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December 15, 2015

Mr. Kevin Lane
Clerk, Court of Appeal
Fourth Appellate District
Division One
750 B Street, Suite 300
San Diego, CA 92101-8118

Re: *In re Richard Eric Ross* (D069126) — Reply to the Informal Response

Dear Mr. Lane:

On December 3rd, 2015, respondent filed an informal response to the habeas corpus petition filed on October 28th, 2015 in the above referenced case. Petitioner now files his reply to that response.

Respondent correctly states many of the relevant facts including the fact that both Hannah and Breanna claimed to have been vaginally penetrated (and Breanna alleged sexual intercourse and sexual penetration with a vibrator), the social worker interviews were curiously scheduled to take place nine days after the initial complaint (at a time when some of the evidence would no longer be present), the social worker requested a medical exam for Breanna, and despite the fact that evidence from digital penetration (as in Hannah's case) and the sex acts described in Breanna's case can be observed long after the incident, Sergeant Lopez still decided to forego the physical exams for fear of "traumatizing" the young girls. (Informal Response (IR) 2-3.)

But respondent later misses the point when arguing the failure to present expert testimony did not constitute ineffective assistance of counsel within the meaning of *Strickland v. Washington* (1984) 466 U.S. 666.

Respondent's primary argument is that trial counsel performed competently by contacting Dr. Fitzgerald. (IR 6.) According to respondent, counsel contacted Dr. Fitzgerald who told her that she would not be able to

challenge the SART doctor's findings because no exam was done, and there was therefore nothing to challenge. (IR 6.) This claim misses the point for a couple of important reasons. First, respondent fails to include the fact that Dr. Fitzgerald immediately told trial counsel that she would not testify as a witness for the defense under any circumstance because she no longer worked as an expert witness even though her name was apparently still on file in the public defender's office. (Exh. B., p.2 line 3; Exh. D, 7.)

Contrary to respondent's suggestion, this was not a situation where counsel consulted with an expert and thereafter made a decision about whether to call the expert as a witness at trial. Trial counsel's call with Dr. Fitzgerald was brief and the doctor didn't even remember speaking with counsel. (Exh. D, 6.) Counsel was on the right track but she quit trying after the first quick call to Dr. Fitzgerald.

More importantly, the point of consulting with the medical expert was not to challenge the state's nonexistent findings as respondent argues, but rather to collapse the state's medical theory (presented through a police officer) that the chances of finding evidence that would have confirmed the allegations of sexual penetration were "limited." (2 RT 445.)

The truth is, and an independent medical expert would have testified, that if petitioner had committed the sex acts described by the young girls it was highly likely or "virtually certain" that the SART exam would have shown it. (Exh. A, p. 5; Exh. D, 8.) Dr. Gabaeff went so far as to say "These stated alleged actions are virtually 100% likely to leave permanent damage to the genitalia in that child that can be seen for years..." (Exh. A, p. 2.)

Dr. Gabaeff also rejects the sergeant's excuse that the medical exam would traumatize the child and that justified foregoing the exam. He's worked on thousands of cases over many years and served as a supervisor of San Diego's SART program at one time. (Exh. A, p. 1.) He notes the SART exams "are like pelvic exams and are not that uncomfortable... often causing no discomfort at all." (Exh. A, p. 3.) Dr. Gabaeff emphasizes the importance of following the medical protocols in these cases, which are designed in part "to identify false allegations," and the chances of convicting an innocent person increase when "the system ignores the scientific method." (Exh. A, p. 1.) The protocol in cases where penetration is alleged calls for a medical

exam and obviously takes into account the fact that there may be some discomfort to the accusers. It's improper for the officer to reject the required test based on his own subjective medical opinion that the exams would "traumatize" the accusers.

Absent medical evidence, jurors are left with the "unwarranted belief that the alleged victim is always telling the truth." (Exh. A, pp. 1-2.) Dr. Gabaeff notes that false accusers include children manipulated by adults who are capable of installing false memories, and goes on to note that the biological parents of Hannah (Melissa) and Breanna (Alan) had known animus toward petitioner. (Exh. A, p. 2.) Moreover, Alan and Melissa were given "unsupervised access" to the girls following Hannah's allegation, and Hannah was curiously taken by her aunt almost immediately to a swimming pool, which "would have corrupted significant available evidence, "although it was never determined whether this was done intentionally to tamper with evidence or out of ignorance." (Exh. A, p. 5.)

Dr. Gabaeff stressed that because evidence confirming the allegations of sexual penetration would almost certainly have shown up in a medical exam, the absence of evidence of penetration would show the girls' stories to be false. (Exh. A, p. 5.)

In concluding there was no excuse for not conducting the exam, he also notes that children claiming sexual penetration must be tested for the presence of sexually transmitted diseases, and the failure to order the exam here was either because the officer didn't believe the allegations of sexual conduct, or was a product of "pure negligence" on the part of the officer. (Exh. A, p. 5.)

So, respondent entirely misses the point by arguing that a medical expert couldn't have helped since no exam was performed, and there could therefore be no challenge to it.

The medical expert would have explained the state's medical opinion, delivered by a sheriff's sergeant that a medical exam was unlikely to confirm the allegations, was nonsense. These are among the most serious charges imaginable (with a life prison term at stake), and the sergeant rejected the medical protocol that would have confirmed the abuse or exposed the false

allegation. This should have been explained to the jury by a doctor who understands the importance of following the protocol.[1] When the state fails to gather critical forensic evidence for no valid reason, defense counsel must present an expert to call them out on it.

Respondent next argues that trial counsel's decision to not call an expert was reasonable because counsel was still able to capitalize on the state's lack of physical evidence by emphasizing the point during closing argument, and respondent notes "the strategy paid off" since the jury rejected the rape by sexual intercourse claim involving Breanna. (IR 6-7.)

However, as petitioner's "*Strickland* expert," Bob Boyce emphasizes, sexual assault cases involving children are exceptionally challenging as juries routinely "believe the child's testimony for no reason other than the witness is a child." (Exh. C, p. 3; quoting *Kennedy v. Louisiana* (2008) 554 U.S. 407, 443.) In cases where the child alleges penetration and there was no SART exam, "defense counsel must present an expert to explain to the jury a medical exam would have resulted in physical findings if penetration in fact occurred." (Exh. C, p. 5.) "A few simple cross-examination questions of the police officer as to whether an exam might have shown something is not nearly enough." (Exh. C, p. 6.) And the court instructs the jury that the statements of counsel are not evidence, so the defense cannot forego presenting essential medical expert testimony based on the plan to mention the lack of physical evidence during closing argument. (See CALCRIM No. 104.)

The fact that the jury rejected the rape by intercourse count doesn't help respondent as it only shows the jurors were partially suspicious of Breanna's claims and they compromised by rejecting one count. Had they

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[1] It is noteworthy that the undersigned appellate counsel is currently working on another case where a minor alleged vaginal penetration by her uncle and the police in that case also decided against having a medical exam to confirm the child's allegation. (See *People v. Phuoc Tran* (D067919).) So it's either a coincidence that the San Diego police officers have violated the relevant protocol in two cases, or it's a disturbing pattern that damages the state's credibility in prosecuting sex cases involving minors by ignoring available evidence that will lead to the truth.

been shown through an expert that the state's case, which involved no physical evidence, was a product of the sergeant's flawed medical opinion, they would almost certainly have rejected the entire case — not just the worst count involving Breanna. Had they known evidence was available but ignored by the state, the defense could have made a compelling argument that the sergeant was biased or incompetent and the prosecution failed to meet its burden of proof. (See Exh. C, p. 8, and *People v. Wimberly* (1992) 5 Cal.App.4th 773, 793.) The failure to present the "powerfully exculpatory" medical expert can't be excused by counsel's comment during closing argument that the state failed to produce forensic evidence to prove its case.

Respondent next argues that even if counsel's failure to present the expert was a mistake, petitioner has not shown the "result of his trial would have been different." (IR 7.) But the defense doesn't have to show the result of the trial "*would* have been different." It need only show a "reasonable probability" of that fact which is a probability "sufficient to undermine confidence in the outcome." (*Strickland v. Washington*, *supra*, 466 U.S. at p. 694; *In re Neely* (1993) 6 Cal.4th 901, 909.)

Respondent suggests the jury believed the girls (with the exception of one count) even though there were inconsistencies in the facts they provided, and defense counsel emphasized the lack of physical evidence. (IR 7.) Respondent claims there was overwhelming evidence of guilt, essentially because Breanna and Hannah said so. (IR 7.) But the girls stories were inconsistent and the social worker even 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.) And both Breanna and Alan said that Hannah was known to lie. (1 CT 189; 2 RT 292.)

Given the lack of any supportive evidence and the inconsistencies in the girls' stories, this was a weak case to begin with. It was even weaker in light of the animosity that Alan and Melissa had regarding petitioner. Petitioner had no record of crimes or aberrant behavior — he was a highly accomplished Navy veteran who made the mistake of engaging in sex with Alan's wife Tami, while Alan was present one drunken night after a wedding. Tami left Alan for petitioner soon after that incident, and these allegations followed.

The state, despite the lack of any confirming evidence of sexual abuse,

obtained verdicts that have put petitioner in prison for the rest of his life unless the court corrects this profound error.

SART protocols are developed to increase the reliability of the evidence in these most serious cases. Had the defense presented expert testimony showing the state's investigation was perfunctory, this would almost certainly have undermined everyone's confidence in the verdict.

Trial counsel was right to consult an expert, but she went no further after being told that Dr. Fitzgerald no longer did this kind of work. The next step for counsel was to find an expert who could help. A good medical expert would have devastated the state's case — way beyond the impact of defense counsel's cross-examination or comments during closing argument.

The case identifies a flaw in the present system as a police officer has the authority to reject the established SART protocol, and the recommendation of the social worker to conduct a medical exam. The officer likely didn't mind because he understood the chances of conviction would be good if the jury was asked to resolve a credibility contest between young girls claiming abuse, and the accused who had to prove a negative.

Few cases are more challenging to our justice system and defense lawyers must investigate and present experts to undermine the state's case — especially in a case like this where the expert (who was not part of the defense team) would have presented such powerful testimony regarding the weakness of the state's case against petitioner.

In the present case, trial counsel rendered ineffective assistance of counsel.

Conclusion

Children occasionally falsely accuse adults of improper sexual contact. This is especially likely to happen where the children's parents hold a grudge against the accused.

The greatest problem for an innocent defendant arises where the child claims the improper contact involved non-invasive touching that cannot be confirmed through forensic testing. It's easier to identify false accusations

where the children claim vaginal (or rectal) penetration because medical tests can confirm the crime — or expose the false allegation. While some evidence disappears after time, other evidence of scars from torn tissue remains for years.

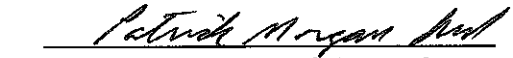
There can be no excuse for the state prosecuting claims of digital penetration, sexual intercourse and painful penetration with an electric vibrator, to forego a medical exam. This is especially true here, where petitioner had never been involved in improper conduct and the accusers' parents held a grudge against him.

Trial counsel must be vigilant in these cases and present expert testimony that will expose the state's failure to properly investigate these cases. Asking the detective whether testing might have provided physical evidence wasn't nearly enough.

The facts are not in dispute here. Trial counsel gave up after one quick call to a medical expert and simply proceeded to make the critical point weakly through cross-examination of the expert and closing argument. She was left with the sergeant's statement that there was a "limited" chance that tests would have revealed evidence. The truth is that testing would almost certainly have shown the truth. There are times when it's possible that an innocent person will be convicted of child molest offenses and other times when it is predictable. It was predictable here.

Petitioner asks that this court issue an order to show cause seeking further briefing or oral argument on any remaining matters in question or an evidentiary hearing if the court believes further fact-finding is necessary. Alternatively, since this case is being considered with the related direct appeal (D066786), petitioner now requests oral argument in that matter that will address both cases, but will likely focus on the habeas petition.

Respectfully submitted,



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RICHARD ERIC ROSS

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 *Reply to the Informal Response*, 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 December 15, 2015, at San Diego, California.

Esther F. Rowe