

1
2
3
4
5
6 **BEFORE THE VICTIM COMPENSATION BOARD**
7 **OF THE STATE OF CALIFORNIA**

8
9 In the Matter of the Claim of:

Proposed Decision
(Penal Code § 4900 et seq.)

10 **Rodrigo Martinez**

11 PC 4900 Claim No. 16-ECO-04

12 **INTRODUCTION**

13 Pursuant to Penal Code section 4900, on August 3, 2016, Rodrigo Martinez (Martinez) filed an
14 erroneously convicted person claim with the California Victim Compensation Board (CalVCB).
15 CalVCB's Executive Officer assigned the matter to Hearing Officer Jenny M. Wong.

16 The in-person hearing occurred on September 27, 2017. Jorge Ledezma, Esq. represented
17 Martinez, who appeared, and Kathleen McKenna, Supervising Deputy Attorney General, represented
18 the California Department of Justice, Office of the Attorney General (AG). A Spanish language
19 interpreter assisted the parties during the hearing.

20 After considering all evidence in the record, it is determined that Martinez has not proven by a
21 preponderance of evidence that the crimes for which he was convicted and incarcerated—second
22 degree murder and assault on a child—either were not committed or, if committed, were not
23 committed by him. Accordingly, the Hearing Officer recommends that the Board deny his claim for
24 compensation as an erroneously convicted person.

25 **CRIMINAL PROCEEDINGS**

26 On October 3, 2005, officers from the Garden Grove Police Department arrested Martinez for
27 the murder of Diana Hernandez (Diana), an infant. The Orange County District Attorney's Office (DA)
28

1 filed an information charging Martinez with two felonies: second degree murder (Pen. Code, § 187,
2 subd. (a)) (count one),¹ and assault on a child with force likely to produce great bodily injury resulting in
3 death (§ 273ab) (count two). On January 8, 2008, the jury convicted Martinez of both counts and, on
4 March 10, 2008, the trial court sentenced Martinez to 25 years to life in state prison on count two, and
5 stayed sentence on count one pursuant to section 654.

6 Martinez appealed to the California Court of Appeal, Fourth Appellate District, contending that
7 his conviction occurred because of several erroneous evidentiary rulings. Martinez also filed a petition
8 for habeas corpus, claiming that his trial counsel provided ineffective assistance by failing to call as a
9 witness, or consult with, an expert forensic pathologist; object to forensic pathology and DNA evidence;
10 impeach key prosecution witnesses; and elicit prejudicial testimony from one witness. The Court of
11 Appeal consolidated the appeal and habeas petition. Ultimately, the Court of Appeal affirmed the
12 judgment on appeal, but concluded that Martinez had made a prima facie showing of ineffective
13 assistance of counsel for purposes of habeas relief. The appellate court issued an order to show cause
14 and returned the matter to the superior court for an evidentiary hearing on the habeas petition.

15 The Orange County Superior Court conducted an evidentiary hearing over five days between
16 June 10, 2011 and December 30, 2011. Thereafter, the superior court found that Martinez was denied
17 his constitutional right to the effective assistance of counsel because trial counsel failed to investigate,
18 research or interview witnesses, and consult with medical experts in determining the theory of
19 Martinez's defense.

20 Following the grant of habeas relief, the Orange County District Attorney's Office again
21 prosecuted Martinez for second degree murder and assault on a child with force likely to produce great
22 bodily injury resulting in death. The second trial began on July 17, 2014 and, after 12 days, the jury
23 found Martinez not guilty of the charged felonies and all lesser included offenses. The superior court
24 ordered Martinez released from custody on August 7, 2014.²

25
26 ¹ All further statutory references are to the California Penal Code, unless otherwise indicated.

27 ² Despite their initial dispute as to custody credits, during the hearing, the parties stipulated that
28 Martinez had served 3,230 days in custody, amounting to \$452,200 in compensation, if successful.

1 **SUMMARY OF FACTS**

2 Diana was born on March 10, 2005. Diana’s mother, Alma Hernandez (Alma), and Martinez
3 began dating in May 2005. Approximately two weeks later, Martinez moved in with Alma and Diana at
4 a house in Santa Ana. The following people also lived with them: Ambrosia Ortega (Ambrosia),
5 Ambrosia’s husband, Esther, Esther’s husband, and Maria Vazquez.³

6 Ambrosia babysat Diana for the first few months of Diana’s life while Alma worked at El Moro
7 De Cumpas bar from 7:00 p.m. to 2:00 a.m., six nights a week. Alma, who worked as a waitress at the
8 bar, frequently consumed a lot of alcohol.

9 On July 15, 2005, while working, Martinez shot himself in the leg with a nail gun. He could not
10 work for a while. Around the same time, Ambrosia moved to Anaheim. Alma sometimes took Diana to
11 Ambrosia’s new residence for babysitting while Alma worked nights. Other times, Martinez babysat
12 Diana. In August 2005, however, Ambrosia raised her babysitting rates, and Alma could not afford the
13 new rates. Martinez began babysitting Diana while Alma worked.

14 The next month, Alma, Martinez, Diana, and Imelda Hernandez (Imelda), Alma’s cousin, began
15 renting a room from Elvia Gutierrez (Elvia) and Miguel Gutierrez (Miguel) in Garden Grove. Shortly
16 thereafter, Alma, Martinez, Diana, and Imelda moved into Elvia and Miguel’s converted garage, which
17 consisted of two bedrooms and one bathroom. Elvia and Miguel rented rooms in the house to others
18 as well. While living in Garden Grove, Alma watched Diana during the day and Martinez babysat Diana
19 when Alma worked at night. Neither the other renters nor Elvia watched Diana.

20 **I. Diana’s Arm Injury**

21 On September 9, 2005, Diana injured her arm while alone with Martinez. Four days later, Alma
22 took Diana to the doctor. Alma told the doctor that she injured Diana’s arm while playing with her. The
23
24
25
26

27 ³ Esther was the principal renter of the house. Her last name is unknown.
28

1 doctor sent Diana to the emergency room for x-rays, and placed her arm in a hard cast.⁴ The doctor
2 removed the cast on September 23, 2005.

3 **II. Martinez's Fall While Holding Diana**

4 On September 29, 2005, while Alma and Imelda were at work, Martinez babysat Diana by
5 himself. At some point, Martinez told Elvia he needed to get bread for sandwiches because he planned
6 to return to work the next day. Elvia offered him bread. Martinez responded that he needed to buy
7 sour cream. Martinez walked out the front door of the house, holding Diana facing outward in his arms.
8 Thereafter, Elvia heard Martinez yell and, when she went outside, she saw Martinez kneeling down on
9 one knee with the other knee bent, holding Diana tightly. He was facing the front door, about four feet
10 away from the small step area in front of the door. Diana appeared pale, but not crying.

11 Martinez informed Elvia that he had tripped and twisted his right ankle when he went outside.
12 He claimed that Diana's head may have hit the exterior wall when he fell. Elvia looked around and saw
13 nothing that would have caused Martinez to trip and fall. Martinez asked for help getting up. Elvia
14 called for Miguel to come outside, and took Diana from Martinez. Miguel helped Martinez into the
15 house and brought him a bag of ice for his ankle. Elvia did not see scratches or marks on Diana's
16 head, though she noticed a "squishy" area on Diana's head. When she rubbed the "squishy" area,
17 Diana cried. After about 10 minutes, Martinez got up, said his ankle did not hurt anymore and walked
18 away with Diana. When Alma returned from work, Martinez told her that he fell while holding Diana.
19 Martinez did not see a doctor about his ankle. He did not return to work the next day as anticipated.

20 Prior to the fall with Martinez, Diana ate well; however, thereafter she ate and drank very little.
21 She had a "squishy" bump on her head and did not act like her normal, happy self. Diana appeared
22 sad and scared, did not smile, did not sleep well, and woke up more frequently.

25 ⁴ There was soft tissue swelling over the distal humerus, indicative of a supracondylar fracture. "A
26 supracondylar fracture is an injury to the humerus, or upper arm bone, at its narrowest point, just above
27 the elbow. [It is] the most common type of upper arm injury in children. [It is] frequently caused by a
28 fall on an outstretched elbow or a direct blow to the elbow."

(<https://www.healthline.com/health.supracondylar-fracture>, last visited October 23, 2018.)

1 On October 2, 2005, around 11:00 a.m., Alma, Imelda, Martinez and Diana went to San Pedro
2 for lunch. Diana still appeared sad and scared. She did not eat much. They returned home around
3 5:00 p.m. Diana was cranky and crying as Alma got ready for work. Martinez drove Alma and Imelda
4 to work around 7:00 p.m.

5 **III. Diana Becomes Pale and Limp and Vomits**

6 Also on October 2, 2005, around midnight, Miguel woke-up Elvia and Miguel by knocking on
7 their bedroom door. He told them Diana was sick, and asked for help. Elvia and Miguel went to
8 Martinez's bedroom and saw Diana lying on the bed, vomiting. Elvia moved Diana's head to one side
9 so she would not choke on her vomit. She also cleaned the vomit from Diana's mouth. Diana was pale
10 and limp, and her eyes were closing.

11 Martinez ran out of the room and drove to Alma's work. When Martinez arrived at the bar, Alma
12 was under the influence of alcohol. Martinez informed Alma that Diana was sick and that they should
13 take her to the hospital. Alma left with Martinez and returned to their residence. When Alma arrived,
14 she asked what was wrong with Diana. Elvia told Alma to ask Martinez—as she did not know what had
15 happened—and to take Diana to the hospital. Alma indicated they were taking Diana to the University
16 of California Irvine Medical Center (UCIMC). She took Elvia's cell phone with her.

17 **IV. Diana's Death / Stories Develop and Change**

18 When Diana arrived at UCIMC, she was unresponsive and her breathing rate was very low.
19 Alma told hospital staff that, at approximately midnight, Diana's crying awakened she and Martinez.
20 Alma immediately went into the kitchen to prepare formula. Martinez could not handle the crying so he
21 picked up Diana and walked towards the kitchen. While he was walking towards the kitchen, his right
22 leg gave out and he slipped on the stairs near the kitchen. He fell forward with Diana cradled in his
23 arms, sandwiching Diana between the floor and his body. As he stood up with Diana, she immediately
24 began crying. Alma attempted to feed formula to Diana. Diana refused and immediately vomited. For
25 approximately eight minutes, Alma and Martinez tried to care for Diana; however, Diana continued to
26 vomit and appeared very weak.

1 Diana died at 2:10 a.m. UCIMC staff contacted the Child Abuse Registry and the Orange
2 County Sheriff's Department's Coroner's Division.

3 **V. Efforts to Hide Martinez's Gun**

4 Just before Diana died, at approximately 1:30 a.m., Alma called Amalia Arechiga (Amalia), her
5 co-worker at El Moro De Cumpas, and told her Diana was bad. Alma asked Amalia to give Imelda a
6 ride from work, pick up Martinez's gun from their residence, and hold it for a couple of days. Amalia
7 refused to pick up the gun and informed Alma she would take Imelda to the hospital.

8 After Elvia and Miguel arrived at the hospital, Martinez asked Miguel to help him by informing
9 police or anyone who asked that Elvia was taking care of Diana.⁵ Miguel refused. He told Martinez to
10 say what happened. Alma asked Elvia to help by telling anyone who asked that Alma was home that
11 night. She told Elvia she did not want anyone to know that she worked while Martinez was alone with
12 Diana.

13 Alma again asked Amalia to remove the gun from the house. Amalia told Martinez to get "that
14 fucking thing out," referring to the gun. Martinez told Miguel he needed to get rid of something back at
15 the house. Miguel and Martinez left the hospital and drove to the house. Martinez retrieved the gun
16 and a box of ammunition from the garage. While driving back to the hospital, Martinez threw out the
17 gun and box of ammunition in the area of Dale and Lampson Street. Later, Miguel returned to the area
18 and retrieved the gun and box of ammunition. He placed them in his truck.

19 **VI. Martinez's Statements**

20 **A. Martinez's Statements to Law Enforcement**

21 Officers from the Garden Grove Police Department responded to the hospital to investigate. On
22 October 3, 2005, around 4:17 a.m., Officer Santana interviewed Martinez. Martinez stated that Alma
23 was in the kitchen preparing a bottle for Diana, who was crying in the bedroom. Diana continued to cry
24 so he picked her up to take her to Alma. While in the kitchen, his right leg gave out and he fell to the
25

26 ⁵ During his police interview and the 2008 trial, Miguel stated Martinez asked him to inform police or
27 anyone who asked that Elvia was taking care of Diana. During the 2014 trial, he testified that Martinez
28 had told him to tell Elvia to say she was taking care of Diana to police or anyone who asked.

1 ground. He accidentally squeezed Diana very tight to protect her from falling and fell on top of her,
2 causing her to stop breathing. At that point, they went to UCIMC.

3 At approximately 5:31 a.m., Investigator Echavarria interviewed Martinez. Martinez maintained
4 that Alma was present during the fall with Diana on Sunday night. He described that he held Diana
5 with her face directed outward so she could see Alma. As he walked into the kitchen, his leg gave out
6 and he fell on Diana. As he fell, Martinez pulled Diana tighter into his body to protect her, and his arm
7 slid up the bridge of her nose. Diana's head never touched the ground and her head remained
8 between his arm and chest. He fell on both arms with Diana between his body and the floor.

9 Investigator Echavarria saw a small circular scab on Martinez's outer right wrist area and minor
10 scratch type scabs on the outer right forearm, which looked older than an incident happening hours
11 earlier. Martinez showed no emotion and seemed nervous and scared. Investigator Echavarria
12 expected him to be more emotional about Diana's death. Martinez did not show the emotions that
13 Investigator Echavarria typically saw when a loved one dies.

14 Due to Martinez's demeanor, the scabs, and some comments vaguely indicating Alma may not
15 have been present, Investigator Echavarria questioned Martinez as to whether the fall happened at
16 another time when Alma was not present, to which he denied. Martinez described a previous injury to
17 Diana's elbow, which occurred when Alma was playing with her on the bed. Alma grabbed Diana's
18 arm and pulled her. Martinez told officers that Elvia was the usual babysitter and he watched Diana
19 only sometimes, while Alma was at work.

20 At approximately 8:00 a.m., officers took Martinez to his residence so he could reenact what
21 had happened. When they arrived at the house, Investigator Echavarria spoke with Investigator Noce,
22 who had been simultaneously interviewing Alma. Investigator Noce informed Investigator Echavarria
23 that Alma had admitted that she was not present during the accident. Investigator Echavarria
24 immediately took Martinez to the station for an additional interview.

25 On October 3, 2005, at approximately 9:29 a.m., Investigator Echavarria interviewed Martinez
26 again. When Investigator Echavarria told Martinez they knew Alma was at work at the time of the fall,
27 Martinez admitted he was alone with Diana. He described the same events that he had described in
28

1 the initial interview, without Alma. When officers told Martinez that the doctor opined Diana's injury
2 was inconsistent with the fall he described, Martinez indicated he placed a lot of pressure on Diana's
3 head and may have struck her eye when he jerked her into his body at the time he fell.

4 While at the hospital, Martinez and Miguel drove home to pick up a jacket for Alma. At the
5 house, he gave Miguel the gun he had in his room and told him to dispose of it because he did not
6 want the police to find the gun. He did not know where Miguel took the weapon. When questioned
7 about Diana's prior elbow injury, Martinez said he saw Alma playing with Diana when Diana injured her
8 elbow, and they had told the doctor the truth.

9 **B. Martinez's Post-Arrest Statements**

10 Martinez was arrested for homicide. On October 3, 2005, at approximately 2:36 p.m.,
11 Investigator Echavarria spoke to Martinez again and read him his *Miranda* rights.⁶ Martinez said the
12 fall happened in the afternoon on Thursday, September 29th. Diana's head did not hit the wall or
13 ground; however, she incurred a bump on her head because he gripped her tight and squeezed her
14 head as he fell. Although Diana continued to have a bump on her head leading up to her death, they
15 did not take Diana to the hospital because Martinez feared someone might say he had hit her. In
16 addition, Alma was concerned about what others may say concerning the injury.

17 According to Martinez, on October 2, 2005, while babysitting Diana, he was watching television
18 and eating on the bed when he heard Diana making noises. He turned on the light and saw that she
19 had vomited and was having difficulty breathing. Martinez could only see the whites of her eyes.
20 When Martinez picked up Diana, her head tilted back and her arms fell down to her sides. He rubbed
21 hydrogen peroxide on her head but Diana did not respond. Martinez knocked on Elvia's door and told
22 her Diana was sick. He asked for help. Elvia went to Diana and told Martinez to pick up Alma.

23 Around midnight, Martinez picked up Alma at the bar, returned home, and took Diana to the
24 hospital. Alma told Martinez that, when they arrived at the hospital, they would say Martinez fell with
25 Diana that day. Martinez refused to lie because he did not want problems and feared incarceration.

26
27 ⁶ *Miranda v. Arizona* (1966) 384 U.S. 436, 467-468.
28

1 However, by the time he parked the car and entered the hospital, Alma had already told hospital staff
2 that he had fallen with Diana.

3 While at the hospital, in Martinez's presence, Alma called the bar where Imelda and Amalia
4 were working and asked Amalia to get Martinez's gun and hide it. Amalia initially agreed, but then said
5 she was going straight to the hospital. Alma called Imelda and asked her if she could tell Amalia to get
6 the gun out of the house. When Amalia arrived at the hospital, she informed Martinez she did not rid
7 of the gun. She told him he should get the gun out of the house. Alma also told Martinez to get the
8 gun out of the house. Miguel drove Martinez home and Martinez retrieved the gun from his drawer in
9 his room. He gave the gun to Miguel because Miguel told him he would hide it for him. Miguel later
10 told Martinez that he hid the gun. When Miguel and Martinez returned to the hospital, they learned
11 that Diana had died.

12 Investigator Echavarria confronted Martinez with information he had received from Investigator
13 Bogue indicating that Alma had lied to the doctor by saying she was watching Diana when Diana hurt
14 her elbow. Martinez continued to claim he watched Alma play with Diana and injure her arm. Upon
15 further questioning about the injury, Martinez admitted he was home alone with Diana when she
16 injured her elbow. He initially lied to Alma about how the injury occurred, but later told her the truth.
17 Martinez first told Alma he had been playing with Diana when she slipped and he pulled on her arm.
18 He later said that he had been playing on the bed with Diana when she pulled back and fell in an
19 awkward position onto her arm on the bed. He claimed her body weight caused the injury.

20 Martinez said it was Alma's idea to lie since they were afraid of going to jail. When Elvia and
21 Miguel arrived at the hospital, they told them to tell the truth but, by then, Alma had already lied.

22 **C. Martinez's Trial Testimony**

23 Martinez testified in the first trial, but not the second. Concerning the fall with Diana on
24 September 29, 2005, Martinez testified that Diana's head did not hit the wall. Diana had a bump on her
25 head, approximately one-half inch in size, from him squeezing her head as he fell. The same day,
26 before the fall, Martinez had been feeling pain in his leg and ankle. He planned to return to work the
27 following day, but remained in bed due to the fall. He did not seek medical attention for his ankle.
28

1 From Friday through Sunday, the bump remained on Diana's head and she appeared sad,
2 serious and frightened. She did not sleep well and woke-up more frequently. Martinez asked Alma
3 whether they should take her to the doctor, and Alma replied it was up to her to make the decision.
4 Alma wanted to send Diana to Mexico to be under the care of Alma's mother rather than take her to the
5 hospital. On Sunday, Diana was eating very little. She appeared sad and did not laugh.

6 On October 2, 2005, while Martinez was babysitting Diana, he heard Diana vomiting. He picked
7 up Diana and noticed she was limp. Her head went back, her eyes rolled back, and her skin was
8 yellow. He put hydrogen peroxide on her head to revive her, but she did not react. Martinez went to
9 Elvia's room and asked her to help. Elvia and Miguel came to the garage. Elvia said Diana was not
10 well. Miguel stated they need to do something. Martinez knew Elvia had a telephone in her room;
11 however, she did not tell him to call 911. Martinez did not have a working cell phone so he drove to the
12 bar to get Alma.

13 During the drive home from the bar, Alma asked what was wrong with Diana. Martinez
14 explained that she was vomiting. Upon returning home, they drove Diana to the hospital. Martinez was
15 frightened. Alma told Martinez she was going to say the accident happened Sunday night while she
16 was present. Alma asked Martinez to say the same thing. He told her to tell the truth. There was no
17 discussion about the location of the accident, such as in the kitchen versus outside. On the way to the
18 hospital, Alma called Amalia on Elvia's cell phone, asking her to go to their house to get Martinez's gun
19 and throw it away. When they arrived at the hospital, Alma took Diana into the hospital and Martinez
20 parked the car. When he entered the hospital, Alma had already told hospital staff he had an accident
21 that night with Diana.

22 After the doctors informed Alma and Martinez that Diana had died, they said they were going to
23 find out the cause of Diana's death. Alma cried and screamed. Martinez was in shock and did not feel
24 well. He went outside. Miguel and Elvia arrived, then Amalia and Imelda. Martinez was walking
25 towards the room where Alma and Amalia were located when he heard Amalia say to Alma, "Let's get
26 rid of that fucking thing," referring to the gun. Martinez told Alma and Amalia not to touch the gun. He
27 told them the gun was clean, new and never used. Alma told Elvia to take Martinez to the house to get
28

1 rid of the gun, to which Martinez refused. Miguel told him he wanted to take him to get the gun
2 because the gun was at his house and he did not want problems. As Miguel drove Martinez home,
3 Martinez told him not to touch the gun. Miguel informed him he needed to hand over the gun to
4 someone to avoid going to jail. Martinez retrieved the gun and box of bullets from a wrapped jersey in
5 a drawer in his room. He carried the gun by the slide and gave the gun and box of bullets to Miguel.
6 On the way back to the hospital, Miguel informed Martinez he would hide the gun in one of his sister's
7 houses so no one would have any problems.

8 Martinez lied to the police because Alma had already told a different story than what had
9 happened. Martinez never hit Diana and did not point his gun at her. He never saw anyone abuse her.

10 Regarding Diana's arm injury, Martinez testified that, in the middle of September, he was
11 playing with Diana when she injured her elbow. As he held her arms, she pulled backwards and fell on
12 one side while he held her other arm. On September 23, 2005, Alma, Martinez and Diana went to the
13 doctor's office to have the cast removed. Martinez was present while Alma told the doctor she was with
14 Diana when her arm was injured. He did not say anything.

15 **VII. Alma's Statements**

16 **A. Alma's Statements to Law Enforcement**

17 During her interviews on October 3, 2005, around 4:17 a.m. and 5:37 a.m., Alma maintained
18 that Martinez had fallen with Diana in the kitchen on October 2, 2005, while in her presence. During
19 her second interview, Alma stated that Diana cried after the fall. She tried to give Diana a bottle, but
20 Diana would not drink it. Diana then vomited and grew pale and limp.

21 According to Alma, Martinez watched Diana, played with her, watched television with her, and
22 walked with her in the stroller. Martinez was patient and calm. She wanted Diana to call Martinez her
23 father. Alma never saw Martinez hit Diana.

24 During a search of Alma's residence, Investigator Noce noticed a slight amount of liquid at the
25 bottom of a baby bottle on the counter, in contravention of Alma's claim that Diana would not drink from
26 the bottle after the fall. When Investigator Noce confronted Alma with information received from
27
28

1 Investigator Echavarria—namely, that Alma may have left the residence that night—Alma admitted she
2 had been at work at the time of the incident.

3 Alma was interviewed again on October 3, 2005, at approximately 10:05 a.m. When confronted
4 with Amalia's statements to the police that the fall occurred days earlier, Alma admitted Martinez fell
5 with Diana on September 29, 2005. When bringing Diana to the hospital on October 2, 2005, Martinez
6 told Alma to say he fell in the kitchen that same day. She told Martinez the doctors would know the
7 injury did not happen that day. When they arrived at the hospital, he told Alma he gave Diana medicine
8 at 10:00 p.m., so Alma initially told police she gave medicine to Diana at that same time.

9 Alma told Amalia what Martinez had told her to say and what she was going to tell the police.
10 Alma told everyone she was going to lie and they were covering for her. Alma had told Martinez she
11 should go to the police because the bump on Diana's head was not right; however, Martinez told her to
12 calm down. When asked why she lied during the earlier interviews, Alma said it was because she left
13 Diana with Martinez, a man. She asked Amalia to retrieve Martinez's gun because she was concerned
14 police would come to the residence as a result of Diana's illness and bump on her head. She was
15 concerned the police would find the gun and it was not right for Diana to be around a gun. Martinez did
16 not tell her he fell another time with Diana, or that he had hit Diana.

17 Alma described Martinez as an angry person. Around the beginning of September, Diana was
18 on the bed when Martinez grabbed her by both arms, shook her, and yelled at her. Alma told Martinez
19 to stop because Diana was crying. Martinez got mad when Diana cried and disturbed him while he
20 watched soccer on the television. Although Martinez never hit Alma, a month before, after she told him
21 she wanted to leave, he grabbed her by both arms and pushed her.

22 Alma initially told police she had injured Diana's elbow in mid-September and, when confronted
23 with information that Martinez admitted he was alone with Diana when her arm was broken, she
24 changed her story. Alma said she did not know when Diana's arm was broken. It could have
25 happened when Martinez was alone with Diana. Alma had four children living in Mexico with her
26 mother and she was planning to send Diana to Mexico too.

27 Alma was subsequently arrested for child endangerment.
28

1 **B. Alma's Trial Testimony**

2 Alma testified during the first trial, but did not testify during the second trial. She testified that,
3 on October 3, 2005, on the way to the hospital, she told Martinez she was going to say that she had
4 been carrying Diana and fell at the threshold of the kitchen. Alma told Martinez to get rid of the gun
5 because she was afraid of getting in trouble for having a weapon in her house. She indicated Miguel
6 and Elvia rented rooms out in the house to other renters; however, they did not have access to the
7 garage where Alma, Martinez, Diana and Imelda resided.

8 Alma initially lied to the police because she was afraid she would get in trouble for having a
9 man watch Diana and failing to seek medical attention for Diana after the fall on September 29, 2005.
10 Alma admitted that she lied to the doctor about Diana's elbow injury. Diana was alone with Martinez
11 the day her elbow was injured, as well as on September 29, 2005, and October 2, 2005. According to
12 Alma, Martinez was a calm person. However, on one occasion, while they were living in Garden
13 Grove, Diana became restless while he was trying to watch television. Martinez grabbed her by the
14 arms and told her to be quiet. Alma was upset. She told Martinez to stop talking to Diana that way.

15 **VIII. Elvia's Statements**

16 **A. Elvia's Statements to Law Enforcement**

17 When interviewed by law enforcement on October 3, 2005, around 4:17 a.m. and 7:30 a.m.,
18 Elvia stated she was awakened early in the morning by Alma yelling about taking Diana to the hospital.
19 However, during an interview that same day, at approximately 1:45 p.m., Elvia said Alma pleaded with
20 her to say Alma was at the residence with Martinez and Diana; otherwise, Alma would have problems.
21 Alma told Elvia she was going to say she was present, and told her to say she heard a scream and saw
22 Alma and Martinez leave for the hospital with Diana. Martinez did not tell Elvia that Diana fell or had
23 another accident, other than the September 29, 2005, fall with Diana. She saw Diana at 10:00 a.m. on
24 October 2, 2005; Diana was fine.

25 On October 6, 2005, officers interviewed Elvia again. She indicated that she did not know
26 Martinez and Alma's real names until Diana died. Both Martinez and Alma represented that Martinez
27 was Diana's biological father. Elvia later learned Martinez was not the biological father and Alma did
28

1 not work at a Mexican restaurant, as she had previously been told. Concerning the fall on September
2 29, 2005, Elvia believed Martinez struck Diana sometime earlier and was creating an alibi. The way
3 Martinez was on the driveway, on one knee, appeared staged to her. There was nothing outside on the
4 driveway to cause Martinez to fall or trip over and, if Diana had hit her head against the wall, she would
5 have been crying. On September 29, 2005, Elvia told Martinez she believed Diana's injury did not
6 happen on the driveway because there would be scratches, bleeding or roughness visible on Diana's
7 head. She told him it looked like someone had hit her head or she had suffered a blow to her head.
8 Martinez looked down, and said, "I don't know." The following day she saw Martinez running out to a
9 car and it did not appear there was anything wrong with his ankle.

10 Immediately prior to the fall, Martinez's actions made Elvia feel he was looking for an excuse to
11 leave the house. For example, Martinez told Elvia and Miguel that he was leaving to buy bread;
12 normally, Martinez did not tell them when he left. When she showed him the bread in the refrigerator,
13 he momentarily paused, had a brief, puzzled look on his face, and then told her he was leaving to buy
14 sour cream. Elvia also found it unusual that he was carrying Diana in his arms because, whenever she
15 had seen him leave with Diana, he always had Diana in a baby carrier. In addition, after the fall, Elvia
16 asked Martinez if she should put some ice on Diana's head. Martinez responded he did not know and
17 dismissed her suggestion.

18 On September 26, 2005, Alma came into the kitchen, crying. She told Elvia that Martinez
19 always yelled at Diana and took everything out on her. Alma planned to send Diana to Mexico. On
20 September 30, 2005, Elvia told Alma she should take Diana to the hospital; however, Alma expressed
21 concern the hospital would take Diana away if they returned so soon after having the cast removed.

22 According to Elvia, Alma had previously mentioned being tired because she worked late and
23 needed to get up early with Diana. Martinez did not get up with Diana because Diana did not like him
24 and always cried.

25 On October 3, 2005, after Martinez woke up Elvia and Miguel, Martinez repeatedly said he did
26 not do anything and did not hurt or touch Diana. At the hospital, Martinez told Miguel he had to help.
27 Miguel told Martinez there was nothing he could do; Diana was dead. Martinez told Miguel he needed
28

1 to tell them he had fallen with Diana. Miguel said he could not help Martinez. Martinez told Elvia she
2 needed to help him because Diana died. He told her to tell the police she saw him fall with Diana, to
3 which Elvia responded she did not see him fall.

4 **B. Elvia's Testimony at Trial**

5 Elvia testified at the first trial that, when Alma was with Diana, Diana was happy. However,
6 Martinez was mean-spirited and yelled at Diana to "shut up" when Diana cried. He left her alone in the
7 yard in the baby carrier. Approximately 10 minutes after the fall on September 29, 2005, Elvia saw
8 Martinez run to his car for his cell phone.

9 During the second trial, Elvia testified that Martinez took care of Diana by himself every
10 afternoon when Alma worked. Diana cried a lot when she was with him. He always yelled at Diana to
11 stop crying. Martinez never asked Elvia for help when Diana cried. He stayed in the garage with
12 Diana; however, on one occasion when Diana was crying, he put her on the lawn in the baby carrier
13 and left her there. Elvia told police Alma and Martinez did not pay her rent because she was concerned
14 that she would get in trouble for renting out her garage and that Diana had died while living there.

15 **IX. Miguel's Statements**

16 **A. Miguel's Statements to Law Enforcement**

17 Miguel initially told police that, on October 3, 2005 around 12:00 a.m., Martinez knocked on his
18 bedroom door, while holding Diana. He said she was sick and they were taking her to the hospital.
19 Martinez, Alma and Elvia took Diana to the hospital. Miguel left for the hospital around 1:00 a.m.

20 Later that day, around 10:45 a.m., police interviewed Miguel again. Miguel changed his story.
21 He said Martinez and Alma took Diana to the hospital. Miguel initially denied having possession of
22 Martinez's gun. He claimed that Martinez threw it out the window, in the area of Dale and Lampson,
23 while they were driving back to the hospital. They later returned to the area in an effort to find the gun,
24 but were unsuccessful. Upon further questioning, Miguel changed his story and admitted he had the
25 gun. While driving back to the hospital, Martinez showed Miguel a gun and box of ammunition.
26 Martinez drove to the area of Dale and Lampson and threw the gun and box of ammunition out the
27 window. After arriving at the hospital, Miguel entered his vehicle and drove to the area of Dale and
28

1 Lampson to find the gun. Miguel found the gun and box of ammunition in the street, picked it up and
2 put it in the storage compartment located under the back seat of his vehicle. Miguel said he went back
3 to find the gun because he was worried that a child might find it. Miguel lied to the police because he
4 was scared. Investigator Sutherland retrieved a Ruger nine-millimeter gun, a magazine with
5 approximately 10 rounds in it, and a box of nine-millimeter ammunition, from Miguel's vehicle.

6 On October 5, 2005, at approximately 8:24 p.m., police interviewed Miguel again. After
7 Martinez had fallen on September 29, 2005, Miguel asked Martinez what happened and Martinez said
8 he hurt his right ankle. Miguel helped Martinez into the house, and took off his shoe and sock so he
9 could check the ankle. Miguel did not notice anything wrong with Martinez's ankle. Martinez continued
10 to complain that his ankle hurt. Miguel brought him a bag of ice. Miguel saw a small bump on Diana's
11 head, but did not think the bump had just happened because Diana was not crying. On October 2,
12 2005, Martinez came into Miguel's bedroom and said Diana was sick. Martinez told Elvia to check on
13 her, and Miguel told Martinez to call 911.

14 When Martinez and Elvia arrived at the hospital, Martinez asked Miguel to help him by saying
15 that Elvia was watching Diana. Miguel told him he was not going to lie to the police. Martinez cried and
16 said he did not do anything wrong to Diana. At the hospital, Martinez told Miguel he needed to get rid
17 of something back at the house. Miguel returned to the house with Martinez because he was
18 concerned Martinez had drugs in the house. On the way back to the hospital, Miguel asked Martinez
19 what he picked up at the house. Martinez lifted his shirt and showed Miguel a handgun tucked in his
20 waistband and a box of ammunition in his shirt pocket. Martinez drove to Dale and Lampson Street,
21 stopped at a red light, tossed the gun and ammunition into the street, and drove back to the hospital.

22 **B. Miguel's Testimony at Trial**

23 During the first trial, Miguel testified that, after Martinez woke-up him and Elvia, Miguel told
24 Martinez to call the paramedics. Martinez said his cell phone was in the car. About five to six minutes
25 later, Martinez returned with Alma. At the hospital, Martinez informed Miguel that he wanted to get rid
26 of something at the house. Miguel did not know what Martinez was referring to and went home with
27 him. Miguel went to the living room and Martinez went to the garage. Miguel's version of who was
28

1 driving and when he discovered the gun changed. As Miguel was driving back to the hospital, Martinez
2 opened the car door at a red light. After returning to the hospital, Martinez informed Miguel he had to
3 get rid of a gun. Martinez further explained that he threw it away at the location he had opened the car
4 door. Miguel maintained he retrieved the gun and ammunition. Miguel testified he initially denied
5 having possession of the gun to the police because he did not know what to do.

6 During the second trial, Miguel testified that, after Martinez woke-up him and Elvia, Martinez
7 said he was going to call Alma. He left and returned with Alma. At the hospital, Martinez informed
8 Miguel he was going back to the house to get some “fucking” thing and Miguel accompanied him.
9 Miguel’s version of when he discovered the gun again changed. After returning to the residence,
10 Martinez went into the garage bedroom. After two to three minutes, Martinez came into the living room
11 with a gun sticking out of his pants. While Miguel drove back to the hospital, Martinez said he was
12 going to throw out the gun. While the vehicle was moving, Miguel saw Martinez open the door and
13 throw the gun out at Dale and Lampson Street. When they returned to the hospital, Miguel got into his
14 vehicle and drove to where Martinez threw out the gun. He picked up the gun, put it in his vehicle, and
15 went back to the hospital. He did not want to leave the gun at Dale and Lampson Street because there
16 was a nearby school and he did not want a child to pick up the gun.

17 **X. Weeks Preceding Diana’s Death**

18 **A. Maria Vazquez’s Statement to Law Enforcement**

19 On October 3, 2005, Maria Vazquez (Maria) informed police she lived in the house with Alma,
20 Martinez, and Diana in Santa Ana. She previously worked at El Moro De Cumpas. When Diana was
21 four months old, Maria saw marks and small abrasions on Diana’s back and left side, but did not think
22 much of the marks. When Ambrosia could not babysit Diana after Ambrosia became pregnant.
23 Martinez began babysitting Diana. According to Maria, Martinez left Diana alone when he went to the
24 store.

1 **B. Imelda Hernandez’s Statement to Law Enforcement**

2 On October 4, 2005, Imelda informed law enforcement that she had seen red bruising on
3 Diana’s right ear about two to three weeks earlier.⁷ The bruising was on the top inside right ear and
4 appeared to be about three days old. Imelda asked Alma what happened, and Alma said she would
5 ask Martinez. Martinez never answered and shrugged off the question. Imelda had seen various
6 scratches on Diana’s hands and face, but noticed Diana did not have long nails. Imelda did not believe
7 Diana injured herself. She remembered an incident towards the end of September when Martinez left
8 Diana alone for 30 minutes inside a car. Diana cried a lot when Alma went to work and Martinez
9 watched her. Imelda said something would happen to Diana when Alma went to work. She had seen
10 bruises on Diana’s arm on two other occasions, but Alma did not say that Martinez injured Diana.
11 Imelda had never seen Martinez drinking at the bar.

12 **C. Vanessa Solano’s Statement to Law Enforcement**

13 On October 4, 2005, officers interviewed Vanessa Solano (Vanessa), a receptionist at the
14 chiropractic office where Martinez had been receiving treatment two times a week, usually Tuesday and
15 Thursday. Vanessa indicated that Alma and Diana almost always accompanied Martinez to the office,
16 and both Martinez and Alma were attentive to Diana. About three weeks before the interview, Martinez,
17 Alma and Diana were in the office when Vanessa noticed a cast on Diana’s arm. Alma informed her
18 that she had been playing with Diana on the bed when Diana fell and injured her arm. About a week
19 and a half prior, Martinez, Alma and Diana returned to the office and Vanessa noticed a bruise on
20 Diana’s right cheek, which was about the size of a quarter or a half dollar. Alma claimed that Diana had
21 hit herself with a rattle. When Martinez, Alma and Diana initially came to the office, Diana was happy
22 but, more recently, Diana was serious and fussy. When she questioned Alma about it, Alma said Diana
23 was teething and getting vaccines.

24 _____
25 ⁷ During her initial interview on October 3, 2005, Imelda stated she had come to the United States
26 approximately a month prior. Martinez watched Diana the most and babysat her by himself. Imelda
27 worked with Alma at the bar. Imelda told police she discovered Diana was sick around 2:00 a.m. on
28 October 3, 2005, when Alma called the bar and told a co-worker to tell Imelda that Diana was sick.
During her second interview on October 3, 2005, Imelda said Alma asked her to lie to the police for her.

1 **D. Rosa Maria Banos-Ventura’s Statement to Law Enforcement**

2 On October 4, 2005, officers interviewed Rosa Maria Banos-Ventura (Rosa), Martinez’s former
3 girlfriend and El Moro De Cumpas employee. She stated a man came in selling balloons at El Moro de
4 Cumpas. Alma told Martinez to buy a balloon for Diana. He replied, “And why me?” About two to
5 three months before, after Martinez dropped off Alma at the bar, he came into the bar to play pool and
6 left Diana in the car. He checked on Diana twice by looking out the door of the bar.

7 **E. Ambrosia Ortega’s Statement to Law Enforcement**

8 On October 24, 2005, Ambrosia told law enforcement that, about three weeks before October 4,
9 2005, the day she heard Diana died, she babysat Diana four days in a row. When Martinez and Alma
10 brought Diana over she noticed Diana had a bandage and sling on her right arm. When she asked
11 Alma about it, Alma said Diana fell on her arm while in Alma’s care. On the second day, she asked
12 Martinez what happened. He said Diana fell while she was in his care. He claimed she had fallen on
13 her arm, injuring it because she was heavy. Ambrosia did not see bruises or injuries on Diana.

14 **XI. DNA Evidence**

15 In 2005, the Orange County Sheriff’s Department Crime Laboratory performed a DNA analysis
16 on the muzzle, back of the slide, and butt of Martinez’s gun. Annette McCall (McCall), forensic
17 scientist, looked at Martinez’s gun under a magnifying glass and did not see tissue, hair, blood or vomit.
18 However, according to McCall, she found DNA on the muzzle, back of the slide, and butt of the gun.
19 Diana was a major contributor to the sample found on the front of the muzzle, and a minor contributor
20 to the sample found on the back of the slide and butt of the gun. Martinez was a major contributor to
21 the sample found on the back of the slide and a minor contributor on the butt of the gun. Alma was a
22 minor contributor to the sample found on the back of the slide of the gun.

23 During the second trial, McCall testified that Diana was a major contributor to the sample found
24 on the front of the muzzle of the gun, and Martinez was a major contributor to the samples found on the
25
26
27
28

1 back of the slide and the butt of the gun.⁸ Diana's DNA could have been transferred to the gun by one
2 of several ways: direct contact with Diana; Martinez touching Diana before touching the gun; Martinez
3 handling an item that had been in contact with Diana before touching the gun; or from the gun touching
4 an item Diana had touched. DNA can remain on an item for months.

5 **XII. Medical Evidence**

6 **A. Dr. Anthony Juguilon's Testimony at Trial**

7 Dr. Juguilon, the chief forensic pathologist for the Orange County Sheriff's Coroner's
8 Department, performed Diana's autopsy on October 3, 2005. He opined the blunt head trauma was
9 likely due to one sharp blow, causing the complex skull fracture and injuries to the brain within 24 hours
10 of Diana's death. He performed an external and internal examination of Diana's body. The major
11 external finding was a cephalohematoma, a collection of blood in the scalp tissue. The
12 cephalohematoma was "squishy" and located just above the right ear. For the internal examination of
13 the area above the skull, Dr. Juguilon made an incision behind the head and ears, and reflected the
14 scalp forward and backward. By doing so, he was able to see evidence of tissue hemorrhage or
15 bleeding within the layers of the scalp and view the skull for fractures. He discovered a hematoma on
16 the right parietal region directly overlying a complex skull fracture indicating blunt force trauma. Dr.
17 Juguilon explained a complex skull fracture is a fracture with branching components, rather than a
18 simple, linear line. He observed a 13-centimeter fracture line extending from the frontal region to the
19 back of the skull. There were two fractures, one, two and a half centimeters in length, the other two
20 centimeters, radiating off the fracture line towards the back where the cephalohematoma was located.
21 The majority of the bleeding occurred around the fractured site. A complex skull fracture is a severe
22 head injury that, in the forensic setting, is seen only in a few scenarios, including, a fall from a
23 significant height such as 10 feet; a high-speed motor vehicle accident (significant collision where there
24 was damage and intrusion into a vehicle); and abusive head trauma (forceful blow to the head).

25
26 ⁸ In 2010, there was a change in reporting standards for mixture profiles found on evidence. Prior to
27 the change in reporting standards, the laboratory reported all of the DNA contributors found on the gun;
28 however, per the revised reporting standards, the laboratory could not report low DNA contributors.

1 According to Dr. Juguilon, branching skull fractures in a child Diana's age are usually associated with
2 abusive head trauma. Typically, accidents cause a simple linear fracture. Most complex fractures are
3 due to abusive head trauma. However, it is possible to have a complex skull fracture if a baby flips
4 over a step while in a walker and hits its head on a hard tile floor or tumbles out of a moving swing.

5 Dr. Juguilon testified that the scenario given by Martinez, where he fell and squeezed Diana's
6 head, would not create the complex skull fracture. There was no pattern injury on Diana's head
7 evidencing a gun hit her; however, if there was a towel around the gun or, depending on the way the
8 gun struck her head, it may not leave a mark. Dr. Juguilon did not believe the muzzle of the gun would
9 cause Diana's injury as there was no pattern imprint. He testified a child's scalp is elastic so oftentimes
10 there may not be a visible external injury on the scalp when there is severe injury underneath.

11 Furthermore, the significant amount of hair on Diana could protect her scalp from external injuries.

12 Complex skull fractures, such as the one Diana had, would reveal neurologic deterioration at or
13 near the time of the injury or event causing the skull fracture. Neurologic deterioration includes
14 nausea, vomiting, lethargy, irritability, various states of sleepiness, unconsciousness, or loss of
15 neurological function, such as an inability to move her arms. This was not a fracture where Diana
16 would have been fine for several days or weeks and suddenly decompensated. In aging the skull
17 fracture, Dr. Juguilon did not take a sample from the bone of the skull, but took a tissue sample of the
18 hemorrhage overlying the fracture because the skull fracture would cause a hemorrhage and,
19 therefore, the fracture and hemorrhage would be the same age. According to Dr. Juguilon, this is a
20 generally accepted, reliable substitute to taking a bone sample. The tissue above the bone showed a
21 fresh acute injury on top of an older injury, indicating a past impact and a newer impact. The skull
22 fracture was as old as the acute injury because it was a fresh skull fracture and there was a fresh
23 hemorrhage inside the skull tissue. The injury causing the skull fracture is what caused Diana's death.
24 She did not die of the hemorrhages, but the hemorrhages were contemporaneous with the fracture.

25 Dr. Juguilon removed Diana's skull cap and looked at the brain externally. After his review, he
26 preserved the brain in formaldehyde and provided it to Dr. Andrews, a neuropathologist who had a
27 contract with the Coroner's Office. Dr. Juguilon testified in December 2005, as part of the autopsy, Dr.
28

1 Andrews viewed the brain externally and internally. He removed blocks of tissue from parts of the
2 brain and made slides from the tissue for microscopic analysis. He preserved the rest of the block in
3 wax for future slides. Dr. Andrews issued a neuropathology report, separate from Dr. Juguilon's
4 report. Dr. Juguilon found that Diana's entire brain was swollen, which is a response to blunt head
5 trauma. Dr. Andrews' analysis in December confirmed that Diana's brain was swollen.

6 Diana had bleeding at three different levels of the cranium with differing ages, indicating there
7 was repetitive head trauma, not just a single event. Hemorrhages were found in the epidural, subdural
8 and subarachnoid levels.⁹ To age the injuries, pathologists analyzed Diana's tissue under a
9 microscope. When the body is injured, an acute inflammatory response of blood cells typically occurs
10 around 24 hours from the injury. The absence of an inflammatory response indicates that the injury
11 occurred within 24 hours. Dr. Andrews microscopically analyzed tissue from the hemorrhages at the
12 epidural, subdural and subarachnoid levels. Dr. Juguilon subsequently microscopically analyzed the
13 tissue. Both Dr. Juguilon and Dr. Andrews found Diana had a subarachnoid hemorrhage around 24
14 hours old; a subdural hemorrhage around several weeks old; and an epidural hemorrhage around
15 seven to 10 days old. The hemorrhages were mainly concentrated on the right side of her head,
16 though there were injuries on her left side with similar findings. The hemorrhaging was consistent
17 with blunt force trauma.

18 An epidural hemorrhage related to the skull fracture could also help in determining the age of
19 the skull fracture; however, there was no indication the epidural hemorrhage was in the area of the
20 skull fracture and thus related to the skull fracture. During his initial examination, Dr. Juguilon did not
21 see the epidural hemorrhage. However, after Dr. Andrews identified an epidural hemorrhage, Dr.
22 Juguilon reviewed Dr. Andrews' slides of the epidural hemorrhage.

23 In aging the cephalohematoma, Dr. Juguilon performed an iron stain to detect the presence of
24 iron in the blood. The presence of iron is an element of healing which begins 48 to 72 hours after
25

26 ⁹ Bleeding above the dura, a thin, tough membrane underneath the skull and above the brain, is called
27 an epidural hemorrhage and bleeding below the dura is called a subdural hemorrhage. Bleeding under
28 the arachnoid membrane, a thin membrane close to the brain, is called a subarachnoid hemorrhage.

1 injury. Dr. Juguilon did not see iron in the major component. The major component was an acute
2 injury, meaning the injury occurred within 24 hours. However, he found an older injury in the same
3 vicinity indicating there had been past head trauma.

4 Dr. Juguilon also found hemorrhages in the optic nerve sheath, a covering on the optic nerve
5 that controls the eyes. The hemorrhages occurred within 24-hours. He also found hemorrhaging
6 within Diana's retina. The retinal hemorrhages occurred within 24-hours, but there was additional
7 injury, which may have been 36 to 48 hours old, indicating past injuries. According to Dr. Juguilon,
8 blunt head trauma, shaken baby syndrome, or both, typically cause this type of injury.

9 In Diana's lower extremities, Dr. Juguilon found a fractured callus about four to eight weeks old
10 on the posterior rib on her right side, evidencing repetitive abuse. A fractured callus represents the rib
11 attempting to heal itself. To Dr. Juguilon, a rib fracture is highly suspicious for child abuse, if not
12 diagnostic of child abuse. In a child Diana's age, there are only two ways this type of fracture could
13 occur in that location: direct trauma to the rib or a squeezing mechanism. It is highly unlikely an
14 accidental squeeze would cause rib fractures.

15 Dr. Juguilon opined Diana exhibited repetitive blunt head trauma and was a victim of repetitive
16 physical abuse.

17 **B. Dr. Terri Haddix's Testimony at Trial**

18 Dr. Haddix, a pathologist working for Forensic Analytical Sciences, a private independent crime
19 lab, testified for the defense. Dr. Haddix specialized in forensic pathology and neuropathology.

20 Dr. Haddix requested that the Coroner's Office generate slides for him by cutting the blocks of
21 tissue that had been preserved. He microscopically analyzed the same tissue Dr. Juguilon and Dr.
22 Andrews had analyzed, but not the same area within the tissue. Within the same tissue, one slide may
23 show no signs of healing, and a slide right next to it may show signs of healing, also known as
24 organization, as it depends on the portion of tissue analyzed. Presence of iron indicates the injury is
25 three days old, at a minimum. When there is a fair amount of iron, the injury is aged much longer than
26 three days. If there is no healing, the injury may be acute.

1 From reviewing the autopsy photographs of the fracture before the skull was opened, Dr.
2 Haddix opined that the fracture was a simple fracture with a couple of radiating components. Dr.
3 Haddix defined a simple fracture as a linear fracture that was not separated by more than two
4 millimeters at the fracture line and did not cross sutures, whereas a complex fracture is a fracture
5 crossing the suture line with a linear separation of more than two millimeters. A suture is where the
6 bones of the skull ultimately knit together. According to Dr. Haddix, Diana's fracture was not complex
7 because it did not cross the suture line and there was no separation.

8 Dr. Haddix testified Diana's fracture involved the parietal bone. Dr. Haddix indicated that the
9 parietal bone is a common location for fractures in infants. He did not believe the fracture, alone,
10 correlated with neurologic decompensation. He relied on an article published in 2009, which followed
11 11 newborns, one who had fallen from more than three feet and 10 who had fallen from less than three
12 feet. Several of the newborns incurred skull fractures in the parietal region, one had a fracture in a
13 different area, and others did not have a skull fracture. Of those having skull fractures involving the
14 parietal bone, they exhibited no neurologic symptoms. Looking at the skull fracture alone, based on
15 his research, Dr. Haddix opined that this type of fracture would not cause a child to die immediately or
16 within 24 hours from incurring the skull fracture.

17 He aged the skull fracture around seven to 10 days because a majority of the
18 cephalohematoma was several days old, and the epidural hemorrhage was a week old or beyond. Dr.
19 Haddix testified that, 85 percent of the time when there is an epidural hemorrhage, there is an
20 associated skull fracture, indicating the fracture produced the hemorrhage. In the epidural
21 hemorrhage tissue, Dr. Haddix found extensive healing. Since he believed it was in the same location
22 as the skull fracture, he opined the skull fracture and epidural hemorrhage occurred at the same time
23 and the fracture produced the epidural hemorrhage. He believed the epidural hemorrhage was in the
24 same location as the fracture because the autopsy photograph showed the hemorrhage coursing
25 along the entire length of the fracture and the location where Dr. Andrews reported he sampled the
26 tissue, a couple inches off the midline on the right hand side, correlated with the location of the
27 fracture. In microscopically analyzing the cephalohematoma, Dr. Haddix found a fair amount of iron
28

1 present showing the injury was well beyond three days old and some areas where there was no iron,
2 indicating a more recent injury of less than three days old. According to Dr. Haddix, analyzing tissue
3 from the cephalohematoma and epidural hemorrhage to age the fracture is medically acceptable;
4 however, an analysis of the bone would have provided direct evidence.

5 The fracture likely happened from a single incident. A child's skull is malleable and more
6 flexible than an adult's skull. It may take a greater amount of force to produce a similar fracture in a
7 child than an adult.

8 Dr. Haddix opined that Diana died from the combination of the epidural hemorrhage, the
9 subdural hemorrhage, and the subarachnoid hemorrhage, caused by the blunt force trauma creating
10 the fracture and the hematoma, causing her brain to mildly swell. When she received these injuries,
11 she may have exhibited symptoms of crying, loss of appetite, lethargy, loss of motor skills, and
12 eventually loss of consciousness. Dr. Haddix's analysis would have been aided by neurological
13 information about Diana prior to her death. There was evidence of healing in all the areas and,
14 therefore, he did not believe Diana died from the skull fracture. He surmised there was an old injury
15 and then a superimposed recent injury.

16 Dr. Haddix believed some type of blunt force caused the skull fracture. Typically, lineal skull
17 fractures are a consequence of an impact against a relatively broad surface. He believed the impact
18 was caused by a broad base which did not have elevated points because there was no external injury.
19 If Diana was hit with the muzzle of the gun, there would be a discrete skin injury. If she was hit with
20 the gun, he would expect to see marks from the parts protruding from the gun; however, it depends on
21 how the gun was wielded. After reviewing a picture of the kitchen area, Dr. Haddix indicated a fall in a
22 baby walker onto the tile floor could cause this type of fracture. However, he had no indication Diana
23 had the motor skills to move a baby walker nor that she fell from a walker. He testified babies start
24 standing by about a year and walking thereafter. He also indicated a skull fracture could result if a
25 baby were to fall out of a baby swing.

26 Dr. Haddix concurred with Dr. Andrews that the majority of the subdural hematoma is in the
27 seven to 10 days age range, and some areas may be weeks old. In reviewing the microscopic slides,
28

1 autopsy photographs, and reports by Dr. Juguilon and Dr. Andrews, Dr. Haddix saw evidence of a
2 good deal of organization. The date and type of mechanism that produced both the fracture and the
3 epidural could have resulted in injury to the subdural too. The re-bleed found in some areas of the
4 subdural hematoma was a more recent hemorrhage caused by a second type of insult. Dr. Haddix
5 testified a re-bleed usually requires an impact.

6 Dr. Haddix believed the subarachnoid hemorrhage was a minimum of three days old due to
7 evidence of iron deposition, but the right side of the hemorrhage appeared to be more recent or acute.

8 Dr. Haddix found hemorrhaging within multiple layers of the retina and no evidence of iron
9 deposition. He found some regions in the optic nerve sheath showing cells starting to break down and
10 no iron deposition, suggesting the injuries were a couple days old. However, Dr. Haddix could not be
11 certain. He did not see the iron nor inflammation that Dr. Juguilon indicated he saw; however, it could
12 be due to analyzing a different slide of the tissue.

13 Dr. Haddix opined the fractured rib was several weeks old because it was well along in the
14 healing process.

15 Dr. Haddix testified the cephalohematoma, epidural hemorrhage, subdural hemorrhage,
16 possibly some of the subarachnoid hemorrhage, and the skull fracture could be aged around the
17 seven to 10 day range. The skull fracture and hemorrhages could have resulted from one application
18 of force and severely compromised the skull. Furthermore, because there were areas in the right
19 parietal bone that were fractured, any subsequent application of force in that same location would
20 have a greater chance of being readily transmitted to the brain and cause a more serious injury. The
21 second application of force could be substantially less than the first application that produced the
22 whole constellation of injuries, but would need to be enough to produce additional hemorrhage within
23 the skull associated with the brain and not just a slight brush. The compression from an arm
24 squeezing Diana's head could contribute to a more recent appearing hemorrhage and would increase
25 pressure inside her head, leading to retinal hemorrhaging and some of the bleeding located around the
26 optic nerves. When intracranial pressure in the head is increased, neurological signs may be present
27
28

1 such as lethargy, nausea, decreased levels of consciousness, flat affect, general overall decreased
2 movement, and, if pain, then perhaps more crying.

3 **C. Dr. Janice Ophoven's Testimony**

4 Dr. Ophoven, a retired medical doctor with a specialization in pediatric forensic pathology who
5 consults on cases concerning children's injuries, testified for the defense. Dr. Ophoven reviewed slides
6 from blocks of tissue the Coroner's Office had preserved. Her key finding was evidence of a significant
7 area of softening and swelling on the right of Diana's head associated with a complex skull fracture.
8 She felt the fracture was "quite long" and testified a complex skull fracture is a serious intracranial
9 injury. Where there is no history of falls or accidents, the more common cause would be child abuse.
10 A fall of two to three feet onto a hard, unyielding surface could create a complex skull fracture and
11 significant traumatic injury. It could also cause fatality, although such is rare. However, there was no
12 indication Diana fell from any height, such as from a baby swing or bed.

13 Dr. Ophoven disagreed with Dr. Juguilon's opinion that the injury and death happened within
14 hours of each other. After reviewing the photographs from Dr. Juguilon's autopsy and performing a
15 microscopic analysis, she aged the skull fracture at seven to 10 days or more as she found substantial
16 healing in the tissues above and below the fracture. She aged the cephalohematoma at more than a
17 week. The cephalohematoma was loaded with iron, had granulation tissue, and new, small blood
18 vessels forming—a classic healing organizing clot. Development of new blood vessels in the scar
19 tissue comes on a week or more after injury.

20 She believed the fresh blood found in the cephalohematoma and the subdural may have been
21 the leaking of blood during the dying process. Shock or decreased oxygen causes blood vessels to
22 leak and bleed, especially fragile, new blood vessels. Furthermore, blood vessels in the subdural
23 space will leak and bleed spontaneously because of fragile vessels, even without a trigger. She did
24 not see tearing, bruising or new disruption of tissue, which would be evidence of a new impact;
25 however, this did not necessarily mean a new impact did not occur.

26 Dr. Ophoven agreed with Dr. Andrews' findings of the epidural, subdural, and subarachnoid
27 hemorrhages occurring seven to 10 days prior to death because she found substantial healing. Dr.
28

1 Ophoven testified the blood around the optic nerve and retina showed healing, indicating the injuries
2 occurred at least a week or more before Diana died.

3 However, to definitively determine the age of the skull fracture, a section of the bone should
4 have been processed and analyzed under the microscope. According to Dr. Ophoven, it was not
5 uncommon for a pathologist to sample just above and below the fracture and use that as a proxy for
6 age, especially when the pathologist knows the fracture is fresh because the event just occurred.
7 However, in a situation where there is a suggestion the fracture is a different age than the tissue above
8 and below, one would need to take a sample of the skull to verify the age. Once Dr. Juguilon realized
9 there was an older injury over the area of the fracture, he should have alerted law enforcement so the
10 investigation could be realigned to the proper timeline. Law enforcement could have obtained
11 information concerning the details of Diana's behavior, activities of daily living, interaction, irritability,
12 and lethargy, approximately a week or two before death to help narrow down the time and
13 circumstance surrounding the fatal event and subsequent symptomology.

14 Dr. Ophoven disagreed with Dr. Juguilon's opinion that the fracture was consistent with blunt
15 force trauma from a gun. In her opinion, the pattern was classic for a flat service impact. One would
16 need to have a pattern of fracture characteristic of an instrument in order to opine that a particular
17 instrument was involved. A pointed or narrow point of impact would be more likely to cause a different
18 fracture pattern causing tearing of the scalp and skin. Dr. Ophoven believed that, if Diana was hit with
19 the muzzle of a gun, there would be a pattern imprint on the scalp and a depressed skull fracture. She
20 opined the absence of a pattern on the skin in the tissue and on the bone was sufficient to exclude the
21 gun as an instrument of injury. She stated clothing and hair may reduce the chance of a pattern on the
22 skin and, in this case, Diana had hair. Short falls can and do kill children, although such is rare.
23 However, there was no evidence submitted to Dr. Ophoven indicating that any adult in charge of Diana
24 said she fell from any height or that she fell from a swing, a bed or anything.

25 Dr. Ophoven opined Diana died of complications from blunt force trauma seven to 10 days
26 before due to a secondary event causing sudden and irreversible deterioration. The second event did
27 not need to be a serious impact to cause deterioration. Dr. Ophoven did not see evidence of another
28

1 significant traumatic impact separate from the original one; however, it was possible. The secondary
2 event could be anything that altered circulation or pressure, such as a squeezing of the chest or a
3 bump to the head. It would have caused a sudden imbalance in the intracranial system, a pulse of
4 increased pressure, lack of oxygen to the brain tissue, and increased volume inside the head that
5 precluded normal circulation. Deterioration would have occurred fairly quickly after the fatal event. Dr.
6 Ophoven opined terminal deterioration occurred shortly before Diana arrived at the hospital due to the
7 mild brain swelling, herniation of the brain stem, and the nerve cells of the brain. The mild amount of
8 swelling in Diana's brain showed sudden deterioration as her brain did not have time to swell to
9 maximum potential before she died. The brain stem did not herniate and there was insufficient time for
10 the nerve cells of the brain to degenerate and show changes of lack of oxygen. This theory was
11 consistent with her review of Martinez and Alma's statements in the police report concerning Diana's
12 behavior in the days before her death confirming there were no significant alterations until her last day.
13 Martinez falling with the child could be a trigger that caused the demise of Diana; however, if it were
14 the fatal event, the deterioration would have occurred fairly quickly. When there is no obvious history
15 of a severe accidental event, such as a car accident, then fatal traumatic head injuries are statistically
16 more likely to have occurred from abuse.

17 Dr. Ophoven microscopically analyzed the section of rib bone and surmised it was more than
18 two to three weeks old, but less than two to three months. The rib bone showed the kind of tissue
19 reaction that a long bone goes through to heal. To Dr. Ophoven, rib fractures are more commonly
20 associated with abuse than other fractures. Not all rib fractures are abuse, but rib fractures are seen
21 more often due to abuse than other kinds of fractures. However, Diana had bronchitis at one point.
22 Bronchitis coupled with an underlying metabolic abnormality of the bone could have resulted in the rib
23 fracture. Before assuming abuse, there should be an analysis of Diana's metabolic status. There was
24 no testing to determine if Diana had an underlying metabolic abnormality of the bone.

25 **XIII. Martinez's Probation Report**

26 On January 24, 2008, probation officers interviewed Martinez. Martinez stated he worked as a
27 framer until July 2005, when he shot himself in the foot with a framing pistol, fracturing his foot. He
28

1 was unable to work, lost his job, became depressed, and participated in counseling for two months.
2 He did not take medication for depression until sentencing. On Thursday, September 29, 2005,
3 Martinez was carrying Diana when he twisted his right foot and fell. His right arm struck the wall and
4 Diana's head hit the wall. She tried to cry, but was very frightened. After Martinez told Elvia about the
5 accident, she advised him to wait and take Diana to the hospital when Alma returned home. Everyone
6 told Alma to take Diana to the hospital, but she refused. Diana slept and stopped eating until October
7 3, 2005, when they took her to the hospital because she started vomiting.

8 Alma told Miguel about the gun on October 3, 2005, and Miguel told Martinez to go home and
9 get the gun to avoid further problems. Alma initially called her cousin to get the gun; however, she
10 refused and, as a result, he returned home and gave the gun to Miguel. When he picked up the gun,
11 Diana's vomit and saliva were on his hands, and transferred to the gun.

12 Martinez stated that, although he never babysat previously, he took care of Diana during the
13 month preceding her death because Alma could not afford a babysitter. He cared for Diana from 6:00
14 p.m. to 2:00 a.m. Diana generally slept, did not cry much, and there were no incidents when she
15 would not stop crying. He and Alma had a good relationship, though they argued occasionally
16 because he wanted to return to work and she wanted him to continue babysitting.

17 **XIV. Martinez's Evidentiary Hearing on the Petition for Writ of Habeas Corpus**

18 Martinez filed an appeal and petition for habeas corpus, which the appellate court consolidated.
19 The court affirmed Martinez's judgment on appeal, but issued an order to show cause for the habeas
20 petition. The matter was returned to the superior court for an evidentiary hearing to determine whether
21 the petition for ineffective assistance of counsel had merit and whether Martinez was entitled to relief.

22 **A. Sherry Garrels' Testimony**

23 Sherry Garrels, Martinez's counsel for the first trial, testified that, up until a year before trial,
24 Martinez maintained that Diana's injuries occurred from him falling because of his knee and squeezing
25 her head. However, after Alma pled guilty to child endangerment, Martinez told her that Diana's injuries
26 occurred when Alma was with Diana and the showerhead accidentally fell on Diana. The incident
27 happened on the Thursday or Friday before Diana died. After receiving this information, Garrels did not
28

1 intend to call Dr. Ophoven as a witness and did not speak with medical experts as to whether the
2 injuries were consistent with the showerhead incident. Martinez informed her Alma would testify about
3 the showerhead incident. Garrels interviewed Alma in jail before trial without a Spanish language
4 interpreter. Because Alma was devastated and crying during the interview, Garrels believed Alma was
5 telling the truth. Thereafter, Garrels spoke with Alma in the courthouse with the assistance of a
6 Spanish language interpreter. Alma told Garrels the showerhead incident did not occur. Garrels still
7 put Alma on the stand because Martinez informed her if Alma saw him she would testify to the truth.
8 Garrels initially thought Martinez was innocent, then realized he had lied to her, and that he was guilty.

9 **B. Martinez's Testimony**

10 Martinez denied that he told Garrels about the showerhead incident or that he had changed his
11 story. He stated he was always truthful and informed her he fell with Diana. The first time he had
12 heard about the showerhead incident was when Garrels testified in the evidentiary hearing. Martinez
13 stated he had wanted to use Dr. Ophoven to testify at trial and thought she would testify as a defense
14 witness. He had received letters from Alma saying she was sure he did not do anything wrong and she
15 felt responsible for Diana's death because she did not take Diana to the hospital. Martinez understood
16 that Alma was coming to court to testify about what she said in her letter.

17 **C. Findings**

18 The superior court found that Martinez was denied his right to effective assistance of counsel,
19 requiring habeas relief. The court did not find Martinez to be a credible witness stating, "his testimony
20 in these proceedings was substantially motivated by the desire to benefit himself at the expense of Ms.
21 Garrels" and "he's told a number of different stories about what occurred in the weeks and days and
22 hours leading up to the child's death."¹⁰ The court also found "his behavior following the child being
23 taken to the hospital to be conduct inconsistent with innocent behavior."¹¹ The court further stated "in
24 terms of comparing his testimony to Ms. Garrels' with respect to the showerhead story, given Mr.

25
26 ¹⁰ Attorney General's Exhibit 11, at p. 494.

27 ¹¹ Attorney General's Exhibit 11, at p. 494.

1 Martinez's many challenges to his credibility and given the choice between finding that either he told
2 her the showerhead story or she just invented the showerhead story out of thin air, I don't find the
3 version that she invented the showerhead story out of thin air to be credible or reasonable."¹² The
4 court also found Garrels was not a particularly good historian. Garrels abandoned a competent medical
5 testimony in pursuit of a theory that was not investigated, researched, prepared, or presented to the
6 jury. She did not consult with medical experts, use an investigator to look into the matter, or interview
7 Alma prior to trial with an investigator and Spanish language interpreter. Alma never told Garrels about
8 the showerhead incident. The court found Garrels' representation of Martinez fell below the objective
9 standards of reasonableness and that, but for Garrels' errors, there was a reasonable probability that
10 the result of the first trial may have been different.

11 **XV. Penal Code Section 4900 Claim**

12 In his claim filed with CalVCB, Martinez claimed he was at home looking after Diana while
13 Alma worked when he noticed Diana had become very ill. Martinez asked his landlords to watch after
14 Diana while he drove to Alma's job to pick her up. Alma and Martinez took Diana to UCIMC where she
15 died of respiratory arrest followed by cardiopulmonary arrest associated with acute onset of altered
16 consciousness. Dr. Juguilon's error in concluding Diana had sustained a fresh blunt force injury to the
17 head misled authorities as to the timing of the fatal injuries and caused them to focus on Martinez as
18 the main suspect since he was taking care of Diana on the night she died. As a result, Martinez was
19 charged with Diana's murder.

20 At Martinez's first and second trial, the District Attorney argued the fatal injuries were due to a
21 blow to the head caused by the butt of Martinez's gun. Martinez pled not guilty to all charges and did
22 everything in his power to prove his innocence, but failed due to his trial counsel's failure to challenge
23 the conclusions reached by the prosecution's expert witness on Diana's injuries in the first trial.
24 Martinez always maintained his innocence and was acquitted after a second trial because of Dr.

25
26 ¹² Attorney General's Exhibit 11, at pp. 494-495.
27
28

1 Ophoven's expert testimony that the injuries suffered by Diana were seven to 10 days older than
2 originally determined in the first trial and there was no pattern on the skin of Diana's scalp and tissue,
3 thereby excluding the gun as an instrument of injury. To Martinez, this exculpatory evidence proved
4 the fatal injuries sustained by Diana occurred when Martinez was not in her presence. The second
5 jury acquitted Martinez of all charges.

6 Martinez brought Amalia Arechiga (Amalia) to testify at the hearing. Amalia lived four doors
7 down from Alma when she lived in Santa Ana and met Alma when she was pregnant. Amalia worked
8 at the same bar as Alma. Alma was a waitress and waitresses were required to drink and dance with
9 customers. Sometimes, Amalia drove Alma home when Alma was very intoxicated. Amalia felt it was
10 dangerous for Alma to be so intoxicated because she could drop Diana.¹³

11 Amalia met Martinez when he moved in with Alma. When Alma and Martinez lived in Santa
12 Ana, she assumed Martinez was the father because he walked around with Diana in the stroller,
13 carried her, sat with her and fed her. She discovered Martinez was not Diana's father when she began
14 working at the bar. She would see Ambrosia babysit Diana every once in a while.¹⁴ Sometimes
15 Ambrosia babysat Diana when Alma was at work, and sometimes she babysat her when Martinez
16 went to physical therapy for his knee. Alma told Amalia he had injured his knee; she noticed he had
17 difficulty walking. Amalia never saw Martinez drink; however, Ambrosia's husband frequently
18 consumed alcohol and was always at the bar.

19 Alma and Martinez moved to Garden Grove about a month before Diana died. Thereafter,
20 Ambrosia babysat Diana every once in a while. Amalia never saw Alma drop Diana off at Ambrosia's
21 house to be babysat. She believed Ambrosia babysat Diana up until she died because, when she
22

23
24 ¹³ During her police interview and testimony in the second trial, Amalia did not mention her concern of
25 Diana due to Alma's drinking. In fact, during the second trial, Amalia testified she never saw Alma
taking care of Diana when she was drunk.

26 ¹⁴ During the second trial, Amalia testified Ambrosia babysat Diana often and babysat Diana while Alma
27 was at work. Amalia saw Ambrosia with Diana almost all the time, and saw Diana with Ambrosia more
28 than Alma. Ambrosia brought Diana over to her house almost every afternoon.

1 asked Alma whether she needed a ride home, Alma replied she did not as Martinez was picking her up
2 and they were going to pick up Diana.

3 A couple months before Diana died, Alma offered Amalia money to take Diana to Alma's
4 mother in Mexico. Alma said she wanted Diana to live with her mother because Diana was a burden.
5 Amalia agreed to take Diana to Mexico; however, it was delayed due to Diana's arm injury. A week
6 before Diana died, Alma told her Diana had a squishy spot on her head. Amalia told her to take Diana
7 to the doctor, but Alma replied she wanted to take her to a healer instead of a doctor because she
8 already had an injury to her arm and did not want social services to be contacted. Alma told Amalia
9 the injury occurred when Martinez was carrying Diana and his leg bent as he stepped on some steps.
10 Diana's head hit the wall, but Martinez did not fall.¹⁵

11 On October 3, 2005, while at work, Alma told Amalia that Diana was sick and asked her to take
12 her to the hospital. Amalia said she could not leave because she needed to close the bar at 2:00 a.m.
13 Later, Alma called Amalia and asked her to remove Martinez's gun from Alma's residence. Amalia
14 refused to get the gun. Upon arriving at the hospital, Alma told Amalia that Diana had died. Alma
15 again asked her to remove the gun. Alma did not tell her to do anything else and she left the hospital
16 around 3:00 a.m. to go home.¹⁶ Around 7:00 a.m., law enforcement called Amalia. She gave a
17 statement and the police asked her to talk to Alma so she would tell the truth. Alma whispered in
18 Amalia's ear, but Amalia could not understand what she was saying because Amalia was crying.
19 Amalia felt that Alma was a liar because she lied to Martinez about her whereabouts.

23 ¹⁵ During her police interview, Amalia stated that, Alma told her Martinez was watching Diana when he
24 fell. Alma said that Martinez said he was falling while holding Diana and squeezed her head. During
25 the second trial, Amalia testified a few nights before October 2, 2005, Alma told her and other girls at
the bar that Martinez had fallen with Diana and did not know whether to take her to the doctor.

26 ¹⁶ During her police interview, Amalia said that, at the hospital, Alma told Amalia to lie and say the fall
27 happened that day, rather than Thursday. Alma also told her to tell the nurse that Martinez was the
28 father. Amalia did not want to stay at the hospital because she did not want to lie.

DETERMINATION OF ISSUES

1
2 A person who has been erroneously convicted of and imprisoned for a felony can apply for
3 compensation from the state for every day of imprisonment.¹⁷ To receive compensation, the applicant
4 must prove, by a preponderance of the evidence, that (1) the crime with which he was charged was
5 either not committed at all, or, if committed, was not committed by him, and that (2) he sustained an
6 injury through his erroneous conviction and imprisonment.¹⁸ “Preponderance of the evidence” means
7 evidence that has more convincing force than that opposed to it.¹⁹ If the applicant satisfies this burden,
8 CalVCB shall recommend to the Legislature an award of compensation equal to \$140 per day for every
9 day of time spent in custody.²⁰

10 In reaching a determination of the merits of a section 4900 claim, the Board may consider
11 claimant’s denial of commission of the crime, reversal of the judgment of conviction, acquittal of
12 claimant on retrial, or decision of the prosecuting authority not to retry claimant for the crime.²¹
13 However, none of these circumstances are sufficient evidence to warrant a recommendation for
14 compensation in the absence of substantial independent corroborating evidence that claimant is
15 innocent of the crime charged.²² The Board may also consider as substantive evidence the prior
16 testimony of witnesses claimant had an opportunity to cross-examine, and evidence admitted in prior
17 proceedings for which claimant had an opportunity to object.²³

18
19
20
21 ¹⁷ § 4900.

22 ¹⁸ §§ 4903, subd. (a), 4904; *Tennison v. Victim Compensation and Government Claims Board* (2006)
23 152 Cal.App.4th 1164.

24 ¹⁹ *People v. Miller* (1916) 171 Cal. 649, 652.

25 ²⁰ § 4904.

26 ²¹ Cal. Code Regs., tit. 2, § 641, subd. (a).

27 ²² Cal. Code Regs., tit. 2, § 641, subd. (a).

28 ²³ Cal. Code Regs., tit. 2, § 641, subd. (b).

1 CalVCB hearings are informal and the traditional rules of evidence do not apply.²⁴ All relevant
2 evidence is admissible if it is the sort of evidence on which reasonable persons are accustomed to rely
3 in the conduct of serious affairs,²⁵ even if a common law or statutory rule might make its admission
4 improper over objection in any other proceeding.²⁶ CalVCB may also consider any other information
5 that it deems relevant to the issue before it.²⁷ However, the factual findings and credibility
6 determinations establishing the court's basis for granting a writ of habeas corpus, a motion for new trial
7 pursuant to section 1473.6, or an application for a certificate of factual innocence as described in
8 section 1485.5 shall be binding on the Attorney General, the factfinder, and CalVCB.²⁸

9 **I. Claimant Has Failed to Establish His Innocence**

10 **A. Medical Evidence Pertaining to the Blunt Force Trauma and Skull Fracture**

11 In his claim filed with CalVCB, Martinez contends the expert testimony by Dr. Ophoven—that
12 the injuries suffered by Diana were seven to 10 days older than originally determined in the first trial—
13 and exclusion of the gun as an instrument of injury proves the fatal injuries sustained by Diana occurred
14 when Martinez was not in her presence. However, even if the skull fracture and other injuries suffered
15 by Diana were seven to 10 days old, Martinez has failed to prove the fatal injuries sustained by Diana
16 occurred when he was not in her presence. Further, Martinez has failed to prove by a preponderance
17 of the evidence that the gun was not the instrument of injury.

18 Dr. Juguilon, Dr. Ophoven and Dr. Haddix agreed Diana died from blunt force trauma to her
19 head and the blunt force trauma caused the skull fracture. Dr. Juguilon surmised the blunt force trauma
20 causing the complex skull fracture occurred within 24 hours of Diana's death. Dr. Ophoven and Dr.
21 Haddix opined the blunt force trauma causing the skull fracture occurred approximately seven to 10

22
23 ²⁴ See Cal. Code Regs., tit. 2, § 615.1, subd. (a).

24 ²⁵ Cal. Code Regs., tit. 2, § 641, subd. (c).

25 ²⁶ Cal. Code Regs., tit. 2, § 641, subd. (d).

26 ²⁷ Cal. Code Regs., tit. 2, § 641, subd. (f).

27 ²⁸ § 4903, sub. (b).

1 days before Diana's death, and the injury was aggravated from a secondary event. Martinez has failed
2 to show he was not in Diana's presence seven to 10 days prior to her death. In fact, the evidence
3 shows he was present and Diana's sole babysitter. Martinez had been Diana's primary babysitter since
4 they moved to Garden Grove in September 2005. Per Elvia's testimony, since Martinez and Alma
5 moved to Garden Grove approximately a month before Diana's death, Martinez had been babysitting
6 Diana when Alma went to work. Martinez's own statement in the probation report reveals that he
7 admittedly took care of Diana during the month preceding her death from 6:00 p.m. to 2:00 a.m.
8 because Alma could not afford a babysitter. At trial, Martinez testified he had been babysitting Diana
9 two weeks prior to her death. Also, Alma testified that he had been babysitting Diana at least two
10 weeks prior to her death. There is no indication that Martinez was not around Diana seven to 10 days
11 prior to her death.

12 There is no evidence a third person inflicted the skull fracture. Although Amalia testified that
13 Ambrosia was babysitting Diana up until she died, she never witnessed it. Ambrosia informed police
14 she only babysat Diana for four days in September, three weeks prior to Diana's death, which is
15 outside the time period when the skull fracture may have occurred. Martinez's assertion that Elvia was
16 Diana's usual babysitter when they lived in Garden Grove is not supported by the evidence. Elvia and
17 Miguel both testified that Elvia did not watch Diana and Martinez's own statement (included in the
18 probation report) refutes this. Moreover, there is no evidence that Miguel and Elvia's other renters
19 babysat Diana or were in her presence during this time. Elvia told police that none of the other renters
20 babysat Diana. Alma also testified that the other renters did not have access to the garage where
21 Alma, Martinez, Imelda and Diana lived. Further, although Alma would be intoxicated when she
22 returned home from work and had access to Diana during this time period, this does not prove that
23 Alma caused Diana's injuries. Martinez has provided no evidence showing how or when Alma
24 purportedly injured Diana during the relevant period.

25 Additionally, Martinez and Alma could not attribute the skull fracture to an event occurring seven
26 to 10 days prior to Diana's death. The only explanation provided for Diana's head injuries is the fall
27 which occurred on September 29, 2005. However, Martinez's fall occurred approximately four days
28

1 prior to Diana's death, which is outside the timeframe given by his own experts, and none of the
2 medical experts believed Martinez's fall created the skull fracture. Dr. Juguilon testified this type of
3 fracture is a severe head injury that, in the forensic setting, is seen only in several scenarios such as a
4 fall from a significant height, high-speed motor vehicle accident, and abusive head trauma. Because
5 there was no history of a high-speed motor vehicle accident or significant fall, Dr. Juguilon surmised the
6 fracture was a result of abusive head trauma. Dr. Ophoven also confirmed that, absent a history of falls
7 or accidents, the common cause of this type of fracture is abuse. There was no indication a fall or
8 accident occurred seven to 10 days prior to Diana's death. Although there was disagreement as to how
9 high the fall would need to be to cause this type of skull fracture, notably, there was no information
10 provided to the experts that Diana had fallen from any height. Because there is no evidence Diana
11 experienced a motor vehicle accident or fall from any height that would have produced the skull
12 fracture, it is likely the fracture was caused by abusive head trauma.

13 Moreover, Martinez has failed to prove by a preponderance of the evidence that the gun was
14 not the instrument of injury. Although Dr. Ophoven opined the absence of a pattern on the skin and on
15 the bone was sufficient to exclude the gun as an instrument of injury, both Dr. Haddix and Dr. Juguilon
16 testified that, depending on how the gun was wielded, it may not leave a pattern imprint. Dr. Juguilon
17 further testified if there was a towel around the gun, it may not leave an imprint. Furthermore, Martinez
18 and Alma's urgency to dispose of the gun immediately prior to and after Diana's death was highly
19 suspicious. Shortly before Diana's death, Alma asked Amalia to retrieve the gun from her residence
20 and hold it for a couple days in the event police came to the house and, shortly after Diana died,
21 repeated the request. Soon after Diana's death, upon realizing Amalia would not retrieve the gun,
22 Martinez left the hospital to retrieve and dispose of the gun and ammunition. Based on the foregoing,
23 Martinez has failed to prove the gun was not the instrument of injury.

24 **B. Evidence of Abuse**

25 Based on the repeated trauma to Diana's head, rib fracture, and other injuries, it appears Diana
26 was abused. All experts found multiple head injuries but disagreed on the age of the injuries. The
27 estimated ages ranged from approximately within 24 hours, to seven to 10 days old, to weeks old.
28

1 Additionally, Dr. Juguilon, Dr. Haddix, and Dr. Ophoven observed a fractured posterior right rib. All
2 these experts saw evidence of healing in Diana's rib fracture and agreed Diana's rib fracture occurred
3 weeks prior to Diana's death. Dr. Haddix aged the injury at several weeks. Dr. Juguilon aged the rib
4 fracture at four to eight weeks and Dr. Ophoven aged the fracture more than two to three weeks old,
5 but less than two to three months.

6 Similar to the skull fracture, there was no explanation from Martinez or Alma as to how the rib
7 fracture or the repeated head injuries at different ages occurred. Martinez's fall on September 29, 2005
8 could not have produced the rib fracture and head injuries at different ages. Dr. Juguilon opined the
9 repetitive trauma to the head likely showed evidence of repetitive physical abuse and the rib fracture is
10 highly suspicious for child abuse, if not diagnostic of child abuse. Dr. Ophoven confirmed that rib
11 fractures are commonly associated with abuse. While Dr. Ophoven indicated bronchitis coupled with
12 an underlying metabolic abnormality of the bones could result in a rib fracture, Diana had bronchitis in
13 May 2005, which was outside of the time frames when the rib fracture occurred. Therefore, despite the
14 fact there was no metabolic testing of her rib bone, there was no indication Diana had any illness which
15 would result in a rib fracture during the relevant time period. Looking in totality at all her injuries, and
16 absent any reasonable explanation, it is highly likely the rib fracture and multiple head injuries were
17 caused by abuse.

18 Although the experts disagreed on the age of the above injuries, during all relevant time periods,
19 Martinez had access to Diana and was babysitting her while Alma worked. Martinez began babysitting
20 Diana in July 2005, approximately three months prior to Diana's death. Notably, all the head injuries
21 and the rib fracture occurred during the time period Martinez was babysitting Diana, and a majority of
22 the head injuries occurred while Martinez was Diana's primary babysitter during her last month. While
23 Ambrosia also may have babysat Diana on occasion in July, August and September, there is no
24 indication in the record either she or her husband abused Diana. Ambrosia had babysat Diana since
25 she was born in March 2005. Prior to July 2005, Diana's medical records did not indicate any injuries.
26 Moreover, there were no injuries found on Diana that are aged prior to the time Martinez began
27 babysitting Diana.

1 In addition to the injuries found by medical experts, lay witnesses also informed police of injuries
2 they had observed on Diana, occurring during the period that Martinez babysat Diana. Both Alma and
3 Martinez indicated there was an elbow injury which occurred while Diana was alone with Martinez on
4 September 9, 2005. Imelda also noticed various scratches on Diana's hands and face, and bruises on
5 Diana's arm. She also observed red bruising on Diana's right ear about two to three weeks prior to
6 Diana's death and, when Alma asked Martinez about it, he never responded and shrugged off the
7 question. Vanessa noticed a bruise on Diana's right cheek a week and half prior to Diana's death.

8 While Amalia, Alma, and Vanessa described Martinez as caring and attentive towards Diana,
9 there were multiple conflicting witness statements, including Alma's own conflicting statements. Elvia
10 told police Alma had informed her Martinez always yelled at Diana and took everything out on her.
11 Alma further stated she was tired because Martinez would not wake up with Diana since she did not
12 like him and always cried. Imelda and Elvia both indicated Diana cried a lot when Martinez was left
13 alone with her. Imelda believed something would happen to Diana. Elvia testified when she saw Diana
14 with Alma, Diana was happy. However, Martinez was mean-spirited and yelled at Diana to stop crying.
15 She had seen Martinez leave Diana crying in the baby carrier in the yard by herself. Imelda also
16 informed police that, in late September, Martinez left Diana alone for 30 minutes inside of a car. Rosa
17 also described an incident where Alma told Martinez to buy a balloon for Diana from a man selling
18 balloons and he replied, "And why me?" She witnessed Martinez leave Diana in the car while he
19 played pool in the bar, checking on her twice by looking out the door of the bar. Maria informed police
20 Martinez would leave Diana by herself when he went to the store. Alma testified to an incident in
21 Garden Grove when Diana was restless and Martinez grabbed Diana by her arms and told her to be
22 quiet because he was trying to watch sports on television. The incident was upsetting to Alma and she
23 told Martinez to stop talking to Diana that way. Martinez's own statements in his probation report
24 suggest he did not even want to babysit Diana as he stated he and Alma argued occasionally because
25 he wanted to return to work and she wanted him to continue babysitting.
26
27
28

1 **C. Martinez’s Credibility and Conduct Following Diana Being Taken to the Hospital**

2 CalVCB is bound by the judge’s credibility determination and factual findings in the habeas
3 proceeding pursuant to Penal Code section 4903. During the evidentiary hearing in the habeas
4 proceeding, the judge found Martinez “not to be a particularly credible witness” as his testimony in the
5 habeas proceeding “was substantially motivated by the desire to benefit himself at the expense of Ms.
6 Garrels” and he had “told a number of different stories about what occurred in the weeks and days and
7 hours leading up to the child’s death.”²⁹ Accordingly, Martinez lacks credibility.

8 Martinez has provided several different accounts when questioned about Diana’s injuries. At
9 the hospital, Alma and Martinez informed hospital staff he had fallen that day with Diana while Alma
10 was present. Although he said Alma had already lied to staff by the time he entered the hospital, he did
11 not correct the story and maintained the same story throughout his first and second police interviews. It
12 was not until police informed him they were aware Alma was at work during the time of the fall that
13 Martinez changed his version to Alma being absent during the fall on October 2, 2005. After his arrest,
14 he indicated the fall occurred on September 29, 2005 without Alma present. Although he testified at the
15 2008 trial that the September 29, 2005 fall caused Diana’s injuries, prior to trial he told his attorney that
16 the injuries occurred on September 29th or 30th when Alma was with Diana and a showerhead fell on
17 Diana. His version as to how Diana received her elbow injury also changed throughout the police
18 interviews. Initially, Martinez said Diana had injured her elbow when Alma was playing with her, then
19 later admitted he was home alone with Diana when she injured her elbow.

20 It is also questionable whether the September 29, 2005 fall with Diana actually occurred. Elvia
21 believed Martinez struck Diana prior to the fall and was creating an alibi with the fall. Martinez on one
22 knee in the driveway appeared staged to her, there was nothing outside for Martinez to trip over, and
23 Diana was not crying, despite Martinez’s assertion she incurred a fresh bump on her head. If Diana’s
24 head had been injured during the fall, it is more likely than not she would have cried immediately after
25 the fall. However, Diana did not cry until Elvia touched the “squishy” area on Diana’s head. When
26

27 ²⁹ Attorney General’s Exhibit 11, at p. 494.
28

1 meet his burden in demonstrating by a preponderance of evidence that the crimes with which he was
2 charged and convicted were either not committed or, if committed, were not committed by him. Thus,
3 he is ineligible for compensation under Penal Code section 4900.
4

5 Date: October 24, 2018

6 _____
7 Jenny M. Wong
8 Hearing Officer
9 California Victim Compensation Board
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

**BEFORE THE VICTIM COMPENSATION BOARD
OF THE STATE OF CALIFORNIA**

In the Matter of the Claim of:

Notice of Decision

Rodrigo Martinez

PC 4900 Claim No. 16-ECO-04

On November 15, 2018, the California Victim Compensation Board adopted the attached Proposed Decision of the Hearing Officer as its Decision in the above-referenced matter.

Date: November 19, 2018

Michelle Greer
Board Liaison
California Victim Compensation Board