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December 3, 2015

Kevin J. Lane
Clerk/Administrator
Court of Appeal
Fourth Appellate District, Division One
750 B Street, Suite 300
San Diego, CA 92101

RE: *In re Richard Eric Ross on Habeas Corpus*
Fourth District, Division One, Case No. D069126
San Diego County Superior Court, Case No. SCD241238

Dear Mr. Lane:

By Order dated November 4, 2015, this Court requested an informal response to the petition for writ of habeas corpus filed by petitioner Richard Ross. Petitioner claims he received ineffective assistance of counsel and alleges he was prejudiced as a result of his trial counsel's conduct. For reasons discussed below, respondent submits that the petition should be summarily denied because petitioner has failed to establish a prima facie case for habeas relief. (*In re Clark* (1993) 5 Cal.4th 750, 769, fn. 9; *People v. Romero* (1994) 8 Cal.4th 728, 737.) As such, there is no basis for an order to show cause.

1. STATEMENT OF THE CASE

A San Diego County jury convicted petitioner of attempted sexual penetration of Hannah C., a child 10 years of age or younger (Pen. Code[1], §§ 664, 288.7, subd. (b); count 1), forcible lewd act upon Hannah C. (§ 288, subd. (b)(1); count 2), lewd act upon Hannah C. (§ 288, subd. (a); count 3), oral copulation of Breanna L., a child 10 years of age or younger (§ 288.7, subd. (b); counts 4, 5, 7, and 14), sexual penetration of Breanna L. (§ 288.7, subd. (a); counts 10, 12, and 15), and lewd act upon Breanna L. (§ 288, subd. (a); counts 6, 11, 13, and 16). (1 CT 258-278; 3 RT 597-610.) As to counts 2, 3, 6, 11, 13, and 16, the jury found true allegations petitioner had substantial sexual conduct with

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[1] All further statutory references are to the Penal Code.

the children (§ 1203.066, subd. (a)(8)). (1 CT 258-278; 3 RT 597-610.) As to counts 3 and 13, the jury found true allegations petitioner committed the offenses against more than one victim (§ 667.61, subds. (b)(c) and (e)). (2 CT 258-278; 3 RT 597-610.)

The trial court denied petitioner's motion for new trial, and sentenced him to state prison for 120 years to life plus 17 years. (2 CT 466-468; 4 RT 734, 749-751.)

Petitioner appealed and filed an opening brief on June 23, 2015. Respondent's brief was filed August 23, 2015, and petitioner filed a reply brief on September 1, 2015. Petitioner filed his petition for writ of habeas corpus on October 28, 2015, and on October 30, 2015, this Court ruled that it would consider the appeal and the petition for writ of habeas corpus together.

2. STATEMENT OF FACTS[2]

Christina Schultz, interviewer for the Palomar Health Child Abuse Program at Palomar Hospital, conducted forensic interviews with Breanna and Hannah on May 30, 2012. (3 RT 340, 351; 1 CT 109-200.) Schultz explained that Palomar Hospital has a physical examination unit located a couple of rooms away from the forensic interview unit. (3 RT 362.) At the conclusion of a forensic interview, the interviewer may recommend that the child participate in a medical examination. (3 RT 363-364.) A medical examination may be recommended even in cases where the alleged sexual abuse occurred years prior. (3 RT 364.)

Schultz testified that a medical examination was not requested for Hannah. (3 RT 365-367.) Schultz acknowledged that during Hannah's forensic interview, she alleged that petitioner inserted his fingers into her vagina, and that a medical examination can reveal scarring or tearing. (3 RT 367-368.) Schultz testified that a medical examination was requested for Breanna, but that an examination had not been conducted as of the date of her forensic interview report. (3 RT 368.)

San Diego County Sheriff's Sergeant Dustin Lopez was assigned to investigate this case on May 21, 2012, the date petitioner touched Hannah and called the police. Sergeant Lopez was informed that Hannah alleged "illicit touching" by petitioner. (2 RT 310-311.) Sergeant Lopez scheduled a forensic interview with Hannah and Breanna for May 30, 2012. (2 RT 312.) Sergeant Lopez did not refer Hannah or Breanna for a

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[2] A thorough recitation of the facts supporting petitioner's convictions is presented in respondent's brief. Because this court is considering petitioner's petition for writ of habeas corpus together with his appeal, respondent only includes the facts relating to petitioner's ineffective assistance of counsel claim in this informal response.

medical examination after their forensic interviews because, based on his training and experience, the chance of obtaining any kind of DNA after nine days was very limited. (2 RT 313.) At trial, Sergeant Lopez described a "72-hour policy," and explained that "if anything goes past 72 hours, it needs to be vetted and looked at as far as what kind of sexual molestation it relates to." (2 RT 313.) Sergeant Lopez continued, "And, also, victims this young, I don't like to send victims for medical examinations if I don't believe there's going to be findings based on the fact that you're traumatizing young children with these medical examinations." (2 RT 313.)

On cross-examination, Sergeant Lopez testified that a physical examination could reveal any type of trauma, such as cuts and bruising, but that he did not believe such evidence would exist in Hannah or Breanna after nine days. (2 RT 320-321.) Sergeant Lopez acknowledged there was a possibility that a physical examination could have revealed such evidence even nine days after the alleged abuse. (2 RT 321.) Sergeant Lopez also acknowledged that he was aware Breanna alleged sexual intercourse (2 RT 322), and that digital penetration with fingers was alleged (2 RT 325). He admitted that, in his experience, digital penetration with fingers can result in scratches inside of the vagina. (2 RT 325-326.) He also admitted that a physical examination could have been done prior to 72 hours in this case. (2 RT 324.)

3. ARGUMENT

I. AN ORDER TO SHOW CAUSE WILL NOT ISSUE UNLESS PETITIONER ALLEGES SPECIFIC FACTS WHICH ESTABLISH A PRIMA FACIE CASE FOR RELIEF

Habeas corpus is an extraordinary remedy. (*In re Clark*, *supra*, 5 Cal.4th at p. 764, fn. 3.) Because a petition for writ of habeas corpus collaterally attacks a presumptively final criminal judgment, "the petitioner bears a heavy burden initially to *plead* sufficient grounds for relief, and then later to *prove* them." (*People v. Duvall* (1995) 9 Cal.4th 464, 474, emphasis in original.) "[A]ll presumptions favor the truth, accuracy, and fairness of the conviction and sentence; defendant thus must undertake the burden of overturning them." (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1260, superseded by statute on other grounds as stated in *In re Steele* (2004) 32 Cal.4th 682, 691.) "Although habeas corpus thus acts as a 'safety valve' [citation] for cases in which a criminal trial has resulted in a miscarriage of justice despite the provision to the accused of legal representation, a jury trial, and an appeal, this 'safety valve' role should not obscure the fact that 'habeas corpus is an extraordinary, limited remedy against a presumptively fair and valid final judgment.' [Citation.]" (*In re Reno* (2012) 55 Cal.4th 428, 450.)

Collateral attack by habeas corpus is limited to challenges based on newly discovered evidence, claims going to the jurisdiction of the court, and claims of

constitutional dimension. (*In re Clark, supra*, 5 Cal.4th at pp. 766-767.) A habeas corpus petitioner "bears the burden of establishing that the judgment under which he or she is restrained is invalid. To do so, he or she must prove, by a preponderance of the evidence, facts that establish a basis for relief on habeas corpus." (*In re Visciotti* (1996) 14 Cal.4th 325, 351, citations omitted.)

In considering a petition for a writ of habeas corpus, a reviewing court "must first determine whether the petition states a prima facie case for relief -- that is, whether it states facts that, if true, entitle the petitioner to relief -- and also whether the stated claims are for any reason procedurally barred." (*People v. Romero*, *supra*, 8 Cal.4th at p. 737.) If the petition, accepted as true, includes specific factual allegations which establish a prima facie claim for relief, the court will issue a show-cause order; otherwise, it will summarily deny the petition. (*People v. Duvall, supra*, 9 Cal.4th at pp. 474-475.)

II. PETITIONER RECEIVED THE EFFECTIVE ASSISTANCE OF COUNSEL

Petitioner claims that his right to effective assistance of counsel was violated because his trial counsel failed to present expert medical testimony showing that the SART protocol as described by Sergeant Lopez at trial was incorrect and that the truth about the victims' allegations would easily have been determined with medical examinations. (Pet. at 19-23.) Petitioner's claim fails. He has not shown that trial counsel's conduct fell outside the range of acceptable professional norms, or that counsel's decisions prejudiced the outcome of his case.

A. Applicable Law

When a criminal defendant complains that trial counsel was ineffective, the defendant must first show the legal representation fell below an objective standard of reasonableness. (*Strickland v. Washington* (1984) 466 U.S. 666, 688 (*Strickland*).)

> The Sixth Amendment . . . relies . . . on the legal profession's maintenance of standards sufficient to justify the law's presumption that counsel will fulfill the role in the adversary process that the Amendment envisions. [Citation.] The proper measure of attorney performance remains simply reasonableness under prevailing professional norms.

(*Strickland, supra*, 466 U.S. at p. 688; see *People v. Lucas* (1995) 12 Cal.4th 415, 436-437.)

Reviewing courts generally defer to tactical decisions made by trial counsel. These decisions must be viewed through counsel's perspective at the time they were made and will not ordinarily be second-guessed. (*Strickland, supra*, 466 U.S. at pp. 689-691.) It

must be presumed that counsel exercised reasonable professional judgment. (*Bell v. Cone* (2002) 535 U.S. 685, 698; *People v. Holt* (1997) 15 Cal.4th 619, 703.) *Strickland* imposes a "highly demanding standard upon [the defendant] to prove gross incompetence." (*Kimmelman v. Morrison* (1986) 477 U.S. 365, 382.) "The [defendant's] burden is to show that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. [Citation.]" (*Harrington v. Richter* (2011) 562 U.S. 86, 104 [131 S.Ct. 770, 787, internal quotations omitted.) Counsel is not ineffective for foregoing a strategy simply because there would have been "nothing to lose" by pursuing it. (*Knowles v. Mirzayance* (2009) 556 U.S. 111, 121-122.) "The fact that [the defendant] was convicted is no evidence that his counsel was incompetent." (*People v. Hartridge* (1955) 134 Cal.App.2d 659, 667.)

"[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." (*Strickland*, *supra*, 466 U.S. at p. 691.) However, the decision whether to put on witnesses are matters of trial tactics and strategy that a reviewing court generally may not second-guess. (*People v. Pangelina* (1984) 153 Cal.App.3d 1, 8-9.) "[T]he choice of which, and how many, of potential witnesses [to call] is precisely the type of choice which should not be subject to review by an appellate court." (*People v. Floyd* (1970) 1 Cal.3d 694, 709, disapproved of on another ground in *People v. Wheeler* (1978) 22 Cal.3d 258, 287, fn. 36, overruled on other grounds in *Johnson v. California* (2005) 545 U.S. 162.)

The defendant must also demonstrate prejudice. (*People v. Ledesma* (1987) 43 Cal.3d 171, 217; *People v. Fosselman* (1983) 33 Cal.3d 572, 584.) Prejudice exists only when it is reasonably probable that a result more favorable to the defendant would have occurred absent the challenged act or omission. (*Strickland, supra*, 466 U.S. at p. 694; *People v. Ledesma, supra*, 43 Cal.3d at pp. 217-218.) The defendant must show that counsel's incompetence resulted in a fundamentally unfair proceeding or an unreliable verdict. (*Harrington v. Richter, supra*, 131 S.Ct. at pp. 787-788; *Lockhart v. Fretwell* (1993) 506 U.S. 364, 369-370; *In re Hardy* (2007) 41 Cal.4th 977, 1019.)

> [T]o be entitled to reversal of a judgment on the grounds that counsel did not provide constitutionally adequate assistance, the [defendant] must carry his burden of proving prejudice as a "demonstrable reality," not simply speculation as to the effect of the errors or omissions of counsel. [Citation].

(*People v. Williams* (1988) 44 Cal.3d 883, 937.)

If a defendant fails to show that the challenged acts or omissions were prejudicial, a reviewing court may reject the claim on that ground without determining whether counsel's performance was deficient. (*Strickland, supra*, 466 U.S. at p. 697; *In re Scott* (2003) 29 Cal.4th 783, 830.)

B. Trial Counsel Was Not Ineffective for Failing to Introduce Expert Medical Testimony

Petitioner claims his trial counsel's failure to present a medical expert to explain the falsity of the prosecution's "medical strategy" constituted ineffective assistance. (Pet. at 35.) However, petitioner fails to demonstrate that his trial counsel's performance fell below an objective standard of reasonableness. (See *Strickland*, *supra*, 466 U.S. at pp. 687-691.) Before trial, petitioner's trial counsel consulted with Dr. Fitzgerald regarding why a physical examination was not conducted on the minor victims in this case. (Exh. B at 2.) Dr. Fitzgerald informed defense counsel both that it was unusual for a physical examination to not be done given the accusations in this case, and that she could not testify as to whether the victims had injuries consistent with their allegations since examinations were never performed. (Exh. B at 2.) Based on her conversation with Dr. Fitzgerald, petitioner's trial counsel decided not to call Dr. Fitzgerald or any other medical doctor to testify about the lack of physical examinations since there was no evidence for any doctor to explain or challenge. (Exh. B at 2.) Counsel specifically stated in her declaration that her decision was a tactical one. (Exh. B at 2.)

Counsel's tactical choice was reasonable under the circumstances. As it was, the jury was presented with no physical evidence or expert medical testimony that corroborated the victim's claims. On the other hand, had Dr. Fitzgerald been called as a witness, she could only say that if a medical examination had been performed in a timely manner, there most likely *could have been* physical findings had there been sexual penetration, *especially with a penis*. (Exh. B. at 2.) Further, on cross-examination the prosecutor no doubt would have elicited her acknowledgment that physical findings do not always appear under those circumstances, and would be much less likely to appear in situations where the sexual abuse consisted of surface touchings, oral copulation, and digital penetration, all of which comprised the majority of the conduct that occurred in this case. Notably, the jury acquitted petitioner of the greater offense of sexual *intercourse* with a child under the age of 10 years, as alleged in count one. Thus, petitioner's trial counsel reasonably decided not to call an expert like Dr. Fitzgerald to testify, and such decision did not fall "outside the wide range of professionally competent assistance." (See *Strickland*, *supra*, 466 at p. 690.)

Petitioner's trial counsel made a rational, tactical decision to rely on the People's burden of proof and a negative inference from the People's failure to produce any physical evidence that the victims were sexually abused. The People did not introduce any medical or physical evidence to support the victims' claims that petitioner sexually abused them. In closing argument, petitioner's trial counsel was able to capitalize on that fact by arguing that no physical evidence supported any of the charges. (3 RT 363-365.) That strategy paid off, as the jury found that petitioner had not engaged in sexual

intercourse with Breanna. The jury's finding not only calls the probative value of Dr. Fitzgerald's declaration into question, it also undermines the foundation of Dr. Gabaeff's claim that, "If [petitioner] had committed the acts he was accused of, it is virtually certain the medical exam would have shown it" (Exh. A at 5), since the textbook examples he provides of pre-pubescent vaginal damage "show the expected consequences of *intercourse* with an 8 year old[.]" (Exh. A at 3.) In assailing Sergeant Lopez's decision to forego a physical examination, Dr. Gabaeff offers, "It might be considered axiomatic that a moment of discomfort in a brief exam, *which might discover possible exculpatory or inculpatory evidence to support or undermine a conviction*, should never be considered an excuse to not seek and document relevant evidence that *may be present*." (Exh. A at 3.)

Given that any expert would have rendered at best an equivocal opinion regarding the probative value of a physical examination in this case, defense counsel's strategy was reasonable. The utility of expert medical opinion was carefully considered by defense counsel, balanced against its possible negative consequences, and properly rejected for strategic reasons. As there was a reasonable tactical basis for counsel's decision, petitioner's claim of ineffective assistance necessarily fails. (*People v. King* (2010) 183 Cal.App.4th 1281, 1310.)

Petitioner also fails to show a reasonable probability that but for his trial counsel's alleged errors the result of his trial would have been different. (See *Strickland*, *supra*, 466 U.S. at pp. 691-696.) Petitioner candidly acknowledges, "We don't know for sure whether the evidence produced by the medical exam would have exonerated [him]." (Pet. at 35.) If petitioner's trial counsel had called an expert in child abuse like Dr. Fitzgerald to testify, then petitioner would have been placed in no better a position than he found himself at trial, and may have been worse off for it. Without the benefit of expert medical testimony, the People's case relied solely on the credibility of the victims. In closing argument, petitioner's trial counsel highlighted the absence of physical evidence to support the victims' claims and argued they were not credible. (3 RT 563-565.) She contended the girls changed their stories, gave inconsistent details regarding the sexual abuse, made up allegations, and only parroted a fabricated story told to them by their parents. (3 RT 361-363.) True, the jury resolved those credibility issues adversely to appellant (with the exception of the allegation that petitioner had committed an act of sexual intercourse with Breanna), but appellant fails to demonstrate that a different result would have obtained had defense counsel procured the testimony of an expert witness.

Further, the evidence overwhelmingly showed that petitioner committed lewd acts upon Breanna and Hannah. Breanna testified that, over the course of several years, petitioner touched Breanna's private parts while the two were alone. (2 RT 103-104,

107-109, 111-112, 117, 119-120.) Petitioner used his hands and his mouth to touch her bare vagina. (2 RT 104-105, 110-112.) Petitioner also used a sexual device on Breanna's vagina. (2 RT 112-115, 159-160.) Breanna's statements during her forensic interview were consistent with this testimony. (1 CT 160-161, 163-164, 172, 174-176.)

Hannah's interview and testimony also provided evidence of petitioner's molestation on May 21. During her trial testimony and forensic interview, Hannah recalled petitioner got into bed with the children, pulled Hannah's pants down, and inserted his finger into her vagina. (2 RT 184, 186-188, 209-210; 1 CT 117, 120, 128, 130-131.) Hannah reacted by immediately getting out of bed, running to the bathroom, and crying. (2 RT 123-124, 188-189.) This was corroborated by Breanna's testimony. (2 RT 123-125.) Then, Hannah demanded to call her dad and immediately told him about what had just occurred. (2 RT 191-192.) The testimony of the victims' parents also supplied details and information that corroborated portions of the children's testimony. Karina, Breanna's cousin, testified to an experience with petitioner in which he called her into a private bedroom, exposed his penis, and said, "You can touch it if you want." (2 RT 217-218.) Thus, there was other evidence from which the jury could conclude that petitioner was disposed or inclined to commit sexual offenses and was likely to have committed the charged offenses in the instant case. (See CALCRIM 1191.) As the verdicts reveal, the jury found that Breanna and Hannah were credible and testified truthfully about the instances of sexual abuse. Petitioner fails to demonstrate how expert medical testimony would have altered the jury's findings.

Finally, Sergeant Lopez testified that it was possible a medical examination could have revealed evidence of trauma even after nine days since the alleged sexual abuse. (2 RT 321.) He also testified that a medical examination could have been done prior to 72 hours in this case. (2 RT 324.) This is the same testimony petitioner now claims was missing from his trial. Accordingly, petitioner has not "establish[ed] that, counsel's purportedly deficient performance resulted in prejudice to him to the extent that it undermined the proper functioning of the adversarial process, such that the proceeding cannot be relied upon to have produced a just result." (*People v. King, supra*, 183 Cal.App.4th at p. 1311.)

Petitioner's reliance on *In re Hill* (2011) 198 Cal.App.4th 1008 (*Hill*), is misplaced. (Pet. at 28.) In *Hill*, the defendant was convicted of 23 counts of sexual abuse against two minors, including his stepdaughter C.W. (*Hill*, *supra*, 198 Cal.App.4th at pp. 1011-1012.) At trial, C.W. recanted her prior statements that the defendant had molested and had sexual intercourse with her. (*Id.* at pp. 1012-1014.) The prosecution presented testimony from Dr. Davis, who examined C.W. (*Id.* at pp. 1014-1015.) Since C.W.'s examination was a month after the last reported incident, Dr. Davis did not expect to find injuries. (*Id.* at p. 1014.) C.W. had a "'normal'" anogenital examination. (*Ibid.*) The

doctor testified that she would not expect to see any physical findings on a teenage girl who had regular sexual intercourse for two years but no sexual intercourse for a month prior to an examination. (*Ibid.*) Dr. Davis also testified that when a person infected with the herpes virus has sexual intercourse with an uninfected person for up to two years, there was only a 4 to 10 percent chance of transmitting the virus. (*Id.* at p. 1015.) The evidence showed the defendant was infected with the herpes virus prior to the allegations of abuse, and C.W. was uninfected after the sexual abuse stopped. (*Ibid.*) The defendant testified and denied the allegations. (*Ibid.*)

On a writ of habeas corpus, the defendant claimed his trial counsel provided ineffective assistance by not requesting and obtaining copies of C.W.'s colposcopic photographs before trial and not making reasonable efforts to retain a medical expert to assist in trial preparation and/or testify at trial to contradict Dr. Davis. (*Hill*, *supra*, 198 Cal.App.4th at pp. 1015, 1017.) The defendant submitted an affidavit from his trial counsel, who claimed she was unaware colposcopic photographs had been taken, had spoken with a doctor regarding Dr. Davis' conclusions that "'no findings' in an exam is not inconsistent with molest," but could not recall the substance of that conversation, and had no tactical reason for not pursuing a medical defense that C.W. was not molested. (*Hill*, *supra*, 198 Cal.App.4th at p. 1018.) The defense also submitted a declaration from a medical expert who examined Dr. Davis' trial testimony, Dr. Davis' report on her forensic examination of C.W., an interview C.W. gave alleging sexual abuse, and the colposcopic photographs taken of C.W. (*Id.* at pp. 1018-1019.) The defense expert concluded that C.W.'s hymen would not have appeared "normal" after the 100 to 200 penile-vaginal penetrations that she alleged occurred, and there was a 50 percent chance petitioner would have transmitted the herpes virus to C.W. each time they had sexual intercourse. (*Id.* at pp. 1012, 1018-1020.)

The reviewing court concluded the defendant's trial counsel provided ineffective assistance. (*Hill*, *supra*, 198 Cal.App.4th at p. 1024.) The court determined the attorney did not conduct a reasonable investigation of all defenses, citing the attorney's failure to request and obtain the colposcopic photographs, her inadequate and "superficial" consultation with medical experts, and her failure to obtain an independent medical expert in the field of child molestation who could help her review the evidence. (*Id.* at pp. 1024-1025.) The court reasoned that had counsel conducted a reasonable investigation, she would have obtained a medical opinion to contradict Dr. Davis' testimony that C.W.'s "normal" anogenital examination was consistent with her claim of sexual abuse and Dr. Davis' opinion that the chance of transmitting the herpes virus during sexual intercourse between an infected and uninfected person was relatively low. (*Id.* at pp. 1025-1026.) The court held that counsel's lapses prejudiced the defendant. (*Id.* at pp. 1028-1030.)

Hill is inapposite to the instant case. Here, the prosecution did not present any medical or physical evidence to prove that the victims had been sexually abused. As such, petitioner's trial counsel did not have to defend against such evidence or cross-examine a prosecution expert regarding the lack of a physical examination. Further, unlike in *Hill*, petitioner's trial counsel consulted with Dr. Fitzgerald, who explained that physical findings would likely have been found had an examination been performed, but since there were no examinations, there were no findings to explain or challenge. (Exh. B at 2.) Thus, unlike counsel in *Hill,* here petitioner's trial counsel made a rational, tactical decision to rely upon a negative inference regarding a lack of physical evidence of sexual abuse after he conducted a thorough investigation.

Petitioner's reliance on *Gersten v. Senkowski* (2d Cir. 2005) 426 F.3d 588 (*Gersten*) is equally misplaced. (Pet. at 26.) In *Gersten*, the defendant's daughter testified the defendant had regularly, forcibly inserted his penis into her mouth and anus for years and had also forced his penis into her vagina a couple of times. (*Gersten*, at pp. 591-592.) The People presented medical testimony from Dr. Silecchia who examined the victim. (*Id.* at pp. 594-596.) Dr. Silecchia testified her findings during the examination were "'highly suggestive of penetrating trauma to the hymen'" and that "something had passed through the alleged victim's anus that was large enough to tear it." (*Id.* at p. 595.)

The defendant's trial counsel did not examine colposcopic photographs taken during Dr. Silecchia's examination and conceded that the doctor's examination found evidence of penetration in closing argument. (*Gersten*, *supra*, 426 F.3d at pp. 596, 598.) Defense counsel argued the sexual penetration was explained by the victim's sexual relationship with her boyfriend. (*Id.* at pp. 597, 598.)

After the defendant was found guilty, he filed a federal writ of habeas corpus alleging ineffective assistance of counsel for failing to obtain medical discovery materials, failing to have those materials reviewed by an expert, and failure to consult or call a medical expert to testify at trial. (*Gersten*, *supra*, 426 F.3d at pp. 601-602.) The defendant's trial counsel claimed he reviewed the victim's medical records, briefly spoke with a registered nurse on whether the medical records could have been consistent with the victim having a sexual relationship with her boyfriend, and pursued a defense strategy that any penetration was the result of the victim's relationship with her male friend. (*Id.* at pp. 602, 604.) The defendant provided a post-trial affidavit from Dr. Brown, who reviewed Dr. Silecchia's testimony, the victim's medical records, and the victim's colposcopic photographs. (*Id.* at p. 599.) Dr. Brown concluded the physical evidence was not indicative of penetrating trauma to the victim's hymen or anus, so "none of the medical evidence corroborated the allegations of abuse or the alleged victim's testimony." (*Id.* at pp. 599-600.)

The reviewing court found the defendant's counsel ineffective, noting counsel's failure to call as a witness or consult any medical expert on child sexual abuse and counsel's concession that the physical evidence was indicative of sexual abuse without any investigation into the matter. (*Gersten*, *supra*, 426 F.3d at pp. 607-608.) The court reasoned, "had counsel conducted such an investigation, counsel would likely have discovered that exceptionally qualified medical experts could be found who would testify that the prosecution's physical evidence was not indicative of sexual penetration and provided no corroboration whatsoever of the alleged victim's story." (*Id.* at p. 608.)

Gersten is factually distinguishable from the instant case. Here, as previously noted, the prosecution did not present any physical or medical evidence to corroborate the victims' claims. Also, defense counsel made no concessions that any sexual abuse had occurred. Further, unlike the defendant's counsel in *Hill*, petitioner's trial counsel consulted with Dr. Fitzgerald and performed a complete investigation. In light of the foregoing, petitioner has not demonstrated that his counsel provided ineffective assistance.

CONCLUSION

Petitioner has failed to state a prima facie case showing that he is entitled to habeas relief. Accordingly, the petition for writ of habeas corpus should be denied.

Respectfully submitted,

KRISTEN HERNANDEZ
Deputy Attorney General
State Bar No. 301160

For Kamala D. Harris
Attorney General

KH:lr

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

Case Name: **People v. Ross** No.: **D066786**

I declare: I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business. The Office of the Attorney General's eService address is AGSD.DAService@doj.ca.gov.

On December 3, 2015, I served the attached: LETTER BRIEF

by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 600 West Broadway, Suite 1800, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

Patrick Morgan Ford, Esq.
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Counsel for Appellant Richard Eric Ross

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Executive Officer
San Diego County Superior Court
220 West Broadway
San Diego, CA 92101-3409

The Honorable Bonnie M. Dumanis, D.A.
ADI Participant
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and, furthermore I declare, in compliance with California Rules of Court, rules 2.251(i)(1)(A)-(D) and 8.71(f)(1)(A)-(D), I electronically served a copy of the above document on December 3, 2015, by 5:00 p.m., on the close of business day to the following.

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ljlegal@sbcglobal.net
Appellant's Attorney Patrick Morgan Ford

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on December 3, 2015, at San Diego, California.

Laura Ruiz
Declarant


Signature

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