knew petitioner and Tami were considering a move out of state, and they intended to take Breanna with them. (2 RT 290.) Allan married Melissa, mother of Hannah and she disliked petitioner as well. (2 RT 250.)

Hannah alleged a vaginal digital penetration when petitioner was watching her on May 21st, 2012. (2 RT 186-187.) This act allegedly happened in the bed when Breanna was present but she didn't notice anything. (2 RT 124, 209.)

Police were called, petitioner maintained his innocence and asked that Hannah be tested in order to establish his innocence, but the police officer in charge of the investigation ignored his request. (4 RT 621.)

Instead, the officer scheduled a social worker interview with both girls for nine days later. (2 RT 312.)

During those interviews, the girls who had spent substantial time with their parents in the intervening days, claimed that petitioner had repeatedly penetrated their vaginas with his finger. (1 CT 130, 159-160, 170.) Breanna also alleged other incidents, including rape by sexual intercourse and that petitioner had inserted a vibrator into her vagina causing great pain. (1 CT 174-176.)

After hearing about these painful vaginal penetrations, Sergeant Lopez rejected the suggestion that the girls be taken down the hall at Palomar Hospital for a physical examination. (2 RT 318-319.) He claimed he was acting pursuant to SART policy, which was to reject an exam even though there was penetration, if the most recent event was more than 72 hours old (which it had to be in this case where he ordered the social worker interviews nine days after the incident was reported). (2 RT 313, 322.)

He claimed that DNA evidence would likely disappear after 72 hours, but he acknowledged on cross-examination that it was possible other physical evidence would be shown in an exam but noted the chance of finding such evidence was “limited.” (2 RT 321.)

The social worker also acknowledged on cross-examination that medical exams are often performed after a child claims penetration and said these exams sometimes take place months or years after the interview. (3 RT 366-368.)

Trial counsel asked Sergeant Lopez about an exam during cross-examination after conferring with two colleagues and speaking briefly with Dr. Fitzgerald, an OB/GYN the public defenders office used to occasionally use as an expert. (2 RT 445.) Counsel's phone conversation with Dr. Fitzgerald was brief and the doctor said she no longer worked as an expert in criminal cases. (Exh. D, para. 5.) Dr. Fitzgerald confirmed that if a child had been penetrated by a man's finger, a vibrator or a penis, the event would most likely leave physical evidence that would appear in a physical exam. (Exh. D, para. 8.) But trial counsel decided not to present any affirmative medical testimony on this point because the girls were not given an exam and there was no doctor's opinion for a defense expert to challenge. (Exh. B, para. 7.)

Trial counsel mentioned the lack of a medical exam during closing argument, but the defense focused primarily on the prosecution's failure to establish guilt beyond a reasonable doubt. (3 RT 554-571.)

After the direct appeal was filed in the present case challenging

trial counsel's competence on other grounds (failure to present evidence showing the girls were lying), the defense contacted an experienced child abuse pediatrics physician, who was a former SART supervisor in San Diego. (Exh. A, p. 2.) Dr. Steven Gabaeff noted the historical problems with the SART teams lacking objectivity, with the physicians acting as part of the prosecution's team, and noted there were many cases in which the local SART practices resulted in the conviction of innocent people.¹ (Exh. A, p. 1.)

He noted there were several red flags in the present case where there was no physical evidence of abuse, there was animosity between the girls' parents and petitioner, the girls were left with their parents in the time between the alleged incident and the social worker interviews, and Hannah was taken from the scene of the alleged incident immediately to a swimming pool, which would have corrupted

¹ Dr. Gabaeff's reference to historical problems with San Diego's SART problems is confirmed by the 1992 San Diego County grand jury report, titled "Families in Crisis" where the grand jury criticized the local SART process. The report noted "a highly respected jurist testified that this lack of objectivity within the CCP (Center for Child Protection now referred to as the Chadwick Center) has 'poisoned the stream.' He felt that much of the bias and even zealotry found in the Child Dependency System could be traced back to training conferences and meetings held at the behest of the Center for Child Protection." The grand jury emphasized that "CCP is rare to rule out abuse even where there are no physical findings, because it still 'might' have happened," and referred to specific cases where "patently erroneous testimony by members of the CCP medical staff played a significant and most disturbing role in the outcome."

any DNA a digital penetration would have left behind. (Exh. A, p. 5.)

Dr. Gabaeff rejected the police officer's medical opinion (which was allegedly based on SART protocol) claiming that evidence of a vaginal penetration was unlikely to exist after 72 hours. While DNA or other fluid evidence might disappear, he emphasized that if petitioner committed the acts suggested by the young girls, "it is virtually certain the medical exam would have shown it." (Exh. A, p. 5.) And "absent evidence of physical penetration, their stories of penetration would be shown to be false." (Exh. A, p. 5.) This was the same opinion trial counsel had received from Dr. Fitzgerald.

Applicable law

Under the Sixth Amendment to the United States Constitution and article 1, section 15 of the California Constitution, a criminal defendant has the right to the assistance of counsel. The right entitles a defendant not to some bare assistance, but rather to *effective* assistance. (*People v. Ledesma* (1987) 43 Cal.3d 171, 215.)

The test for determining whether a criminal defendant received ineffective assistance is well-settled. The court must first determine whether counsel's representation fell below an objective standard of reasonableness. (*Strickland v. Washington* (1984) 466 U.S. 668.) The

court then inquires whether there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. (*Ibid.*) A "reasonable probability" is a probability sufficient to undermine confidence in the outcome. (*Id.* at p. 694; *In re Neely* (1993) 6 Cal.4th 901, 909.)

Part of counsel's constitutional obligation to the client requires that he or she, investigate carefully all defenses of law or fact that may be available. (*Strickland, v. Washington, supra*, 466 U.S. at p. 691; *People v. Ledesma, supra*, 43 Cal.3d at p. 215.) Trial counsel's first duty to his client is to investigate the facts of the case and research the law applicable to those facts. (*People v. Ledesma, supra*, 43 Cal.3d at pp. 216-218.) "The defendant can reasonably expect that before counsel undertakes to act, or not to act, counsel will make a rational and informed decision on strategy and tactics founded on adequate investigation and preparation. (*In re Fields* (1990) 51 Cal.3d 1063, 1069.)

The proper measure of attorney performance remains simply reasonableness under the prevailing professional norms, and the American Bar Association standards are a guide to determining what is reasonable. (*Padilla v. Kentucky* (2010) 559 U.S. 356, 366. Standard 4-

4.1(a) of the ABA’s Standards for Criminal Justice Prosecution Function and Defense Function provides that “Defense counsel should conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case. The duty to investigate exists regardless of the existence of facts constituting guilt or the accused’s admissions. (ABA Standards for Criminal Justice Prosecution Function and Defense Function (3rd Ed. 1993), p. 181.) Commentary to this standard, which is entitled “The Importance of Prompt Investigation” emphasizes that “effective investigation by the lawyer has an important bearing on competent representation at trial, for without adequate investigation the lawyer is not in position to make the best use of such mechanisms as cross-examination or impeachment of adverse witnesses at trial . . .” (*Id.* at p. 183.)

In *People v. Jones* (2010) 186 Cal.App.4th 216, the court reversed the defendant’s drug related convictions based upon the ineffective assistance of counsel due to the lack of pretrial investigation — specifically the failure to locate and interview certain witnesses. (*Id.* at p. 239.) (See also *In re Lucas* (2004) 33 Cal.4th 682, *In re Vargas* (2000) 83 Cal.App.4th 1134, and *In re Neely* (1993) 6 Cal.4th 901, where

counsel's failure to adequately investigate the case resulted in findings of ineffective assistance of counsel.)

In *Gersten v. Senkowski* (2nd Cir. 2005) 426 F.3d 588, the Second Circuit Court of Appeals affirmed the district court's decision to grant the writ of habeas corpus following the defendant's child molest convictions in state court. In that case, the court found that trial counsel rendered ineffective assistance by failing to consult with or present any medical expert on child sexual abuse when preparing for trial and cross-examination of the prosecution's medical expert. The alleged victim (the defendant's daughter) testified as to various sexual acts defendant committed against her over an eight year period. The prosecution also presented a pediatrician who testified the physical findings of the girls's genitalia were consistent with the claimed acts of abuse, and a psychologist who testified about child abuse accommodation syndrome, which is a set of behaviors exhibited by sexually abused children. (*Id.* at pp. 594-597.) In a post-trial motion, the defense presented the affidavits from a medical doctor and a psychologist challenging the conclusions of the prosecution's expert witness. (*Id.* at pp. 599-601.)

The federal district court later granted the writ based on trial

counsel's failure to conduct an adequate pretrial investigation into the critical medical evidence, including failure to have the evidence evaluated by an independent expert, which thereby limited counsel's ability to effectively cross-examine the state's medical expert. (*Id.* at p. 605.) The appellate court later affirmed the order granting the writ and found that reversal of all convictions was necessary because counsel's errors regarding the sexual abuse count "spilled over" and prejudiced him on the remaining counts. (*Id.* at p. 614.) The court emphasized that "in sexual abuse cases, because of the centrality of medical testimony, the failure to consult with or call a medical expert is often indicative of ineffective assistance of counsel... This is particularly so where the prosecution's case, beyond the purported medical evidence of abuse rests on the credibility of the alleged victim, as opposed to direct physical evidence such as DNA, or third party eyewitness testimony." (*Id.* at p. 607.) (And see *Michael T. v. Commissioner of Corrections* (2010) 122 Conn.App. 416, [999 A.2d 818, 823] where the court found petitioner was entitled to a new trial because his trial counsel was ineffective in failing to present expert testimony to challenge the state's medical expert who strongly linked the child's trichonoma to a sexual assault.)

In *In re Hill* (2011) 198 Cal.App.4th 1008, this court reversed all 23 counts of conviction and multiple life terms for a defendant convicted of molesting his young stepdaughter and another young girl who lived in the home. In that case, The Children’s Hospital SART doctor had performed a physical examination of the girls who claimed to have been sexually penetrated by the defendant, but the hospital did not provide the photos taken during the exams to the prosecutor, and so the prosecutor did not provide the photos to defense counsel. After trial, the defense obtained the photos, presented them to an independent medical expert who concluded the photos showed no evidence of abuse and the SART doctor’s conclusions were “dead wrong.” (*Id.* at p. 1026.) This court determined that trial counsel rendered ineffective assistance of counsel by failing to obtain the photos and failing to make a reasonable effort to obtain the assistance of an independent medical expert in the field of child molestation to aid her in the investigation and preparation of possible medical defenses to the charges. (*Id.* at p. 1030.) The error required a full reversal.

Legal Analysis

The present case has all of the indicators one would expect to find where an innocent person is wrongly convicted of molesting children.

- Petitioner was a productive citizen with no criminal record or history of improper conduct involving children.
- There was no physical evidence supporting any claim of sexual misconduct.
- The girl who claimed the majority of the violations (Breanna) was the daughter of a man who had an axe to grind with petitioner. Hannah's mother also disliked petitioner.
- The girls spent a substantial amount of time with their parents in the days leading up to the social worker interviews, giving them plenty of time to discuss the situation.
- The lead investigator arranged for the interviews to take place several days after the time limit for giving medical exams — according to SART policy.
- Medical exams would have shown whether or not the allegations of penetration were true even though DNA, semen or saliva evidence might have been lost by then.
- Petitioner, after hearing about and denying the allegations, immediately requested that the accuser be examined.

- The social worker who conducted the interviews believed that some of the allegations were a product of suggestibility — that is the girls had essentially received their ideas from someone else.
- The social worker requested a medical exam and said the tests are often performed months or years after the claim.
- The investigator rejected all requests for a medical exam based on his false theory that the chances of proving the claims with a medical exam were “limited,” and he didn’t want to “traumatize” the young girls with a medical exam.
- The result was that the officer’s decisions made during the investigation set up the case as a credibility contest between two young girls and petitioner, rather than a case where physical evidence would have proved or disproved the girls’ claims.

Given these facts, trial counsel presented no real affirmative defense — other than a single witness who testified for a couple of minutes (two reporter’s transcript pages) about whether petitioner had a scar on his groin. Aside from that point, defense counsel simply relied on the burden of proof and suggested the girls were lying because their

parents had set them up to do so.

Trial counsel failed to present powerful affirmative evidence that the critical theory presented by the state's lead investigator — the inability to provide physical evidence to support the charges after 72 hours — was totally false. Instead, she was left to prove (or at least argue) a negative.

Counsel understood the premise was false. She discussed the fact with two lawyers in her office, and then briefly called Dr. Fitzgerald who said that if the girls' vaginas had been penetrated, there would be residual evidence that a medical exam would produce. But counsel's conversation with Dr. Fitzgerald was brief and the doctor said she no longer worked as an expert witness and no longer testified in legal proceedings.

Thereafter, counsel made no further effort to find a medical expert to present this important proposition. Trial counsel explains in her declaration that she decided not to present a medical expert at trial because there had been no physical exam with medical findings and there was therefore no evidence for a defense medical expert to challenge.

But the problem here is that counsel needed to present a medical

expert to rebut the investigating officer’s premise that an exam would not likely have produced results. The state presented its medical theory through a police officer rather than a doctor, but the defense needed to challenge that theory. As the defense medical expert’s declaration in this petition emphasizes — if the petitioner committed the charged acts “it is *virtually certain* the medical exam would have shown it.” And “Absent evidence of physical penetration [the girls] stories of penetration would be shown to be false.” (Exh. A, p.5; emphasis added.)

If Dr. Fitzgerald was unavailable to testify as an expert in this case, trial counsel should have looked further and found an available expert.

Bob Boyce, the “*Strickland*” expert, a highly regarded and experienced criminal defense attorney, known for his work in child molest cases, concludes that trial counsel’s decision to forgo a medical expert was beneath the standard of acceptable practice in this community for a number of reasons:

- Child molest cases are unique in that jurors often have a difficult time setting emotion aside, and the nature of the charges make the defense more difficult than in other cases

because of the juror attitudes towards child molest charges.
(Exh. C, para. 3.)

- A credibility contest between an accuser and the accused in these cases is often not a fair fight given juror sympathy for molested children, and whenever possible it is incumbent upon defense counsel to present physical evidence to establish innocence. Chipping away at a complainant's credibility through cross-examination is no substitute for physical evidence of innocence. (Exh. C, paras. 5, 6.)
- Trial counsel's explanation for not presenting a doctor makes little sense. Counsel understood the SART policy was wrong but decided against having an expert explain the fact to a jury because there was no exam and no findings to criticize. But what needed to be challenged was obviously not the non-existent test results, but rather the police officer's medical opinion that a medical exam was unlikely to confirm claims of repeated vaginal penetration in young girls if the claims were not made within 72 hours of the last incident. (Exh. C, paras. 8, 9.)
- A medical expert, like Dr. Gabaeff or Dr. Fitzgerald, would

have explained that a simple test would have proven or disproven the claims, the pelvic exam often presents minimal discomfort to the girls, and it simply must be done where a criminal defendant is on trial facing a permanent loss of his liberty. (Exh. A, p. 3.)

- By emphasizing the state's failure to conduct a test, the defense would also have been entitled to a jury instruction informing the jurors that they could consider the officer's failure to order the test to be an indication of the accused's innocence and might by itself be sufficient to raise a reasonable doubt about the defendant's guilt. (*People v. Wimberly* (1992) 5 Cal.App.4th 773, 793.) (Exh. C, para. 8.)

Conclusion

When the girls informed the SART team that they had been vaginally penetrated on multiple occasions, the lead investigator had two options:

- 1) Allow the simple physical exam that would have shown either that the girls had been molested, or they had falsely accused petitioner, or,
- 2) ignore the test that would prove or disprove the allegations

and allow the case to proceed as a credibility contest between the two young girls and petitioner.

The officer chose to forego the exam, and based his decision on the false medical fact that any evidence of abuse would have disappeared after 72 hours, or there was only a “limited” chance that evidence would still exist. The officer’s decision to reject the medical exam was based on a provably false premise and the failure to have the girls examined rendered the trial fundamentally unfair.

Trial counsel’s failure to present a medical expert explaining the falsity of the state’s medical strategy constituted the ineffective assistance of counsel.

We don’t know for sure whether the evidence produced by the medical exam would have exonerated petitioner. What we do know for sure is that young children occasionally falsely accuse adults of molestation, and the facts in this case show all of the elements of a case where an innocent person was falsely accused. Those elements include the fact that petitioner had been a productive citizen with a distinguished naval career and no history of a sexual interest in children; the parents of the accusing girls hated or disliked him; the social worker who interviewed the girls didn’t believe some of the things

they said; both Breanna and Alan acknowledged that Hannah lied occasionally; and there was no physical evidence supporting a single claim of sexual misconduct by petitioner.

Absent any physical evidence (including dispositive evidence that would have been produced in a medical test), the case became a credibility contest between the accusers and petitioner who didn't testify for reasons explained in his appeal.

Trial counsel rendered ineffective assistance by failing to properly investigate the police officer's false claim and by failing to present an expert witness explaining to the jury that the state's medical theory was false.

Dated: 10/27/15

Respectfully submitted

s/Patrick Morgan Ford
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Certificate of Compliance

I, Patrick Morgan Ford, certify that the within brief consists of 7,162 words, as determined by the word count feature of the program used to produce the brief.

Dated: 10/27/15

s/Patrick Morgan Ford
PATRICK MORGAN FORD

DECLARATION OF SERVICE BY U.S. MAIL AND
ELECTRONIC SERVICE

I, Esther F. Rowe, say: I am a citizen of the United States, over 18 years of age, and employed in the County of San Diego, California, in which county the within-mentioned delivery occurred, and not a party to the subject case. My business address is 1901 First Avenue, Suite 400, San Diego, CA 92101. I served a *Writ for Petition of Habeas Corpus*, of which a true and correct copy of the document filed in the case is affixed, by placing a copy thereof in a separate envelope for each addressee respectively as follows:

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Additionally, I electronically served a copy of the above document as follows: 1) Court of Appeal electronic notification address, 4d2nbrief@jud.ca.gov, 2) Attorney General's electronic notification address, ADIEService@doj.ca.gov. I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed on October 28, 2015, at San Diego, California.

Esther F. Rowe
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