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HILARY POTASHNER (Bar No. 167060)
Federal Public Defender
JOSEPH TRIGILIO (Bar No. 245373)
E-Mail: Joseph_Trigilio@fd.org
RAJ SHAH (Bar No. 301369)
Deputy Federal Public Defenders
321 East 2nd Street
Los Angeles, California 90012-4202
Telephone: (213) 894-7525
Facsimile: (213) 894-1221

LAURIE LEVENSON (Bar No. 97067)
E-Mail: Laurie.Levenson@lls.edu
Loyola Law School's Project for the Innocent
919 S. Albany Street
Los Angeles, CA 90015
Telephone: (213) 736-8141
Facsimile: (213) 380-3769

Attorneys for Petitioner
JOHNATHON RAMOS

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN LUIS OBISPO

19HC-0131

In re JOHNATHON RAMOS, Petitioner, Petition for Writ of Habeas Corpus.	San Luis Obispo County Case No. F461346 **PETITION FOR WRIT OF HABEAS CORPUS; EXHIBITS** Place/County of Conviction: San Luis Obispo, California (Trial Court: Dept. 6)

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I. INTRODUCTION

Petitioner Johnathon Ramos is serving an indeterminate life sentence in prison for a bizarre attack on his ex-girlfriend that even the prosecution must agree was an aberration. He had never before been arrested, much less convicted of any crimes. He had never before acted violently. He worked at an Apple Store in San Luis Obispo; he played in a rock band; he had had meaningful friendships; he had been accepted to Fordham University. On the surface, Ramos was a relatively normal young man—twenty-one years old when the crime occurred. But Ramos also suffered from mental illness. He endured bouts of severe depression and periods of uncharacteristic anxiety and recklessness. Ramos knew something was wrong, and he sought help.

Ramos was never given the help he needed; to the contrary, the treatment he received proved the predicate of his crime. Ramos checked himself into a county mental-health facility, but after an hour-long evaluation, a doctor discharged Ramos from the hospital with a prescription for 150mg of an anti-depressant drug venlafaxine (Effexor). Ramos's life would never be the same. After a few weeks of taking the drug, Ramos noticed that he was not getting better; his life seemed to be spiraling out of control. Six weeks into his prescription of Effexor, Ramos had a mental breakdown. One night—on June 14, 2011—he began calling friends to say goodbye, wanting to end his life. He was despondent and hallucinating; he believed the moon was speaking to him and that something in the universe was wrong. Later that night, Ramos entered his Jennifer Doe's apartment, and with the pocket knife he intended to use to kill himself, he attacked her. As she screamed for help, Ramos jumped up, ran straight to a nearby emergency room, and told the first person he saw what he had just done. Jennifer Doe had to get treated at a hospital for wounds that resulted in stiches and staples, surviving the traumatic event with relatively minor injuries. Ramos was ultimately charged with and convicted of attempted, premeditated murder. He was sentenced to life in prison.

In 2014, State Senator Darryl Steinberg, President Pro Tem at that time (now the Mayor of Sacramento), held a press conference advocating proposals on public safety and mental health. He started the press conference discussing Ramos's struggle with mental illness, his attempts to seek help, the "horrible" reaction to the drug he was prescribed, and the resulting assault on his ex-girlfriend. Steinberg describes as "inhumane" Ramos's indeterminate sentence and the lack of adequate treatment he received prior to prison. (Ex. 28, Steinberg Press Conf., at 0:34-1:41.)

But even in 2014, no one knew just how toxic Effexor was for Ramos. No one knew that Ramos, in fact, has a rare genetic mutation that prevents him from adequately metabolizing drugs like Effexor, thus substantially increasing the likelihood it would cause toxicity and known side-effects, like psychosis and homicidal ideation. Scientific advancements recently allowed Ramos to have his DNA analyzed, where his gene variant was discovered. If the doctors who had prescribed Effexor to him in 2011 had known of his impairments, Ramos very likely would never have committed any crime at all.

Without the DNA evidence of his genetic mutation, Ramos's jury did not know the true details that led to his actions. While the jury knew he had been taking Effexor, it had no idea that Ramos was biologically incapable of flushing it from his system. This impairment effectively created a ticking time-bomb inside Ramos, where the likelihood of toxicity increased daily. Effexor's side-effects uniquely include homicidal ideation and psychosis, but the jury had no idea that Ramos was uniquely susceptible to those effects.

Ramos's jury was deprived of more than just the newly-discovered evidence of Ramos's gene mutation. Ineffective assistance by Ramos's trial counsel and the presentation of false testimony by the prosecution deprived the jury of an accurate assessment of Ramos's mental condition at the time of the attack. The prosecution used the gap in defense evidence and false testimony by an investigating detective to

bolster its argument that Ramos was not, in fact, mentally ill. It argued instead that Ramos's statements made during two interrogations showed his "anger" and intent to kill. But the jury should never have considered those statements; he was too mentally impaired to have understood the ramifications of his making them and the statements unconstitutionally procured. Furthermore, the jury did not hear the context in which the statements were made, the context where Ramos was still in an Effexor-induced impaired state. The incomplete portrayal of Ramos and of his intent in committing the crime was the direct results of constitutional violations. In sum, Ramos's conviction and sentence was not just "inhumane," as Senator Steinberg remarked, but unconstitutional.

Had the jury heard the new evidence presented in this Petition, there is at least a likelihood that they would not have convicted him of attempted premeditated murder. Nor would they have concluded that he harbored any intent to kill Jennifer. And even if they could convict him of a crime, they could not have found that—given his psychosis at the time—he had the ability to appreciate the nature and gravity of his actions. In short, Ramos is innocent of the charges for which he was convicted. Ramos had never had any violent incident before the crime, and—even in prison—has never had any violent or disruptive incident after the crime. It was aberration in his life, the result of a rare constellation of factors—both internal, preexisting, and external from misconduct by the state—that prevented true justice from being served. Habeas relief is warranted, Ramos's conviction should be overturned, and he should have the opportunity to be either retried by a jury that can hear the truth about his mental state or allowed to rejoin society after the San Luis Obispo District Attorney recognizes freeing Ramos is in the interest of justice.

II. STATEMENT OF FACTS

Ramos was convicted of, among other offenses, attempted murder, with a sentencing enhancement because the jury found he acted with willfully and with

premeditation and deliberation. (2 CT 479.)[1] At around 2:00 a.m. on the night of June 14 ,2012, he left his apartment in a despondent state. While calling friends in distress, incoherently uttering statements about the universe and ending his life, Ramos walked to his ex-girlfriend Jennifer Doe's apartment. There, Jennifer awoke to Ramos on top of her and telling her he loved her. He had an opened pocket knife in his hand. Jennifer reached up to grab his hand, and at that point, in the midst of a struggle, Ramos began swinging his harm, punctured Jennifer's skin with his pocket knife; she had to be treated with stiches and stables on her arms and on the side of her head. Ramos immediately ran to an emergency room at French Hospital, where he exclaimed what he had just done.

Ultimately, a jury found that Ramos intended to kill Jennifer when he entered her apartment, and that he did so with premeditation and deliberation. It concluded that Ramos was sane when he acted. The jury did not have, however, the full set of facts and the benefit of today's scientific advancements by which to accurately assess Ramos's mental state at the time of the attack. These facts, which begin with Ramos seeking treatment in the Spring of 2011, confirm Mayor Steinberg's view of this case—that Ramos's indeterminate life sentence is "inhumane."

A. Ramos seeks treatment for his feelings of depression and anxiety.

In April of 2011, Johnathon Ramos was working at the Apple Store. He took advantage of an Employee Assistance Program to address what he described at the time as depression, anxiety and insomnia. (Ex. 40, Davis Records, at ¶ 2.) Ramos had his first appointment with Jeannette Davis, DSW, on April 8, 2011. (7 RT 1934.) Ramos

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[1] The "CT" is the Clerk's Transcript on Appeal and the "RT" is the Reporter's Transcript on Appeal.

told Davis at that session about relationship issues he was having with Jennifer Doe,[2] including arguing and jealousy. (Ex. 10, Davis Records.) Ramos agreed to continue therapy sessions with Davis. (*Id.*)

At trial, Davis testified that she diagnosed Ramos as having severe major depression, without psychotic ideation. (7 RT 1934-35, 1941-44.) She noted that Ramos had symptoms of anxiety, appetite disturbance, sleep disturbance, and social isolation. (7 RT 1938.) Ramos expressed suicidal ideation to Davis, and discussed having been suicidal in high school. (7 RT 1941, 1950.) Davis did not receive any information from Ramos that indicated he had bipolar disorder. (7 RT 1944.)

The therapy sessions with Davis were not the first time Ramos had sought help. At around age sixteen, Ramos reportedly began experiencing alternating feelings of depression, anxiety, and intermittent periods of euphoria, rapid speech, and frequent pacing. (7 RT 1892, 1897; 8 RT 2167, 2188-92.) In high school he was diagnosed with situational depression, and took Zoloft, which was discontinued after Ramos suffered side effects from the drug like numbness, agitation, and instability. (8 RT 2198; 7 RT 2017; 9 RT 2467.)

Davis continued to see Ramos after their first April 7, 2011 meeting. They met again on April 12, 19, and 26, 2011. (7 RT 1934.)

B. Ramos is prescribed Venlafaxine (Effexor) after he voluntarily checks himself into a mental health hospital.

1. Ramos checks into a mental-health facility

On May 5, 2011, Ramos voluntarily admitted himself to a San Luis Obispo County Department of Behavioral Health Facility, where he stayed overnight. He was reported to be having suicidal ideation and reckless behavior. (Ex. 11, SLO County

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[2] Jennifer Doe is the victim in the case and her last name was not publicly reported at the trial. Petitioner will continue to refer to Jennifer without referencing her actual last name.

Hosp. Recs., at 113.) A doctor there diagnosed him with a mental disorder, severe, and recurrent major depression, without psychotic features. (7 RT 1867-71, 1886, 1894, 1896.) Dr. Ronald Morgan, a psychiatrist, discharged Ramos the next morning. He spent about an hour with Ramos. (7 RT 1876.) Morgan prescribed Ramos a 150mg dosage of Venlafaxine, sold under the brand name Effexor. (7 RT 1876.) Effexor is an anti-depressant that acts as a selective serotonin-norepinephrine reuptake inhibitor (SNRI), which increases the concentrations of serotonin and norepinephrine neurotransmitters in the brain. *See*, Bymaster FP, Dreshfield-Ahmad LJ, Threlkeld PG, Shaw JL, Thompson L, Nelson DL, Hemrick-Luecke SK, Wong DT, *Comparative affinity of duloxetine and venlafaxine for serotonin and norepinephrine transporters in vitro and in vivo, human serotonin receptor subtypes, and other neuronal receptors*, Neuropsychopharmacology, Vol. 25, No. 6, at 871-80 (December 2001).

2. Ramos reports feelings of anxiety and mood fluctuations in the weeks leading up to the attack.

Soon after Ramos began taking Effexor, mental health professionals noticed he began exhibiting unusual symptoms. Dr. Davis saw Ramos in sessions on May 10 and 17, 2011. (7 RT 1934.) At the May 10, 2011 visit, Ramos reported feeling angry and trying to escape his intense feelings, for which Davis felt an anger management referral may be appropriate. (7 RT 1947-48.) On May 17, 2011, Ramos purported to be feeling better, but after the May 17 session, Ramos uncharacteristically stopped responding to phone calls and stopped attending therapy sessions. (7 RT 1937.)

On May 16, 2011, Ramos saw a general care physician, Dr. Matthew T. Talarico, M.D. (*See* Ex. 12.) At that visit, Ramos reported trouble breathing and sleeping. (*Id.* at 1.) At some point in late May, Dr. Talarico renewed Ramos's Effexor prescription. (9 RT 2464-65.)

Friends and co-workers also began noticing visible changes in Ramos's behavior after he began taking Effexor. In a recent declaration, Ramos's friend Peter Ljepava

recalls noticing "a real shift in [Ramos's] personality" after Ramos started Effexor. (Ex. 23, P. Ljepava Decl., at ¶ 4.) Ramos began smoking more and drinking more than he had previously. 8 RT 2146-47 (Gabriela Collins's trial testimony regarding Ramos's chain smoking); 9 RT 2462-63, 2502 (Ramos's trial testimony regarding increased drinking and drug use); Ex. 22, J. Hix Decl., at ¶ 4.) Friends reported Ramos began engaging in impulsive and careless spending. (6 RT 1616-17 (Neal Breton's trial testimony noting Ramos's obsession with buying an expensive car); Ex. 22, J. Hix Decl., at ¶ 3.) Ramos stopped attending practices with a band he played with. (7 RT 1970 (fellow band member Franklin Hayes's trial testimony that Ramos uncharacteristically stopped attending scheduled band practices for one to two weeks and did not return calls or text messages).) Ramos also began taking long periods of sick leave from work. 7 RT 1956-57 (Apple Store employee Adam Berger's trial testimony that Ramos uncharacteristically took three consecutive days of sick leave in the weeks before the offense).)

Jennifer Hix, a mutual friend of Ramos and Jennifer Doe, noticed Ramos was "all over the place, full of energy, wanting to start projects and do lots of things." (Ex. 22, J. Hix Decl., at ¶ 3.) She would see this behavior "two or three times over the course of one week." (*Id.*) Hix, who had a brother with bipolar disorder, states Ramos's behavior reminded her of her brother's behavior during periods of mania. (*Id.*)

In late May—on Memorial Day weekend—Ramos's mother, Laurel Ramos, visited him. (8 RT 2192-94.) He appeared thin and had little interest in eating. (8 RT 2195.) Like Hix, Laurel reported Ramos's mood during her three-day visit fluctuated rapidly from euphoric, outgoing, and excitable, to being isolated, paranoid, remove, and lacking in interest. (8 RT 2192-93.) She reported that during periods of excitement, he would have "out of character" conversations with strangers on the street and introduce

her to them.[3] (8 RT 2195.) The same weekend, Ramos's cousin Gabriela Collins reported he seemed disconnected and "not himself." (8 RT 2145-47.) In fact, Ramos told her that he was having depression and anxiety. (8 RT 2147.)

C. Six weeks after his prescription for Effexor, Ramos's drug-induced psychosis leads him to Jennifer Doe's apartment where he injures her with a pocket knife.

In the week or two before the attack, Ramos disappeared from the band, not returning any phone calls or text messages. (7 RT 1970, 1975.) He began drinking heavily. (7 RT 1999; 8 RT 2109.) On June 12, 2011, Ramos reports attempting to kill himself. He tells his friend Neal Breton that the medication he has been given is too much for him. (5 RT 1642-61.)

1. Ramos has repeated phone calls with friends while he is in a despondent and psychotic state

Ramos took his prescribed dosage of Venlafaxine (Effexor) the morning of June 13, 2011. (Ex. 1, Interrogation Transc., at 5.) Later that day, Ramos went to work at the Apple Store, and he went to band rehearsal. (9 RT 2460-61.) He seemed erratic and had trouble focusing. (7 RT 1971, 1975; 9 RT 2468.) He went to a drive-in movie that night, where he and a friend brought a pint of whisky and they smoked marijuana. (9 RT 2468-73, 2501. Ramos, though, did not get drunk. (9 RT 2501.)

In the early morning hours of June 14, 2011, from 1:17 a.m. to 1:48 a.m., Ramos chatted online with a friend who used the name "Verdi Gough" on Facebook. (9 RT 2519.) Half an hour later, at 2:17 a.m., Ramos is despondent. He leaves a message at that time on the voicemail of Emily Medcalf, a friend of Ramos since junior high school. (Ex. A to Ex. 20, Medcalf Phone Recs., at 316.) He sounds distraught and is barely comprehensible. (Ex. 26, Ramos Msg to Medcalf (audio).) Upon hearing the

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[3] Laurel reported Ramos was taking Effexor at this time. (8 RT 2196.)

message, Emily immediately calls Ramos back. Ramos "kept talking about not wanting to be on this earth and that the was calling to say good-bye." (Ex. 20, E. Medcalf Decl., at ¶ 10.) Emily lives in Seattle at this time, and she urges him to just go to the Amtrak train station, get a ticket, and visit her. (*Id.*) But for the next hour, Emily and Ramos exchange phone calls while Ramos is crying hysterically. (*Id.* at ¶ 11; 9 RT 2159.) Ramos tells Emily he wants to end his life and that he cannot be "in this place" anymore. (9 RT 2160.) Emily's phone records show multiple calls with Ramos between 2:17 and 2:51 a.m., lasting anywhere from one to seven minutes.

After the first few back-and-forth calls with Emily, Ramos left a voice-mail message for his friend Peter Ljepava at around 2:27 a.m.. Over the course of the next hour, Peter and Ramos spoke at least three times. According to Peter, Ramos spoke bizarrely and irrationally, talking about how "the universe is an ever expanding place" and that he "can't do this anymore." (Ex. 23, P. Ljepava Decl., at ¶ 5.) Ramos was crying hysterically during these calls. (*Id.*)

Later in the evening—around 3:00 a.m.—something changed for Ramos. Emily called him around that time. Emily describes the call like this:

> He answered in a euphoric, 'sing-songy' voice. His tone was completely different than it had been in our prior phone calls. Something had switched. He sounded completely out of character and as if he had dissociated. Johnathon answered the phone and asked "Hello? Who is this?!" I responded with something like "This is Emily, we've been talking all night." He then asked me to confirm my childhood home address, which was very strange – he sounded suspicious of me and like he didn't know who I was.

(Ex. 20, E. Medcalf Decl., at ¶ 12.) Finally, Johnathon told Emily "you're never going to find me" which prompted her to call 9-1-1. (*Id.* at ¶ 13.) She called 9-1-1 at 3:07 a.m. (Ex. A to Ex. 20, Medcalf Phone Recs., at 316.)

Ramos also spoke to Peter after the strange shift in Ramos's behavior and personality. The two spoke around 3:08 a.m. for two to four minutes. At trial, Peter described Ramos as sounding "like a completely different person." (5 RT 1308.)

Where Ramos before was "just kind of crying out and saying good-bye," during the final call Ramos "sounded completely - - it was just like a switch happened." (*Id.*) In a recent declaration, Peter confirms that Ramos "flipped" in the last call, and "started to display super high energy and at times he was crying." (Ex. 23, P. Ljepava Decl., at ¶ 6.) Peter "had never known [Ramos] to act like that or to so rapidly change his behavior and persona; there seemed to be some sort of switch in his behavior from this second to third call." (*Id.*) It was during this call that Ramos told Peter that he going to "take her with me," which alarmed Peter and prompted him to call the police.

2. Ramos arrives at Jennifer's apartment and attacks her.

At 3:20 a.m., Officer Aaron Schafer received a "welfare check" call to check on an individual who wanted to hurt himself. (4 RT 931.) As he approached "The Establishment," an apartment complex in downtown San Luis Obispo, he saw a man running away. (4 RT 935.) Officer Schafer then received a call that someone had been assaulted or stabbed; he went inside and saw Jennifer Doe. (4 RT 939-40.) Jennifer had wounds on her right arm, right shoulder, and two cuts on her arm; she had a couple of wounds on her right leg. Officer Schafer noted that Jennifer seemed surprisingly calm, and when he asked whether she wanted an ambulance, she declined. (4 RT 941-44.)

At Ramos's trial, Jennifer testified that she awoke to feeling someone standing over her with a weight at her midsection. (5 RT 1209.) At first she thought someone at her apartment complex was playing a joke. When she awakes, Ramos is on top her mumbling something about loving her or having loved her, and he has a pocket knife in his hand. (5 RT 1212-13.) Ramos begins swinging the knife at her and she reacts by grabbing his hand and wrist. Jennifer does not remember where she received the first wound, but she was stabbed in the upper right arm and inside her right armpit. (5 RT 1215-19.) Jennifer began screaming, at which time the attack just stopped. (5 RT 1223.) Ramos threw the knife to the side and ran out the door. (5 RT 1224.) At trial,

Jennifer estimated that the attack lasts between twenty and thirty seconds. (5 RT 1276.) Jennifer ultimately received stiches and staples to treat her wounds. The staples were removed a week later. (5 RT 1230-38.)

3. Ramos describes his mental state preceding and during the attack

Ramos testified at trial that on the night of June 14, 2011, he was suicidal. (9 RT 2442.) He called different friends to tell them goodbye. After talking with Emily Medcalf, he decided he was going to slit his wrists at a train station to—in his distorted mental state—symbolize that he wanted to make it to see her but could not do it. (9 RT 2444.) Ramos then describes a bizarre scene where he sees the moon, which reassures him taking his life will be fine, and then a porch light that signified to him salvation and draws him to it, away from the train station. (9 RT 2445-46.) He remembers entering Jennifer Doe's room from a hallway. (9 RT 2446.) Ramos testified that he felt a "lurch" and "cold fire" running through his body as he was on top of the victim, like he was melting, and he believed that his soul was leaving his body; he recalls seeing blood." (9 RT 2447.) Ramos said that he felt blows to his head and heard screaming, which prompted him to realize that the blood was Jennifer's; he felt an object in his hand; he dropped it, and ran to a hospital. (9 RT 2448).

In a recent interview with psychiatrist Peter Breggin, M.D. on April 17, 2018, Ramos had a remarkably similar account. He explained that after talking with Emily he decided to slit his wrists at the train station. He began to feel an "evil presence" preventing him from transitioning to the afterlife. The moon was bright and he believed that if he "was faithful to what the moon told [him] he would be alright." (Ex. 18, Rpt. of Dr. Breggin, at 32.) Ramos explains that at some point his phone battery was running down and so he threw his phone and smashed it. He continued walking and saw a bright porch light on at Jennifer Does's apartment complex, which he saw as connected to the moon. The moon, which he said had the name "Luna," told him to kill himself inside the complex. Nothing was locked and he entered Jennifer's room. (*Id.*)

Ramos tells Dr. Breggin that at the time of the attack, he feels his hand being reached for—Jennifer was reaching for the knife in his hand—and he then "dissolved into a burst of energy through my back and limbs being lifted up and down." (*Id.*) When Ramos realized he was not dying, feeling being hit on the side of the head, he "woke up" and saw blood on Jennifer and himself. Jennifer was holding on to him; he dropped the knife or threw it, pulled off the sweater he was wearing, and ran to the hospital." (*Id.*)

D. Ramos immediately goes to an emergency room where he alerts staff to what he has done and is questioned by police without *Miranda* warnings.

Ramos goes directly to French Hospital Emergency Room, which was located near Jennifer Doe's apartment. (9 RT 2449.) He reports pounding on the doors when he arrived. Jennifer Nicholson was a nurse on duty at the emergency room that night. According to a police report of her interview on the day of the incident, Nicholson[4] explained that she hears a bell ringing from the main entrance of the hospital; it was "being pushed a lot." She sees a white man with no shirt on ringing and banging on the door. (Ex. 5, Offcr Riedel Supp. Rpt., at 2.) As Nicholson approaches the doors and they opened, Ramos walks inside and says "I tried to kill my girlfriend." (*Id.*) Ramos admits that he stabbed her multiple times with a knife. Nicholson "told someone to call the police as she tried to keep the suspect talking." (*Id.*)

Officer Jason Dickel testified that he arrives to the hospital at around 3:40 a.m., less than a minute after he was dispatched. (1 RT 5.) Dickel met with hospital staff who directed him to an evaluation room inside the emergency room. (*Id.*) Officer

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[4] At trial and in the police reports, the prosecutor and police department misspelled her name as "Jennifer Nicholas." (*Compare* Ex. 5, Offcr Riedel Supp. Rept. *and* 7 RT 1810 *with* Ex. 44, D. Crawford Decl., at ¶ 3.) Nicholson did not testify at trial. This petition will refer to the nurse with her last name spelled correctly, even though her name is spelled "Nicholas" in the cited reports and testimony.

Gillham and Riedel arrived separately, at around the same time as Dickel. (1 RT 6.) The three uniformed officers walked into examination room where Ramos was laying on a bed. (1 RT 7.)

Officer Dickel testified at trial that upon entering the examination room, Ramos "appeared excited and happy to see us." (6 RT 1518.) He was shirtless. (Ex. 4, Dickel Supp. Rep.) Dickel noted in his police report that Ramos appeared to have dry blood on his hands. (*Id.*) Ramos told Dickel that he had stabbed Jennifer, at which point Dickel asked if he had any weapons on him. (*Id.*) Dickel conducted a pat-down search of Ramos's person. (*Id.*) Immediately after the pat-down, Dickel asked Ramos what had happened, and Ramos responded that he had stabbed his girlfriend a bunch of times. (6 RT 1519.)

Sergeant Gillham asked Ramos why he stabbed Jennifer, to which Ramos responded "I needed a release of energy. I have all this rage that I needed to get out. She was keeping me in a box and I had to release it." (5 RT 1521.) According to Dickel's testimony, Ramos responded to Gillham's question about whether he intended to kill Jennifer with a "yeah." (*Id.*)

No officers advised Ramos of his *Miranda* rights at any time while he was in the examination room. Ramos's booking report shows Dickel to be the arresting officer and that Ramos was arrested at 3:44 a.m., just four minutes after Dickel reported arriving to the hospital. (Ex. 6, SLO Booking Rep.)

Dickel explained in his report that during the "conversation," Ramos's "attitude and mood would go up and down[.]" (Ex. 4, Dickel Supp. Rep.) "He would be extremely cooperative and respectful and then suddenly rude." (*Id.*) At one point, Ramos asked Dickel, "Have you ever killed a man? Placed a weapon in someone's body? It feels good." (*Id.*) Later, after transporting Ramos to the San Luis Obispo police station, Ramos asked Dickel if the victim was ok. (*Id.*) After Dickel said that he did not know, Ramos "became upset and started crying for a few minutes." (*Id.*)

Ramos "made several statements about killing himself and wanting to die. He asked [Dickel] to kill him using [Dickel's] gun." (*Id.*)

E. Ramos is placed on a "pre book mental health hold" and interrogated by Officer Chad Pfarr.

1. The officers provide inconsistent accounts of what happened leading up to Pfarr's interrogation.

Officer Dickel reports that he transported Ramos to the San Luis Obispo police station and waited with Ramos for Detective Chad Pfarr to arrive. (*Id.*) A booking report indicates that Ramos was placed on a "pre book mental health hold," that was "set by" Officer Dickel. (Ex. 5, Booking Rep.) A mental health hold suggests to jail staff that they should have the inmate evaluated by a mental-health professional and protected from self-harm. (6 RT 1540-41.)

While the booking report, including a note that the "arresting officer"—listed as Dickel—requested a pre book mental health hold, (*Id.*), Dickel, in his trial testimony at a *Miranda* hearing, denied recommending that Ramos be placed on such a hold. (1 RT 19-20.) In front of the jury, when asked whether he placed Ramos on a mental-health hold, Dickel simply responded that he did not complete the booking form and that he cannot recall. (6 RT 1537.) The prosecutor at trial tells the court and the defense that Officer Jake Koznek, who purportedly transported Ramos to the jail following Pfarr's interrogation, was the officer who placed the mental-health hold on Ramos. (6 RT 1594; 7 RT 1810.) The prosecutor refused, however, to stipulate to that fact. (7 RT 1810.) The record, therefore, is silent as to when a mental-health hold was recommended and by whom.[5]

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[5] After Ramos's current counsel visited the San Luis Obispo police station in an attempt to interview Officers Koznek and Dickel, and after repeated phone calls, each Officer declined to contact counsel. (Ex. 45, J. Trigilio Decl., ¶¶ 4-5.)

According to Dickel's report, Dickel waited with Ramos for Detective Pfarr to arrive, and then Dickel "turned over" the investigation to Pfarr at the police department. (*Id.*) Dickel similarly testified that he spoke with Pfarr when he dropped Ramos off at the police station, and told Pfarr what he knew about the case and about the statements Ramos had made. Dickel testifies that Ramos was in the custody of Pfarr when Dickel left the police station. (6 RT 1541.)

Detective Pfarr has a different account. He writes in his report that he was called to the police station at around 4:15 a.m. on June 14, 2011, and when he arrived he met with Officer Schafer, who was the primary investigating officer.[6] (Ex. 33, Pfarr Supp. Rep.) Pfarr makes no mention of speaking with Dickel. Instead, he implies that he retrieved Ramos from a holding cell alone, and reports that he brings Ramos "to an interview room to be interviewed." (*Id.*; 1 RT 29; 6 RT 1551.)

2. Pfarr interrogates Ramos in an interview room that he claims has faulty audio recording equipment.

The interview room in which Pfarr chose to interrogate Ramos was capable of audio and video recording. (6 RT 1551.) According to Pfarr, however, it "was discovered after the interview was conducted that the audio for the interview room had malfunctioned and was grossly over modulated making review of the audio portion very difficult." (Ex. 33, Pfarr Supp. Rep.; *see also* 1 RT 41-42; 6 RT 1553.) As a result, while a video and audio recording exists, it is extremely difficult to discern what Ramos and Pfarr are saying. (Ex. 3, Recorded Ramos Interrogation (Trial Exhibit 1.) Instead, Pfarr created a transcript of the interrogation based on his attempt to discern what was said on the damaged audio recording. (5 RT 1392 (Trial Exhibit 1A).)

Detective Pfarr begins by asking Ramos to recite what he knows of his *Miranda* rights and then reads most of Ramos's rights. (Ex. 1, Interrogation Transc., at 1-2.)

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[6] Officer Dickel's supplemental report was typed on June 14, 2011, the same day as the incident. Detective Pfarr's report was typed over a week later, on June 22, 2011.

Ramos is then asked some basic booking questions, and when asked why he is there Ramos acknowledges that he assaulted his ex-girlfriend, Jennifer Doe. (*Id.* at 3.) Soon after, Ramos invokes his right to an attorney. (*Id.* at 4.) Ramos confirms that he wants an attorney and does not want Pfarr asking questions. (*Id.*) Immediately after Ramos's invocation—pausing for about 8 seconds, Pfarr continues: "Okay. Do you have any questions about what's going to happen now?" (*Id.*; *see also* Ex. 3, Recorded Ramos Interrogation, at 05:48-05:55) Ramos asks what is going to happen now, and Pfarr tells Ramos that he is going to jail. (*Id.*) At that point, Ramos begins stammering, stating that he wants to be "cooperative" and asking what Pfarr needs to know. (*Id.*) Ramos is then interrogated in detail by Pfarr, offering responses that vary from incomprehensible, to cogent, to delusional, to non-responsive. *See, generally,* Ex. 1, Interrogation Trasnc.; Ex. 3, Recorded Ramos Interrogation.)

3. After Ramos is interrogated he is placed in a safety cell at the jail.

After Ramos's interrogation, at around 7:30 a.m. on June 14, 2011, he was taken by Officer Jay Koznek to French Hospital to have a blood sample taken. (Ex. 7, Koznek Rep.) The results show that Ramos had no alcohol in his system. (Ex. 8, Foresnic Lab. Services Rep.) He did, however, have .10mg/L of Effexor in his system, and .25mg/L of desmethylvenlafxine (the metabolite of Effexor) in his system. (Ex. 9, Central Valley Toxicology Rep.) Koznek then took Ramos to the county jail. (Ex. 7, Koznek Rep.)

Because of his mental health hold, Ramos was placed in a safety cell at the jail, which has rubberized walls designed to prevent suicide attempts, for forty-eight hours. (7 RT 1979.) While Effexor at the jail, he was again placed in a safety call on June 23, 2011 after he reported a seizure and that he felt suicidal. (8 RT 2126-27.) The jail records—not admitted at trial—indicate that Ramos, on June 22, 2011, was vomiting on the floor, with his pulse and blood pressure elevated. He reported tremors, weakness, restlessness, anxiety, and confusion. (Ex. 18, Rpt. of Dr. Breggin, at 13-14.)

Ramos's Effexor prescription was discontinued on June 23, 2011. (7 RT 2016.) He was prescribed Lithium, a mood stabilizer; Ramos reported feeling more stable with the drug. (7 RT 1984-85.)

F. Ramos faces trial, charged with attempted premeditated murder.

Ramos was charged with four crimes arising from his assault of Jennifer Doe: (1) first-degree residential burglary ("Count 1"), in violation of California Penal Code section 459; (2) attempted murder ("Count 2"), in violation of California Penal Code sections 664 and 187; (3) battery on former cohabitant causing corporal injury ("Count 3"), in violation of California Penal Code section 273.5(a); and (4) assault with a deadly weapon ("Count 4"), in violation of California Penal Code section 245(a)(1). (1 CT 21-26 (operative Information).) The State also alleged the following facts: (1) Ramos's commission of Count 2 was willful, deliberate, and premeditated within the meaning of California Penal Code sections 189 and 664(a); (2) Ramos personally used a deadly or dangerous weapon, a knife, during the commission of Counts 1, 2, and 3; (3) Ramos willfully and unlawfully personally inflicted great bodily injury on Jennifer Doe during the commission of Counts 1, 2 3, and 4; and (4) Jennifer Doe was present in the residence during the commission of Count 1. (*See id.*)

Ramos pled not guilty and not guilty by reason of insanity, resulting in a bifurcated proceeding where the jury determined Ramos's sanity following their verdict convicting him of the charged offenses.

1. The prosecution's case

The prosecution's theory at the guilt phase was that Ramos intentionally set out to Jennifer Doe's apartment with the intention of killing her, and that he was a jealous and angry ex-boyfriend who was triggered into rage by Jennifer's failure to reciprocate his affection. Jennifer Doe described meeting Ramos at the Establishment apartment complex in the summer of 2010. They dated until about April of 2011. Jennifer described Ramos as prone to depression and jealous, regularly accusing her of cheating.

(4 RT 972-76.) Concerned for his safety and mental health, Jennifer drove Ramos to a mental health hospital in early May, 2011 to prevent him from harming himself. (4 RT 977.) Jennifer testified that after breaking up with Ramos, she received a couple of angry text messages from Ramos where he called her names and accused her of having a sexually transmitted disease. (4 RT 982-83.) After the text about the disease, Jennifer blocked Ramos's number, preventing her from seeing whether Ramos called or texted her. (4 RT 983.) Jennifer then described the attack (discussed above).

The prosecution also presented the testimony of Neal Breton and Peter Ljepava, who each spoke with Ramos before he arrived at Jennifer's apartment. As described in more detail above, these witnesses testified that Ramos was despondent and distressed when he spoke with them on the night of June 14, 2011. Ljepava also believed that Ramos may be trying to harm Jennifer, based on his last call with Ramos during which Ramos seemed to have "switched" into a completely different personality. (5 RT 1309-10.) Neal Breton described Ramos as distressed when he spoke to Ramos on the night of the attack, and Breton also testified that Ramos attempted to kill himself on June 12, 2011, and that Ramos told him that the medication he had been given at the county mental-health hospital was too much for him. (5 RT 1342-61.)

The remaining prosecution witnesses in its case-in-chief were police officers who described the scene, items that they retrieved belonging to Ramos, and Ramos's statements after the attack. The prosecution played the interrogation tape and introduced to the jury the interrogation transcript of Ramos's interview with Detective Pfarr. (6 RT 1552-67.) An apology note that Ramos wrote the victim immediately after his interrogation with Pfarr was also introduced as evidence. (6 RT 1568; Trial Exhibit 12.)

2. The defense case

The defense theory at the guilt-phase of trial was that Ramos lacked the requisite mental states necessary to commit the charged offenses, based on a combination of his

mental illness and his suffering the side-effects of Effexor. (9 RT 2576-77, 2592-94; 10 RT 2726-27, 2734-35, 2747, 2752.) Trial counsel called a number of medical doctors and mental health professionals to testify in support of this theory. Critically, however, none of these witnesses actually opined Ramos was acting under the influence of side-effects of Effexor at the time of the offense.

Dr. Morgan testified about Ramos's stay at the county mental-health hospital, testifying that Ramos was diagnosed with major depression, recurrent type, without psychotic features, and that he did not have the information necessary to diagnosis Ramos with bipolar disorder. (7 RT 1871, 1873.) Morgan admitted to prescribing Ramos a 150mg dosage of Effexor after having seen him for only an hour, and that he did so without obtaining a family history of illness from Ramos. (7 RT 1920 Morgan also testified that that he was not aware of whether Effexor had potentially lethal side effects, called "Black-box warnings," and suggests Effexor is no more dangerous than other anti-depressants. (7 RT 1878-80.) Morgan also testified that he has never observed anyone suffering drug or alcohol abuse due to Effexor, but acknowledges it is listed as a side effect. (7 RT 1876. 1882.) Morgan does not know why prescribed as high a dosage of 150mg; that dosage is ordinarily reserved for a few days to a week after release from a hospital. (7 RT 1907.)

Jeannette Davis, the clinical social worker who had multiple therapy sessions with Ramos in the weeks before and after his Effexor prescription, also testified. She told the jury that she was not provided information to support a bipolar diagnosis, and that she diagnosed Ramos with major depression. (7 RT 1934-35; 1943.) During cross-examination, Davis noted that Ramos had feelings of anger and boredom. (7 RT 1946.) The jury did not hear that these feelings of anger were noted only after Ramos's prescription for Effexor, on May 17, 2011. (Ex. 40, J. Davis Decl., at ¶ 6.)

The defense also presented the testimony of David Fennell, M.D., a psychiatrist who treated Ramos at the San Luis Obispo county jail. Fennell testified about Ramos's

condition at the jail, including that he was placed in a padded safety cell upon admission. (7 RT 1979.) Fennell discontinued Ramos's prescription for Effexor about a week after he was in the jail, based on Ramos reporting that the drug was making him anxious and "activating" him. (7 RT 1981.) Effexor can cycle a person into mania and mixed episodes, and it has a Black-box warning that increases the risk of self-harm and impulsive behavior. Hallucinations, abnormal thinking, agitation, and psychosis are side effects of Effexor. (7 RT 1982-83.) On cross-examination, however, Fennell testifies that any adverse effects from Effexor will almost always be apparent early on, soon after a patient begins to take the drug. (7 RT 2005.) Fennell does not diagnose Ramos with bipolar disorder, but he did prescribe Ramos lithium in the summer of 2011, which helped stabilize Ramos and helped him sleep. (7 RT 1985.)

Hadley Osran, M.D., also testified for the defense. Osran concluded that Ramos suffers from bipolar disorder. (8 RT 2213.) He opined that the 150mg dosage of Effexor was inappropriate for bipolar in the absence of a mood stabilizer and careful monitoring. (8 RT 2217, 2220.) Effexor may increase the risk of suicidality, homicidality and aggressive behavior, and it may cause a bipolar person to go into a "mixed" situation where they rapidly fluctuate between mania and depression, with the two states almost coexisting simultaneously. This is called a "mixed manic state." (8 RT 2217-19.)

As described in more detail in Section C.3 above, Ramos testified about what he experienced immediately before and during the attack. (9 RT 2440-2504.) The defense also presented evidence about Ramos's character and disposition before the attack. Laurel Ramos and Gabriel Collins, as also described above, testified about Ramos's bizarre behavior a couple of weeks before the attack. His bandmate Franklin Hayes testified about Ramos's unexplained absence from the band, and his bizarre behavior the night before the attack. (7 RT 1968-71.) A co-worker, Adam Berger, testified that Ramos's work attendance and performance was exemplary, but that he took an absence

from work for dealing with emotional issues, for which Ramos was seeking treatment. (7 RT 1954-57.)

And Emily Medcalf testified that she is good friends with Ramos and dated him in high school. She testifies that Ramos was never violent, angry, or suicidal during their relationship. (8 RT 2157.) She also described Ramos's despondency when he called her the night of the attack, and how in their last conversation Ramos seemed completely different. (8 RT 2159-64.) The prosecutor, on cross-examination, suggested that Emily was avoiding the police or refusing to talk to them, but Emily insisted that Detective Pfarr had left her a voice message, and that she attempted to call him back multiple times. (8 RT 2168-73.)

3. The prosecution's rebuttal case

On rebuttal, the prosecution presented Detective Pfarr to testify that he tried calling Emily multiple times and that he did not leave any voice messages for Emily. (8 RT 2178-79.) He also denies having received any messages from Emily. (*Id.*) He testified that he tried to call her from June 17, 2011 until the week before trial. (8 RT 2179.)

Alana Rodriguez also testified to rebut the defense evidence concerning Ramos's character. She dated Ramos from June 2009 through January or February of 2010. (8 RT 2255.) She was twenty-five years old and Ramos was nineteen. (9 RT 2266.) She described Ramos as "extremely jealous," and said that Ramos asked her to cut off most of her prior relationships with men; she was previously married. (9 RT 2258.) She described incidents where Ramos would call a suicide hotline and tell her about it, stood in the kitchen scratching his arm as if he were debating cutting himself, asked her to name her past sexual partners, and judged her for the number of partners she had in the past. (9 RT 2258-65.) She acknowledged that Ramos was never physically abusive or violent, and he never threatened or harassed her. (9 RT 2272.)

Alana testified that Ramos's mother told her that he had threatened suicide in high school, (8 RT 2266), but the defense presented Laurel Ramos, who said that she had never discussed suicide with Alana in any discussions. (9 RT 2421-22.)

4. Guilt-phase deliberations and verdict

The jury began deliberations on September 10, 2012 at 12:08 p.m. At 1:44 p.m., the jury submits questions to the court about Fennell's testimony concerning the half-life of Effexor and Osran's testimony about Effexor as a serotonin inhibitor. (1 CT 235.) The court reporter read each witnesses' testimony. (*Id.*) The jury also asked to read the testimony of Officer Dickel, Peter Ljepava, and Detective Pfarr, regarding his phone call with Ljepava. (*Id.*) On the same day the jury also asked to see police report, "specifically supplemental #3.) (*Id.*)

The next day, on September 11, 2012, the jury resumed deliberations and asked the court a series of additional questions. First, the jury asked to listen Ramos's iPod, which he was listening to prior to the attack; the Court did not allow it because the contents of the iPod was not introduced as evidence. (1 CT 283.) Next, the jury asked a series of questions regarding the charged enhancement that the attempted murder was premeditated and deliberate. It asked whether the jury must be unanimous to find the enhancement true and whether the court could clarify the meaning of the words "carefully weighed the considerations for and against his choice" in the jury instruction. (1 CT 284.)

On September 12, 2012, Ramos's jury found him guilty of four crimes arising from his assault of Jennifer Doe: (1) first-degree residential burglary ("Count 1"), in violation of California Penal Code section 459; (2) attempted murder ("Count 2"), in violation of California Penal Code sections 664 and 187; (3) battery on former cohabitant causing corporal injury ("Count 3"), in violation of California Penal Code section 273.5(a); and (4) assault with a deadly weapon ("Count 4"), in violation of California Penal Code section 245(a)(1). (12 RT 3304-3306; 1 CT 286-289; *see also* 1

CT 21-26 (operative Information).) The jury also found true the following allegations: (1) Ramos's commission of Count 2 was willful, deliberate, and premeditated within the meaning of California Penal Code sections 189 and 664(a); (2) Ramos personally used a deadly or dangerous weapon, a knife, during the commission of Counts 1, 2, and 3; (3) Ramos willfully and unlawfully personally inflicted great bodily injury on Jennifer Doe during the commission of Counts 1, 2 3, and 4; and (4) Jennifer Doe was present in the residence during the commission of Count 1. (*Id.*) By finding Ramos guilty, the jury apparently credited the prosecutor's account of the offense, albeit after some disagreement as to whether Ramos's commission of Count 2 was willful, deliberate, and premeditated. (11 RT 3015-3020.)

5. The sanity proceeding

During the sanity phase, trial counsel argued Ramos's ingestion of Effexor rendered him legally insane, specifically rendering him unable to understand the moral wrongfulness of his actions. (14 RT 4037-39.) Trial counsel elicited testimony from Dr. Osran and psychiatrist Dr. William Walters, M.D., that Ramos suffered from bipolar disorder and was in a mixed state at the time of the offense that rendered him unable to understand the moral wrongfulness of his actions. (12 RT 3320, 3324-29, 3331, 3335, 3338-39, 3380-81 (Dr. Osran); 13 RT 3607, 3609, 3611-12, 3637 (Dr. Walters).) In opposition, the prosecution elicited opinion testimony from Dr. Fennell that Ramos did not have bipolar disorder, *see* 13 RT 3704, did not display manic symptoms during the first few days of his detention in San Luis Obispo County Jail, *see* 13 RT 3704, did not appear to be in a mixed state during his interactions with police, 13 RT 3724-26, and understood the moral wrongfulness of his actions. (13 RT 3723.) The prosecution also elicited opinion testimony from Dr. Kris Mohandie, a forensic psychologist, that Ramos knew his actions were morally wrong. (13 RT 3802.)

On September 17, 2012, the jury found Ramos was legally sane at the time he committed all four crimes of conviction. (15 RT 4204-07; 2 CT 313-16.) On October

17, 2012, Ramos was sentenced to a term of five years to life with the possibility of parole. (2 CT 479.)

6. Ramos's sentence

On October 17, 2012, Ramos was sentenced to a term of five years to life in prison with the possibility of parole, as follows: the trial court imposed an indeterminate sentence of life with the possibility of parole for the jury's finding that Ramos's commission of Count 2 was willful, deliberate, and premeditated,[7] a one-year determinate sentence for the jury's finding that Ramos used a deadly or dangerous weapon during commission of Count 2, and a consecutive four-year determinate sentence for the jury's finding that Ramos personally inflicted great bodily injury on Jennifer Doe during commission of Count 2. (2 CT 479; 17 RT 4840-41.) The court imposed additional determinate sentences for the other counts and findings, but these sentences were stayed. (*Id.*)

G. Newly discovered DNA evidence reveals that Ramos has a gene mutation that prevented him from adequately metabolizing Effexor, which resulted in him having suffered from a drug-induced manic psychosis at the time of the offense.

At trial, the prosecution argued—and the jury accepted—that Ramos's prescription of Effexor played no role in the crime and did nothing to hamper his mental state. As explained in detail in Claim One, below, newly-discovered evidence—an analysis of Ramos's DNA (specifically, his "Cytochrome P450" or "CYP450" genes)—reveals that Ramos suffers from a genetic mutation that renders him unable to effectively metabolize Effexor. (*See, generally,* Ex. 19, Rpt. of Dr. Eikelenboom.)

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[7] Ordinarily, a crime of attempted murder would carry a sentence of "five, seven, or nine years" in state prison. Cal. Penal Code § 664(a). However, if the attempted murder "is willful, deliberate, and premeditated murder, . . . the person guilty of that attempt shall be punished by imprisonment in the state prison for life with the possibility of parole." Cal. Penal Code § 664(a).

Ramos's genetic mutation is exceedingly rare. "The chances within a Caucasian population to have these specific variances on these CYP450 [genes] is 1 in about 37,000." (*Id.* at 16.) Moreover, Ramos's genetic incapacity to metabolize the drug was exacerbated by additional circumstances at the time of the offense, including the state of Ramos's liver in May and June 2011, the dosage of Effexor Ramos was prescribed, and Ramos's age. As a result, two independent experts—Dr. Selma Eikelenboom and Dr. Peter Breggin—opine that Ramos was at significant risk of suffering side-effects of Effexor toxicity at the time of the offense based on Ramos's unique genetic profile. (Exs. 18, 19.) New developments in science further demonstrate that Ramos suffered from bipolar disorder, which could exacerbate or increase the likelihood of, Effexor-related toxicity. (Ex. 19, Rpt. of Dr. Breggin, at 25-28.) The impairments resulting from Effexor-toxicity include psychosis, impulsivity, homicidal ideation, and volitional impairment. (Ex. 19, Rpt of Dr. Eikelenboom, at 12-13, 19-20.)

Drs. Eikelenboom and Breggin also opine that, in fact, Ramos was suffering from these adverse effects—including psychosis, mania, and heightened impulsivity—at the time of the offense. (*Id.* at 19; Ex. 18, Rpt of Dr. Breggin, at 40-42.)

III. THIS COURT MUST ISSUE AN ORDER TO SHOW CAUSE IF RAMOS'S ALLEGATIONS, ASSUMED TO BE TRUE, RAISE PRIMA FACIE CLAIMS

In California, a prisoner like Ramos initiates a post-conviction action by filing a verified petition for writ of habeas corpus. *People v. Romero*, 8 Cal. 4th 728, 737 (1994). The petition must merely allege that a petitioner is unlawfully restrained and specify the facts on which the petitioner bases her claim that the restraint is unlawful. *In re Lawler*, 23 Cal. 3d 190, 194 (1979); Cal. Pen. Code § 1474. A petitioner is also tasked with supporting his allegations with "reasonably available documentary evidence." *People v. Duvall*, 9 Cal. 4th 464, 474-75 (1995).

The petition serves a "limited function." *Id.* at 743; *see also People v. Pancini*, 120 Cal. App. 3d 877, 884 (1981) ("The petition for a writ of habeas corpus is thus preliminary in nature"). "The function of the petition is to secure the issuance of the writ, and, when the writ is issued, the petition has accomplished its purpose." *Ex parte Collins*, 151 Cal. 340, 342 (1907).

1. Post-petition proceedings prior to an order to show cause are limited.

Upon receipt of a properly-filed petition, this Court has only two options to act. Its first option is to deny the petition, which it should do only if the petition does not state a prima facie case for relief or if the claims are procedurally defaulted. *In re Clark*, 5 Cal. 4th 750, 769 nn.9, 21 (1993). When deciding whether a prima facie claim has been made, this court should have considered the facts alleged by Ramos as true, set aside any possibility of contradiction or impeachment, and draw all legitimate inferences in favor of the presence of a prima facie case. *Aguilar v. Atlantic Richfield Co.*, 25 Cal. 4th 826, 851 (2001); *Quinn v. City of Los Angeles*, 984 Cal. App. 4th 472, 279-80 (2000).

The second option available to this court is to grant the petition, i.e., issue the writ of habeas corpus. The issuance of the writ "is largely procedural" and "does not decide the issues and cannot itself require the final release of the petitioner." *Romero*, 8 Cal. 4th at 738; *People v. Getty*, 50 Cal. App. 3d 101, 110 (1975). Taken literally, the writ requires the custodian to bring the detained person ("the body") before the court. But because of the obvious impracticality of such a requirement, California courts have substituted bringing the body (habeas corpus) to the court with issuing an order to show cause (OSC), requiring the custodian to show cause for why the relief sought should not be granted. *In re Hochberg*, 2 Cal. 3d 870, 873-74 (1970).

Again, the writ, *i.e.*, an OSC *must* issue if Ramos's allegations state a prima facie case on a claim that is not procedurally barred. *Romero*, 8 Cal. 4th at 738; Cal. Pen. Code § 1476.

2. This Court only has the jurisdiction and power to resolve factual issues after an OSC has issued.

The issuance of an OSC transforms a habeas action into an actual case that can be resolved. Prior to an OSC, a court does not even have jurisdiction to resolve factual disputes, order a hearing or discovery, or grant other measures to resolve a petitioner's claims. Cal. Pen. Code § 1484. Once an OSC issues, however, this court has the "full power and authority" to hold a hearing, allow discovery, "and to do and perform all other acts and things necessary to a full and fair hearing and determination of the case." *Id.* The OSC is, therefore, "an intermediate but nonetheless vital step in the process of determining whether the court should grant the affirmative relief that the petitioner has requested." *Romero*, 8 Cal. 4th at 740.

The next step after the issuance of an OSC is the custodian's filing of a Return. This is analogous to civil complaint because it is "the central pleading in the action, to which another pleading must respond[.]" *Id.* at 739 n. 6. The custodian (the Warden) has the burden in the Return of alleging facts that establish the legality of the petitioner's incarceration. It "'is an essential part of the scheme' by which relief is granted in a habeas corpus proceeding." *Id.*, *quoting Getty*, 50 Cal. App. 3d at 110.

The petitioner will then file a Traverse that denies or controverts any of the material facts set forth in the Return, or allege any facts showing that he is in custody unlawfully, which will typically include the allegations set forth in the petition. Cal. Pen. Code § 1484. This along with the Return are the formal pleadings in a habeas case; "it is through the return and the traverse that the issues are joined in a habeas corpus proceeding." *Romero*, 8 Cal. 4th at 740.

Only after formal pleadings are filed can this Court decide whether petitioner's entitlement to relief—i.e., his release from custody—"hinges on the resolution of factual disputes;" if so, an evidentiary hearing is necessary. *Id.* Only following such a hearing can a court determine whether petitioner has proven his claims by demonstrating that the factual disputes should be resolved in his favor.[8]

IV. TIMELINESS ALLEGATIONS: PETITIONER'S CLAIMS ARE NEITHER UNTIMELY NOR PROCEDURALLY DEFAULTED.

Claims raised in a habeas corpus petition are timely if they are either (1) brought without "substantial delay," (2) substantially delayed but with justification, or (3) substantially delayed without justification but merits review is warranted to avoid a miscarriage of justice. *In re Robbins*, 18 Cal. 4th 770, 780 (1998). Here, Ramos's claims are brought to this Court without substantial delay—identified and developed only after Ramos was appointed counsel for the first time in post-conviction proceeding. To the extent any claims were brought with substantial delay, that delay is justified, given the lack of resources Ramos had to investigate, research and develop his claims prior to have appointed counsel. Finally, Ramos's claims should be heard on their merits regardless of any delay. This is because Ramos's allegations demonstrate that he is innocent of the charged offense based on new science and DNA evidence indicating he did not form the intent necessary to commit first-degree premeditated murder.

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[8] California's rules—requiring an OSC and an evidentiary hearing before this Court can resolve any factual findings against Ramos—is consistent with federal law. *See Taylor v. Maddox,* 366 F.3d 992, 1000-01 (9th Cir. 2004) (finding that a state-court decision may amount to an unreasonable determination of facts where it made factfindings or credibility determinations without an evidentiary hearing, or where it ignored or misconstrued critical evidence).

A. Ramos's claims were brought to this court without substantial delay or with justifiable substantial delay.

Substantial delay is "measured from the time the petitioner or his or her counsel knew, or reasonably should have known, of the information offered in support of the claim and the legal basis for the claim." *Id.* This triggering date does not demand the maximum diligence possible, but only 'reasonable' diligence." Moreover, a petitioner must reasonably have known or should have known of both the legal and factual basis of a claim. *Id.* This means that delay should not be measured until the factual and legal predicate of *each element* of a particular claim was reasonably discoverable.[9]

Here, Ramos was *pro se* when he filed his initial state-habeas petition and federal habeas petition. He did not have the benefit or funding to pay for a lawyer or an investigator to research or investigate his claims. The federal district court appointed the Office of the Federal Public Defender ("FPD") to represent Ramos on September 19, 2017. *See Ramos v. Lizzaraga*, USDC Case No. 16-303, Dkt. No. 37. Not until that date, and the ensuing investigation conducted by the FPD, were the factual predicates fully known to Ramos, as shown below.[10]

1. Expert Declarations (factual predicates to Claims One, Two, Three, Four, Five, and Seven)

The FPD retained two experts to provide factual predicates for Ramos's new claims. Dr. Peter Breggin evaluated Ramos, reviewed prior records, and provided a detailed report. (Ex. 18, Rpt. of Dr. Breggin.) This report was used as a factual

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[9] This is in accord with the rules governing the triggering date—measured from the date the factual predicate of a claim becomes available—for the federal statute of limitations set forth in 28 U.S.C. § 2244(d). *See Hasan v. Galaza*, 254 F.3d 1150, 1154 (9th Cir. 2001).

[10] Since its appointment, the FPD has not delayed bringing claims to this Court. After completing a ten-month investigation, the FPD on July 18, 2018 sought permission from the federal court to stay the federal case and bring these claims to this Court. (*Ramos v. Lizzaraga*, USDC Case No. 16-303, Dkt. No. 53.) It was not until July 8, 2019 that the federal court granted Ramos permission to stay the federal case and file a petition (within 30 days of the court's order) in this Court. (*Id.*, Dkt. No. 70.)

predicate to Claim One, alleging Ramos's actual innocence, Claim Two, related to trial counsel's failure to present an expert like Breggin, Claims Three and Five, regarding Ramos's mental state at the time of his interrogation, Claim Four, regarding the prosecution's presentation of false testimony, and Claim Seven, which alleges cumulative error. Ramos also retained Dr. Selma Eikelenboom, who tested Ramos's DNA, reviewed records, and also provided a report regarding Ramos's genetic mutation that prevented him from effectively metabolizing the anti-depressant Effexor. (Ex. 19, Eikelenboom Rep.) Her report was similarly used as a factual predicate to Claim One and Claim Two.

These two experts were retained at a fee that Ramos could not have afforded in prison. Each expert spent multiple hours reviewing materials in Ramos's case in order to form their expert opinion. And each expert relied on the assistance of the FPD to provide them with organized files and the new declarations and records the FPD was able to obtain. None of this was available to Ramos, despite reasonable diligence, until the FPD was appointed.

2. Declarations of Witnesses (factual predicates to Claims One, Two, Three, Four, Six, and Seven)

The FPD was also able to locate and interview multiple witnesses who provided factual predicates to new claims. The FPD traveled to San Luis Obispo eight times to speak with witnesses, obtain files, and secure declarations. For example, the FPD interviewed Neal Breton and Jennifer Hix, both of whom witnessed Ramos's decompensation before the offense. Each signed declarations for the FPD. (*See* Exs. 22, 25.) Their declarations—describing Ramos's impairments—provide the factual predicate for Claims One and Two, related to the jury not having considered their testimony before reaching a verdict. The FPD also traveled to San Luis Obispo County to interview Juror J.T., whose identity must be protected from public disclosure, but who provided a declaration in support of Claims One, Two, Three, Six, and Seven. (Ex.

24.) Similarly, the FPD traveled to French Hospital, where Ramos first went after the offense and where his first interrogation took place. There, the FPD spoke with Barbara Dyer, who provided a declaration describing the security protocols at the time, providing the factual predicate of Claim Three. (*See* Ex. 40.) Ramos, exercising reasonable diligence in prison, could not have located these witnesses, contacted them, and secured their declarations absent the FPD's appointment.

The FPD was also able to contact Emily Medcalf, who spoke with Ramos minutes before the offense. She is now living in Vietnam. By making long-distance phone calls and using electronic communications, the FPD secured a declaration from Medcalf, which provided a factual basis to Claims Two and Claim Four, related to Detective Pfarr's false testimony about his contact with Medcalf. (Ex. 20.) Medcalf also provided the FPD with her phone records, further predicating the claim that Detective Pfarr falsely testified about his contact with her. (*Id.*) Ramos could not have located and contacted Medcalf from prison while she was in Vietnam. Nor is it reasonable to expect Medcalf to have sent to him her private phone records while he was incarcerated.

The FPD also contacted Dr. Jeanette Davis, Ramos's therapist before the offense, by finding her new location in San Luis Obispo. The FPD obtained her files regarding Ramos, and secured from her a declaration that provided a factual basis to Claim Two, related to counsel's failure to adequately present her testimony. (Ex. 40.) Similarly, the FPD was able to use its resources to identify Jennifer Nicholson, the first person to come into contact with Ramos after the offense. Neither the prosecution nor defense located her at the time of trial, and her name was misspelled on police reports. The FPD used its internal resources to locate her using her date of birth. (Ex. 44, D. Crawford Decl., at ¶ 3.) Nicholson's statements provided a factual basis to Claim Three, alleging Ramos's custodial interrogation. Ramos could not have located her in prison. Nor could

he have secured her statements; indeed, she did not agree to sign a declaration for the FPD and so her statements are recounted by the FPD investigator instead.[11]

3. Physical and documentary evidence (factual predicates to Claims Two, Three, Four, Five, and Seven)

Nor could Ramos have reasonably identified and obtained the physical evidence and documents that the FPD, with its investigatory resources, obtained as factual predicates to the claims in the PAP. This evidence includes a DVD video of Ramos's interrogation, which provides a factual basis to Claims Two, Three, Four, and Five (Ex. 3), and two audio files of voice-messages left by Ramos for Medcalf and Peter Ljepava that provide factual bases to Claim Two. (Exs. 26, 27.) While in prison and despite due diligence, Ramos could not have reasonably obtained this evidence nor secured the equipment necessary to play it in order to identify the bases for allegations of constitutional violations.

Similarly, the FPD secured multiple records—including hospital records (Exs. 11, 13); records from Ramos's general doctor before the offense (Ex. 12); Medcalf's phone records (Ex. 20); and San Luis Obispo County jail records (Ex. 31)—that were not reasonably available to an indigent prisoner lacking the funds to retain an investigator to gather them. This evidence provided not only the factual predicates to Claims One, Two, Three, and Four, but also were provided to the expert witnesses as a basis of their opinions. (Exs. 18, 19.) Similarly, the FPD identified a website, unavailable to Ramos in prison, indicating Detective Pfarr's official contact number, which was used as a predicate to Claim Four alleging Pfarr's false testimony. (Ex. 30.)

[11] Subpoena power is necessary to compel Nicholson to provide testimony confirming the statements she provided to the FPD investigator.

B. If any of Ramos's claims are substantially delayed, this Court should nevertheless consider their merits to avoid a miscarriage of justice.

Regardless, even if this Court were to find the petition substantially delayed, and that the delay is unjustified, the merits of the claims in this Petition indicate a fundamental miscarriage of justice; thus, it would be a fundamental miscarriage of justice to forego merits-review of the claims based on a procedural obstacle. The California Supreme Court requires merits review of claims that are even justifiably substantially delayed if the claim alleges "facts that a fundamental miscarriage of justice has occurred[.]" *Clark*, 5 Cal. 4th at 775. Here, the facts alleged in Claim One demonstrate that Ramos is innocent of the charges for which he was convicted, warranting merits review of his claims. *Id.* at 761.

V. CLAIMS FOR RELIEF

CLAIM ONE: NEW AND PREVIOUSLY UNAVAILABLE SCIENTIFIC EVIDENCE ESTABLISHES RAMOS IS ACTUALLY INNOCENT OF THE CRIMES OF CONVICTION, AND THAT EVIDENCE PRESENTED AT TRIAL WAS FALSE

Penal Code § 1473(b)(3) requires habeas relief upon presentation of new evidence that is credible, material, timely, and would have more likely than not changed the outcome at trial. Moreover, Penal Code § 1473(e)(1) requires habeas relief when the prosecution elicited false testimony, including "the opinions of experts . . . that have been undermined by later scientific research or technological advances." Ramos is entitled to relief under both of these provisions. The same factual bases set forth in the allegations below also entitle Ramos to relief under the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

SUMMARY

1. DNA testing prompted by new scientific research shows Ramos has a rare genetic mutation preventing him from properly metabolizing Effexor—the anti-depressant he was prescribed and taking at the time of the offense.
2. Ramos's inability to properly metabolize Effexor likely caused him to experience adverse side-effects that would induce violent behavior, such as suicidal and homicidal ideation, akathisia, psychosis, and volitional impairment.
3. Ramos's behavior in the six weeks after he began taking Effexor—culminating in the offense—reflects he was suffering from these adverse side-effects.

CONCLUSION

It is at least more likely than not that Ramos committed the offense under the influence of adverse side-effects of Effexor brought on by his genetic mutation, rather than out of consciously formed intent. An order to show cause and habeas relief pursuant to Penal Code section 1473 is, thus, required.

A. Overview

The prosecution's theory of the case at trial was that Ramos was a jealous and angry ex-boyfriend who set out to Jennifer Doe's apartment with the intention of killing her because she failed to reciprocate his affections. Ramos's trial counsel presented a different account of the offense: trial counsel argued Ramos's actions were attributable to side-effects of Effexor, and its interaction with his underlying bipolar disorder. To this end, trial counsel introduced testimony from Ramos's friends, family, and acquaintances describing how he began acting out of character over the six-week period that he was taking Effexor in May and June 2011.

Unfortunately, trial counsel's case during the guilt phase had one fatal flaw: trial counsel failed to present *any* scientific evidence establishing Ramos was suffering from

the side-effects of Effexor at the time of the offense or that this affected his culpability for the charged offenses. *See People v. Ramos*, No. 2D CRIM. B244670, 2014 WL 4071039, at *6 (Cal. Ct. App. Aug. 19, 2014) (noting trial counsel "did offer theoretical evidence that Effexor has side effects," but "offered no evidence, however, that he was suffering from those effects when he committed the attack on Jennifer" or "how his alleged intoxication affected his actual formation of the intents necessary to commit burglary and attempted premeditated murder"). Taking advantage of this gap in the defense case, the prosecution elicited testimony by an expert, Dr. David Fennell, that Ramos could *not* have suffered adverse side-effects of Effexor at the time of the offense because it has "a relatively short half life" and "is metabolized quickly." (7 RT 2005-06.) Presumably because the defense failed to establish a connection between Effexor and the offense, the jury found Ramos guilty and accepted the prosecution's account of the offense as intentional and premeditated. (*See* 12 RT 3304-3306 (guilty verdict finding offense to be willful, deliberate, and premeditated).)

As set forth below, new and previously unavailable scientific evidence fills in this evidentiary gap, and establishes—at least by a preponderance—that Ramos's actions were likely caused by side-effects of Effexor. The new evidence is set forth in reports by Dr. Selma Eikelenboom-Schieveld, M.D. (hereinafter "Dr. Eikelenboom"), a forensic medical examiner and founder of Independent Forensic Services, LLC ("IFS"), and psychiatrist Dr. Peter Breggin, M.D. The new evidence establishes Ramos has a rare genetic variance that would have impaired his ability to metabolize Effexor, caused toxic levels and fluctuations of the drug in his body, and caused him to suffer side-effects that would induce violent behavior.

The new evidence establishes that Ramos more likely than not acted in a psychotic state produced by the adverse side-effects of Effexor, rather than out of consciously formed intent. The new evidence constitutes *biological proof* that Ramos would have experienced adverse side-effects of Effexor at the time of the offense, as

trial counsel argued at trial. The evidence also possesses great explanatory power: it explains why Ramos—an otherwise ordinary young man with no prior criminal history—committed the offense. The evidence also explains why Ramos suddenly began engaging in uncharacteristically self-destructive behavior in the six weeks after he began taking Effexor and leading up to the offense. In short, the new evidence explains and is consistent with all of Ramos's actions after he began taking Effexor.

Had the new scientific evidence been introduced at trial, Ramos's jury would likely not have found him guilty or at the very least would not have found he was sane at the time of the offense. The evidence also falsifies Dr. Fennell's critical testimony at Ramos's trial. Consequently, the new evidence entitles Ramos to habeas relief under California Penal Code § 1473.

B. Penal Code § 1473 requires habeas relief when new evidence more likely than not would have changed the verdict or when new scientific evidence demonstrates that false evidence was presented at trial.

California Penal Code section 1473 establishes a right to habeas relief on a number of different grounds. Two are pertinent here. First, the statute holds a petitioner may procure relief if "[n]ew evidence exists that is . . . of such decisive force and value that it would have more likely than not changed the outcome at trial." Cal. Penal Code § 1473(b)(3)(A). "'[N]ew evidence' means evidence that has been discovered after trial, that could not have been discovered prior to trial by the exercise of due diligence . . . ." *Id.* § 1473(b)(3)(B). To procure relief, a petitioner need only show the new evidence "would have led at least one juror to maintain a reasonable doubt of guilt." *In re Sagin*, No. H044767, 2019 WL 4126421, at *5 (Cal. Ct. App. Aug. 30, 2019). And the weight of the petitioner's burden of proof depends on the case presented against him at trial: "if the trial was close, the new evidence need not point so conclusively to innocence to tip the scales in favor of the petitioner." *Id.*

Second, the statute provides for habeas relief if "[f]alse evidence that is substantially material or probative on the issue of guilt or punishment was introduced against a person at a hearing or trial relating to his or her incarceration." Cal. Penal Code § 1473(b)(1). "False evidence" includes opinions of experts "that have been undermined by later scientific research or technological advances." *Id.* § 1473(e)(1). False evidence is "substantially material or probative" if there is a reasonable probability that, had the evidence not been introduced, the result of the trial would have been different. *In re Cox*, 30 Cal. 4th 974, 1008-09 (2003). To procure habeas relief based on false testimony, a person need not prove the testimony was perjurious. *See In re Richards*, 55 Cal. 4th 948, 961 (2012). Nor must he prove that the prosecution knew or should have known of its falsity. Cal. Penal Code § 1473(c). Rather, "[s]o long as some piece of evidence at trial was actually false, and so long as it is reasonably probable that without that evidence the verdict would have been different, habeas corpus relief is appropriate." *Richards*, 55 Cal. 4th at 961.

As set forth below, the newly discovered evidence contained within Dr. Eikelenboom and Dr. Breggin's reports entitle Ramos to habeas relief under both § 1473(b)(3)(A) *and* § 1473(b)(1).

C. New scientific evidence establishes that Ramos lacked the mental state necessary to be convicted of the charged offenses.

Ramos has discovered new scientific evidence—set forth in the reports of Dr. Eikelenboom and Dr. Breggin—showing he has a rare genetic mutation (specifically with respect to his "Cytochrome P450" or "CYP450" genes) that renders him unable to effectively metabolize Effexor, and that likely caused him to suffer adverse side-effects of Effexor when he took the medication in May and June 2011. The experts' conclusions that Ramos suffered these side-effects are corroborated by evidence of Ramos's behavior during the period he was prescribed Effexor. The new DNA testing and expert evaluations regarding Ramos's mutation, supported by his behavior upon

ingesting the medication in 2011 together establish, at least by a preponderance of the evidence, that Ramos was acting under the influence of side-effects of Effexor and lacked the mental state necessary to commit the crimes of conviction.

The new scientific research regarding CYP450 genes that Dr. Eikelenboom's and Dr. Breggin's reports rely on was not reasonably available at the time of Ramos's trial. "[P]sychiatrists in 2012 would not have been reasonably familiar with the use of CYP genetics in prescribing medication or aware that, in retrospect, certain [variances] on CYP genes can be linked to patients developing psychiatric symptoms and acts of violence as side effects due to medication toxicity." (Ex. 19, Rpt. of Dr. Eikelenboom, at 25.) Indeed, "[r]esearch regarding the genetic inability to metabolize antidepressant medication" "is a scientifically valid emerging field of genetics related to the ability of individuals to metabolize or breakdown antidepressant drugs that was not readily available or in the awareness of most experts until after 2014, and which they did not utilize." (Ex. 18, Rpt. of Dr. Breggin, at 11.)

1. New scientific research not reasonably available at the time of trial demonstrates that specific genetic mutations can impair the metabolization of anti-depressants like Effexor.

a. A person's Cytochrome P450 genes produce enzymes that metabolize drugs such as Effexor.

Human cells contain twenty-three pairs of chromosomes, for a total of forty-six. (Ex. 19, Rpt. of Dr. Eikelenboom, at 6.) A person's father donates half of the chromosomes, and the other half come from the person's mother. (*Id.*) Every chromosome is comprised of genes. (*Id.*) A gene is the basic physical and functional unit of heredity, and is comprised of a sequence of DNA molecules that code for a specific hereditary trait or function. (*Id.*) Different variations of a gene are referred to as "alleles." (*Id.*)

Because every individual has two copies of every gene (with one copy inherited from each parent), he or she necessarily has two gene alleles that code for a particular trait or function. (*Id.*) The two alleles a person inherits from each parent for a particular trait need not be identical. (*Id.*) If the alleles for a particular trait on both of a person's chromosomes are the same, the person is called "homozygous" for that trait. (*Id.*) If the alleles are different, the person is "heterozygous." (*Id.*)

Genes produce proteins, and proteins cause hereditary characteristics to be expressed. (*Id.*) In particular, genes produce a type of protein called an "enzyme." (*Id.*) Different enzymes execute different biochemical reactions in the body. (*Id.*) Some enzymes metabolize medications that interact with brain chemistry, such as anti-depressants. (*Id.*) Genes responsible for producing such enzymes belong to what is called the Cytochrome P450 or "CYP450 system." (*Id.*) The enzymes themselves are thus known as "CYP450 enzymes." (*Id.*) CYP450 enzymes are primarily found in the liver, but also in the brain. (*Id.*)

The genes that produce CYP450 enzymes (hereinafter "CYP450 genes") consist of eighteen families and forty-four subfamilies. (*Id.*) Moreover, each CYP450 gene has a range of different alleles (i.e. variations). (*Id.*) As set forth in greater detail in below, the type of CYP450 alleles a person has determines the composition and effectiveness of the CYP450 enzymes produced in their system. (*Id.*)

A person's CYP450 genes are designated as follows. Each gene's family name is denoted by an Arabic number (e.g., CYP2), the subfamily by a Roman uppercase letter (e.g., CYP2D), and the individual gene by another Arabic number following the letter indicating the subfamily (e.g., CYP2D6). (*Id.*) The two alleles of the gene the person possesses are indicated with an asterisk, and a number, separated by a forward slash (e.g., CYP2D6 *1/*3). (*Id.*) If someone inherited the same allele from both his father and his mother, this would be described as, for example, CYP2D6 *1/*1. (*Id.* at 6.) If someone has been given two different alleles from his parents, this would be

described as CYP2D6 *1/*3. (*Id.*) These designations are also used to refer to the enzymes produced by each gene. (*Id.*)

Seven CYP450 genes are responsible for producing the enzymes that metabolize most drugs. (*Id.* at 7.) These genes are designated as CYP1A2, CYP2B6, CYP2C8, CYP2C9, CYP2C19, CYP2D6, and CYP3A4. (*Id.*) Four of these genes produce the enzymes that metabolize Effexor: CYP2C9, CYP2C19, CYP2D6, and CYP3A4. (*Id.* at 8-9.) Two of these genes also metabolize desvenlafaxine, the substance Effexor is metabolized into: CYP2C19 and CYP3A4. (*Id.* at 16.)

b. A person with "variant" CYP450 gene alleles produces enzymes that cannot effectively metabolize drugs.

CYP450 genes can have a range of different alleles. Different CYP450 alleles produce CYP450 enzymes of varying compositions and effectiveness. (*Id.* at 6.) These variations in CYP450 enzymes may, in turn, "influence a patient's response to prescribed drugs, including antidepressants." (*Id.*) In short, the functioning of a person's CYP450 gene alleles determine how effectively that person will metabolize drugs such as anti-depressants.

There are two broad categories of CYP450 gene alleles. "Alleles are referred to as 'wild type' (which is considered normal) or [as] 'variant,' with [the] wild type occurring most commonly in the general population." (*Id.*) "Variant alleles usually encode [CY]P450 enzymes that have reduced or no activity." (*Id.*)

An individual's capacity to effectively metabolize drugs is dependent on whether the individual's CYP450 gene alleles are "wild" or "variant." An individual with two "wild type" CYP450 alleles is known as an "'extensive' (i.e. normal) metabolizer." (*Id.* at 7.) On the other hand, "[p]ersons with two copies of *variant* alleles with reduced metabolic activity are 'poor' metabolizers." (*Id.* (emphasis added).) Finally, "those with one wild type and one . . . variant allele will have reduced enzyme activity and are called 'intermediate metabolizers.'" (*Id.*)

2. DNA testing demonstrates that Ramos has one "variant" allele on three of the four CYP450 genes responsible for metabolizing Effexor and desvenlafaxine, rendering him an "intermediate metabolizer" of the drug.

Ramos was appointed counsel for the first time during his federal habeas proceedings in September 2017. *See Ramos v. Lizzaraga*, USDC Case No. 16-303, Dkt. No. 37. With the assistance of counsel and investigative resources, Ramos discovered the new scientific research described above. Based on this new research, Ramos's counsel retained Dr. Eikelenboom and IFS to obtain and test Ramos's DNA. On February 1, 2018, Dr. Eikelenboom and IFS received twenty-one swabs containing buccal cells from Ramos. (Ex. 19, Rpt. of Dr. Eikelenboom, at 4.) IFS sent one swab to OneOme, a pharmacogenomics testing company in Minneapolis, Minnesota. (*Id.*) IFS sent the remaining twenty swabs to IFS's forensics DNA laboratory in Hulshorst in the Netherlands. (*Id.*) Both OneOme's and IFS's laboratories analyzed Ramos's buccal cells and constructed a DNA profile of the four genes involved in metabolizing Effexor and desvenlafaxine. (*Id.* at 15.)

Testing by both laboratories established Ramos has one "variant" allele with respect to *three of the four* CYP450 genes responsible for metabolizing Effexor, and *both* of the two CYP450 genes responsible for metabolizing desvenlafaxine.[12] (*Id.*) Ramos's profile for the four genes reads as follows:

CYP2C9 *1/*1

CYP2C19 *1/*2

CYP2D6 *1/*6

CYP3A4 *1/*22

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[12] Dr. Eikelenboom's report reflects that Ramos also has a "variant" allele with respect to a fourth gene—his CYP2B6 gene. (Ex. 19, Rpt. of Dr. Eikelenboom, at 15.) However, this gene is "not involved in metabolizing Effexor." (*Id.* at 16.)

(*Id.*) In her report, Dr. Eikelenboom explains that the alleles designated as "*2," "*6," and "*22," in connection with CYP2C19, CYP2D6, and CYP3A4 respectively, are "variant" alleles. (*Id.*) These alleles "generate enzymes with a reduced rate of metabolism." (*Id.*) The alleles designated as "*1" on all four of the genes denote "an allele which produces an enzyme with a normal function." (*Id.*) Consequently, Ramos has one "variant" and one "wild" allele on CYP2C19, CYP2D6, and CYP3A4, and two "wild" alleles on CYP2C9. (*Id.*)

Based on these results, Dr. Eikelenboom concluded "Ramos is incapable of metabolizing and expelling Effexor from his body at the same rate as an average person with a CYP450 profile without" the "variant" alleles. (*Id.* at 16.) The "variant" allele on Ramos's CYP2D6 gene is especially detrimental to his ability to metabolize Effexor because the CYP2D6 gene produces the "most important" enzymes for metabolizing Effexor. (*Id.*)

Notably, because only one of Ramos's two alleles for CYP2C19, CYP2D6, and CYP3A4 are "variant," he is an "intermediate metabolizer" with respect to these genes, as opposed to a "poor metabolizer." (*Id.*; *see also id.* at 7.)

Ramos's genetic profile is exceedingly rare. Dr. Eikelenboom reports that "[t]he chances within a Caucasian population to have these specific variances on these CYP450 [genes] is *1 in about 37,000*." (*Id.* at 15.)

Based on Ramos's genetic profile, Dr. Eikelenboom concluded his capacity to metabolize Effexor and desvenlafaxine at the time of the offense would have been impaired. While the enzymes produced by Ramos's CYP2C9 genes would "work at full capacity," those produced by his CYP2C19, CYP2D6, and CYP3A4 genes would have a "reduced rate of metabolizing" Effexor because of Ramos's "variant" alleles as to these genes. (*Id.* at 16.) Put succinctly, Ramos would have been "incapable of metabolizing and expelling Effexor from his body at the same rate as an average person with a CYP450 profile without variances." (*Id.*)

Dr. Eikelenboom and Dr. Breggin also conclude Ramos's capacity to metabolize Effexor and desvenlafaxine may have been further impaired by other biological factors affecting Ramos at the time he took the drug in May and June of 2011. Both doctors reviewed Ramos's medical records from his brief May 2011 admission to the San Luis Obispo County Department of Behavioral Health Facility—the facility where Ramos was first prescribed Effexor. (*Id.* at 17; Ex. 18, Rpt. of Dr. Breggin, at 14-15; *see also* Ex. 11, SLO Hosp. Recs.) Both doctors observed that a blood sample drawn on May 6, 2011 showed Ramos's three parameters for liver function were out of the normal range: AST (aspartate aminotransferase) was 199 U/L (whereas a normal range would have been 0-38), ALT (alanine aminotransferase) was 110 U/L (whereas a normal range would have been 0-41), and TBIL (total bilirubin) was 1.10 mg/dl (whereas a normal range would have been 0.20 -1.00). (Ex. 19, Rpt. of Dr. Eikelenboom, at 17; Ex. 18, Rpt. of Dr. Breggin, at 14-15; *see also* Ex. 11, SLO Hosp. Recs., at 8.) Dr. Eikelenboom concludes (with Dr. Breggin's concurrence) that "[t]hese laboratory results indicate that Mr. Ramos's liver was not working properly" and that "[t]his w[ould] affect the function of the [CYP450 enzymes] involved, as most of them are located in the liver." (Ex. 19, Rpt. of Dr. Eikelenboom, at 17; *see also* Ex. 18, Rpt. of Dr. Breggin, at 14.)

3. High or fast-changing levels of Effexor and desvenlafaxine in the body can become toxic and produce dangerous side-effects inducing violent behavior, such as suicidal and homicidal ideation, akathisia, psychosis, and volitional impairment.

Ramos's inability to effectively metabolize Effexor and desvenlafaxine matters. Both drugs have been linked to reports of violent behavior, and side-effects such as suicidal ideation, akathisia, and psychosis. Dr. Eikelenboom notes that the "Full Prescribing Information" section found on Effexor's medication label states the

following symptoms have been reported in connection with the drug: "'anxiety, agitation, panic attacks, insomnia, irritability, hostility, aggressiveness, impulsivity, akathisia (psychomotor restlessness), hypomania, and mania.'"[13] (Ex. 19, Rpt. of Dr. Eikelenboom, at 3 (quoting Ex. 39, Effexor Full Prescribing Info., at 7).) The section goes on to warn that "'there is concern that such symptoms may represent precursors to emerging suicidality.'" (Ex. 19, Rpt. of Dr. Eikelenboom, at 4 (quoting Ex. 39, Effexor Full Prescribing Info., at 7).) Moreover, Dr. Eikelenboom and Dr. Breggin both cite an abundance of literature and new Federal Drug Administration data connecting Effexor and other anti-depressant medications to adverse symptoms, including suicidal ideation, inexplicable violent behavior, and psychosis. (Ex. 19, Rpt. of Dr. Eikelenboom, at 9-11, Ex. 18, Rpt. of Dr. Breggin, at 6-11.) In addition, a more recent study conducted in 2010 found that of 484 different drugs, 31 drugs, including Effexor and desvenlafaxine, accounted for 79% of all reported cases of violence. (Ex. 19, Rpt. of Dr. Eikelenboom, at 10-11; Ex. 18, Rpt. of Dr. Breggin, at 6-7.) Effexor ranked *fourth* among the 484 drugs in terms of total number of reports of violence, while desvenlafaxine ranked *fifth.* (Ex. 19, Rpt. of Dr. Eikelenboom, at 10-11, 22; Ex. 18, Rpt. of Dr. Breggin, at 6-7.) Put another way, the number of violence cases reported as side-effects of Effexor was *8.3 times greater* than for other drugs; the number of violence cases reported as side-effects of desvenlafaxine was *7.9 times greater* than for other drugs. (Ex. 19, Rpt. of Dr. Eikelenboom, at 11.)

Dr. Eikelenboom opines that such reports of violence can be considered "an expression of toxicity," that is, as signaling what can happen if a person ingests toxic levels of Effexor and desvenlafaxine. (*Id.* at 4.) Effexor (and similar SNRI medications) can become toxic and induce violent behavior because of how they affect

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[13] At trial, all of the testifying medical doctors acknowledged that Effexor can cause psychosis and homicidal ideation. (7 RT 1880-83, 1910 (Dr. Morgan); 7 RT 1982-84, 8 RT 2129, 13 RT 3763-64 (Dr. Fennell); 8 RT 2220, 8 RT 2218 (Dr. Osran); 13 RT 3667 (Dr. Walters)). No evidence was presented, however, as to why or how this might occur.

an individual's brain: by their very nature, they alter the balance of chemicals in the brain. (*Id.* at 11-13.) While the precise interactions between psychoactive substances and brain chemistry are unknown, *see id.* at 11, Effexor and SNRI medications as a general matter "increase[] the concentrations of the neurotransmitters serotonin and norepinephrine," and can lead to "overstimulation." (*Id.* at 20.) Desvenlafaxine—the substance Effexor is metabolized into—has "a comparable mechanism and effect on the brain." (*Id.* at 16.) The increase in neurotransmitters caused by the two drugs may cause a chemical imbalance, "leading to an interruption in the communication between the frontal lobes and the rest of the brain." (*Id.* at 13.) Because the frontal lobe "guide[s] the 'higher functions' of the brain," including "judgment and memory," impairment in its communications with the brain can result in "emotional blunting" and "impulses that any ordinary person is unlikely to be able to withstand." (*Id.*) These problems can then in turn manifest themselves in an individual's behavior as "akathisia," defined as "the subjective urge to move continuously." (*Id.* at 11 (internal citation and quotation marks omitted).) Individuals suffering from akathisia suffer from "unpleasant states of tension and agitation" and an inability to sit still that may "under particular circumstances find an explosive outlet." (*Id.* (internal citation and quotation marks omitted).) The individual may even "reach the level of medication-induced delirium or toxic psychosis." (*Id.*) "The impact of these emotions can be acts of violence." (*Id.* at 20.)

Because of their impact on neurotransmitters and the frontal lobe, "[h]igh or fast-changing levels" of Effexor and desvenlafaxine (and similar "brain chemistry-altering substances") "can lead to toxicity and violent behavior." (*Id.* at 13.) "[F]luctuations in blood levels of" Effexor and desvenlafaxine are particularly dangerous because "[t]he brain is not able to adapt quickly enough to the changes in the delicate equilibrium between the different neurotransmitters" affected by the drugs. (*Id.* at 16.) In fact, Dr. Eikelenboom notes, this is why Effexor, if stopped, should be "tapered off, as abrupt

discontinuation can cause a withdrawal syndrome." (*Id.*) Consequently, if an individual, such as Ramos, "has loss-of-function variances on certain CYP450[] [gene alleles], especially when this concerns several enzymes, and/or when several drugs are involved, this can lead to both a higher amount of the drug(s) in the bloodstream and greater fluctuations in the levels of the drugs, with a higher risk of toxicity and side effects." (*Id.* at 13.) Indeed, this is why "[a] CYP450 DNA profile of the genes involved in metabolizing the medications prescribed to Mr. Ramos w[ould] give an indication of whether toxicity is to be expected." (*Id.* at 15.)

4. Ramos's inability to metabolize Effexor and desvenlafaxine created a significant risk that toxic levels would build up in his blood near the time of the offense, and that he would suffer adverse side-effects of Effexor toxicity.

Dr. Eikelenboom concludes Ramos's inability to metabolize Effexor and desvenlafaxine would have significantly increased the risk that toxic levels of the drug would build up in his system and that he would suffer adverse side-effects as a result. (*Id.* at 16.) Because of Ramos's inability to metabolize Effexor and desvenlafaxine, he would have had higher levels of both drugs in his bloodstream and greater fluctuations of these levels. (*Id.* at 7, 16.) As stated previously, the "higher the blood levels [of a psychoactive drug such as Effexor], or the more fluctuations of these substances, the greater the chances of such [adverse] side-effects." (*Id.* at 13.) Consequently, Dr. Eikelenboom concludes **"it is highly likely that the combination of substances in the blood of Mr. Ramos and the reduced possibilities of his CYP450 enzyme system to expel them, would have led to toxicity and severe side effects."** (*Id.* at 22 (emphasis added).) As set forth previously, side-effects of toxicity would have included volitional impairment, homicidal ideation, akathisia, and psychosis. (*Id.* at 11-13.) These side-

effects, in turn, would have induced Ramos to engage in violent behavior and created aggressive impulses he would have been unable to control.[14] (*Id.*)

5. Ramos's genetic variances make it likely he committed the offense because of the side-effects of Effexor toxicity.

Based on Ramos's genetic variances, Dr. Eikelenboom concludes Ramos's behavior on the night of the offense was likely attributable to side-effects of Effexor toxicity, namely: "psychosis, akathisia, homicidal and suicidal ideation, frontal-lobe dysfunction resulting in an inability to modulate or regulate emotion and behavior, agitation, impaired judgment, an inability to reflect on his behavior and appreciate the nature and consequences of his actions." (Ex. 19, Rpt. of Dr. Eikelenboom, at 28.) As a result of these side-effects, Ramos likely suffered from "impulses that any ordinary person [would be] unlikely to be able to withstand," *id.* at 20 (internal citation and quotation marks omitted)), and the offense was an "explosive outlet" for such impulses. (*Id.*) In other words, "[t]his means that Mr. Ramos's behavior was not the result of a premediated or deliberate thought process, and he was, in actuality, acting as a result of the medication's toxicity." (*Id.* at 27.) According to Dr. Eikelenboom, "had Effexor not been prescribed, the behavior and violence exhibited by Mr. Ramos would most likely have not occurred." (*Id.* at 28.)

Dr. Breggin reaches similar conclusions. Dr. Breggin concludes Ramos likely acted "in a state of psychosis, marked by heightened impulsivity, executive functioning impairment (i.e. an inability to control or understand one's actions), and delusional thinking." (Ex. 18, Rpt. of Dr. Breggin, at 40.) Dr. Breggin opines that "[t]he cause of the psychosis stem[med] from [Ramos's] ingestion of Effexor." (*Id.*) As a result of the side-effects of Effexor toxicity, "Mr. Ramos's executive functioning—due to the

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[14] Dr. Eikelenboom and Dr. Breggin both note that the risk Ramos would suffer these side-effects would have been exacerbated by other factors, such as the fact that Ramos was under the age of 24 and the high dose of Effexor he was prescribed (150 mg). (Ex. 19, Rpt. of Dr. Eikelenboom, at 16-17; Ex. 18, Rpt. of Dr. Breggin, at 22 (describing 150 mg as a "large starting dose" of Effexor).)

impaired functioning of the serotonergic nerves in the brain—would be severely impaired, leading to his actions being impulsive and irrational." (*Id.* at 40-41.) Ramos's Effexor-induced psychosis "impair[ed] judgment, insight, and an appreciation of the gravity and nature of one's actions by similarly severing the ability of the brain's frontal lobe to control [his] actions." (*Id.* at 41.) In this state, Ramos was "devoid of conscious control over his behavior and instead driven by irrational unconscious processes chemically driven by Effexor." (*Id.*) "Although physically awake, he was unconscious in respect to his lack of control over his mind and behavior, very much like a person who is caught in a nightmare." (*Id.*) "He was acting within a waking nightmare over which he had little or no conscious, rational control." (*Id.*) Dr. Breggin therefore concludes Ramos's "venlafaxine-induced psychosis" was the "proximate cause of his actions" at the time of the offense. (*Id.*)

6. Ramos's behavior in the six weeks after he began taking Effexor reflect he was suffering side-effects of Effexor toxicity.

As set forth below, after reviewing the record, both Dr. Eikelenboom and Dr. Breggin note that the evidence of Ramos's behavior in May and June 2011 after he began taking Effexor corroborate their conclusion that he committed the offense because of adverse side-effects of Effexor toxicity brought on by his genetic variance.

a. Dr. Eikelenboom's Findings

Reviewing the record, Dr. Eikelenboom concludes Ramos's behavior from the time he was prescribed Effexor on May 6, 2011 to the morning of June 14 exhibits a number of well-documented side-effects of Effexor toxicity such as akathisia and psychosis, supporting the idea that he was in fact suffering from Effexor toxicity at the time of the offense. (Ex. 19, Rpt. of Dr. Eikelenboom, at 17-20.) In the course of her review, Dr. Eikelenboom relied, *inter alia*, on two documents authored by Ramos that report his behavior and sensations during this time period: (1) a timeline of his

symptoms between May 6 and June 13, 2011 (attached to this Petition as Exhibit 34); and (2) an "Akathisia Questionnaire" prepared by Dr. Eikelenboom and completed by Ramos (attached to this Petition as Exhibit 42).[15] (*Id.* at 18-19.) These reports are also corroborated by testimony and declarations by individuals who knew and interacted with Ramos during this time period. Hence, where relevant, Ramos includes citations to such testimony and declarations when referring to the Akathisia Questionnaire and timeline.

Dr. Eikelenboom notes that individuals with "medication-induced psychosis and characteristics of akathisia" have been known to exhibit the following symptoms: (1) "self-destructive and aggressive impulses, colored by paranoia and delusions, with an extremely bizarre content"; and (2) "disinhibition of behavior, causing compulsory drinking, smoking, gambling, sexual hunger, and psychotic behavior." (*Id.* at 20-21.) The side-effects of toxicity caused by psychotropic drugs are "a sliding scale: a continuum, with, on the one hand, vague complaints of restlessness, anxiety, nightmares and obsessive thoughts with overtones of death and dying, and at the other end a state of fully developed akathisia with extreme violence, murder, homicide and suicide." (*Id.* at 12.) "The impact of these emotions can be acts of violence." (*Id.* at 20.)

Dr. Eikelenboom opines that records of Ramos's visit with his primary care physician Dr. Talarico on May 16 contain the earliest indications that Ramos was suffering from Effexor toxicity. During the visit, Ramos reported not being able to breath or move—a side-effect of toxicity. (*Id.* at 18; *see also* Ex. 12 at 1.) In addition, as a result of the visit, Dr. Talarico reported Ramos was suffering from restless leg syndrome—"an indicator of a gradual onset of akathisia-related symptoms." (Ex. 19, Rpt. of Dr. Eikelenboom, at 18; *see also* Ex. 12 at 1.)

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[15] Ramos's citations to Exhibit 42 refer to Bates Numbers found at the bottom-center of each page of the exhibit.

Dr. Eikelenboom notes that in the following weeks, Ramos suddenly began engaging in uncharacteristic behaviors that displayed additional and less subtle signs of Effexor toxicity. Ramos's conduct reflected both "self-destructive and aggressive impulses" and a "disinhibition of behavior." (Ex. 19, Rpt. of Dr. Eikelenboom, at 20.) Ramos began experiencing "feelings of extreme restlessness, agitation, and confusion"—symptoms of akathisia. (*Id.* at 18.) In particular, he would experience a "restless leg-type syndrome increase in urgency of motion walking faster and at times aimlessly." (*Id.* (quoting Ex. 34 at 3).) He would have "'mood swings alternating between suicidal depression, euphoria and enthusiasm and severe irritability.'" (*Id.* (quoting Ex. 34 at 4); *see also* 8 RT 2195 (Laurel Ramos's trial testimony regarding mood swing); Ex. 22, J. Hix Decl., at ¶ 3 (noting Ramos's mood swings in spring 2011).) Ramos began smoking more and drinking more than he had previously, often to the point of blackout. (Ex. 19, Rpt. of Dr. Eikelenboom, at 18-19 (citing Ex. 34 and Ex. 42); *see also* 8 RT 2146-47 (Gabriela Collins's trial testimony regarding Ramos's chain smoking); 9 RT 2462-63, 2502 (Ramos's trial testimony regarding increased drinking and drug use); Ex. 22, J. Hix Decl., at ¶ 4 (noting Ramos "started drinking" after taking anti-depressant).) Ramos began "'flirting with acquaintances and strangers alike,'" and engaging in promiscuous sex. (Ex. 19, Rpt. of Dr. Eikelenboom, at 18 (quoting Ex. 34 at 3).) Ramos had a "'strong impulse to converse with friends and strangers.'" (*Id.* (quoting Ex. 34 at 3); *see also* 8 RT 2195 (Laurel Ramos's trial testimony regarding Ramos's "out of character" conversations with strangers); Ex. 22, J. Hix Decl., at ¶ 4 (noting Ramos started "hanging out with new friends" after taking anti-depressant).) Ramos engaged in impulsive and careless spending. (Ex. 19, Rpt. of Dr. Eikelenboom, at 18-19; *see also* 6 RT 1616-17 (Neal Breton's trial testimony noting Ramos's obsession with buying an expensive car); Ex. 25, N. Breton Decl., at ¶ 4 (noting Ramos would spend his pay checks buying rounds for strangers at bars); Ex. 22, J. Hix Decl., at ¶ 3 (noting Ramos's obsession with buying an expensive car).)

Ramos "ignored and avoided preexisting plans and engagements." (Ex. 19, Rpt. of Dr. Eikelenboom, at 19 (citing Ex. 42 at 624); *see also* 7 RT 1970 (fellow band member Franklin Hayes's trial testimony that Ramos uncharacteristically stopped attending scheduled band practices for one to two weeks and did not return calls or text messages).) For instance, he would often "'call[] in sick to work carelessly and without cause or warrant.'" (Ex. 19, Rpt. of Dr. Eikelenboom, at 18 (quoting Ex. 34 at 4); 7 RT 1956-57 (Apple Store employee Adam Berger's trial testimony that Ramos uncharacteristically took three consecutive days of sick leave in the weeks before the offense).) As the descriptions of Ramos's acquaintances make clear, Ramos had not previously engaged in such behavior.[16]

Dr. Eikelenboom concludes such out-of-character behavior in the weeks after taking Effexor and his commission of the offense six weeks later makes sense given Ramos's status as an "intermediate metabolizer" of Effexor. (Ex. 19, Rpt. of Dr. Eikelenboom, at 20.) As noted previously, a "poor metabolizer" of Effexor and desvenlafaxine would suffer extreme symptoms instantly upon taking the drug because toxic levels of the drug would quickly build up in the bloodstream. Because Ramos was an "intermediate metabolizer" and had a greater capacity to metabolize the drugs, the side-effects of Effexor toxicity "would not have been immediately apparent [at the time Ramos began taking Effexor] and would have 'crept' up over time." (*Id.*) In other words, Ramos's behavior in the weeks leading up to the offense is exactly what would be expected given his genetic variation: he displayed subtle signs of side-effects of Effexor toxicity and was not "overwhelmed" by these side-effects until six weeks after he first began taking Effexor. (*Id.*)

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[16] Current counsel attempted to contact other individuals who knew Ramos at the time of the offense, such as Franklin Hayes, Derek Schultz, and Joe Shannon. All of these individuals stated in interviews near the time of trial that after he began taking Effexor, Ramos started drinking and smoking more, had mood swings and was depressed, and behaved erratically. (*See* Ex. 35, Investigative Reports.) These individuals did not respond to informal requests to speak about the case. (Ex. 45, J. Trigilio Decl., at ¶ 4.) A subpoena may be necessary to procure their testimony.

Many of the impulses Ramos experienced also had the sort of "bizarre content" and "paranoia and delusions" associated with Effexor toxicity. (*Id.*) Ramos would experience "'visual hallucinations and distortions.'" (*Id.* at 18 (quoting Ex. 34 at 3).) He would see "objects changing colors in front of him." (*Id.* at 19 (citing Ex. 42 at 621).) He would have "thoughts that people were talking in code in order to deceive or mock him," "wanted to fight or harm him," and "were after him." (*Id.* (citing Ex. 42 at 625).) He would have "visions of an ocean of blood washing across a beach shore, visions of infernal fires raging in the city, in the streets and in houses, delusions of spiritual possession and supernatural communication." (*Id.* (citing Ex. 42 at 625).) In short, Ramos had "obsessive thoughts with overtones of death and dying" that have been documented in other cases of Effexor toxicity. (*Id.* at 12.)

Consistent with Effexor toxicity, Ramos also experienced both suicidal and homicidal ideation in the weeks before the offense. Ramos made statements indicating he wanted to kill himself. (*Id.* at 19 (citing Ex. 42 at 625); *see also* 5 RT 1350 (Neal Breton's trial testimony that in the days before the offense, Ramos told him he experienced suicidal ideation); Ex. 25, N. Breton Decl., at ¶ 6.) Ramos also experienced "visions of vicious fistfights with strangers, stabbing people, impulses to strangle people, and visions of throwing Molotov cocktails into the streets and various buildings." (Ex. 19, Rpt. of Dr. Eikelenboom, at 19 (citing Ex. 42 at 626).)

Ramos's state of mind and behaviors during the morning of the offense also show signs of Effexor toxicity. Displaying "self-destructive and aggressive impulses" and a "disinhibition of behavior," *id.* at 20, he: (1) "'became extremely agitated and destroyed [his] furniture with [his] pocket knife'"; (2) "'urinated in [his] laundry basket'"; and (3) began "'crying hysterically and felt like [he] was losing control.'" (*Id.* at 19-20 (quoting Ex. 42 at 626-27).) Exhibiting suicidal ideation, he "'became fixated on slitting [h]is wrists and bleeding out on the tracks of the local train station" and "began calling friends to say goodbye.'" (*Id.* at 19 (quoting Ex. 42 at 626-27).) He

"stormed out of [his] apartment to kill [himself] on the train station tracks," and had "'delusions that [he] needed to kill [himself] in the victim's house in order to fulfill the moon's prophecy of salvation.'" (*Id.* (quoting Ex. 42 at 627).) He experienced delusions with "bizarre content." (*Id.* at 20.) He had "'hallucinations of being possessed by a dark and evil spirit which seemed to enter and exit [his] body numerous times,'" and that "'the moon was telling [him] he would be saved.'" (*Id.* at 19 (quoting Ex. 42 at 627).) When he entered the victim's room and placed himself on top of her, he "'felt a spiritual sensation of [his] soul being pulled up to heaven and leaving [his] body'" and "'felt dissolved in these sensations.'" (*Id.* (quoting Ex. 42 at 627).) He felt a "'huge release of energy,'" and then felt himself "'being hit on the side of the head.'" (*Id.* (quoting Ex. 42 at 627).) He then ran to the French Hospital's Emergency Room. (*Id.*)

Reviewing all of these sensations and behaviors in their entirety, Dr. Eikelenboom concludes that "[f]rom the literature and my forensic practice, what Mr. Ramos described is completely consistent with medication-induced psychosis with characteristics of akathisia." (*Id.* at 20.) In particular, Dr. Eikelenboom finds it critical that Ramos's behavior leading up to and during the offense occurred so soon in time after he began taking Effexor, and that Ramos's behavior was by all accounts out of character. (*Id.* at 24; *see also* 5 RT 1260 (victim's testimony that Ramos's assault was completely out of character).) This supports the conclusion that Ramos's behavior was caused by side-effects of Effexor toxicity and would not have been expected absent his ingestion of Effexor.

Dr. Eikelenboom also notes Ramos's behavior during the offense is "similar to that of other patients who have been studied and found to have acted violently as a result of their ingestion of anti-depressants." (Ex. 19, Rpt. of Dr. Eikelenboom, at 21.) For instance, Ramos's behavior mirrors that of David Hawkins, a loving father and

husband who inexplicably strangled his wife of fifty years while taking the anti-depressant Zoloft in 2001. (*Id.* at 10.)

Ramos's behavior also bears shocking similarities to three other reported instances of anti-depressant-induced violence described in a 2016 article published in the Journal of Forensic and Legal Medicine (co-authored by Dr. Eikelenboom). The article describes incidents of violence by three individuals with CYP450 genetic variations comparable to Ramos's. (*See* Ex. 43.) The parallels between the three case studies and the instant offense are chilling. The first of these subjects ("Subject 1"), a thirty-nine year-old woman living in the United States, ambushed her ex-husband with a baseball bat and stabbed him many times. (*Id.* at 67.) She then attempted to commit suicide, but survived and was charged with murder. (*Id.*) Like Ramos, Subject 1 was prescribed and had been taking 150 mg of venlafaxine, felt "restless" while on the drug, and had no prior history of mental illness, suicidality, or violence. Moreover, like Ramos, she had genetic variances on CYP450 genes responsible for metabolizing venlafaxine, including CYP2C19, CYP2D6, and CYP3A4. (*Id.*)

The second subject described by the article ("Subject 2"), a thirty-three year-old woman living in Holland, suffocated and hanged her two-year-old son and drove a car containing her daughter into a canal. (*Id.* at 68.) Like Ramos and Subject 1, Subject 2 had been taking venlafaxine and was prescribed 150 mg of venlafaxine (although the dosage was later reduced to 75 mg). (*Id.*) Like Ramos, Subject 2 was charged with murder and attempted murder and had only a "patchy recall" of the events. (*Id.*) As with Ramos and Subject 1, Subject 2 had genetic variances on CYP450 genes responsible for metabolizing venlafaxine. (*Id.*) In fact, like Ramos, she was an "intermediate metabolizer" with respect to two of the four relevant genes. (*Id.*)

The third and last subject described by the article ("Subject 3"), a forty-two year-old man living in Holland, committed two acts of violence while taking the anti-depressant paroxetine. (*Id.* at 69.) One day, as he drove home, he saw the car of his

estranged wife in front of the house of her lover. (*Id.*) He called her on his cell phone, but she refused to talk to him. (*Id.*) Much like the "switch" reported by Peter Ljepava and Emily Medcalf during their phone conversations with Ramos just before the instant offense, Subject 3 later reported his "'lights went out'" after his phone conversation with his wife. (*Id.*) He went home, picked up a revolver and a hammer, returned and broke into the house of his wife's lover, and then shot both his wife and her lover. (*Id.*) Subject 3 reported that he "'felt nothing'" and was "'like a robot.'" (*Id.*) He then drove to the house of the lover's wife, forced entry into the house, and shot her. (*Id.*) He then "drove for some hours before turning himself in to the authorities." (*Id.*) Like Ramos, Subject 3 had no history of mental illness, suicidality, or violence, and was an "intermediate metabolizer" with respect to a number of CYP450 genes. (*Id.*)

In sum, each of the case studies described by the article resemble Ramos's offense, and suggest a connection between CYP450 genetic variances and anti-depressant-induced violence. Like Ramos, each of the three subject individuals had CYP450 variances rendering them unable to effectively metabolize anti-depressant medication. Like Ramos, none of the three subject individuals had a history of mental illness or aggression prior to taking anti-depressants. Moreover, like Ramos, the three subjects reported the following symptoms upon taking anti-depressants: "restlessness, akathisia, confusion, delirium, euphoria, extreme anxiety, obsessive preoccupation with aggression, and incomplete recall of events." (*Id.* at 70.) Like Ramos, each of the three subjects acted on "[w]eird impulses to kill . . . without warning." (*Id.*) And finally, like Ramos, "[o]n recovery, all recognized their actions to be out of character, and their beliefs and behaviours horrified them." (*Id.*) These case studies corroborate Dr.

Eikelenboom's conclusion that Ramos's violent behavior is attributable to side-effects of Effexor toxicity brought on by his CYP450 genetic variances.[17]

b. Dr. Breggin's Findings

Upon independently reviewing the record, Dr. Breggin concurs in Dr. Eikelenboom's findings, concluding Ramos's behavior leading up to the offense shows he "was suffering from drug-induced psychosis" attributable to Effexor, and that he was "in a psychotic state at the time he entered Jennifer's apartment and during the attack."[18] (Ex. 18, Rpt. of Dr. Breggin, at 28-29.) Dr. Breggin bases his opinion partly on Ramos's own account of his mental state and behavior leading up to the offense during an April 17, 2018 interview with Dr. Breggin. (*Id.* at 29-34.) The interview, Dr. Breggin opines, "confirms that he was in a drug-induced psychosis and/or manic psychosis at the time of the events he described." (*Id.* at 34.)

Dr. Breggin also finds the following eyewitness accounts of Ramos's behavior directly after the offense indicative of Effexor-induced psychosis (*see id.* at 36-37):

- Police reports reflect that Ramos ran from the victim's apartment to the French Hospital's Emergency Room with no shirt, even though he was uninjured and even though it would guarantee his arrest. (Ex. 4, Dickel Supp. Rep., at 2; Ex. 5, Riedel Supp. Rep., at 2.)
- According to Officer Riedel's report, Jennifer Nicholson, a nurse on duty at the French Hospital's Emergency Room stated Ramos rang the doorbell

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[17] These case studies are particularly important because neither of the two medical doctors who testified in Ramos's favor could identify on cross-examination case studies showing a causal connection between Effexor and incidents of violence and homicide. (12 RT 3367-68 (Dr. Osran); 13 RT 3630-31 (Dr. Walters).)

[18] As set forth in Claim Four, Dr. Breggin also concludes Ramos suffers from bipolar disorder and that Effexor's interaction with this condition may have contributed to his psychosis at the time of the offense. Dr. Breggin makes clear, however, that it is his opinion that "Effexor toxicity—on its own—most likely resulted in a drug-induced psychosis." (Ex. 18, Rpt. of Dr. Breggin, at 16.) In other words, "Mr. Ramos's bipolar disorder would have served to exacerbate the impact that Effexor [toxicity] [already] had on his mental condition, making those effects much more extreme." (*Id.*)

repeatedly and banged on the door frantically. (Ex. 5, Riedel Supp. Rep., at 2.) Nicholson's description of Ramos suggests he was confused: he was unable to say where the victim was or even provide Nicholson his name. (Ex. 5, Riedel Supp. Rep., at 2.)

- Officer Dickel reported Ramos seemed "happy" to see the police while at the French Hospital. (Ex. 4, Dickel Supp. Rep., at 2.)
- Ramos "display[ed] marked eagerness to tell people that he stabbed his girlfriend many times." (Ex. 18, Rpt. of Dr. Breggin, at 37; *see also* Ex. 4, Dickel Supp. Rep., at 2-3; Ex. 5, Riedel Supp. Rep., at 2.)
- Officer Dickel reported that when asked by police why he stabbed the victim, Ramos said, "'I needed a release of energy. I have all this rage that I needed to get out. She was keeping me in a box and I had to release it.'" (Ex. 4, Dickel Supp. Rep., at 3.) Ramos also stated he "fe[lt] good now that he released the rage." (*Id.*)
- Officer Dickel reported that after he placed Ramos under arrest in the French Hospital's Emergency Room, Ramos spontaneously stated "Have you ever killed a man? Placed a weapon in someone's body? It feels good." (*Id.*)
- Officer Dickel reported that after he placed Ramos under arrest in the French Hospital's Emergency Room, "RAMOS' attitude and mood would go up and down during the conversation": "he would be extremely cooperative and respectful and then suddenly rude." (*Id.*) When one of the nurses smiled at Ramos, Ramos laughed and stated, "I just killed my girlfriend and she's smiling at me." (*Id.*) Dr. Breggin opines that "the description confirms that [Ramos] is in a psychotic state, totally oblivious of the consequences of his actions and laughing that a girl is smiling at

him right after he thinks he has killed his girlfriend." (Ex. 18, Rpt. of Dr. Breggin, at 36.)

- Officer Dickel reported that upon transporting Ramos to the San Luis Obispo Police Station, "RAMOS asked me if the victim was ok? I replied that I did not know and he became upset and started crying for a few minutes. RAMOS remained calm and cooperative during the rest of our contact waiting for Detective Pfarr. RAMOS made several statements about killing himself and wanting to die. He asked me to kill him using my gun." (Ex. 4, Dickel Supp. Rep., at 3.) Dr. Breggin opines this description shows "it seems to be gradually dawning on [Ramos] that he has done something horrendous, [although] he is still out-of-touch with reality when he asks the police officer to shoot and kill him." (Ex. 18, Rpt. of Dr. Breggin, at 36.)

Dr. Breggin concludes these eyewitness accounts establish Ramos was in a state of psychosis. Dr. Breggin notes these eyewitness accounts show Ramos "put[] himself in the worst possible light, talking about being enraged at the victim, wanting to kill her, looking happy, boasting about the feeling of sticking a knife into her flesh." (*Id.* at 37.) These behaviors show Ramos was "wholly lacking in any sense of consequences for himself, the victim, their families, or friends." (*Id.*) Dr. Breggin therefore concludes these behaviors reflect a "continuous state of venlafaxine-induced psychosis." (*Id.* at 41.)

Dr. Breggin also notes Ramos's behavior in the days after the offense further corroborates Dr. Eikelenboom's conclusion that he suffered from Effexor toxicity. Dr. Breggin notes that records from San Luis Obispo County Jail reflect that Ramos "had an unusually strong reaction to withdrawing from Effexor after an exposure of only 6-7 weeks." (*Id.* at 13.) Dr. Breggin cites portions of the jail records dated June 22, 2011, showing Ramos began "'vomiting,'" was "'man down,'" suffered high blood pressure,

and was "'positive for weakness, restlessness, diaphoresis, tremors, [and] anxiety'" upon discontinuing Effexor.[19] (*Id.* at 13-14; *see also* Ex. 31 at 1.) Dr. Breggin opines "[t]he marked withdrawal reaction lasted for approximately one day and was stronger than would be expected from being on the medication for only 6 weeks (since May 2011)." (Ex. 18, Rpt. of Dr. Breggin, at 13-14.) Dr. Breggin concludes Ramos's "relatively strong withdrawal reaction is consistent with Dr. Eikelenboom's conclusion that he in effect had a constant overdose of the drug due to his genetic inability to robustly metabolize it." (*Id.* at 14.)

D. The new evidence more likely than not would have changed the outcome of Ramos's trial, warranting relief under California Penal Code § 1473(b)(3)(A).

1. The new scientific evidence establishes Ramos lacked the mental states required for the crimes, or was insane at the time of the offense.

Had the newly discovered scientific evidence contained in Dr. Eikelenboom's and Dr. Breggin's reports been presented at trial, it "would have led at least one juror to maintain a reasonable doubt of guilt." *Sagin*, 2019 WL 4126421, at *5; s*ee also* Cal. Penal Code § 1473(b)(3)(A). The reports establish that Ramos, because of the side-effects of Effexor toxicity brought on by his genetic mutation, lacked the mental states required for the crimes of conviction, or was insane at the time of the offense. Dr. Eikelenboom and Dr. Breggin opine on Ramos's mental state at the time of the offense as follows. The doctors opine Ramos likely experienced akathisia, psychosis, suicidal ideation, homicidal ideation, and impaired executive functioning and judgment. (Ex. 19, Rpt. of Dr. Eikelenboom, at 28; Ex. 18, Rpt. of Dr. Breggin, at 41.) In practical terms, Ramos would have experienced "unpleasant states of tension and agitation."

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[19] Ramos's use of Effexor was officially discontinued on June 23, 2011. (13 RT 3695; Ex. 31 at 10.) But Dr. Fennell testified Ramos had already stopped ingesting Effexor for two days before this date, (13 RT 3695.)

(Ex. 19, Rpt. of Dr. Eikelenboom, at 11 (internal citation and quotation marks omitted).) He would have experienced "self-destructive and aggressive impulses" that "any ordinary person [would be] unlikely to be able to withstand," *see* Ex. 19, Rpt. of Dr. Eikelenboom, at 20-21, 24, 27 (internal citation and quotation marks omitted), and would have acted because of "irrational unconscious processes chemically driven by Effexor." (Ex. 18, Rpt. of Dr. Breggin, at 41.) These impulses would have been "colored by paranoia and delusions," *see* Ex. 19, Rpt. of Dr. Eikelenboom, at 20, "obsessive thoughts with overtones of death and dying," *id.* at 12, and homicidal ideation. (*Id.* at 28.) As a result of these side-effects, Ramos at the time of the offense would have been unable to "reflect on his behavior and appreciate the nature and consequences of his actions." (*Id.*) While Ramos may have had "moments of clarity," *see* Ex. 18, Rpt. of Dr. Breggin, at 31 n.13, he would have been "unconscious in respect to his lack of control over his mind and behavior, very much like a person who is caught in a nightmare." (*Id.* at 41.) Hence, Dr. Eikelenboom opines that Ramos's assault on the victim "was not the result of a premediated or deliberate thought process," but rather "a result of the medication's toxicity." (Ex. 19, Rpt. of Dr. Eikelenboom, at 27.)

Ramos's own account of his mental state at the time of the offense is consistent with the doctors' conclusions. In his trial testimony, Ramos averred he had no memory of assaulting the victim and only remembered certain moments leading up to the offense. In particular, Ramos recalled having hallucinations and delusions just prior to the offense. Ramos testified that on the night of June 14, 2011, he was feeling suicidal. (9 RT 2442.) He called different friends to bid them goodbye. (9 RT 2442.) After talking with Emily Medcalf, he decided he was going to slit his wrists at a train station to—in his distorted mental state—symbolize that he wanted to make it to see her but could not do it. (9 RT 2444.) Ramos then described a bizarre scene where he saw the moon, which reassured him taking his life would be "the best thing to do," and then

saw a porch light that signified to him salvation and drew him to it, away from the train station. (9 RT 2445-46.) He remembered the moon reassuring him he would be saved from a dark spirit that was overwhelming him. (9 RT 2452.) He remembered the moon drawing him to the victim's apartment and telling him that he would have a "good death" if he killed himself there. (9 RT 2446.) He remembered entering Jennifer Doe's room from a hallway, but did not remember taking out his pocket knife. (9 RT 2446-47.) He remembered "being on top of her and telling her that [he] loved her." (9 RT 2447.) Ramos reported he then felt a "lurch" and "cold fire" running through his body as he was on top of the victim, as if he was melting. (9 RT 2447.) In the moment, he believed that his soul was leaving his body. (9 RT 2447.) He recalled seeing blood. (9 RT 2447.) Ramos said that he felt blows to his head and heard screaming, which prompted him to realize that the blood was Jennifer's; he felt an object in his hand; he dropped it, and ran to a hospital. (9 RT 2448.) Ramos averred he had no intention of harming anyone but himself in the victim's apartment. (9 RT 2453.)

Put simply, the doctors' opinions, together with Ramos's testimony, establish Ramos could not have had the mental state necessary to commit the crimes of conviction, on several legal grounds. First, given Dr. Eikelenboom and Dr. Breggin's description of Ramos's mental state at the time of the offense, Ramos could not have formed *either* the general or specific intents required for the crimes. The doctors' reports establish Ramos's actions were fueled by "irrational unconscious processes" and impulses, and "colored by paranoia and delusions." (Ex. 19, Rpt. of Dr. Eikelenboom, at 20-21, 24, 27; Ex. 18, Rpt. of Dr. Breggin, at 27, 41.) Ramos's own account of the offense itself reflects the influence of such impulses, irrational unconscious processes, and delusions on his actions. (*See* 9 RT 2442-48.) Given Ramos's mental state, Ramos could not have formed a general intent to perform any of his actions on the night of the offense, much less a specific intent to kill or commit a felony in the victim's residence (as required for attempted murder and first-degree

residential burglary, respectively). *See* Cal. Penal Code § 459 (defining burglary as requiring specific intent to commit a felony); *People v. Lee*, 31 Cal. 4th 613, 623 (2003) (holding attempted murder "requires the specific intent to kill and the commission of a direct but ineffectual act toward accomplishing the intended killing"). Nor could Ramos have premeditated and deliberated his actions, as the State alleged. *See People v. Pearson*, 56 Cal. 4th 393, 443 (2013) (holding an act is "'premeditated and deliberate if it occurred as the result of preexisting thought and reflection rather than unconsidered or rash impulse'") (quoting *People v. Stitely*, 35 Cal. 4th 514, 543 (2005)).

Second, the evidence shows Ramos was rendered legally unconscious by the side-effects of Effexor. As Dr. Breggin opines, Ramos at the time of the offense was in state of psychosis wherein he "was acting within a waking nightmare over which he had little or no conscious, rational control." (Ex. 18, Rpt. of Dr. Breggin, at 41.) Ramos's own account, with its references to the moon, dark spirits, and other delusions, is consistent with this conclusion. Given his mental state, Ramos acted in a state of legal unconsciousness during the offense. *See People v. James*, 238 Cal. App. 4th 794, 812-13 (2015), *as modified on denial of reh'g* (Aug. 12, 2015) (holding expert testimony that defendant suffered a drug-induced psychotic episode at the time of the offense could support unconsciousness defense); Cal. Penal Code § 26, subd. Four (exempting from criminal responsibility "[p]ersons who committed the act charged without being conscious thereof").

Finally, Ramos was rendered legally insane by the side-effects he suffered. A defendant can present evidence that "long-continued intoxication" caused a "mental disorder" giving rise to insanity, provided the insanity is "of a settled nature" that remains even after the intoxicant has "worn off." *People v. Kelly*, 10 Cal. 3d 565, 576-77 (1973). To amount to legal insanity, the mental disorder must have caused the defendant to become incapable of (1) knowing or understanding the nature and quality

of his actions, or (2) distinguishing right from wrong. *See People v. Lawley*, 27 Cal. 4th 102, 170 (2002). Dr. Eikelenboom and Dr. Breggin's reports establish these requirements. Both doctors opine Ramos's continued ingestion of Effexor in May and June 2011 placed him in a state of psychosis at the time of the offense, wherein he was unable to reflect on or understand his actions, much less distinguish between right and wrong. (Ex. 19, Rpt. of Dr. Eikelenboom, at 28; Ex. 18, Rpt. of Dr. Breggin, at 40.) Ramos's account of the offense supports this conclusion. Moreover, Dr. Eikelenboom opines that the side-effects Ramos suffered could have "linger[ed] on long after" he discontinued Effexor. (Ex. 19, Rpt. of Dr. Eikelenboom, at 23.) The reports therefore establish Ramos suffered from a settled mental disorder that rendered him legally insane at the time of the offense. *See Kelly*, 10 Cal. 3d at 577 (holding evidence of temporary psychosis during offense established insanity defense).

2. Had it been presented, the new scientific evidence would have vastly strengthened the defense's theory of the case at both phases of trial.

Had the jury had been presented with the new scientific evidence contained in Dr. Eikelenboom and Dr. Breggin's reports, it is likely "at least one juror" would have maintained a reasonable doubt as to Ramos's guilt. *See Sagin*, 2019 WL 4126421, at *5. First, the doctors' opinions would have been a critical asset to Ramos's defense in the guilt phase of his trial. As set forth previously, trial counsel failed to present any scientific evidence connecting Ramos's commission of the crime to the side-effects of Effexor. Moreover, trial counsel's defense was significantly weakened by Dr. Fennell's testimony that Effexor has a short half-life and that an individual is unlikely to suffer adverse side-effects of Effexor after six weeks of use—testimony the jury apparently found critical to its deliberations. (*See* 1 CT 235 (reflecting jury note requesting read-back of "[t]estimony from Dr. Fennell regarding half life of Effexor").)

Dr. Eikelenboom and Dr. Breggin's opinions would have remedied these problems in the defense case. As set forth previously, the opinions of Dr. Eikelenboom and Dr. Breggin would have given the jury an *objective biological basis* to conclude Ramos was in fact acting under the influence of adverse side-effects attributable to Effexor, and that he lacked the mental states required for the crimes under California law as a result. In addition, Dr. Eikelenboom could have specifically rebutted Dr. Fennell's claim that an individual would be unlikely to start suffering adverse side-effects of Effexor six weeks after starting it because of Effexor's short half-life and quick metabolization. Dr. Eikelenboom could have opined that Ramos's genetic variance necessarily slowed his metabolism of the drug and increased the risk that toxic levels of the drug would build up in his system. Dr. Eikelenboom could also have opined that, because Ramos is an "intermediate metabolizer" with respect to his genetic variances as opposed to a "poor metabolizer," the levels of Effexor in his system would have built up slowly. As a result, any side-effects resulting from Effexor toxicity "would not have been immediately apparent" and "would have 'crept' up [on him] over time." (Ex. 19, Rpt. of Dr. Eikelenboom, at 20.) Given the "intermediate" nature of Ramos's genetic variance, Dr. Eikelenboom could have opined that it is perfectly plausible for these side-effects to have taken six weeks to "creep up," "overwhelm[]" him, and induce him to commit the offense. (*Id.*)

Moreover, the idea that adverse side-effects of Effexor "crept up" on Ramos would have perfectly explained his behavior during this six-week period. Individuals who knew Ramos all uniformly agreed he began acting differently in the weeks after he began taking Effexor. Ramos's friend Peter Ljepava recalls noticing "a real shift in [Ramos's] personality" after Ramos started Effexor. (Ex. 23, P. Ljepava Decl., at ¶ 4; *see also* 8 RT 2145-47 (Ramos's cousin Gabriela Collin's testimony that Ramos seemed disconnected and "not himself" in late May 2011).) Ramos suddenly began alternating between periods of intense energy and depression. (*See* 8 RT 2192-93,

2195 (Laurel Ramos's trial testimony regarding mood swings); Ex. 22, J. Hix Decl., at ¶ 3 (describing periods of intense energy); Ex. 25, N. Breton Decl., at ¶ 4 (noting Ramos would "have up's and down's" and would often "look vacant, sluggish, and tired").) Ramos's friend Jennifer Hix reported seeing Ramos's high-energy episodes "two or three times over the course of one week." (Ex. 22, J. Hix Decl., at ¶ 3.) Hix, who had a brother with bipolar disorder, states Ramos's behavior reminded her of her brother's behavior during periods of mania. (*Id.*)

Ramos also began engaging in disinhibited and self-destructive behavior—symptoms of Effexor toxicity. (*See* Ex. 19, Rpt. of Dr. Eikelenboom, at 20.) He began smoking more and drinking more than he had previously, often to the point of blackout. (8 RT 2146-47 (Gabriela Collins's trial testimony regarding Ramos's chain smoking); 9 RT 2462-63, 2502 (Ramos's trial testimony regarding increased drinking and drug use); Ex. 22, J. Hix Decl., at ¶ 4 (noting increased drinking).) Ramos began to spend time with strangers. (8 RT 2195 (Laurel Ramos's trial testimony regarding Ramos's "out of character" conversations with strangers); Ex. 22, J. Hix Decl., at ¶ 4 (noting Ramos began interacting with new friends after taking Effexor); Ex. 25, N. Breton Decl., at ¶ 4 (noting Ramos would buy rounds for strangers at bars).) Ramos began spending impulsively and carelessly. (6 RT 1616-17 (Neal Breton's trial testimony noting Ramos's obsession with buying an expensive car); Ex. 25, N. Breton Decl., at ¶ 4 (noting Ramos would spend his pay checks buying rounds for strangers at bars); Ex. 22, J. Hix Decl., at ¶ 3 (noting Ramos's obsession with buying an expensive car).) Ramos stopped showing up for band practice and responding to phone calls and messages. (7 RT 1970 (fellow band member Franklin Hayes's trial testimony that Ramos uncharacteristically stopped attending scheduled band practices for one to two weeks and did not return calls or text messages).) Ramos began calling in sick for work for large periods of time. (7 RT 1956-57 (Apple Store employee Adam Berger's trial

testimony that Ramos uncharacteristically took three consecutive days of sick leave in the weeks before the offense).)

In short, Dr. Eikelenboom's conclusion that Ramos slowly and progressively suffered from side-effects of Effexor toxicity corresponds perfectly with eyewitness accounts of Ramos's behavior in May and June 2011. Had Dr. Eikelenboom's opinions been available and admitted at Ramos's trial, they would have explained Ramos's behavior and refuted Dr. Fennell's testimony that it was not possible for Ramos to have suffered adverse side-effects of Effexor six weeks after first taking the drug.

Given that Dr. Eikelenboom and Dr. Breggin's opinions would have rebutted Dr. Fennell's critical testimony, established Ramos acted under the influence of side-effects of Effexor, and established Ramos lacked the mental states required for the crimes, it is likely the evidence "would have led at least one juror to maintain a reasonable doubt of guilt." *Sagin*, 2019 WL 4126421, at *5. In fact, a sworn declaration from one of Ramos's jurors says as much. In the declaration, the juror avers "[i]f I had known, and heard from an expert witness, that Mr. Ramos had a unique characteristic like a DNA mutation that could have resulted in Effexor causing Mr. Ramos's actions the night of the attack, I would have determined that Mr. Ramos did not form the intent to commit the crimes." (Ex. 24, Juror J.T. Decl., at ¶ 6.) The juror also indicates he "may have even been able to persuade other jurors" who had doubts about whether the prosecution had proven Ramos acted with the requisite intent. (*Id.*)

Alternatively, at the very least, had it been presented with Dr. Eikelenboom and Dr. Breggin's opinions, the jury would have found Ramos did not attempt to murder Jennifer Doe with willfulness, premeditation, and deliberation, as the State alleged. This seems particularly likely because the jury, after deliberating for two days, was already at an impasse as to whether Ramos acted with premeditation and deliberation. Moreover, comments by one of the jurors later in the trial reveals how conflicted the jurors felt about the issue: the juror described that "after the deliberations when we

proceeded to try again, there was a lot of emotions going on" and "a lot of crying." (12 RT 3341.) Given that the case against Ramos was apparently already close, it is likely at least one juror would not have found Ramos acted with willfulness, premeditation, and deliberation if presented with the new scientific evidence contained in Dr. Eikelenboom and Dr. Breggin's reports. *See Sagin*, 2019 WL 4126421, at *5 (noting that "if the trial was close, the new evidence need not point so conclusively to innocence to tip the scales in favor of the petitioner" to warrant habeas relief under Penal Code section 1473(b)(3)(A)).

Accordingly, the newly discovered evidence warrants habeas relief: the evidence "is of such decisive force and value that it would have more likely than not changed the outcome at trial."[20] Cal. Penal Code § 1473(b)(3)(A).

E. The new evidence exposes as false critical expert testimony elicited by the prosecution during the guilt phase, warranting relief under California Penal Code § 1473(b)(1).

Even leaving aside whether the new scientific evidence would have changed the outcome of Ramos's trial, Ramos may also procure habeas relief in this Court because the new evidence shows as false "substantially material or probative" expert testimony presented at his trial. *See* Cal. Penal Code § 1473(b)(1) (holding habeas relief warranted where "[f]alse evidence that is substantially material of probative" was presented at trial). Specifically, the reports of Dr. Eikelenboom and Dr. Breggin establish that expert testimony by Dr. Fennell at Ramos's trial has "been undermined by later scientific research or technological advances." *Id.* § 1473(e)(1). On cross-

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[20] A state appellate court recently ordered further factual development when faced with the same scientific evidence Ramos has presented here. *See People v. Adamo*, No. 109964, 2019 WL 3330295, at *2 (N.Y. App. Div. July 25, 2019) (remanding for evidentiary hearing where defendant produced evidence showing "he has a genetic deficiency that negatively affects his ability to metabolize antidepressants and antipsychotic medications and that such metabolic deficiency has been scientifically linked to increased rates of drug-induced psychiatric symptoms, including 'increased states of psychosis, depression, agitation, violence and suicide'").

examination during the guilt phase, the State elicited testimony from Dr. Fennell that it would be unlikely for an individual, such as Ramos, to first suffer adverse side-effects of Effexor six weeks after starting the medication because it has "a relatively short half life" and "is metabolized quickly." (7 RT 2005-06.)

While brief, Dr. Fennell's remarks were certainly "substantially material or probative on the issue of guilt." *See* Cal. Penal Code § 1473(b)(1). Dr. Fennell's remark utterly devastated the defense's theory that Ramos had been suffering side-effects of Effexor at the time of the offense. Indeed, the jury's questions to the trial court during deliberations at the guilt phase make clear it considered Dr. Fennell's statement to be a critical piece of evidence. (1 CT 235 (reflecting jury note requesting read-back of "[t]estimony from Dr. Fennell regarding half life of Effexor").) Moreover, the prosecutor emphasized in his closing argument that Dr. Fennell's statement undermined the defense's theory that Ramos was acting under the influence of side-effects of Effexor at the time of the offense. (10 RT 2758.)

As set forth above in Section D.2, however, Dr. Eikelenboom's report indicates Dr. Fennell's testimony has been discredited by new scientific research regarding the relationship between a person's genes and his or her ability to metabolize anti-depressant medication. Cal. Penal Code § 1473(e)(1). Dr. Eikelenboom opines that the new scientific evidence of Ramos's rare genetic variances establishes he is an "intermediate metabolizer" of Effexor. As an "intermediate metabolizer," Ramos is unable to metabolize Effexor at the same rate as an ordinary person. As a result, Dr. Eikelenboom opines, levels of Effexor in his system likely built up slowly in the six-week period he was taking the drug in May and June 2011, eventually reached toxic levels, and caused adverse side-effects that induced him to commit the offense. (Ex. 19, Rpt. of Dr. Eikelenboom, at 20.) Given Ramos's genetic variance, Dr. Eikelenboom opines it is perfectly plausible for these side-effects to have taken six weeks to "creep up," "overwhelm[]" him, and induce him to commit the offense. (*Id.*)

Consequently, Dr. Eikelenboom's conclusions falsify Dr. Fennel's claim that Ramos could not have suffered side-effects of Effexor at the time of the offense: new "scientific research" and "technological advances" show Ramos could and likely did suffer side-effects of Effexor toxicity at the time of the offense. Cal. Penal Code § 1473(e)(1).

Given that the new evidence Ramos has adduced falsifies Dr. Fennell's trial testimony, Ramos is entitled to habeas relief under California Penal Code § 1473(b)(1).[21]

CLAIM TWO: RAMOS RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL THAT RESULTED IN HIS CONVICTION AND SENTENCE

Ramos's conviction and sentence were unlawfully and unconstitutionally imposed in violation of his rights to a trial by a fair and impartial jury, a reliable, fair, non-arbitrary, and non-capricious determination of guilt and penalty, the effective assistance of counsel, present a defense, confrontation and compulsory process, the privilege against self-incrimination, the enforcement of mandatory state laws, a trial free of materially false and misleading evidence, a fair trial, an impartial and disinterested tribunal, equal protection, due process of law and a fair and objective judicial determination pursuant to Penal Code section 190.4, subdivision (e) as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 1, 7, 9, 12, 13, 14, 15, 16, 17, 24, 27 and 28 of the California Constitution, customary international law, international human rights law and *jus cogens*, and state law because his trial counsel fell below professional

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[21] As set forth in greater detail in Claim Four below, Dr. Breggin's report also falsifies Dr. Fennell's opinion testimony in both the guilt and sanity phases of trial that Ramos does not suffer from bipolar disorder. (7 RT 1989, 1991; 10 RT 3704.) Dr. Breggin, after reviewing Ramos's psychiatric records from his incarceration at Mule Creek State Prison, concludes Ramos *does* in fact suffer from bipolar disorder and was susceptible to Effexor-induced mania. (Ex. 18, Rpt. of Dr. Breggin, at 17-19.) Dr. Breggin's report thus also falsifies Dr. Fennell's testimony that Ramos does not suffer from bipolar disorder and is an independent basis for relief under California Penal Code section 1473(b)(1).

norms by failing to present evidence relevant to the defense and to his suppression motion.

If Respondent disputes any of the facts alleged below, Ramos requests fact-development and an evidentiary hearing so that the factual disputes may be resolved.

A. Overview

The prosecution's theory at trial was that Ramos was a jealous ex-boyfriend filled with anger, and that he entered Jennifer Doe's apartment with an intention to kill. (9 RT 2560-63 (Prosecution's closing argument).) The prosecutor dismissed the defense theory that Ramos was impaired or suffering from a medication-induced mania as "preposterous." (10 RT 2756.) He noted the absence of any evidence that Ramos was manic. (10 RT 2763-64.) The prosecutor insisted Ramos—by asserting that his medication Effexor and pre-existing mental disorder caused him to be in a manic and psychotic state at the time of the attack—was simply deflecting blame on his medication or mental condition. (10 RT 2764.)

The prosecution's narrative was built on a house of cards that should have fallen at the time of trial and is entirely eviscerated with the new evidence presented in this petition. As explained in Claim One, newly discovered evidence of Ramos's DNA mutation proves that Ramos was, in fact, suffering from Effexor toxicity. But putting aside evidence that was not reasonably available at the time of trial, trial counsel performed deficiently by failing to present evidence that was available, and that would have also demonstrated that Ramos's mental condition at the time of the attack was, in fact, impaired such that he did not form the requisite intent to commit the charged offenses.

This is not a case where counsel made no effort to defend his client, or where counsel wholly abdicated his duty to present a defense. Ramos's lawyer, Fredrick Foss, clearly attempted to mount a defense. But as the sole attorney, Foss was admittedly under-resourced and in over his head with a case of this magnitude, which involved

complicated questions of mental health and pharmacology, in addition to pre-trial issues surrounding Ramos's interrogation. (*See* 2 CT 15 (New Trial Motion wherein Foss explains his lack of funds and resources).) Foss inherited a pre-trial investigation by Ramos's prior counsel, but he failed to present pertinent evidence and witnesses identified by the prior legal team. He argued at the guilt and sanity phases that Ramos had a mental condition that resulted in his lacking the requisite mental state due to the impact of his medication and pre-existing mental condition, but he failed to present the evidence necessary to support it. Foss attempted to argue that the anti-depressant drug Effexor, which Ramos was taking prior to the attack, triggered Ramos's actions, but he failed to present evidence linking Effexor's general dangers to what, in fact, happened to Ramos. And he moved to suppress Ramos's statements to police officers, but he failed to present at the suppression motion relevant evidence that would have permitted the trial court to grant the motion.

The result was the jury hearing a "hallow shell of the testimony necessary" for it to reach the correct decision: that Ramos, in fact, did not have the intent necessary to commit the charged offenses. *Collier v. Turpin*, 177 F.3d 1184, 1201-02 (11th Cir. 1999) (citing *Woodson v. North Carolina*, 428 U.S. 280, 303 (1976)).

As explained in Claim One, there is new scientific advancements and new evidence that Foss could not have *reasonably* presented. To the extent this Court determines that such evidence *was* reasonably available, Foss should be found ineffective for failing to present it because he there could be no strategic justification for failing to do so, given Foss's chosen defense. But even putting aside the newly-discovered evidence that Foss should be excused for not presenting, his failure to investigate and present evidence that was readily available fell below professional norms, despite his best intentions. Foss's inadequate performance undermines the jury's verdict that Ramos is guilty of attempted premeditated murder, and the jury's conclusion that Ramos was sane at the time of the offense.

B. Legal Standard for ineffective-assistance claims

An ineffective assistance of counsel claim has two components: that trial counsel's performance was deficient, and that the deficiency prejudiced the defense. *Porter v. McCollum*, 558 U.S. 30 (2009). "To establish deficiency, [Ramos] must demonstrate that counsel's representation 'fell below an objective standard of reasonableness.'" *Porter*, 130 S. Ct. at 38 (quoting *Strickland v. Washington*, 466 U.S. 668, 688 (1984)). To establish prejudice, Ramos "'must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" *Porter*, 130 S. Ct. at 38-39 (quoting *Strickland*, 466 U.S. at 694).

While the inquiry into ineffective assistance involves a presumption that counsel's conduct is within the "wide range of professionally competent assistance," *Strickland*, 466 U.S. at 690, that presumption does not excuse counsel's failure to investigate and prepare a defense. *Kimmelman v. Morrison*, 477 U.S. 365, 385 (1986). Any presumption that counsel reasonably exercised professional judgment is rebutted when, as in this case, the challenged acts and omissions were not informed tactical decisions, but resulted from a lack of diligence in preparation and investigation. T*urner v. Duncan*, 158 F.3d 449, 456 (9th Cir. 1998).

Trial counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. S*anders v. Ratelle*, 21 F.3d 1446, 1456 (9th Cir. 1994) ("counsel must, at a minimum, conduct a reasonable investigation enabling him to make informed decisions about how best to represent his client"). Similarly, trial counsel has a duty to consult with the client and investigate and present a reasonable defense. *Johnson v. Baldwin*, 114 F.3d 835 (9th Cir. 1997) (guilt phase relief for failure to investigate meritorious alibi defense and consult with the client); *Philips v. Woodford*, 267 F.3d 966 (9th Cir. 2001) (remanded

for evidentiary hearing on whether counsel was ineffective for failing to investigate alternative to patently meritless alibi defense); *Jennings v. Woodford*, 290 F.3d 1006 (9th Cir. 2002) (guilt-phase relief for failure to investigate petitioner's mental health and drug abuse).

A decision to abandon investigation into a particular defense is only reasonable if trial counsel has first investigated sufficiently to warrant a reasonable conclusion that further investigation is not warranted. *See, e.g., Stankewitz v. Woodford*, 365 F.3d 706, 722 (9th Cir. 2004). *See also Porter v. McCollum*, 558 U.S. 30, 39 (2009) (counsel's failure to "take the first step of interviewing witnesses or requesting records" "did not reflect reasonable professional judgment").

C. Trial counsel failed to present readily-available evidence consistent with the chosen defense.

Ramos has never denied that he entered Jennifer Doe's apartment and attacked her with his pocket knife. Instead, the central issue at trial was Ramos's mental state at the time he entered Jennifer's apartment and at the time of the attack. During pre-trial proceedings, Foss was explicit about his defense strategy, explaining that he will present a defense based on "involuntary intoxication and unconsciousness resulting from" his ingestion of Effexor. (4 RT 904.) But Foss failed to ultimately present evidence that would have supported this chosen defense.

1. Counsel's defense presentation was limited to generalized evidence and failed to make the showing he promised the jury.

Foss's defense strategy was to argue that Ramos was either legally unconscious during the attack or otherwise lacked the intent required to commit burglary and attempted, premediated, murder. During his opening argument, Foss told the jury that with Ramos acknowledging what he did, the jury's task "is to find out the reason why this happened." (Augmented RT 10.) He told the jury to expect two psychiatrists—Dr. Walters and Dr. Osran—to testify about "what is called a mixed state bipolar disorder"

and to explain that "mania is characterized by rapid thought, confusion, [and an] inability to concentrate. (*Id.* at 14-15.) The jury was told to expect to hear from "Dr. Walters and Dr. Osran" that Ramos was suffering from mania, and that Ramos's description of his actions are "a layperson's description of the mania that is produced by a bipolar person who is in a mixed state of bipolar depression." (*Id.* at 21.)

Moreover, Foss's defense was premised on proving that Effexor, which Ramos was regularly taking leading up to the attack, caused Ramos's mental-state to be impaired such that he could not form the requisite intent. Foss promised that "the doctors" would explain that Effexor causes adverse side effects such as psychosis, and that "this medication is particularly dangerous to individuals with bipolar disorder." (*Id.* at 22.) Foss concluded his opening remarks by explaining that Ramos, at the time of the attack, was "acting differently. He is going through mood swings. They observed the behaviors. You are going to hear the doctors explain the reason for that." (*Id.* at 24.)

But Foss failed to present the evidence he promised the jury. Dr. Walters did not testify at the guilt phase.[22] Foss presented no evidence that Ramos's description of events was consistent with Effexor's side effects or of psychosis. As the Court of Appeal noted in its opinion affirming Ramos's conviction, Foss "offered no evidence that [Ramos] was suffering from [Effexor's] effects when he committed the attack on Jennifer. He similarly failed to offer any evidence as to how his alleged intoxication affected his actual formation of the intents necessary to commit burglary and attempted premeditated murder." *See People v. Ramos*, No. 2D CRIM. B244670, 2014 WL

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[22] Walters ultimately testified at the sanity phase—after the jury had already convicted Ramos was first-degree burglary and attempted premeditated murder—that Ramos's attack at the hospital was the result of a hypomanic or manic episode. (13 RT 3608.)

4071039, at *6 (Cal. Ct. App. Aug. 19, 2014). This gaping hole in the defense presentation prevented the jury from rendering a verdict consistent with his defense.

Instead, Foss presented only "theoretical evidence that Effexor has side effects and that alcohol and other drugs can potentiate the medication." *See People v. Ramos*, No. 2D CRIM. B244670, 2014 WL 4071039, at *6 (Cal. Ct. App. Aug. 19, 2014). Three doctors—Dr. David Fennell, Dr. Ronald Morgan, and Dr. Hadley Osran—and one social worker—Jeannette Davis—testified for the defense. Morgan, Davis, and Fennell testified primarily about their interactions with Ramos in the weeks before and after the attack; they did not provide testimony about Ramos's actions on the day of the attack. (*See, Supra*, Sec. II.F.1.) Osran testified as to Ramos's general mental condition but he did not describe or corroborate Ramos's account of his mental state at the time of the offense. They offered only vague general descriptions of what Effexor toxicity *could* do to a hypothetical person—with no link or testimony demonstrating that the medication *in fact* impaired Ramos. (7 RT 1880-83, 1910 (Dr. Morgan); 7 RT 1982-84, 8 RT 2129, 13 RT 3763-64 (Dr. Fennell); 8 RT 2220, 8 RT 2218 (Dr. Osran)).

Foss put Ramos on the stand to testify about his behavior and mental state at the time of the attack. (9 RT 2441-48.) But none of what Ramos described was corroborated or explained by expert testimony. Missing from the defense presentation was critical expert testimony explaining that what Ramos described is precisely the type of symptomology that one would expect with Effexor-toxicity and a manic/psychotic episode, and that such an episode would render someone to act impulsively and without the ability to regulate or control their behavior.

In sum, Ramos's jury was deprived of the ability to accurately decide the ultimate question of whether Ramos, in fact, had the an intent to kill or premediated and deliberated. Such evidence was admissible and available, and had Ramos had minimally competent counsel, the jury would have heard it.

2. California law allowed counsel to present expert testimony describing a defendant's mental condition and how it affected him at the time of the offense.

California Penal Code section 28 prohibits evidence of a mental defect or disorder that negates the *capacity* to form any mental state, but allows such evidence on the issue of whether or not the defendant *actually* formed a required specific intent. (Cal. Pen. Code § 28.) An expert witness may not discuss "whether the defendant had or did not have the required mental states . . . for the crimes charged" and that question is reserved for the trier of fact. (Cal. Pen. Code § 29.) "Taken together, these sections 'do not preclude offering as a defense the absence of a mental state that is an element of a charged offense . . . [t]hey preclude only expert opinion that the element was not present.'" *People v. Herrera*, 247 Cal.App.4th 467, 476 (2016) (citing *People v. Coddington*, 23 Cal. 4th 529, 583 (2000)).

"Put differently, sections 28 and 29 *do not* prevent the defendant from presenting expert testimony about any psychiatric or psychological diagnosis or mental condition he may have, or how that diagnosis or condition affected him at the time of the offense, as long as the expert does not cross the line and state an opinion that the defendant did or did not have the intent[.]" *People v. Cortes*, 192 Cal.App.4th 873, 908 (2011) (emphasis added); *see also People v. Ochoa*, 19 Cal. 4th 353, 431 (1998) (By its terms, section 29 prohibits an expert witness from giving an opinion about the ultimate fact whether a defendant had the required mental state for conviction of a crime. It prohibits no more than that."); *People v. Halvorsen*, 42 Cal. 4th 379, 402 (2007) (expert testified that defendant suffered from bipolar disorder and was psychotic at the time of the offense).

Foss, thus, had "considerable latitude" to present expert testimony about "defendant's mental condition at the time of the offense" so long as those experts did not opine "on the defendant's capacity to have, or actually having, the intent required to

commit the charged crime." *Cortes*, 192 Cal.App. at 910. With Foss's defense strategy entirely focused on Ramos's mental state at the time of the offense, his failure to adduce this testimony from his expert witnesses—particularly when Ramos testified about his behavior and mental state—fell below professional norms and constitutes deficient performance.

3. The evidence counsel failed to elicit from his experts was admissible and necessary to describe the nature of Ramos's mental condition and how it affected him at the time of the offense.

Minimally competent counsel would have been aware that admissible expert testimony was available to explain Ramos's condition at the time of the offense. For example, Dr. Osran authored a report stating that "[a]t the time of the instant offense, [Ramos] was clearly suffering from symptoms of both mania and depression which was not only reported by the defendant but observed by many others." (Ex. 29, Osran Rep., at 2.) Osran went on to state in his report that at the time of the offense, "in addition to displaying psychiatric symptoms, his behavior was described as bizarre and possibly even psychotic." (*Id.* at 3.) Counsel failed, however, to elicit Osran's testimony on any of these points; instead, Osran merely provided the jury with generalized descriptions of mania untethered to Ramos's actual behavior or actions at the time of the offense. (*See* 8 RT 2218.)

Similarly, had counsel understood with a minimal degree of competency the relevant law about what he was permitted to present, he could have consulted with and presented testimony from a psychiatrist like Peter Breggin, M.D., who recently reviewed the trial testimony and materials available to counsel. A psychiatrist, like Breggin, could have testified to his "opinion that Johnathon Ramos was in a psychotic state at the time he entered Jennifer's apartment and during the attack." (Ex. 18, Rpt. of Dr. Breggin, at 29.) A psychiatrist could have also explained that psychosis "impairs

judgment, insight, and an appreciation of the gravity and nature of one's actions by similarly severing the ability of the brain's frontal lobe to control one's actions. The executive functioning of someone in this state is simply too impaired and absent to allow such a thought-process to occur." (*Id.* at 41.) The jury heard none of this.

Moreover, Foss failed to present testimony that Ramos's psychosis was linked to, and entirely consistent with, Effexor toxicity. For example, a psychiatrist could have explained to a jury that, whether or not Ramos had Bipolar Disorder or a previous mental illness, "[b]y itself, Effexor was capable of and probably caused or contributed to [Ramos's psychotic] state. (*Id.*) Effexor toxicity can manifest in psychosis and/or akathisia, which has symptoms including "aggressive impulses, colored by paranoia and delusions," disinhibition of behavior," and "psychotic behavior" stemming from the drug's "interference with the brain's neurotransmitters and frontal lobe." (Ex. 19, Rpt. of Dr. Eikelenboom, at 20-22.) This Effexor-induced psychosis caused Ramos to act impulsively: "Mr. Ramos's executive functioning—due to the impaired functioning of the serotonergic nerves in the brain—would be severely impaired, leading to his actions being impulsive and irrational." (Ex. 18, Rpt. of Dr. Breggin, at 40-41.)

This evidence—that Ramos's mental state resulted in his acting impulsively—was admissible for and critical to the jury's assessment of whether Ramos, in fact, harbored an intent to kill when he entered Jennifer Doe's apartment (burglary), a specific intent to kill (attempted murder), or acted with premeditation and deliberation (attempted-murder enhancement). *See Coddington*, 23 Cal. 4th at 582-83 (expert opinion admissible regarding whether a form of mental illness could lead to impulsive behavior). Yet, the jury was deprived of this evidence when deciding whether Ramos, in fact, premediated, deliberated, and formed an intent to kill.

4. Counsel acknowledged his ineffective assistance was not due to any tactical considerations.

Unfortunately, Foss is no longer alive to provide testimony about his decision-making and strategy. But given the evidence available to counsel and his chosen defense, there can be no reasonable strategy for failing to elicit the foregoing testimony from a qualified expert. Rather, it appears from the record that counsel either misunderstood California law regarding the admissibility of testimony on the subject, or simply forgot to recall an expert to corroborate Ramos's mental condition after Ramos testified. Indeed, the trial court noted the unusual defense presentation: "I always assumed the traditional way of doing this would be that Mr. Ramos would testify . . . and then people like Dr. Osran or Dr. Fennell . . . would come in and be corroborating his claims." (8 RT 2225.) But Counsel did no such thing; in fact, counsel offered *no* expert testimony describing Ramos's mental condition at the time of the offense. As well-intentioned as counsel may have been, his failure to present critical evidence demonstrating Ramos' mental condition at the time of the attack fell below professional norms.

Foss, in a motion for new trial, acknowledged his deficient performance in failing to present relevant evidence concerning Ramos's mental condition and Effexor toxicity, and he attributed it to his laboring under "very limited finances" rather than some tactical miscalculation. (2 CT 335-36.) He explained that evidence existed showing that Ramos's "behaviors markedly changed" while he was taking the medication as directed, "resulting in the inexplicable events of June 14, 2011." (2 CT 336.) But "due to counsel's ineffectiveness, the jury was not presented a clear picture of the facts leading up to this incident." (2 CT 336-37.) Accordingly, counsel's omissions cannot be explained as a strategic choice. *See Harrington v. Richter*, 562 U.S. 86 (2011) (Courts may not "indulge 'post hoc rationalization' for counsel's

decisionmaking that contradicts the available evidence of counsel's actions") (quoting *Wiggins v. Smith*, 539 U.S. 510, 526-27 (2003)).

D. Trial Counsel failed to present evidence that would have corroborated the defense theory that Ramos's mental condition resulted in him lacking the requisite intent at the time of the attack.

In addition to failing to provide expert testimony linking Effexor's general side effects with the indications of Ramos's behavior at the time of the attack, Foss also failed to present lay-witness and documentary evidence that would have supported the defense theory that Ramos's mental condition was materially impaired at the time of the offense. Foss failed to clarify and expand upon testimony from defense witnesses and failed to present evidence that corroborated those witnesses, including evidence that Ramos was suffering from mania and potential Effexor toxicity leading up to the attack.

1. Failure to accurately present Dr. Jeannette Davis's opinion and observations

Foss called Dr. Jeannette Davis, a social worker, to testify about her therapy sessions with Ramos in the weeks leading up to the attack. Her testimony, however, refuted the defense theory that Ramos suffered from bipolar disorder while bolstering the prosecution's theory that Ramos was merely angry and—at most—prone to depression. Specifically, Davis testified that she diagnosed Ramos with "major depression, severe, without psychotic ideation." (7 RT 1934-35.) She reported that his symptoms of anxiety and social isolation improved over the course of therapy. (7 RT 1938.) She testified that she did not think that Ramos has bipolar disorder. (7 RT 1944.) She also agreed, on cross-examination, that Ramos had feelings of anger and boredom. (7 RT 1945.) Foss failed to contextualize Davis's testimony and elicit from her the significant limitations of her opinions.

First, Davis's diagnosis of major depression was not intended by her to be a final diagnosis that ruled out other, more severe, psychiatric disorders. As she explains in a recent declaration, her diagnosis "was not intended by me to be a definitive diagnosis of who he is, but rather a working diagnosis that was based on my limited contact with Mr. Ramos." (Ex. 40, J. Davis Decl., at ¶ 3.) She instead believed when she was working with Ramos that he needed a "full psychiatric exam to determine whether the behaviors [she] observed and Mr. Ramos reported were symptoms of an underlying psychiatric condition for which [she] simply lacked information or expertise to diagnose." (*Id.*) In other words, her working diagnosis was a starting place—an "initial hypothesis"—"which could change over time depending on what information [she] was provided." (*Id.* at ¶ 4.)

Today, Davis explains that at trial, her "'working' diagnosis was taken out of context." (*Id.*) She "lacked substantial information to diagnosis Mr. Ramos with a disorder like Bipolar disorder, and [her] 'working' diagnosis was not intended by [her] to rule out bipolar or any other psychiatric disorder." (*Id.* at ¶ 5.) But, "the lawyers in the courtroom did not understand the limits of my license or scope of practice in my evaluation of Mr. Ramos." (*Id.*) Had Foss performed competently by adequately understanding Davis's expertise and identifying from her the limits of her testimony, her diagnosis of mere depression and exclusion of Bipolar disorder could have been placed in an accurate context that did not eviscerate the defense theory that was attempting to show the opposite.

Second, Foss failed to elicit from Davis that Ramos reported anger only in the visits after his prescription with Effexor. Davis's testimony was critical because she began having therapy sessions with Ramos both before and after he was prescribed Effexor, allowing her to observe any differences in his behavior. The prosecutor elicited from Davis that Ramos, generally, had feelings of anger. (7 RT 1945.) This supported the prosecution theory that Ramos's attack was motivated by anger that had

nothing to do with the medication he was prescribed. (10 RT 2764) (closing argument that Ramos's motivation was "the building of the anger. It is the building of the frustration, it is the building of I am a loser and I'm going to show her").

Davis, had Foss competently prepared and presented her testimony, could have supported the defense theory that it was Effexor that was causing Ramos's feelings of anger. She recalls being "questioned about Mr. Ramos's anger issue at the trial[,]" but that testimony was general and not specific to *when* she observed his anger. Ramos was prescribed Effexor on May 5, 2011, prior to his may visits with Davis. (Ex. 11, SLO Hosp. Recs.) Today she clarifies that she "did not observe Mr. Ramos to express anger during our sessions" and he only "reported anger issues in the May visits." (Ex. 40, J. Davis Decl., at ¶ 6.)[23] In other words, she did not observe Ramos to be angry or express feelings of anger until *after* he had been taking Effexor. Foss had access to Davis's notes that would have exposed the timing of her observations, but he failed to clarify this timing in front of the jury. This clarification would have supported the defense theory about the impact of Effexor of Ramos's mental condition and countered the prosecution's narrative that Ramos's anger stemmed from ordinary jealousy.

2. Failure to present evidence of Ramos's symptoms leading up to the attack

Foss also failed to present evidence that Ramos was suffering from manic symptoms and Effexor toxicity in the weeks leading up to the attack. For example, medical records of Dr. Talarico, the physician who prescribed Ramos a refill of Effexor, indicated that on May 16, 2011 (a month before the attack), Ramos reported difficulty breathing or moving. Ramos reported that "his body does not seem to work

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[23] Davis also "did not observe manifest symptoms of a personality disorder such as Borderline Personality Disorder" but rather Ramos "presented as someone who was trying to change his life and had come to see me for that purpose." (*Id.* at ¶ 7.) Foss failed to elicit her observation and opinion,

and he cannot breathe but his brain is fully awake and alert." (Ex. 12, Dr. Talarico Recs, at 1). "These are the first symptoms that could be considered side effects of [Effexor]" but Talarico failed to "question Mr. Ramos about how he was reacting to the Effexor and whether any adjustment in dose was needed." (Ex. 19, Rpt. of Dr. Eikelenboom, at 18-19.) Foss failed to present Dr. Talarico as a witness, or question any other expert witness about Talarico's notes.

Foss also failed to interview and present the testimony of Jennifer Hix, a friend of both Ramos and Jennifer Doe. Hix could have testified that in the Spring of 2011, which would have been after Ramos's hospital visit, Ramos "was all over the place, full of energy, wanting to start projects and do lots of things." Hix recognized this behavior as mania because her brother has bipolar disorder and she had seen her "brother in this manic phase and recognized the same behavior in John." (Ex. 22, J. Hix Dec.., at ¶ 3). An investigator working for Ramos's prior counsel had interviewed Hix (*see Id.* at ¶ 5), and Hix was even on the witness list prepared by Ramos's prior counsel, (Ex. 32, McGuire Witness List), but Foss inexplicably failed to follow-up and present her testimony. As a result, the prosecutor was permitted to argue that there was no evidence that Ramos was suffering from mania. (*See, e.g.,* 9 RT 2764.)

3. Failure to present evidence of Ramos's impaired mental state in the hours following the attack

Foss presented the testimony of Dr. David Fennell, a forensic psychiatrist who saw Ramos at the county jail. Fennell testified, *inter alia*, that he discontinued Ramos's Effexor prescription, and that he instead prescribed Ramos Lithium, a mood stabilizer that reportedly helped Ramos feel more stable. (7 RT 1981, 1984-85.) But Fennell also opined that Ramos does not have Bipolar disorder (7 RT 1987), that Fennell did not see "anything" indicating manic symptoms" while Ramos was taking Effexor (7 RT 1989), and that Ramos's 150mg dosage of Effexor was a moderate

dosage for someone like Ramos. (7 RT 2115, 2128.) The impression from Fennel's testimony is that Ramos was not suffering from a serious mental condition. Not so.

Foss also elicited testimony from Officer Jason Dickel describing Ramos's behavior at French Hospital immediately after the attack. Dickel testified that Ramos's mood fluctuated from cooperative to rude over and over; that Ramos mentioned wanting "to kill himself and [that] he wanted to die" and asked Dickel to "shoot him with [Dickel's] gun;" and that Ramos seemed "happy and excited" to see the police. (6 RT 1533-34.) Foss failed to present, however, any expert testimony explaining that the symptoms Ramos was reported to exhibit following the attack "demonstrates severe mania and psychosis." (Ex. 18, Rpt. of Dr. Breggin, at 38.) Indeed, a qualified psychiatrist, if asked, could have explained that Ramos's mental state upon arriving at French Hospital after the attack can be "labeled in the Diagnostic and Statistical Manual of Mental Disorders as 296.44, Bipolar I Disorder, Severe, Mixed, with Psychotic Features and probably with Rapid Cycling (between depression and mania)." (*Id.*)

Had Foss prepared a competent defense, he could have presented the testimony of a psychiatrist who could identify for the jury that Ramos had multiple symptoms indicating he was suffering from mania and psychosis, including:

> (1) He runs from his girlfriend's house with no shirt and, although uninjured, runs to an emergency room. He rings the bell and knocks on the door frantically.
>
> (2) Instead of trying to escape when he runs from the house, he goes to an ER, when he has no injuries to be treated, and guarantees his apprehension.
>
> (3) He seems "happy" to see the police.

> (4) He appears happy or lighthearted when he makes a joke about a woman smiling at him when he has just tried to kill his girlfriend. This manic episode is of psychotic proportions.
>
> (5) He displays marked eagerness to tell people that he stabbed his girlfriend many times.
>
> (6) He talks to a police officer about how good it feels to put a weapon into someone's flesh.
>
> (7) He initially says he does not know why he did it.
>
> (8) Then he elaborates bizarre delusion-like thoughts about being trapped by the victim, losing his energy, and getting it back by stabbing her. He is in the midst of a manic psychotic episode.
>
> (9) He is wholly lacking in any sense of consequences for himself, the victim, their families or friends. (The only close to normal seeming emotion is when he briefly cries after being told she is alive.)
>
> (10) He at times seems confused, for example, being unaware of where the victim was or even giving his name.
>
> (11) Overall, he puts himself in the worst possible light, talking about being enraged at the victim, wanting to kill her, looking happy, boasting about the feeling of sticking a knife into her flesh.

(*Id.* at 37.)

Absent expert testimony to explain and put into context Ramos's bizarre behavior at French Hospital, Fennel's testimony about Ramos's behavior at the jail and Ramos's statements to Dickel could have been interpreted as someone who was unremorseful but "happy" to have released the rage inside of them. (*See* 9 RT 2559)

(Prosecutor arguing intent by relying on Ramos's statement to Dickel that "I needed a release an [sic] energy. I have all this rage that I needed to get out.").

Moreover, counsel incompetently failed to admit into evidence a booking report that demonstrated that the arresting officer placed a mental-health hold on Ramos, meaning that someone is "suggesting to the jail staff that they should have the person evaluated by a mental health professional." (6 RT 1540-41; *see* Ex. 6, Booking Rept.) Foss attempted to question Officer Jason Dickel about the booking report, but the court sustained a hearsay objection because Dickel claimed that he did not personally complete the booking report. (6 RT 1537.) Dickel later claimed did not recall placing Ramos on a mental-health hold. (6 RT 1540.) Reasonably competent counsel would have presented the author of the report or the officer who, in fact, placed Ramos on the mental-health hold. The prosecutor, outside the presence of the jury, claimed that transporting officer Jake Koznek placed Ramos on the mental-health hold. (7 RT 1809.) But the prosecutor refused to stipulate to that fact and invited Foss to call Koznek as a witness if he wanted to introduce the report. (*Id.*) Foss failed to do so.[24]

4. Failure to explain to the jury that Detective Pfarr's transcript of Ramos's interrogation had a materially false statement and object to the prosecutor's use of that false statement during closing argument.

As explained more fully in Claim Four, the transcript of Ramos's interrogation prepared by Detective Pfarr, and shown to the jury, contained a material falsehood. According to Pfarr's transcript, Ramos tells Pfarr that "there's something wrong with her that's just not right and that something has to change." (Ex. 2, Trial Transcript 13A, at 13.) The prosecutor seized on this statement during his closing argument and

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[24] Current counsel was unable to speak with Officer Koznek or Dickel; the San Luis County City Attorney instructed counsel that a subpoena was required before the Officers would speak to Ramos's attorneys. (Ex. 45, J. Trigilio Decl., at ¶¶ 4-5.)

again during his rebuttal argument—arguing both times that Ramos's statement indicated his motivation to kill Jennifer Doe. (9 RT 2564; 10 RT 2765.)

Foss unreasonably failed to conduct a minimally competent comparison of Pfarr's transcript with the recording of the interrogation. Had he done so, he would have discovered that the video/audio recording of Detective Pfarr's interrogation of Ramos exposes that Ramos actually said, "There's something in the *universe* that's not right." (Ex. 3, DVD Recorded Interview, at 34:23-34:28.) This statement corroborates Ramos's testimony, wherein he explains that leading up to the attack he was having delusions about, among other things, the moon. (9 RT 2446; s*ee also* 5 RT 1310 (Ljepeva's testimony that Ramos was rambling about the "universe").

The prosecutor provided the transcript midway through trial, on August 31, 2012. (5 RT 1304.) Foss indicated that he would spend "the lunch hour" reviewing the transcript and the court invited counsel to identify any problems and "bring it to Mr. Devitt's or my attention." (*Id.*) But Foss did not ask for more time to examine any discrepancies between the transcript and tape, despite understanding that both would be shown to the jury. As a result of this deficient failure to investigate and uncover the false evidence in the transcript, Foss failed to question Pfarr or Ramos about material discrepancies, and he failed to object to the prosecutor's use of the false transcript to argue that Ramos had a motive to kill Jennifer Doe.

E. Trial Counsel failed present readily-available evidence that supported defense witness Emily Medcalf's credibility and exposed Detective Pfarr's testimony as false.

Emily Medcalf was a defense witness who testified about her prior relationship with Ramos and her communication with him minutes before he arrived at Jennifer Doe's apartment. Medcalf testified that Ramos was never violent or angry when she dated him in high school, and that the two remained friends even after she left to Seattle for college. (8 RT 2157-58.) Medcalf also testified that she spoke with Ramos the

night of the attack, and described Ramos as suicidal, crying "hysterically," and saying he wanted to end his life. (8 RT 2159.) She testified that Ramos was inconsolable for much of the time the two were talking, but that in their last conversation, Ramos sounded completely different: talking in a "sing-songy" voice, apparently not knowing who she was and asking her to confirm her address and identity, and sounding completely out of character. (8 RT 2164.) During their conversations that night, Ramos never indicated an intent to harm anyone but himself; it was Medcalf's concern for Ramos's *own* safety that prompted her to call the police. (8 RT 2165.)

The prosecution attempted to assail Medalf's credibility by characterizing her as a friend of Ramos and his family. The prosecutor, during cross-examination, attempted to show her bias by suggesting that she intentionally avoided speaking with the police. (8 RT 2168.) Medcalf testified that she received a call from Detective Pfarr and attempted, on multiple occasions, to return Pfarr's call but was unable to reach him. (8 RT 2171.) After her testimony, the prosecutor called Detective Pfarr to the stand as a rebuttal witness. He testified that he called Medcalf in the days following Ramos's arrest, but (1) never left a voice message or return phone number for Medcalf, (2) was unable to reach her when he called, and (3) has never received a voice message from Medcalf. (8 RT 2178-79.) The jury was left to resolve the credibility battle based on nothing more than their dueling testimony.

1. Counsel failed to present Medcalf's cell phone records that would have bolstered Medcalf's credibility while refuting Pfarr's testimony.

Reasonable counsel could have presented evidence—Medcalf's cell phone records—that would have demonstrably proven that Medcalf did, in fact, attempt to call Detective Pfarr on multiple occasions. Pfarr admitted that his number would have appears as blocked on Medcalf's cell phone, (8 RT 2251), and her phone records show

that a blocked number called her three days after the attack. (Ex. A to Ex. 20, E. Medcalf Decl., at 317.)

Medcalf's phone records demonstrate that she attempted to return Pfarr's calls by repeatedly calling the direct line to his office. Detective Pfarr's office phone number is publicly available and listed online. (Ex. 30, SLO Police Contact Website.) Medcalf's phone records confirm that she called the number identified on the police website as Pfarr's office at least four times: one call on September 15, 2011, two calls on September 16, 2011, and one call on September 19, 2011. (Ex. A to Ex. 20, Medcalf Phone Recs., at 439-40.) Accordingly, Medcalf's phone records confirm that she was *not* attempting to avoid the police, as the prosecution insisted. Moreover, since Pfarr's number appeared as "blocked" on her cell phone, the only way for her to have known to call Detective Pfarr's office is that he left her a message informing her he was the officer handling the case and leaving his office number. If he did so, his testimony that he never left her a message was false.

The records were available to counsel if he had thought to introduce them. Medcalf, in a recent declaration, explains that Foss never asked her for a copy of her phone records "at any point before or during trial. If he had, I would have provided them." (Ex. 20, E. Medcalf Decl., at ¶ 17.) Given the importance of Medcalf's testimony and the ease of which her records could have been made available, there can be no strategic justification for failing to present them.

2. Counsel failed to present an audio recording of Ramos's voice-messages on the night of the attack.

As described above, Medcalf testified that Ramos was suicidal and despondent when Ramos left her a voice message on her cell phone, and when the two talked leading up to the attack. (8 RT 2159.) During closing argument, the prosecutor argued that Medcalf's testimony was biased, that she was "lying," and suggests that her

account of Ramos's behavior was fabricated based on what she knew of the psychological reports provided to her by Ramos's mother. (10 RT 2759-60.)

Foss had available to him, however, an audio recording of the voice message that Ramos left for Medcalf, which would have corroborated her testimony and powerfully demonstrated to the jury the impaired nature of Ramos's mental condition. (Ex. 26, VM from Ramos to Medcalf.) Medcalf acknowledged on the record that she had made a recording of the voicemail. (8 RT 2159.) But Foss never attempted to play it for the jury. Had he, the jury would have heard Ramos crying and talking almost incoherently, telling Medcalf that he loves and misses her, and that he is going "to a different place" and that he "can't be here." (Ex. 26, VM from Ramos to Medcalf.)

Similarly, Foss could have presented to the jury Ramos's voicemail to Peter Ljepava, another friend that Ramos had called the night of the attack. Like the message to Medcalf, Ramos's message to Ljepava was nearly incoherent, but Ramos can be heard crying and saying "I love you" and he seems to say goodbye: "keep doing what you're doing, man, please take care of yourself." (Ex. 28, VM from Ramos to Ljepava.) The recordings of each voice message confirms the defense theory that Ramos was initially suicidal and despondent prior to having a psychotic break that resulted in his attacking Jennifer Doe. The voice messages also corroborate Medcalf's account of the Ramos's behavior, which the prosecutor attempted to cast as a lie born from bias.

3. The failure to corroborate Medcalf's testimony allowed the prosecutor argue that she was a liar and erroneously bolstered Detective Pfarr's credibility.

Foss's failure to corroborate Medcalf's testimony—either with her phone records of the recording of Ramos's voicemail—mattered. The trial court explained to the jury the relevance of the back-and-forth testimony about the phone calls, stating it "has only to do with the issue of bias; did she refuse to call the police department? Did they call

her? . . . You have to decide whether she got the phone calls and didn't call the police department. . . . Does the witness have a bias one way or the other?" (8 RT 2184.) Indeed, during closing argument, the prosecutor bluntly told the jury Medcalf "is lying. She is lying. It is okay. Happens, call it what it is." (10 RT 2760.) Absent corroborating evidence apparently credited Detective Pfarr over Medcalf, who admitted that she was a friend of Ramos and his family.

It was important to Ramos's case that the jury credit Medcalf's testimony. When asked if Ramos was ever violent, she responded emphatically: "Never. Never. Never. We never even fought. You know, not until the end of our relationship the disagreements that you have, but never an angry person, never violent person. None of the things I've been hearing the last year and a half." (8 RT 2157-58.) Medcalf also resisted the prosecution's attempt to portray Ramos as jealous, testifying that "it was more self-consciousness than jealousy" and that "everyone experiences jealousy." (8 RT 2167-68.) Finally, her testimony about her conversations with Ramos the night of the attack, if true, show that Ramos was irrational and suicidal the night of the attack—with a clear psychotic break during his last phone call with her. (*See also* Ex. 20, E. Medcalf Decl., at ¶ 12 ("His tone was completely different than it had been in our prior phone calls. Something had switched. He sounded . . . as if he had dissociated.") This testimony was critical to support the defense theory that Ramos suffered a psychotic break before entering Jennifer Doe's apartment after he despondently called Medcalf, and that he began acting out-of-character after taking Effexor.

Moreover, the issue of credibility between Medcalf and Detective Pfarr was a zero-sum battle: if Medcalf was telling the truth than Pfarr was a liar, but if Pfarr was telling the truth than Medcalf was a liar. Foss's failure to corroborate Medcalf's testimony with her phone records allowed not just Medcalf's credibility to be impugned but resulted in Detective Pfarr's credibility remaining improperly intact.

And Pfarr's credibility was critical on matters beyond whether Medcalf called him. For example, Pfarr's testimony was used by the prosecution to undermine portions of Peter Ljepava's testimony that supported the defense theory. Like Medcalf, Ljepava testified that Ramos called him immediately before Ramos arrived at Jennifer Doe's apartment on the night of the attack. Ljepava described three phone calls with Ramos that night. Ljepava testified that during the third call, Ramos sounded "completely like he switched from going from the — just depressed and like he was going to kill himself to just a completely different, completely different person." (5 RT 1308.) Ljepava, who had known Ramos for at least a couple of years, said that he "had never heard [Ramos] talk like that before. Very fast, very manic almost." (5 RT 1320.) This testimony bolstered the defense theory that Ramos switched to a psychotic/manic state prior to entering Jennifer Doe's apartment, as evidenced by the abrupt shift in behavior that both Medcalf and Ljepava describe.

Detective Pfarr testified immediately after Ljepava. Pfarr testified that Ljepava never mentioned Ramos having a "switch" or "change" in his voice during their phone calls. (5 RT 1337.) Pfarr denied that Ljepava ever told that Ramos sounded manic. (6 RT 1337.) Instead, according to Pfarr, Ljepava told him Ramos sounded angry, and said that Ramos was going to do something "that he was going to pay for a long time. And that she had better watch out." (5 RT 1337-38.) Ljepava did not testify that Ramos sounded angry, and he testified that he did not recall ever telling Pfarr that "she better watch out." (5 RT 1311.) Nor could he recall Ramos saying that "he was going to pay for it for a long time." (5 RT 1310.) Accordingly, Pfarr's credibility was important to determining what Ljepava, in fact, heard Ramos say. But Pfarr had no notes of his conversations with Ljepava. (5 RT 1340.) His practice is to destroy his notes. (7 RT 1825.) This left the jury with nothing but Pfarr's and Ljepeva's competing testimony, with Ljepava unable to flatly deny Pfarr's account. Had Foss presented Medcalf's phone records, demonstrating that Pfarr lied about his contact with

her, it is at least reasonably probable that they would have found him—and his testimony in other material aspects and about other witnesses—to be biased or incredible.

F. Trial counsel failed to locate, interview and present the testimony of Jennifer Nicholson, the witness who had the first contact with Ramos after the attack.

French Hospital emergency-room nurse Jennifer Nicholson was the first person to interact with Ramos after he attacked Jennifer Doe. But the jury never heard what she had to say. The reason: Foss failed to call her.

San Luis Obispo police Officer C. Riedel interviewed the nurse on the day of the attack. According to his report, she "heard the bell ringing from the main entrance to the door" and she let Ramos into the emergency room. (Ex. 5, Offcr Riedel Supp. Rept., at 2.) The nurse "told the suspect to take a seat in the examination room," and asked someone to call the police as "she tried to keep the suspect talking." (*Id.*) She told Officer Riedel that Ramos told her that he had stabbed his girlfriend, but that he did not know where she was located. Nor could Ramos even convey to the nurse his own name. (*Id.*)

Riedel mistakenly reported the nurse's name as "Jennifer Nicholas." (*Id.* at 1.) Her real name is Jennifer *Nicholson.* (Ex. 44, D. Crawford Decl., at ¶ 3.) But Riedel included her correct date of birth and the correct number to the French Hospital Emergency Room. (Ex. 5, Offcr Riedel Supp. Rept., at 1.) Moreover, the prosecutor provided counsel the last phone number that the prosecutor had used to contact the witness just days before, and he informed counsel where the witness lived. (7 RT 1811-12.) As the prosecutor reminded Foss at trial, Foss "has the subpoena power" to compel the nurse's appearance at trial. (7 RT 1811.) Foss, however, failed to call or locate the nurse, much less interview her.

Foss knew that Nicholson was an important witness. She was, according to Foss, placed on the prosecution's witness list, but ultimately not called by the prosecution. (7 RT 1810.) The prosecutor's decision not to call her would infer to a minimally competent defense lawyer that she was not helpful to the prosecution's case and potentially helpful to the defense. Foss acknowledged on the record that he does not "know what her observations of Mr. Ramos were," and that a relevant question is whether "she [is] capable of saying he looked like he was out of his mind or what her perception was[?]" (7 RT 1811.) Accordingly, Foss could not have had a strategic justification for failing to, at the very least, interview the nurse to see if she could offer information—such as evidenced that Ramos was in an impaired mental state minutes after the attack—that would be helpful to the defense.

Indeed, Foss unsuccessfully tried to elicit information about what the nurse may have observed through other witnesses. For example, during his cross-examination of Officer Jason Dickel, Foss asked whether Nicholson told Dickel "how it was that her attention was brought to Mr. Ramos?" (6 RT 1531.) The court sustained the prosecution's objection because it called for hearsay. Foss similarly asked Detective Pfarr whether he spoke with her, and whether he "ask[ed] her if Mr. Ramos appeared to be psychotic." (6 RT 1601.) Pfarr admitted to speaking with her, but denied asking her whether Ramos seemed psychotic and claimed that he did not make a report of the conversation. (6 RT 1601-02.) Accordingly, given his obvious understanding of her importance to his defense that Ramos was psychotic during the attack, Foss's failure to locate and speak with Nicholson fell below professional norms.

To the extent counsel's failure to locate Jennifer Nicholson is attributable to the state's failure to correctly identify her or make her available to the defense, the state is complicit in violating Ramos's constitutional right to prevent an effective defense. *Pennsylvania v. Ritchie*, 480 U.S. 39, 56 (1987); *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973) (The state may not prevent access to the most basic component of due

process: the right of access to witnesses with information relevant to the case and the right to present witnesses as part of a defense"); *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973); *Washington v. Texas*, 388 U.S. 14, 16 (1967) (A defendant's rights guaranteed by the Fifth, Six, and Fourteenth Amendments are violated when state action prevents the defense from talking with a witness or prevents the witness from testifying on the defendant's behalf); *Freeman v. Georgia*, 599 F.2d 65, 69 (1979) ("If the state deliberately conceals" a material witness, "due process has been violated and habeas must be granted if, in the context of the entire trial, the missing witness' testimony was such as might have created a reasonable doubt which would not otherwise have existed.") (citing *United States v. Agurs*, 427 U.S. 97, 112 n. 21 (1976)).

Foss's failure to locate and present Nicholson's testimony—individually and when assessed in light of the other instances of deficient performance—"undermines confidence" in the jury's verdict. *Strickland*, 466 U.S. at 695. As Officer Riedel's report indicates, Nicholson was literally the first person to interact with him after the attack. Ramos was unable to state even his own name when he first arrived at the emergency room. (Ex. 5, Offcr Riedel Supp. Rept., at 2.) It is at least reasonably likely that she could have testified that Ramos appeared psychotic or otherwise mentally impaired. Ramos's present counsel located and spoke with Nicholson in April of 2018 by using the date of birth indicated on Riedel's police report. (Ex. 44, D. Crawford Decl., at ¶ 3.) Nicholson claims, however, that she no longer recalls Ramos or the night of the attack. (*Id.* at ¶ 5.) She states, however, that she would have been willing to speak at the time of trial. (*Id.* at ¶ 10.) Ramos needs subpoena power to compel Nicholson's testimony under oath to determine if she, indeed, lacks recollection of Ramos; the inference that it is at least reasonably likely that she would have provided helpful testimony is shown, however, by the indications in Riedel's report that Ramos was impaired.

Moreover, as discussed below, Nicholson's testimony would have also been relevant to the issue of whether Ramos's statements at French Hospital were made during a custodial interrogation. Nicholson explained in her recent declaration that someone, like Ramos, who indicated they committed a crime would not be allowed to leave the emergency room once they entered, and that protocols existed to essentially lock-down the facility to ensure everyone's safety. (*Id.* at ¶¶ 6-9.) It is at least reasonably likely that her testimony about restrictions on Ramos's movements at the hospital would have resulted in the trial court suppressing Ramos's statements at the hospital because, at the time of his interrogation there, he was "deprived of his freedom of action in [a] significant way." *Miranda*, 384 U.S. at 444.

G. Trial counsel failed to present readily-available evidence at the suppression motion indicating that Ramos was in custody and that he lacked an ability to waive his rights.

Trial counsel moved to suppress Ramos's statements at French Hospital and at the police station on the basis that they were made during a custodial interrogation and without the requisite *Miranda* warnings. (*See* Claim Three.) Counsel relied, however, exclusively on the reports of the police officers, without presenting any evidence demonstrating that Ramos (1) was in custody at French Hospital and (2) was in an impaired mental state that deprived him of the ability to adequately understand and/or waive his rights. Had counsel presented a minimally competent presentation on these issues, the trial court would have been compelled to suppress Ramos's statements and it is at least reasonably probable that the jury would have reached a different outcome. The allegations and supporting evidence described in Claim Three, alleging a violation of Ramos's Fifth Amendment rights, is hereby incorporated by reference as if full set forth.

1. Counsel's *Miranda* motion was a hallow shell of what was available to show an unlawful custodial interrogation.

Ramos was interrogated twice: at the French Hospital Emergency Room, minutes after he had attacked his ex-girlfriend and ran to the hospital explaining what he had done, and then later at the San Luis Obispo police station. Ramos was advised of his constitutional rights only prior to his recorded statement at the police station, after which he invoked his right to a lawyer. The interrogating detective immediately informed him that he would be going to jail. During both interrogations, Ramos was impaired; still suffering from the Effexor-induced psychosis and mania that had resulted in his attacking Jennifer Doe.

Counsel properly moved to suppress the statements made during Ramos's custodial interrogations. (1 CT 143-148 (motion to suppress statements).) He knew the issues: his motion correctly argued that Ramos was "in custody" during his interrogation at the hospital, and that Ramos should never have been questioned by Detective Pfarr at the police station once he invoked his right to counsel. (*Id.*) But when the time came for the hearing on his suppression motion, counsel failed to present the readily-available evidence to support his arguments. Only the officers testified at the hearing. The trial court saw no pictures of the examination room where Ramos was interrogated. The court did not hear the hospital security protocols limiting Ramos's ability to leave. Nor did the court hear any evidence regarding Ramos's impaired mental state that prevented him from understanding, much less knowingly and intelligently waiving, his rights. In sum, the court heard a mere hallow shell of the totality of the circumstances relevant to its decision of whether to suppress Ramos's statements.

The trial court denied counsel's suppression motion on two bases. First, it found that Ramos was not in custody at French Hospital, and so *Miranda* warning were unnecessary. (1 RT 25-26.) Second, it found that Ramos, while having invoked

counsel after being read his rights, voluntarily reinitiated questioning, making his resulting recorded statement admissible. (1 RT 48-50; *see also* 5 RT 1400-05 (the trial court's denial of a renewed *Miranda* hearing brought after Pfarr's transcript of the police-station interrogation).) But for counsel's failure to investigate and present the trial court with the readily-available evidence showing Ramos's deprived freedom and the hospital and inability to waive his constitutional rights, there is at least a reasonable probability that the suppression hearing would have had a different outcome, which in turn, undermines confidence in the jury's verdict that was based largely on those statements.

2. Counsel failed to investigate and present readily-available evidence demonstrating that Ramos was in custody at the French Hospital Emergency Room.

As explained in Claim Three, and incorporated by reference herein, the circumstances of Ramos's interrogation at French Hospital demonstrate that he was in custody at that time. "Custody" is defined as when a suspect is "deprived of his freedom of action in any significant way." *Miranda*, 384 U.S. at 444. The test is "whether there was a formal arrest or restraint on freedom of movement of the degree associated with formal arrest." *California v. Beheler*, 463 U.S. 1121, 1125 (1983) (per curiam). While the trial court unreasonably concluded that Ramos was not in custody based on the record, counsel failed to provide the trial court with additional evidence that would have led a reasonable court to conclude that Ramos's freedom of movement was significantly deprived.

First, counsel failed interview and present the testimony of any hospital staff at French Hospital to explain the circumstances that Ramos (or any reasonable person in his position) faced when three uniformed officers entered the private evaluation room where Ramos was sitting. For example, had counsel conducted a minimally competent investigation into the circumstances of Ramos's interrogation at the hospital, he would

have discovered that the private area where Ramos was interrogated was locked and secured. (Ex. 21, B. Dyer Decl., at ¶ 4.) Staff, like witness Barbara Dyer who worked in the emergency room in 2011, could have testified that the area where Ramos was interrogated was closed off to the public and secured by door that could only be accessed by keypad. (*Id.*) Once inside, no reasonable person observing this security could feel free to go. Counsel could have presented emergency-room nurse Jennifer Nicholson, who could have explained that the hospital staff were trained to *prevent* a person like Ramos—who just admitted to committing a crime—from leaving before the police arrive. (Ex. 44, D. Crawford Decl., at ¶ 8.)

Second, counsel could have presented—or questioned interrogating Officer Dickel about—a booking report that lists Ramos's arrest time at 3:44 a.m. on June 14, 2011. (Ex. 6, Booking Rep.) According to Officer Dickel, he received a dispatch at 3:39 a.m. that night from the hospital. (1 RT 5.) He claims he arrived at the hospital in less than a minute. (*Id.*) Dickel's booking report indicates that Ramos is arrested four minutes later. In that four minutes, Dickel had to (1) walk into the emergency room from his car, (2) speak to a nurse about where Ramos was located and about what Ramos had told hospital staff, (3) walk to the locked section of the emergency room, (4) enter the private examination room where Ramos was seated, and (5) pat-down Ramos for weapons. (Ex. 4, Dickel Supp. Rep.) Assuming the booking report arrest time is accurate, Dickel must have arrested Ramos almost immediately after the pat-down, and before Ramos's interrogation in the room began. But counsel failed to present and argue that the arrest time was listed in such specific terms and so closely to Dickel's arrival at the hospital.

Even if the foregoing evidence, on its own, was not dispositive on the issue of custody, it would have provided context and additional weight to the circumstances already known by the trial court surrounding Ramos's hospital interrogation, including the fact that Ramos was placed in a private hospital room, surrounded by three

uniformed officers, one of whom was blocking the exit from the doorway, all after Ramos had just admitted to stabbing his ex-girlfriend. (*See* Claim Three, explaining the totality of circumstances demonstrating custody.)

3. Counsel failed to investigate and present *any* evidence demonstrating that Ramos's impaired mental state prevented him from knowingly, intelligently, or voluntarily waiving his rights.

Detective Chad Pfarr interrogated Ramos at the San Luis Obispo police station. Pfarr provided Ramos with most of the *Miranda* warnings, save the advisement that anything said by Ramos could be used against him. (1 RT 30-31.) Ramos, by shaking his head or uttering the word "yes," indicated to Pfarr that he understood his rights. (1 RT 32-33.) Despite what appeared to be an invocation of counsel by Ramos, the trial court ultimately admitted Ramos's statements to Pfarr by finding that Ramos understood his rights and voluntarily continued with the questioning. Counsel failed to present evidence that would have refuted this conclusion.

A valid waiver of *Miranda* rights must be voluntary, knowing, and intelligent. *United States v. Bautista–Avila*, 6 F.3d 1360, 1365 (9th Cir.1993). The prosecution must prove that "the defendant was aware of 'the nature of the right being abandoned and the consequences of the decision to abandon it.'" *United States v. Garibay*, 143 F.3d 534, 536 (9th Cir.1998) (quoting *Moran v. Burbine*, 475 U.S. 412, 421 (1986)). Whether a waiver is valid depends on the totality of the circumstances, including the background, experience, conduct, age, and language difficulties of the defendant. *Id.* As explained more fully in Claim Three, and incorporated herein by reference, Ramos's mental impairments at the time of his interrogation—as can be visibly evidenced in the interrogation video—prevented him from understanding his rights and the consequences of abandoning them.

Yet, during the suppression hearings and in argument, counsel presented *no* evidence of Ramos's mental impairments, and counsel failed to argue that Ramos was

incapable of competently understanding his rights when they were provided to him. The trial court held two hearings regarding Pfarr's interrogation—the second hearing was based on a new transcript that Detective Pfarr created of the interrogation, which had not yet been created at the time of the first suppression hearing. (5 RT 1392.) Foss presently only the testimony of Detective Pfarr at both hearings, and of Officer Jason Dickel during the first hearing.

The trial court, therefore, lacked any evidence concerning Ramos's impaired mental condition at the time of the interrogation. To the contrary, the court heard false testimony from Dickel, who denied recommending that Ramos be placed in a psychiatric cell and placing Ramos on a mental-health hold around the time Pfarr interrogated Ramos. (1 RT 19-20.) As explained in Claim Four, Dickel's testimony is shown to be false by a booking report, indicating that the arresting officer did place Ramos on a mental-health hold. (Ex. 6, SLO Booking Rpt.) During his guilt-phase testimony, Dickel admitted to being the arresting officer. (6 RT 1535.) Counsel's failure to properly introduce the booking report for the *Miranda* hearing prevented the trial court from considering Ramos's mental condition.

Similarly, minimally competent counsel could have presented expert testimony demonstrating that Ramos was still in a state of psychosis at the time of his interrogation. (*See supra*, at Sec. D.3.) A qualified expert could have explained to the trial court that the video recording of Ramos's interrogation shows "a man who is [in] 'cave-in,' confused an unable to make extremely important decisions." (Ex. 18, Rpt. of Dr. Breggin, at 42.) Rather, the police reports describing Ramos "suggest that at the time he was taken into custody, he continued to suffer from a mentally disabling psychosis that was lapsing into a disabling suicidal depression after the violent outburst." (Ex. 18, Rpt. of Dr. Breggin, at 42.) An individual in that condition "is incapable of making rational decisions" and "was not capable of understanding or making a sound judgment about waiving his *Miranda* rights." (*Id.*)

Foss's failure to present any evidence of, and argue that, Ramos's mental condition prevented him from validly understanding or waiving his rights cannot be excused as a reasonable tactical strategy. Indeed, Foss was on notice of Ramos's impairments as shown by the fact that his entire guilt-phase defense was premised on showing that Ramos's mental condition negated his intent to commit the charged offenses. Foss tried to discuss the booking report and its mention of a mental-health hold during the guilt-phase, but was unsuccessful because he failed to subpoena and present the testimony of the report's author. (6 RT 1537.) Foss simply failed—perhaps by oversight—to use the same mental-health evidence to show Ramos could not have validly waived his rights. *See Rompilla v. Beard*, 545 U.S. 345, 395-96 (2005) (counsel's omission not entitled to deference and fell below "constitutionally required standards" where it "was the result of inattention, not reasoned strategic judgment") (quoting *Wiggins*, 539 U.S. at 534 (2003); *Cornell v. Kirkpatrick*, 665 F.3d 369, 378 (2d Cir. 2011) (deficient performance found where counsel's omission "arose from oversight").

H. Addressing counsel's failures individually or cumulatively, there is a reasonable probability of a different outcome at both the guilt and sanity phases had counsel investigated and prepared a minimally competent defense.

To establish prejudice from counsel's deficient performance, Ramos "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. A reasonable probability is less than preponderance. *Kyles v. Whitley*, 514 U.S. 419, 434 (1995). *Strickland*'s prejudice test requires the Court to consider all of trial counsels' unprofessional errors against "the totality of the evidence" adduced at trial and in postconviction proceedings. 466 U.S. at 695; *Wiggins vs. Smith*, 539 U.S. 510, 536 (2003). Additionally, the prejudice resulting from individual instances of deficient

performance described in the sections above must be "considered collectively, not item-by-item." *Kyles*, 514 U.S. at 419; *see also Strickland*, 466 U.S. at 696 (holding that determinations of prejudice require a cumulative assessment of counsel's errors); *accord, Turner v. Duncan*, 158 F.3d 449, 457 (9th Cir. 1998).

Here, the jury had to decide whether Ramos, *inter alia*, had the mental-state to commit first-degree burglary (Cal. Pen. Code § 459) and attempted premediated murder (Cal. Pen. Code §§ 664/187), with an enhancement "that the attempted murder was willful, deliberate and premediated with the meaning of Penal Code sections 189 and 664(A)." (1 CT 21-22) (Information.) The burglary and attempt charges required proof that Ramos had a specific intent to commit a felony, *to wit*, kill Jennifer Doe. To show premeditation and deliberation, the prosecution had to prove that Ramos weighed his options and decided he wanted to kill Jennifer Doe. (9 RT 2564.) It is at least reasonably likely that, had counsel presented the readily-available evidence of Ramos's impairments, exposed Pfarr's false testimony, and competently presented evidence at Ramos's suppression hearing, the jury would not have concluded that Ramos harbored the requisite intent.

Most critically, as the appellate court noted when it affirmed judgment, Foss offered only "theoretical evidence that Effexor has side effects," but failed to present *any* evidence "that he was suffering from those effects when he committed the attack on Jennifer." *See People v. Ramos*, No. 2D CRIM. B244670, 2014 WL 4071039, at *6 (Cal. Ct. App. Aug. 19, 2014). This critical omission prevented the jury from concluding that Ramos was "legally unconscious" due to "involuntary intoxication due to an adverse reaction to medication." (1 CT 281 (jury instruction).) Indeed, as juror J.T. notes, the defense presented no evidence that "Effexor caused Mr. Ramos to suffer the types of side effects" that would have allowed the jury to conclude that Ramos lacked the requisite intent. (Ex. 24, Juror J.T. Decl., at ¶ 6.)

Moreover, Foss's failure to describe—through expert testimony—Ramos's mental condition at the time of the offense left the jury without "*any* evidence as to how his alleged intoxication [with Effexor] affected his actual formation of the intents necessary to commit burglary and attempted premediated murder." *See Ramos*, 2014 WL 4071039, at *6 (emphasis added). As a result, the prosecutor was able to repeatedly characterize Ramos's testimony as "self-serving," (9 RT 2560, 2573, 10 RT 2766). Had experts been presented to corroborate Ramos's testimony by explaining that his behavior and thoughts at the time of the attack were, in actuality, indicative of psychosis, the jury would have had the evidence it lacked regarding Ramos's mental state.

Exacerbating Foss's more fundamental omission of expert testimony about Ramos's condition was his failure to present evidence that corroborated the defense theory. For example, the prosecutor's argument that Ramos was not, in fact, suicidal, and that the defense testimony that Ramos wanted to kill himself was a "smoke screen," (9 RT 2560, 2568), could have been easily refuted by Foss. First, Foss could have played Ramos's voice messages at the time of the attack wherein Ramos indicates he wants to kill himself. (Exs. 26, 27.) Second, the prosecutor seized on Pfarr's testimony that Peter Ljepava told him that Ramos said "I'm going away for a long time" to show Ramos was not contemplating killing himself, (9 RT 2564); Ljepava denied recalling saying that to Pfarr. But if Foss exposed Pfarr's false testimony regarding his contact with Medcalf, (*see Supra* at Sec. E), it is at least reasonably likely Pfarr's credibility would be equally assailable regarding his account of his contact with Ljepeva.

Confidence in the jury's verdict is also undermined by Foss's failure to present evidence of Ramos's custody at French Hospital, and his failure to present and argue the import of Ramos's impaired mental condition during his interrogation by Detective Pfarr. As explained more fully in Claim Three, Ramos's statements to Dickel and Pfarr

were repeatedly exploited by the prosecutor as evidence of his intent and motive. (9 RT 2560, 2562.) Had the suppression motion been supported with reasonably-available evidence, and had Foss explained to the trial court Ramos's condition during his interrogation, the trial court would have properly kept Ramos's statements from the jury.

Foss's deficient performance at the pre-trial and guilt phases also impacted the sanity phase, where the jury was tasked with deciding whether Ramos understood the nature of his actions or whether what he was doing was morally wrong. (*See* Cal. Pen Code § 25.) The expert testimony Foss failed to elicit, along with the description of symptoms and evidence regarding the nature of Ramos's mental condition, demonstrate that at the time of the offense Ramos was unable to know or understand the nature and quality of his actions or that his actions were morally or legally wrong.

In sum, even with Foss's incomplete and deficient defense presentation, the jury struggled with the issue of intent. It asked repeated questions during deliberations about how to resolve the issue, and was almost deadlocked on whether Ramos acted with premeditation and deliberation. (1 CT 283; 11 RT 3006-07.) Had Foss presented the jury with an accurate portrayal of Ramos's mental condition at the time of the offense, and the readily-available evidence of Ramos's impairments and the defense-witness's credibility, it is at least reasonably likely that the jury would have sided with the defense that Ramos lacked the requisite intent to commit burglary or attempted premeditated murder, or—at the very least—would have found that it is more likely than not that Ramos was legally insane at the time of the offense.

CLAIM THREE: RAMOS'S FIFTH AMENDMENT RIGHTS WERE VIOLATED BY THE INTRODUCTION OF HIS CUSTODIAL STATEMENTS AT TRIAL.

Ramos's conviction and sentence were unlawfully and unconstitutionally imposed in violation of his rights to a trial by a fair and impartial jury, a reliable, fair,

non-arbitrary, and non-capricious determination of guilt and penalty, the effective assistance of counsel, present a defense, confrontation and compulsory process, the privilege against self-incrimination, the enforcement of mandatory state laws, a trial free of materially false and misleading evidence, a fair trial, an impartial and disinterested tribunal, equal protection, due process of law and a fair and objective judicial determination pursuant to Penal Code section 190.4, subdivision (e) as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 1, 7, 9, 12, 13, 14, 15, 16, 17, 24, 27 and 28 of the California Constitution, customary international law, international human rights law and *jus cogens*, and state law because the trial court failed to suppress his custodial statements.

If Respondent disputes any of the facts alleged below, Ramos requests fact-development and an evidentiary hearing so that the factual disputes may be resolved.

To the extent that trial counsel failed to investigate, prepare, and litigate the issues contained herein during trial proceedings, trial counsel rendered ineffective assistance.

To the extent Ramos was required by state procedures to, but did not, allege this claim in his direct appeal proceeding, Ramos's appellate counsel was inadequate and ineffective such that Ramos should not be subject to any procedural bar to having merits review of this claim.

A. Procedural and factual overview

Ramos provided multiple statements to the police at both French Hospital and at the San Luis Obispo police department. Ramos arrived at French Hospital immediately after he had attacked Jennifer Doe, and he immediately told the staff at the hospital what he had done. (Ex. 5, Offcr. Riedel Supp. Rept.) The police soon arrived, at which time they patted Ramos down to look for weapons and asked him to explain what he had just done. Ramos was not warned of his constitutional rights prior to this

interrogation. (1 RT 10-11.) The statements Ramos made during this interrogation were used extensively against him by the prosecution in its case-in-chief.

Following his interrogation at the hospital, Ramos was taken to the San Luis Obispo police department, where he was interrogated by Detective Chad Pfarr. Prior to the police-station interrogation, which was recorded on video and audio, Detective Pfarr advised Ramos of most of his *Miranda* warnings. Pfarr failed to advise Ramos that anything Ramos said could be used against him. (1 RT 30-31.) Soon after the advisement, Ramos invoked his right to counsel. (1 RT 34.) Two seconds later, Pfarr asked Ramos if he had any questions about what would happen next and told Ramos that he would be going to the county jail and booked. (*Id.*) Ramos then asked "what do you want to know," at which time the interrogation proceeded. (1 RT 35.) While a video exists of the interrogation, the audio recording purportedly malfunctioned rendering the audio "grossly over modulated" and difficult to detect what Ramos and Pfarr are saying. (Ex. 3, Ramos Int. Video; 1 RT 41-42.) Detective Pfarr eventually created a transcript of the interrogation based on his attempt to determine what each person said during the interrogation. (Ex. 1, Trial Exhibit 1A.)

The trial court denied the Ramos's motion to suppress these statements. It found that Ramos was not in custody at the hospital, relying on the fact that (1) the three officers present with Ramos in the hospital room had a "low-key" demeanor, (2) Ramos was detained for only five minutes, (3) the interrogation took place at a hospital where Ramos went voluntarily, and (4) guns were not drawn. (1 RT 25-26.) The trial court did not have before it the extra-record evidence presented in this petition. As explained further in Claim Two, counsel's failure to present the evidence relating to the issue of custody fell below professional norms and constitutes ineffective assistance of counsel.

The trial court also admitted Ramos's statements made to Detective Pfarr after Ramos's initial invocation of counsel by concluding that Ramos voluntarily reinitiated the interrogation with Pfarr. (1 RT 48-50; 5 RT 1403-05.) The trial court had no

evidence of Ramos's mental state at the time of that interrogation, and counsel did not argue that Ramos lacked the ability to knowingly or voluntarily waive his *Miranda* rights. Counsel's failure to present evidence of Ramos's mental condition and ability to understand or waive his rights also amounted to prejudicially deficient performance. (*See* Claim Two.)

B. The *Miranda* rule

The Fifth Amendment privilege against self-incrimination provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." In *Miranda v. Arizona* 384 U.S. 436, 457-58 (1966), the U.S. Supreme Court established a prophylactic procedural mechanism to safeguard a defendant's Fifth Amendment privilege against the inherently coercive effects of custodial interrogation. *Miranda* requires that before questioning a suspect in custody, law enforcement officials must inform the suspect that:

> He has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.

Id. at 444. If the suspect unambiguously requests counsel at any time before or during the interrogation, police must cease all interrogation until counsel is present or the suspect himself initiates further conversation. *Edwards v. Arizona*, 451 U.S. 477, 484-485 (1981).

"Any statements obtained during custodial interrogation conducted in violation of [*Miranda*'s] rules may not be admitted against the accused, at least during the State's case in chief." *Fare v. Michael C.*, 442 U.S. 707, 718 (1979). To introduce evidence of an incriminating statement made by a criminal defendant in its case-in-chief, the government must affirmatively prove a voluntary, knowing, intelligent waiver of the defendant's rights to silence and an attorney. *Miranda*, 384 U.S. at 475; *Colorado v.*

Connelly, 479 U.S. 157, 168 (1986) (proof of waiver must be by a preponderance of the evidence). These requirements apply only to statements or testimonial acts that are made in response to a "custodial interrogation." *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980).

C. Ramos's statements made at French Hospital should not have been admitted at trial because they were made subject to a custodial interrogation.

1. The circumstances surrounding Ramos's interrogation at French Hospital

At around 3:40 a.m. on June 14, 2011, Ramos began banging on the front door of the French Hospital Emergency Room, asking to be let inside. (Ex. 5, Offcr Riedel Supp. Rept., at 2.) As soon as he walked inside, Ramos confessed that he had stabbed his ex-girlfriend multiple times with a knife. (*Id.*) According to a police report of an interview with the on-duty nurse Jennifer Nicholson, she "told someone to call the police as she tried to keep the suspect talking." (*Id.*)[25]

Ramos was taken to a small evaluation room inside the French Hospital Emergency Room. (1 RT 5.) Barbara Deyer, an employee at French Hospital who routinely treated people in the emergency room in 2011, explains in a recent declaration that the evaluation room where Ramos was placed is one of two rooms "on the left of the emergency room treatment area." (Ex. 21, B. Dyer Decl., at ¶ 5.) Dyer explains that to enter the private evaluation room, a person in Ramos's position would have had to first be buzzed into the larger emergency room, which leads to a hallway accessible to the public. (*Id.* at ¶ 3.) A person in Ramos's position would have seen the keypad entry system as they walked into the evaluation room because they would be entering

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[25] In the police reports and at trial, nurse Jennifer Nicholson's name was misspelled as "Nicholas," preventing counsel from interviewing or identifying her. Current counsel was able to identify her by piecing together postconviction information concerning her whereabouts. (*See* Ex. 44, D. Crawford Decl., at ¶ 3.)

the room through a locked door inaccessible to the general public. (*Id.* at ¶ 4.) An authorized employee was able to unlock the door "only by inputting a code into a keypad located to the left of the door. The keypad is visible to anyone attempting to enter the door into the treatment area of the emergency room." (*Id.*)

Ramos's placement inside the evaluation room is consistent with French Hospital protocol for handling individuals who have admitted to committed a crime or may be a danger to himself or others. Nurse Jennifer Nicholson recently confirmed that the door leading to the evaluation room "is locked and a patient cannot get in or out without medical staff assistance." (Ex. 44, D. Crawford Decl., at ¶ 7.) A patient who may have committed a crime "is not allowed to leave or go anywhere. A special code is broadcast to let hospital staff working at that time know of the threat being experienced in the emergency room section of the hospital." (*Id.* at ¶ 8.)[26]

Inside the evaluation room, Ramos was placed on a bed. According to Officer Dickel, the dimensions of the room are approximately fifteen by thirty feet. (1 RT 15.) A photograph of the room, which accurately represents what it looked like at the time of Ramos's interrogation, is attached to Dyer's declaration. (Ex. 21, B. Dyer Decl., at ¶ 5.) Officer Dickel testified that he was dispatched to the evaluation room at 3:39 a.m. (1 RT 14.) Two other officers were in the room when he arrived. (*Id.*) Officer Dickel moved to the back of the room, Officer Riedel stood just outside the door, and Officer Gillham stood inside the room near Ramos's bed. (1 RT 15.)

Upon entering the evaluation room, Officer Dickel knew that Ramos had announced that he had stabbed his girlfriend, and he observed that Ramos "appeared to have dried blood on his hands." (Ex. 4, Dickel Supp. Rep. at 2.) Photographs taken about twenty minutes later shows the extent of blood seen on Ramos's hands. (Ex. 14,

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[26] Jennifer Nicholson refused to sign a declaration that includes the statements she provided to Investigator Crawford. (Ex. 44, D. Crawford Decl., at ¶ 5.) Accordingly, Ramos needs subpoena power in order to reasonably obtain her statements under oath.

Ramos Hospital Photos.) Ramos immediately told the three uniformed Officers that he had stabbed his girlfriend. (Ex. 4, Dickel Supp. Rep. at 1.) At that point, Dickel patted Ramos down Ramos to search for weapons; he found none. (*Id.*; 1 RT 9.) Dickel then began questioning Ramos.

During the interrogation, Ramos stated that he "stabbed my fucking girlfriend," and said that he did so because he had rage and needed a release of energy, and that "she" was keeping him in a box. (1 RT 10.) Ramos appeared "excited" and happy the police were there. (1 RT 11.) Officer Gillham asked Ramos if he was trying to kill his girlfriend, to which Ramos replied, "yea." (*Id.*) According to Dickel's report, Ramos said that he feels good now that he released the rage. (Ex. 4, Dickel Supp. Rep., at 3.) After Ramos made these statements, Officer Dickel placed Ramos under arrested and handcuffed him. (*Id.*) Dickel then took photographs of Ramos on the bed. (*See* Ex. 14, Ramos Hospital Photos.)

At no point prior to placing handcuffs on Ramos did Officer Dickel tell Ramos that he was free to leave. (1 RT 16.) No one at the hospital gave Ramos his *Miranda* warnings before or after he was placed in handcuffs. (1 RT 16-17.) Moreover, the trial court correctly determined that the questioning of Ramos at the hospital amounted to an interrogation. (1 RT 24.) Accordingly, if Ramos was in custody during the interrogation at the hospital, any statements made during that interrogation should not have been admitted at is trial. The totality of circumstances demonstrates that he was in custody.

2. Ramos's statements at French hospital should have been suppressed because they were made while he was in custody and without having received *Miranda* warnings.

At Ramos's trial the court determined that Ramos not in custody at French Hospital. (1 RT 25-26.) This determination was unreasonable in light of the evidence

presented to the court at the time of the hearing and in light of evidence that was not placed in the record at the time of the hearing.

The determination of whether a defendant is in custody is made by examining the objective circumstances of the interrogation. *Stansbury v. California*, 511 U.S. 318, 323 (1994). The United States Supreme Court has defined custody as when a suspect is "deprived of his freedom of action in any significant way." *Miranda*, 384 U.S. at 444. The test is "whether there was a formal arrest or restraint on freedom of movement of the degree associated with formal arrest." *California v. Beheler*, 463 U.S. 1121, 1125 (1983) (per curiam). A court must review the "totality of the circumstances" to determine whether they "add up to custody as defined in *Miranda*." *Thompson v. Keohane*, 516 U.S. 99, 113 (1995).

The custody determination is objective and not based on the subjective views of the officers or the individual being questioned. *United States v. Bassignani*, 575 F.3d 879, 884 (9th Cir. 2009). The subjective views of the police officer are relevant, however, if they are conveyed to the person being questioned. *Stansbury*, 511 U.S. at 325. Additionally, the officers' internal thoughts should be considered if "they would affect how a reasonable person in the position of the individual being questioned would gauge the breadth of his or her 'freedom of action.'" *Id.*, (citing *Berkemer v. McCarty*, 468 U.S. 420, 440 (1984).).

Factors that are relevant to custody determination may include "(1) the number of law enforcement personnel and whether they were armed; (2) whether the suspect was at any point restrained, either by physical force or by threats; (3) whether the suspect was isolated from others; and (4) whether the suspect was informed that he was free to leave or terminate the interview, and the context in which any such statements were made." *United States v. Craighead*, 539 F.3d 1073 (9th Cir. 2008) An overarching consideration is whether the location of the interrogation had become a "police-dominated environment." *Id.* at 1077; *see also United States v. Revels*, 510

F.3d 1269, 1275 (10th Cir. 2007) (concluding that the suspect's home had become a "police-dominated environment" because "the facts belie any conclusion that [the suspect's] home, on the morning of the questioning at issue, was the traditional comfortable environment that we normally would consider a neutral location for questioning.")

The totality of the circumstances inside the French Hospital Emergency Room evaluation room demonstrate that when the three uniformed officers entered the private room, it became a police-dominated atmosphere. Ramos's freedom was significantly restricted as he sat on the bed. He was surrounded by these three officers after having just confessed to a violent crime, in a confined private room that was inaccessible to the public, and while the officers stood between him and the door without telling him that he was free to leave. In short, no reasonable person in Ramos's position would believe that they could walk away from the police officers in that situation.

a. A reasonable person in Ramos's position knew that the police were aware that he just admitted stabbing his ex-girlfriend and could see the dried blood on his hands.

The existence of probable cause to justify an arrest is 'one factor to consider in determining someone's custodial status in the twilight zone between detention and custody[.]" *United States v. Butler*, 249 F.3d 1094, 1099 (9th Cir. 2001). For example, in *People v. Layton*, 29 Cal.App.3d 349, 354 (1972), a suspect was determined to be in custody during an emergency room interrogation where the interrogating officer "had reasonable cause to believe that the defendant" had violated a law. *See also State v. Thunder Hawk*, 322 N.W.2d 669, 672 (Neb. 1982) (finding custody in a hospital emergency room where "[a]t the time the incriminating statements were made, the investigation had reached the accusatory stage and had clearly focused on the defendant. The interrogation was aimed at soliciting incriminating statements from the defendant upon whom the investigation focused."); *State v. White*, 1986 WL 6048, *8

(Ohio Ct. App. 1986) (unreported) (finding custody during an emergency-room interrogation where the officer had an arrest warrant in his pocket and the suspect "had already become a focus of [ ] investigation").

Here, Ramos knew that everyone around him knew that he had committed a violent crime. He had alerted hospital staff upon his arrival at the emergency room that he had just stabbed his ex-girlfriend. (Ex. 5, Offcr Riedel Supp. Rept., at 2.) Then, when Officer Dickel walked into the private evaluation room where Ramos was seated, Ramos again informed Dickel that he had stabbed his ex-girlfriend. (1 RT 8.) Moreover, Ramos had visible blood on his hands and arms; thus, the police would reasonably know that Ramos's admission to stabbing his ex-girlfriend had an indicia of truth and was not the rambling of someone fabricating a story. (*See* Ex. 4, Dickel Supp. Rep. (noting that Ramos "appeared to have dried blood on his hands"); Ex. 14, Photographs of Ramos in the Emergency Room).) At that point, any reasonable person in Ramos's position would know that the interrogating officers understand that he committed a crime—he admitted as much.

Courts have found custody when a suspect was merely "confronted with evidence of guilt," *United States v. Hudgens*, 798 F.2d 1234, 1236 (9th Cir. 1986), but here, Ramos had an even more concrete basis to believe he was in custody—the entire interrogation was premised on his *admission* of guilt. Even without the other factors demonstrating his restricted freedom, no one in Ramos's position—having just *admitted* stabbing his ex-girlfriend—could reasonably believe that they were free to walk away. *See Roman v. State*, 476 So. 2d 1228, 1231-32 (Fla. 1985) ("Occasions would be rare when a suspect would confess to committing a [crime] and then be allowed to leave."); *Cushman v. State*, 228 So. 3d 607, 618-19 (Fla. Ct. App. 2017) (holding that an interrogation became custodial once the defendant admitted to sexual battery of a child); *State v. Pitts*, 936 So. 2d 1111, 1134 (Fla. Ct. App. 2006) ("A reasonable person understands that when a suspect confesses to committing a serious

criminal act, the police ordinarily will not permit the suspect to go free."); *Jackson v. State*, 528 S.E.2d 232, 234 (Ga. 2000) ("A reasonable person in Jackson's posi-tion, having just confessed to involvement in a crime in the presence of law enforcement officers would, from that time forward, perceive himself to be in custody, and expect that his future freedom of action would be significantly curtailed"); *Commonwealth v. Smith*, 686 N.E.2d 983, 987 (Mass. 1997) ("after the defend-ant told the police that he was there to confess to the murder of his girlfriend, given the information the police already had received about the murder, we conclude that if he had wanted to leave at that point, he would not have been free to do so."); *Dowthitt v. State*, 931 S.W.2d 244, 256 (Tex. Ct. Crim. App. 1996) ("we believe that 'custody' began after appellant admitted to his presence during the murders.").

The trial court failed to address how the critical fact that Ramos's interrogation occurred after he had already confessed to stabbing his ex-girlfriend affected his custodial status.

b. Ramos was placed in a small, private room that was cut off from the rest of the emergency room with no other medical personnel present.

In the *Miranda* decision, the Supreme Court was particularly concerned about interrogations by police "in a room in which [the suspect] was cut off from the outside world," because such incommunicado interrogations can result in self-incriminating statements without full warnings of constitutional rights. 384 U.S. at 444.

Here, Ramos was not interrogated in the public area of the emergency room. Nor was the interrogation conducted out in the open, with medical staff coming and going. Rather, the Officers interrogated Ramos in a small private room. (Ex. 14, Photograph of Examination Room.) No one could see or hear what Ramos was saying from outside the room and they were isolated from the public and emergency-room staff. Like the suspect in *State v. O'Loughlin*, where the court found a custodial interrogation inside a

hospital, "the questioning occurred in private in a non-public hospital examining room." 637 A.2d 553, 560 (NJ App. Div. 1994). This factor, too, was ignored by the trial court when it determined custody, resulting in an unreasonable determination of facts and unreasonable application of *Miranda*.

c. Three uniformed officers were present, with one standing by the door and the others standing between Ramos and the door.

A fundamental question in determining custody when a suspect is interrogated in a home or other location that is not normally associated with traditional police custody is whether it became a "police-dominated environment." *United States v. Craighead*, 539 F.3d at 1077; *see also United States v. Mittel–Carey*, 493 F.3d 36, 40 (1st Cir. 2007) (finding suspect was in custody although interrogated in his home because of the "level of physical control that the agents exercised over" the suspect); *Sprosty v. Buchler*, 79 F.3d 635, 641 (7th Cir.1996) ("More important than the familiarity of the surroundings where [the suspect] was being held is the degree to which the police dominated the scene."); *United States v. Griffin*, 922 F.2d 1343, 1354–55 (8th Cir. 1990) ("Questioning which occurs in the suspect's own home may provide a margin of comfort, but ... the setting of the interrogation is not so important to the inquiry as the question of police domination of that setting.").

The case *Shedrick v. State*, 271 A.2d 773 (Md. Ct. of App. 1970) is strikingly similar to the circumstances of Ramos's hospital interrogation. There, the court found a suspect in custody where he "made his statement in the presence of two detectives in a small separate room immediately adjacent to the emergency room." *Id.* at 775. Even more police-dominated than in *Shedrick*, here, a total of *three* officers were inside Ramos's interrogation room. Officer Dickel patted Ramos down and moved to the back of the room, Officer Riddell stood just outside the door of the room, effectively blocking Ramos's exit, and Officer Gillham stood near the bed. (1 RT 15.) All three

officers wore uniforms. (1 RT 7.) Their positions at various points inside the room made it entirely "police dominated," even if Ramos was not physically handcuffed or subdued until the end of the interrogation. *See Orozco v. Texas*, 394 U.S. 324, 325, 327 (1969) (finding custody where four officers entered the suspect's bedroom and acted as though he was "not free to leave," but did not actually handcuff or physically subdue the suspect).

d. The three uniformed officers did not tell Ramos he was free to leave and a reasonable person in Ramos's position would know that he was not free to do so.

Nor was Ramos ever informed—by anyone at the hospital or by the police—that he was free to leave the emergency room facility once he was placed in the private evaluation room. (1 RT 16); *compare United States v. Crawford,* 372 F.3d 1048, 1060 (9th Cir. 2004) (en banc) ("Perhaps most significant for resolving the question of custody, Defendant was expressly told that he was not under arrest . . . .") To the contrary, a reasonable person in Ramos's position would know that his freedom was restricted as soon as he entered the emergency room area, and then most certainly deprived when the three officers entered his private room.

Inside the emergency room hallway, Ramos would have seen a "visible" keypad that must be used to access the inside of the emergency room where the private evaluation room was located. (Ex. 21, B. Dyer Decl., at ¶ 4.) The emergency room staff at French Hospital was trained at that time to ensure that a person who has admitted to a crime is "not allowed to leave or go anywhere." (Ex. 44, D. Crawford Decl., at ¶ 8.) Indeed, Ramos was not treated like an ordinary emergency-room patient. It appears from Ramos's hospital records that he was neither treated nor seen by an attending physician. (Ex. 13, French Hosp. Recs.) Instead, he was simply placed in a private room, alone, while the police were called. Any reasonable person in Ramos's position, understanding that he was walking through a locked portion of the hospital,

and without receiving any normal medical care, would understand that he could not simply get up and walk out. And if that were not enough to convey custody, a reasonable person would certainly know his freedom was significantly constricted once the three officers arrived inside his private evaluation room, particularly, when they said nothing—such as telling him he's free to leave—to negate the inference that he was at that point restrained.

***

Taken together, the circumstances of Ramos's interrogation—where he inside a small, private evaluation room, isolated from the public and hospital staff, never told he could leave, surrounded by three uniformed officers, having just told the officers he stabbed his ex-girlfriend and having visible tried blood on his hands—demonstrate that Ramos reasonably understood that his freedom was significantly deprived. No reasonable person in those circumstances could believe that they could simply get up, decline further interaction with three officers after having told them he stabbed his ex-girlfriend, and walk away from such a police-dominated environment.

D. Ramos's statements made after he invoked his right to counsel at the San Luis Obispo police station should have been suppressed.

1. The circumstances surrounding Ramos's interrogation at the San Luis Obispo Police Department

Following his interrogation and arrest at the French Hospital, Ramos was taken to the San Luis Obispo Police Department. (Ex. 4, Dickel Supp. Rep., at 3.) At approximately 4:00 a.m., Detective Chad Pfarr arrived at the police station and was briefed on the circumstances of Ramos's arrest by Sergeant Gillham and Officer Schafer. (Ex. 33, Pfarr Supp. Rep., at 2; 1 RT 29, 38-39.) Pfarr decided to personally interrogate Ramos. (1 RT 29.)

Officer Dickel reported he maintained custody of Ramos at the police station before Ramos was "turned over" to Pfarr.[27] (Ex. 4, Dickel Supp. Rep., at 3); *see also* 6 RT 1541.) Dickel stated that while, "waiting for Detective Pfarr to arrive, R[amos] asked me if the victim was ok." (Ex. 4, Dickel Supp. Rep., at 3.) When Dickel "replied that [he] did not know," Ramos "became upset and started crying for a few minutes." (*Id.*) Ramos also "made several statements about killing himself and wanting to die" and "asked [Dickel] to kill him using [his] gun." (*Id.*)

At some point, Pfarr took Ramos to an interview room and interrogated him. (*See* Ex. 33 at 2; 1 RT 29; 6 RT 1551.) The interrogation was recorded by audio and video equipment in the room. (6 RT 1552-53; Ex. 33 at 2.) However, after the interrogation, it was discovered that the audio recording equipment had malfunctioned and was "grossly over modulated," making it different to understand.[28] (1 RT 41-42; 6 RT 1553; Ex. 33 at 2.)

The transcript of the interrogation, Pfarr's police report, and Pfarr's testimony at the suppression hearing all establish the following facts. Pfarr began the interrogation by advising Ramos of most of his *Miranda* warnings. (Ex. 1, Trial Ex. 1A, at 1-2; 1 RT 30-32; Ex. 33, Phfarr Rep., at 2.) Notably, however, Pfarr failed to advise Ramos that anything he said could be used against him. (Ex. 1, Trial Ex. 1A, at 1-2; 1 RT 30-32.)

Pfarr then asked about Ramos's name, place of employment, birth date, address, and cell and home phone numbers. (Ex. 1, Trial Ex. 1A, at 2-3; 1 RT 32-33.) As Pfarr began asking Ramos about the victim, the following exchange occurred:

Q. AND, WHERE DOES SHE LIVE?

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[27] Pfarr made no mention of Dickel's custody of Ramos in his own police report and testimony: Pfarr claimed he retrieved Ramos from a holding cell and brought him to an interview room. (*See* Ex. 33 at 2; 1 RT 29; 6 RT 1551.)

[28] A full transcript of the interview was submitted to the trial court as part of trial counsel's renewed motion to suppress Ramos's statements to Pfarr during the interrogation. (5 RT 1392; 1 CT 212 (reflecting admission of interrogation transcript; *see also* Ex. 1, Trial Ex. 1A.)

A . UH, I, UM, [INAUDIBLE] ATTORNEY. I DON'T KNOW. UH, SHE WAS - - SHE - - SHE WAS ON, WHAT'S THE STREET, IT'S, UH, THE ESTABLISHMENT. WHERE? 'CAUSE IT'S DOWN THIS -

Q. JOHN ARE YOU SAYING YOU WANT AN ATTORNEY?

A. YES.

Q. OKAY. SO YOU DON'T WANT ME ASKING YOU QUESTIONS?

A. PROBABLY.

Q. DO YOU HAVE ANY QUESTIONS ABOUT WHAT'S GONNA HAPPEN NOW?

A. YES. WHAT'S GONNA HAPPEN NOW [LAUGHS].

Q. WELL, [INAUDIBLE ...] WERE GOING TO GO OUT TO JAIL.

A. I DIDN'T - - I FORGOT TO TELL YOU [INAUDIBLE]. I INAUDIBLE] YOU KNOW. I, I WANNA BE COOPERATIVE. I MEAN [INAUDIBLE] IS - - IT IS SOMETHING THAT - WHAT DO YOU NEED TO KNOW?

Q. HUH?

A. WHAT DO YOU NEED TO KNOW?

Q. WELL, DO YOU WANT TO TELL ME?

A. I DO.
Q. YOU WANT TO TALK?

A. I DO.

Q. OKAY. DO YOU REMEMBER THE RIGHTS I JUST READ YOU?

A. [NODS HEAD IN THE AFFIRMATIVE.]

Q. OKAY, SO YOU UNDERSTAND THEM AND YOU STILL WANT TO TALK TO ME?

A. I DO.

Q. AND I CAN ASK YOU SOME QUESTIONS AND YOU'LL ANSWER THEM WITHOUT AN ATTORNEY?

A. YEAH.

Q. YES?

A. [NODS HEAD IN THE AFFIRMATIVE.] [INAUDIBLE] YEAH, THAT'S FINE.

(Ex. 1 at 4-5; *see also* 1 RT 32-35, 39-40; Ex. 33, Pfarr Supp. Rep., at 2.) Pfarr then continued interrogating Ramos and elicited a number of incriminating statements.

Before trial, trial counsel filed a motion to suppress Ramos's statements during the interrogation. (1 CT 143-148.) Trial counsel argued Pfarr's continued questioning after Ramos invoked his right to counsel contravened *Miranda*. (*Id.* at 146.) Among other authorities, trial counsel's motion cited the Supreme Court's decision in *Oregon v. Bradshaw*, 462 U.S. 1039 (1983). (*Id.*)

The State filed an opposition. (*Id.* at 164-69.) The State did not dispute Ramos invoked his right to counsel during in the interrogation. (*See id.*) Instead, the State argued Pfarr was permitted to continue questioning Ramos because Ramos re-initiated the interrogation after his invocation of his right to counsel by asking what Pfarr wanted to know. (*Id.* at 164-69.) The State discussed the facts of *Bradhsaw* at length and argued *Bradshaw* supported its own position on the suppression question. (*Id.* at 3-7.)

The trial court conducted a hearing on trial counsel's motion and heard testimony from Pfarr and the arguments of counsel. (1 RT 36-70.) The trial court did not review an audio recording or a written transcript of the interrogation because the audio recording was not intelligible at this time. (1 RT 41-42.) At the hearing, both trial counsel and the prosecutor contended *Bradshaw* supported their respective positions. (1 RT 43, 45-47.) Trial counsel argued Pfarr failed to terminate his interrogation after Ramos requested counsel and instead asked Ramos whether Ramos had any questions for him. (1 RT 44.) Trial counsel argued Pfarr's question "was a tactic to keep Mr. Ramos talking." (1 RT 44.) In support, trial counsel elicited testimony from Pfarr that Pfarr had been trained to "keep the subject talking until you get a confession." (1 RT 40.) In response, as in his opposition, the prosecutor relied heavily on *Bradshaw* and claimed "I don't think it can be any more clear cut than the *Bradshaw* case." (1 RT 45-47.)

The trial court denied the suppression motion. (1 RT 49.) The trial court acknowledged Ramos invoked his right to counsel. (1 RT 48-49.) However, because Ramos asked Pfarr what Pfarr wanted to know after the invocation, the trial court concluded Ramos voluntarily reinitiated the interrogation. (1 RT 49.) The trial court also found Pfarr's initial post-invocation question (i.e. "Do you have any questions for me?") was " a common question asked by a police officer when they are about to take someone to jail" and was not asked in "bad faith." (1 RT 49.)

Trial counsel later renewed his motion to suppress after the State produced an intelligible audio recording and transcript of the interrogation. (5 RT 1392-1405.) Upon reviewing the audio file and the transcript, the trial court re-affirmed its prior ruling. (5 RT 1403-05.) The trial court acknowledged "[t]here was an invocation." (5 RT 1405.) Nonetheless, the trial court again construed Pfarr's initial post-invocation question to Ramos as asking "do you have any questions about what was going to happen as far as, I'm implying, where are you going, are we going to the jail, are we

going to make phone calls, et cetera." (5 RT 1403.) The trial court also found that, while the transcript reflected Ramos never expressly waived his *Miranda* rights, he *impliedly* waived these rights when he began answering questions about his name and other identifying information. (5 RT 1401-02.)

2. Applicable law

In *Miranda*, the U.S. Supreme Court held that a criminal suspect may not be subjected to custodial interrogation unless he or she knowingly and intelligently waives certain constitutional rights, including the right to counsel. 384 U.S. at 444-445. After *Miranda*, the Supreme Court further held that if the suspect unambiguously requests counsel at any time before or during the interview, police must cease all interrogation until counsel is present or the suspect himself initiates further conversation: "[a]n accused . . . having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." *Edwards v. Arizona*, 451 U.S. 477, 484-485 (1981). The rule set forth in *Edwards* is intended to guard against the "coercive pressures" inherent in repeated, successive contact by the police. *Minnick v. Mississippi*, 498 U.S. 146, 151 (1990); *Michigan v. Harvey*, 494 U.S. 344, 350 (1990) (the *Edwards* rule is "designed to prevent police from badgering a defendant into waiving his previously asserted *Miranda* rights"); *Smith v. Illinois*, 469 U.S. 91, 98 (1984) (noting "the authorities through 'badgering' or 'overreaching'—explicit or subtle, deliberate or unintentional—might otherwise wear down the accused and persuade him to incriminate himself notwithstanding his earlier request for counsel's assistance.").

"The applicability of the rigid prophylactic rule of *Edwards* requires courts to determine whether the accused *actually invoked* his right to counsel." *Davis v. United States*, 512 U.S. 452, 458 (1994) (internal citation and quotation marks omitted)

(emphasis in original). "Invocation of the *Miranda* right to counsel 'requires, at a minimum, some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney.'" *Id.* at 459 (quoting *Smith*, 469 U.S. at 95).

As the Court in *Edwards* expressly recognized, however, the rule against interrogation after the suspect invokes his right to counsel will generally not apply where the suspect thereafter "initiates further communication, exchanges, or conversations with the police." *Edwards*, 451 U.S. at 485. Such "initiation" will be found when the suspect utters words or engages in conduct that can be "fairly said to represent a desire" on his part "to open up a more generalized discussion relating directly or indirectly to the investigation." *Oregon v. Bradshaw*, 462 U.S. 1039, 1045 (1983) (plurality opinion). After a suspect initiates such dialogue, the police may begin to question the suspect if he is then willing to knowingly and intelligently waive his constitutional rights. *Id.* at 1044-46. A valid waiver of the right to counsel, however, "cannot be established by showing only that [the suspect] responded to further police-initiated custodial interrogation." *Edwards*, 451 U.S. at 484. Rather, the Court must look to "whether the purported waiver was knowing and intelligent and found to be so under the totality of the circumstances." *Edwards*, 451 U.S. at 486 n.9.

Under *Miranda*, before the government may introduce evidence of an incriminating statement by a criminal defendant, it must prove a voluntary, knowing, intelligent waiver of the defendant's Fifth Amendment rights to silence and an attorney. *Miranda*, 384 U.S. at 475; *Connelly*, 479 U.S. at 168 (proof of waiver must be by a preponderance of the evidence); *United States v. Binder*, 769 F.2d 595, 599 (9th Cir. 1985). "Voluntariness" and "knowing and intelligent" are two distinct considerations to be analyzed separately in determining whether a *Miranda* waiver was valid. *Colorado v. Spring*, 479 U.S. 564, 107 S. Ct. 851, 93 L. Ed. 2d 954 (1987). While the "voluntariness" question involves the same inquiry as that employed to determine whether a confession was involuntary, *Connelly*, 479 U.S. at 169-170, a waiver can

only be considered "knowing" if it was "made with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it." *Spring*, 479 U.S. at 574 (internal citation and quotation marks omitted). There is a presumption against waiver, and the burden of showing a valid waiver is on the government. *North Carolina v. Butler*, 441 U.S. 369, 372-73, 99 S. Ct. 1755, 60 L. Ed. 2d 286 (1979).

The Supreme Court applied these principles in *Bradshaw*. In *Bradshaw*, a defendant under arrest who had recently invoked his right to counsel inquired of a police officer, "Well, what is going to happen to me now?" *Bradshaw*, 462 U.S. at 1042. The officer answered by saying "'You do not have to talk to me. You have requested an attorney and I don't want you talking to me unless you so desire because anything you say—because—since you have requested an attorney, you know, it has to be at your own free will." *Id.* The defendant stated he understood, proceeded to engage in a conversation with the officer, and later made incriminating statements to police. *Id.* The Supreme Court held that the defendant's post-invocation statements to police were not inadmissible under *Edwards*. The Supreme Court reasoned that the defendant, by asking the officer ""Well, what is going to happen to me now?," had "'initiated further conversation" with the police, for purposes of *Edwards*: the question "evinced a willingness and a desire for a generalized discussion about the investigation." *Id.* at 1045-46. Consequently, despite his earlier invocation of his right to counsel, police were permitted to speak with the defendant upon this re-initiation of the interrogation, and the defendant's subsequent statements were admissible under *Edwards*. *Id.* at 1046.

Critically, the Supreme Court explained that "inquiries or statements, by either an accused or a police officer, relating to routine incidents of the custodial relationship, will not generally 'initiate" a conversation in the sense in which that word was used in *Edwards*." *Id.* at 1045. For instance, "inquiries, such as a request for a drink of water

or a request to use a telephone" "are so routine that they cannot be fairly said to represent a desire on the part of an accused to open up a more generalized discussion relating directly or indirectly to the investigation." *Id.*. The Court explained, however, that the defendant's "question . . . as to what was going to happen to him" "was not merely a necessary inquiry arising out of the incidents of the custodial relationship." *Id.* at 1045-46. Rather, the question "could reasonably have been interpreted by the officer as relating generally to the investigation." *Id.* at 1046.

The Ninth Circuit and other courts have interpreted *Bradshaw* to hold that "[t]he *Edwards* prophylactic rule applies to [and prohibits] the initiation of any 'communication, exchanges, or conversations' by police," after a defendant invokes his right to counsel.[29] *Smith v. Endell*, 860 F.2d 1528, 1534 (9th Cir. 1988) (quoting *Edwards*, 451 U.S. at 485); *see also Christopher v. State of Fla.*, 824 F.2d 836, 845 (11th Cir. 1987). "Although the police may terminate an interrogation without falling into total silence, any discussion with the suspect other than that 'relating to routine incidents of the custodial relationship,'" as defined in *Bradshaw*, "must be considered a continuation of the interrogation." *Christopher*, 824 F.2d at 845 (quoting *Bradshaw*, 462 U.S. at 1045). In particular, police may not ask questions "clothed in the guise of 'clarification'" to "keep the suspect talking." *Id.* at 842.

Often citing *Bradshaw*, courts have held improper a law enforcement officer's post-invocation question to a defendant about whether he wants to know what will

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[29] *Bradshaw* was a plurality opinion authored by then-Justice Rehnquist. Nonetheless, it remains good law with respect to its interpretation of the *Edwards* rule. *See Tauno Waidla*, Case No. CV-01-0650-AG, Doc. No. 152 at 22 (C.D. Cal. Dec. 18, 2017) (noting "the courts construing *Bradshaw* have treated the overall holding like any other precedent"). Ordinarily, "'[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'" *United States v. Davis*, 825 F.3d 1014, 1020 (9th Cir. 2016) (quoting *Marks v. United States*, 430 U.S. 188, 193 (1977)). In *Bradshaw*, the only justice who concurred in the judgment was Justice Powell. *Bradshaw*, 462 U.S. at 1047-51 (Powell, J., concurring in the judgment). Justice Powell's concurring opinion, however, did not disagree with the plurality's interpretation of the *Edwards* rule, and instead discussed other issues. *See id.*

happen to him. *See United States v. Johnson*, 812 F.2d 1329, 1331 (11th Cir. 1986) (explaining that when FBI agent asked defendant whether he wanted to know what would happen to him after defendant invoked his right to counsel, defendant's statements that followed were inadmissible under *Edwards*); *United States v. Williams*, No. 12-60116-CR-RNS, 2012 WL 4449439, at *1 (S.D. Fla. Sept. 26, 2012) (concluding that where detective inquired, "You don't want to know what's goin' on,?" after defendant invoked his right to silence, defendant's subsequent statements were inadmissible). Under *Bradhsaw*, such questions are improper because they relate not to "routine incidents of the custodial relationship," *Bradshaw*, 462 U.S. at 1045, but instead "directly and indirectly to the investigation." *Johnson*, 812 F.2d at 1331. The Eleventh Circuit has noted in particular that such questions are often part of a "'good guy routine'" intended to elicit inculpatory statements from a defendant who has invoked his right to counsel. *Johnson*, 812 F.2d at 1331.

3. Ramos's post-invocation statements to Pfarr should have been suppressed under *Oregon v. Bradshaw* and *Edwards v. Arizona*

For the reasons set forth below, *Bradshaw* establishes Pfarr improperly interrogated Ramos after Ramos invoked his right to counsel. Consequently, all of Ramos's statements to Pfarr after his request for counsel must be suppressed pursuant to the *Edwards* rule. *See Edwards*, 451 U.S. at 485.

Pfarr's police report, Pfarr's suppression hearing testimony, and the transcript of the interrogation prepared by the State establish the following facts. Near the beginning of Pfarr's interrogation, Ramos explicitly stated "Yes" when asked by Pfarr whether he wanted an attorney. (Ex. 1 at 4; *see also* 1 RT 32-33; Ex. 33, Pfarr Supp. Rep., at 2.) During the suppression proceedings, the State did not contest that this statement constituted an invocation of Ramos's right to counsel. Moreover, the trial court acknowledged that Ramos did in fact invoke his right to counsel. (5 RT 1405.)

Ramos's request for counsel therefore triggered *Edwards*'s "rigid prophylactic rule" prohibiting further interrogation by Pfarr regarding the offense. *Davis*, 512 U.S. at 458.

Pfarr failed to comply with the *Edwards* rule. Pfarr's police report, suppression hearing testimony, and the transcript of the interrogation all agree that at this stage, Pfarr responded with the question, "Do you have any questions about what's gonna happen now?" (Ex. 1 at 4; *see also* 1 RT 34; Ex. 33, Pfarr Supp. Rep., at 2.) This question contravened *Edwards*. *Bradshaw* establishes that once a defendant has invoked his right to counsel, any discussion with the suspect other than that 'relating to routine incidents of the custodial relationship,'" "must be considered a continuation of the interrogation" prohibited by *Edwards*. *Christopher*, 824 F.2d at 845 (quoting *Bradshaw*, 462 U.S. at 1045); *see also Smith*, 860 F.2d at 1534 (noting *Edwards* prohibits "initiation of any 'communication, exchanges, or conversations' by police," after a defendant invokes his right to counsel) (quoting *Edwards*, 451 U.S. at 485). Critically, *Bradshaw* also establishes that a defendant's question about what will happen to him next is *not* an "inquiry arising out of the incidents of the custodial relationship." *Bradshaw*, 462 U.S. at 1045. It is not like a "request for a drink of water" or a "request to use a telephone": it communicates a "desire for a generalized discussion about the investigation" and could be "reasonably . . . interpreted" as "relating generally to the investigation." *Bradshaw*, 462 U.S. at 1045-46.

Pfarr's question invited Ramos to ask the question at issue in *Bradshaw*: Pfarr asked Ramos if he had any questions about what would happen to him. (Ex. 1 at 4; *see also* 1 RT 34; Ex. 33, Pfarr Supp. Rep., at 2.) Logically, *Bradshaw* holds that Pfarr's question recommenced the interrogation. Under *Bradshaw*, a defendant's question in a criminal interrogation about what will happen to him next signals a desire "to open up a more generalized discussion relating directly or indirectly to the investigation." *Bradshaw*, 462 U.S. at 1045. It follows, then, that a police officer's *solicitation* of such a question necessarily also relates not to the "custodial relationship," but rather to the

investigation itself. In other words, *Bradshaw* establishes Pfarr's question was a continuation of the interrogation because it elicited questions from Ramos about what would happen to him next. Consequently, under *Edwards*, all of Ramos's subsequent statements should have been suppressed as the product of an unlawful interrogation.

Pfarr's question effectively amounted to a "'good guy routine'"—an interrogation technique intended to keep Ramos talking even after he invoked his right to counsel. *Johnson*, 812 F.2d at 1331. In fact, Pfarr admitted as much during his suppression hearing testimony, stating he had been trained to keep a suspect talking until he got a confession. (1 RT 40.) This is exactly the sort of interrogation technique *Edwards* prohibits. *See Christopher*, 824 F.2d at 845 (noting police may not ask questions "clothed in the guise of 'clarification'" to "keep the suspect talking"). In fact, courts have repeatedly suppressed inculpatory statements elicited by similar post-invocation questions. *See Johnson*, 812 F.2d at 1331; *Williams*, 2012 WL 4449439, at *1.

The trial court's failure to suppress Ramos's statements pursuant to *Edwards* and *Bradshaw* is particularly astounding. As noted previously, trial counsel and the prosecutor repeatedly cited and discussed *Bradshaw* during the suppression proceedings. Nonetheless, the trial court still concluded Pfarr's question to Ramos was " a common question asked by a police officer when they are about to take someone to jail" and was not asked in "bad faith." (1 RT 49.) *Bradshaw* holds that this is not the case. The plain text of *Bradshaw* establishes that questions relating to what will happen to a defendant are not routine questions related to the "custodial relationship." *Bradshaw*, 462 U.S. at 1045.

In sum, Pfarr continued interrogating Ramos after Ramos invoked his right to counsel. *Bradshaw* instructs that Pfarr's invitation to Ramos to ask about what would happen to him next recommenced the interrogation. Consequently, under *Edwards*,

Ramos's statements following his invocation of his right to counsel should have been suppressed. *See Edwards*, 451 U.S. at 485.

4. Ramos's statements to Pfarr should have been suppressed because the waiver of his *Miranda* rights was invalid

Ramos's statements to Pfarr during his interrogation at the San Luis Obispo Police Department must be suppressed for an additional reason. As set forth in greater detail in Claim One, new scientific evidence establishes that Ramos was likely suffering from the side-effects of Effexor toxicity and Effexor-induced mania at the time of the offense. This evidence demonstrates Ramos could not have executed a valid waiver of his *Miranda* rights at the time of his interrogation with Pfarr. Any incriminating statements resulting from the interrogation must therefore be suppressed.

As noted previously, *Miranda* holds that before the government may introduce evidence of an incriminating statement by a criminal defendant, it must prove a voluntary, knowing, intelligent waiver of the defendant's Fifth Amendment rights to silence and an attorney. *Miranda*, 384 U.S. at 475; *Colorado v. Connelly*, 479 U.S. 157, 168 (1986) (proof of waiver must be by a preponderance of the evidence); *United States v. Binder*, 769 F.2d 595, 599 (9th Cir. 1985). "Voluntariness," and "knowing and intelligent," are two distinct considerations to be analyzed separately in determining whether a *Miranda* waiver was valid. *Colorado v. Spring*, 479 U.S. 564, 107 S. Ct. 851, 93 L. Ed. 2d 954 (1987). The "voluntariness" question involves the same inquiry as that employed to determine whether a confession was involuntary under the Due Process Clause. *Connelly*, 479 U.S. at 169-170. Relevant considerations include "the defendant's maturity; education; physical condition; and mental health." *Taylor v. Maddox*, 366 F.3d 992, 1015 (9th Cir. 2004) (citation omitted). A waiver can only be considered "knowing and intelligent" if it was "made with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it." *Spring*, 479 U.S. at 574 (internal citation and quotation marks omitted).

There is a presumption against waiver, and the burden of showing a valid waiver is on the government. *North Carolina v. Butler*, 441 U.S. 369, 372-73, 99 S. Ct. 1755, 60 L. Ed. 2d 286 (1979).

Here, the trial court found Ramos impliedly waived his *Miranda* rights near the beginning of Pfarr's interrogation. (5 RT 1401-02.) However, new scientific evidence set forth in a report by psychiatrist Dr. Peter Breggin, M.D., establishes that Ramos could not have validly waived his *Miranda* rights. As set forth in further detail in Claim Two, Dr. Breggin concludes "[Ramos]'s behavior at the time of the offense occurred in a state of psychosis, marked by heightened impulsivity, executive functioning impairment (i.e. an inability to control or understand one's actions), and delusional thinking." (Ex. 18, Rept. of Dr. Breggin, at 40.) Reviewing the police reports of Ramos's arrest and placement in custody, Dr. Breggin opines that "at the time he was taken into custody, [Ramos] continued to suffer from a mentally disabling psychosis that was lapsing into a disabling suicidal depression after the violent outburst [at the time of the offense]." (*Id.* at 41-42.) Dr. Breggin states the video recording of Ramos's interrogation by Pfarr confirms this: the recording shows "a man who is 'cave-in,' confused and unable to make extremely important decisions." (*Id.* at 42.) As a result, Dr. Breggin concludes Ramos was "incapable of making rational decisions in his own interest on critical matters such as his constitutional right to remain silent and to have a lawyer present." (*Id.* at 42.)

The trial record supports Dr. Breggin's conclusion. Numerous pieces of evidence reflect that Ramos was in an agitated state at the time of the interrogation, and was incapable of executing a voluntary, knowing, and intelligent *Miranda* waiver. A booking report indicates that Ramos was placed on a "pre book mental health hold," after his arrest. (Ex. 6, SLO Booking Rep.) A mental health hold suggests to jail staff that they should have the inmate evaluated by a mental-health professional and protected from self-harm. (6 RT 1540-41.) In addition, Officer Dickel reported that

just before he "turned over" Ramos to Pfarr's custody, Ramos was "upset," "started crying," and made several statements about killing himself and wanting to die" and "asked [Dickel] to kill him using [his] gun." (Ex. 4, Dickel Supp. Rep., at 3.)

In sum, Ramos was incapable of voluntarily, knowingly, and intelligently waiving his *Miranda* rights at the time of Pfarr's interrogation. Consequently, Ramos's statements to Pfarr during the interrogation should have been suppressed. *Miranda*, 384 U.S. at 475.

E. The failure to suppress Ramos's statements prejudiced him and affected the outcome at trial.

The introduction of the statements obtained from Ramos by the interrogating officers at French Hospital, and of his recorded statement to Detective Pfarr, were not harmless beyond a reasonable doubt, requiring Mr. Ramos's conviction to be vacated. *See Chapman v. California*, 386 U.S. 18, 24 (1967).

Here, "the record raises 'grave doubts' about whether the [introduction of Ramos's statements] influenced the jury's decision." *Jones v. Harrington*, 829 F.3d 1128, 1141 (9th Cir. 2016). Ramos admitted stabbing his ex-girlfriend before the police even arrived; therefore, his *actions* in this case were not in dispute at his trial. Rather, the critical issue for his jury was whether he acted with premeditation and deliberation, and with a specific intent to kill at the time he entered Jennifer Doe's apartment and began striking her with his pocket knife. (*See* 1 CT 278 (requiring proof that Ramos "intended to kill" to satisfy attempted-murder count; 1 CT 279 (requiring proof that Ramos "acted willfully" to satisfy assault with a deadly weapon count); 9 RT 2545 (requiring proof that Ramos acted with deliberation and premeditation for enhancement to be found true).) Ramos's statements were the prosecution's *only* unambiguous evidence of that intent.

Officer Dickel testified in front of Ramos's jury about the statements made by Ramos at French Hospital. In response to the interrogation, the jury heard that Ramos made the following statements:

- In response to a question of why he stabbed his ex-girlfriend, Ramos responded that he "needed a release of energy, I had all this rage inside me." (6 RT 1520);
- "I needed a release of energy. I have all this rage that I needed to get out. She was keeping me in a box and I had to release it." (6 RT 1521);
- Ramos "said it made him feel good." (*Id.*); and
- In response to a question from Sergeant Gillham about whether Ramos had tried to kill his ex-girlfriend, Ramos responded, "yeah." (*Id.*)

These statements were the only direct evidence that Ramos intended to kill his ex-girlfriend.

Indeed, the prosecutor in closing argument relied heavily on Ramos's statements in the emergency room to show intent, and to refute Ramos's testimony that he was suicidal prior to the attack. The prosecutor argued that stabbing his ex-girlfriend was "the release of energy that the defendant wanted." (9 RT 2560.) The prosecutor then said that the element of Ramos intending to kill and taking a direct step to kill was shown by Ramos's affirmative response to Gillham asking if he tried to kill Jennifer Doe. (9 RT 2562.) The prosecutor also used Ramos's statements to address Ramos's defense that he was suffering from mental impairments and had a foggy memory at the time of the attack. "He admitted to leaving his knife, I-pod, sweater and jacket at the scene. Hardly somebody who's suffering from memory failure." (*Id.*) Had Ramos's statements at the hospital been properly suppressed, the prosecutor would lack these devastating arguments.

Ramos's statements during his recorded interrogation with Detective Pfarr were similarly devastating to the defense. The transcript of the recorded statement that was put before the jury show Ramos making the following statements, among others:

- "She was just like, it was -- I -- it's like I'm -- it's [inaudible] shit everywhere I go. I just -- I can't [inaudible] with it. And -- And, I don't trust people and it's hard and I -- I've just had a lot of strong feelings on this, this energy built up in my body and I, I just" (Ex. 2, Trial Transcript 13A, at 5);
- I was mad at my -- I knew that I was angry and I just walked in that general direction" (*Id.*);
- In explaining why he was frustrated with Jennifer Doe, Ramos says "she's the first person that I trusted in a long time. And, the one time we [inaudible] and I went through a lot of fuckin' shit, man, and, um, I deserve [inaudible] for the the first time and I fetl really, physically, I went [inaudible]" (*Id.* at 6);
- I got inside [Jennifer's apartment] and I -- I dropped my stuff outside the door when I was getting ready. I left everything and I got inside the room. . . . this was just happening. That -- this, you know [inaudible], explosion of whatever, it just happened," (*Id.* at 7-8);
- In response to Pfarr saying that Ramos was trying to "stab her to death" and re-enacting how the attack occurred, Ramos stated, "Yeah." (*Id.* at 9);
- Pfarr suggested that Ramos was angry at Jennifer because she blocked his number, to which Ramos said, "yeah, I think so." (*Id.* at 13.)

Importantly, the transcript of the interrogation that the jury read also had a critical mistake. During the interrogation, Pfarr asked what message Ramos was trying to delivery by attacking Jennifer, to which Ramos replies, "Oh fuckin' [inaudible]. There's something with her that's just not right and that something has to change."

Because if there's one weak link in the chain, then the -- then we have to look at things." (*Id.* at 13.) In reality, and as can be heard in the video/audio recording, is that Ramos said that "There's something *in the universe* that's not right." (Ex. 3, Video of Interrogation, at 34:23-34:28.) The false and incorrect transcript of Ramos stating would could be inferred as a motivation to stab Jennifer Doe should never have been presented to the jury. (*See* Claim Four.)

And Ramos's jury was, in fact, focused on the statements as they related to the issue of intent. During deliberations, it asked the trial court whether "an admission of guilt after an act go toward intent to commit the act." (1 CT 283.) The trial court told the jury it was up to them to decide the answer to that question. (*Id.*) Moreover, even with Ramos's statements admitted, the jury viewed the issue of intent as a close one. It almost deadlocked, and the issue of Ramos's premeditation and deliberation appeared to be the cause of the jury's lack of unanimity. 11 RT 3006-07. Indeed, Juror J.T. recalls that he was the holdout juror who explains that the jury was "not able to decide unanimously on the issue of intent, willfulness, premeditation, and deliberation." (Ex. 24, Juror J.T. Decl., at ¶ 4.) Accordingly, with *the* central issue for the jury being Ramos's intention and mental state when he attacked Jennifer Doe, his statements in the hospital and to detective Pfarr, which could lead a jury to infer he tried to kill Jennifer and had a motivation—out of anger and frustration with her—to do so, was manifestly impactful and injurious.

CLAIM FOUR: PENAL CODE SECTON 1473 REQUIRES RELIEF BECAUSE OF, AND RAMOS'S CONSTITUTIONAL RIGHTS WERE VIOLATED BY, THE PROSECUTION'S PRESENTATION OF FALSE TESTIMONY

Ramos's conviction and sentence were unlawfully and unconstitutionally imposed in violation of his federal due process rights because of the prosecution's knowing presentation of false evidence. Even if the prosecution did not know of the falsity of the evidence it presented, habeas relief is still necessary pursuant to Penal

Code § 1473, requiring a conviction to be vacated where material false evidence was presented.

A. The prosecution's presentation of false evidence, testimony, and argument deprived Ramos of due process.

The prosecution presented numerous items of false evidence at Ramos's pre-trial suppression hearing and during the trial. Much of the false testimony could have been uncovered by minimally competent defense counsel, but Ramos's counsel performed deficiently by failing to do so. (*See* Claim Two.) But counsel's failure to identify the prosecution's presentation of false testimony does shield the prosecution from its constitutional obligations. For purposes of assessing a *Napue* violation, "[w]hether defense counsel is aware of the falsity of the statement is beside the point. . . . [R]egardless of whether defense counsel should have known that a state witness testified falsely, a prosecutor's responsibility and duty to correct what he knows to be false and elicit the truth, requires [him] to act when put on notice of the real possibility of false testimony." *Belmontes v. Brown*, 414 F.3d 1094, 1115 (9th Cir. 2005) (internal citations omitted) (rev'd on other grounds by *Ayers v. Belmontes*, 549 U.S. 7 (2006)).

1. The admission of evidence that is materially false or that gives a jury a materially false impression renders a trial unconstitutional.

The United States Supreme Court "established that a conviction obtained through the use of false evidence, known to be such by the representatives of the State, must fall under the Fourteenth Amendment[.]" *Napue v. Illinois*, 360 U.S. 264, 269 (1959). A witness need not commit perjury to violate due process. "The question of whether the witnesses' 'untruthfulness . . . constituted perjury' makes no 'material difference' where the issue is a conviction 'on tainted testimony.'" *Drake v. Portuondo*, 553 F.3d 230, 242 n. 7 (2d Cir. 2009) (quoting *Mesarosh v. United States*, 352 U.S. 1 (1956)); *Napue*, 360 U.S. at 269.

Nor does witness testimony need to be literally false. The Supreme Court has established that if a witnesses' "testimony, taken as a whole, [gives] the jury the *false impression*" of a material fact, the conviction must be reversed. *Alcorta v. Texas*, 355 U.S. 28, 31 (1957) (per curium) (emphasis added). Put differently, due process is violated by the "the introduction of specific misleading evidence important to the prosecution's case in chief[.]" *Donnelly v. DeChristoforo*, 416 U.S. 637, 647 (1974); *see also Downs v. Hoyt*, 232 F.3d 1031, 1038 (9th Cir. 2000) ("due process violated when prosecution presents evidence that 'taken as a whole' gives jury 'false impression'"); *Phillips v. Ornoski*, 673 F.3d 1168, 1184 (9th Cir. 2012) (similar). The prosecutor must or should have known of the falsity or misleading character of the testimony. *United States v. Agurs*, 427 U.S. 97, 103 (1976); *Giglio v. United States*, 405 U.S. 150, 153 (1972). The prosecutor is considered to have the knowledge of "others acting on the government's behalf in the case, including the police." *Kyles v. Whitley*, 514 U.S. 419, 437 (1995). Even if the prosecution does not knowingly solicit false evidence, it must correct it "when it appears." *Napue*, 360 U.S. at 269.

When false or misleading evidence has been knowingly presented at trial, the conviction must be vacated if there is "*any* reasonable likelihood" that the false testimony *could* have affected the judgment of the jury. *Napue*, 360 U.S. at 271; *see also Jackson v. Brown*, 513 F.3d 1057, 1076 (9th Cir. 2008). The *Napue* materiality standard is a lower threshold than the showing needed to obtain a new trial based on the withholding of exculpatory evidence under *Brady v. Maryland*, 373 U.S. 83 (1963). *Phillips*, 673 F.3d at 1189; *Jackson*, 513 F.3d at 1076. Indeed, "if it is established that the government knowingly permitted the introduction of false testimony reversal is virtually automatic." *Hayes*, 399 F.3d at 978 (cited with approval by *Schad v. Ryan*, 671 F.3d 708, 716 (9th Cir. 2011). Each instance of false testimony "further undermines [ ] confidence in the jury's decision." *Id.* A reviewing court must analyze the false evidence "collectively." *Kyles*, 514 U.S. at 436; *Jackson*, 513 F.3d at 1076.

2. Penal Code § 1473 independently requires relief based on the presentation of materially false evidence.

Under California Penal Code section 1473, a writ of habeas corpus may be granted where "[f]alse evidence that is substantially material or probative on the issue of guilt or punishment was introduced against a person at any hearing or trial relating to his or her incarceration." Cal. Penal Code § 1473(b)(1).

Importantly, a prima facie claim is alleged—and an order to show cause is required—under section 1473 even if the prosecution did not know or had no reason to know that the evidence it was presenting was false. *See Id.* ("Any allegation that the prosecution knew or should have known of the false nature of the evidence referred to in paragraphs (1) and (2) of subdivision (b) is immaterial to the prosecution of a writ of habeas corpus"); *see also Richards*, 55 Cal. 4th at 961; *In re Roberts*, 29 Cal. 4th 726, 741-42 (2003); *People v. Marshall*, 13 Cal. 4th 799, 829-30 (1996).

False evidence includes opinions of experts "that have been undermined by later scientific research or technological advances." Cal. Penal Code 1473(e)(1). False evidence is "substantially material or probative" if there is a reasonable probability that, had the evidence not been introduced, the result of the trial would have been different. *In re Cox*, 30 Cal. 4th 974, 1008-09 (2003); *see In re Richards*, 55 Cal. 4th 948, 961 (2012). Whether there is a reasonable probability that the result would have been different is an objective determination based on the totality of the circumstances. *Cox*, 30 Cal. 4th at 1008-09; *see In re Malone*, 12 Cal. 4th 935, 965-66 (1996). Courts have looked at the strength of evidence admitted against a defendant, including circumstantial evidence, to determine whether false evidence was material. *In re Richards*, 63 Cal. 4th 291, 313-15 (2016) (granting habeas corpus because, given weak circumstantial evidence, it was reasonably probable that faulty expert testimony about bite mark evidence affected trial's outcome); *see also Strickland v. Washington*, 466 U.S. 668, 696 (1984) ("[A] verdict or conclusion only weakly supported by the record

is more likely to have been affected by errors than one with overwhelming record support.").

Finally, under section 1473, Ramos need not prove that the false testimony was perjurious. "So long as some piece of evidence at trial was actually false, and so long as it is reasonably probable that without that evidence the verdict would have been different, habeas corpus relief is appropriate." *Richards*, 55 Cal. 4th at 961.

B. San Luis Obispo Police Officers testified falsely at the pre-trial suppression motion and at the guilt phase about the circumstances surrounding Ramos's arrest and interrogation.

As explained more fully in Claim Three, Ramos was subjected to two separate interrogations: in a private evaluation room at the French Hospital Emergency Room and at the San Luis Obispo County Jail. The trial court held a pre-trial hearing to determine whether either statement should be suppressed. (1 RT 1-50; 5 RT 1394-1405.) Officer Jason Dickel and Detective Chad Pfarr were the only witnesses who testified at the suppression hearing. Dickel interrogated Ramos at French Hospital, minutes after Ramos took himself there directly from Jennifer Doe's apartment. (1 RT 12.) Pfarr interrogated Ramos at the police station, after Dickel had arrested Ramos and transported him to the station. (1 RT 28-29.) Each testified falsely about their impressions of and interactions with Ramos when he was in their custody.

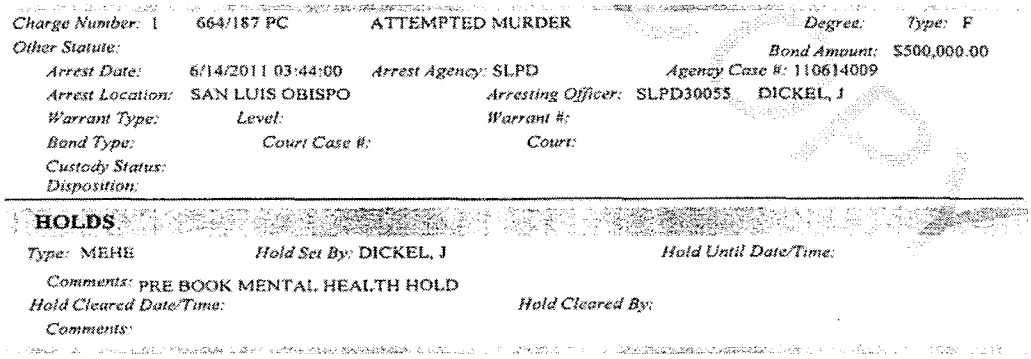
1. Dickel's false testimony

Dickel was asked by trial counsel whether he recommended that Ramos be placed in a psychiatric cell, to which Dickel testified, "I did not." (1 RT 20.) Defense counsel then asked whether Dickel placed "a mental health hold on" Ramos, to which Dickel again said, "I did not." (*Id.*)[30] During the guilt-phase of Ramos's trial, defense

[30] A mental-health hold is a way for an arresting officer to suggest to jail staff that they should have the arrestee evaluated by a mental health professional, and that the arrestee should not be released until cleared by mental health staff. (6 RT 140-41.)

counsel asked Dickel the same question of whether he placed Ramos on a mental-health hold. (6 RT 1540.) This time, Dickel testified that he could not recall whether he placed a mental-health hold on Ramos. (*Id.*)

Dickel testified falsely at the suppression hearing when he stated—unambiguously—that he "did not" place Ramos on a mental-health hold. (1 RT 20.) As shown below, Ramos's booking report indicates that Dickel did, in fact, set a mental-health hold on Ramos.



Charge Number: 1 664/187 PC ATTEMPTED MURDER *Degree:* *Type:* F
Other Statute: *Bond Amount:* $500,000.00
Arrest Date: 6/14/2011 03:44:00 *Arrest Agency:* SLPD *Agency Case #:* 110614009
Arrest Location: SAN LUIS OBISPO *Arresting Officer:* SLPD30055 DICKEL, J
Warrant Type: *Level:* *Warrant #:*
Bond Type: *Court Case #:* *Court:*
Custody Status:
Disposition:

HOLDS

Type: MEHE *Hold Set By:* DICKEL, J *Hold Until Date/Time:*
Comments: PRE BOOK MENTAL HEALTH HOLD
Hold Cleared Date/Time: *Hold Cleared By:*
Comments:

(Ex. 6, SLO Booking Rpt.)

Moreover, Ramos was, in fact, placed "in the safety cell" when he first arrived at the jail. Ramos's jail record indicates that immediately upon entering the jail—at 9:20 a.m. on June 14, 2011—Ramos was placed in a "safety cell." (Ex. 31, SLO Jail Records.) A safety cell "is essentially a locked cell" with rubberized walls "reserved for people that are having thoughts of self-harm or are suicidal." (7 RT 1979.) Thus, Dickel falsely testified that he did not request a psychiatric cell for Ramos.

The prosecutor must have had knowledge of the booking report either at the time Dickel testified at the suppression motion or at least by the end of the trial. Indeed, the prosecutor, Greg Devitt, provided Ramos's current counsel with the district attorney file, which included the report. (Ex. 45, J. Trigilio Decl., at ¶¶ 2-3.) Outside the presence of the jury, the prosecutor claimed—without supporting evidence—that he "think[s] it was a different police officer, Officer Kosnik, who placed the mental-health

hold. (7 RT 1809.) But the prosecutor refused to stipulate to that fact, and Kosnik was never called to testify at the trial. (*Id.*)[31]

2. Pfarr's false testimony

During the suppression hearing, Detective Pfarr testified that he was called from home to come to the police station after Ramos was arrested. (1 RT 28-29.) Upon arriving to the station, Pfarr testified that he was told by Sergeant Gillham that Ramos "had been arrested by Officer Dickel and transported to one of the holding cells at the police department." (1 RT 29.) Pfarr testified that he "retrieved Mr. Ramos from the holding cell and took him to an interview room." (*Id.*)

In fact, Dickel noted in his report that he "transported [Ramos] to the San Luis Obispo Police Station for further processing" and waited for Pfarr to arrive. (Ex. 4, Dickel Supp. Rep. at 3.) Dickel said in his report that Ramos began crying while the two were waiting for Pfarr, and "asked me if the victim was ok?" (*Id.*) "I replied that I did not know and he became upset and started crying for a few minutes. . . . Ramos made several statements about killing himself and wanting to die. He asked me to kill him using my gun." (*Id.*) During the guilt phase, Dickel also testified that he, not Gillham, spoke to Pfarr about what he knew of the case and handed Ramos off to Pfarr to be interviewed. (6 RT 1541.) Dickel's report and guilt-phase testimony is in direct conflict with Pfarr's testimony at the suppression hearing.

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[31] The allegation that Dickel testified falsely, supported by the booking report indicating that he (not Kosnik) placed the mental-health hold on Ramos must be considered true for purposes of deciding whether an evidentiary hearing is warranted on this claim. The San Luis Obisbo City Attorney's Office, that represents the police officers in the county, refused to allow Ramos's counsel to interview either Dickel or Kosnik. (Ex. 45, J. Trigilio Decl., at ¶¶ 4-5.)

3. The officers' false testimony at the suppression hearing prevented the trial court from assessing Ramos's mental condition at the time of his interrogation.

Under the relaxed prejudice standard for the admission of false evidence, there is at least a "reasonable likelihood" that Dickel's and Pfarr's false testimony *could* have affected the judgment of the jury by affecting the outcome of the suppression hearing. *Napue*, 360 U.S. at 271. The trial court concluded that Ramos was adequately advised of his rights and "voluntarily" initiated a conversation after invoking his right to counsel. (1 RT 49.) Evidence of Ramos's impaired mental state at the time he was advised of his constitutional rights was relevant to assess whether Ramos "was aware of 'the nature of the right being abandoned and the consequences of the decision to abandon it.'" *United States v. Garibay*, 143 F.3d 534, 536 (9th Cir.1998) (quoting *Moran v. Burbine*, 475 U.S. 412, 421 (1986)). The fact that Dickel believed Ramos was so impaired as to warrant a mental-health hold, and felt compelled to stay with Ramos until Pfarr arrived, indicates that Ramos mental-state was compromised; indeed, he wanted to commit suicide—indicating he lacked the ability to understand the gravity and adverse consequences of his actions, including abandoning his rights. Dickel's and Pfarr's false testimony prevented the trial court from taking into account these facts when it made its decision to deny Ramos's motion to suppress his statements.

C. The prosecutor knowingly presented false evidence of Ramos's interrogation transcript and argued the false evidence to the jury.

There were two hearings regarding the defense motions to suppress Ramos's statements. The first hearing took place on August 25, 2012. At the time of that initial hearing, no transcript of Ramos's interrogation with Detective Pfarr existed. Nor did the court consider the audio/video recording of that interrogation. The audio/video recording of Pfarr's interrogation of Ramos was "grossly over modulated," making it very difficult to discern what Ramos or Pfarr were saying. (1 RT 41-42.) The

prosecutor explained that the FBI was attempting to improve the audio, and as a result the court did not listen to it during the first hearing. It instead denied the suppression motion on the basis of Pfarr's testimony about the interrogation, but allowed the defense to renew a suppression motion if the audio differs from Pfarr's testimony. (1 RT 48-50.)

On August 31, 2012, the prosecutor apprised the court that Detective Pfarr had just finished—at 9:15 a.m. that day—a transcript of the interrogation. (5 RT 1304.) Ultimately, the that transcript would be admitted as an exhibit (Trial Exhibit 13A) to the jury. (6 RT 1554.) This transcript, however, contained a material falsehood that the prosecutor failed to correct. According to Pfarr's self-created transcript, Pfarr asked Ramos what message Ramos was trying to deliver by attacking Jennifer, to which Ramos replied, "Oh fuckin' [inaudible]. There's something with her that's just not right and that something has to change. Because if there's one weak link in the chain, then the -- then we have to look at things." (Ex. 2, Trial Transcript 13A, at 13.)

The transcript of Ramos's statement to Pfarr about something being wrong with "her" was false evidence. Ramos actually says that "There's something in the *universe* that's not right." (Ex. 3, Video of Interrogation, at 34:23-34:28.) He does not say there something wrong with "her."

But Pfarr's false transcript allowed the prosecutor to argue that Ramos had an intent to kill. During closing argument, the prosecutor seized on the false portion of Pfarr's transcript to argue that Ramos "was proud of what he did . . . he said it himself . . . there's something with her that's just not right. She's the problem. She's the problem for him. (9 RT 2564.) Then during rebuttal argument, the prosecutor relied on the transcript of Ramos's purported statement to argue that Ramos's motivation to kill Jennifer could be shown by Ramos having "claimed that there is something not right about her." (10 RT 2765.)

The false transcript also allowed Pfarr and the prosecutor to portray to the jury that Ramos was not suffering from any impaired mental condition or hallucinations at the time of the interrogation—refuting the defense theory and Ramos's testimony that Ramos was delusional. The prosecutor asked Pfarr the following questions about Ramos's mental condition at the time of the interrogation:

Q. DID YOU MENTION ANYTHING ABOUT A GHOST?

A. A GHOST?

Q. UH-HUH.

A. NO.

Q. SOUTHERN GHOST?

A. NO.

Q. BEING POSSESSED BY A SPIRIT?

A. NO.

Q. ANYTHING ABOUT THE POWER OF THE MOON?

A. NO.

Q. ANYTHING ABOUT A BRIGHT LIGHT?

A. NO.

Q. ANYTHING ABOUT A BRIGHT LIGHT CALLING HIM TO
JENNIFER'S HOUSE?

A. NO.

Q. ANYTHING ABOUT A BRIGHT LIGHT CALLING TO HIM TO
JENNIFER'S HOUSE TO COMMIT SUICIDE AT JENNIFER'S HOUSE?

A. NO.

Q. ANYTHING ABOUT A CONVERSATION ABOUT COMMITTING
SUICIDE AT THE TRAIN STATION?
A. NO.
Q. ANYTHING ABOUT HALLUCINATING?
A. NO.

(6 RT 1583-84.)

Had the jury been made aware that Ramos, in fact, discussed the "universe" during the interrogation, the defense could have cross-examined Pfarr about Ramos's state of mind, and the jury would have seen that Ramos, in fact, was suffering from hallucinations about celestial objects even in the hours after the attack. The true account of Ramos's statement about the universe during his interrogation would have corroborated the defense theory that he was delusional at the time of the attack. It would also have supported the credibility of his testimony. Ramos testified the he was having delusions about, among other things, the moon, which guided him to Jennifer Doe's apartment. (9 RT 2446; *see also* 5 RT 1310 (Ljepeva's testimony that Ramos was rambling about the "universe").

The fact that the jury technically heard the audio of the interrogation does not obviate the prejudice from the admission (and the prosecutor's use) of the false transcript. (6 RT 1564-67.) It would be nearly impossible, given the quality of the audio, for the jury to have listened intently to the audio to the degree of detail needed to catch the Pfarr's false transcript entry, which occurred thirty-four minutes into the interrogation. It is at least as likely that the jury, instead, relied primarily on the transcript and the prosecution's argument quoting it for its assessment of the evidence. Indeed, the jury asked to read the transcript again during their deliberations. (10 RT 2724-25.)

D. Officer Chad Pfarr testified falsely about his contact with Emily Medcalf.

Emily Medcalf was a defense witness who testified about her prior relationship with Ramos and her communication with him minutes before he arrived at Jennifer Doe's apartment. The prosecution knowingly presented the false testimony of Detective Chad Pfarr to impeach Mecalf by implying she was biased and arguing to the jury that she was a "liar." (10 RT 2760.)

The prosecutor invited its own false testimony by asking Medcalf on cross examination whether she was "aware that the gentleman seated to my left, the detective in this matter had tried to reach you numerous times." (8 RT 2168.) Medcalf responded that she had "tried [to] reach him numerous times as well." (*Id.*) She elaborated that she "left him multiple voice mail[s]." (*Id.*)

Based on Medcalf's testimony during her cross, the prosecution called Detective Pfarr to testify as soon as Medcalf left the stand.[32] Pfarr testified that he never received a voice mail message from Medcalf. (8 RT 2179.) Pfarr also testified that he was "never left her a phone number to return" his call, (*id.*), and that his number would not appear on Medcalf's phone but instead would appear as "blocked." (8 RT 2251.) The only impression from Pfarr's testimony—if believed by the jury—was that Medcalf could not have called him back, as she testified, because she never had his phone number. The jury was left to resolve the credibility battle based on nothing more than their dueling testimony.

Detective Pfarr's testimony was false and it gave the jury a "false impression" of Medcalf's bias and credibility. *Alcorta*, 355 U.S. at 31. Medcalf's phone records, which the jury did not see (*see* Claim Two), demonstrate that she repeatedly attempted

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[32] Trial counsel agreed to allow Pfarr testify out of order, despite the fact that the defense case-in-chief had not completed. (8 RT 2178.)

to return Pfarr's calls by calling his direct line. (Ex. A to Ex. 20, Medcalf Phone Recs., at 444-48.)[33] Specifically, the records show that Medcalf called a San Luis Obsispo area phone number once on September 15, 2011, twice on September 16, 2011, and once on September 19, 2011. (*Id.*) That number is listed publicly on the San Luis Obispo County Police Department's website as Detective Pfarr's office phone number. (Ex. 30, SLO Police Contact Website Page.) Accordingly, Medcalf's phone records confirm that she was *not* attempting to avoid the police, as the prosecution insisted. Moreover, since Pfarr's number appeared as "blocked" on her cell phone, the only way for her to have known to call Detective Pfarr's office is that he left her a message informing her he was the officer handling the case and leaving his office number. If he did so, his testimony that he never left her a message was false.

Even without considering the other false testimony presented by the prosecutor described in this Claim (as this Court must do when assessing prejudice), there is at least a likelihood that the false impression from Pfarr's testimony affected the jury's verdict. The trial court explained to the jury the relevance of Pfarr's disputing testimony, stating it "has only to do with the issue of bias; did she refuse to call the police department? Did they call her? . . . You have to decide whether she got the phone calls and didn't call the police department. . . . Does the witness have a bias one way or the other?" (8 RT 2184.) And the credibility and bias, *vel non*, of Medcalf's testimony mattered.

Medcalf testified that Ramos was never violent or angry when she dated him in high school, and that the two remained friends even after she left to Seattle for college. (8 RT 2157-58.) When asked if Ramos was ever violent, she responded emphatically: "Never. Never. Never. We never even fought. You know, not until the end of our

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[33] Medcalf's phone records are attached as an exhibit to her declaration because in her declaration she authenticated them by declaring that they are, in fact, a true and correct copy of her phone records. (Ex. 20, E. Medccalf Decl., at ¶ 7.)

relationship the disagreements that you have, but never an angry person, never violent person. None of the things I've been hearing the last year and a half." (8 RT 2157-58.) Medcalf resisted the prosecution's attempt to portray Ramos as jealous, testifying that "it was more self-consciousness than jealousy" and that "everyone experiences jealousy." (8 RT 2167-68.) Her testimony, if credited, also demonstrated that Ramos was irrational and suicidal the night of the attack—with a clear psychotic break during his last phone call with her. (*See also* Ex. 20, E. Medcalf Decl., at ¶ 12 ("His tone was completely different than it had been in our prior phone calls. Something had switched. He sounded . . . as if he had dissociated.") Her account of Ramos's demeanor during these calls was critical to the defense, which was premised on showing that Ramos had a psychotic break based on a mixed-manic episode prior to entering Jennifer Doe's apartment.

Pfarr's false testimony, however, allowed the prosecutor to argue that the jury dismiss *all* of Medcalf's testimony. The prosecutor argued that she, in total, "is lying. She is lying. It is okay. Happens, call it what it is." (10 RT 2760.) Absent Pfarr's false testimony, the prosecutor would have had no solid basis to make that argument.

E. The prosecutor elicited false testimony from Dr. Fennell that Ramos does not have bipolar disorder.

At both the guilt and sanity phases of trial, Ramos's counsel argued Ramos suffers from bipolar disorder and committed the offense because he was placed into a "mixed" manic state by his ingestion of Effexor.[34] During the guilt phase, trial counsel argued that while he was in this mixed state, Ramos was unable to think clearly, had a loss of contact with reality, and was "high energy with nowhere to go with it." (RT Augmented, 8-30-12, at 14-15, 21-22; 9 RT 2580, 2582-83; 10 RT 2732-33.) As a

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[34] The testifying medical doctors agreed that a "mixed state" occurs when a bipolar individual is treated with an antidepressant without an accompanying mood stabilizer. In a "mixed state," the person would either experience both depression and mania simultaneously or cycle between the two state. (8 RT 2217-20; 12 RT 3333, 3335 (Dr. Orsan); 13 RT 3615-16 (Dr. Walters); 13 RT 3700 (Dr. Fennell).)

result, trial counsel argued Ramos acted without the general and specific intents required for the charged offenses and allegations, and was legally unconscious. (9 RT 2576-77, 2592-94; 10 RT 2726-27, 2734-35, 2747. 2752.) During the sanity phase, trial counsel argued Ramos's mixed state rendered him legally insane, specifically rendering him unable to understand the moral wrongfulness of his actions. (14 RT 4037-38.)

To rebut these arguments, the prosecution elicited false testimony from Dr. Fennell at both the guilt and sanity phases of trial. During the guilt phase, the prosecutor elicited testimony from Dr. Fennell on cross-examination that Ramos did *not* have bipolar disorder, 7 RT 1991, and did not display manic symptoms while he was taking Effexor during the first week of his detention in San Luis Obispo County Jail (i.e. from June 14 to June 23, 2011). (7 RT 1989, 2004-05; 8 RT 2106.) Similarly, in the sanity phase, the prosecutor elicited testimony from Dr. Fennell that Ramos did not have bipolar disorder, *see* 13 RT 3704, and did not display manic symptoms during the first few days of his detention in San Luis Obispo County Jail, *see* 13 RT 3704, and did not appear to be in a mixed state during his interactions with police. (13 RT 3724-26.)

New scientific evidence shows Dr. Fennell's testimony was false, warranting habeas relief. *See* Cal. Penal Code § 1473(e)(1) (holding habeas relief warranted where expert trial testimony is "undermined by later scientific research or technological advances"). As set forth in a report by psychiatrist Dr. Peter Breggin, M.D., Ramos's psychiatric records from his incarceration at Mule Creek State Prison—unavailable at the time of trial—establish Ramos does in fact suffer from Bipolar I Disorder, as defined in the Diagnostic and Statistical Manual of Mental Disorders ("DSM") IV-TR

and V.[35] (Ex. 18, Rpt. of Dr. Breggin, at 17-19.) Dr. Breggin opines that years of Ramos's post-trial psychiatric records from Mule Creek State Prison repudiate Dr. Fennell's conclusion that Ramos's "jail evaluation and records did not confirm a diagnosis of bipolar disorder." (*Id.* at 17.) Dr. Breggin concludes these records establish that Ramos suffers from bipolar disorder, as trial counsel sought to prove at trial. (*Id.* at 18.) Moreover, Dr. Breggin credits Ramos's psychiatric records from prison over Dr. Fennell's opinions because "medical, psychiatric and psychological services in prison are generally much more comprehensive than those in jail" and "it is [therefore] not uncommon for jail officials and healthcare providers to fail to make a proper diagnosis and to offer improper treatment during the limited time of the inmate's stay." (*Id.*)

Dr. Breggin notes that a review of the records demonstrates Ramos "has been consistently diagnosed with Bipolar Disorder, or on a very few occasions Schizoaffective Disorder: Bipolar Type, by physicians treating and evaluating him in prison." (*Id.*) Dr. Breggin also notes that "[t]he qualifier 'with psychotic features' is often attached to these prison diagnoses, and there are often specific references to hallucinations, delusions and alternative realities." (*Id.*) Dr. Breggin counts dozens of bipolar diagnoses in these records and notes that Ramos is "rarely free of symptoms for a sustained period." (*Id.* at 18-19; *see, e.g.*, Ex. 41, Mule Creek State Prison Psychiatric Records, at 596, 598, 600, 602, 604, 613, 614, 617.)[36] Dr. Breggin concludes "[t]he prison records present a consistent picture of Bipolar I Disorder with Psychotic Features." (*Id.* at 18.)

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[35] The DSM IV-TR was the edition of the DSM published at the time of Ramos's 2012 trial. (Ex. 18, Rpt. of Dr. Breggin, at 15.) In 2013, after the trial, the DSM-V was published. (*Id.*) Dr. Breggin states his "opinion remains the same whether applying the diagnostic criteria set forth in either the *DSM-IV-TR* or the *DSM-V*." (*Id.* at 16.)

[36] Ramos's citations to Exhibit 41 refer to Bates Numbers found at the bottom-center of each page of the exhibit.

Dr. Breggin finds this diagnosis is bolstered by "[a]dditional direct evidence that existed prior to his placement in prison and prior to the assault." (Ex. 18, Rpt. of Dr. Breggin, at 19.) For instance, Dr. Breggin cites the write-up conducted upon Ramos's hospitalization to the San Luis Obispo County Department of Behavioral Health Facility on May 5, 2011. (*Id.*) Dr. Breggin notes the write-up contained descriptions of Ramos's mental state that match criteria for a manic episode, such as "'reckless unpredictable thoughts/behavior.'" (*Id.* at 20; Ex. 11 at 2.) Dr. Breggin also notes the write-up described a long history of depression, further corroborating Ramos's bipolar disorder. (Ex. 18, Rpt. of Dr. Breggin, at 21; Ex. 11 at 13.)

Dr. Breggin notes Ramos's answers to his questions during an April 17, 2018 interview also support a bipolar diagnosis. Dr. Breggin reports that Ramos during the interview elaborated on his behavior prior to the time he was prescribed Effexor in May 2011. Ramos explained that when he was in college at Fordham University, he "'became preoccupied for several days installing additional operation symptoms, like Lennox and Word, on [his] Mac [computer]'" and "'[s]pent a couple of days working on it, missing classes and eating little in the cafeteria.'" (Ex. 18, Rpt. of Dr. Breggin, at 23.) At the time of his hospitalization to the San Luis Obispo County Department of Behavioral Health Facility on May 5, 2011, Ramos reported "he had been driving his bicycle the wrong way into traffic down a busy street" and was "feeling grandiose and invulnerable, as well as suicidal." (*Id.*) Dr. Breggin opines these behaviors are consistent with manic tendencies. (*Id.*) Dr. Breggin also notes that "[p]atients undergoing a manic-like episode are almost never able to recall the worst of their thoughts, feelings and actions" and concludes "[w]e can assume that Mr. Ramos'[s] symptoms were even worse than he describes." (*Id.*)

Dr. Breggin adds that Ramos's account in the interview of his mental state and behavior leading up to and during the offense also makes it "clear . . . that [Ramos] suffered from Bipolar I condition with mixed depression and mania, and with psychotic

features," that he was in a state of "manic psychosis," and that he "is not malingering or fabricating his description." (*Id.* at 29-34.)

Finally, Dr. Breggin cites police reports by Officers Dickel and Riedel describing Ramos's behavior directly after the offense at the French Hospital's Emergency Room. As described in detail in Claim One, Dr. Breggin concludes these descriptions of Ramos's behavior demonstrate Ramos was in a state of psychosis, in which he was "wholly lacking in any sense of consequences for himself, the victim, their families, or friends." (*Id.* at 37.) Dr. Breggin also separately concludes Ramos's behavior at this time "demonstrates severe mania" and supports a diagnosis of "Bipolar I Disorder, Severe, Mixed, with Psychotic Features and probably with Rapid Cycling (between depression and mania)." (*Id.* at 38.)

Hence, based on Ramos's prison psychiatric records, Ramos's interview accounts of his behavior, and supporting documentary evidence, Dr. Breggin concludes Ramos suffers from Bipolar I Disorder. Dr. Breggin's conclusions constitute new scientific evidence falsifying Dr. Fennell's testimony that Ramos does not suffer from bipolar disorder. Accordingly, habeas relief is warranted. *See* Cal. Penal Code §§ 1473(b)(1), (e)(1).

F. The cumulative impact of the prosecution's presentation of false testimony, evidence and argument affected the jury's verdict.

"Although the government's knowing use of false testimony does not automatically require reversal, courts apply a less demanding materiality standard to *Napue* errors: whether 'there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.' *Dow v. Virga*, 729 F.3d 1041, 1048, quoting *United States v. Agurs*, 427 U.S. 97, 103 (1976). Thus, a far lesser showing of harm is required under the *Napue* materiality standard than under ordinary harmless error review. *See Smith v. Phillips*, 455 U.S. 209, 220 n.10 (1982); *see also Hayes v. Brown*, 399 F.3d 972, 984 (9th Cir. 2005) (en banc). *Napue* requires courts to determine only

whether the error could have affected the judgment of the jury, whereas ordinary harmless error review requires courts to determine whether the error would have done so. *Dow*, 729 F.3d at 1047-49 (emphasis added). Multiple instances of false testimony or evidence must be viewed cumulatively, not item-by-item, when assessing the impact the presentation of that false evidence had on the jury's verdict. *Hovey v. Ayers*, 458 F.3d 892, 921 (9th Cir. 2006).

Considered individually or cumulatively, the false evidence presented by the prosecution through Officer Dickel, Detective Pfarr, and Dr. Fennell affected the jury's verdict. First, Dickel's and Pfarr's false testimony at the suppression hearing left the trial court with the impression that Dickel—one of the first officers to interact with Ramos after the attack—(1) did not think Ramos was impaired enough to warrant a mental-health hold and (2) was comfortable leaving Ramos alone in a jail cell until Detective Pfarr could arrive to take over the case. Without the booking report, or the truth that Dickel felt compelled to stay with Ramos until Pfarr arrived, the trial court lacked any evidenced that Ramos's mental condition was significantly impaired at the time Pfarr advised him of his rights. With the benefit of that evidence, there is at least a likelihood that the trial court would have correctly determined that Ramos, in fact, lacked the ability to know, understand, and waive his rights.

Had the trial court properly suppressed Ramos's statements due to his inability to waive his rights, there is at least a likelihood that the jury would not have convicted him of first-degree burglary and attempted premediated murder. (Cal. Pen. Code §§ 459 (Burglary), 664/187 (attempted murder); 1 CT 21-22 (enhancement allegation that Ramos's attempted murder was willful, deliberate and premediated). As explained more fully in Claim Three, incorporated herein by reference, Ramos's statements were used extensively by the prosecution to argue that Ramos had a motivation and intent to kill Jennifer Doe. Pfarr's interrogation transcript, which falsely indicated that Ramos said something was wrong with the victim, compounded the prejudice from the

admission of Ramos's statements, and allowed the jury to infer that he was motivated to kill her, as the prosecutor argued. (9 RT 2564; 10 RT 2765.)

Exacerbating the prejudice from the introduction of Ramos's statements, and Pfarr's transcript that critically falsified one of Ramos's statements, is Pfarr's false testimony about his contact with Emily Medcalf. Her testimony was critical to demonstrating to the jury that Ramos's behavior and mental condition in the minutes leading up to the attack was aberrant and the result of a psychotic breakdown; and that Ramos was not simply a jealous rage-filled person based on her extensive experience of interacting with him. Yet, Pfarr's false testimony that Medcalf never called him allowed the jury to argue that she is a liar, thus permitting the jury to discredit her entire testimony. (10 RT 2760.) There is at least a likelihood that this false testimony and erroneous argument by the prosecutor affected the jury's conclusion that Ramos's condition was not, in actuality, too impaired to form the requisite intent to commit the charged offenses.

Finally, Ramos was additionally prejudiced by Dr. Fennell's false testimony that he does not suffer from bipolar disorder. Dr. Fennell was the only medical expert at Ramos's trial to testify that Ramos did not have bipolar disorder, and could not have been in a "mixed" manic state at the time of the offense.[37] Absent Dr. Fennel's testimony, no testifying medical expert at trial contradicted trial counsel's theory that Ramos committed the offense in a "mixed" manic state. There is thus at least a

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[37] The prosecution also briefly elicited testimony from Dr. Mohandie that Ramos did not have bipolar disorder and was not in a mixed state at the time of the offense. (14 RT 4023, 4025-26.) Unlike the other testifying experts, however, Dr. Mohandie was not a psychiatrist or even a medical doctor, and was merely a forensic psychologist. (13 RT 3773, 3784-85; 14 RT 3960, 3968.) Moreover, Dr. Mohandie based his opinions on the Minnesota Multiphasic Personality Inventory (MMPI)—a test he himself acknowledged could not be used by itself to diagnose a mental illness. (14 RT 3978.)

likelihood that this false testimony affected the jury's verdicts finding Ramos guilty and sane at the time of the offense.[38]

CLAIM FIVE: RAMOS'S CONSTITUTIONAL RIGHTS WERE VIOLATED BY THE ADMISSION OF HIS INVOLUNTARY STATEMENTS AND HIS TRIAL COUNSEL'S FAILURE TO MOVE TO SUPPRESS THEM BASED ON THEIR INVOLUNTARINESS.

Ramos's conviction and sentence were unlawfully and unconstitutionally imposed in violation of his rights to a trial by a fair and impartial jury, a reliable, fair, non-arbitrary, and non-capricious determination of guilt and penalty, the effective assistance of counsel, present a defense, confrontation and compulsory process, the privilege against self-incrimination, the enforcement of mandatory state laws, a trial free of materially false and misleading evidence, a fair trial, an impartial and disinterested tribunal, equal protection, due process of law and a fair and objective judicial determination pursuant to Penal Code section 190.4, subdivision (e) as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 1, 7, 9, 12, 13, 14, 15, 16, 17, 24, 27 and 28 of the California Constitution, customary international law, international human rights law and *jus cogens*, and state law because the state elicited statements from Ramos that were involuntary and unconstitutionally procured.

If Respondent disputes any of the facts alleged below, Ramos requests fact-development and an evidentiary hearing so that the factual disputes may be resolved.

To the extent that trial counsel failed to investigate, prepare, and litigate the issues contained herein during trial proceedings, trial counsel rendered ineffective assistance.

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[38] As set forth in greater detail in Claim One, Ramos has also uncovered new scientific evidence undermining Dr. Fennell's testimony that Effexor has "relatively short half life" and "is metabolized quickly." (7 RT 2005-06.) Dr. Fennell's false testimony on this issue is an independent ground for habeas relief under California Penal Code sections 1473(b)(1) and 1473(e)(1).

To the extent Ramos was required by state procedures to, but did not, allege this claim in his direct appeal proceeding, Ramos's appellate counsel was inadequate and ineffective such that Ramos should not be subject to any procedural bar to having merits review of this claim.

A. Overview

As explained more fully in Claims Three, Ramos was subjected to two separate interrogations: one at French Hospital and the other at the San Luis Obispo Police Station. By the time Ramos was at the police station, the officers in contact with him knew that he was in an impaired mental state. The arresting officer, Jason Dickel, placed a mental-health hold on him after he had asked Dickel shoot him, and after that Dickel observed Ramos having multiple mood fluctuations in the course of just a few minutes.

According to Dickel, Detective Pfarr spoke with Dickel about Ramos just before Pfarr interrogated him at the police station. Ramos was placed in a small room, shirtless and clearly impaired, while Detective Pfarr interrogated him. This was not a stereotypical example of a coercive interrogation. Pfarr did not seem angry and no physical threats were used or implied. But as the video of the interrogation shows, Ramos was in a crippling mental state, unable to understand his rights or what he may have been saying, and unable to resist Pfarr's questioning. Pfarr had to have known Ramos was impaired, and he exploited it to maximum advantage. The statements Pfarr obtained were used by the prosecutor to show Ramos's motivation and intent. The jury should never have heard those statements—they were involuntary and an inaccurate indicator of Ramos's intentions at the time of the attack.

While trial counsel moved to suppress Ramos's statements based on a lack of, or inadequate, *Miranda* protections, he failed to raise as a separate grounds for suppression that Ramos's statements were involuntary and in violation of the Fifth and

Fourteenth Amendments. This failure lacked any strategic justification and fell below professional norms.

B. The legal standard for determining whether a statement is involuntary requires assessing the totality of the circumstances surrounding the interrogation.

A confession is unconstitutionally coerced or involuntary if a suspect's "will was overborne by the circumstances surrounding the giving of [the] confession." *Dickerson v. United States*, 530 U.S. 428, 434 (2000). A court reviewing the voluntariness of a confession must take into consideration "the totality of all the surrounding circumstances—*both* the characteristics of the accused *and* the details of the interrogation." *United States v. Preston*, 751 F.3d 1008, 1016 (9th Cir. 2014) (citations omitted) (emphasis in original).

The coercion "can be mental or physical," *Juan H. v. Allen*, 408 F.3d 1252, 1273 (9th Cir. 2005), and the question of whether the defendant's will was overborne is "a question that logically can depend on 'the characteristics of the accused.'" *Yarborough v. Alvarado*, 541 U.S. 652, 668 (2004); *see also Taylor v. Maddox*, 366 F.3d 992, 1015 (9th Cir. 2004) (relevant factors to determine coercion include "the defendant's maturity; education; physical condition; and mental health") (citing *Withrow v. Williams*, 507 U.S. 680, 693 (1993)). "Ultimately, the voluntariness determination depend[s] upon a weighing of the circumstances of pressure against the power of resistance of the person confessing." *Preston*, 751 F.3d at 1016 (citations omitted.)

The question whether a confession was voluntary is "to be answered with complete disregard of whether or not [the confessor] in fact spoke the truth." *Rogers v. Richmond*, 365 U.S. 534, 544 (1961). A "coerced confession is inadmissible under the Due Process Clause even though statements in it may be independently established as true." *Watts v. State*, 338 U.S. 49. 50 n. 2 (1949).

C. The totality of circumstances surrounding Ramos's interrogation with Detective Pfarr demonstrate that his will was overborne.

Immediately before Detective Pfarr interrogated Ramos, Ramos had been "crying for a few minutes" and making "several statements about killing himself and wanting to die." (Ex. 4, Supp. Rep. at 3.) He asked Officer Dickel, who was waiting with Ramos for Detective Pfarr to arrive, to "kill him using [Dickel's] gun." (*Id.*) Ramos became despondent after asking Dickel if the victim, Jennifer Doe, was "ok" and Dickel responded that he did not know. (*Id.* at 3.) According to Dickel's testimony, he personally spoke with Pfarr about what he knew of the case before handing Ramos over to Pfarr for an interrogation. (6 RT 1541.)

What happens next is on video. (*See* Ex. 3, DVD Recorded Interview.) While the audio is distorted, it is clear that Ramos's mental condition is impaired. Pfarr's exploitation of Ramos's impairments renders Ramos's subsequent interrogation unconstitutional and involuntary.

1. Ramos's impairments prevented him from voluntarily providing statements

"The line between proper and permissible police conduct and techniques and methods offensive to due process is, at best, a difficult one to draw, particularly in cases such as this where it is necessary to make fine judgments as to the effect of psychologically coercive pressures and inducements on the mind and will of an accused." *Haynes v. Washington*, 373 U.S. 503 (1963). But "even subtle coercion ... can have an extraordinary effect on one of low mental capabilities." *Preston*, 751 F.3d at 1028 (internal citations omitted).

Here, the video and transcript of Ramos's interrogation with Detective Pfarr speak for themselves in terms of showing Ramos's impaired mental condition. He appears disheveled and withdrawn; he had just been arrested at an emergency room where he admitted to stabbing Jennifer Doe. As psychiatrist Peter Breggin, M.D.,

states, Ramos appears "confused and unable to make extremely important decisions." (Ex. 18, Rpt. of Dr. Breggin at 42.) Breggin opines that Ramos was "not capable of understanding or making a sound judgment about" whether to invoke or waive his constitutional rights. Indeed, even Ramos's statement that the trial court considered an invocation of counsel was spontaneous and nearly incoherent:

> Q. [Pfarr]: And, where does she live?
>
> A. [Ramos]: Where does "uh, I um, [inaudible] attorney. I don't know. Uh, she was -- she -- she was on, wahts' the street, it's, uh, the establishment. Where? 'Cause it's down this"
>
> Q. [Pfarr]: John are you saying you want an attorney?
>
> A. [Ramos]: Yes.

(Ex. 1, Ramos Interrogation Trans., at 4.) But as soon as Ramos utters agrees that he wants an attorney, Pfarr immediately brings up that "were [sic] going to go out to jail." (*Id.*) This in turn prompts Ramos to say "I didn't -- I forgot to tell you [inaudible] . . . I, I wanna be cooperative. I mean [inaudible] is -- it is something that - what do you need to know?" (*Id.*) Pfarr's subtle threat of taking Ramos to jail—even if true—was coercive given Ramos's mental condition.

Ramos's impaired and delusional mental state left him susceptible to Pfarr's subtle coercion. Ramos had just asked Dickel if Jennifer Doe was "ok," and began crying hysterically, (Ex. 4, Supp. Rep. at 3); this left Ramos susceptible to manipulation by playing off Ramos's remorse and getting him—through leading questions—to admit that he wanted to harm her, when in fact, he did not. This is precisely what Pfarr accomplished. Indeed, Pfarr coercively "misled" Ramos to draft an apology note to the victim. *Preston*, 751 F.3d at 1026 (discussing the coerciveness of officers inducing suspect to confess under guise of an apology). Pfarr testified that he had no intention of providing the victim with the apology note and it was a mere ruse to obtain

incriminating evidence, which the prosecution used to show that Ramos knew what he was doing. (10 RT 2765) (prosecutor's closing argument discussing the apology note).

2. Pfarr's knowledge and exploitation of Ramos's impairments make their admission at Ramos's trial unconstitutional.

Pfarr knew of Ramos's impaired mental state. It was his exploitation of Ramos's "mental condition" and "susceptibility to police coercion" that created the stae action making Ramos's involuntary statements unconstitutional and inadmissible. *Colorado v. Connelly,* 479 U.S. 157, 165 (1986). Ramos's demeanor during the interrogation showed Ramos to be slouched and slow. (Ex. 3.) Dickel had presumably just told Pfarr that Ramos was suicidal and wanting to die.[39]

Pfarr's exploitation of Ramos's despondent and impaired mental state are apparent from the transcript. For example, Pfarr repeatedly implanted motivations in an attempt to get Ramos, in his impaired state, to agree. "I'll tell you what I know John . . . you got pissed off at Jenn somehow and -- and went to her house with your knife and you stabbed her in the head. Does that sound about right?" (Ex. 2, Ramos Interrogation Transcript (Trial Exhibit 13A), at 3.)[40] Ramos merely nodded his head. (*Id.*) Pfarr continued asking about Ramos's purpose and intent, and Ramos's impaired mental state continued to be more apparent and explicit. In response to Pfar's question about why Ramos attacked Jennifer Doe, Ramos responded, "I - - I Don't, I - - If I - - I Guess At That Point, I - - I - - I Really Don't Know . . . You Know [Inaudible] When I Say There's A Purpose, But There - [Inaudible] I feel very - - I feel fery bad for her

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[39] Ramos needs subpoena power and an evidentiary hearing to prove this allegation because Dickel would not speak to Ramos's counsel absent a subpoena. Thus, Ramos could not ask Dickel the details of what he told to Pfarr, but Dickel's trial testimony indicates that Dickel briefed Pfarr on what he knew about Ramos up to that time, inferring he told Pfarr that Ramos was suicidal. (6 RT 1541.)

[40] Exhibit 1 appears to be the transcript that the trial court considered during the suppression hearing. It includes the *Miranda* warning discussion. Exhibit 2 is the a abridged version of the transcript that the jury heard, which lacks the *Miranda* discussion.

because this is not anything that should happen to her. Dude, completely straight forward [inaudible]. She - - as I was being very logical and patient with - -with, with those things. and, I - - don't think that I -can accept that. I don't know. I - - I am trying to do my best here." (*Id.* at 8.) Ultimately, Ramos finally said "Yeah" to the question of whether he was trying to "stab her to death." (*Id.* at 9.) In short, Ramos's will was overborne by Pfarr's subtle and leading questions.

While Pfarr's interrogation techniques may not be coercive or impermissible generally or when used on a competent and normal suspect, his interrogation of Ramos—given what he knew of Ramos's condition—exploited Ramos's condition to overbear his will. This is unconstitutional. "[A]s interrogators have turned to more subtle forms of psychological persuasion," and away from physical coercion, "courts have found the mental condition of the defendant a more significant factor in the 'voluntariness' calculus." *Connelly*, 479 U.S. at 164. "It simply "takes less" in terms of sophisticated police interrogation techniques 'to interfere with the deliberative processes of one whose capacity for rational choice is limited than it takes to affect the deliberative processes of one whose capacity is not so limited.'" *Preston*, 751 F.3d at 1023, quoting *Smith v. Duckworth*, 910 F.2d 1492, 1497 (9th Cir. 1990).

D. Trial counsel failed to move to suppress Ramos's statements on the ground that they were involuntarily made.

Counsel moved to suppress Ramos's statements, but failed to do so on the basis that they were involuntary in violation of due process. Rather, counsel's motion was premised only a failure to properly adhere to *Miranda v. Arizonz*, 384 U.S. 436 (1966). (1 CT 143-47) (Defense motion to suppress statements). Counsel had access to the video showing that Ramos's mental state was impaired at the time of the interrogation, and his entire defense was premised on Ramos's impaired mental condition before, during and after the attack. There can be no rational or strategic justification for failing

to include as a basis for suppressing Ramos's statements the fact that they induced by Pfarr's exploiting Ramos's impaired mental condition.

E. The involuntary statements prejudiced Ramos.

The unconstitutional admission of Ramos's confession requires vacating his conviction if the prosecution cannot show that its admission was harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 17, 24 (1967); *Fulminante*, 499 U.S. at 295-96 (reviewing court must determine "whether the State has met its burden of demonstrating that the" error "did not contribute to [defendant's] conviction") (citations omitted).

Similarly, Ramos is entitled to habeas relief based on counsel's unreasonable failure to move to suppress the confession if her failure to do so undermines confidence in the jury's verdict. *Strickland*, 466 U.S. at 694. The two analyses are not the same—the *Chapman* standard places the burden on the State and requires reversal more easily than the *Strickland* standard. But each require an assessment of whether Ramos's confession had an impact on the jury's verdict. Whether the State has the burden to disprove prejudice or Ramos has the burden to demonstrate it, no reasonable jurist can conclude that Ramos's unconstitutionally admitted statements were harmful under any applicable standard.

"The prejudice from a defendant's confession 'cannot be soft pedaled.'" *Jones v. Harrington*, 829 F.3d 1128, 1142 (9th Cir. 2016) (quoting *Anderson v. Terhune*, 516 F.3d 781, 792 (9th Cir. 2008)). It is "like no other evidence" and has a "profound impact on the jury[.]" *Fulminante,* 499 U.S. at 296; *see also Colorado v. Connelly*, 479 U.S. 157, 182 (1986) ("the real trial, for all practical purposes, occurs when the confession is obtained. No other class of evidence is so profoundly prejudicial") (internal citations omitted).

Here, as explained more fully in Claim Three, the admission of Ramos's statements were devastating. Ramos's statements to Pfarr were used to show that

Ramos intended to kill Jennifer—Ramos said "Yeah" to the question of whether he was trying to "stab her to death." (Ex. 2, Ramos Interrogation Transc., at 9)—and to show that Ramos was angry and had a motivation to do so. Further, as explained in Claims Three and Four, the interrogation transcript had a critical falsehood that Ramos said something was wrong with the victim, when in fact, he had said something was wrong with the universe. (*Compare Id.* at 13 *with* Ex. 3, DVD Recorded Interview, at 34:23-34:28.) This allowed the prosecutor to argue—in both his closing argument and rebuttal argument—that Ramos was motivated to kill Jennifer Doe. (9 RT 2564; 10 RT 2765.)

The jury's questions demonstrate how impactful they were to its decision. During deliberations, the jury asked the trial court whether "an admission of guilt after an act go toward intent to commit the act." (1 CT 283.) The trial court told the jury it was up to them to decide the answer to that question. (*Id.*) Moreover, even with Ramos's statements admitted, the jury viewed the issue of intent as a close one. It almost deadlocked, and the issue of Ramos's premeditation and deliberation appeared to be the cause of the jury's lack of unanimity. (11 RT 3006-07.) Accordingly, under either the *Brecht* or *Strickland* standard, the admission of Ramos's statements made to Pfarr during his interrogation impacted the jury's verdict.

CLAIM SIX: THE TRIAL COURT COMMITTED INSTRUCTIONAL ERROR WHEN DEFINING THE MENTAL STATE REQUIRED FOR ATTEMPTED MURDER

Ramos's conviction and sentence were unlawfully and unconstitutionally imposed in violation of his rights to a trial by a fair and impartial jury, a reliable, fair, non-arbitrary, and non-capricious determination of guilt and penalty, the effective assistance of counsel, present a defense, confrontation and compulsory process, the privilege against self-incrimination, the enforcement of mandatory state laws, a trial free of materially false and misleading evidence, a fair trial, an impartial and

disinterested tribunal, equal protection, due process of law and a fair and objective judicial determination pursuant to Penal Code section 190.4, subdivision (e) as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 1, 7, 9, 12, 13, 14, 15, 16, 17, 24, 27 and 28 of the California Constitution, customary international law, international human rights law and *jus cogens*, and state law because the trial court failed to correctly instruct the jury regarding the mental state required for the offense of attempted murder.[41]

If Respondent disputes any of the facts alleged below, Ramos requests fact-development and an evidentiary hearing so that the factual disputes may be resolved.

A. Background

The State charged Ramos with four crimes arising from his assault of Jennifer Doe: (1) first-degree residential burglary ("Count 1"), in violation of California Penal Code section 459; (2) attempted murder ("Count 2"), in violation of California Penal Code sections 664 and 187; (3) battery on former cohabitant causing corporal injury ("Count 3"), in violation of California Penal Code section 273.5(a); and (4) assault with a deadly weapon ("Count 4"), in violation of California Penal Code section 245(a)(1). (1 CT 21-26 (operative Information).) The State also separately alleged the attempted murder was willful, deliberate, and premeditated within the meaning of California Penal Code sections 189 and 664(a) (hereinafter, "premeditation enhancement"). (1 CT 22.) This premeditation enhancement, if proven true, would enhance Ramos's sentence to life in prison with the possibility of parole. *See* Cal. Penal Code § 664(a).

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[41] While Ramos previously raised a version of this instructional error claim on his direct appeal, it should still be considered on the merits by this Court. First, as explained in Section IV, Ramos has alleged a miscarriage of justice warranting a merits review of his claims. *See In re Harris*, 5 Cal. 4th 813, 834 (1993), *as modified* (Sept. 30, 1993), *reh'g denied and opinion modified* (Sept. 30, 1993). Second, Ramos now re-asserts the claim with supporting extra-record evidence discovered by his federal post-conviction counsel: namely, a declaration from one of his jurors shedding light on the prejudice caused by the instructional error. (*See* Ex. 24, Juror J.T. Decl., at ¶ 4.) Ramos could not have previously obtained and presented the declaration because he was incarcerated and lacked counsel.

Under California law, the mental state required for attempted murder differs from that required to prove the premeditation enhancement. Attempted murder requires only "the specific intent to kill and the commission of a direct but ineffectual act toward accomplishing the intended killing." *People v. Lee*, 31 Cal. 4th 613, 623 (2003). The premeditation enhancement, on the other hand, requires "substantially more reflection than may be involved in the mere formation of a specific intent to kill." *People v. Coston*, 82 Cal. App. 2d 23, 35 (1947) (internal citation and quotation marks omitted). California courts have instructed that "[t]he very definition of 'premeditation' encompasses the idea that a defendant thought about or considered the act beforehand." *People v. Pearson*, 56 Cal. 4th 393, 443 (2013). "Premeditation means thought over in advance, and deliberation refers to careful weighing of considerations in forming a course of action." *Id.* (internal citation, quotation marks, and alterations omitted). An act is "'premeditated and deliberate if it occurred as the result of preexisting thought and reflection rather than unconsidered or rash impulse.'" *Id.* (quoting *People v. Stitely*, 35 Cal. 4th 514, 543 (2005)).

The trial court's guilt phase instructions to the jury conflated these mental state requirements. One of the trial court's written instructions incorrectly stated:

> The People have the burden of proving beyond a reasonable doubt that the defendant acted with the requisite intent or mental state, specifically: intent to commit murder or assault with a deadly weapon, or corporal []injury to a former cohabitant for Count 1; intent to kill for Count 2; the willful, deliberate and premeditated mental state for the enhancement to Count 2. *If the People have not met this burden, you must find the defendant not guilty of Counts 1 and 2.*

(1 CT 281 (emphasis added).) Similarly, the trial court incorrectly instructed the jury from the bench as follows:

> You may consider evidence of hallucinations, if any, in deciding whether Mr. Ramos acted with premeditation and deliberation. *If the people have not met this burden, you must*

> *find Mr. Ramos not guilty.* That should just say of attempted murder.

(9 RT 2546 (emphasis added).) In other words, in both instructions, the trial court incorrectly instructed the jury that it had to find Ramos acted with willfulness, deliberation, and premeditation, in order to find him guilty of attempted murder. These instructions were at odds with another written instruction that correctly did *not* include willfulness, deliberation, and premeditation as an element of attempted murder. (*See* 1 CT 278.) The incorrect instructions also conflicted with oral instructions that the jury decide on the premeditation enhancement only if it found Ramos guilty of attempted murder. (9 RT 2545; 10 RT 2770.)

Because of these conflicting instructions, the jury submitted numerous questions to the trial court during deliberations concerning the premeditation enhancement. (10 RT 3002-3007.) Of the six sets of questions the jury submitted to the court during deliberations, the fifth and sixth sets pertained to the premeditation enhancement. (1 CT 235, 283-84.) In its fifth set of questions, the jury asked:

> Question for his honor: On a particular enhancement, if the jury cannot come to a unanimous decision, should "Not True" be selected?
>
> Question for his honor: Is it possible to offer clarification to the words ". . . carefully weighed the considerations for and against his choice . . ." in section 601 on page 10 of the jury instructions [speaking to the premeditation enhancement].

(1 CT 284.) The second of these questions referred to the trial court's instruction that "Mr. Ramos deliberated [for purposes of the premeditation enhancement] if he carefully weighed the considerations for and against his choice and knowing the consequences decided to kill." (9 RT 2545.) The court answered the jury's questions as follows:

> To return a verdict on any count or to find an enhancement "True" or "Not True" the vote must be unanimous.
>
> NO FURTHER CLARIFICATION CAN BE OFFERED.

(1 CT 284.)

In its sixth set of questions, the jury asked:

> Questions for His Honor: The jury cannot come to a unanimous agreement on one enhancement of one count.
>
> Question 1: Can the enhancement be left blank meaning no decision on "True" or "Not True."
>
> Question 2: If a unanimous decision cannot be reached on the enhancement, must the jury vote Not Guilty for the count? Reference the last paragraph on page 15.

(1 CT 284.) The second question's final sentence regarding the "last paragraph on page 15" referred to the trial court's incorrect written instruction that the jury had to find the defendant not guilty of attempted murder if the prosecution had not proven willfulness, deliberation, and premeditation. (*See* 11 RT 3006-07; 1 CT 281.) Upon reviewing the sixth set of questions with the prosecutor and trial counsel, the trial court admitted the instruction had been drafted "rather inartfully." (11 RT 3007.)

Believing the jury was struggling with its verdict because of the incorrect instruction, the trial court called the jury into the courtroom instead of answering the sixth set of questions. (11 RT 3007, 3012.) The trial court questioned the jury as to whether they had reached a verdict with respect to any counts. In the course of this questioning, the trial court briefly stated that "you would never get to the [premeditation] enhancement unless you already voted to find him guilty of Count 2," to which the jury foreman replied "[t]hat is correct." (11 RT 3015.)

The trial court's questioning revealed the jury had reached verdicts on all counts except the attempted murder charge. (11 RT 3013-3014.) However, the jury foreperson reported the jury was at an impasse as to the premeditation enhancement. (11 RT 3015-16, 3017.) The foreperson initially stated it was "unlikely" that the jury would reach a decision on the enhancement. (11 RT 3017.) When polled by the trial court as to whether further deliberations would allow it to reach a decision, no juror stated further deliberations would be helpful. (11 RT 3017.) Three jurors stated they still needed clarification as to what it meant for Ramos to have "carefully weighed the considerations for and against his choice." (11 RT 3018.) However, as in its answer to the jury's fifth set of questions, the trial court stated it could not provide any further clarification. (11 RT 3019.) When the trial court asked whether there was anything further it could do to assist the jury, no jurors responded. (11 RT 3019.)

Just as the trial court indicated it would proceed without further deliberations, the juror foreperson suddenly approached the court and stated some jurors had asked to be allowed to "go back in and try again." (11 RT 3019-20.) The trial court agreed and allowed further deliberations. (11 RT 3020.) The following morning, the jury found Ramos guilty of all four crimes charged, and also found true the premeditation enhancement. (12 RT 3304-3306.) In total, the jury deliberated for two full days before reaching its verdict. (*See* 10 RT 2773 (noting beginning of deliberations); 12 RT 3304-3306 (the verdict).)

On direct appeal, Ramos challenged the trial court's instructional error, contending it presented the jury with an "all or nothing" choice. *People v. Ramos*, No. 2D CRIM. B244670, 2014 WL 4071039, at *7 (Cal. Ct. App. Aug. 19, 2014). In other words, Ramos contended the incorrect instructions led the jury to believe it had to find the premeditation enhancement to be true in order to convict Ramos of attempted murder. *Id.* As a result, the jury likely found the enhancement to be true in order to avoid the possibility of an acquittal on the attempted murder charge. *Id.*

The California Court of Appeal rejected Ramos's claim in a reasoned decision. *Id.* at *7-*8. The Court of Appeal "agree[ed] that the instructions were erroneous." *Id.* at *7. Nonetheless, the Court of Appeal concluded the error was harmless because there was not "'a reasonable likelihood the jury applied the instruction in an impermissible manner.'" *Id.* at *8 (quoting *People v. Houston*, 54 Cal. 4th 1186, 1229 (2012), *as modified on denial of reh'g* (Sept. 19, 2012)). In support, the Court cited two factors: "(1) other instructions informed the jury that a conviction of attempted murder was not contingent on a finding of willfulness, premeditation and deliberation; and (2) the confusion created by the erroneous instructions was cleared up by the court during deliberations." *Id.* at *7. The second of these factors referred to the trial court's statement in passing to the jury during deliberations that "'you would never get to the [premeditation] enhancement unless you already voted to find him guilty of Count 2.'" *Id.* at *8. Based on these two factors, the Court of Appeal "presume[d] the jurors were intelligent enough to . . . appreciate that [Ramos] could be found guilty of attempted murder and yet also found not to have acted with willfulness, premeditation and deliberation." *Id.*

B. The Trial Court's Instructional Error Merits Relief

The trial court's instructional error warrants habeas relief. As an initial matter, the California Court of Appeal applied an incorrect legal standard when assessing whether the trial court's instructional error was prejudicial: it looked to whether there was a "'reasonable likelihood'" that the jury incorrectly applied the trial court's instructions. *Ramos*, 2014 WL 4071039, at *8 (quoting *Houston*, 54 Cal. 4th at 1229). This was error. The "reasonable likelihood" standard applies only to challenges to an *ambiguous* jury instruction. *See Boyde v. California*, 494 U.S. 370, 380 (1990) (holding that where "the instruction is ambiguous and therefore subject to an erroneous interpretation . . . the proper inquiry *in such a case* is whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the

consideration of constitutionally relevant evidence" (emphasis added)); *see also People v. Ngo*, 225 Cal. App. 4th 126, 152 (Cal. Ct. App. 2014), *as modified on denial of reh'g* (Apr. 25, 2014) ("The court in *Boyde* thereby limited the reasonable likelihood standard to cases involving a single ambiguous instruction.").

But where, as here, a trial court gives instructions that are flatly incorrect on their face or that conflict with one another, the standard for assessing prejudice is the "harmless beyond a reasonable doubt" standard set forth in *Chapman v. California*, 386 U.S. 18, 24 (1967). *See People v. Lee*, 43 Cal. 3d 666, 674, 738 P.2d 752, 757 (1987) (holding conflicting instructions regarding specific intent to kill for attempted murder charge were subject to harmless error analysis under *Chapman*); *People v. Jeter*, 125 Cal. App. 4th 1212, 1217 (Cal. Ct. App. 2005) ("Conflicting instructions or instructions that misdescribe an element of an offense are harmless only if it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (internal citation and quotation marks omitted)). The *Chapman* standard is far more favorable to the challenger of an instructional error than the "reasonable likelihood" standard: under *Chapman*, the *State* bears the burden of proving any errors were "harmless beyond a reasonable doubt." *People v. Jackson*, 58 Cal. 4th 724, 748 (2014). The Court of Appeal therefore erred in applying the less favorable "reasonable likelihood" standard.

But in any case, Ramos can show the trial court's instructional error was prejudicial under *either* standard. Here, the trial court issued two instructions that incorrectly stated the jury had to find the premeditation enhancement was true in order to find Ramos guilty of attempted murder. (1 CT 281; 9 RT 2546.) One of these incorrect instructions directly followed an instruction defining what it means for an act to be premeditated and deliberate, making it more likely the jury would have relied on it when considering the premeditation enhancement. (*See* 9 RT 2545-46.)

These incorrect instructions were undoubtedly prejudicial: they would have pressured the jury with an "all or nothing" choice. The instructions gave the jury the mistaken impression that if it did not find the premeditation enhancement true, Ramos would escape liability for attempted murder. The incorrect instructions effectively pressured the jury to find the premeditation enhancement true, even if sufficient evidence did not support it.

Although, as the Court of Appeal noted, the trial court issued other instructions—one oral and two written—correctly stating the jury only decide the premeditation enhancement if it found Ramos guilty of attempted murder, *see* 9 RT 2545; 10 RT 2770; 1 CT 278, the record makes clear the jury did not pay attention to these instructions. Indeed, in its sixth set of questions to the trial court, the jury indicated it had only read the *incorrect* instructions. The jury, citing one of these incorrect instructions, asked "[i]f a unanimous decision cannot be reached on the enhancement, must the jury vote Not Guilty for the count?" (1 CT 284; *see also* 11 RT 3006-07.) The fact that the jury did not ask about or even cite the other correct instructions shows it was instead relying on the incorrect instructions, and believed it had to find the premeditation enhancement true in order to find Ramos guilty of attempted murder.

The jury's reliance on the incorrect instructions makes sense given how the crime of attempted murder was described by both Ramos's trial counsel and the State. The State's charging document incorrectly titled the attempted murder charge as "ATTEMPTED PREMEDITATED MURDER."[42] (1 CT 22.) Moreover, in their closing arguments, the prosecutor and trial counsel repeatedly described the crime by such names as "premeditated attempted murder" and "first degree deliberate and premeditated murder." (9 RT 2561; 10 RT 2728; *see also* 10 RT 2734 ("I want to talk

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[42] As the trial court itself acknowledged, this was incorrect because "there is no such crime in the State of California as attempted premeditated murder." (11 RT 3010.)

to you about premeditation, deliberation, those are things that have to be proved for him to commit attempted first-degree murder.").) Given how the crime of attempted murder was framed for the jury, it makes sense that the jury necessarily believed the premeditation enhancement was a necessary condition for finding Ramos guilty of attempted murder. *Waddington*, 555 U.S. at 191 (2009) (noting an incorrect jury instruction "'may not be judged in artificial isolation,' but must be considered in the context of the instructions as a whole and the trial record") (quoting *Estelle*, 502 U.S. at 72).

Moreover, the Court of Appeal wrongly concluded the jury's "confusion created by the erroneous instructions was cleared up by the court during deliberations." The Court of Appeal relied on the trial court's statement in passing during its conversation with the jury that "you would never get to the [premeditation] enhancement unless you already voted to find him guilty of Count 2." *Ramos*, 2014 WL 4071039, at *8. However, the record does not reflect the matter was "cleared up" as the Court of Appeal claimed. In fact, the only individual who responded to the trial court's comment was the jury foreman, who replied "[t]hat is correct." (11 RT 3015.)

On the contrary, the jury's subsequent actions confirm it was still relying on the incorrect instructions. When the trial court signaled it would proceed without further deliberations because of the jury's impasse as to the premeditation enhancement, some jurors inexplicably asked to be allowed to "go back in and try again." (11 RT 3019-20.) The fact that these jurors were willing to "try again" despite reported impasse on the premeditation enhancement suggests they incorrectly believed Ramos would escape liability for attempted murder entirely if the jury did not reach a decision as to the enhancement, and felt pressured to reach such a decision. One of the juror's comments later in the trial reveals the extent of the pressure the jurors felt: the juror described that "after the deliberations when we proceeded to try again, there was a lot of emotions going on" and "a lot of crying." (12 RT 3341.)

A sworn declaration by one of the jurors also confirms that the instructional error pressured the jury to find the premeditation enhancement true. The juror avers the jury was "not able to decide unanimously on the issue of intent, willfulness, premeditation, and deliberation." (Ex. 24, Juror J.T. Decl., at ¶ 4.) The jury states "he was the last holdout" and "did not feel that the prosecutor proved that Mr. Ramos intended to commit this crime." (*Id.*) Nonetheless, the juror reports, he "voted with the majority to avoid a hung jury" once "the judge indicated that if we could not make up our minds, it would end up being a hung jury." (*Id.*)

In sum, Ramos has shown the trial court's instructional error was prejudicial under both the "reasonable likelihood" standard and *Chapman*'s "harmless beyond a reasonable doubt" standard. Accordingly, the jury's finding as to the premeditation enhancement must be vacated and Ramos must be resentenced.

CLAIM SEVEN: RAMOS WAS DEPRIVED OF A FAIR TRIAL AND HIS CONSTITUTIONAL RIGHTS BECAUSE OF THE CUMULATIVE EFFECT OF ERRORS, DEFICIENT PERFORMANCE OF HIS COUNSEL AND STATE MISCONDUCT THROUGHOUT HIS TRIAL.

Ramos's conviction and sentence were unlawfully and unconstitutionally imposed in violation of his rights to a trial by a fair and impartial jury, a reliable, fair, non-arbitrary, and non-capricious determination of guilt and penalty, the effective assistance of counsel, present a defense, confrontation and compulsory process, the privilege against self-incrimination, the enforcement of mandatory state laws, a trial free of materially false and misleading evidence, a fair trial, an impartial and disinterested tribunal, equal protection, due process of law and a fair and objective judicial determination pursuant to Penal Code section 190.4, subdivision (e) as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 1, 7, 9, 12, 13, 14, 15, 16, 17, 24, 27 and 28 of the California Constitution, customary international law, international human rights

law and *jus cogens*, and state law because of the cumulative impact of errors, misconduct, and ineffective assistance of counsel at his trial.

If Respondent disputes any of the facts alleged below, Ramos requests fact-development and an evidentiary hearing so that the factual disputes may be resolved.

To the extent that trial counsel failed to investigate, prepare, and litigate the issues contained herein during trial proceedings, trial counsel rendered ineffective assistance.

To the extent Ramos was required by state procedures to, but did not, allege this claim in his direct appeal proceeding, Ramos's appellate counsel was inadequate and ineffective such that Ramos should not be subject to any procedural bar to having merits review of this claim.

A. Legal Overview

Even when individual constitutional violations are each insufficient to warrant relief, a new trial is required if the errors in combination had a "substantial and injurious effect" on the verdict, so as to violate due process. *Fry v. Pliler*, 551 U.S. 112, 120 (2007); *Chambers v. Mississippi*, 410 U.S. 284, 298, 302-03 (1973). To succeed on this claim, a petitioner must show that more than one error occurred, and that the errors collectively rendered his proceeding unfair. *Chambers*, 410 U.S. at 298, 302-30.

When cumulative error claims are based solely on claims of ineffective assistance of counsel, habeas petitioners must merely meet the *Strickland* test of prejudicially deficient performance to show a constitutional violation. *Strickland v. Washington*, 466 U.S. 668, 695-96 (1984), requires courts to assess the aggregate impact of counsel's deficient actions when evaluating prejudice, and thus ineffective assistance claims have their own internal cumulative error component. *See Sanders v. Ryder*, 342 F.3d 991, 1000-01 (9th Cir. 2003) ("When we examine whether trial counsel gave effective assistance, we examine all aspects of the counsel's performance

at different stages, from pretrial proceedings through trial and sentencing. . . . Separate errors by counsel at trial and at sentencing should be analyzed together to see whether their cumulative effect deprived the defendant of his right to effective assistance."); *Libberton*, 583 F.3d at 1166.

When cumulative error claims are not based solely on *Strickland* claims, habeas relief is required when the combined prejudice of multiple constitutional errors "that might not be so prejudicial as to amount to a deprivation of due process when considered alone . . . cumulatively produce a trial setting that is fundamentally unfair." *Alcala v. Woodford*, 334 F.3d 862, 883 (9th Cir. 2003). Cumulative errors require relief "where the errors have 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Id.* at 927. "Such 'infection' occurs where the combined effect of the errors had a 'substantial and injurious effect of influence on the jury's verdict.'" *Id.* "In simpler terms, where the combined effect of individually harmless errors renders a criminal defense 'far less persuasive than it might otherwise have been,' the resulting conviction violates due process." *Id.*

The "substantial and injurious effect" standard is a lower burden of proof than the reasonable probability standard. *See Kyles*, 514 U.S. at 419; *Pirtle v. Morgan*, 313 F.3d 1160, 1173 n.8 (9th Cir. 2002) ("[A] harmless error analysis . . . involves a lower standard than *Strickland*'s standard for prejudice.")

B. The cumulative impact of trial counsel's deficient performance, the trial court's instructional errors, and the state's misconduct deprived Ramos of a fair trial.

Even with the constitutional errors that permeated Ramos's trial, the prosecution's case was weak. Ramos had no prior arrests, convictions, or acts of violence, making it clear to the jury that his actions on the night of June 14, 2011 were an aberration. The prosecutor had to resort to arguing to the jury that it had to forget how demonstrably compelling and sympathetic Ramos's circumstances were, and that

it must make "a decision with the mind not with the heart, with analysis not with pity." (9 RT 2556.) Even so, the jury viewed the case as a close one, with at least one sitting juror recalling that during the two-day deliberations, the jury was at an impasse on the issue of Ramos's intent. (Ex. 24, J.T. Decl., at ¶ 4.)[43] The multiple constitutional errors during Ramos's trial—including ineffective-assistance of counsel, the presentation of false testimony, and instructional error—tipped the balance toward conviction.[44]

The errors and violations in this case compounded upon each other and prevented the jury from assessing an accurate picture of Ramos's mental state at the time of the attack. For example, had the prosecution not presented false testimony, the case against Ramos have looked dramatically different. As explained in Claim Four, Officer Dickel's and Detective Pfarr's false testimony at the suppression hearing ultimately resulted in a jury hearing statements from Ramos that should never have been put before it. The statements he made during his interrogations gave a false impression of his intent and motive; the detrimental impact of these statements were exacerbated by Pfarr's false transcript suggesting Ramos believed something was wrong with the victim when he was instead relaying a delusion about the universe. (*See* Claim Four.) And his trial counsel's failure to present an effective defense and expert testimony explaining Ramos's mental condition prevented the jury from accurately contextualizing those custodial statements.

Moreover, Detective Pfarr's false testimony regarding Emily Medcalf, and trial counsel's failure to expose that false testimony to the jury through Medcalf's phone records, caused her to appear biased and for the prosecutor to label her a "liar." (Claim

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[43] Juror J.T. ultimately voted to convict "to avoid a hung jury." (*Id.*)

[44] Because this claim relies on the allegations of constitutional violations set forth throughout this petition, those allegations in Claims One through Six are incorporated by reference herein as if fully set forth.

Four.) Had counsel provided constitutionally adequate assistance, Pfarr's testimony would have been exposed as false and his credibility impugned. This would have potentially led the jury to disregard Pfarr's claim that Ljepava told him that Ramos acknowledged he would be getting in trouble because of the attack, something Ljepava during his testimony did not remember saying. Moreover, Medcalf's testimony that Ramos was not especially jealous, never violent, and seemed to have a "switch" or mental break before the attack, would have been credited; that testimony buttressed the defense theory that Ramos was psychotic and in the midst of a mixed-manic episode at the time.

Trial counsel's overarching failure to explain and present evidence of Ramos's impairments prevented the jury from rendering a verdict consistent with the defense, *i.e.*, concluding that Ramos was legally unconscious or otherwise lacked the requisite intent to commit the charged offenses. (*See* Claim Two.) But for this constitutionally inadequate representation, Ramos's jury would learned that the behavior he and others described him having around the time of the attack was, in fact, Effexor-induced psychosis and mania, which prevented him from having the executive functioning necessary to control his actions. (*Id.*)

At the very least, the jury may have found that Ramos committed some lesser-included offense. But instructional error gave the jury an impermissible all-or-nothing choice. The California Court of Appeal, considering *only* the record and not any of the extra-record evidence presented in this petition, found that the jury received an erroneous instruction that suggested Ramos could be guilty of attempted murder only if he acted with willfulness, premeditation, and deliberation—elements that were part of a separate enhancement. This instructional error, when considered cumulatively with the evidence kept from the jury due to ineffective-assistance and false testimony, prevented it from acquitting Ramos of attempted premediated murder but holding him accountable for some lesser crime.

In sum, absent the cumulative impact of the constitutional violations presented in this petition, the picture painted of Ramos and his mental condition on the night of the attack would have looked dramatically different, and more in accord with the truth. Indeed, because of newly-discovered evidence of Ramos's gene mutations, we know the truth: Ramos's attack was the product of Effexor toxicity, the direct result of his inability to adequately metabolize the drug. (*See* Claim One.) The manifestations of his behavior eerily mirror other cases where individuals taking similar drugs were similarly impaired by the same genetic mutation. (Ex. 43, Art. on CY450 Genes.) While a jury—even absent constitutional violations—may not have been able to learn of this gene defect at the time of Ramos's trial, it could have learned facts that would have allowed it to reach a verdict that reflected the reality we now know—that Ramos is innocent of attempted premediated murder. Accordingly, habeas relief is required.

VI. PRAYER FOR RELIEF

WHEREFORE, Petitioner prays that this Court:

1. Permit Petitioner, who is indigent, to proceed without prepayment of costs or fees;

2. Grant Petitioner the authority to obtain subpoenas in forma pauperis for witnesses and documents necessary to prove the facts alleged in this Petition;

3. Grant Petitioner and his counsel the right to conduct discovery, including the right to take depositions, request admissions, and propound interrogatories, as well as the means to preserve the testimony of witnesses;

4. Require Respondent to bring forth the entire state court records in the following cases so that this Court can review those parts of the record that are relevant to the issues and defenses raised in this proceeding: People v. Ramos, Superior Court Case No. F461346; his direct appeal, Case No. B244670; his initial state habeas action, In re Ramos, Case No. S229675, and the instant Petition;

5. Order respondent to show cause why Petitioner is not entitled to the relief sought;

6. Permit Petitioner to amend this Petition to allege any other basis for his unconstitutional confinement as it is discovered or becomes ripe for habeas review;

7. Conduct an evidentiary hearing at which proof may be offered concerning all of the allegations in this Petition;

8. Issue a writ of habeas corpus to have Petitioner brought before this Court to the end that he might be discharged from his unconstitutional confinement and restraint and/or relieved of his unconstitutional sentences imposed in San Luis Obispo County Superior Court Case No. F461346; and,

9. Grant such relief as this Court may deem appropriate.

Respectfully submitted,

HILARY POTASHNER
Federal Public Defender

DATED: September 12, 2019

By: _____
JOSEPH A. TRIGILIO
RAJ SHAH
Deputy Federal Public Defenders

Attorneys for Petitioner
JOHNATHON RAMOS

VII. VERIFICATION

I, Joseph A. Trigilio, declare as follows, under penalty of perjury:

1. I am an attorney with the Office of the Federal Public Defender. I am admitted to practice law in the State of California, and I am admitted to practice in this Court.

2. I have read the foregoing Petition for Writ of Habeas Corpus and declare that the facts alleged are true to the best of my knowledge based upon my reading of what I know to be true copies of documents in this action.

3. I am authorized by Johnathon Ramos to file this Petition for Writ of Habeas Corpus on his behalf. I make this verification because the truth and accuracy of the facts contained herein are more within my knowledge than Ramos.

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

Executed September 12, 2019 at Los Angeles, California

JOSEPH A. TRIGILIO

PROOF OF SERVICE

I, Stephanie Verhamme, declare that I am a resident or employed in Los Angeles County, California; that my business address is the Office of the Federal Public Defender, 321 East 2nd Street, Los Angeles, California 90012-4202, Telephone No. (213) 894-2854; that I am over the age of eighteen years; that I am not a party to the action entitled above; that I am employed by the Federal Public Defender for the Central District of California, who is a member of the Bar of the State of California, and at whose direction I served a copy of the attached **Petition for Writ of Habeas Corpus; Exhibits** on the following individual(s) by:

[X] Placing same in a sealed envelope for collection and interoffice delivery addressed as follows:	[ ] Placing same in an envelope for hand delivery addressed as follows:	[ ] Placing same in a sealed envelope for collection and mailing via the United States Post Office addressed as follows:	[ ] Faxing same via facsimile machine addressed as follows:

San Luis Obispo County District Attorney's Office
1035 Palm St,
San Luis Obispo, CA 93408

Johnathon Ramos, CDC#: AM7408
Mule Creek State Prison
P. O. Box 409099
Ione, CA 95640

This proof of service is executed at Los Angeles, California, on September 12, 2019.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

S. Verhamme

Stephanie Verhamme