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15 **UNITED STATES DISTRICT COURT**
16 **NORTHERN DISTRICT OF CALIFORNIA**

17 JONATHAN MONTANA,) Case No. _____
18 Petitioner,)
19 vs.) PETITION FOR WRIT OF
20 UNITED STATES OF AMERICA,) HABEAS CORPUS PURSUANT
21 Respondent,) TO 28 U.S.C. § 2254
22)
23) Date: TBD
24) Time: TBD
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1 **I. INTRODUCTION AND PROCEDURAL HISTORY**

2 Petitioner Jonathan Montana respectfully petitions this Court for a writ of
 3 habeas corpus pursuant to 28 U.S.C. § 2254, challenging his conviction in the
 4 Superior Court of California, County of Santa Clara, Case No. C1774437, on
 5 grounds that his conviction was obtained in violation of the Sixth Amendment to
 6 the United States Constitution and the Fourteenth Amendment's guarantee of
 7 due process and a fair trial.

8 **A. State Court Proceedings**

9 On January 6, 2020, the Santa Clara County District Attorney filed an
 10 amended information charging Petitioner with seven felony counts related to an
 11 alleged sexual assault on January 20, 2017. Following a 19-day jury trial before
 12 the Honorable David A. Cena, Petitioner was convicted on February 7, 2020, of
 13 six counts:

- 14 1. Count 1: Sodomy by use of an intoxicating substance (Cal. Penal Code §
 15 286(i));
- 16 2. Count 2: Forcible sodomy (Cal. Penal Code § 286(c)(2)(A));
- 17 3. Count 3: Oral copulation by use of an intoxicating substance (Cal. Penal
 18 Code former § 288a(i));
- 19 4. Count 4: Forcible oral copulation (Cal. Penal Code former § 288a(c)(2));
- 20 5. Count 5: Rape by use of an intoxicating substance (Cal. Penal Code §
 21 261(a)(3));
- 22 6. Count 7: Forcible rape (Cal. Penal Code § 261(a)(2)).

23 The jury acquitted Petitioner of Count 6, rape of a victim unconscious of
 24 the nature of the act (Cal. Penal Code § 261(a)(4)).

25 On August 11, 2021, the trial court sentenced Petitioner to three years in
 26 state prison on Count 2 (forcible sodomy), with concurrent three-year terms on
 27 Counts 4 and 7. The court stayed separate three-year terms on Counts 1, 3, and 5

1 pursuant to California Penal Code section 654, and ordered sex offender
2 registration.

3 **B. Direct Appeal**

4 Petitioner timely appealed. On June 11, 2024, the California Court of
5 Appeal, Sixth Appellate District, affirmed the judgment. *People v. Montana*,
6 2024 Cal. App. Unpub. LEXIS 3591 (Cal. Ct. App. June 11, 2024) (See Exhibit
7 A) ("Montana, LEXIS 3591")

8 On direct appeal, Petitioner raised three claims: (1) the trial court abused
9 its discretion in denying post-verdict discharge of retained counsel; (2) counsel
10 rendered ineffective assistance due to conflict of interest; and (3) the court
11 erroneously excluded lay opinion testimony on capacity to consent. *Id.* at *18-
12 44.

13 The Court of Appeal rejected all claims but noted that many ineffective
14 assistance contentions "rest[ed] primarily upon matters other than what the trial
15 court could have observed during trial" and were "more appropriately resolved
16 in a habeas corpus proceeding." *Id.* at *36-37 (citing *People v. Mai*, 57 Cal.4th
17 986, 1009 (2013)).

18 Petitioner filed a petition for review on July 12, 2024. The California
19 Supreme Court denied review on August 14, 2024. *People v. Montana*, 2024
20 Cal. LEXIS 4577 (Cal. Aug. 14, 2024). Petitioner's conviction became final on
21 November 12, 2024. *See Bowen v. Roe*, 188 F.3d 1157, 1159 (9th Cir. 1999)
22 (finality occurs ninety days after state supreme court denial of review, allowing
23 time to file petition for certiorari in United States Supreme Court).

24 **C. State Habeas Proceedings and Explanation for Delay**

25 Following direct appeal, Petitioner retained post-conviction counsel in
26 September 2024. Petitioner paid this attorney in full and reasonably relied upon
27 the attorney to diligently investigate and file appropriate petitions.

1 However, from October 2024 through late July 2025, retained counsel
2 failed to: conduct a meaningful investigation; communicate substantively with
3 Petitioner; obtain necessary declarations; secure expert opinions; or file any
4 petition.

5 Upon discovering this abandonment in late July/early August 2025,
6 Petitioner retained current counsel, who has worked since August/September
7 2025 to investigate claims, obtain evidence, and prepare both state and federal
8 habeas petitions.

9 The delay is attributable solely to abandonment by prior post-conviction
10 counsel and does not reflect lack of diligence by Petitioner. Courts recognize
11 that delay may be excused where a petitioner establishes reasonable grounds and
12 acts with diligence upon discovering the problem.

13 Petitioner acted diligently in retaining counsel upon conclusion of direct
14 appeal, paid counsel in full, and had no reason to know counsel was not
15 performing until July 2025. Upon discovering abandonment, Petitioner retained
16 new counsel and this petition was prepared expeditiously. The delay is both
17 explained and excusable.

18 Petitioner has filed concurrently with this federal petition a Motion to
19 Stay and Hold in Abeyance pursuant to *Rhines v. Weber*, 544 U.S. 269 (2005),
20 and *Blake v. Baker*, 745 F.3d 977 (9th Cir. 2014) (reversing denial of *Rhines*
21 stay; recognizing good cause where post-conviction counsel failed to investigate
22 and present substantial extra-record evidence).

23 **II. STATEMENT OF FACTS**

24 The following facts are drawn from the trial record, the Court of Appeal's
25 opinion, and declarations submitted in support of this petition.

A. Pre-Assault Events

On January 20, 2017, complainant T. Doe met friends at a San Jose hotel to celebrate a birthday. Before arriving around 10:30-11:00 p.m., Doe consumed two tequila shots. At the hotel, she drank four Jägermeister shots. *Montana*, LEXIS 3591, at *3.

Around 11:30 p.m., Doe and friends walked to Temple nightclub. Doe felt alcohol effects during the walk but was admitted. *Id.* In earlier texts, Doe expressed concern about going out, having not consumed alcohol "for some time prior." *Id.*

At the nightclub, Doe's friend A.K. wanted to celebrate Doe's first nightclub visit by drinking at the bar. As Doe approached the bar, Petitioner, whom she had not met, lifted his arm causing her to duck around him. Doe thought this "weird." *Id.* at *4.

At the bar, Doe drank a tequila shot with A.K. Doe felt alcohol effects but could still walk and converse. *Id.* She made eye contact with Petitioner, who smiled and introduced himself, telling her she was "really pretty" and "had a good aura." *Id.*

After A.K. said Petitioner "seems old," Doe asked his age. Petitioner, age 36, lied and said he was 30. *Id.* at *5. Doe was flattered and thought him genuine.

Petitioner bought tequila shots for himself, Doe, and A.K. After consuming shots, they danced. On the dance floor, Doe felt "the alcohol [] hitting" and "wasn't really thinking much, just doing." She and Petitioner danced "close[]" with "bodies [] touching." *Id.*

They returned to the bar with other friends. Petitioner bought another round—larger shots. Doe initially couldn't finish hers, tried giving it to a friend

1 who declined, then asked Petitioner to finish it. He told her it was hers, so she
 2 finished it. *Id.*

3 At the bar, friend L.A. told Doe if she needed help, she should let him or
 4 friends know. *Id.* Petitioner asked to stay in touch, so Doe handed him her phone
 5 to enter his number. She texted "Hey, it's [Doe]" to that number. *Id.* at *5-6.

6 After the second round, Doe wanted friends to join her dancing. A.K.
 7 pushed her toward Petitioner, so they returned to the dance floor.
 8

9 Doe and Petitioner danced face-to-face. Doe "remember[ed] there was
 10 kissing ... [and she] turned around and [] grinded on him." Petitioner said she
 11 "smelled good" and kissed her neck. Doe didn't think about her boyfriend and
 12 didn't feel bad about kissing Petitioner because "there[] [was] an attraction." *Id.*
 13

14 Friend A.B., who drank nothing that evening, started "doing rounds to
 15 check up on" friends. A.B. saw Doe and friends at the bar where Petitioner was
 16 buying shots. *Id.* at *7.

17 After dancing and talking, A.B. did "another set of rounds" and saw Doe
 18 standing in a corner by the bar with Petitioner holding her up. A.B. made eye
 19 contact, gave double thumbs-up, and mouthed asking if Doe was okay. A.B. was
 20 too far to hear but saw Doe do "something with her hand." A.B. wasn't sure if
 21 Doe's gesture meant she was okay or wanted help. Doe then mouthed something
 22 A.B. thought was "Never mind." A.B. didn't follow up. *Id.*
 23

24 When A.B. and friends left around 1:15 a.m., Doe wasn't with them. A.B.
 25 returned inside but couldn't find Doe. A.B. and others started calling Doe's
 26 phone as they walked back to the hotel. *Id.* at *7-8.

27 **B. Transport to Hotel**

28 After sitting with Petitioner at the nightclub, Doe's next memory was
 29 being outside with no memory of how she got there. Petitioner told her to "look
 30 sober" and said, "We're almost there." *Id.* at *8.

1 Doe's next memory was a "really bright" hotel lobby. She later learned
 2 they were at the Fairmont but didn't remember Petitioner checking in. Petitioner
 3 again told her to look sober as they walked to elevators. *Id.*

4 Doe remembered being in a hallway, holding Petitioner for support.
 5 Petitioner opened a room with a key card. Doe recalled walking toward the bed,
 6 then "everything [went] blank." *Id.*

7 **C. The Alleged Sexual Assault**

8 Doe's next memory was lying naked on her back on the bed. Petitioner's
 9 penis was in her vagina, and he asked if she "liked his dick." Doe didn't respond.
 10

11 What Doe next remembered, Petitioner and she were still having vaginal
 12 intercourse. Doe noticed her phone vibrating. Petitioner then inserted his penis
 13 in her anus. Doe couldn't remember exactly how long—"probably [] five
 14 minutes or so." *Id.* at *9.

15 Petitioner removed his penis from her anus and reinserted it in her vagina.
 16 Doe briefly blacked out. When she came to, Petitioner was performing oral sex
 17 on her. Doe still felt intoxicated. *Id.*

18 Petitioner and Doe then continued having vaginal intercourse. Doe then
 19 felt her phone vibrating. She tried reaching for her phone on the floor, but
 20 Petitioner pushed her back and told her firmly not to answer. *Id.* at *9-10.

21 While Petitioner and Doe continued engaging in sex, Doe's phone began
 22 ringing. Petitioner told her not to answer. Doe answered her phone and spoke to
 23 A.K., who asked where she was and if she was with anyone. Doe said she was
 24 with Petitioner. A.K. asked to speak to him. She held the phone toward
 25 Petitioner, who paused, withdrew his penis but didn't immediately take the
 26 phone, shaking his head rapidly and furrowing his brow. *Id.* at *10.

27 Eventually, Petitioner took the phone and spoke to A.K. Doe heard A.K.
 28 telling Petitioner "not to do anything to [Doe] because [she] ha[s] a boyfriend."

1 Petitioner replied nothing had happened and Doe was sleeping. After about a
 2 minute, Petitioner ended the call. *Id.*

3 At one point while Petitioner had his penis in her vagina, he asked if she
 4 was on birth control. She shook her head no. Petitioner asked if he could
 5 ejaculate inside her, but Doe didn't respond. He repeated the question; Doe
 6 shook her head no. She couldn't remember whether Petitioner wore a condom or
 7 if he ejaculated. *Id.* at *10-11.

8 **D. Additional Phone Calls and Texts**

9 At one point, Doe tried texting "help" to friend N. Her first text read "H-
 10 K-E-O-O-S-B." Her second attempt read "H-E-L-L-S-L-O-L-L-L-P," but on
 11 her third try, she succeeded: "Help." N. texted back asking if she was okay, but
 12 Doe didn't respond or remember seeing that text. N. called and asked if she was
 13 okay. Doe didn't tell N. she was being raped because it "[d]idn't feel right to say
 14 that" while Petitioner was on top of her. Instead, she said "yeah" and asked what
 15 he was doing to distract herself. *Id.* at *11.

16 Doe also answered a call from A.B. while Petitioner was having sex with
 17 her. A.B. repeatedly asked where Doe was. Doe said she was in a hotel room but
 18 didn't know where. Doe asked Petitioner where they were; he replied he didn't
 19 know either. A.B. became frustrated and asked to talk to Petitioner. Doe gave
 20 him her phone. Petitioner told A.B. that Doe was okay and he was letting her
 21 sleep. He said he didn't know the hotel name. A.B. was worried and irritated,
 22 telling Petitioner to look in the room or go to the lobby to find out. The call
 23 suddenly ended. *Id.* at *11-12.

24 A.B. called back; Petitioner answered. He told A.B. that Doe was
 25 vomiting. A.B. told him to use Doe's phone to send their location, but Petitioner
 26 said he didn't know how on Doe's phone type. A.B. said she'd walk him through
 27 it. As she began, the call ended again. *Id.* at *12.

1 When A.B. called again, Doe answered. Doe shared her location, so A.B.
 2 and three friends drove to the Fairmont Hotel from the De Anza Hotel. A.B. told
 3 Doe but to get to the lobby. Doe told Petitioner her friends arrived and she
 4 needed to go. *Id.*

5 **E. Aftermath**

6 Doe and Petitioner then got dressed. Doe didn't remember walking down
 7 the hallway or riding the elevator but remembered Petitioner walked behind her
 8 as she exited. Next, she remembered exiting the elevator into the lobby thinking
 9 she needed to find her friends. A.B. described Doe as "disheveled" in the lobby.
 10 *Id.* at *12-13.

11 Friends walked Doe to their car and drove her to the De Anza Hotel. Doe
 12 didn't tell them what happened. After returning to their room, some friends
 13 asked what happened, but Doe didn't tell them. Doe used the bathroom at the
 14 hotel but ended up sleeping on her dance team director's apartment couch. *Id.* at
 15 *13.

16 On January 21 evening, Doe was examined by a SART nurse. Doe said
 17 she hadn't changed clothes or showered since the assault. She hadn't defecated
 18 but had urinated and cleaned herself with toilet paper. Doe told the nurse her
 19 "'vagina[] hurts'" and her anus "'felt weird.'" She reported she hadn't been
 20 choked, hit, or grabbed. The encounter consisted of vaginal intercourse, anal
 21 intercourse, and Petitioner performing oral sex. The SART nurse noted. *Id.* at
 22 *14-15.

23 The SART nurse examined Doe's body and observed several small
 24 abrasions and bruises. Doe had petechiae on her right arm's back; the nurse
 25 testified this could result from someone grabbing Doe there. Doe had petechiae
 26 on her left neck, which could result from pressure or suction. *Id.* at *15.

1 Examining Doe's genitals, the nurse noted Doe's perineum was swollen
2 and tender, as Doe complained of pain when touched. Swelling and tenderness
3 extended to the labia majora. The nurse observed four lacerations to the vaginal
4 opening, which she testified were consistent with penetration. *Id.*

5 Doe complained of pain as the nurse examined her cervix; the nurse
6 observed Doe's cervix was red and swollen. The nurse noted a perineum
7 laceration and lacerations she testified were consistent with anal penetration. *Id.*

8 On January 26, Doe received a call from Petitioner. When she answered,
9 Petitioner identified himself and asked how she was. Doe told him to hold on,
10 then ended the call. Petitioner called back approximately two minutes later, but
11 Doe didn't answer. Doe created a contact name reading "Don't pick up under any
12 circumstance." *Id.* at *15-16.

13 On February 3, Doe went to the San Jose Police Department and made a
14 pretext call to Petitioner at Detective Jose Alfaro's direction. During the call,
15 Petitioner denied having sex with Doe that night, saying she "just wanted to
16 sleep." On February 24, Doe returned and identified Petitioner in a photographic
17 lineup. *Id.* at *16.

18 On April 7, Detective Alfaro interviewed Petitioner and, pursuant to
19 search warrant, took buccal swabs for DNA. A video recording of the interview
20 was played for the jury. Petitioner first said he couldn't recall meeting anyone
21 with Doe's name but eventually said he met her and "her sister and her friend" at
22 the nightclub. *Id.* at *16-17.

23 Petitioner repeatedly stated Doe was an "adult." He said Doe willingly
24 went to the Fairmont after he repeatedly asked if she was sure. In the hotel
25 room, Petitioner said Doe started undressing, they kissed, but didn't have sex.
26 Petitioner stated he felt Doe didn't want to do anything more and they were both
27
28
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1 tired, so he didn't try to go further. Petitioner denied seeing Doe vomit in the
 2 hotel room. *Id.* at *17.

3 DNA testing revealed Petitioner as a contributor to DNA mixtures on
 4 Doe's underwear waistband and panty liner. *Id.*

5 **F. Petitioner's Testimony at Trial**

6 Petitioner testified at trial. He admitted meeting Doe at the nightclub,
 7 lying about his age, buying drinks, dancing, and walking to the Fairmont Hotel
 8 together. *Id.* at *22-23. He stated that Doe willingly agreed to go and he
 9 repeatedly confirmed she wanted to go. *Id.* at *23.

10 Petitioner testified Doe "seemed tipsy" but not drunk when agreeing to
 11 accompany him. Doe said yes and led the way to the exit. On the way, Petitioner
 12 stopped to make sure Doe "really wanted to go to the hotel." Doe didn't express
 13 reservations and it "[s]eem[ed] like she made up her mind." *Id.*

14 Walking from the nightclub to the hotel, Petitioner didn't notice Doe
 15 having trouble walking. Petitioner held hands with Doe sometimes but didn't
 16 need to guide or hold her. *Id.*

17 When shown video of him and Doe in the hotel lobby, Petitioner agreed
 18 Doe stumbled on the way to the elevator and he helped her regain balance.
 19 Petitioner suggested Doe might have stumbled because flooring went from tile
 20 to carpet and tile may have been slick from light rain. *Id.* at *23-24.

21 After entering the room, Doe headed toward the bed as he put his jacket
 22 away. When he turned, he saw her taking off her clothes except panties.
 23 Petitioner joined her on the bed, took off his shirt, and they started kissing. They
 24 touched each other's genitals, and Doe helped Petitioner remove her panties.
 25 Petitioner asked if she wanted him to orally copulate her; she agreed. *Id.* at *24.

26 After a short time, Doe told Petitioner she wanted him "inside [] her."
 27 Petitioner put his penis in her vagina but became worried about not having a
 28

1 condom and asked if Doe was on birth control. Petitioner then asked if Doe
 2 enjoyed anal sex; she replied "she really likes it." Doe rolled over and got on
 3 hands and knees on the bed. Petitioner and Doe began anal sex, and Doe even
 4 assisted Petitioner in putting his penis in her anus. Petitioner soon climaxed,
 5 withdrawing and ejaculating on Doe's "butt or leg area." Petitioner got tissue
 6 paper so they could clean themselves, then they cuddled. Petitioner fell asleep.
 7

8 *Id.*

9 Dozing, Petitioner became aware Doe's phone was vibrating "quite a lot."
 10 He heard her speaking on the phone sometimes over the next 30-60 minutes.
 11 Petitioner got up and sat near Doe while she spoke and heard her tell the person
 12 she was fine. Doe ended the call, but her phone buzzed again. After Doe
 13 answered, she said her friend wanted to talk to Petitioner, so he took the phone.
 14 *Id.* at *24-25.

15 Petitioner spoke to A.B., who was "very demanding," "asking about the
 16 hotel," and "wanting to pick [Doe] up." Petitioner thought A.B. was "pushy," so
 17 he avoided answering questions about where they were. Petitioner testified he
 18 felt he and Doe were having a good time and he didn't want Doe to leave. Doe
 19 had already told A.B. she was fine, but A.B. was "trying to just override" what
 20 Doe told her. Petitioner was shocked when A.B. said Doe had a boyfriend and
 21 Petitioner shouldn't have sex with her. After hanging up, Petitioner asked if Doe
 22 had a boyfriend; she said she'd just broken up with him. *Id.* at *25.

23 Petitioner fell asleep again and woke to find Doe "kind of panicking, []
 24 rushing to get dressed." Doe told him her friends were in the lobby. He asked if
 25 she wanted him to go downstairs with her. Doe said she did, and Petitioner
 26 accompanied her because he felt he "had nothing to hide." *Id.* at *25-26.

27 Petitioner testified that as soon as Doe saw friends in the lobby, she
 28 "immediately went limp" and needed friends "to help carry her out." It seemed

1 to Petitioner that Doe was acting more intoxicated to help explain to friends why
2 she went to a hotel with a man she just met. After Doe left with friends,
3 Petitioner checked out at 2:47 a.m. *Id.* at *26.

4 **III. EXHAUSTION AND PROCEDURAL COMPLIANCE**

5 **A. Exhaustion Status**

6 Pursuant to 28 U.S.C. § 2254(b)(1), a federal habeas petitioner must
7 exhaust available state court remedies before seeking federal relief unless: (1)
8 there is an absence of available state corrective process; or (2) circumstances
9 exist that render such process ineffective to protect the rights of the applicant.
10 *See Rose v. Lundy*, 455 U.S. 509, 515-16 (1982).

11 Petitioner raised three claims on direct appeal to the California Court of
12 Appeal and in his petition for review to the California Supreme Court: (1) trial
13 court abuse of discretion in denying post-verdict discharge of retained counsel;
14 (2) ineffective assistance of counsel due to conflict of interest; and (3) erroneous
15 exclusion of lay opinion testimony on capacity to consent. *Montana*, LEXIS
16 3591, at *18-44.

17 All other claims raised in this petition are currently unexhausted. These
18 claims were not and could not have been raised on direct appeal because they
19 depend on evidence outside the appellate record, including: expert declarations;
20 investigator reports; witness statements; original surveillance video; forensic
21 phone analysis; and other extra-record materials. The California Court of Appeal
22 explicitly recognized that such claims are "more appropriately resolved in a
23 habeas corpus proceeding." *Id.* at *36-37.

24 Petitioner has prepared and intends to file immediately a comprehensive
25 habeas corpus petition in the Superior Court of California, County of Santa
26 Clara, raising all grounds presented herein. If denied, Petitioner will seek review
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1 in the California Court of Appeal, Sixth Appellate District, and the California
2 Supreme Court, thereby exhausting state remedies.

3 **B. Concurrent Motion to Stay and Hold in Abeyance**

4 Concurrently with this federal petition, Petitioner has filed a Motion to
5 Stay and Hold in Abeyance pursuant to *Rhines v. Weber*, 544 U.S. 269 (2005),
6 and *Blake v. Baker*, 745 F.3d 977 (9th Cir. 2014). The motion demonstrates:

7 1. **Good Cause for Failure to Exhaust:** Petitioner acted diligently in
8 retaining post-conviction counsel immediately after conclusion of direct
9 appeal proceedings. However, retained counsel abandoned Petitioner
10 without conducting investigation or filing the necessary state habeas
11 petition despite receiving full payment for services. Upon discovering this
12 abandonment in late July 2025, Petitioner immediately retained current
13 counsel and has moved expeditiously to prepare both state and federal
14 petitions.
15

16 2. **Potentially Meritorious Claims:** As demonstrated in detail below,
17 Petitioner presents substantial claims of constitutional violations that
18 individually and cumulatively deprived him of his Sixth Amendment right
19 to effective assistance of counsel and his Fourteenth Amendment rights to
20 due process and a fair trial.
21

22 3. **No Intentional Delay:** Petitioner seeks a stay to comply with exhaustion
23 requirements, not to delay proceedings. Petitioner is prepared to file his
24 state habeas petition immediately and to prosecute it diligently through all
25 available state court levels.
26

27 The *Rhines* Court held that district courts may stay mixed petitions in
28 "limited circumstances" where: (1) the petitioner had good cause for failing to
29 exhaust; (2) the unexhausted claims are potentially meritorious; and (3) the
30

1 petitioner has not engaged in abusive litigation tactics or intentional delay. 544
2 U.S. at 277-78. All three requirements are satisfied here.

3 **C. Procedural Default and Cause and Prejudice**

4 To the extent any claim might be deemed procedurally defaulted under
5 state law, Petitioner can demonstrate cause and prejudice or actual innocence to
6 excuse any default. *See Coleman v. Thompson*, 501 U.S. 722, 750 (1991).

7 Cause exists in the form of ineffective assistance of appellate counsel if
8 any claim was not raised on direct appeal due to counsel's failure to recognize its
9 merit or develop necessary extra-record evidence. Attorney error rising to the
10 level of ineffective assistance constitutes cause. *Edwards v. Carpenter*, 529 U.S.
11 446, 451 (2000); *see also Murray v. Carrier*, 477 U.S. 478, 488 (1986)
12 ("Ineffective assistance of counsel, then, is cause for a procedural default.").

13 Although three ineffective assistance of counsel claims were presented in
14 the Petition for Review before the California Supreme Court and in the Petition
15 for Rehearing before the Court of Appeal, the appellate court emphasized that
16 these claims primarily relied on extra-record evidence and therefore were more
17 appropriately addressed in a petition for writ of habeas corpus. *Montana*, LEXIS
18 3591, at *36-37.

19 Prejudice is demonstrated by showing the underlying claims have
20 constitutional merit and a reasonable probability exists that their adjudication
21 would have resulted in a different outcome. *Strickland v. Washington*, 466 U.S.
22 668, 694 (1984). As detailed in Grounds One through Eight below, Petitioner's
23 claims satisfy this standard.

24 Petitioner does not concede that any claims are procedurally defaulted.
25 The California Court of Appeal's recognition that many claims are "more
26 appropriately resolved in a habeas corpus proceeding" suggests state courts
27

1 anticipate and will entertain these claims on habeas review. *Montana*, LEXIS
2 3591, at *36-37.

3 **IV. GROUNDS FOR RELIEF**

4 Petitioner's conviction resulted from multiple constitutional violations
5 that, individually and cumulatively, deprived him of his Sixth Amendment right
6 to effective assistance of counsel and his Fourteenth Amendment rights to due
7 process and a fair trial. These violations satisfy the standards set forth in
8 *Strickland v. Washington*, 466 U.S. 668 (1984), and the Antiterrorism and
9 Effective Death Penalty Act (AEDPA), 28 U.S.C. § 2254(d).

10 **GROUND ONE: INEFFECTIVE ASSISTANCE OF COUNSEL –
11 FAILURE TO RETAIN SART EXPERT AND EFFECTIVELY
12 CROSS-EXAMINE PROSECUTION SART NURSE**

13 **A. Constitutional Basis and Governing Law**

14 The Sixth Amendment guarantees effective assistance of counsel.
15 *Strickland v. Washington*, 466 U.S. 668, 684-86 (1984). To establish ineffective
16 assistance, a petitioner must demonstrate: (1) counsel's performance was
17 deficient, falling below an objective standard of reasonableness under prevailing
18 professional norms, *id.* at 687-88; and (2) the deficient performance prejudiced
19 the defense, showing "a reasonable probability that, but for counsel's
20 unprofessional errors, the result of the proceeding would have been different,"
21 *id.* at 694.

22 "Strategic choices made after less than complete investigation are
23 reasonable precisely to the extent that reasonable professional judgments
24 support the limitations on investigation." *Id.* at 690-91. Counsel has "a duty to
25 make reasonable investigations or to make a reasonable decision that makes
26 particular investigations unnecessary." *Id.* at 691.

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1 In *Hinton v. Alabama*, 571 U.S. 263, 274-75 (2014), the Supreme Court
 2 held that counsel's failure to obtain an adequate expert constituted deficient
 3 performance where expert testimony was critical to the defense. The Ninth
 4 Circuit has similarly recognized that failure to consult with and present expert
 5 testimony may constitute ineffective assistance where such testimony is
 6 necessary to rebut prosecution expert evidence. *Silva v. Woodford*, 279 F.3d
 7 825, 842-43 (9th Cir. 2002).

8 **B. Deficient Performance**

9 Trial counsel's performance fell below an objective standard of
 10 reasonableness by failing to use a SART expert to rebut prosecution medical
 11 evidence and by failing to adequately cross-examine the prosecution's SART
 12 nurse on critical methodological deficiencies.

13 **1. The Critical Importance of SART Evidence**

14 The prosecution's case rested on three pillars: Doe's testimony of
 15 unconsciousness and inability to consent; the SART nurse's physical findings
 16 purportedly corroborating force; and circumstantial evidence of intoxication.
 17 The SART evidence was uniquely powerful because it purported to provide
 18 objective, scientific corroboration of Doe's subjective testimony.

19 The prosecution SART nurse testified that physical findings—lacerations,
 20 swelling, redness, and petechiae—were "consistent with" nonconsensual
 21 penetration; that Doe's positioning during anal assault was "on her back,"
 22 strongly corroborating her unconsciousness testimony; and that injury nature
 23 and pattern were consistent with forcible sexual assault. *Montana*, LEXIS 3591,
 24 at *8, *14-15.

25 This testimony was devastating. It transformed Doe's testimony—which
 26 suffered from credibility issues including memory gaps, extreme intoxication,
 27 and the count 6 acquittal—into scientific fact.

2. Counsel's Failure to Use a Defense SART Expert

Expert testimony is often essential to rebut prosecution expert witnesses.

Ake v. Oklahoma, 470 U.S. 68, 83 (1985). In sexual assault prosecutions, SART evidence involves significant interpretive judgment. The same physical findings can be interpreted as consistent with consensual intercourse or nonconsensual assault depending on methodology, assumptions, and experience.

Competent defense counsel would have: consulted with a SART expert during pretrial preparation; retained that expert to review the prosecution nurse's report, photographs, and testimony; obtained written opinion critiquing prosecution methodology; called the expert at trial; and used the expert's opinions to cross-examine the prosecution nurse.

Trial counsel did none of these things. This failure cannot be justified as tactical. *Strickland* makes clear "strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." 466 U.S. at 690-91.

The Ninth Circuit has consistently held that counsel's failure to conduct a reasonable investigation and to present available substantial evidence or key witness testimony constitutes objectively unreasonable performance. *See Duncan v. Ornoski*, 528 F.3d 1222, 1234 (9th Cir. 2008), “[a] lawyer who fails adequately [] to investigate and introduce . . . [evidence] that demonstrate[s] his client's factual innocence, or that raise[s] sufficient doubt as to that question to undermine confidence in the verdict, renders deficient performance.” *Hart v. Gomez*, 174 F.3d 1067, 1070 (9th Cir. 1999) (holding that counsel's failure to review key documents corroborating defense witness's testimony constituted deficient performance); *see also Avila v. Galaza*, 297 F.3d 911, 919 (9th Cir. 2002) (holding that counsel's failure to investigate evidence that defendant's brother was the shooter constituted deficient performance); *Lord v. Wood*, 184

1 F.3d 1083, 1095-96 (9th Cir. 1999) (holding that counsel's failure to call key
 2 witnesses whose testimony undermined the prosecutor's case constituted
 3 deficient performance)."

4 **3. Specific Deficiencies a Defense SART Expert Would Have
 5 Identified**

6 ***a. Physical Findings Equally Consistent with Consensual Intercourse***

7 The prosecution SART nurse testified Doe had four vaginal lacerations,
 8 swelling and tenderness of perineum, redness and swelling of cervix, perineum
 9 lacerations consistent with anal penetration, and petechiae on right arm and left
 10 neck. *Montana*, LEXIS 3591, at *15.

12 A defense expert would have testified these findings are equally
 13 consistent with consensual intercourse under these circumstances: first
 14 intercourse or infrequent sexual activity (minor lacerations and tenderness are
 15 common); anal intercourse in particular (frequently results in minor lacerations,
 16 tenderness, and swelling even when consensual); delayed examination (over 24
 17 hours after the alleged assault, during which Doe urinated, cleaned herself, and
 18 engaged in normal activities); and absence of definitive force indicators (no
 19 significant tearing, defensive injuries, or inner thigh/genital bruising typically
 20 associated with forcible assault; neck petechiae could result from consensual
 21 kissing Doe admitted occurred).

23 ***b. The "Positioning" Opinion Was Scientifically Unsupported***

25 The prosecution SART nurse opined that Doe was "on her back" during
 26 anal assault, critical to the prosecution's unconsciousness theory since Petitioner
 27 testified Doe was on hands and knees—an active, participatory position.

28 *Montana*, LEXIS 3591, at *24.

29 A defense expert would have testified that: no reliable method exists for
 30 determining positioning during anal intercourse based on injury patterns alone;

1 the nurse exceeded her expertise (SART nurses document injuries, not
2 reconstruct sexual positioning); and basic anatomy contradicts the opinion (anal
3 intercourse with recipient on her back would require anatomically awkward
4 positioning).

5 ***c. Methodological Violations: Toluidine Blue Dye Protocol***

6 A defense expert would have testified the prosecution nurse violated
7 standard protocol by applying toluidine blue dye before completing baseline
8 examination and photographic documentation. Standard protocol requires:
9 complete visual inspection and photography documenting baseline appearance;
10 apply toluidine blue dye; then document additional findings revealed by dye.
11

12 This sequence is critical because dye can create artifacts—false-positive
13 findings. By applying dye before baseline documentation, the nurse created a
14 record that cannot distinguish genuine injuries from dye artifacts, undermining
15 reliability of all findings documented after dye application.
16

17 ***d. Failure to Rule Out Alternative Causation***

18 The SART examination occurred over 24 hours after the alleged assault.
19 During this interval, Doe urinated multiple times, cleaned herself with toilet
20 paper, rode in a car, slept, moved about normally, and vomited. *Montana*,
21 LEXIS 3591, at *13-15. Each activity could cause or exacerbate minor injuries.
22 Without immediate post-incident examination, it's impossible to definitively
23 attribute observed findings to sexual activity rather than intervening events.
24

25 **4. Counsel's Failure to Cross-Examine the SART Nurse**

26 Even without calling a defense expert, competent counsel would have
27 used expert consultation to conduct devastating cross-examination. The trial
28 transcript reveals defense counsel conducted only minimal cross-examination,
29 focusing on Doe's clothing appearing clean. *Montana*, LEXIS 3591, at *15 n.9.
30

1 Defense counsel failed to cross-examine regarding: consistency of
2 findings with consensual intercourse; lack of definitive force indicators; the
3 scientifically unsupported "positioning" opinion; toluidine blue dye protocol
4 violation; alternative causation from delayed examination; the nurse's
5 qualifications to offer opinions about sexual positioning; and absence of peer-
6 reviewed literature supporting her methodology.

7 This failure is particularly egregious given SART evidence centrality.
8 *Davis v. Alaska*, 415 U.S. 308, 316 (1974) (cross-examination is "the principal
9 means by which the believability of a witness and the truth of his testimony are
10 tested").

12 **5. No Reasonable Tactical Explanation**

13 The record contains no explanation for counsel's failures. No reasonable
14 tactical explanation exists: not a budgetary decision (retained private counsel);
15 not a strategic choice to humanize defendant; not a decision to focus on other
16 defenses (defense theory was consent—expert testimony supporting that theory
17 would have been essential); and not a calculated risk.

19 **C. Prejudice**

20 There is a reasonable probability that, but for counsel's deficient
21 performance, the result would have been different.

22 **1. The Prosecution's Case Was Not Overwhelming**

23 The jury's verdict demonstrates evidence was closely balanced. The Count
24 6 acquittal shows the jury wasn't unanimously convinced Doe was completely
25 unconscious. The case ultimately turned on credibility with no independent
26 witnesses. Doe's credibility suffered from significant memory gaps and
27 inconsistencies. Physical evidence was ambiguous—DNA established
28 intercourse but not consent; SART findings were susceptible to multiple
29 interpretations.

2. Expert Testimony Would Have Materially Altered the Evidentiary Landscape

A qualified defense SART expert would have: eliminated the primary objective corroboration of Doe's account; directly contradicted the "positioning" opinion (the Court of Appeal's treatment demonstrates its significance, *Montana*, LEXIS 3591, at *38-39); provided scientific support for the defense theory; and undermined reliability of all SART findings through testimony regarding protocol violations.

3. Cumulative Impact on All Counts

The absence of expert rebuttal affected both force-based counts (Counts 2, 4, 7—requiring proof of "force, violence, duress, menace, or fear") and intoxication-based counts (Counts 1, 3, 5—requiring proof Doe was "prevented from resisting" by intoxication). Without SART corroboration, the prosecution's case rested entirely on Doe's testimony, significantly weakened by her intoxication, memory gaps, and the count 6 acquittal.

4. Reasonable Probability of Different Outcome

Under *Strickland*, Petitioner need not show expert testimony would have resulted in acquittal—only "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 U.S. at 694. This standard "does not require a showing that counsel's deficient performance 'more likely than not altered the outcome' but rather that the likelihood of a different result is 'substantial, not just conceivable.'" (internal quotation marks and citations omitted).

Harrington v. Richter, 562 U.S. 86, 112 (2011).

The cumulative effect of eliminating objective corroboration of force, refuting the "positioning" opinion, providing scientific support for consensual intercourse, and undermining SART findings reliability creates far more than a reasonable probability of a different outcome. At minimum, there is a reasonable

1 probability the jury would have acquitted on force-based counts (as they did on
2 count 6), hung on some or all counts, or convicted on fewer counts. [See
3 Exhibit B, Declaration of licensed SART nurse.]

4 **D. Conclusion as to Ground One**

5 Trial counsel's failure to retain and present a SART expert, and failure to
6 adequately cross-examine the prosecution SART nurse, fell below an objective
7 standard of reasonableness and resulted in prejudice. This ground alone warrants
8 habeas relief.
9

10 **GROUND TWO: INEFFECTIVE ASSISTANCE OF COUNSEL –**
11 **FAILURE TO INVESTIGATE AND PRESENT EVIDENCE OF**
12 **PRIOR FALSE ACCUSATION**

13 **A. Constitutional Basis and Governing Law**

14 The Sixth Amendment includes the duty to conduct reasonable
15 investigation. *Strickland*, 466 U.S. at 690-91; *Kimmelman v. Morrison*, 477 U.S.
16 365, 384-85 (1986). The Confrontation Clause guarantees the right to cross-
17 examine adverse witnesses and present credibility-challenging evidence. *Davis*,
18 415 U.S. at 316. "The exposure of a witness' motivation in testifying is a proper
19 and important function of the constitutionally protected right of cross-
20 examination." *Id.* at 316-17.

21 Evidence of motive to fabricate or prior false accusations is
22 constitutionally significant. *Olden v. Kentucky*, 488 U.S. 227, 231-32 (1988)
23 (holding exclusion of evidence showing witness's motive to lie violated
24 defendant's Sixth Amendment right to confrontation).
25

1 See, e.g., *Olden*, 488 U.S. at 232 (per curiam) (finding relevant
2 petitioner's theory of the case that the victim concocted the rape story to protect
3 her relationship with her lover who would have grown suspicious upon seeing
4 her disembark from petitioner's car); *Davis*, 415 U.S. at 316 ("The partiality of a
5 witness is subject to exploration at trial, and is 'always relevant as discrediting
6 the witness and affecting the weight of his testimony.'" (citing 3A J.
7 WIGMORE, EVIDENCE § 940, p. 775 (Chadbourn rev. 1970))).
8
9

10 **B. Deficient Performance**
11
12

13 Trial counsel failed to investigate, develop, and seek admission of
14 evidence that Doe had previously made a false accusation of sexual assault
15 against another individual.
16
17

18 **1. The Evidence of Prior False Accusation**
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21 According to information provided to trial counsel, Doe had previously
22 made a rape accusation against another individual during her relationship with
23 her boyfriend. This information came from the boyfriend's mother, who had
24 personal knowledge that: Doe accused another man of raping her; the accusation
25 was made during Doe's relationship with her boyfriend; the accusation was
26 investigated; the accusation was determined to be unfounded or false; and the
27 boyfriend's mother had personal knowledge and at that time was willing to
28 testify.
29
30

1 Despite diligent efforts by undersigned counsel and our office's licensed
2 private investigator, we have been unable to locate Adry Svraka, the mother of
3 Doe's boyfriend, or the boyfriend himself to obtain a supporting declaration at
4 this time. Our investigator has conducted searches through public records, and
5 social media platforms, but these witnesses appear to have relocated without
6 forwarding information.
7

8 Additionally, trial counsel has not responded to our office's queries
9 regarding this matter.
10

11 Given the constitutional significance of this evidence and the time-sensitive
12 nature of this petition, Petitioner respectfully submits this ground based on the
13 information known to have been available to trial counsel at the time of trial.
14 Petitioner's investigation remains ongoing, and we are continuing efforts to
15 locate these critical witnesses through additional investigative resources,
16 including subpoenas for records that may reveal current locations. Petitioner will
17 supplement the record with declarations from Adry Svraka, the boyfriend, and
18 any other witnesses with knowledge of the prior false accusation as soon as they
19 are located and prior to any evidentiary hearing on this petition. The absence of
20 these declarations at this stage should not diminish the merit of this claim, as the
21 issue presented is trial counsel's failure to investigate and present evidence that
22 was known and available to counsel at the time of trial.
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2. The Relevance and Materiality of Prior False Accusation Evidence

In a case turning entirely on credibility—Doe's word against Petitioner's—evidence that Doe previously made a false rape accusation was extraordinarily material.

a. Motive to Fabricate

The pattern alleged in the prior accusation is strikingly similar: Doe engaged in consensual sexual activity with someone other than her boyfriend; rather than admit infidelity, Doe claimed she was raped; this allowed Doe to maintain her relationship while explaining away her conduct.

In the instant case, Doe was living with her boyfriend when she went to the nightclub. *Montana*, LEXIS 3591, at *4 n.4. She admitted kissing and "grinding" with Petitioner and accompanied him to a hotel room. *Id.* at *22, *44. After the incident, Doe texted friends using language suggesting surprise and regret: "I didn't give consent. He kind of just started taking my clothes off"; "Even if I were to have said yes, it still isn't consent if I'm drunk"; "I don't even remember him taking me from the club." *Id.* at *14.

This language is consistent with someone who regretted a consensual encounter and was recharacterizing it as nonconsensual to avoid relationship consequences. Evidence of a prior false accusation following the same pattern would have been powerfully probative.

1 ***b. Credibility Impeachment***

2 Even absent proof of specific motive in the instant case, evidence that
 3 Doe previously made a false rape accusation would have been devastating
 4 impeachment. A witness who previously made a false accusation of sexual
 5 assault has demonstrated willingness to lie about the most serious allegations.
 6

7 Notably in *Olden*, 488 U.S. at 231, the Supreme Court held, [w]e
 8 emphasized that '[] the exposure of a witness' motivation in testifying is a
 9 proper and important function of the constitutionally protected right of cross-
 10 examination."

11 See also *Davis* 415 U.S. at 316-317, citing *Greene v. McElroy*, 360 U.S.
 12 474, 496 (1959). "Recently, in *Delaware v. Van Arsdall*, 475 U.S. 673 (1986),
 13 we reaffirmed *Davis*, and held that '[] a criminal defendant states a violation of
 14 the Confrontation Clause by showing that he was prohibited from engaging in
 15 otherwise appropriate cross-examination designed to show a prototypical form
 16 of bias on the part of the witness, and thereby 'to expose to the jury the facts
 17 from which jurors . . . could appropriately draw inferences relating to the
 18 reliability of the witness.' 475 U.S., at 680, quoting *Davis*, *supra*, at 318."

19 ***c. Pattern Evidence***

20 If the prior accusation followed a similar pattern—consensual activity
 21 while in a relationship, followed by a false rape claim to avoid consequences—
 22

1 this would demonstrate a modus operandi making Doe's accusation less credible.

2 *Huddleston v. United States*, 485 U.S. 681, 685 (1988).

3 **4 3. Trial Counsel's Failure to Investigate and Present This Evidence**

5 The record contains no indication trial counsel: conducted any
6 investigation into the prior false accusation; interviewed the boyfriend's mother
7 or other potential witnesses; obtained police reports, medical records, or other
8 documentation; or filed any motion seeking admission of this evidence.

9
10 This complete failure constitutes deficient performance under *Strickland*.
11
12 "Counsel must conduct a reasonable investigation of the law and facts," 466
13 U.S. at 690-91.

14
15 Competent counsel would have: interviewed the boyfriend's mother;
16 conducted reasonable follow-up investigation to corroborate her information;
17 researched the governing evidentiary standards; filed a written motion with a
18 detailed offer of proof; presented admissible supporting evidence at the hearing;
19 and preserved the issue for appellate review if denied.

20
21 The Ninth Circuit has repeatedly held that when counsel is on notice of
22 potentially exculpatory or impeaching evidence but fails to investigate it, such
23 inaction constitutes deficient performance. *Hart*, 174 F.3d at 1070-01 (Counsel's
24 failure to investigate potentially exculpatory evidence and witnesses falls below
25 an objective standard of reasonableness.); *Lord*, 184 F.3d 1095-96 (finding
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1 ineffective assistance where counsel failed to interview and present testimony
2 from witnesses who would have undermined the prosecution's case).
3

4 Counsel's omissions here—failure to investigate, to present the
5 corroborating witness, and to preserve the evidentiary issue—were not strategic
6 but neglectful. Under *Strickland* and its Ninth Circuit progeny, such failures
7 constitute constitutionally deficient performance that undermines confidence in
8 the outcome.
9

10 **4. No Reasonable Tactical Justification**

11 The record contains no explanation for counsel's failure. No reasonable
12 tactical explanation exists: not a calculated decision to avoid "victim-blaming"
13 (evidence of prior false accusations is highly relevant impeachment, not
14 gratuitous character attack); not a decision to focus on other defenses (defense
15 theory was consent—evidence supporting that theory would have been
16 essential); not a strategic choice to avoid angering the jury (properly presented
17 through the boyfriend's mother's testimony); and not concern about admissibility
18 (competent counsel would have at minimum filed a motion and obtained a
19 ruling).
20

21 *See Reynoso v. Giurbino*, 462 F.3d 1099, 1112-13 (9th Cir. 2006), the
22 Court stated, "if counsel's failure to investigate possible methods of
23 impeachment is part of the explanation for counsel's impeachment strategy (or a
24

1 lack thereof), the failure to investigate may in itself constitute [] ineffective
2 assistance of [] counsel."

3
4 *See also Tucker v. Ozmint*, 350 F.3d 433, 444 (4th Cir. 2003) ("Trial
5 counsel have an obligation to investigate possible methods for impeaching a
6 prosecution witness, and failure to do so may constitute ineffective assistance of
7 counsel.").

8
9 **C. Prejudice**

10 There is a reasonable probability that, but for counsel's failure to
11 investigate and present evidence of Doe's prior false accusation, the result would
12 have been different.

13
14 **1. This Was a Pure Credibility Contest**

15 The case turned entirely on whether the jury believed Doe or Petitioner.
16 No independent witnesses observed sexual activity. Physical evidence (DNA,
17 SART findings) established intercourse occurred but was ambiguous as to
18 consent. Video evidence and phone records were susceptible to competing
19 interpretations.

20 In this credibility contest, evidence that Doe previously made a false rape
21 accusation following a similar pattern would have been devastating. Critically,
22 credibility determinations are for the jury, as the "the jury is the lie detector.".

23
24
25 *United States v. Scheffer*, 523 U.S. 303, 313 (1998)

2. The Jury Demonstrated Receptiveness to Defense Theories

2 The Count 6 acquittal demonstrates: the jury wasn't predisposed to believe
3
4 the prosecution; the jury carefully evaluated evidence on each count; and the
5 jury had reasonable doubt about at least one element of the prosecution's theory.
6
7 *Montana*, LEXIS 3591, at *2. This strongly suggests additional impeachment of
8 Doe—particularly evidence of a prior false accusation—would have created
9 reasonable doubt on additional counts.
10

4. Prior False Accusation Evidence Would Have Addressed the Prosecution's Strongest Arguments

13 The prosecution relied heavily on: SART findings; phone calls during
14 which Petitioner allegedly prevented Doe from disclosing her location; text
15 messages describing nonconsent; and Petitioner's false statements in the pretext
16 call and police interview. Each point could be explained by Petitioner's theory
17 that Doe willingly engaged in sexual activity but later regretted it and fabricated
18 a rape claim to avoid relationship consequences. Evidence of a prior false
19 accusation following the same pattern would have provided powerful support for
20
21 this theory.

4. The Standard Is Reasonable Probability, Not Certainty

27 *Strickland* requires showing "a reasonable probability that, but for
28 counsel's unprofessional errors, the result of the proceeding would have been
29 different," which "does not require a showing that counsel's actions 'more likely

1 than not altered the outcome,' but rather that the 'likelihood of a different result
2 [must be] substantial, not just conceivable.'" Harrington, 562 U.S. at 112.
3

4 In a pure credibility contest where the jury already demonstrated
5 uncertainty by acquitting on count 6, evidence that the complainant previously
6 made a false rape accusation following a similar pattern would have
7 fundamentally altered the evidentiary landscape. At minimum, there is a
8 reasonable probability the jury would have acquitted on all counts, acquitted on
9 additional counts, hung on some or all counts, or convicted on fewer counts with
10 less severe sentencing consequences.
11
12

14 **D. Need for Evidentiary Development**

15

16 The Court of Appeal properly recognized that many of Petitioner's
17 ineffective assistance of counsel claims "rest[ed] primarily upon matters other
18 than what the trial court could have observed during trial" and were therefore
19 "more appropriately resolved in a habeas corpus proceeding." *Montana*, LEXIS
20 3591, at *34–37.
21
22

23 This claim squarely illustrates that principle. Resolution of the issue
24 necessarily depends on evidence outside the appellate record, including
25 declarations from the boyfriend's mother, the boyfriend himself, and friends of
26 Doe, as well as testimony from witnesses such as the individual previously
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1 accused. In addition, expert legal analysis would be required to assess the
2 admissibility and probative value of such evidence.
3

4 **E. Conclusion as to Ground Two**

5 Trial counsel's complete failure to investigate and present evidence of
6 Doe's prior false accusation fell below an objective standard of reasonableness
7 and resulted in prejudice sufficient to undermine confidence in the outcome.
8 This ground independently warrants habeas relief.
9

10 **GROUND THREE: INEFFECTIVE ASSISTANCE OF COUNSEL –**
11 **FAILURE TO IMPEACH WITH AVAILABLE EVIDENCE**

12 **A. Constitutional Basis and Governing Law**

13 The Sixth Amendment guarantees effective assistance of counsel,
14 including the duty to conduct adequate cross-examination and impeachment of
15 adverse witnesses. *Strickland v. Washington*, 466 U.S. 668, 684-86 (1984).
16 "Cross-examination is the principal means by which the believability of a
17 witness and the truth of his testimony are tested." *Davis v. Alaska*, 415 U.S. 308,
18 316 (1974).

23
24 Effective cross-examination requires adequate preparation and
25 impeachment with available evidence. *Kimmelman v. Morrison*, 477 U.S. 365,
26 386 (1986). To effectively cross-examine a witness, counsel must "make
27 reasonable investigations or make a reasonable decision that makes particular
28 investigations unnecessary." *Strickland*, 466 U.S. at 691.
29
30

1 "[A] failure to cross-examine a witness about a particular issue has been
2 found to constitute ineffective assistance where there was no credible strategic
3 reason not to question the witness about that issue." *United States v. Kazeem*,
4 2023 U.S. Dist. LEXIS 145139, at *25 (D. Or. 2023); *see also Reynoso v.*
5 *Giurbino*, 462 F.3d 1099, 1114 (9th Cir. 2006).

8 **B. Deficient Performance**

9 Trial counsel failed to impeach Doe with available preliminary hearing
10 evidence demonstrating a material inconsistency regarding her physical position
11 during the alleged anal assault.

13 **1. Failure to Impeach with Preliminary Hearing Positioning
14 Testimony**

15 The SART nurse testified that Doe was "on her back" during the anal
16 assault, testimony critical to the prosecution's unconsciousness theory. *Montana*,
17 LEXIS 3591, at *24. Petitioner testified that Doe was on her hands and knees
18 and "assisted" him. *Id.* The physical positioning was therefore central to the
19 credibility contest between Doe and Petitioner and directly relevant to whether
20 Doe was unconscious or consenting.

24 At the preliminary hearing, Doe physically demonstrated that appellant
25 was behind her when he had anal sex with her. (See Exhibit C, Appellant's
26 Opening Brief, H049456, at pp. 56-57; submitted as Exhibit D, 3CT 822-823).
27
28 This demonstration is fundamentally inconsistent with the "on her back"
29
30

1 testimony that formed the cornerstone of the prosecution's case at trial. Trial
2 counsel wholly failed to use this critical impeachment evidence.
3

4 On direct appeal, the Court of Appeal found "Doe's testimony from the
5 preliminary examination is entirely in accord with her testimony at trial," noting
6 "there is nothing in the transcript of the preliminary examination to support"
7 Petitioner's claim that Doe made a physical demonstration inconsistent with her
8 trial testimony. *Montana*, LEXIS 3591, at *38-39. However, the appellate court
9 also recognized that ineffective assistance of counsel claims require supporting
10 information that is not part of the record and therefore are best addressed in
11 habeas proceedings. *Id.*
12

13 The appellate court's rejection does not bar habeas relief for several
14 reasons:
15

16 **First**, the physical demonstration Doe made at the preliminary hearing—
17 showing that appellant was behind her during anal intercourse—was not
18 adequately captured in the cold transcript reviewed by the appellate court. (See
19 Exhibit C, Appellant's Opening Brief, H049456, at pp. 56-57; submitted as
20 Exhibit D, 3CT 822-823). A habeas corpus proceeding is the appropriate vehicle
21 to present evidence through declarations from witnesses who observed this
22 demonstration, including trial counsel, the prosecutor, defense investigators, and
23 court personnel present at the preliminary hearing.
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1 **Second**, even if the appellate court had access to some record of Doe's
2 positioning testimony, counsel's complete failure to use this evidence at trial was
3 objectively deficient. Competent counsel would have:

4

- 5 • Carefully reviewed the preliminary hearing transcript and notes regarding
6 Doe's physical demonstration;
- 7 • Consulted with a SART expert to understand the significance of
8 positioning in analyzing injury patterns and assessing claims of
9 unconsciousness;
- 10 • Created demonstrative exhibits illustrating the inconsistency between the
11 "behind her" positioning demonstrated at the preliminary hearing and the
12 "on her back" positioning testified to at trial;
- 13 • Methodically cross-examined Doe about this material inconsistency in her
14 testimony;
- 15 • Cross-examined the SART nurse about the unreliability of determining
16 sexual positioning from injury patterns alone, particularly when the
17 alleged victim's own account of positioning has materially changed;
- 18 • Highlighted these positioning inconsistencies during opening statement
19 and closing argument to undermine Doe's credibility on the central issue
20 of consent versus unconsciousness.

21 The trial record contains no indication that counsel undertook any of these
22 essential tasks. Counsel's performance fell far below the objective standard of
23 reasonableness required by *Strickland*.

24 "Impeachment evidence is offered to discredit a witness and reduce the
25 effectiveness of her testimony." *Norwood v. Children & Youth Servs.*, 2013 U.S.
26 Dist. LEXIS 206023, at *9 (C.D. Cal. 2013). Such evidence is that which
27 "explains why the jury should not put faith in [the witness] or [her] testimony."
28 *Chiasson v. Zapata Gulf Marine Corp.*, 988 F.2d 513, 517 (5th Cir. 1993). Doe's
29
30

1 preliminary hearing demonstration that Petitioner was behind her during the
2 alleged anal assault was precisely this type of powerful impeachment evidence.
3 Its complete absence from trial counsel's cross-examination and case
4 presentation cannot be explained by any reasonable strategic decision.
5

6 The physical positioning during the alleged assault was not a peripheral
7 detail—it was central to determining whether Doe was conscious and consenting
8 (as Petitioner testified, with Doe on hands and knees assisting him) or
9 unconscious (as the prosecution argued, requiring Doe to be on her back). Doe's
10 preliminary hearing demonstration supporting Petitioner's version of events was
11 the single most important piece of impeachment evidence available to the
12 defense, yet counsel inexplicably failed to use it.
13

14 **2. Failure to Use Video Evidence to Impeach**

15 Surveillance video was critical evidence regarding Doe's intoxication
16 level, motor function, whether she voluntarily accompanied Petitioner, and
17 accuracy of witness testimony about her condition.
18

19 Doe testified that: her next memory after sitting on the couch was "being
20 outside the nightclub" with "no memory of how she got there"; "she could not
21 walk very well"; and Montana was "holding her up with his arm around her
22 shoulders." *Montana*, LEXIS 3591, at *8. This painted a picture of profound
23 incapacitation.
24

25 According to Petitioner, complete video surveillance showed: Doe
26 walking without falling multiple times, including walking from nightclub to
27 hotel (several blocks); Doe and Petitioner walking hand-in-hand at times; Doe's
28 gait and bearing suggesting intoxication but not incapacitation; and Doe's facial
29 expressions and body language suggesting awareness and responsiveness.
30

1 Trial counsel failed to: obtain complete, unedited surveillance video (see
 2 Ground Four); play complete video sequences for the jury; cross-examine Doe
 3 with video evidence showing she was capable of walking without assistance;
 4 cross-examine witnesses with video evidence; and use video evidence in closing
 5 argument. That said, the Ninth Circuit in *Perry v. Rushen*, 713 F.2d 1447, 1452
 6 (9th Cir. 1983), noted, "where the state interest is strong, only the exclusion of
 7 critical, reliable and highly probative evidence will violate due process.").
 8

9 **3. Failure to Impeach with "Kidnapping" Narrative Evolution**

10 After the incident, Doe texted friend N. that she had been "low key
 11 kidnapped." *Montana*, LEXIS 3591, at *14. The prosecution initially charged
 12 kidnapping allegations but filed an amended information deleting them before
 13 trial. *Id.* at *2-3, *29.

14 This sequence—from "kidnapped" to "low key kidnapped" to no
 15 kidnapping charge—provided powerful impeachment that counsel failed to
 16 exploit: the claim was demonstrably false (video showed Doe walking
 17 voluntarily with Petitioner, at times hand-in-hand); the evolution suggests Doe
 18 was walking back her initial exaggeration; the dismissal suggests even the
 19 prosecution concluded this allegation was unsupported; the false claim
 20 impeached Doe's credibility on the central issue; and the claim was logically
 21 inconsistent with her testimony about memory blackout.

22 Defense counsel's failure to obtain the initial charging documents
 23 containing the kidnapping allegations and to effectively cross-examine Doe
 24 constituted ineffective assistance of counsel under *Strickland*, 466 U.S. 668, as
 25 applied by the Ninth Circuit.

26 The Ninth Circuit stated in *United States v. Monroe*, 943 F.2d 1007, 1012
 27 (9th Cir. 1991) "[a] basic rule of evidence provides that prior inconsistent
 28 statements may be used to impeach the credibility of a witness." *United States v.*

1 *McLaughlin*, 663 F.2d 949, 952 (9th Cir. 1981) (quoting *United States v. Hale*,
2 422 U.S. 171, 176, 45 L. Ed. 2d 99, 95 S. Ct. 2133 (1975)). 'The prior
3 statements may have been oral and unsworn, and 'the making of the previous
4 statements may be drawn out on cross-examination of the witness himself, or if
5 on cross-examination the witness has denied making the statement, or has failed
6 to remember it, the making of the statement may be proved by another witness.'

7 *United States v. Sisto*, 534 F.2d 616, 622 (5th Cir. 1976) (citation omitted)."

4. Failure to Impeach with Conditional Language in Text Messages

10 Doe's text "'Even if I were to have said yes, it still isn't consent if I'm
11 drunk'" is revealing. *Montana*, LEXIS 3591, at *14. The conditional phrasing—
12 "even if I were to have said yes"—suggests Doe was uncertain whether she had
13 consented, consistent with Petitioner's account that she did consent.

Competent counsel would have cross-examined Doe about this uncertainty and used this conditional language in closing argument. Strickland, 466 U.S. at 688.

5. Failure to Impeach with Delayed Disclosure and Desire to "Forget"

19 Doe testified that after returning to the hotel, "some of her friends asked
20 her what happened, but Doe did not tell them as she wanted to forget." *Montana*,
21 LEXIS 3591, at *13. This is inconsistent with typical rape victim behavior and
22 more consistent with someone who regretted a consensual encounter. Competent
23 counsel would have developed this inconsistency through cross-examination and
24 expert testimony.

C. Prejudice

27 For reasons discussed in Grounds One and Two, there is a reasonable
28 probability that effective impeachment would have resulted in a different
29 outcome. The cumulative effect of impeaching Doe with positioning
30 inconsistencies, video evidence contradicting incapacitation testimony, the false

1 "kidnapping" narrative, conditional language suggesting uncertainty about
 2 consent, and other inconsistencies would have fundamentally undermined Doe's
 3 credibility in a case turning entirely on credibility.

4 *Doe v. Ayers*, 782 F.3d 425, 434 (9th Cir. 2015), "the prevailing
 5 professional norms, as outlined by the ABA Standards, required that a lawyer
 6 conduct a prompt investigation of the circumstances of the case and [] explore
 7 all avenues leading to facts relevant to the merits of the case and the penalty in
 8 the event of conviction,"

9 At minimum, there is a reasonable probability of acquittal on some or all
 10 counts, a hung jury, or conviction on fewer counts. *Strickland*, 466 U.S. at 694.
 11 The Ninth Circuit has recognized that "where multiple instances of deficient
 12 performance combine to undermine a key prosecution witness, prejudice may be
 13 found even if no single instance would independently satisfy *Strickland's*
 14 prejudice prong." *See also Bemore v. Chappell*, 788 F.3d 1151, 1163 (9th Cir.
 15 2015).

16 **D. Conclusion as to Ground Three**

17 Trial counsel's failure to impeach Doe and key witnesses with available
 18 evidence fell below an objective standard of reasonableness and resulted in
 19 prejudice. This ground independently warrants habeas relief.

20 **GROUND FOUR: INEFFECTIVE ASSISTANCE OF COUNSEL –**
 21 **FAILURE TO SECURE COMPLETE SURVEILLANCE VIDEO**

22 **A. Constitutional Basis and Governing Law**

23 The Sixth Amendment guarantees the right to effective assistance of
 24 counsel, which includes counsel's duty to conduct a reasonable investigation into
 25 potentially exculpatory evidence. *Strickland*, 466 U.S. at 690-91 (counsel has "a
 26 duty to make reasonable investigations or to make a reasonable decision that
 27 makes particular investigations unnecessary"). This investigative duty is
 28

1 particularly critical when dealing with potentially exculpatory evidence. *Wiggins*
2 *v. Smith*, 539 U.S. 510, 522-23 (2003) (emphasizing counsel's obligation to
3 conduct thorough investigation before making strategic decisions).

4 The Fourteenth Amendment's Due Process Clause guarantees a criminal
5 defendant the right to present a complete defense, including the right to compel
6 production of favorable evidence. *California v. Trombetta*, 467 U.S. 479, 485
7 (1984); *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973) ("The right of an
8 accused in a criminal trial to due process is, in essence, the right to a fair
9 opportunity to defend against the State's accusations").

10 In the Ninth Circuit, counsel's failure to investigate and secure potentially
11 exculpatory video evidence may constitute deficient performance under
12 *Strickland*. *Reynoso*, 462 F.3d at 1112-13, "[a] lawyer who fails adequately to
13 investigate, and to introduce into evidence, [information] that demonstrates his
14 client's factual innocence, or that raises sufficient doubts as to that question to
15 undermine confidence in the verdict, renders deficient performance.' *Lord v.*
16 *Wood*, 184 F.3d 1083, 1093 (9th Cir. 1999) (quoting *Hart v. Gomez*, 174 F.3d
17 1067, 1070 (9th Cir. 1999)) (internal quotation marks omitted and second
18 alteration in original). In particular, if counsel's failure to investigate possible
19 methods of impeachment is part of the explanation for counsel's impeachment
20 strategy (or a lack thereof), the failure to investigate may in itself constitute []
21 ineffective assistance of [] counsel."

22

B. Deficient Performance

23 Trial counsel failed to subpoena and obtain complete, original
24 surveillance video from the nightclub and hotel, failed to retain a video forensics
25 expert to authenticate and analyze footage, and failed to challenge the
26 prosecution's presentation of edited or incomplete video clips.
27
28
29
30

1. Complete Video Was Critical

Surveillance video directly addressed: Doe's intoxication level and motor function; whether Doe voluntarily accompanied Petitioner; Doe's demeanor, affect, and awareness; and the accuracy of testimony about Doe's condition.

According to Petitioner, the prosecution provided defense counsel with edited clips rather than complete, continuous footage. These clips were selected by the prosecution to support its incapacitation theory and didn't include exculpatory footage showing Doe's capabilities.

2. Authentication and Foundation Requirements

First, competent counsel would have: issued comprehensive subpoenas to all custodians of records requiring production of original surveillance video files, metadata, chain of custody documentation, and technical specifications.

United States v. Nixon, 418 U.S. 683, 709 (1974) (recognizing the fundamental right to compulsory process for obtaining evidence); *See also Ohio v. Roberts*, 448 U.S. 56, 65 (1980) ("underlying purpose" of Confrontation Clause is "to augment accuracy in the factfinding process by ensuring the defendant an effective means to test adverse evidence")

Second, competent counsel would have: retained a video forensics expert to authenticate the original files, analyze whether files had been edited or altered, extract and prepare defense exhibits from exculpatory portions, and provide expert testimony regarding completeness and authenticity. *Hinton v. Alabama*, 571 U.S. 263, 273 (2014) (counsel's failure to request expert funding constituted deficient performance where expert assistance was critical to the defense); *Richter v. Hickman*, 578 F.3d 944, 953-54 (9th Cir. 2009) (en banc) (counsel ineffective for failing to consult forensic expert on critical evidence), rev'd on other grounds, *Harrington v. Richter*, 562 U.S. 86 (2011).

1 Third, competent counsel would have: vigorously challenged the
2 prosecution's edited clips through foundational objections, authentication
3 challenges, cross-examination of custodians, and motions to exclude incomplete
4 or misleading evidence. *Crawford v. Washington*, 541 U.S. 36, 61-62 (2004)
5 (emphasizing the critical role of cross-examination in testing evidence
6 reliability).

7 Fourth, competent counsel would have: presented the complete, unedited
8 video to the jury to provide full context and counter any misleading impressions
9 created by selective editing. *Crane v. Kentucky*, 476 U.S. 683, 690 (1986)
10 (defendant has fundamental right to present evidence critical to his defense).

12 **3. Counsel's Complete Failure**

13 The record contains no indication trial counsel: subpoenaed custodians of
14 records; obtained original video files or metadata; retained a video forensics
15 expert; challenged completeness or authenticity of prosecution video; or
16 presented complete video sequences.

18 This complete failure constitutes deficient performance. *Strickland*, 466
19 U.S. at 691 ("counsel has a duty to make reasonable investigations or to make a
20 reasonable decision that makes particular investigations unnecessary").

21 **4. No Reasonable Tactical Explanation**

22 There is no reasonable tactical explanation: not a cost concern (retained
23 private counsel); not a strategic decision (defense theory was consent/voluntary
24 participation—video evidence supporting this theory would have been
25 essential); and not concern about harmful content (counsel's duty is to review all
26 evidence). The only explanation is neglect. *Strickland*, 466 U.S. at 690.

28 **C. Prejudice**

29 There is a reasonable probability that presentation of complete, unaltered
30 surveillance video would have resulted in a different outcome.

1 **1. Complete Video Would Have Provided Critical Evidence**

2 First, objective documentation of Doe's functional capabilities throughout
 3 the relevant time period, providing the jury with comprehensive evidence to
 4 assess capacity and consent. *Holmes v. South Carolina*, 547 U.S. 319, 324
 5 (2006) ("Whether rooted directly in the Due Process Clause of the Fourteenth
 6 Amendment or in the Compulsory Process or Confrontation Clauses of the Sixth
 7 Amendment, the Constitution guarantees criminal defendants 'a meaningful
 8 opportunity to present a complete defense'"') (quoting *Crane v. Kentucky*, 476
 9 U.S. 683, 690 (1986)).

10 Second, visual evidence of voluntary accompaniment through footage
 11 showing Doe walking hand-in-hand with Petitioner, smiling, and actively
 12 engaging in social interaction—conduct fundamentally inconsistent with
 13 incapacitation. *Chambers*, 410 U.S. at 294 (excluding critical defense evidence
 14 violates due process and Sixth Amendment right to a present a defense).

15 **2. The Prosecution's Theory Depended on Incapacitation**

16 The prosecution's theory on intoxication-based counts (counts 1, 3, 5) was
 17 that Doe was "prevented from resisting by [an] intoxicating ... substance." The
 18 prosecution's theory on force-based counts (counts 2, 4, 7) also depended on
 19 showing Doe was so intoxicated she was unconscious or unable to resist.

20 Video evidence showing Doe was capable of walking, making decisions,
 21 and exhibiting awareness would have directly contradicted this central theory.
 22 Given the jury's acquittal on count 6 (rape of unconscious victim), there is a
 23 reasonable probability that complete video evidence would have resulted in
 24 acquittal on intoxication-based counts, acquittal on force-based counts, or hung
 25 jury on some or all counts.

1 **D. Conclusion as to Ground Four**

2 Trial counsel's failure to secure complete, unaltered surveillance video
 3 and to retain video forensics expertise fell below an objective standard of
 4 reasonableness and resulted in prejudice. This ground independently warrants
 5 habeas relief.

6 **GROUND FIVE: INEFFECTIVE ASSISTANCE OF COUNSEL –**
 7 **DEFICIENT PRESENTATION OF CAPACITY EVIDENCE**

8 **A. The Trial Court's Exclusion of L.A.'s Opinion Testimony**

9 The trial court excluded lay opinion testimony from Doe's friend L.A.
 10 regarding whether Doe was capable of consenting to sex when he saw her in the
 11 hotel lobby after the incident. *Montana*, LEXIS 3591, at *40-42. The defense
 12 asked whether L.A. had "an opinion about whether [Doe] could say 'yes' or 'no'
 13 to sex" when he saw her in the lobby. *Id.* at *40. The trial court sustained the
 14 prosecutor's objection, finding the evidence irrelevant, an improper lay opinion
 15 on a legal conclusion, and more prejudicial than probative. *Id.* at *41. The Court
 16 of Appeal affirmed. *Id.* at *41-44.

17 **B. Constitutional Basis and Governing Law**

18 The Sixth Amendment guarantees effective assistance of counsel.
 19 *Strickland*, 466 U.S. at 684-86. The Fourteenth Amendment guarantees "a
 20 meaningful opportunity to present a complete defense." *Crane v. Kentucky*, 476
 21 U.S. 683, 690 (1986). However, counsel's failure to present evidence in a form
 22 that satisfies evidentiary requirements may constitute ineffective assistance.
 23 *Chia v. Cambra*, 360 F.3d 997, 1004 (9th Cir. 2004).

24 **C. Deficient Performance**

25 Significantly, the Ninth Circuit opined in *Chia*, 360 F.3d 997, 1003-04,
 26 "[i]n a habeas proceeding, we have traditionally applied a balancing test to
 27 determine whether the exclusion of evidence in the trial court violated

1 petitioner's due process rights, weighing the importance of the evidence against
 2 the state's interest in exclusion." *Miller v. Stagner*, 757 F.2d 988, 994 (9th Cir.),
 3 amended on other grounds, 768 F.2d 1090 (9th Cir. 1985). In balancing these
 4 interests, we must, on the one hand, afford 'due weight to the substantial state
 5 interest in preserving orderly trials, in judicial efficiency, and in excluding
 6 unreliable . . . evidence.' *Miller*, 757 [] F.2d at 995. [] On the other hand, we
 7 must stand vigilant guard over the principle that "the right to present a defense is
 8 fundamental" in our system of constitutional jurisprudence. *Perry v. Rushen*,
 9 713 F.2d 1447, 1450-51 (9th Cir. 1983) (noting that 'because this right is so
 10 important, language from some cases and commentary suggests that the
 11 defendant's right carries conclusive weight, and that the exclusion of any
 12 relevant evidence is unconstitutional.')."

14 While the Court of Appeal found no error in the trial court's evidentiary
 15 ruling based on how defense counsel framed the question, counsel's performance
 16 was deficient because counsel failed to present the evidence in an admissible
 17 form.

19 **1. The Problem with Counsel's Question**

20 The problem was counsel's question seeking legal conclusion about
 21 "capacity to consent." The trial court correctly excluded this specific question,
 22 but counsel should have framed it differently.

23 **2. How Competent Counsel Would Have Presented the Evidence**

24 Competent counsel would have: elicited detailed factual observations
 25 from L.A. about Doe's condition in the hotel lobby (could she walk on her own,
 26 was she stumbling, could she speak clearly, were her responses coherent, did she
 27 recognize L.A., could she communicate her needs, what was her affect);
 28 established L.A.'s familiarity with Doe's functioning while intoxicated (how
 29 many times had L.A. observed Doe while intoxicated, on a scale of 1-10 how

1 intoxicated had L.A. seen Doe previously, what did Doe look like at various
2 intoxication levels); elicited comparative testimony (how did Doe's condition in
3 lobby compare to her condition at nightclub earlier, how did her condition
4 compare to times L.A. had seen her at various intoxication levels); and elicited
5 lay opinion testimony about capabilities carefully framed to avoid legal
6 conclusions (based on L.A.'s observations, did Doe appear capable of walking
7 on her own, did she appear aware of surroundings, did she appear able to
8 communicate and make decisions).

9
10 This testimony would have been admissible because it was: rationally
11 based on L.A.'s perception; helpful to understanding his testimony; and not a
12 legal conclusion. *United States v. Figueroa-Lopez*, 125 F.3d 1241, 1246 (9th
13 Cir. 1997).

14 **3. Integration with Expert Testimony**

15
16 Defense counsel retained toxicology expert Halla Weingarten. *Montana*,
17 LEXIS 3591, at *21-22. Competent counsel would have: presented L.A.'s
18 factual observations and comparative assessments; presented a comprehensive
19 hypothetical to the toxicology expert incorporating L.A.'s observations; used the
20 expert's testimony to translate L.A.'s lay observations into scientific conclusions
21 about Doe's timeline of intoxication and recovery; and used both lay and expert
22 testimony to argue that Doe retained significant capabilities even in the hotel
23 lobby.

24 **4. Constitutional Significance**

25
26 The right to present a defense is guaranteed by the Sixth Amendment and
27 Due Process Clause. *Crane*, 476 U.S. at 690. Where defense counsel's
28 incompetence results in exclusion of critical defense evidence, this violates the
29 constitutional right to present a defense. *Chia*, 360 F.3d at 1004.

1 **D. Prejudice**

2 The prosecution's case on all counts rested on proving Doe couldn't
3 consent due to intoxication or unconsciousness. Properly presented evidence that
4 Doe retained significant capabilities even in the hotel lobby (after additional
5 time for alcohol metabolism) would have: created reasonable doubt about the
6 prosecution's incapacitation theory; supported Petitioner's testimony that Doe
7 was responsive and participating; undermined the SART nurse's "unconscious
8 on her back" theory; and provided scientific foundation through expert
9 testimony for concluding Doe retained capacity to consent.

10 The jury acquitted on count 6 (rape of unconscious victim), demonstrating
11 uncertainty about the prosecution's unconsciousness theory. *Montana*, LEXIS
12 3591, at *2. Properly presented capacity evidence would likely have extended
13 this reasonable doubt to the intoxication-based counts (counts 1, 3, 5) and the
14 force-based counts (counts 2, 4, 7). There is a reasonable probability that
15 effective presentation of admissible capacity evidence would have resulted in
16 acquittal on some or all counts, a hung jury, or conviction on fewer counts.

17 **E. Conclusion as to Ground Five**

18 Trial counsel's failure to present capacity evidence in an admissible form
19 fell below an objective standard of reasonableness and resulted in prejudice.
20 This ground independently warrants habeas relief.

21 **GROUND SIX: INEFFECTIVE ASSISTANCE OF COUNSEL –**
22 **FAILURE TO FORENSICALLY ANALYZE PHONE EVIDENCE**

23 **A. Constitutional Basis and Governing Law**

24 The Sixth Amendment guarantees effective assistance including the duty
25 to investigate and present available evidence. *Strickland*, 466 U.S. at 690-91.
26 Where phone records and digital evidence are central to the prosecution's case,
27 counsel must retain appropriate experts. *Hinton v. Alabama*, 571 U.S. 263, 274-

1 75 (2014). In *Lee v. Thornell*, 104 F.4th 120, 135 (9th Cir, 2023), the Ninth
 2 Circuit explained, "[i]t is certainly within the 'wide range of professionally
 3 competent assistance' for an attorney to rely on properly selected experts."
 4 *Harris v. Vasquez*, 949 F.2d 1497, 1525 (9th Cir. 1990) (quoting Strickland, 466
 5 U.S. at 690)"

6 **B. Deficient Performance**

7 Phone records and text messages were central to this case, yet trial
 8 counsel failed to retain a phone forensics expert to analyze and present this
 9 evidence.

10 **1. The Centrality of Phone Evidence**

11 Phone and text evidence included: Doe's misspelled "help" texts (sent
 12 three attempts, succeeding on the third try), *Montana*, LEXIS 3591, at *11—the
 13 prosecution argued this showed incapacitation; the defense theory would be that
 14 it showed impaired fine motor skills but retained cognitive function); multiple
 15 phone calls (Doe answered multiple calls during the alleged assault and was able
 16 to communicate, *id.* at *10-12, suggesting retained cognitive function); Doe's
 17 use of phone to share location (*id.* at *12, demonstrating significant cognitive
 18 and motor function); and timing and sequence of calls/texts (metadata could
 19 have established timeline and correlated phone activity with Doe's claimed
 20 periods of consciousness and unconsciousness).

21 **2. What a Phone Forensics Expert Could Have Provided**

22 Properly presented by competent counsel under Federal Rule of Evidence
 23 401, which provides that "[e]vidence is relevant if: (a) it has any tendency to
 24 make a fact more or less probable than it would be without further evidence; and
 25 (b) the fact is of consequence in determining the action." Federal Rule of
 26 Evidence 402 provides that "[r]elevant evidence is admissible unless any of the
 27 following provides otherwise: [] the United States Constitution; [] a federal
 28
 29
 30

1 statute; [] these rules; or [] other rules prescribed by the Supreme Court.

2 Irrelevant evidence is not admissible."

3 A phone forensics expert could have: analyzed motor skill impairment
 4 reflected in misspelled texts (alcohol impairs fine motor skills before gross
 5 motor skills; ability to eventually succeed demonstrated retained cognitive
 6 function); analyzed cognitive function demonstrated by answering calls,
 7 communicating needs, operating phone features, and making decisions about
 8 when to answer; created a timeline correlating phone activity with testimony;
 9 and testified that the pattern of phone use was inconsistent with the level of
 10 incapacitation claimed.

12 3. Counsel's Complete Failure

13 The complete phone records with accompanying metadata, conducted any
 14 meaningful analysis of the evidentiary significance of the phone data, or
 15 affirmatively employed that evidence to advance the defense theory. Counsel's
 16 failure to undertake these fundamental investigative and strategic steps falls
 17 below an objective standard of reasonableness under *Strickland*, 466 U.S. at
 18 688.

20 The Supreme Court has long held that competent counsel must make
 21 reasonable investigations or sound strategic decisions that render particular
 22 investigations unnecessary. *Wiggins v. Smith*, 539 U.S. 510, 521–23 (2003);
 23 *Rompilla v. Beard*, 545 U.S. 374, 387 (2005). Likewise, the Ninth Circuit has
 24 found deficient performance where counsel failed to investigate or present
 25 readily available forensic or documentary evidence critical to the defense. *Lord*
 26 *v. Wood*, 184 F.3d 1083, 1096–97 (9th Cir. 1999).

28 Given that the phone evidence was central to both the prosecution's
 29 narrative and the defense's credibility, counsel's omissions deprived the
 30 factfinder of critical, objective evidence that could have altered the outcome.

1 This failure undermines confidence in the verdict and satisfies *Strickland*'s
2 prejudice prong.

3 **4. No Reasonable Tactical Explanation**

4 There is no reasonable tactical explanation: not a cost concern (retained
5 private counsel); not a strategic decision (the phone evidence was being used by
6 the prosecution to support incapacitation—leaving it unanalyzed left the
7 prosecution's interpretation unchallenged); and not concern about harmful
8 content. The only explanation is neglect. *Strickland*, 466 U.S. at 690.

9 **C. Prejudice**

10 Properly analyzed and presented phone evidence could have demonstrated
11 that Doe retained significant cognitive and motor function, undermining the
12 prosecution's incapacitation theory and supporting Petitioner's account.

13 If forensic analysis revealed: messages were drafted over time suggesting
14 deliberation; "help" texts were sent in different sequence than claimed or
15 manufactured later; call patterns contradicted prosecution narrative; location
16 data contradicted testimony; or post-incident consensual contact existed—any of
17 these findings would have materially affected the case.

18 Given the close evidentiary balance, forensic phone evidence supporting
19 the defense would likely have resulted in acquittal, hung jury, or conviction on
20 fewer counts. The jury's count 6 acquittal demonstrates the evidence was closely
21 balanced. *Montana*, LEXIS 3591, at *2. Forensic evidence showing Doe
22 retained significant function during the alleged assault would likely have
23 extended reasonable doubt to additional counts.

24 **D. Conclusion as to Ground Six**

25 Trial counsel's failure to forensically analyze phone evidence fell below
26 an objective standard of reasonableness and resulted in prejudice. This ground
27 independently warrants habeas relief.

GROUND SEVEN: INEFFECTIVE ASSISTANCE OF COUNSEL – FAILURE TO INVESTIGATE AND REMEDY DETECTIVE- JUROR CONTACT

Petitioner was deprived of his Sixth Amendment right to the effective assistance of counsel when his trial attorney learned of prejudicial ex parte contact between the lead investigating detective and sitting jurors but failed to take any action whatsoever to investigate the misconduct or seek a remedy from the court. Counsel's complete inaction in the face of credible allegations of juror tainting constituted a total abdication of his duties. His failure to act is an unreasonable application of clearly established federal law as determined by the Supreme Court of the United States in *Strickland*, 466 U.S. 668, and its precedents governing the right to an impartial jury. See 28 U.S.C. § 2254(d)(1).

A. Governing Constitutional Principles and Standard of Review

The Sixth Amendment guarantees a criminal defendant not just a trial, but
a fair trial before an impartial jury. U.S. Const. amend. VI. This guarantee of
impartiality is a cornerstone of American jurisprudence. The Supreme Court has
long held that a jury's verdict must be based solely on "the evidence developed
against a defendant...from the witness stand in a public courtroom where there is
full judicial protection of the defendant's right of confrontation, of cross-
examination, and of counsel." *Turner v. Louisiana*, 379 U.S. 466, 472-73
(1965).

1 To safeguard this fundamental right, the Supreme Court established a
2 powerful procedural rule in *Remmer v. United States*, 347 U.S. 227 (1954).
3
4 *Remmer* holds that "any private communication, contact, or tampering, directly
5 or indirectly, with a juror during a trial about the matter pending before the jury
6 is...deemed presumptively prejudicial." *Id.* at 229. The moment a colorable
7 claim of such contact arises, the trial court has an affirmative duty to "determine
8 the circumstances, the impact thereof upon the juror, and whether or not it was
9 prejudicial, in a hearing with all interested parties permitted to participate." *Id.* at
10 229-30. The burden then shifts squarely to the government to "establish, after
11 notice to and hearing of the defendant, that such contact with the juror was
12 harmless to the defendant." *Id.* at 229. The rule's purpose is to ensure that the
13 "remedy for allegations of juror partiality is a hearing in which the defendant has
14 the opportunity to prove actual bias." *Smith v. Phillips*, 455 U.S. 209, 215
15
16 (1982).

17
18 The right to the effective assistance of counsel is the primary vehicle
19 through which a defendant vindicates these trial rights. *Strickland*, 466 U.S. at
20 686. To establish ineffective assistance of counsel claim, a petitioner must show:
21
22 (1) that counsel's performance was deficient because it "fell below an objective
23 standard of reasonableness" under "prevailing professional norms," *id.* at 688;
24
25 and (2) that the deficient performance resulted in prejudice, meaning "a
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1 reasonable probability that, but for counsel's unprofessional errors, the result of
2 the proceeding would have been different," *id.* at 694.
3

4 In evaluating counsel's performance, our review is doubly deferential
5 because we apply § 2254's deference on top of *Strickland's* deferential standard.
6 *Harrington v. Richter*, 562 U.S. 86, 105 (2011). The question is not whether
7 counsel's performance was merely unreasonable, but "whether there is any
8 reasonable argument that counsel satisfied *Strickland's* deferential standard." *Id.*
9 However, this deference is not absolute.
10

11 Counsel's complete failure to investigate a credible allegation of juror
12 bias—an allegation that strikes at the very heart of a fair trial—constitutes both
13 deficient performance and actual prejudice under *Strickland*. Such total inaction
14 undermines the structural guarantee of an impartial jury and violates the
15 fundamental principles of juror integrity articulated in *Remmer*.
16

17 **B. Deficient Performance: Counsel's Complete Abdication of Duty**

18 Trial counsel was confronted with specific, credible, and alarming
19 information indicating that the State's lead detective engaged in prejudicial ex
20 parte communication with jurors. Counsel's performance was constitutionally
21 deficient because he did nothing in response, abandoning his client at a critical
22 moment.
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1 As documented in Petitioner's appellate opening brief, Detective Alfaro—
2 the lead investigating officer and a key prosecution witness—made highly
3 prejudicial comments to the trial court's bailiff in the presence of at least three
4 jurors. Specifically, Detective Alfaro told the bailiff that he had "gotten
5 everything" on Petitioner. These comments were made before court was in
6 session and were overheard by multiple sitting jurors. (See Exhibit C,
7 Appellant's Opening Brief, H049456, at pp. 56-57; submitted as Exhibit D, 3CT
8 822-823).
9
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12 Such comments were certain to have had a prejudicial effect on the jurors'
13 view of the case by causing them to believe—before any evidence was
14 presented—that the police were convinced they had an extremely strong case
15 against Petitioner. When the lead investigator publicly boasts to a court official
16 that he has "gotten everything" on the defendant, he is conveying to anyone
17 within earshot that guilt is a foregone conclusion. This type of extrajudicial
18 communication directly undermines the presumption of innocence and taints the
19 jury's ability to impartially evaluate the evidence presented at trial.
20
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23 Faced with such improper contact, a reasonably competent attorney has an
24 immediate and non-negotiable duty to act. See *Strickland*, 466 U.S. at 691
25 ("[C]ounsel has a duty to make reasonable investigations or to make a
30

1 reasonable decision that makes particular investigations unnecessary."). Here,
2 counsel's failure was not a tactical miscalculation; it was a complete dereliction
3 of his investigatory and advocacy duties. Despite learning of specific instances
4 of potential juror tainting by one of the State's star witnesses, trial counsel:
5

6

- 7 • Failed to alert the trial judge of the improper contact;
- 8 • Failed to request a sidebar or an in-camera discussion to address the issue
9 outside the jury's presence;
- 10 • Failed to request a *Remmer* hearing to place Detective Alfaro and the
affected jurors under oath;
- 11 • Failed to move for a mistrial based on the prejudicial contact; and
- 12 • Failed to make any record of the issue that would preserve it for appellate
13 review.

14 There was no tactical advantage in counsel's inaction. Choosing not to
15 challenge potentially tainted jurors to avoid "antagonism" or a mistrial is not a
16 strategy—it is a surrender to a constitutionally defective trial. Counsel's
17 performance was not strategy; it was neglect. This conduct is objectively
18 unreasonable under the *Strickland* standard, making any state court finding to
19 the contrary an unreasonable application of the law.
20
21

22
23
**C. Prejudice: The Forfeiture of the *Remmer* Presumption and the
24 Collapse of Confidence in the Verdict**

25 Counsel's deficiency was profoundly prejudicial. The prejudice is two-fold:
26
(1) counsel's failure forfeited the powerful procedural protections and
27
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29
30

1 presumption of prejudice mandated by *Remmer*, and (2) it fundamentally
2 undermined confidence in the verdict under a traditional *Strickland* analysis.
3

4 **1. Forfeiture of the Remmer Presumption and Its Procedural
5 Protections**

6 The most direct and severe prejudice is that counsel's silence forfeited the
7 procedural rights guaranteed by *Remmer*. The allegations—a lead detective
8 boasting to a bailiff about having "gotten everything" on Petitioner in the
9 presence of at least three jurors—are the exact type of "private communication"
10 about a "matter pending before the jury" that triggers a presumption of
11 prejudice. *Remmer*, 347 U.S. at 229.
12
13

14 Had counsel simply brought this information to the trial court's attention,
15 the entire legal landscape would have shifted. The court would have been
16 obligated to hold a hearing, and at that hearing, the burden would have been on
17 the government to prove the contact was harmless beyond a reasonable doubt.
18
19 *Id.* By doing nothing, counsel relieved the State of its constitutional burden and
20 allowed the poison of juror bias to go unexamined and unremedied.
21
22

23 In *United States v. Hurtado*, 838 Fed. Appx. 258, at *260-61 (9th Cir.
24 2020), the Ninth Circuit "established a two-step process for evaluating allegedly
25 prejudicial jury contacts. First, '[t]he defendant must present evidence of a
26

1 contact sufficiently improper as to raise a credible risk of affecting the outcome
 2 of the case.' *Godoy v. Spearman*, 861 F.3d 956, 967 (9th Cir. 2017). If the
 3 defendant makes that showing, 'the presumption of prejudice attaches, and the
 4 burden shifts to the state to prove that the contact was harmless.' *Id.* at 968. The
 5 district court must also [] hold an evidentiary hearing to evaluate prejudice only
 6 'if there is any remaining uncertainty about 'what actually transpired, or whether
 7 the incident[]' was prejudicial. *Id.* at 969 (quoting *Remmer v. United States*, 347
 8 U.S. 227, 229 (1954))."

13 Specifically, in *Dyer v. Calderon*, 151 F.3d 970, 974-75 (9th Cir. 1998),
 14 the Ninth Circuit reiterated the Supreme Court's holdings in *Remmer*: "[a] court
 15 confronted with a colorable claim of juror bias must undertake an investigation
 16 of the relevant facts and circumstances." See 28 U.S.C. § 2254(d)(3) (1994);
 17 *Remmer v. United States*, 350 U.S. 377, 379; *Remmer v. United States*, 347 U.S.
 18 227, 230. An informal in-camera hearing may be adequate for this purpose; due
 19 process requires only that all parties be represented, and that the investigation be
 20 reasonably calculated to resolve the doubts raised about the juror's []
 21 impartiality."

22
 23 Here, counsel's complete inaction foreclosed any meaningful investigation
 24 or evidentiary hearing, leaving the record barren. Under *Strickland*, 466 U.S. at
 25

1 694, prejudice exists where counsel's deficient performance "undermines
2 confidence in the outcome."
3

4 **2. Prejudice Under the Traditional Strickland Standard**
5

6 Alternatively, even without the *Remmer* presumption, there is a
7 "reasonable probability that, but for counsel's unprofessional errors, the result of
8 the proceeding would have been different." *Strickland*, 466 U.S. at 694. A
9 "reasonable probability" is one sufficient to "undermine confidence in the
10 outcome." *Id.* Confidence in this verdict is shattered.
11

12
13 **The Source of the Taint:** The improper contact came not from a stranger,
14 but from Detective Alfaro—the lead investigator and a central witness for the
15 prosecution. When an agent of the State entrusted with the jury's care or the
16 case's integrity engages in ex parte communications, the potential for prejudice
17 is "acute." *Turner*, 379 U.S. at 473-74 (finding inherent prejudice where key
18 prosecution witnesses also served as jury deputy sheriffs). A juror who hears the
19 lead detective boast that he "got everything" on the defendant is not receiving
20 evidence; he is receiving a private, expert opinion on the ultimate issue of guilt
21 from a figure of authority.
22

23
24 **The Nature of the Information:** The detective's alleged comments were
25 far from innocuous; they were substantive, prejudicial, and went directly to the
26

1 central issue of guilt. Boasting that he had "everything" on Petitioner constituted
2 an extrajudicial statement that could readily influence a juror's impartiality. Such
3 remarks strike at the heart of the defendant's right to a fair trial by an unbiased
4 jury. See *Remmer*, 347 U.S. at 229 (any private communication or contact with a
5 juror during trial about the matter pending before the jury is presumptively
6 prejudicial). The detective's statements were precisely the type of extrinsic,
7 outcome-oriented communications the Supreme Court has held to be inherently
8 prejudicial and incompatible with the constitutional guarantee of jury
9 impartiality.

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The Impact on Multiple Jurors: The misconduct was not isolated to a
15 single juror. It allegedly occurred with "at least 3 jurors" present, creating a risk
16 that the taint would spread during jury deliberations. When multiple jurors are
17 exposed to the same prejudicial extrajudicial information, the likelihood that it
18 will influence the verdict increases substantially.

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22
The Complete Lack of Curative Measures: Because counsel remained
23 silent, the trial court was deprived of the opportunity to take any remedial
24 action. The jurors were not admonished, the detective was not questioned, and
25 the potential prejudice was allowed to fester, potentially infecting the entire trial.

1 Had counsel performed competently, there is a reasonable probability of a
2 different outcome. A *Remmer* hearing could have exposed actual bias, leading to
3 the removal of jurors and a potential mistrial. Even if the hearing only revealed
4 an "appearance of impropriety," a motion for a mistrial would have been
5 exceptionally strong. At a minimum, a curative instruction would have been
6 given. Counsel's failure to secure any of these remedies is prejudicial and fatally
7 undermines confidence in the verdict.
8
9

10

11 **D. Conclusion as to Ground Seven**

12

13 Trial counsel was presented with credible, specific evidence of prejudicial
14 juror contact by the government's lead witness and did nothing. This complete
15 abdication of his duty to investigate and protect his client's right to an impartial
16 jury was constitutionally deficient performance. This deficiency resulted in clear
17 prejudice, as it denied Petitioner the procedural safeguards and presumption of
18 prejudice afforded by *Remmer* and, in the alternative, directly undermined
19 confidence in the jury's verdict under *Strickland*. The state court's rejection of
20 this claim was an unreasonable application of clearly established Supreme Court
21 precedent. This Court should grant the petition for a writ of habeas corpus on
22 this ground.
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1 GROUND EIGHT: CUMULATIVE ERROR

2 A. Constitutional Basis and Governing Law

3 The Fourteenth Amendment's Due Process Clause guarantees a fair trial.
4 Even where individual errors don't independently warrant reversal, their
5 cumulative effect may render the trial fundamentally unfair. *Chambers*, 410 U.S.
6 at 298, 302-03. *Taylor v. Kentucky*, 436 U.S. 478, 487 n.15 (1978).

7 The Ninth Circuit has held that "the combined effect of multiple errors
8 can violate due process even where each error individually would be insufficient
9 for reversal, if the cumulative effect renders the trial fundamentally unfair."
10 *Parle*, 505 F.3d at 927. "The cumulative effect of multiple errors can violate due
11 process even where no single error rises to the level of a constitutional violation
12 or would independently warrant reversal." *Id.* (citing *Alcalá v. Woodford*, 334
13 F.3d 862, 893-95 (9th Cir. 2003)).

16 B. Application to This Case

17 The errors detailed in Grounds One through Seven, when considered
18 cumulatively, deprived Petitioner of his constitutional right to a fair trial and
19 effective assistance of counsel.

20 1. The Individual Errors

21 Recapitulating the constitutional violations: **Ground One** (failure to
22 retain SART expert, resulting in unchallenged testimony that physical findings
23 were "consistent with" forcible assault and that Doe was "on her back");
24 **Ground Two** (failure to investigate prior false accusation); **Ground Three**
25 (failure to impeach with available evidence); **Ground Four** (failure to secure
26 complete surveillance video); **Ground Five** (failure to present capacity evidence
27 in admissible form); **Ground Six** (failure to forensically analyze phone
28
29

1 evidence); **Ground Seven** (failure to investigate and remedy detective-juror
2 contact);

3 **2. The Cumulative Effect**

4 When these errors are considered together, their cumulative effect is
5 overwhelming.

6 *a. Evidentiary Imbalance*

7 The prosecution presented: Doe's testimony; SART expert testimony
8 purporting to scientifically corroborate force and unconsciousness; testimony
9 from friends about intoxication; phone evidence interpreted as showing
10 incapacitation; video evidence selected to show impairment; and Detective
11 Alfaro's testimony about Petitioner's statements.

12 The defense presented: Petitioner's testimony; toxicology expert on
13 alcohol effects; minimal cross-examination; and no rebuttal to SART evidence,
14 prior false accusation evidence, complete video, forensic phone analysis, or
15 positioning analysis.

16 This imbalance wasn't because favorable evidence didn't exist—it was
17 because counsel failed to investigate, develop, and present it. The cumulative
18 effect was to create a fundamentally one-sided presentation.

19 *b. Compounding Prejudice*

20 Each error compounded the others: Counsel's failure to utilize a SART
21 expert and effectively cross-examine the prosecution nurse (Ground One) left
22 the State's forensic narrative unrebutted, bolstering Doe's credibility. That
23 failure amplified the harm from counsel's omission to investigate and present
24 evidence of a prior false accusation (Ground Two) and to impeach with other
25 available evidence (Ground Three). The resulting credibility imbalance was
26 further magnified by the failure to secure complete surveillance video (Ground
27 Four), which could have provided objective context for disputed events.

1 Counsel's deficient presentation of capacity evidence (Ground Five) and failure
 2 to forensically analyze phone data (Ground Six) deprived the jury of critical
 3 scientific and corroborative proof undermining the prosecution's timeline and
 4 theory. Finally, counsel's failure to investigate and remedy improper detective-
 5 juror contact (Ground Seven) infected the integrity of deliberations themselves.
 6 Considered cumulatively, these errors rendered the trial fundamentally unfair
 7 and prejudiced the outcome, warranting relief under Ground Eight.
 8

9 "Even if no single error were [sufficiently] prejudicial, where there are
 10 several substantial errors, 'their cumulative effect may nevertheless be so
 11 prejudicial as to require reversal.'" *Killian v. Poole*, 282 F.3d 1204, 1211 (9th
 12 Cir. 2002) (quoting *United States v. de Cruz*, 82 F.3d 856, 868 (9th Cir. 1996)).

13 ***c. Central Role of Credibility***

14 This case turned entirely on credibility. In this credibility contest,
 15 counsel's failures were devastating: allowed prosecution to present seemingly
 16 objective scientific corroboration (SART) unchallenged; failed to present
 17 evidence directly attacking Doe's credibility (prior false accusation); failed to
 18 impeach effectively with available evidence; failed to present complete video
 19 showing Doe's capabilities; failed to forensically analyze phone evidence
 20 demonstrating function; allowed prosecutorial misconduct to go unchallenged;
 21 failed to respond to "drugs" outburst; failed to investigate detective-juror
 22 contact; and failed to secure proper jury instructions.
 23

24 Each failure independently undermined Petitioner's ability to challenge
 25 Doe's credibility. Cumulatively, they rendered Petitioner's defense essentially
 26 non-existent despite substantial evidence supporting his account.
 27

28 **3. Impact on Verdict**

29 The jury's count 6 acquittal is critical. It demonstrates: the jury carefully
 30 evaluated evidence on each count; the jury had reasonable doubt about

1 prosecution's unconsciousness theory on at least one count; the evidence was
2 closely balanced; and additional impeachment and defense evidence likely
3 would have created additional reasonable doubt.

4 With effective representation presenting all available evidence and
5 challenging all errors, there is far more than a reasonable probability that: the
6 jury would have acquitted on all counts; the jury would have acquitted on
7 additional counts beyond count 6; the jury would have hung on some or all
8 counts.

9 *Parle*, 505 F.3d at 927 The Supreme Court has clearly established that the
10 combined effect of multiple trial court errors violates due process where it
11 renders the resulting criminal trial fundamentally unfair. *Chambers*, 410 U.S. at
12 298, 302-03 (combined effect of individual errors "denied [*Chambers*] a trial in
13 accord with traditional and fundamental standards of due process" and "deprived
14 *Chambers* of a fair trial")

15 **4. Fundamental Fairness**

16 The ultimate inquiry under cumulative error analysis is whether the
17 defendant received a fundamentally fair trial. *Chambers*, 410 U.S. at 302-03.
18 Here, the combination of counsel's failures rendered Petitioner's trial unfair:
19 unchallenged scientific evidence from the SART examination went unrebutted;
20 critical credibility evidence regarding a prior false accusation was excluded; key
21 surveillance video remained incomplete; crucial phone data were never
22 forensically analyzed; capacity evidence was ineffectively presented; and
23 improper detective-juror contact was left uninvestigated. Petitioner was not
24 convicted after fair adversarial testing of the evidence, but because his attorney's
25 cumulative omissions deprived the jury of the information necessary to reach a
26 reliable verdict. The aggregate effect of these errors undermines confidence in
27 the outcome and compels relief under Ground Eight.

McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970) ("the right to counsel is the right to effective assistance of counsel"). When counsel's cumulative failures are so pervasive that the defendant receives no meaningful assistance, the Sixth Amendment is violated regardless of whether any individual failure would independently warrant relief.

C. Conclusion as to Ground Eight

The cumulative effect of the errors detailed in Grounds One through Seven violated Petitioner's Sixth Amendment right to effective assistance of counsel and Fourteenth Amendment right to a fair trial. Even if this Court were to find that some individual errors don't independently warrant relief, the cumulative effect of all errors requires that the conviction be set aside and Petitioner be granted a new trial.

V. REQUEST FOR EVIDENTIARY HEARING

Petitioner respectfully requests that this Court grant an evidentiary hearing pursuant to 28 U.S.C. § 2254(e)(2) and applicable Supreme Court and Ninth Circuit precedent.

Legal Standard for Evidentiary Hearing

The Supreme Court has held that district courts must hold evidentiary hearings in habeas proceedings under certain circumstances. *Townsend v. Sain*, 372 U.S. 293, 312 (1963).

Under § 2254(e)(2), as amended by AEDPA, a petitioner is entitled to an evidentiary hearing if: (1) the claim relies on a new rule of constitutional law made retroactive by the Supreme Court or a factual predicate that could not have been previously discovered through due diligence; and (2) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that

1 but for constitutional error, no reasonable factfinder would have found the
2 applicant guilty. 28 U.S.C. § 2254(e)(2).

3 However, § 2254(e)(2) applies only "if the applicant has failed to develop
4 the factual basis of a claim in State court proceedings." 28 U.S.C. § 2254(e)(2).
5 The Supreme Court has held that "diligent petitioners" who were unable to
6 develop the factual record in state court through no fault of their own are entitled
7 to hearings under pre-AEDPA standards. *Williams v. Taylor*, 529 U.S. 420, 432-
8 35(2000)

9 The Ninth Circuit has held in *Insyxiengmay v. Morgan*, 403 F.3d 657, 670
10 (9th Cir. 2005), "[u]nder AEDPA, 'a failure to develop the factual basis of a
11 claim is not established unless there is [] a lack of diligence, or some greater
12 fault, attributable to the prisoner or the prisoner's counsel.'" *Williams*, 529 U.S.
13 at 432.

14 **Petitioner's Diligence and Lack of Fault**

15 As explained in Section III. B-C above, Petitioner acted diligently:

16

- 17 • Retained post-conviction counsel immediately after direct appeal
18 concluded;
- 19 • Paid counsel in full;
- 20 • Reasonably relied on counsel to investigate and file necessary petitions;
- 21 • Had no reason to know counsel was not performing until July 2025;
- 22 • Immediately retained new counsel upon discovering abandonment;
- 23 • Filed this petition expeditiously.

24 The delay in developing the factual record was caused solely by prior
25 post-conviction counsel's abandonment, not by Petitioner's lack of diligence.
26 The Ninth Circuit has recognized that "attorney abandonment constitutes good
27 cause excusing delay." *Blake v. Baker*, 745 F.3d 977, 982 (9th Cir. 2014).

Factual Development Required

Many of Petitioner's claims rely on facts outside the pre-trial and trial record, therefore require evidentiary development. Due to the substantial passage of time since the underlying trial and related proceedings, some of the declarations, records, video materials, and witness observations necessary to fully support the claims raised under 28 U.S.C. § 2254 may no longer be available or retrievable. Certain physical and digital evidence, as well as the recollection of witnesses, may have diminished or been lost over the intervening years.

Nevertheless, undersigned counsel, through the assistance of the office's licensed private investigator, is diligently pursuing all reasonable avenues to locate and obtain the remaining available materials necessary to support Petitioner's federal and state habeas claims. Efforts are ongoing to secure expert analyses relevant to each ground for relief, including but not limited to: expert declarations, prior investigative records, phone and video data, and witness statements.

To date, several records have already been located and submitted as Exhibits A, B, C, and D. Should the Court grant the requested motion to Stay, Petitioner will promptly supplement the record and, where appropriate,

1 respectfully seek leave of Court to expand the record pursuant to Rule 6(a) of
2 the *Rules Governing Section 2254 Cases in the United States District Courts*
3 prior to the hearing of his 2254 Petition.
4

5
6 The following declarations, records, and videos are currently being
7 sought:
8

9 **Ground Two (prior false accusation):** Requires: declaration from
10 boyfriend's mother, or boyfriend or friends that may remember; investigation to
11 obtain police reports and records; interview including the previously accused
12 individual; expert legal analysis regarding admissibility.
13

14
15 **Ground Three (failure to impeach):** Requires: video if it is available,
16 expert analysis of the video.
17

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19 **Ground Four (complete video):** Requires: original video files if
20 available from nightclub and hotel; video forensics expert analysis;
21 authenticated complete video sequences.
22

23
24 **Ground Five (capacity evidence):** Requires: declaration from L.A.
25 detailing his observations; expert testimony on proper presentation; analysis of
26 what testimony would have shown.
27

28
29 **Ground Six (phone forensics):** Requires: complete phone records with
30 metadata; phone forensics expert analysis; expert testimony on cognitive
function demonstrated by phone use.
31

State Court Proceedings

Petitioner intends to file as soon as practical a comprehensive habeas corpus petition in state court presenting all grounds raised herein. However, state court proceedings will require substantial time—potentially a year or more—to complete exhaustion through all three levels (superior court, court of appeal, supreme court).

During this period, critical evidence can be lost: witnesses' memories fade, video footage is deleted, phone records are purged, experts become unavailable, and documents go missing. Although years have passed since the events at issue took place, counsel continues to pursue the necessary evidentiary records

Concurrent State and Federal Proceedings

Petitioner has filed concurrently with this petition a Motion to Stay and Hold in Abeyance pursuant to *Rhines v. Weber*, 544 U.S. 269 (2005), and *Blake v. Baker*, 745 F.3d 977 (9th Cir. 2014).

If this Court grants the Stay motion, Petitioner requests that the Court:

1. Counsel will request leave to conduct limited discovery during the Stay period to preserve critical evidence that may be lost if not secured promptly;

- 1 2. Order that an evidentiary hearing be scheduled expeditiously following
- 2 exhaustion of state court remedies;
- 3 4. Grant leave to supplement the record with evidence obtained during state
- 5 court proceedings.

6 **Materiality of Evidence**

7 The evidence Petitioner seeks to develop is material to his claims and
8 would, if proven, establish constitutional violations warranting habeas relief.

9 As detailed in Grounds One through Seven, there is a reasonable
10 probability that proper investigation, effective cross-examination, presentation
11 of available evidence, and adequate post-verdict representation would have
12 resulted in acquittal, hung jury, acceptance of plea offer, mistrial, or new trial.

13 The Ninth Circuit has recognized that "where a petitioner presents a
14 colorable claim of constitutional violation and identifies specific evidence that,
15 if developed, would support that claim, an evidentiary hearing is warranted."
16

17 *Insyxiengmay*, 403 F.3d at 670.

18 **Conclusion Regarding Evidentiary Hearing**

19 For the foregoing reasons, following exhaustion of his claims in state
20 court, Petitioner respectfully requests that this Court grant an evidentiary
21 hearing to develop the factual record necessary to fully and fairly adjudicate his
22 constitutional claims and supplement the record.

VI. PRAYER FOR RELIEF

WHEREFORE, Petitioner Jonathan Montana respectfully requests that this Court:

1. **Grant a Writ of Habeas Corpus** vacating Petitioner's convictions on all counts and ordering his immediate release from custody unless the State of California elects to retry him within a reasonable time;
2. **In the Alternative, Grant a Writ of Habeas Corpus** vacating Petitioner's convictions on Counts 1, 2, 3, 4, 5, and 7, or some subset thereof, and ordering a new trial;
3. **Grant the concurrently filed Motion to Stay and Hold in Abeyance** to permit Petitioner to exhaust state court remedies;
4. **Grant an Evidentiary Hearing** to develop the factual record necessary to adjudicate Petitioner's claims;
5. **Grant Leave to Supplement the Record** with evidence obtained during state court proceedings, discovery, and expert consultation;
6. **Grant Such Other and Further Relief** as this Court deems just and proper.

Respectfully Submitted,

Dated: 11/10/2025

/s/ Gail Shifman
Gail Shifman, Esq.
Attorney for Petitioner
Jonathon Montana

Dated: 11/10/2025

/s/ John D. Kirby
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