

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SECOND APPELLATE DISTRICT  
DIVISION TWO

In re AMY HO

Petitioner,

on Habeas Corpus.

Habeas Corpus  
Case No. B291923

Related Court of Appeal  
Case No. B279939

Los Angeles Superior Court  
Case No. BA395107

A petition for writ of habeas corpus  
from a judgment of the Superior Court  
of the State of California for the County of Los Angeles,  
The Honorable George G. Lomeli, Judge Presiding

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**PETITIONER'S TRAVERSE TO ORDER TO SHOW CAUSE**

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Case No. 291923

Related Court of Appeal  
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Los Angeles Superior Court  
Case No. BA395107

**PETITIONER'S TRAVERSE TO ORDER TO SHOW CAUSE**

By this Traverse, Petitioner Amy Ho, by and through her attorneys, Dmitry Gorin and Alan Eisner, responds to Respondent's Return to Order to Show Cause.

Petitioner realleges and incorporates each of the allegations contained in the Petition for Habeas Corpus filed on August 10, 2018, together with the attached exhibits, declarations and memorandum.

**DENIAL OF ALLEGATIONS IN RETURN TO ORDER TO SHOW CAUSE**

1. Petitioner agrees with respondent's summary of the charges and not guilty plea.
2. Petitioner agrees with respondent's summary of the verdicts.
3. Petitioner agrees with respondent's summary of the procedural history of the motion for new trial.

4. Petitioner agrees with respondent's description of the sentence.

5. Petitioner agrees that the judgment of conviction is currently pending on direct appeal before this Court in case number B279939.

6. Petitioner agrees that this Court has original jurisdiction over the petition.

7. Petitioner agrees that petitioner is currently incarcerated at the California Institute for Women, Cornea, California, pursuant to the judgment in Los Angeles County Superior Court case number BA395107. Contrary to respondent's denial, petitioner alleges she is unlawfully incarcerated.

8. Petitioner agrees that Molly Hill is the Warden of the California Institute for Women and that she is the custodian of petitioner, but denies that she is the "legal" custodian of petitioner, as petitioner is unlawfully incarcerated.

9. Petitioner agrees that she cared for her sister, Cora Sam, who suffered from mental disabilities, including an IQ of 9. Contrary to respondent's denial, petitioner realleges that she made many attempts to place Sam in a nursing home, but was rejected because the nursing home staff considered her demands to be unreasonable. Petitioner admits that she removed Sam from a nursing home on September 11, 2008. Petitioner denies that she "failed to meet with [social worker Nhon] Ly to complete the Individual Placement Program" (Answer, p. 7); rather, petitioner alleges that Lhy testified that she *did* complete an initial Individual Placement Program ("IPP") with Lhy in 2007

(7RT 1049), but agrees that Lhy testified that in 2008, Lhy's attempts to set up a new IPP were unsuccessful as Ms. Ho consistently told him that she was busy. (7RT 1034; see 7RT 1054-1055.) Petitioner admits that both Ly and service coordinator George Rodriguez provided petitioner with the names of vacancies in facilities.

Petitioner denies that she was unwilling to allow the Jo-Mi ICF Facility to review Sam's diet; rather, petitioner alleges that she was unwilling to allow the facility to have the final say in Sam's diet as petitioner wanted her sister to follow the diet recommendations of a specific doctor who already dealt with Sam. (9RT 1584.) Petitioner denies respondent's characterization that she would not permit a head-to-toe examination of Sam for bedsores; rather, petitioner alleges that the examination was never permitted because of petitioner's unresolved issue with the diet, as testified to by registered nurse Cecilia Cuevas. (9RT 1587.) Petitioner agrees that other facilities denied admission to Sam, because of the difficulties in working with petitioner.

10. Petitioner agrees with respondent's summary of petitioner's bringing Sam to the hospital and the interactions with medical staff.

11. Contrary to respondent's characterization, petitioner alleges that Dr. Yulai Wang initially wavered and testified he could not say whether the pneumonia or the ulcers caused the sepsis, and instead explained it could be either one. Only subsequently did Dr. Wang state that both the sores and pneumonia caused the sepsis. Petitioner agrees that Dr. John

Fullerton testified the sepsis was caused by the infected decubitus ulcers with a contributing factor of pneumonia. At the same time, petitioner agrees that Dr. Fullerton testified that, without a culture, it was not possible to make a final determination as to whether the bacteria was due to bedsores or pneumonia. Contrary to respondent's denial, petitioner realleges that Dr. Fullerton did testify that he believed the sepsis would have been present even without the infected decubitus ulcers due to Sam's pneumonia. (12RT 2754.)

12. Contrary to respondent's denials, petitioner realleges that petitioner's imprisonment in unlawful and realleges that she was deprived of her rights under the Sixth Amendment to the United States Constitution and article I, section 15, of the California Constitution to effective assistance of counsel and that petitioner was thereby prejudiced.

13. Contrary to respondent's denials, petitioner realleges that trial counsel was ineffective and, in particular, ineffective for failing to present a mental health argument.

14. Contrary to respondent's denial, petitioner realleges that trial counsel was ineffective for failing to present the testimony of a pathologist such as Dr. Sheridan.

15. Contrary to respondent's denial, petitioner realleges that trial counsel was ineffective for failing to challenge the search warrant on staleness grounds.

16. Contrary to respondent's denial, petitioner realleges that trial counsel was ineffective for failing to object to the

testimony of Chris Cardenas. Petitioner agrees that this Court found no merit in this argument.

17. Contrary to respondent's denial, petitioner realleges that trial counsel was ineffective for failing to object to the court's instruction that the jury not consider lesser included offenses until reaching a verdict on the greater offenses.

18. Contrary to respondent's denial, petitioner realleges that trial counsel was ineffective by failing to zealously advocate for petitioner by failing to file a written motion because he was too busy, forgot to argue a critical defense, and berated petitioner. Also contrary to respondent's denial, petitioner realleges that the totality of counsel's alleged errors cumulatively prejudiced petitioner.

19. Petitioner agrees that petitioner has presented facts in support of her claim.

20. Petitioner agrees that she is currently incarcerated at the California Institute for Women, Corona, California, pursuant to a judgment in Los Angeles County Superior Court case number BA395107. Contrary to respondent's denial, petitioner realleges that she is unlawfully incarcerated.

21. Petitioner agrees that her habeas counsel sent trial counsel a letter with detailed questions pertaining to his representation of petitioner.

22. Petitioner agrees that trial counsel responded to habeas counsel by letter, indicating that the questions posed to him were premature because a petition for writ of habeas corpus had not been filed and an order for discovery had not issued.

Petitioner agrees that trial counsel indicated his intention was to cooperate and that he was not refusing to cooperate.

23. Petitioner agrees that habeas counsel sent trial counsel a reply and received no further response from trial counsel.

24-27. Petitioner agrees that, following petitioner's conviction, Dr. Richard I. Romanoff conducted an evaluation of petitioner. Contrary to respondent's uncertainty, petitioner realleges that the evaluation was thorough. Petitioner agrees that Dr. Romanoff concluded that there was strong support for the finding that petitioner suffers from obsessive-compulsive personality disorder and likely from a hoarding disorder. Petitioner agrees that Dr. Romanoff, in his report, came to certain conclusions about petitioner's condition and its effect on her care for her sister.

28. Petitioner agrees that trial counsel did not present information from Dr. Romanoff's report, which was only prepared after trial.

29. Petitioner agrees that Errol Stambler is a criminal defense lawyer and that he reviewed the record in this case and reached certain conclusions. Petitioner further alleges that Mr. Stambler is certified by the California State Bar as a criminal law specialist. Petitioner denies that the conclusions of another attorney are not determinative of the claims of ineffective assistance and are nothing more than legal argument presented as facts. Rather, petitioner avers that Mr. Stambler's statements describing objective standards of defense counsel are factual

assertions and that Mr. Stambler's conclusions of trial counsel's representation qualify as an expert opinion.

30. Petitioner agrees that trial counsel hired pathologist Dr. Bonnell, who subsequently became unavailable during trial. Petitioner denies that trial counsel's decision to proceed without a pathologist was informed and reasonable. Contrary to respondent's denial, petitioner realleges that the reliance by Dr. Fullerton on Dr. Bonnell's reports was insufficient. Petitioner agrees that the record is silent as to whether trial counsel attempted to find a new pathologist. Contrary to respondent's denial, petitioner realleges that trial counsel provided ineffective assistance by not presenting the testimony of a pathologist. Contrary to respondent's denial, petitioner realleges that a pathologist's testimony was necessary to adequately address prosecution witness Dr. Homeier's claims.

31-34. Petitioner agrees that, after petitioner was convicted, her medical records were submitted to Dr. Frank Sheridan, who agreed with the causes of death described in the autopsy report but opined there was no compelling evidence that Sam's death was the result of caretaker neglect.

35. Petitioner agrees that a search warrant to search petitioner's residence for the residual scent of human remains was issued on October 15, 2011, 15 days after Sam's death. Petitioner agrees that trial counsel did not challenge the warrant on staleness grounds and that no tactical reason for failing to do so is presented in the record.

36. Contrary to respondent's denial, petitioner realleges that a proposed search for the scent of human remains 15 days after Sam's death did not justify the issuance of a search warrant. Contrary to respondent's denial, petitioner realleges that trial counsel was ineffective for failing to challenge the search warrant on staleness grounds.

36G. Petitioner agrees that the jury was instructed not only on second-degree murder and dependent adult abuse resulting in death, but also on the lesser charges of involuntary manslaughter and misdemeanor adult abuse. Petitioner agrees the trial court instructed the jury that it must unanimously vote not guilty on the greater crime before considering the lesser crime.

37. Petitioner agrees that trial counsel did not object to the court's instruction on how to proceed on the lesser charges. Petitioner agrees that, pursuant to *People v. Kurtzman* (1988) 46 Cal.3d 322, a jury is permitted to consider a lesser-included charge even before deciding to acquit on the greater charge. Contrary to respondent's denial, petitioner realleges that this was instructional error and that the error was prejudicial.

38-42. Contrary to respondent's denial, petitioner realleges that trial counsel was ineffective for failing to object to the testimony of Chris Cardenas. Petitioner agrees that this Court found no merit in this argument.

43-44. Petitioner agrees that trial counsel and petitioner communicated by e-mail at times. Petitioner agrees that counsel told petitioner she should hire another attorney to

file a written motion. Contrary to respondent's denial, petitioner realleges that trial counsel's advice to hire another attorney instead of filing the motion himself was ineffective assistance. Petitioner denies that this advice was within the range of professional competence. Contrary to respondent's allegation, petitioner realleges that she was prejudiced by trial counsel's ineffective assistance.

45. Contrary to respondent's denial, petitioner realleges that trial counsel provided ineffective assistance by forgetting to argue petitioner's lack of financial motivation during closing argument. Petitioner denies that trial counsel's focusing on other issues and forgetting to raise the lack of financial motivation was not ineffective assistance. Contrary to respondent's allegation, petitioner realleges that she was prejudiced by trial counsel's ineffective assistance.

46-47. Petitioner agrees that trial counsel's e-mails with petitioner were not the best means of communication, and avers that they in fact reflected poor and insulting communication. Contrary to respondent's allegation, petitioner realleges that trial counsel's inability to get along with petitioner, trial counsel's insulting language towards petitioner, and the lack of trust demonstrated ineffective assistance and that petitioner was prejudiced even though the communications were not presented to the jury.

48. Petitioner agrees that she has not previously presented her grounds for relief on habeas corpus, but has

previously presented them on direct appeal, which is still pending.

49-50. Petitioner agrees this Court determined petitioner raised arguments on direct appeal that required inquiry into matters outside the appellate record and this Court invited petitioner to file a petition for writ of habeas corpus.

51. Petitioner agrees that the petition is being presented to this Court under its original habeas corpus jurisdiction and that petitioner's direct appeal is pending before this Court.

52. Petitioner agrees that she is moving to have the petition heard concurrently with the appeal. Although respondent submitted that the direct appeal can be decided without deciding the habeas issues concurrently, petitioner submits that the direct appeal and habeas should be decided concurrently as the direct appeal raises some of the same issues raised in the habeas.

53. Petitioner agrees that she incorporated by reference the memorandum accompanying the petition and the declarations attached to it. Petitioner also incorporated the exhibits attached to the petition. Petitioner also incorporates the memorandum of points and authorities attached to this traverse.

54. Petitioner notes that respondent has concurred in petitioner's request for this Court to take judicial notice of the record on appeal in petitioner's pending direct appeal.

55. Except as expressly stated, petitioner denies each and every allegation of the return and disputes each and every denial in the return.

56. Petitioner realleges and incorporates each of the allegations contained in the Petition for Habeas Corpus filed on August 10, 2018, together with the attached exhibits, declarations and memorandum.

WHEREFORE, petitioner respectfully requests that this Court:

1. Consolidate this habeas corpus proceeding with case number B279939;
2. Take judicial notice of the record and pleadings in the above-mentioned appeal;
3. Find the Return insufficient as a matter of law, and therefore accept the truth of the Petition's allegations as incorporated here and grant the Petition without an evidentiary hearing;
4. After full review of the issues raised in this proceeding, grant the Petition and vacate the judgment in *People v. Amy Ho*, Los Angeles Superior Court case number BA395107; and
5. Grant petitioner further relief as may be appropriate in the interests of justice.

Respectfully submitted,

Dated: December 10, 2018

/S/ ALAN EISNER

ALAN EISNER / DMITRY GORIN  
Attorneys for Petitioner  
AMY HO

## VERIFICATION

I, Alan Eisner, declare as follows:

1. I am an attorney admitted to practice law in the State of California. I have been retained to represent petitioner in her direct appeal to this Court and to prepare the accompanying petition for a writ of habeas corpus.

2. I make this verification because petitioner is incarcerated at the California Institution for Women, in Corona, California, which is outside the county in which my office is located, and because the matters stated in the traverse are more within my knowledge than hers.

3. I have read the foregoing traverse, and declare that the contents of the traverse are true.

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

Executed this 10<sup>th</sup> day of December at Los Angeles, California.

/S/ ALAN EISNER

ALAN EISNER  
Attorney for Petitioner  
AMY HO

## **MEMORANDUM OF POINTS AND AUTHORITIES**

### **PETITIONER PROPERLY INCORPORATES THE PETITION'S ALLEGATIONS**

Petitioner began this traverse by incorporating and reasserting all allegations in her habeas corpus petition (“petition”). According to the Supreme Court, incorporation is a valid way to allege facts. (*People v. Romero* (1994) 8 Cal.4th 728, 739 [“The petitioner’s response to the return, commonly known as the traverse, may incorporate the allegations of the petition”].)

### **HABEAS CORPUS IS A PROPER VEHICLE FOR THE PRESENTATION OF PETITIONER’S CLAIM**

The claim asserted in this petition is that petitioner was deprived of her constitutional right to effective assistance of counsel. This claim cannot be presented as strongly on appeal as it is herein because its factual basis rests in part on evidence not included in the record on appeal. (See *In re Hochberg* (1970) 2 Cal.3d 870, 875.) A petition for writ of habeas corpus is the proper remedy to attack collaterally a judgment that has been obtained in violation of fundamental constitutional rights. (*People v. Adamson* (1949) 34 Cal.2d 320, 327.) Ineffective assistance of counsel is appropriately brought by way of writ. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266–267.)

For all these reasons, habeas corpus is the proper procedure for resolution of the claims included herein. Respondent did not allege otherwise.

**THIS HABEAS CORPUS PETITION SHOULD BE  
CONSOLIDATED WITH PETITIONER’S DIRECT APPEAL**

This habeas corpus petition contests the legality of the judgment of conviction and sentencing order entered December 16, 2016, in *People v. Amy Ho*, Los Angeles Superior Court case number BA395107. Petitioner has appealed her conviction to this Court and petitioner’s direct appeal is pending in case number B279939.

When, as here, a petitioner seeks habeas corpus relief in conjunction with a pending direct appeal, it is appropriate for the reviewing court to consolidate the two proceedings so that all claims may be heard and resolved at one time in a single forum. (*In re Baker* (1988) 206 Cal.App.3d 493, 496; *People v. Pope* (1979) 23 Cal.3d 412, 426, fn. 17.)

Moreover, this Court, after reviewing the claim of ineffective assistance in Ho’s direct appeal, specifically requested the claim of ineffective assistance of counsel be brought by way of writ.

**STATEMENT OF THE CASE**

A two-count felony information was filed on September 25, 2013, charging Amy Ho with (1) murder of Cora Sam (“Sam”) (Pen. Code, § 187, subd. (a)) and (2) elder or dependent adult abuse, resulting in death (Pen. Code, § 368, subd. (b)). (1CT 244-245.) It was also alleged as to count two that Ms. Ho proximately caused the death of Sam, age 60 years (Pen. Code, § 368, subd. (b)(3)(A)). (1CT 245.)

A jury convicted Ms. Ho of both charges on July 8, 2016 and found true the allegation in count two that Ms. Ho proximately caused the death of Sam, who was under the age of 70 years. (4CT 929-930.)

Ms. Ho filed a motion for a new trial. (5CT 1049.) The trial court denied the motion and refused to permit Dr. Richard Romanoff and attorney Errol Stambler to testify about issues raised in the motion. (5CT 1324; 14RT 4205-4206, 4221.)

Ms. Ho was sentenced on December 16, 2016. On count one, Ho was ordered to serve 15 years to life in State prison. (5CT 1324.) On count two, Ms. Ho was ordered to serve the midterm of three years plus five years for the enhancement. (5CT 1325.) The sentence in count two was stayed pursuant to section 654. (5CT 1325-1326.) She was ordered to pay fines and fees.

A direct appeal is currently pending before this Court in Court of Appeal case number B279939.

### **STATEMENT OF FACTS**

Petitioner realleges and incorporates the statement of facts set forth in the Petition. (Petition, pp. 31-59.)

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## ARGUMENT

### **I. Ms. Ho's Convictions Should Be Reversed As She Received Ineffective Assistance of Counsel**

#### **A. Trial Counsel's Failure to Present a Mental Health Argument**

##### **1. Respondent Has Failed to Allege Facts Rebutting Ms. Ho's Prima Facie Case for Relief**

In Ms. Ho's petition, it was argued that Ms. Ho received ineffective assistance of counsel under the Sixth Amendment to the United States Constitution and Article 1, section 15 of the California Constitution due to trial counsel's failure to present a mental health defense at trial. This argument relied on a post-conviction assessment by Dr. Richard I. Romanoff, who conducted a thorough evaluation of Ms. Ho, as well as a review of the relevant materials by certified criminal law specialist Errol H. Stambler.

Respondent did not deny Dr. Romanoff's diagnosis of Ms. Ho's mental health (Answer, p. 9, ¶¶ 24-27), nor aver that another psychiatrist would arrive at a different diagnosis.

Respondent instead argued that (1) "the proposed mental health defense petitioner claims should have been presented does not amount to a defense to the charge of implied malice murder" and (2) "the jury was fully apprised of petitioner's difficulties with being obsessive-compulsive, hoarding, and her devotion to her sister." (Return, pp. 18-19.) As respondent failed to allege any facts rebutting Ms. Ho's prima facie case for relief, and as

respondent's argument fails to undermine this Court's determination, relief is warranted.

## **2. Ms. Ho's Mental Health Was Relevant to a Determination of Malice**

First, Ms. Ho's mental health is absolutely relevant to a determination of whether or not she acted with implied malice. In fact, Penal Code sections 28 and 29 explicitly " 'permit introduction of evidence of mental illness when relevant to whether a defendant actually formed a mental state that is an element of a charged offense.' [Citation.]" (*People v. DeHoyos* (2013) 57 Cal.4th 79, 120; see *People v. Herrera* (2016) 247 Cal.App.4th 467, 474-480 [holding that trial court erred in precluding defense from presenting psychiatrist's testimony as to how the defendant's mental health affected him at the time of the offense]; *People v. Cortes* (2011) 192 Cal.App.4th 873, 912 [holding that trial court erred in precluding defense from presenting psychiatrist's testimony that would have allowed the jury to infer the defendant did not act with malice].)

While Dr. Romanoff would not have been allowed to testify as to whether Ms. Ho had the capacity to form malice (Pen. Code, § 28, subd. (a)) or whether Ms. Ho did act with malice (Pen. Code, § 29), his testimony – or that of any other psychiatrist – on Ms. Ho's mental health issues would have allowed the jury to determine whether the prosecution had proven beyond a reasonable doubt that Ms. Ho "*actually appreciated* the risk involved" in the act or omission, as required for implied malice

murder. (*People v. Watson* 30 Cal.3d 290, 296-297, emphasis added.) Such testimony would have described obsessive-compulsive personality disorder – “a preoccupation with orderliness, perfectionism, and mental and interpersonal control, at the expense of flexibility, openness, and efficiency’ ” (5CT 1157 – and how Ms. Ho’s suffering from that disorder shed light on her inflexible insistence on a specific diet for Sam, her inflexible insistence on colloidal silver as the appropriate remedy for Sam, and her inflexible insistence that she continue to have unconditional access to Sam when considering facilities for Sam.

As described by Dr. Romanoff, Ms. Ho’s “often repeated descriptions of attempts to force her sister to swallow or to methodically apply colloidal silver and bandages makes complete sense when considered in the context of” Ms. Ho’s obsessive-compulsive personality disorder; it is, therefore, “a fundamental misunderstanding to attribute these activities to any absence of care or concern by Ms. Ho for her sister.” (5CT 1160.) Because Ms. Ho was “[p]rogrammed [by her illness] to rigidly persist with the pattern of activities that had worked in the past..., it was not until her sister’s situation deteriorated to a point of no return that she finally recognized the seriousness of the situation in the hours preceding her arrival at the emergency room. (5CT 1160, second brackets in original.)

Dr. Romanoff found that, in addition to suffering from obsessive-compulsive personality disorder, Ms. Ho “likely also suffers from a hoarding disorder.” (5CT 1157.) He also observed “evidence of impaired reasoning and judgment by Ms. Ho in

connection with her care of her sister in the final days of her sister's life." (5CT 1157.)

These disorders were contextualized by Dr. Romanoff's findings of "clear and consistent evidence that from her early childhood years and continuously through her sister's death, Ms. Ho maintained a consistently loving and caring attitude toward her sister. Regularly at her own expense, both financially and psychologically, she worked to care for her sister, in an effort to make her life as pleasant and enjoyable as possible." (5CT 1158.) This "lifelong devotion to her sister, that included fastidious and extremely detail oriented care, often provided by her, and often demanded by her of others who were responsible for her sister's care, was a direct contributing factor to her sister's longevity." (5CT 1158.) Dr. Romanoff did not see "an lack of concern or care by Ms. Ho towards her sister" or "any indifference or frustration by Ms. Ho towards her sister." (5CT 1159.)

As criminal law specialist Errol Stambler determined, "[t]he utter failure of having any expert testify as to the mental makeup and belief of the accused was ineffective assistance at best and malpractice at worst....The jury never heard about the motivation of care and love that Ms. Ho had toward her sister." Stambler opined that Dr. Romanoff's testimony "would be a complete defense to all charges brought against Ms. Ho" as "[t]he testimony would clearly show to the jury that Ms. Ho cared for her sister and that Ms. Ho's entire life was devoted to the well-being of her sister." (5CT 1314.) He elaborated:

Defense counsel for Ms. Ho actually must have realized the necessity for a mental health expert to testify [as] seen in his email [5CT 1212] when he writes to Ms. Ho on July 3, 2016, stating ‘[W]hatever was not done by accident, was therefore done ‘willfully.’ It is the lowest form of ‘mental state’ (assuming you can even call it a mental state) known in law other than strict liability.’ The email goes on to say what a ‘reasonable person’ should realize which tends to beg the question of the mental status of Ms. Ho’s belief that what she was doing for her sister was in her sister’s best interest. The fact that Ms. Ho apparently devoted her entire life to the well-being of her sister requires, under *Strickland*,<sup>[1]</sup> that the mental health issue of the defendant becomes central to her defense.

(5CT 1315.)

**3. While the Jury Was Provided with Some of the Facts *Relied Upon* in Dr. Romanoff’s Diagnosis, the Jury Was Provided With No Diagnosis, No Explanation of a Disorder, and No Explanation of How a Disorder Would Have Affected Ms. Ho’s Cognitive Processes**

Respondent’s argument that “[a]ll of the mental health issues that petitioner claims should be presented to the jury through the testimony of a mental health professional were, in fact, presented to the jury through lay witnesses” is without merit.

Respondent pointed to “evidence petitioner was a hoarder”

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<sup>1</sup> *Strickland v. Washington* (1984) 466 U.S. 668 (*Strickland*).

and evidence that “petitioner was difficult to work with and wanted to do things her own way.” (Answer, p. 19.) Respondent cited no portion in the record to support its argument that “the jury was fully apprised of petitioner’s difficulties with being obsessive-compulsive...” (Answer, p. 19.) Regardless, such evidence about specifics of Ms. Ho’s behavior falls far short of a medical diagnosis, an explanation of a diagnosed disorder by an expert, and an explanation as to how Ms. Ho’s conduct with regards to Sam would have been affected by her disorder. Thus, even if jurors were to infer that Ms. Ho suffered from obsessive-compulsive disorder, the jurors would have been unlikely to understand how the disorder – most popularly associated with compulsive hand-washing and cleanliness – would have impacted Ms. Ho’s mindset and conduct in a case involving negligent conduct of a dependent adult.

#### **4. No Reasonable Strategy Supported Failing to Present a Mental Health Defense**

The evidence at trial was clear that Ms. Ho failed to provide proper care for her sister. Thus, aside from the question of whether the inadequate care definitively contributed to Sam’s death, the only other viable defense was that Ms. Ho lacked malice in her conduct. Expert medical testimony that Ms. Ho suffered from mental health disorders that affected her perception of Sam’s needs and her own care of Sam was critical to establishing this lack of malice. In a case in which the defendant

drove the victim to the hospital and seemed oblivious to the fact that the victim was deceased, no reasonable strategy could fail to account for the role of a mental health disorder in Ms. Ho's behavior.

## **5. The Deficient Representation Was Prejudicial**

Even assuming the evidence supported a finding that caretaker neglect caused Sam's death, the evidence was far from overwhelming as to Ms. Ho's mental state with regards to care of Sam. Rather, the evidence painted a complicated and often paradoxical picture.

Evidence was presented that Ms. Ho did complete an initial individual program plan with social worker Ly, but then failed to complete any follow-up individual program plan with Ly or service coordinator George Rodriguez. (7RT 950, 1034, 1049, 1054.) At the same time, evidence was also presented that, when Ms. Ho and Sam were assigned to Ly, Ms. Ho faxed over weekly letters to the Eastern Los Angeles Regional Center for the Developmental Disabled asking for a new service coordinator (12RT 2781, 2783), indicating that she *did* wish to see Sam placed in a facility. Ms. Ho stated in one of those letters that she had discovered vacancies and referrals on her own that Ly had not informed her about (12RT 2783-2784), further indicating that she was spending her own time to ensure Sam placed in a facility. Additionally, Ms. Ho did at least visit the facilities to see if they were suitable to Ms. Ho's standards of care for Sam, rather than

ignore recommendations of facilities outright.

The prosecution's theory was that Ms. Ho's insistence on specific and sometimes unrealistic requirements with each facility could be interpreted as part of a diabolical plan to prevent Sam from obtaining proper care. More likely, however, Ms. Ho's decades as the primary source of care for her sister combined with her mental health issues produced in her an irrational insistence that only she knew exactly what was required to care for her sister. Yet without expert testimony about Ms. Ho's mental health issues, the jury was unable to understand what drove her behavior.

As trial counsel's failure to present evidence of Ms. Ho's mental health issues was deficient, prejudicial, and not justified by any strategy, Ms. Ho received ineffective assistance of counsel under the Sixth Amendment to the United States Constitution and article I, section 15, of the California Constitution, such that both convictions must be reversed. (*Strickland, supra*, 466 U.S. at p. 687; *People v. Ledesma* (1987) 43 Cal.3d 171, 218.)

**B. Trial Counsel Provided Prejudicially Deficient Representation by Failing to Present Testimony of a Pathologist**

**1. Respondent Has Failed to Allege Facts Rebutting Ms. Ho's Prima Facie Case for Relief**

Mid-trial, defense witness and pathologist Dr. Bonnell suffered a heart attack and was unable to testify. The trial court

denied a defense motion for a mistrial, relying largely on the fact that another defense witness, physician Dr. Fullerton, would be able to testify to Dr. Bonnell's findings, even though Dr. Bonnell had been the only one to review the evidence in the coroner's office and had more clinical hands-on experience than Dr. Fullerton. (11RT 2401-2402, 2407-2409, 2414-2415.)

In Ms. Ho's petition, it was argued that Ms. Ho received ineffective assistance of counsel under the Sixth Amendment to the United States Constitution and Article 1, section 15 of the California Constitution due to trial counsel's failure to secure a new pathologist mid-trial following Dr. Bonnell's sudden inability to testify. This argument relied on a post-conviction report completed by pathologist Dr. Frank Sheridan, who reviewed the relevant medical records in this case. (5CT 1187-1193.)

Respondent did not allege any facts rebutting Ms. Ho's prima facie case for relief. Instead, respondent argued that "counsel had no opportunity to find and retain another expert" and that Dr. Fullerton's testimony sufficiently covered Dr. Bonnell's intended testimony.

As respondent failed to allege any facts rebutting Ms. Ho's prima facie case for relief, and as respondent's argument fails to undermine this Court's determination, relief is warranted.

## **2. Trial Counsel Had Sufficient Opportunity to Obtain a New Pathologist**

Trial counsel learned of Dr. Bonnell's inability to testify on the morning of Saturday, June 25, 2016. (11RT 2401.) The

evidence portion of the trial ended on June 29, 2016. Accordingly, trial counsel had four days to obtain a pathologist who, like Dr. Fullerton, could have reviewed Dr. Bonnell's notes, but who, *unlike* Dr. Fullerton, would be able to testify with the expertise of a pathologist.

Moreover, even if, for example, trial counsel had contacted a pathologist on Monday, June 27, 2016, and the pathologist stated he or she would need an extra day to prepare, trial counsel would have had good cause to seek a short one-day mid-trial continuance pursuant to Penal Code section 1050. (See *People v. Jenkins* (2000) 22 Cal.4th 900, 1037 ["When a continuance is sought to secure the attendance of a witness, the defendant must establish 'he had exercised due diligence to secure the witness's attendance, that the witness's expected testimony was material and not cumulative, that the testimony could be obtained within a reasonable time, and that the facts to which the witness would testify could not otherwise be proven.'"].)

Thus, while the circumstances certainly required trial counsel to act promptly, trial counsel had sufficient opportunity to obtain a new pathologist.

### **3. A Pathologist Would Have Been in a Better Position to Explain the Facts Necessary to the Defense Than Physician Dr. Fullerton**

A review conducted by pathologist Dr. Sheridan following Ms. Ho's conviction demonstrates how a pathologist's testimony would have been more helpful to the defense theory of the case

than physician Dr. Fullerton's.

Although Dr. Sheridan agreed with the autopsy report that Sam "died of sepsis due to gangrenous decubitus ulceration and/or bronchopneumonia," he disagreed with the purported "manner of death." (5CT 1188.) He noted that the pneumonia was likely aspiration pneumonia, which "is typically rapid in progression due to the irritant effect of food and gastric acid on the alveolar tissue in the lungs." (5CT 1188.) Moreover, due to Sam's difficulties with eating, "aspiration pneumonia [was] a constant danger" that could have "occur[ed] even when the patient [was] being well cared for." (5CT 1188.)

Dr. Sheridan also concluded that Sam's malnourished state did "not necessarily imply she was not being fed. There was liquid food material in the stomach at autopsy. Cora Sam's weight was not exceptionally low. She was a generally small person. Also, people in a terminal state will often appear undernourished or malnourished due to their generalized catabolic state." (5CT 1188.)

Dr. Sheridan agreed with Dr. Fullerton's assessment that "[t]he sepsis in this case could have been caused by the pneumonia *or* the infected decubitus ulcer, possibly a combination of the two." (5CT 1188, emphasis added.) Dr. Sheridan also stated that he was "familiar with Kennedy terminal ulcers" and believed that Dr. Fullerton was in the best position to testify on that subject. (5CT 1188.) Dr. Sheridan did additionally note that, "[f]rom a pathology standpoint, it can be said that skin, or any other organ, when inadequately perfused,

can develop very rapidly evolving infections with resulting gangrenous necrosis.” (5CT 1188-1189.)

Based on his analysis, Dr. Sheridan disagreed with Dr. Homeier’s assessment and concluded that “there [was] not compelling evidence in this case to attribute Cora Sam’s death to caretaker abuse or neglect.” (5CT 1189.)

By contrast, Dr. Fullerton’s testimony focused on the regularity with which decubitus ulcers develop when a patient enters terminal decline. (12RT 2722-2725, 2735.) Dr. Fullerton opined that the ulcers were Kennedy ulcers, which develop very rapidly “within 48 hours of death – sometimes [within] a week of death, but 48 hours in particular...” (12RT 2729.)

Thus, while there was certainly some level of overlap between Dr. Fullerton’s testimony and what Dr. Sheridan or another pathologist would have testified to, a pathologist would have been better situated to shed light on how rapidly gangrenous necrosis can develop on the skin. The length of time that the wounds had been present on Sam’s skin was a critical issue in determining how responsive or unresponsive Ms. Ho was to Sam’s medical needs, and what role any negligent care played in Sam’s death. As criminal law specialist Errol Stambler noted, “[t]o substitute in place of Dr. Bonnell, a certified pathologist, who reviewed the coroner’s documents that formed his expert opinion, with Dr. Fullerton, who is not a pathologist, was a fundamental error.” (5CT 1316.)

#### **4. The Deficient Representation Was Prejudicial**

Whether or not caretaker neglect had been a contributing factor to Sam's death was a disputed issue and relevant to Ms. Ho's defense.

Prosecution witness and coroner Dr. Yulai Wang initially wavered and stated that he could not say whether the pneumonia or the ulcers caused the sepsis. Pneumonia, an infection of the lungs, causes difficulty breathing. (8RT 1232-33.) He explained that "it could be either one. That's why I put down both pneumonia and the decubitus ulcers as the underlying source for the sepsis." (5T 1249.) But then he changed his stance again and stated that "both contributed to develop sepsis." (8RT 1251.)

While defense witness and physician Dr. Fullerton opined that both the pneumonia and ulcers caused the sepsis (12RT 2754), he testified that without a culture of the bacteria, it was impossible to make a final determination as to whether the cause of sepsis was from pneumonia or the ulcers. (12RT 2771.) Dr. Fullerton also testified he believed the sepsis would have been present even without the infected decubitus ulcers due to Sam's pneumonia. (12RT 2754.)

Given the conflicting information that was already presented as to the role of the decubitus ulcers in the sepsis, testimony from a pathologist was critical to successfully demonstrating a reasonable doubt existed as to causation. Dr. Sheridan would have testified that the pneumonia was likely aspiration pneumonia, which "is typically rapid in progression

due to the irritant effect of food and gastric acid on the alveolar tissue in the lungs.” (5CT 1188.) Moreover, due to Sam’s difficulties with eating, “aspiration pneumonia [was] a constant danger” that could have “occur[ed] even when the patient [was] being well cared for.” (5CT 1188.) Based on his analysis, Dr. Sheridan disagreed with Dr. Homeier’s assessment and concluded that “there [was] not compelling evidence in this case to attribute Cora Sam’s death to caretaker abuse or neglect.” (5CT 1189.)

As trial counsel’s failure to present the testimony of a pathologist was deficient, prejudicial, and not justified by any strategy, Ms. Ho received ineffective assistance of counsel under the Sixth Amendment to the United States Constitution and article I, section 15, of the California Constitution, such that both convictions must be reversed. (*Strickland, supra*, 466 U.S. at p. 687; *People v. Ledesma* (1987) 43 Cal.3d 171, 218.)

**C. Trial Counsel Provided Prejudicially Deficient Representation by Failing to Challenge the Search Warrant on Staleness Grounds**

**1. Respondent Has Failed to Allege Facts Rebutting Ms. Ho’s Prima Facie Case for Relief**

In Ms. Ho’s petition, it was argued that Ms. Ho received ineffective assistance of counsel under the Sixth Amendment to the United States Constitution and Article 1, section 15 of the California Constitution due to trial counsel’s failure to challenge

on staleness grounds a search warrant, issued 15 days after Sam's death, which allowed a search of Ms. Ho and her husband's residence for "[t]he residual scent of human remains; and any and all biological and physical trace evidence; clothing or other objects bearing blood or physiological fluid-stains; fibers; human hairs; human tissues or parts thereof." (5CT 1202.)

Respondent did not allege any facts rebutting Ms. Ho's prima facie case for relief. Instead, respondent argued that "[t]he scent of human remains, unlike contraband, was not something that might be disposed of or removed." (Answer, p. 24.)

Respondent alleged no facts to support this argument.

As respondent failed to allege any facts rebutting Ms. Ho's prima facie case for relief, and as respondent's argument fails to undermine this Court's determination, relief is warranted.

## **2. Scents and Human Remains Can Easily Disperse or Be Disposed Of, Such That the Warrant Should Have Been Challenged for Staleness**

"Information that is remote in time may be deemed stale and thus unworthy of consideration in determining whether an affidavit for a search warrant is supported by probable cause. Such information is deemed stale unless it consists of facts so closely related to the time of the issuance of the warrant that it justifies a finding of probable cause at that time. The question of staleness turns on the facts of each particular case." (*People v. Hullan* (2003) 110 Cal.App.4th 1646, 1652.)

Thus, whether or not information should be considered stale at the time of the issuance of a warrant depends upon the nature of the information and the nature of the alleged offense. (*People v. Wilson* (1986) 182 Cal.App.3d 742, 754-755; *People v. Hernandez* (1974) 43 Cal.App.3d 581, 586.) The United States Supreme Court has previously held that a 20-day delay between the sale of a controlled substance and the issuance of the search warrant negated the probable cause for finding contraband at the suspect's residence. (*SRGO v. United States* (1932) 287 U.S. 206.)

Here, the 15 days of delay between Sam's death and the issuance of the search warrant was sufficiently long enough that probable cause no longer justified a search for the scent of human remains. (See *People v. Mitchell* (2003) 110 Cal.App.4th 772, 792-793 [noting concerns about scent identification evidence].) In that two weeks, any bedding, clothing, or other materials used to care for Sam could have been cleaned or discarded, floors could have been vacuumed, and the multiple fans that were on in the residence prior to the search (9RT 1619) were likely blowing around the organic material. As there was a very limited timeframe in which law enforcement could still have reasonably expected to find the majority of any discarded tissue, and as law enforcement failed to obtain the search warrant during that timeframe, probable cause did not exist for the search warrant and the evidence regarding the search of the residence by the dog should have been suppressed. For these reasons, trial counsel's failure to challenge the search warrant on staleness grounds was unquestionably a deficient performance.

### **3. The Failure to Challenge the Search Warrant Was Prejudicial**

The failure to challenge the warrant was particularly prejudicial as this search was used to support Karina Peck's conclusion that Sam had been kept in the shower by Ms. Ho. This conclusion was not only emotionally compelling but also likely contributed to a finding by the jury that Ms. Ho had been caring for Sam improperly. Unlike the evidence of Sam's physical state at the time of her arrival at the hospital – the sores on her body, her weight – that could have been attributed to causes other than caretaker neglect (as testified to by Dr. Fullerton), the allegation that Ms. Ho kept Sam in the shower – though largely unsupported – was presented as a direct description of Ms. Ho's care, or lack thereof, of Sam.

As trial counsel's failure to challenge the search warrant on staleness grounds was deficient, prejudicial, and not justified by any strategy, Ms. Ho received ineffective assistance of counsel under the Sixth Amendment to the United States Constitution and article I, section 15, of the California Constitution, such that both convictions must be reversed. (*Strickland, supra*, 466 U.S. at p. 687; *People v. Ledesma* (1987) 43 Cal.3d 171, 218.)

**D. Trial Counsel Provided Prejudicially Deficient Representation by Failing to Object to the Trial Court’s Instruction That the Jury Could Not Consider the Lesser Included Offenses Until They Unanimously Reached a Not Guilty Verdict on the Greater Offenses**

**1. Respondent Has Failed to Allege Facts Rebutting Ms. Ho’s Prima Facie Case for Relief**

In Ms. Ho’s petition, it was argued Ms. Ho received ineffective assistance of counsel under the Sixth Amendment to the United States Constitution and Article 1, section 15 of the California Constitution due to trial counsel’s failure to object to the trial court’s instruction that the jurors could not consider a lesser crime until the jury had unanimously acquit Ms. Ho of the greater crime. (13RT 3045.)

Respondent did not allege any facts rebutting Ms. Ho’s prima facie case for relief. Instead, respondent argued “there was no instructional error” because “[t]he trial court’s instructions to the jury were in reference to the verdict forms, not the deliberations themselves.” (Answer, p. 26.) Respondent alleged no facts to support this argument. Respondent also argued Ms. Ho was not prejudiced because “the jury was provided with the correct written instructions and told that it was to be governed only by the ‘final wording’ of the written instructions.” (Answer, p. 27; see 4CT 913, 923.) But the written instructions only told the jurors that if they were “not convinced” of guilt on the greater offenses, *then* they could consider the lesser offenses. (4RT 905, 913.) Thus, the written instructions were erroneous in the same

manner as the oral instructions or, at minimum, did not contradict the oral instructions.

As respondent failed to allege any facts rebutting Ms. Ho's prima facie case for relief, and as respondent's argument fails to undermine this Court's determination, relief is warranted.

**2. The Instruction Was Erroneous, Such That Trial Counsel's Failure to Object Was Deficient**

Although a jury may not convict a defendant of lesser-included offenses until it has acquitted a defendant of the greater offenses, it is error for the court to instruct the jury that it cannot *consider* the lesser offenses until it has acquitted on the greater offenses. (*People v. Kurtzman* (1988) 46 Cal.3d 322, 330.)

When a court erroneously offers an instruction in violation of *Kurtzman*, the affected counts must be reversed upon a finding of prejudice. (*People v. Olivas* (2016) 248 Cal.App.4th 758, 777 (*Olivas*) [reversing convictions on primary and alternate counts where court erroneously instructed jury not to consider alternate counts until acquitting on the primary counts].)

The ability to consider lesser included offenses is critical to obtaining a fair and appropriate verdict. As the Supreme Court has previously stated in justifying the sua sponte duty for courts to instruct on lesser included offense, permitting the jury to consider lesser included offenses "prevents the 'strategy, ignorance, or mistake' of *either* party from presenting the jury with an 'unwarranted all-or-nothing choice,' encourages 'a

verdict...no harsher *or more lenient* than the evidence merits' ([Citation]), and thus protects the jury's 'truth-ascertainment function' ([Citation])." (*People v. Breverman* (1998) 19 Cal.4th 142, 155, emphasis added by *Breverman* Court.)

Trial counsel's failure, therefore, to object to the erroneous instruction was deficient.

### **3. The Failure to Object Was Prejudicial**

The failure to object was prejudicial because, had the jurors considered the lesser-included offenses, it is reasonably probable they would have elected to convict Ms. Ho of those offenses instead.

Contrary to respondent's argument (Answer, p. 27), the written instructions failed to clarify that the jury could consider lesser offenses prior to reaching an acquittal on the greater offenses. For count one – murder – the jury was instructed, "If you are not convinced that the defendant is guilty of murder you shall consider whether she is guilty or not guilty of the lesser crime of Involuntary Manslaughter." (4RT 905.) For count two – abuse of elder or dependent adult likely to produce great bodily harm or death – the jury was instructed, "If you are not convinced that the defendant is guilty of Count 2, you shall consider whether she is guilty or not guilty of misdemeanor dependent adult abuse." (4RT 913.) In conjunction with the trial court's oral instruction, the jury would have understood these written instructions to mean that it needed to reach an acquittal on the great offenses and only then could consider guilt as to the

lesser offenses.

A review of the evidence indicates that this case presented many difficulties. As to the second-degree murder conviction, the evidence supported a finding that Ms. Ho believed that she was acting in her sister's best interests by maintaining an active search for a nursing facility, insisting on a diet that she believed to be ideal, and applying what she believed to be the most helpful treatment – colloidal silver. This evidence negated the element of implied malice. Involuntary manslaughter, on the other hand, only requires that “[a] reasonable person would have known that acting in that way would create such a risk” (CALCRIM 580; see Pen. Code, § 192, subd. (b)); it is an objective standard instead of a subjective one. Thus, had the jury been allowed to compare and contrast the elements of second-degree murder and involuntary manslaughter, it is reasonably probable that the jury would have convicted Ms. Ho of involuntary manslaughter instead of murder.

As to the conviction for dependent adult abuse causing death, the misdemeanor dependent adult abuse charge did not require that Ms. Ho's negligence caused Sam's death. (13RT 3046.) Here, the experts disagreed as to whether Ms. Ho's failure to obtain professional medical attention for Sam at an earlier date contributed to her death. While Dr. Homeir testified that Ms. Ho's neglect to obtain medical care caused Sam's death, Dr. Fullerton testified that Sam suffered from terminal skin failure and that medical intervention would have been ineffective in preventing Sam's death. (10RT 1919, 12RT 2724, 2734, 2737.) Additionally, dermatologist Dr. Robert Wang disagreed with the

assessment that the wounds were bedsores. (10RT 1824.) Thus, had the jury been able to deliberate whether or not Ms. Ho's negligence caused Sam's death, it is reasonably probable that the jury would have convicted Ms. Ho of misdemeanor dependent adult abuse instead of felony misdemeanor dependent adult abuse causing death.

Moreover, the record regarding the deliberations indicates that the deliberations were contentious. On the second day of jury deliberations, the jury asked about the meaning of the term "human life." (12 RT 3304.) On the fifth day of jury deliberations, one juror complained about a "hostile environment." (12RT 4203.) On the sixth day of jury deliberations, the trial court was notified that one juror had "brought in a book with the definition of 'kill' to aid in the deliberations." (12RT 4502.) The court, after questioning each of the jurors, ultimately allowed the jury to continue deliberations with the juror who had brought in the book. Later that afternoon, the jury reached its verdicts. (12RT 4531.) There is no indication in the record that the jury ever considered the lesser included offenses.

As stated previously, in *Olivas*, in which there were discrepancies in the victim's testimony, indications that the jury was hung on at least one of the counts for some time, and no indication in the record of any consideration of the alternate counts, the Court of Appeal held that the *Kurtzman* error was prejudicial. (*Olivas, supra*, 348 Cal.App.4th at pp. 775-776.) Similarly, here, there was evidence negating the implied malice element for murder, there was evidence that any neglect by Ms.

Ho did not cause Sam's death, the record indicated that the week-long jury deliberations were contentious and motivated at least one juror to look up the word "kill," and there was no indication in the record that the jury gave any consideration to the lesser included counts, in accordance with the court's instructions. Accordingly, counsel's failure to object to the *Kurtzman* error was prejudicial.

As trial counsel's failure to object to the erroneous instruction was deficient, prejudicial, and not justified by any strategy, Ms. Ho received ineffective assistance of counsel under the Sixth Amendment to the United States Constitution and article I, section 15, of the California Constitution, such that both convictions must be reversed. (*Strickland, supra*, 466 U.S. at p. 687; *People v. Ledesma* (1987) 43 Cal.3d 171, 218.)

**E. Trial Counsel Provided Prejudicially Deficient Representation by Failing to Zealously Advocate for Ms. Ho**

**1. Respondent Has Failed to Allege Facts Rebutting Ms. Ho's Prima Facie Case for Relief**

Zealous advocacy is a cornerstone of effective representation. In her petition, it was argued Ms. Ho received ineffective assistance of counsel under the Sixth Amendment to the United States Constitution and Article 1, section 15 of the California Constitution due to trial counsel's failure to perform necessary legal work, neglecting to argue a critical point during

closing argument, and regular beratement of Ms. Ho.

As set forth below, respondent failed to allege any facts rebutting Ms. Ho's prima facie case for relief, and as respondent's argument fails to undermine this Court's determination, relief is warranted.

## **2. Trial Counsel Failed to Perform Necessary Legal Work**

When trial counsel believed that the court was giving an erroneous jury instruction with regards to elder abuse, he told Ms. Ho that he did not have time to file a written motion and asked for funds so that he could hire a different attorney. (5CT 1213.) Trial counsel instead only presented a proposed instruction, which emphasized the need to find criminal negligence for count two, along with snippets of research. (4CT 860.) Respondent argued that because the proposed instruction was still presented to the trial court and denied, trial counsel preserved Ms. Ho's appellate rights. (Answer, p. 28.) Without "the necessary brief[ing]," however, the proposed instruction and snippets of research was inadequate to protect Ms. Ho's rights at trial. Trial counsel explained the failure to file full briefing as follows:

I have been working my butt off because the federal judge would not allow a continuance of a major sentencing I have on Wednesday morning and I cannot do the necessary brief that I believe should be filed with our judge prior to resumption of jury deliberations, or at least prior to 9:45 AM Tuesday morning .... If you were my Mom, sister, daughter,

niece or anyone else near and dear to me I would be adamantly in favor of having an attorney right [sic] up a motion to reconstruct the jury on the issue of elder abuse. I am burned out tired of working and need some time to take care of personal matters in my own well-being, such as getting enough sleep and exercising. I do know the very best minds in criminal law here in Los Angeles and elsewhere that are basically geniuses on jury instructions. I can hire one of these attorneys and give them the necessary materials....I have met all of my obligations to you under our retainer agreement....Another attorney can write a brief...

(5CT 1213.)

While respondent is correct that “[c]ompetent counsel is not required to make all conceivable motions or to leave an exhaustive paper trail for the sake of the record” (Answer, p. 28, quoting *People v. Freeman* (1994) 6 Cal.4th 450, 509), trial counsel is still not discharged of the duty to provide briefing on those issues for which trial counsel believes briefing to be necessary. Accordingly, in failing to complete the necessary briefing on an important instructional issue – emphasizing the necessity of finding criminal negligence for count two – trial counsel failed to zealously advocate for Ms. Ho and provided ineffective assistance of counsel.

### **3. Trial Counsel Failed to Argue a Critical Point During Closing Argument**

Trial counsel neglected to present a central argument in the case. One of the primary facts supporting an acquittal in the instant action was the lack of financial motivation. There was no

insurance or other compensation that Ms. Ho received, or believed she would receive, upon Sam's death. Moreover, while Ms. Ho spent financial resources caring for Sam, Ms. Ho made that decision knowing that she could pass off that financial responsibility to any of the facilities willing to care for Sam. Trial counsel, however, failed to stress the lack of financial motivation to the jury. And as admitted in an e-mail he wrote to Ms. Ho, his failure to harp upon this issue was not based on strategy but based on his own forgetfulness: "I am kicking myself for forgetting to say a few things that may have been helpful....For example, in this case I did not hit upon the lack of a financial motive to commit murder." (5CT 1223.)

Respondent argued that trial counsel's failure to note the lack of financial motivation was the result of trial counsel's "focus[ing] on the most important issues to sway the jury even if it meant foregoing minor issues like a lack of financial motive." (Answer, p. 30.) Yet respondent's argument is rebutted by trial counsel's own words, as he clearly believed the lack of financial motive was an important issue and was accordingly frustrated that he failed to raise it.

#### **4. Trial Counsel Regularly Berated Ms. Ho**

Perhaps the most egregious aspect of trial counsel's representation was trial counsel's manner of communicating with Ms. Ho. He regularly berated her and at one point cut off contact with her. In one e-mail he wrote:

You have to be an idiot!!!!!! .... I do not need your help nor do I need your criticisms. You don't know when to shut up! .... You are insulting to the hundredth degree and you don't even realize it. Sad. .... [Y]ou act identically to a out-of-town tourist visiting Las Vegas and going to a big hotel for the Sunday brunch. Being that they paid \$39.95, they sit there for hours stuffing themselves as it is 'all-you-can-eat.' Dear Amy, you did not pay for and I did not promise to give you 'All-You-Can-Eat.' .... I'm sick and tired of your nickel and diming everybody that tries to help you.

....  
"I am angry that you had the audacity to write this largely meaningless email and, for professional reasons, forced me to respond with this long double email response. STOP WASTING MY TIME.

(5CT 1220.)

In another e-mail, he wrote to her, "[Y]our needs are endless, your emails are repetitive, long and the bottom line is you want everything done as inexpensively as possible." (5CT 1217.) Eventually, he told Ms. Ho, "I want to be left alone by you from here until future notice. I want absolutely no email from you in response to this or for any other reason. I need peace of mind and I do not want to hear from you." (5CT 1215.)

While respondent argued that "[t]he mere 'lack of trust in, or inability to get along with,' " counsel is not sufficient grounds for substitution," (Answer, p. 30, quoting *People v. Taylor* (2010) 48 Cal.4th 574, 600), trial counsel's communications with Ms. Ho far exceeded a mere lack of trust or inability to get along. Trial counsel actually cut off communication with Ms. Ho, telling her to not contact him.

Moreover, trial counsel's communications were harassing, insulting, and belittling.

### **5. The Failure to Zealously Advocate Was Prejudicial**

Trial counsel's refusal to perform necessary legal work, neglecting to argue a critical point, and regulate beratement of Ms. Ho, all reflect his failure to zealously advocate for Ms. Ho. This deficient performance permeated the entire case and underscored the other instances of ineffective assistance, while contributing to the cumulative prejudice suffered by Ms. Ho.

Moreover, the failure to argue the lack of financial motive certainly hurt Ms. Ho's case. Given the decades that Ms. Ho had already dedicated to care of her sister, demonstrating that Ms. Ho had no motivation to suddenly turn on her sister was crucial to raising a reasonable doubt about the element of malice.

As trial counsel's failure to zealously advocate for Ms. Ho was deficient, prejudicial, and not justified by any strategy, Ms. Ho received ineffective assistance of counsel under the Sixth Amendment to the United States Constitution and article I, section 15, of the California Constitution, such that both convictions must be reversed. (*Strickland, supra*, 466 U.S. at p. 687; *People v. Ledesma* (1987) 43 Cal.3d 171, 218.)

**F. The Totality of Trial Counsel's Errors Severely Prejudiced Ms. Ho and Denied Her Effective Assistance of Counsel**

Prejudice may be shown as the result of trial counsel's cumulative errors. (*Harris by and through Ramseyer v. Wood* (1995) 64 F.3d 1432, 1438-1439 (*Harris*)). In *Harris*, the Ninth Circuit found that trial counsel had committed multiple errors that "cumulatively prejudiced" the defense and, thus, affirmed the district court's grant of habeas corpus relief. (*Id.* at p. 1439.)

As detailed above, trial counsel failed to present a mental health argument, failed to present testimony by a pathologist, failed to challenge the search warrant on staleness grounds, failed to object to an erroneous jury instruction, and failed to zealously advocate on behalf of Ms. Ho. Each of these errors contributed to the prejudice caused by trial counsel's ineffective assistance. The cumulative effect of these errors severely prejudiced Ms. Ho. As Ms. Ho was denied her right to effective assistance of counsel under the Sixth Amendment to the United States Constitution and article 1, section 15, of the California Constitution, relief is warranted.

**CONCLUSION**

Starting from a young age and continuing through adulthood and into old age, Ms. Ho devoted a significant amount of her life to caring for her disabled sister. As the evidence showed, Ms. Ho could easily have let Sam be taken care of by nursing facilities who had no personal connection to Sam's

wellbeing, but Ms. Ho time and time again decided that she would rather give up her own time, energy, and money to personally care for Sam.

This devotion undoubtedly contributed to the fact that Sam greatly exceeded her life expectancy. Dr. Romanoff noted that “it is important to recognize that Ms. Ho’s lifelong devotion to her sister, that included fastidious and extremely detail oriented care ... was a direct contributing factor to her sister’s longevity. Stated differently, ... without the care and concern provided by Ms. Ho for her sister over decades of time, she would have been much less likely to reach the age of sixty as she did.” (5CT 1159.) Thus, while Ms. Ho’s mental health issues may have resulted in negligent care for her sister in later years, the earlier – and likely less severe – manifestations of obsessive compulsive disorder were at the same time responsible for extending Ms. Ho’s life.

What Ms. Ho believed to be in Sam’s best interests did not always correspond with what others believed in Sam’s best interests and, unfortunately, the jury was not presented with evidence of Ms. Ho’s own mental health issues that would have explained Ms. Ho’s obstinance on certain matters such as Sam’s diet and the application of colloidal silver to treat Sam’s skin conditions. An account of these mental health issues was absolutely necessary to place some of Ms. Ho’s decisions in their proper context and to demonstrate how these mental health issues affected Ms. Ho’s judgment and her (lack of) intent.

Moreover, there was substantial evidence that the cause of death opinion by the coroner was wrong. Not only did the coroner

waver about the cause of death in his testimony, but the evidence presented by Dr. Fullerton at trial and by Dr. Sheridan in the new trial motion indicated Sam's death was not caused by lack of care. Rather, the sepsis could have been caused by the sores *or* by the pneumonia, and even the sores may have developed very rapidly in the immediate days prior to Sam's death.

Given these questions surrounding Sam's manner of death, Ms. Ho's history of caring for her sister, and Ms. Ho's own mental health issues, as relevant to her intent, trial counsel's failure to give the jury the opportunity to consider Ms. Ho's mental health in relation to both the charges and the lesser included charges of involuntary manslaughter, in addition to all of the other aspects of the deficient representation detailed above, was severely prejudicial. Thus, justice requires that the convictions in this case be reversed.

Respectfully submitted,

Dated: December 10, 2018

/S/ ALAN EISNER

ALAN EISNER / DMITRY GORIN  
Attorneys for Petitioner  
AMY HO

## CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that the memorandum accompanying the traverse contains approximately 8,020 words, including footnotes. Counsel relied on the word count of the computer program used to prepare this brief.

Respectfully submitted,

Dated: December 10, 2018

/S/ ALAN EISNER

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AMY HO

## PROOF OF SERVICE

I, the undersigned, declare that I am a resident or employed in Los Angeles County, California; that I am over the age of eighteen years; that my business address is Eisner Gorin LLP, 14401 Sylvan St., Ste. 112, Van Nuys, CA 91401, at whose discretion I served the document entitled **PETITIONER'S TRAVERSE TO THE ORDER TO SHOW CAUSE** by transmitting a true copy via this Court's TrueFiling system.

For those participants who have not registered with the Court's TrueFiling system or are unable to receive electronic correspondence, on December 10, 2018, I placed a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Eisner Gorin LLP office, addressed as follows:

Judge George G. Lomeli  
Los Angeles Superior Court  
210 W. Temple St., Dept. 107  
Los Angeles, CA 90012

Amy Ho, WF6476  
California Institution for Women (CIW)  
16756 Chino-Corona Road  
Corona, CA 92880

This proof of service is executed at Los Angeles, California, on December 10, 2018.

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

/S/ NARINE GEVORGYAN

NARINE GEVORGYAN