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SUPERIOR COURT OF CALIFORNIA, COUNTY OF FRESNO

CENTRAL DIVISION

DOUGLAS R. STANKEWITZ, Petitioner, On Habeas Corpus.	Case No. 21CRWR685993 PETITIONER'S POST-EVIDENTIARY HEARING SUPPLEMENTAL BRIEF (Fresno Superior Court Case #CF78227015)

TO THE HONORABLE ARLAN L. HARRELL, JUDGE, SUPERIOR COURT FOR THE COUNTY OF FRESNO AND TO THE DISTRICT ATTORNEY FOR THE COUNTY OF FRESNO:

Petitioner DOUGLAS R. STANKEWITZ, through counsel, hereby files his post-Evidentiary Hearing Supplemental Brief, including analysis under a July 2024 published federal habeas opinion that could serve as a framework for this Court's analysis, ordered by the court on August 5, 2024. Petitioner's responses to the court's ordered items are as follows:

(1) The Legal Basis of Claims 1, 2 and 6:

Each of Petitioner's claims are supported by multiple legal bases. California Penal Code,

section 1473(d)[1], effective January 1, 2024, states "This section does not limit the grounds for which a writ of habeas corpus may be prosecuted or preclude the use of any other remedies". *Campbell v. Barnes* (Orange County Superior Court 2020) Cal. Super. LEXIS 30646 at 11. Courts have also recognized this, and in *Stanley v. Ayers*, the USDC quoted section 1473(d), and the court affirmed "The statute does not limit the grounds for which a writ of habeas corpus may be prosecution (sic). *Stanley v Ayers* (USDC, C.D. CA 2017) 2017 U. S. Dist. LEXIS 77483 at 86.

Indeed, both California courts and one federal court have recognized that the statute does not limit the available grounds for bringing a habeas writ. The grounds enumerated in 1473 do not limit the right to seek habeas relief on other, nonstatutory grounds. *In re Pratt* (1999) 69 Cal.App.4th 1294, 1314. In *Pratt*, the court granted the habeas petition under both *Brady v. Maryland* (1963) 373 U.S. 83, and section 1473(b)(1). *Ibid*, at 1323.

The constitutional bases for the claims are viewed through the lens of CA Penal Code Sect. 1473. Thus, the court can grant relief based on either the constitutional grounds outlined by Petitioner, Sect. 1473, or both.

(a) Legal Bases of Claim 1:

- *Brady v Maryland*
- 5th Amendment Due Process
- CA const. Due Process Sect. 7
- Right to Present a defense – 6th Amendment
- Right to Counsel – 6th Amendment
- CA PC 1473(b)(1)(A) false evidence

(b) Legal Bases of Claim 2:

- *Brady v Maryland*
- 5th Amendment Due Process
- CA const. Due Process Sect. 7
- Right to Present a defense – 6th Amendment
- Right to Counsel – 6th Amendment
- CA PC 1473(b)(1)(A) false evidence

(c) Legal Bases of Claim 6:

- *Brady v Maryland*
- 5th Amendment Due Process
- CA const. Due Process Sect. 7
- CA PC 1473(b)(1)(A) false evidence

(2) Prosecutorial Misconduct

[1] All statutory references are to the California Penal Code unless specified otherwise.

Counsel mentioned an intention to withdraw the ongoing prosecutorial misconduct claim. This was directed at only some of the prosecutorial misconduct claims due to the professionalism demonstrated by ADA Smith and by counsel's evaluation that Mrs. Smittcamp's rebuffing of Ret. Judge Ardaiz's interloping in the case file was honest and professional. However, Petitioner cannot withdraw the claim as to all prosecution team members based on the strength of the record that various prosecutors tampered with evidence concealed and misrepresented mitigating and exculpatory materials from the preliminary hearing and trial judges, and bent witness testimony between trial one and trial two to obfuscate that their bullet trajectory theory was invalid, and that the lead homicide detective (Lean) refused to meet with defense in advance of the evidentiary hearing, colluded with Mr. Ardaiz to improperly access stored evidence by way of Sheriff Mims[2] and both former trial prosecutors spoke about the case after they were subpoenaed for the evidentiary hearing and Mr. Ardaiz took the time to remind Mr. Robinson of any alleged facts to shed Mr. Stankewitz in a bad light..

One specific example of ongoing prosecutorial misconduct impacting the evidentiary hearing itself, but through no fault of ADA Smith or Mrs. Smittcamp, is that Ret. Sheriff Mims gave false testimony at the evidentiary hearing, making it necessary to recall her several times. Her lies were apparent when FCSD Captain Gularte took the stand and directly contradicted Ret. Sheriff Mims. Another example is the testimony of DAI Isaac and DDA Cook stating that they met with the Fresno Crime Lab Director Koop about this case. However, Koop contradicted them when he testified a meeting never took place. Further, DAI Isaac continued to deny that the DA's office submitted a false report regarding the second date on the holster in September 2021. Indeed, she maintained that position for over 27 months, until finally admitting at the Evidentiary Hearing, in

[2] Status of retirement does not remove Lean, Ardaiz, and Mims as members of the prosecution team. Evidence presented shows that they are acting as active members in their concerted efforts to influence the outcome, or otherwise hide the truth of, the evidentiary hearing.

January 2024, there is, in fact, a second date on the holster and that it was not noted in her previous report. Therefore, Petitioner only withdraws the prosecutorial misconduct allegation as it relates to DDA Smith's and elected DA Smittcamp's work on this case.

(3) Status of Claims "Submitted" and "Submitted on the Record"

California Rules of Court, Rule 8.45(b)(1) states the "'Record' means all or part of a document, paper, exhibit, transcript, or other thing filed or lodged with the court by electronic means or otherwise." [Emphasis added]. In California, "the record" in an evidentiary hearing for a post-conviction habeas petition proceeding generally refers to the collection of documents and evidence that are part of the proceeding, while "submitted on the record" refers to the process of formally presenting evidence or arguments to the court for consideration. (See, *People v. Pope* (Cal.App 1918) 37 Cal.App 656; *In re Marriage of Matthews* (Cal.App. 2005) 133 Cal.App.4th 624.) In habeas litigation, California Courts have laid out the procedural requirements for habeas petitions, and when and which evidence the court can consider in ruling on the various claims.

In *People v. Duvall* (Cal. 1995) 9 Cal.4th 464, the court explains the procedural requirements for a habeas corpus petition, discussing the roles of the various pleadings and the evidentiary hearing. After a petitioner files a habeas petition, "A [court] receiving such a petition evaluates it by asking whether, assuming the petition's factual allegations are true, the petitioner would be entitled to relief." (*Id*. at 474-475, citing *In re Clark* (1993) 5 Cal.4th 750, 764 fn. 2.) If, during this preliminary assessment, the court believes the petitioner would be entitled to relief, it can issue an Order to Show Cause wherein respondent can file a response and petitioner can reply in a traverse. *Id*., at 475-477. After briefing is complete, the court can hold an evidentiary hearing to address any facts outside the record of facts that are still in dispute. (*In re Rhoades* (Cal. Ct. App. 2017) 10 Cal. App.5th 896, citing, *People v. Romero* (1994) 8 Cal.4th 728, 739-740.) One reason an evidentiary

hearing is held to address disputed facts, is for the court to obtain credibility determinations. (*In re Scott* (2003) 29 Cal.4th 783, 824.) "[R]esolution of testimonial conflicts and assessment of witnesses' credibility requires a hearing where the court 'has the opportunity to observe the witnesses' demeanor and manner of testifying." (*In re Malone* (Cal. 1996) 12 Cal.4th 935, 946.)

Conversely, any facts that are not in dispute or if a fact has been admitted by respondent, the court can resolve an issue without a hearing. (*Id*. at 478-479; *In re Figueroa* (2018) 4 Cal.5th 576.) This means, in some instances, the court can rule on an issue based on the initial filing and supporting exhibits. (*Id*., quoting *People v. Frierson* (1979) 25 Cal.3d 143, 160.) Thus, this Court can rely on the entire record submitted either through the pleadings or at the hearing. If facts are still in dispute, this court must weigh the evidence through credibility determinations and corroborating evidence. In this case, there are many claims either not in dispute, partially admitted by respondent, partially disputed by respondent, or in dispute but supported by the record.

(a) Claims and Subclaims Not In Dispute by Respondent, Supported By Evidentiary Hearing Evidence, Trial Record and/or Petition Exhibits

<u>False Evidence Subclaims Not Disputed by Respondent, supported by Evidentiary Hearing Evidence, Trial Proceedings and/or Petition Exhibits</u>

(i) Petitioner's GSR Test Was Negative (Petition 67, Exhibits 2k, 2l, and 2m).

(ii) There is a Disparity About the Distance of the Cartridge Case Found from the Body. (reframed) (Petition 61 – 62 & 99, Exhibits 1aa and 1bb)

(iii) The Gun Was a Key Part of the Prosecution Story Which Was Provided to the Media to Prejudice Potential Jurors to Find Petitioner Guilty.[3] (Petition 63, Exhibit 1ii)

(iv) The Media Stories At the Time of the First Trial Referred to a Gun In the Possession of Petitioner.[4] (Petition 63, Exhibit 1ii)

(v) Deputy District Attorney Ardaiz Directed Law Enforcement to Change or Add to Their Reports in Order to Support His Theory of the Case. (Petition 68)

(PH Vol. 2 RT 372) and (T2 Vol. I RT 168:14 – 22)

(vi) DDA Robinson Used the Same Primary Witness, Billy Brown, Despite Issues of Coercion and Credibility in Order to Achieve a Conviction. (Petition 72)
(EH 568:1-3) – Robinson testimony that he did not investigate
(T2 Vol. II 352 – T2 Vol. III 584) Billy Brown testimony
(T2 Vol. II RT 550:18-20) Boudreau's testimony about height of victim

(vii) The prosecution had evidence in its possession that different guns were used in the Graybeal and Meras crimes yet represented to the court and jury that the same gun was used in both crimes. (Petition 139) submit
(PRH Vol. XXVI RT 377) – DDA Pebet's statement that the three .22 casings are no longer in property
(EH Exh 9) – FCSD Meras property card shows .22 caliber casings
(EH Exh 1g) – FCSD "Neg" report comparing .22 and .25 casings
(EH Exh 7h) – FCSD Garcia report documenting .25 casings labeled as .22 casings in evidence

(viii) Prosecutor presented argument and/or circumstantial evidence at various stages in the proceedings, including pretrial hearings, guilt and penalty phases of T1 and guilt and penalty phases of T2 to imply Petitioner's guilt in the Meras crime and paint the Petition as a habitual, violent offender. (Petition 143 - 150)
(PT Vol. 1 RT 187-88) – Ardaiz argues to court that the evidence was strong that the same gun was used in both crimes
(T1 Vol. 20 RT 3405) – Bonesteel testimony regarding the casings from the gun
(T1 Vol. 25 RT 4377- 4383) (T2 Vol. IV RT 811 – 814) - Meras penalty phase testimony implicating Petitioner
(T1 Vol. 26 RT 4740:19-25) (T1 Vol. 26 RT 4742:14-16) (T1 Vol. 26 RT 4743:12-14) (T1 Vol. 26 RT 4745:17-26) (T1 Vol. 26 RT 4745:17-26) (T1 Vol. 26 RT 4574:21-22) (T1 Vol. 26 RT 4748:16-19) - DDA Ardaiz statements tying Petitioner's action in the Graybeal and Meras crimes together
(T2 Vol. I RT 148) (T2 Vol. I RT 156) – Det. Boudreau testimony regarding the gun casings
(T2 Vol. IV RT 880) (T2 Vol. IV RT 880) (T2 Vol. IV RT 883) - DDA Robinson tying Meras crimes to Petitioner
(T2 Vol. IV RT 1029) -DDA Robinson moves Court Exhibit 2, a photograph of Petitioner with the hair length that Meras testified to
(T2 Vol. III RT 638) - DDA Robinson closing where he argues that Petitioner is tied to the Meras crimes
(T2 CR Vol. 2 CT 232-233) (T2 CR Vol. 2 CT 220 – 301) - Jury instructions which likely allowed the jury to accept the Meras testimony

(T2 Vol. IV RT 846) (T2 Vol. IV RT 847) (T2 Vol. IV RT 846) (T2 Vol. IV RT 849) -DDA Robinson argues in penalty phase that Petitioner is tied to the Meras crimes as an aider and abettor
(T2 CR Vol. II CT 386) – DDA Robinson again misleads the court at sentencing

(ix) Prosecution had no corroborating evidence to support their theory that Petitioner committed the Meras crimes and in fact had evidence that contradicted that theory. (Petition 150)
(EH Exh 9) – Meras property card shows .22 caliber casings

(x) Law enforcement did not question the codefendants about the Meras crime (Petition 150, Exhibits 7d, 7k and 7l.)

(xi) Meras crimes were key part of prosecution story which was provided to the Media to prejudice potential jurors to find Petitioner guilty. (Petition 152, Exhibit 1ii)

(xii) Media stories at the time of T1 tied the Meras crimes to the Graybeal Murder. (Petition 152, Exhibit 1ii)

(xiii) In a recent interview, Meras said that the robbery occurred in 1975 or 1976, not 1978. (Petition 153, Exhibit 7p)

<u>Brady/Jenkins Subclaims Not Disputed, supported by Petition Exhibits</u>

(i) Criminalist Smith: his photos are missing from court evidence. (Petition 112, 5l, 5z and 5aa) Habeas Exhibit 5z, First Trial Court Exhibit List shows that his photos were admitted; However, the Second Trial Court Exhibit List shows that they were not introduced nor admitted.

(ii) Missing Reports – Criminalist Smith (Petition 112, 5l, 5z and 5aa)

(iii) Witnesses: Petitioner's Cellmates; Jesus Meras; Frank Richardson (Petition 113, Exhibits 5cc,5k, 5dd, 5ee, 5ff and 5gg.)

(iv) Mitigating Evidence at Penalty Phase (Petition 115, Exhibits 5d, 5hh, 5ii, 5jj and 5kk)

<u>Misconduct Subclaims Not in Dispute, Supported by Petition Exhibits</u>

(i) The Shell Casings Were Not Properly Measured in Relation to the Body. (Petition 61 – 62 & 99, Exhibits 2k, 2l and 2m.)

(ii) No Testing Was Done to Determine the Actual Time of Death of the Victim. EH Exhibits 16 and 17 apply, this subclaim relies in part on other Habeas Exhibits. (Petition 99, Exhibits 4tt and 4ww)

(iii) The Investigators Failed to Look at the Victim's Shoes. (Petition 100, Exhibit 4d)

(iv) The Codefendants Statements Were Manipulated. (Petition 101, Exhibits 4w, 4z, 4yy, 4x and 6w)

(b) Claims and Subclaims In Dispute by "general denial," But Supported By Petition Exhibits

(i) Wrongful conviction subclaim dispute, generally denied

Witness and cellmate statements point to his innocence. (Petition 197, Exhibits 17d and 3f, and 4x; and Denial Exhibit 24p)

(ii) Claim 8: Mental Defect (Petition 154, Exhibits 8a, 8b, 8c, 8d and 8e).

Respondent has not disputed this fact with any specific evidence, only with a general denial. General denials are disapproved by California courts because general denials fail to narrow the factual disputes and prevent a petitioner from disputing those facts in a traverse or at the evidentiary hearing. *Duvall, supra*, at 480.

(iii) Witness and cellmate statements point to his innocence. (Petition 197, Exhibits 17d and 3f, and 4x; and Denial Exhibit 24p). Respondent has merely generally denied this claim and has not provided any evidentiary support.

Brady/Jenkins Claims Disputed, Generally Denied

(i) Petitioner's Interview Tapes – Det. Lean (Petition 107, Exhibit 5a)

(ii) Witnesses: Co-defendants (Petition 113, Exhibits 5cc, 5k, 5dd, 5ee, 5ff and 5gg; Billy Brown (Petition 113, Exhibits 6c and 6w);

False Evidence Subclaims Disputed, Generally Denied

(i) The prosecution used a pattern of Pressure and Coercion to secure Billy Brown's cooperation and testimony (Petition 118)
(T2 Vol. II 550:18 – 20 and T2 Vol. II 551:5 – 13)

(ii) Billy Brown's testimony was critical to the prosecution proving its case so they sought cooperation from jailhouse snitches as a backup plan (Petition 130, Exhibits 6y and 6z)

(iii)Billy Brown recanted his testimony, which confirmed his previous false statements in police interviews and court testimony (Petition 134, Exhibits 6c, 6w)

Misconduct Subclaims Generally Denied

(i) The Tapes Containing the Statements of the Codefendants and the Handwritten Notes by Law Enforcement Made During the Interrogations Are Unaccounted For. (Petition 93, Exhibits 4b, 4s, 4t, 4u, 4v, 4w, 4x, 4a and 4o)

(c) Claims Admitted by Respondent

Brady/Jenkins subclaims:

Medical Reports – x-rays of victim (Petition 111, Exhibit 5s)

(d) Claims and Subclaims Partially Admitted By Respondent

False Evidence Subclaim partially admitted by Respondent

Deputy District Attorney Ardaiz Participated in the Codefendant Interrogations, But Almost All the Evidence That Might Have Been Exculpatory Went Missing or Was Destroyed. (Petition 68, Exhibits 2n, 2o, 2t and 2u.)

Misconduct Subclaim Partially admitted

Over Fifty Items Subject to a Discovery Motion Are Unaccounted For. (Petition 92 and 169, Exhibits 4o and 6s)
(PRH Vol. XXVII 403 – 404) - DDA Pebet admitted that the DA's office had lost all DA files prior to 2017

(e) Claims and Subclaims In Dispute

New evidence subclaims In Dispute:

(i) Respondent argues not admissible:

a. Marlin Lewis Admission That He Shot Theresa Graybeal (Petition 84, Exhibits 3f and Denial Exhibit 24p) submit

b. Marlin Lewis' Admission Against Interest Made in 2010, Has Decisive Force and Value That Would Have More Likely Than Not Changed the Outcome at Trial. (Petition 84, Exhibits 3f, 3g and 3h

c. Marlin Lewis' Admission Occurred in 2010, Some 27 Years After the Second Trial. (Petition 84, Exhibits 3f, 3g and 3h)

(ii) Subclaims supported by Trial Record or EH Evidence

a. The Evidence Containing Blood Is Unaccounted For[5] (Petition 94)
EH Exh 22[6]– specifically Report #271 or #291 [number unclear]– blood testing report; and Reports & handwritten note – lists blood evidence collected p. 6, 14, p 16 – 24 & p 27

b. Deputy District Attorney Ardaiz Directed Officers to Manipulate Reports. (Petition 101)
(PH Vol. 2 RT 372) – Officer Mora testimony that he prepared a second report at the direction of DDA Ardaiz

c. The prosecution never filed a Notice of Aggravation Prior to the Penalty Re-Trial[7]. (Petition 173)

(4) Recent decided relevant habeas case:

In *Lucero v. Broomfield* (USDC C.Dist CA, Western Div. 7/26/2024) [attached hereto for the court's convenience as Exhibit 25c], a habeas petition was granted in a death penalty case on the grounds of IAC. The court granted the petition after ordering an evidentiary hearing. However, due to the stipulations of the parties, the court decided the case on the record. This case is relevant to our case for both factual and legal reasons:

At the guilt phase, Petitioner's attorney did not present any witnesses and relied solely on cross examination of prosecution witnesses. *Lucero*, *supra*, at 2. At the time of the current habeas proceeding, trial counsel was deceased. However, there was information in the record from the guilt phase by counsel during which he stated his basis for failing to impeach the pathologist. A review of the defendant's trial and state habeas counsel revealed that counsel had not investigated

[5] In addition to the 1978 standing Discovery Order in this case, Defendant's counsel filed a Motion to Compel Specified Discovery on 5/1/2017: Items #3, #4, #5, #6 and #7 were for blood testing related evidence. On 5/1/2019, Defendant's counsel filed another Motion to Compel Specified Discovery: Items #21, #22 and #23 were for blood related evidence.

[6] It should be noted that EH Exh 22 also contains discovery that was never turned over, including Boudreau's measurement notes and the blood testing reports. This evidence constitutes yet another *Brady* violation and also goes to IAC since second trial counsel never reviewed it.

[7] A review of the post-reversal record in this case between Dec. 20, 2012 – May 3, 2019, Vol. I – Vol. XXXV, does not contain any Notice of Aggravation.

any evidence pertaining to pathology or made any expenditures pertaining to such evidence. *Lucero*, *supra*, at 11.

Trial counsel represented a client where the same pathologist testified in a previous case which should have informed him of the need for an independent pathologist. *Lucero*, *supra*, at 16. Trial counsel knew of the pathologist's damaged credibility and specific failings as a pathologist. *Ibid.* At the subsequent penalty phase retrial, trial counsel failed to cross examine the prosecution's pathologist, including impeachment, although defense counsel had knowledge that the pathologist's credibility and competence as a coroner had been called into question prior to the case. *Lucero*, supra, at 20 – 21. The admitted exhibits in the habeas proceeding included a published case and newspaper articles.

The court applied *Stickland* principles and found that by a preponderance of the evidence, trial counsel failed to investigate the pathology and that Petitioner was prejudiced by that failure. *Lucero*, *supra*, at 24. Petitioner showed by a preponderance that Trial counsel's failure to impeach the prosecution's pathologist would have produced a different result. That alone justified reversal. *Lucero*, supra, at 24 – 25.

Dated: August 24, 2024

Respectfully Submitted,

J. TONY SERRA
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MARSHALL D. HAMMONS

Attorneys for Defendant
DOUGLAS RAY STANKEWITZ

By CURTIS L. BRIGGS

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PROOF OF SERVICE

The undersigned declares:

I am a citizen of the United States. My business address is P. O. Box 7225, Cotati, CA 94931. I am over the age of eighteen years and not a party to the within action.

On the date set forth below, I caused a true copy of the within PETITIONER'S POST-EVIDENTIARY HEARING SUPPLEMENTAL BRIEF to be served on the following parties in the following manner:

Mail _x___ Overnight mail ____ Personal service ____ Fax ____ Email xx_to the address shown below

Earon@Fresnocountyca.gov
Office of District Attorney
Fresno, CA 93721

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration is executed on August 24, 2024, at Sebastopol, California.

Alexandra Cock

LUCERO v BROOMFIELD - **EXHIBIT 25c**

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

PHILLIP LOUIS LUCERO,

Petitioner,

v.

RON BROOMFIELD, Warden of the California State Prison at San Quentin,

Respondent.

Case No. 01-cv-02823-AB

DEATH PENALTY CASE

ORDER GRANTING HABEAS RELIEF ON CLAIM FOUR(A)(1)

In the Court's May 22, 2020 Order Granting Evidentiary Hearing on Four(A)(1) (2020 Order), the Court found that an evidentiary hearing was warranted as to Petitioner's allegations that trial counsel provided ineffective assistance by failing to investigate the prosecution's evidence regarding premeditation that was presented through the testimony of Dr. Harry Wayne Scott, San Bernardino's County contract pathologist, whose forensic examination of the victims in this case was deficient. (Dkt. No. 117.) On October 28, 2022, the parties submitted their Pre-Hearing Briefs in which

they addressed whether the Evidentiary Hearing that was previously ordered remains necessary. (Dkt. Nos. 163, 164.) On March 6, 2023, the Court issued a tentative ruling to the parties granting relief on Claim Four(A)(1), and conducted a Pretrial Conference on March 8, 2023, in which the Court and the parties addressed the tentative ruling. (Dkt. No. 180 (Reporter's Transcript of Proceedings, March 8, 2023).) Thereafter, the Court took the matter under submission, and now, it issues the following ruling.

I. Factual Background

The following facts are summarized from the 2020 Order and the California Supreme Court's decision on direct review, *People v. Lucero*, 44 Cal. 3d 1006, 1011-14, 1024-26 (1988). (*See* Dkt. No. 117 at 1-7.) At the guilt phase, trial counsel conceded that Petitioner was guilty of second-degree murder of the two victims, seven-year-old Chris Hubbard and ten-year-old Teddy Engilman, and sought to show, instead, that the killings were spontaneous and Petitioner had not tried to hide the murders by committing arson. (*See* RT at 604.) Nevertheless, rather than presenting evidence to the contrary, trial counsel relied solely on cross-examination of the prosecution's witnesses.

In its case in chief, the prosecution presented the testimony of Dr. Scott, who performed autopsies on both Engilman and Hubbard as to their injuries and cause of death. (RT at 299-340.) In his testimony, Dr. Scott opined that Engilman sustained an injury to her head from multiple blows with a blunt surface, such as a soda bottle that was not broken. (RT at 306-07.) In his opinion, the immediate cause of her death was her aspiration of blood that was secondary to her injuries, most likely the injuries to her mouth and lost teeth. (RT at 312.) Dr. Scott further explained that, because Engilman was unconscious due to multiple contusions of her brain from external injuries to her head, she could not cough the blood or spit it out. (*Id.*)

Dr. Scott testified that he performed the autopsy on Hubbard after his autopsy on Engilman. (RT at 313.) Dr. Scott pointed to photographs of Hubbard's arms that were

taken at the autopsy that Dr. Scott claimed depicted marks on both of her wrists. (RT at 314.) Specifically, Dr. Scott explained that "the mark on each wrist was discolored" and "under magnification there were fine abrasions or little scrapes within those areas." (*Id*.) Although he noted that "there may be other possibilities," it was Dr. Scott's opinion that "[t]hey suggest from their position and from the fact that there was some abrasion that her wrists may have been tied together with some sort of rough twine or rope, something on that order." (*Id*.) He described the marks in various photographs that looked different from various angles and different in color. (RT at 315.) In addition, he examined Hubbard's neck, which showed an area of bruising and abrasion extending from about an inch to the right of the center of the neck and onto the back of the neck. (RT at 316.) He pointed to another photograph of the left side of her neck, lower portion of her face, and her left ear that he claimed depicted a bruised and abraded line. (RT at 317.) In his opinion, Hubbard died as a result of ligature strangulation. (*Id*.)

In his cross-examination, Smeltzer questioned Dr. Scott as to whether it was possible that Engilman's injuries could have been caused by accidentally falling down a short flight of stairs with multiple impacts to the head. (RT at 323.) Dr. Scott agreed that it was possible. (RT at 324.) In addition, Dr. Scott agreed that he did not remember or make note of finding any broken glass when he examined Engilman's head. (RT at 327.) Dr. Scott further agreed that if a ligature could support Engilman's weight and got caught on something, it would be possible for her to lose consciousness before she could free herself from it. (RT at 327.)

Smeltzer also questioned Dr. Scott as to the marks on Hubbard's wrists, which Smeltzer claimed were "very, very faint marks," although Dr. Scott maintained that, while "[t]hey were not big, obvious bruises[,] [t]hey were visible rather clearly." (RT at 324.) Dr. Scott agreed that the wrist marks could be described as "shadings that were visible which could not be described as bruises," as well as "little linear marks on her

wrists." (*Id.*) Dr. Scott further agreed that he could not determine whether the marks or abrasions had occurred pre-mortem or postmortem. (RT at 324-25.) He also agreed that, in a ligature strangulation, unconsciousness occurs relatively swiftly. (RT at 325.) However, at no point during the cross-examination did Smeltzer question Dr. Scott about his compromised reputation based on inaccuracies and mistakes in other autopsies, his ouster from the coroner's office, or the Board of Medical Quality Assurance (BMQA) disciplinary proceedings that had been initiated against him.

Nevertheless, remarks and comments by counsel before and during voir dire demonstrate that counsel was aware that Dr. Scott's credibility and competence as a coroner had been called into question prior to this case. For instance, in a pre-trial discussion about voir dire, trial counsel (Smeltzer) noted, "We're old friends, Dr. Scott and I," to which the trial court replied, "I know that . . . I'll be glad when we get past the last of Dr. Scott." (RT at 195.) During voir dire, Smeltzer inquired of prospective juror Lucas, who agreed that she knew Dr. Scott professionally. (RT at 2042.) She also agreed that she was aware that he had had some "trouble." (*Id.*) When asked whether she thought Dr. Scott was treated fairly, she responded, "I think that case at that time was warranted, because some discrepancies had come up and it was my belief that it did warrant investigation," and added that, "as far as being fair to him, I was not that involved in it that I formed that much of an opinion on it." (RT at 2043.)

In the prosecutor's closing argument, he argued that several factors demonstrated that the murders were premeditated and deliberated. For instance, he noted that the girls were with Petitioner for several hours, which he maintained was "more than enough time to form the necessary mental states of deliberation and premeditation." (RT at 580.) In addition, he argued that, based on the girls' presence inside the home, "[i]t's pretty clear that the defendant had an intention to get the girls inside the house." (*Id.*) Based on Dr. Scott's and Detective O'Rourke's testimony that Hubbard's wrists had been bound with

a ligature, he argued that it was reasonable to infer she had been restrained, which was evidence of his plan to kill them both. (*Id*. at 581.) Lastly, he argued that after Petitioner had killed the first girl, Petitioner's "decision to execute the second girl is rather clear. He couldn't leave a survivor. He couldn't leave a witness." (*Id*. at 583.)

In the defense's closing argument, counsel did not contest that Petitioner had killed the girls, but he maintained that the prosecution could not prove premeditation and deliberation. Although counsel did not contest the causes of their deaths (RT at 588 (Engilman died from blows to the head and Hubbard was strangled)), he argued that the manner of the murders indicated that Petitioner had acted in a "random explosion of violence." (*Id*. at 597-98.) In addition, counsel argued that the lack of evidence that either girl had screamed or been gagged suggested Hubbard had not been bound or restrained before both girls were killed.[1] (*Id*. at 599-600.)

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[1] Although Respondent contended at the March 8, 2023 Pretrial Conference that defense counsel conceded that Hubbard's wrists were bound in his closing argument (Dkt. No. 180 at 10), the entirety of counsel's argument suggested instead that one could merely speculate that Hubbard's wrists were bound and the evidence as a whole indicated that neither victim had been restrained:

> Then the question becomes, you say, okay, Mr. Nacsin, Chris Hubbard was tied. We know, we hear about the opinion. What about that?
>
> That's a logical inference and that's a reasonable question. Keep in mind, you can't speculate in this case. You can only consider evidence. *There is no evidence of that.* But let's see what Dr. Scott said about it.
>
> Dr. Scott said he couldn't tell if those marks on her arm were pre or post mortem, before death or after death He could not tell. We don't know. We do not know and you cannot speculate. Now, adding further is we know that Chris didn't have any rope on her when she was found. We know that. We know a rope was found in Mr. Lucero's house somewhere between the front porch and the front door. It doesn't clarify anything. Just adds further to the confusion. We don't know.
>
> But let's for the sake of argument, let's do speculate about it. You say, logically, come on, Mr. Nacsin, why would anybody tie anybody up after they were dead. That's not logical. Is there anything in this case that has happened logically? Anything at all that's happened logically from the moment in the morning, from the visit to the walk to the park to everything that happened afterwards? But let's talk about that a little bit.

Following the penalty phase trial, the jury imposed the death penalty. In 1988, the California Supreme Court affirmed the judgment of guilt, but reversed the judgment of death on the grounds that the trial court had improperly excluded certain mitigating evidence at the penalty phase of trial.

The facts of the penalty phase trial in 1989 are briefly summarized from the 2020 Order and the California Supreme Court's decision on direct review, *People v. Lucero*, 23 Cal. 4th 692, 708-13 (2000). (*See* Dkt. No.117 at 7-9.)

At the retrial of the penalty phase, the prosecution presented a case-in-chief comprised solely of the evidence of the two murders that was presented previously at the guilt phase trial in 1981. Dr. Scott testified consistently with his testimony at the first trial as to the injuries sustained by the victims when he testified at the penalty phase retrial in 1989. (RT at 2897-2917.) Defense counsel did not cross-examine him at all. (RT at 2917.)

Following the conclusion of the retrial, the jury again imposed the death penalty.

II. Finding of Premeditation by the California Supreme Court

> We know that from the evidence there's no evidence that either of the girls had any marks on their mouth, were gagged in any way. We know that. We also know where were no unusual sounds, screams or otherwise, that came from Mr. Lucero's house from around 4:45 till around 7:15. We know Mr. – Miss Jackson – let's see Gwaltney was her name, Mrs. Gwaltney. She lived next door in this house right here, J on it. Right there. She heard the car leaving but she never heard any noises or screams.
>
> We know Mrs. Schultz had her window open. She heard the goose earlier. She didn't hear any noises or screams.
>
> So let's go further then. Well, if Chrissy were tied when Teddy was being hit, and she doesn't scream? She doesn't say one single word? That just does not make any sense whatsoever, like anything else in this case. On the other hand, assume that Chris went first.

(RT at 598-99; emphasis added.)

Although the California Supreme Court summarily denied the claim at issue here in Petitioner's state habeas proceedings, the California Supreme Court described the evidence supporting the jury's finding of premeditation in denying Petitioner's claim challenging the sufficiency of the evidence regarding premeditation on direct appeal, stating:

> In this case defendant intercepted the girls from their innocent journey and brought them to his house. The evidence that the younger victim's wrists had been tied suggests additional mistreatment before the murders, which may have further escalated the consequences to defendant of letting his victims go free. As far as defendant knew, no one had ever seen him with the girls. The jury may have inferred that defendant killed them in order to avoid disclosure of his conduct. It should also be noted that whatever the reason for killing the first victim, once this deed was done, defendant had a strong motive to eliminate the only witness to his crime.
>
> The evidence indicated that Chris was strangled with the necklace she was wearing. While ligature strangulation may not always evidence a premeditated murder (*see People v. Rowland* (1982) 134 Cal.App.3d 1, 9 [184 Cal.Rptr. 346]), the jury could have viewed the strangulation as a deliberate manner of killing sufficient to indicate a "preconceived design." (The manner of Teddy's killing, multiple blows to the skull from a blunt object, is much less suggestive of premeditated murder.)
>
> Although the evidence was far from overwhelming, we need not be convinced beyond a reasonable doubt that defendant premeditated the murders. The relevant inquiry on appeal is whether "'any rational trier of fact'" could have been so persuaded. (*People v. Johnson* (1980) 26 Cal.3d 557, 576 [162 Cal.Rptr. 431, 606 P.2d 738, 16 A.L.R.4th 1255], quoting from *Jackson v. Virginia*, *supra*, 443 U.S. 307, 318-319 [61 L.Ed.2d 560, 573], italics original.) The steps taken by defendant prior to the killings, including securing the girls' presence in his house and binding the wrists of one, the possible motive of preventing disclosure of these deeds and anything else that may have occurred in the house that afternoon, and the ligature strangulation of Chris, provide sufficient evidence to support the jury's finding that the murders were premeditated and deliberate.

Lucero, 44 Cal. 3d at 1019-20 (footnote omitted).

In the 2020 Order, the Court found that the California Supreme Court's finding that Petitioner had "taken steps" to "secure[] the girls' presence" inside the home was unreasonable and not entitled to any deference, as there was no evidence in the record to

support that conclusion.[2] (Dkt. No. 117 at 25-26.) Thus, as the Court explained in the 2020 Order, the finding of premeditation substantially rested on the prosecution's evidence that Hubbard's wrists had been bound.[3] (Dkt. No. 117 at 24-25.) In addition, on November 4, 2022, the Court granted in part Petitioner's Motion in Limine to exclude proposed Exhibits 100 through 102 (the testimony and reports of several police officers that they observed "ligature marks" on Hubbard, as well as a rope burn on Petitioner) as improper opinion testimony. (*See* Dkt. No. 165.) Consequently, the only valid evidence in the record from the trial to support the conclusion that Hubbard's wrists had been bound was provided by Dr. Scott. (*See, e.g.*, RT at 314-15 (Dr. Scott's "opinion" that

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[2] As discussed above, the prosecutor had argued this point in his closing argument. Except for his argument that premeditation and deliberation could be inferred based on Dr. Scott's testimony that Hubbard's wrists had been bound, the prosecutor's other arguments as to evidence indicating premeditation and deliberation are also not supported by the record. For instance, it is speculative to assume premeditation, without more, based on the fact that the victims were present in Petitioner's home for several hours. In addition, the prosecutor's last argument -- that Petitioner's decision to kill the second girl was evidence of premeditation because it showed that Petitioner did not want to leave a "survivor" or "witness" -- is similarly speculative. It is equally possible that Petitioner could have killed both quickly in an impulsive explosion of violence. By the prosecutor's argument, premeditation and deliberation could be presumed any time there is more than one victim. (*See also* Dkt. No. 117 at 29 n.6 (finding that this assertion "conflates motive and premeditation.").

[3] As the Court explained in the 2020 Order, the evidence of Hubbard's strangulation was less compelling than the evidence regarding her bound wrists in supporting a finding of premeditation:

> For instance, although the California Supreme Court noted that it was possible that the jury could have found Hubbard's strangulation supported the theory of premeditation advanced by the prosecution, it also noted that "ligature strangulation may not always evidence a premeditated murder." *Lucero*, 44 Cal. 3d at 1020 (citing *People v. Rowland*, 134 Cal. App. 3d 1, 9 (1982)). Furthermore, even Dr. Scott conceded that a child of Hubbard's age would lose consciousness quickly with ligature strangulation. (RT at 325.) *See also Lucero*, 44 Cal. 3d at 1033 (Mosk, J., dissenting) (noting that Petitioner was "taught" in the army to "kill" and, "[a]s his patriotic duty, killed our enemies efficiently" during the war, before returning home to "irrationally" kill two innocent children). In addition, Engilman's murder provided scant evidence, if any, supporting a finding of premeditation. *Id.* at 1020 ("The manner of Teddy's killing, multiple blows to the skull from a blunt object, is much less suggestive of premeditated murder."); (RT at 312) (Dr. Scott's testimony that Engilman lost consciousness contemporaneously with the blows to her head and died after that due to her aspiration of blood).

(Dkt. No. 117 at 24 n.4.)

the victim's wrists "may have been tied together with some sort of rough twine or rope, something on that order."); RT at 607 (prosecutor's closing argument that there was premeditation and evidence of "planning," in that Petitioner had a "method" of killing the girls based on the evidence that "[h]e tied little Chris up.").)

III. Counsel's Investigation pertaining to the Pathology Evidence

On September 30, 2022, the parties filed a Stipulation re Trial Counsel's Knowledge of Pathology Evidence (September Stipulation) as to counsel's knowledge of certain facts pertaining to the Renova murder case in 1979, which preceded Petitioner's trial in 1981. (Dkt. No. 156.) In Petitioner's case, Dr. Scott performed the autopsies on the victims in April 1980, and the first trial spanned from February to December 1981, and Dr. Scott testified as to the victims' injuries on November 18, 1981.

In the September Stipulation, the parties agreed that the following facts had been established: Lucero's trial counsel (Smeltzer) represented Mosqueda, who was accused of murdering Renova. (Dkt. No. 156 at 2.) Renova had been in a fight with multiple people and had been stabbed multiple times and Mosqueda had shot Renova once after the stabbings. (*Id.*) In Mosqueda's trial, Dr. Scott testified that he had performed an autopsy on Renova and, based on organs that Dr. Scott had excised, Renova had died from the gunshot wound. (*Id.*) Based on Smeltzer's motion, the trial court allowed a second autopsy performed by a different pathologist which revealed that the organs Dr. Scott had claimed to have excised were intact, and that pathologist found that Renova had died from stab wounds, not the gunshot. (*Id.*) Smeltzer attended the second autopsy. (*Id.*) Smeltzer thereafter filed a wrongful incarceration civil suit based on Dr. Scott's negligent autopsy, as well as a civil complaint against Dr. Scott, his partner Dr. Irving Root, and their laboratory Root-Scott Labs, Inc. (*Id.*) Both cases were denied. (*Id.*) However, in 1980, Dr. Scott was terminated due to his errors in the Renova case and

other cases, and Smeltzer later died in 1985. (*Id*.) Prior to Petitioner's trial, there were numerous articles in the local newspaper concerning Dr. Scott, as contained in Petitioner's Evidentiary Hearing Exhibit 45.[4] (*Id*. at 3.) In addition, the parties stipulated that these matters "were reasonably available to [Smeltzer] or any competent counsel at the time of [Petitioner's] trial." (*Id*. at 2.)

Petitioner has previously alleged that, on October 23, 1984, the Division of Medical Quality of the BMQA revoked Dr. Scott's medical license, but it later suspended the revocation and placed him on probation for three years. (Dkt. No. 43 at 49, 164.) It placed conditions on his probation, including that Dr. Scott was prohibited from functioning in the role of coroner or pathologist for any county until he passed on oral clinical examination in forensic pathology. (*Id*., citing Ex. 63.)

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[4] Exhibit 45, referred to in Petitioner's Pre-hearing Brief (Dkt. No. 164 at 9-10), includes the following local news articles reporting the questions surrounding Dr. Scott's competence as a coroner in other cases, in the years prior to and during Petitioner's trial in 1981: (1) June 14, 1979 article reporting on the findings at the second Renova autopsy and quoting Smeltzer's statements that he believed he was ethically obligated to request a second autopsy in future cases; (2) September 14, 1979 article reporting Dr. Scott's errors and noting that the defense attorney had been granted a second autopsy after consulting with an independent pathologist; (3) October 5, 1979 article discussing that the San Bernardino District Attorney hoped that Dr. Scott would not participate in any other criminal prosecutions based on the Renova case, which had led to a plea bargain in Mosqueda's criminal case; (4) October 5, 1979 article explaining the attacks on Dr. Scott's credibility as a pathologist and witness based on the Renova errors; (5) November 18, 1979 article noting that District Attorney James M. Cramer had stated that he wished Dr. Scott would not participate in any other cases involving criminal prosecutions and quoting an attorney as stating that Dr. Scott had "established a pattern for expecting errors and doubting the findings."; (6) February 14, 1980 article noting that District Attorney Cramer had "repeated a demand that that San Bernardino County autopsy surgeon Dr. Wayne Scott be removed from all homicide cases" and citing Scott's admitted errors and false testimony in the Robert Renova case as well as questions about his autopsy and findings in the homicide of Winston Hill; (7) April 19, 1980 article stating that Dr. Scott "is being investigated for possible gross negligence and incompetence" by the Board of Medical Quality Assurance (BMQA) and had been under investigation since December 1979; and (8) July 1, 1980 article noting that "[o]fficials barred Scott from all coroner's work due to continuing autopsy errors and his fading credibility as an expert courtroom witness."

On February 14, 2023, the parties submitted a Stipulation regarding Testimony of Mark Hammond (February Stipulation). (Dkt. Nos. 176, 177.) Hammond is a paralegal for the Federal Public Defender, Petitioner's counsel in this case, who stated that he had reviewed the files of Petitioner's trial and state habeas counsel to determine whether counsel had investigated any evidence pertaining to pathology or made any expenditures pertaining to such evidence. (Dkt. No. 176 at ¶ 3.) Hammond's review revealed no such evidence. (*Id*. at ¶¶ 7-9.) The parties stipulated to the truth of these statements and agreed that they should be admitted for all purposes. (*Id*. at 2, 5.) Respondent waived his right to cross-examine Hammond. (*Id*. at 5.)

IV. Standards

A. Standard of Review

Given that the Court found in the 2020 Order that the California Supreme Court had violated 28 U.S.C. § 2254(d) in denying these two ineffective assistance allegations in Claim Four(A)(1), the claim must now be resolved "without the deference AEDPA otherwise requires." *Panetti v. Quarterman*, 551 U.S. 930, 953 (2007). Thus, the Court reviews the allegations at issue *de novo*. Furthermore, the parties agree that Petitioner has the burden of proving that relief is warranted by a preponderance of the evidence. (Dkt. No. 164 at 2; Dkt. No. 163 at 6 (citing *Davis v. Woodford*, 384 F.3d 628, 638 (9th Cir. 2004))).

The Court now addresses whether relief is warranted as to Claim Four(A)(1) on the basis of the record alone and in view of the September and February Stipulations, as well as the arguments made by the parties at the March 8, 2023 Pretrial Conference.

B. Standards for Evaluating Ineffective Assistance of Counsel Allegations

The Sixth Amendment to the United States Constitution guarantees the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686 (1984). To prevail on his ineffective assistance of counsel claims, Petitioner must demonstrate that: (1) his

counsel's performance was deficient; and (2) the deficient performance prejudiced his defense. *Id*. at 688-93. In addition, the Supreme Court has stated that this Sixth Amendment right "is denied when a defense attorney's performance falls below an objective standard of reasonableness and thereby prejudices the defense." *Yarborough v. Gentry*, 540 U.S. 1, 4 (2003) (per curiam). As both prongs of the *Strickland* test must be satisfied in order to establish a constitutional violation, a failure to satisfy either prong requires that a petitioner's ineffective assistance claim be denied. 466 U.S. at 697.

The first prong of the *Strickland* test -- deficient performance -- requires a showing that counsel's performance was "outside the wide range of professionally competent assistance." 466 U.S. at 690. The relevant inquiry under *Strickland* is not what defense counsel could have done, but whether counsel's choices were reasonable. *See Babbitt v. Calderon*, 151 F.3d 1170, 1173 (9th Cir. 1998). With respect to counsel's duty to investigate evidence, the Supreme Court has stated that a reviewing court's principal concern is "not whether should have presented [evidence]" but instead, "whether the investigation supporting counsel's decision not to introduce evidence . . . was itself reasonable." *Wiggins v. Smith*, 539 U.S. 510, 523 (2003) (emphasis in original). Specifically, in *Wiggins*, the Supreme Court found counsel's investigation of mitigating evidence deficient where it fell short of well-defined norms to discover all reasonably available evidence, in that they abandoned their investigation of the petitioner's background after obtaining only a limited information from a narrow set of sources. *Id*.

A court must consider the objective reasonableness of the decision in light of all the circumstances under the prevailing norms in assessing counsel's investigative choices. *Id*. at 521-23. *See also Williams v. Taylor*, 529 U.S. 362, 396 (2000) (citing 1 ABA Standards for Criminal Justice 4-4.1, commentary, p. 4-55 (2d ed. 1980). In explaining the standards for this investigation, the Supreme Court has stated that "[c]ounsel has a duty to make reasonable investigations or to make a reasonable decision

that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 690-91. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all of the circumstances, applying a heavy measure of deference to counsel's judgments. *Id*.

Next, in order to prove prejudice, a petitioner generally must show that there is a "reasonable probability" that but for counsel's errors, the result of the proceeding would have been different. *Id*. at 694. A reasonable probability is a probability that is "sufficient to undermine confidence in the outcome." *Id*.; *Porter v. McCollum*, 558 U.S. 30, 44 (2009). In addition, even though counsel's deficient performance is required to have had more than a "conceivable effect" on the outcome of the trial, it need not have "more likely than not altered" that outcome for prejudice to be shown. *Strickland*, 466 U.S. at 693.

V. Analysis of the Allegations in Claim Four(A)(1)

Here, the Court must determine whether Petitioner has shown by a preponderance of the evidence that counsel provided ineffective assistance by failing to investigate and impeach Dr. Scott's findings and credibility with "readily available evidence of Dr. Scott's incompetence as a pathologist." (Dkt. No. 43 at 59.) The only other allegation to be addressed at the evidentiary hearing is whether counsel provided ineffective assistance in failing to consult an independent pathologist. (*See* Dkt. No. 117 at 31-35.) In granting an evidentiary hearing on Petitioner's allegations that counsel failed to investigate and impeach Dr. Scott, the Court explained that, based on the media coverage of Dr. Scott's loss of reputation, as well as Smeltzer's colloquy with prospective juror Lucas, Petitioner had demonstrated a prima facie claim of ineffective assistance warranting further factual development of the extent counsel knew or should have known about Dr. Scott's compromised reputation. (*See* Dkt. No. 117 at 27.) The Court also

found that Petitioner had demonstrated a prima facie claim of ineffective assistance based on counsel's failure to consult an independent pathologist. (*See* Dkt. No. 117 at 32-33.)

During a pre-trial discussion, counsel stated on the record that he did not intend to confront Dr. Scott about his prior "trouble" at the coroner's office because "he can't help me anyway" (RT at 98) and further explained that the case was not a "cause of death case." (RT at 97.) Thus, because counsel's strategy is provided on the record, the Court must evaluate it in light of the evidence and cannot supply any other possible rationale. *Harrington v. Richter*, 562 U.S. 86, 109 (2011) ("courts may not indulge post hoc rationalization for counsel's decisionmaking that contradicts the available evidence of counsel's actions") (citation and quotation marks omitted).

As noted above, Dr. Scott's testimony was the primary, if not the only valid evidence at trial supporting a finding of premeditation and deliberation. At the guilt phase trial, the principal dispute was whether the killings were "premeditated" or whether they resulted from an "explosion of violence." Without premeditation, there could not be a finding of first degree murder to support a sentence of death. *See People v. Fitzpatrick*, 2 Cal. App. 4th 1285, 1295-96 (1992) (holding that a defendant can be convicted of second degree murder where he can show that he experienced "heat of passion" or provocation at the time of the murder, such that it negated premeditation). In addition, given that there was no evidence that Petitioner took steps to secure the girls evidence in his home, the California Supreme Court's finding that premeditation existed rested substantially on the prosecution's evidence that Hubbard's wrists had been bound. *Lucero*, 44 Cal. 3d at 1019-20. In his opening argument, the prosecutor referred specifically to the "rope" and other relevant evidence that Petitioner had tried to dispose of prior to the police arriving. (RT at 19.) In his closing argument, the prosecutor relied upon Dr. Scott's testimony to argue that the murders were premeditated. (*See* RT at 581 (arguing that Dr. Scott's testimony that Hubbard's wrists were bound indicated

"circumstantially that she was tied up while she was alive . . .[which] shows the defendant had a plan as to what was going to happen"); RT at 607 ("He's a planner . . . He had a method to disable them. He tied little Chris up"). Thus, the record was plain throughout the trial that the prosecutor was relying upon evidence provided primarily by Dr. Scott that Petitioner had restrained Hubbard to argue that Petitioner had premeditated the murders.

In reviewing ineffective assistance allegations, the Ninth Circuit found that "[t]he duty to investigate is especially pressing where . . . the witnesses and their credibility are crucial to the State's case." *Reynoso v. Giurbino*, 462 F.3d 1099, 1113 (9th Cir. 2006). In *Reynoso*, the Ninth Circuit found counsel was ineffective based on his failure to investigate impeachment evidence of a prosecution witness pertaining to a reward the witness would receive if the witness provided testimony against the petitioner, of which counsel was aware. *Id*.

In another similar case, the Ninth Circuit found that habeas relief was warranted based on counsel's failure to challenge the evidence supporting the jury's finding of premeditation at the guilt phase. *Daniels v. Woodford*, 428 F.3d 1181 (9th Cir. 2005). In *Daniels*, where the petitioner had shot two police officers, there was evidence that he had been diagnosed as schizophrenic 16 years prior to the crime and counsel was aware that Petitioner had mental health issues. *Id*. at 1207. Nevertheless, counsel failed to investigate and present evidence of the petitioner's mental illness and brain damage that could have supported a diminished capacity defense and, instead, selected a defense that the petitioner was not the perpetrator that was against the weight of the evidence. *Id*. As the Ninth Circuit explained, "this defense deprived Daniels of the opportunity to challenge the prosecution's theory that he acted with premeditation and denied him two available mental health defenses that, under California law, may have reduced his

conviction from first to second degree murder, thereby making him ineligible for the death penalty." *Id*.

Now, in view of the September Stipulation, it is indisputable that not only Smeltzer should have known about Dr. Scott's incompetence in prior murder investigations, he in fact had first-hand knowledge of it based on his representation of Mosqueda in the Renova case prior to Petitioner's trial. (Dkt. No. 156.) Thus, the record is clear that counsel knew of Dr. Scott's damaged credibility and his specific failings as a pathologist. Nevertheless, Respondent maintains that counsel's decision not to impeach Dr. Scott was not deficient and constituted an appropriate, strategic decision because there was no dispute as to the victims' causes of death. (Dkt. No. 163 at 7-8.) He further notes that Dr. Terri Haddix, Petitioner's expert in these proceedings, agreed with Dr. Scott that Engilman died of blunt force trauma and asphyxiation and that Hubbard died of strangulation. (*Id*. (citing Haddix Decl. at ¶¶ 8, 13).) Thus, Respondent contends, an attempt to impeach Dr. Scott on the basis of his statements in the *Mosqueda* case, a collateral matter, would not have undermined his testimony about how the victims in Petitioner's case were killed. (Dkt. No. 163 at 8.)

Notwithstanding the *cause* of the victims' death, the record demonstrates that counsel did not adequately investigate and consider the evidence pertaining to the *manner* of the victims' death. Specifically, the manner in which Hubbard was murdered was of paramount importance, because Dr. Scott's testimony as to Hubbard's wrists being bound was the primary evidence of premeditation.[5] However, Dr. Scott's

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[5] To the extent that Respondent asserted at the March 8, 2023 Pretrial Conference that Dr. Scott never opined that Hubbard's wrists were bound (Dkt. No. 180 at 5-6), that assertion is not a correct characterization of the record. As Petitioner explained and quoted the record for the Court, Dr. Scott was questioned on this point and notwithstanding his preface that it could "other possibilities," he stated that it appeared her wrists had been "tied together." (Dkt. No. 180 at 24-25; *see also* RT at 314.) He also provided no other possible conclusion, and the prosecutor relied on Dr. Scott's statements in arguing that Hubbard's bound wrists constituted evidence of premeditation. (RT at 581, 607.)

conclusion that Hubbard's wrists were bound has been consistently disputed. Indeed, in his cross-examination at trial, Smeltzer contended the photographs did not necessarily show that Hubbard's wrists had been bound, and Petitioner's state habeas expert, Dr. Hermann found that the photographs did not support Dr. Scott's opinions, as well. (*See* RT at 324; Ex. 171 at ¶ 17 (explaining that the marks were "so faint as to be difficult for Scott to make out in the photographs" and that the photographs do not conclusively show that the victim was bound by the wrists with rope or twine, as there are no "obvious contusions and/or abrasions" or "weave pattern of the rope discernible on the skin.").)

In addition, Respondent quotes the declaration of Dr. Haddix to assert that this expert acknowledges the "possibility" there were ligature marks on Hubbard's wrists. (Dkt. No. 163 at 9 (citing Haddix Decl. at ¶ 20 ("Even if these marks [on Hubbard's wrists] did represent ligature injuries, I am unable to conclude if the marks were produced before or after her death.").) However, Respondent's characterization of Dr. Haddix's conclusions are misleading; the entirety of Dr. Haddix's Declaration demonstrates that she did *not* agree with Dr. Scott's conclusions pertaining to the markings on Hubbard's wrists and forearms and, after reviewing Dr. Scott's testimony and all the evidence presented at trial, Dr. Haddix ultimately opined that she was unable to conclude there were ligature injuries on Hubbard's wrists.[6] (Dkt. No. 169); Fed. R. Evid. 106.

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[6] Based on Respondent's reliance upon and citation to Dr. Haddix's Declaration in his Pre-hearing Brief, the Court requested Petitioner to lodge it. (Dkt. Nos. 167, 169). The discussion in Dr. Haddix's Declaration pertaining to Hubbard's wrists is forth in relevant part, as follows:

15. The exhibit photographs used during the trial do not demonstrate the fine abrasions reported by Dr. Scott (November 18, 1981 transcript, page 314, lines 16-19) to have been associated with the wrist markings on Chris Hubbard. Interestingly, the photographs included in the excerpted DA photographs show more close-up views of these markings with a scale. In these photographs, the markings are not clearly evident and certainly none of the subtle detail described by Dr. Scott can be discerned. (Bates Haddix-433, 434, and 437.)

16. Dr. Scott indicated that he was unable to state if these markings on the wrists/forearms of Chris Hubbard occurred before or after her death. Dr. Scott failed to describe and document

Respondent did not designate his own expert in these proceedings to attempt to refute the doubts as to Dr. Scott's conclusions on this point set forth by Drs. Hermann and Haddix. Certainly, it would have been possible for Petitioner to have easily subdued seven-year-old Hubbard without restraining her wrists. In any event, it is clear that both Petitioner's pathologists agree that the evidence does not support a finding that Hubbard's wrists were restrained prior to their deaths and any argument based on the mere "possibility"

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photographically a procedure commonly used when evaluating potential ligature marks -- incision of the marks to evaluate for the presence of absence of bleeding into the subjacent tissues. The presence of bleeding would indicate that Chris Hubbard was alive and struggling against ligatures.

17. Turning to the photographic documentation of the markings around Chris Hubbard's wrists presented during the trial, the markings on the backs of the wrists/forearms do not coincide with the markings on the fronts of the wrists/forearms. In court exhibits 1 and 1E a single faint linear mark is seen on the back (dorsum) of the left wrist. No markings are seen on the front (volar aspect) of the left wrist in court exhibit 1D (the only provided exhibit that demonstrates this area). In court exhibit 1, a short, slightly darker mark is seen on the front (volar aspect of the right wrist) close to the crease of the wrist. This mark is different in character (as best as can be determined in these limited photographs) from the other and fainter markings. In court exhibit 1D, there are two very faint markings on the back (dorsum of the right forearm. Comparing court exhibits 1 and 1D, the marks on the back (dorsum) and front (volar aspect) of the right wrist and forearms are both numerically dissimilar and in different locations.

18. The markings on the wrists required investigation. The markings that appear most similar in appearance, but not number, are located on the backs (dorsa) of the left wrist and right forearm. If one were to hypothesize that the wrists had been bound together, it is difficult to understand why there are not a similar number of markings on both wrists. If the wrists were not bound together, but rather both wrists individually bound to other objects, then a circumferential ligature mark around the wrists or forearm should be visible. No circumferential injuries are seen in the photographs of the wrists/forearms.

19. Stepping back, however, it is also necessary to evaluate if there are other possible explanations for the markings. Photographs of the bodies within the dumpster demonstrate a large amount of debris around both bodies. One photographs of Chris Hubbard appears to demonstrate her body in a position in which her knees are flexed nearly to her chest with at least her left hand and wrist near the level of her left knee (Bates Haddix-454). While Teddy Engilman was photographed at the autopsy with the bag still in place, no photographs of Chris Hubbard were provided demonstrated the bag in place at the time of the autopsy. Accordingly, it is not possible from the available photographic evidence to determine if there was anything resting against the bag in the areas of the wrists (possibly producing some kind of disturbance of the bag) which may have accounted for the markings.

20. *In the absence of complete documentation as indicated above, I am unable to conclude that the markings on the wrists/forearms of Chris Hubbard represent injuries produced by a ligature.* Even if these marks did represent ligature injuries, I am unable to conclude if the marks were produced before or after her death.

(Dkt. No. 169 at 15-20; emphasis added).

that they might have been bound prior to her death would be based on speculation, just as counsel himself maintained in his closing argument. *See Wise v. DLA Piper*, 220 Cal. App. 4th 1180, 1188 (2013) ("speculation is not evidence") (citations omitted)

Respondent further contended at the Pretrial Conference that Dr. Scott's conclusions about the binding of Hubbard's wrists were corroborated by many other pieces of evidence, including "the autopsy photographs," (Evidentiary Hearing Exhibits 1 through 4, specifically), the rope found at the crime scene, and Sergeant York's testimony. In response, Petitioner argued that Evidentiary Hearing Exhibits 24 through 26 show only faint markings on Hubbard's wrists, and noted how Dr. Haddix explained that the photographs are not consistent with ligature marks. In reviewing the exhibits cited by Respondent, the Court notes that Evidentiary Hearing Exhibit 1 is a photograph of the wrists; Evidentiary Hearing Exhibit 2 is a photograph of Hubbard's upper body right side; Evidentiary Hearing Exhibit 3 is the upper body and left wrist; and Evidentiary Hearing Exhibit 4 is a photograph of Engilman, the other victim. Consequently, only Evidentiary Hearing Exhibit 1, a portion of Evidentiary Hearing Exhibit 3, and Evidentiary Hearing Exhibits 24, 25, and 26 are relevant to this determination. In addition, counsel cross-examined Dr. Scott as to whether the autopsy photographs depicted ligature marks and maintained in his closing argument that it was speculative to conclude that the photographs showed ligature marks on Hubbard's wrists. Thus, to the extent that Respondent further argued that counsel reasonably declined to impeach Dr. Scott's credentials to preserve his own credibility with the jury because the photographs irrefutably proved Dr. Scott's conclusions that Hubbard's wrists showed ligature marks (Dkt. No. 180 at 13-15), that argument is not supported by the record.

In addition, Petitioner noted that the ligature mark on Hubbard's neck due to her ligature strangulation, which is not disputed, could have explained the presence of the rope found at the scene and alleged rope burn on Petitioner's hand. (*See* Dkt. No. 180 at

29.) Finally, to the extent that Respondent maintained that Sergeant York's testimony must be considered in these proceedings where the Court is now considering the relevant evidence *de novo*, that testimony was excluded by the Motions in Limine.[7] *See also* Black's Law Dictionary (11th ed. 2019) (hearing de novo: "1. A reviewing court's decision of a matter anew, giving no deference to a lower court's findings. 2. A new hearing of a matter, conducted as if the original hearing had not taken place.") In any event, York's testimony on this point would have carried far less weight with the jury than that of Dr. Scott, who, as the Court explained at the Pretrial Conference, wore a "halo" by virtue of being an expert. (Dkt. No. 180 at 6.)

Given the substantial room for doubt as to whether Hubbard's wrists were restrained prior to her death, counsel could have greatly undermined the State's primary evidence regarding premeditation by revealing to the jurors that Dr. Scott had given knowingly false testimony in two prior cases as to the manner in which those victims died. *See also, e.g., Williams v. Woodford*, 859 F. Supp. 2d 1154, 1159-60 (E.D. Cal. 2012) (Kozinski, J., sitting by designation) (finding that counsel's failure to call the defendant or his alibi witnesses to testify after having promised such testimony during his opening statement was deficient, as they were the only witnesses supporting the defense's argument). As the parties agreed in the September Stipulation, Smeltzer had first-hand knowledge of one of these cases, as he had been counsel of record for the defendant who was ultimately exonerated by the revelation of Dr. Scott's false testimony. (Dkt. 156.) Furthermore, pointing out to the jurors Dr. Scott's prior false testimony could have greatly undermined Dr. Scott's conclusions based on the fact that he was being called as a witness by the same entity (the County of San Bernardino), which had

[7] Although it may have been possible to have laid a foundation for York's testimony if this officer could have explained that he was able to identify ligature marks by having examined many of them in the course of his investigations, no such foundation was provided. (*See* Dkt. No. 160.)

terminated his contract as a coroner for a lack of competence based on those prior cases. Again, as set forth in the September Stipulation and notwithstanding Smeltzer's first-hand knowledge, there is no dispute that "reasonable counsel" would have known about Dr. Scott's termination. (*See* Dkt. No. 156 at ¶ 11); *Reynoso*, 462 F.3d at 1113 (finding counsel deficient for failing to impeach the prosecution's witnesses with readily available evidence that would have cast doubt on their credibility).

As the Court explained in the 2020 Order, "[c]ounsel's cross-examination that tended to suggest that the death of one or both girls occurred accidentally seemed far-fetched at best, and was not in accord with the defense's theory that Petitioner committed the murders in a sudden explosion of violence." (Dkt. No. 117 at 28.) And, as the Court previously indicated, "challenging the prosecution's evidence of its premeditation theory by impeaching Dr. Scott was entirely consistent with the defense's theory that Petitioner, triggered due to his PTSD, committed the murders in a swift, violent episode." (*Id.*) Put simply, counsel had nothing to lose and everything to gain by pointing out to the jury that Dr. Scott's conclusions had been found invalid in other cases shortly prior to this case and his general incompetence as a coroner. It would have been far more effective than simply cross-examining Dr. Scott as to whether Hubbard's wrists had been bound based solely on the photographs, as counsel did at trial. It also would not have opened the door to any additional harmful evidence. *Waidla v. Davis*, 68 F.4th 575, 586 (9th Cir. 2023) (finding a lack of strategic decision to investigate and present mitigating evidence and distinguishing cases where counsel "made an informed strategic decision to limit their social history investigations because they knew that presenting social history evidence would prove harmful.") (citations omitted). Petitioner has therefore demonstrated deficiency as to counsel's failure to impeach Dr. Scott by a preponderance of the evidence.

Nevertheless, at the March 8, 2023 Pretrial Conference, Respondent maintained that the Court should presume counsel made a "sound tactical decision" not to impeach Dr. Scott about his credentials by pointing out counsel's experience as a trial attorney in this particular field based on his representation of the defendant in the Renova matter. However, it is not enough to say that counsel was an experienced defense attorney; counsel's level of experience cannot excuse him from his constitutional duties of performance. *Small v. Copeland*, 2009 WL 3199649, *16 (D. Id. Sept. 30, 2009) (stating that an ineffective assistance claim "must succeed or fail on counsel's performance, not his level of experience.") (citations omitted). As noted above, impeaching Dr. Scott's credentials had no downside; counsel had everything to gain and nothing to lose. *See*, *e.g.*, *Pavel v. Hollins*, 261 F.3d 210, 218 (2d Cir. 2001) ("[A]lthough Meltzer's decision was 'strategic' in *some* senses of the word, it was not the sort of conscious, reasonably informed decision made by an attorney with an eye to benefitting his client that the federal courts have denominated 'strategic.'") (emphasis in original).

Lastly, to the extent that Respondent maintained that it would not have made a difference had counsel cross-examined the credentials of Dr. Scott because the prosecutor indicated he would have called another coroner to testify to the same conclusions, that argument also misses the mark. The prosecutor made other assertions that were not borne out by the record, and it is speculative to assume what another coroner would have said about the autopsies and specifically about Hubbard's wrists. Indeed, two pathologists have reached contrary conclusions. In any case, the fact remained that the autopsies were performed by Dr. Scott, whose credentials and reputation had been impeached at the time of trial. Thus, any replacement coroner testifying about the autopsies could have been impeached on that point, as well.

Next, the Court turns its attention to whether counsel adequately investigated and considered the evidence regarding premeditation. In view of counsel's statements on the

record that he was not going to challenge Dr. Scott because the victims' cause of death was not at issue, he did not fully understand the importance of Dr. Scott's testimony that Hubbard's wrists had been restrained. In addition, counsel made his decision not to impeach Dr. Scott without seeking the assistance of an independent forensic expert.[8] As the Court noted in the 2020 Order, counsel had no training in the field of forensic pathology and was "woefully unqualified" to evaluate this evidence by himself. (Dkt. No. 117 at 32); *see also Wiggins*, 539 U.S. at 527 ("In assessing the reasonableness of an attorney's investigation, however, a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further."); *Correll v. Ryan*, 539 F.3d 938, 949 (9th Cir. 2008) ("An uninformed strategy is not a reasoned strategy. It is in fact, no strategy at all."). In view of the February Stipulation, the parties now have agreed to the truth of Hammond's statements that he reviewed the entirety of files of Petitioner's counsel which revealed no documents supporting any attempt to investigate pathology in this case. (Dkt. Nos. 176, 177.)

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[8] To the extent that Respondent asserted in his Pre-hearing Brief that Petitioner has not adequately shown that counsel never consulted with a pathologist or forensic expert (Dkt. No. 163 at 9), his argument is unavailing. Certainly, the record contains no correspondence or receipt for services to this effect, and it is doubtful that such experts would have volunteered their services. Indeed, in the parties' February Stipulation, Respondent agreed to the truth of Hammond's statements that, based on his review of the record, it contains no documents or expenditures indicating that counsel investigated pathology evidence, and Respondent has waived his right to cross-examine Hammond. (Dkt. Nos. 176 at ¶¶ 7-9, 177.)

Furthermore, to the extent that Respondent suggested at the March 8, 2023 Pretrial Conference that this allegation fails because the record does not entirely foreclose the possibility of such investigation (Dkt. No. 180 at 21), that argument misstates the standard, is speculative, and is not supported by the record. *See Wise*, 220 Cal. App. 4th at 1188. Trial counsel is deceased and Petitioner has done all he can to show the absence of this investigation in these proceedings. Especially in cases like this one where witnesses are no longer living or no longer remember pertinent facts, requiring petitioners to affirmatively prove that the record forecloses the possibility of such investigation would place an impossible burden on them. Indeed, as Petitioner noted at the Pretrial Conference, counsel's statement on the record -- this case was not a "cause of death" cause -- further indicates his deficiently mistaken belief that he did not need to consult a pathologist. (Dkt. No. 180 at 26-27.)

Moreover, counsel's experience with the Renova matter only constitutes further evidence of deficiency.[9] Given that counsel understood the importance of pathology evidence and recognized the necessity of finding a qualified expert to assist in opining as to the manner of death in the Renova matter, he should have known to secure an expert to assist him with analyzing the pathology evidence in Petitioner's case. Thus, because counsel's failure to investigate the prosecution's evidence regarding premeditation cannot be deemed the product of sound strategy, Petitioner has demonstrated deficiency as to counsel's failure to adequately investigate this evidence by a preponderance of the evidence.

Finally, prejudice has been established. Petitioner's point is well-taken that Dr. Scott was the witness who tied the ligature marks he claimed to see on Hubbard's wrists to the crime and suggested that Hubbard's wrists had been restrained prior to her death. (Dkt. No. 180 at 28.) As the California Supreme Court acknowledged, the evidence supporting a finding of premeditation was only minimal, at best. *Lucero*, 44 Cal. 3d at 1019-20. Revealing to the jurors Dr. Scott's prior false testimony, his lack of competence, and his termination as a coroner could have shattered this fragile evidence. In view of the impeachment evidence that could have cast serious doubt on the evidence pertaining to premeditation about which trial counsel without dispute knew but failed to present, it is enough to "undermine confidence in the verdict," which is all that is necessary for the relief sought here. *See Porter*, 558 U.S. at 455-56 ("We do not require a defendant to show 'that counsel's deficient conduct more likely than not altered his

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[9] Respondent's argument -- that counsel's "concession" that Hubbard's wrists were bound in his closing argument is additional evidence of his tactical decision regarding this evidence -- is not supported by the record. As discussed above, counsel in fact was arguing there was no evidence that either victim had been restrained. (*See infra*, n. 1 and text accompanying.) In any case, such concession, had it been made, could not be deemed the product of sound judgment after hearing the prosecutor maintain in his closing that the binding of Hubbard's wrists was strong evidence of premeditation.

penalty proceeding, but rather that he establish 'a probability sufficient to undermine confidence in [that] outcome.'"). Thus, because there is more than a preponderance of the evidence that the result would have been different had counsel presented this impeachment material, Petitioner is entitled to habeas relief. *Davis*, 384 F.3d at 638; *Strickland*, 466 U.S. at 694. This finding alone suffices as grounds for reversal.

Furthermore, prejudice resulting from counsel's deficient investigation is established by more than a preponderance based on Petitioner's evidence from Drs. Hermann and Haddix affirmatively casting doubt on the prosecutor's argument that there was premeditation because Hubbard's wrists had been restrained prior to her death. As discussed above, the primary evidence at trial that Hubbard's wrists were bound was provided by Dr. Scott and the record simply does not demonstrate that Dr. Scott's conclusions were sufficiently corroborated by other evidence. Thus, because the evidence demonstrating counsel's failure to investigate Dr. Scott's findings is sufficient to "undermine confidence in the verdict," habeas relief is warranted as to these allegations. *Davis*, 384 F.3d at 638; *Strickland*, 466 U.S. at 694.

In Respondent's last argument at the Pretrial Conference, he maintained that, if final Order relies in any way on the opinions of Drs. Hermann (now retired) and Haddix, he is entitled to the opportunity to cross-examine Dr. Haddix at an evidentiary hearing. (Dkt. 180 at 33-34.) However, Respondent has not designated his own pathologist in these proceedings and has agreed that Dr. Haddix is a competent pathologist in good standing. (Dkt. No.180 at 19.) Thus, even if Respondent seeks to criticize Dr. Haddix's opinion on cross-examination, he would not be able to establish any basis to disregard it. Furthermore, although Respondent indicated he would seek to ask Dr. Haddix as to the "possibility" that Hubbard's wrists had been restrained prior to her death, such a question would call for her to speculate and, in any event, even a positive response would not support a finding of premeditation. *See also*, *e.g.*, *New York Cent. R. Co. v. Ambrose*,

280 U.S. 486, 489 (1930) (reversing jury verdict where possible explanations for accident in question were "mere surmises, not legitimate inferences deducible from the proved facts."); *British Airways Bd. v. Boeing Co.*, 585 F.2d 946, 952 (9th Cir. 1978) (affirming summary judgment where plaintiff was unable to "produce specific facts showing, or even creating an inference that [defendant's defective design did] lead to the accident in question.") Because an evidentiary hearing would not change the ultimate balance of evidence failing to demonstrate there were pre-mortem ligature marks on Hubbard's wrists that would support a finding of premeditation, an evidentiary hearing is therefore not required. *Cf. Shriro v. Landrigan*, 550 U.S. 465, 474 (2007) ("It follows that if the record refutes the applicant's factual allegations . . . , a district court is not required to hold an evidentiary hearing.") (citations omitted). In addition, any further trauma to the victims' families by the display of images of their deceased loved ones in a public forum should be avoided when it is not necessary. Accordingly, Petitioner is entitled to habeas relief as to the allegations in Claim Four(A)(1) on the basis of the record alone, and the evidentiary hearing shall be taken off calendar.

In conclusion, the Court acknowledges the troubling nature of this case on several levels. It recognizes the deeply tragic nature of the facts and expresses its condolences for the losses the families have suffered. However, the tragedy of the murders cannot negate the requirement that Petitioner be afforded his constitutional Sixth Amendment right of effective counsel. *Shinn v. Ramirez*, 596 U.S. 366, 393 (2022) (Sotomayor, J., dissenting) ("Our Constitution insists [] that no matter how heinous the crime, any conviction must be secured respecting all constitutional protections."). In addition, it was inexcusable for the State to have adduced testimony from an expert witness who it had terminated as a coroner for a lack of competence shortly before the trial in this capital case.

The parties shall meet and confer, and within 30 days of this Order, submit with the Court a proposed Judgment consistent with the terms of this Order.

VI. Conclusion

For the foregoing reasons, habeas relief is warranted as to Claim Four(A)(1). The conviction in *People v. Lucero*, Case No. 36822, in the California Superior Court for the County of San Bernardino, shall be VACATED.

IT IS SO ORDERED.

DATED: July 26, 2024

ANDRÉ BIROTTE, JR.
United States District Judge