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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re JASON HARLEY MOORE on Habeas Corpus.	D086215 (Riverside County Super. Ct. Nos. SWF10001680, CVRI2202119)

ORIGINAL PROCEEDING on a petition for writ of habeas corpus. Petition granted.

Lauryn Barbosa Findley and Heather Angove for Petitioner Jason Harley Moore.

Rob Bonta, Attorney General, Charles R. Ragland, Chief Assistant Attorney General, Arlene A. Sevidal, Assistant Attorney General, Christine Y. Friedman and Arlyn Escalante, Deputy Attorneys General, for Respondent the People.

Over 15 years ago, Jason Harley Moore's infant daughter, Charlotte, sustained fatal head injuries while in his care. He claimed Charlotte fell off a bed while he was in the shower, but doctors suspected abuse. Moore was charged with one count of assault by means of force likely to produce great bodily injury on a child resulting in death pursuant to Penal Code section 273ab. In 2014, a jury convicted him as charged and the trial court sentenced him to 25 years to life in prison. We affirmed the judgment on appeal. (*People v. Moore* (May 11, 2016, D069310) [nonpub. opn.] (*Moore*).)

Moore now has filed this petition for writ of habeas corpus challenging his conviction based on post-trial developments in the scientific understanding of the types of injuries Charlotte sustained. He contends (1) the prosecution's expert trial testimony has been undermined by scientific developments since trial and, thus, the testimony constitutes false evidence within the meaning of section 1473, subdivision (b)(1)(A); (2) the scientific developments have created a significant dispute in the medical community in Moore's favor within the meaning of section 1473, subdivision (b)(1)(D); and (3) the scientific developments constitute new evidence of Moore's innocence under section 1473, subdivision (b)(1)(C).

We issued an order to show cause why the relief sought in the petition should not be granted. The People filed a Return and Moore filed a Traverse. We now find relief is warranted as to Moore's false evidence claim and thus vacate the judgment. Because we grant relief on Moore's false evidence claim, we express no opinion as to his other two claims.

I.

A.

We grant Moore's unopposed request for judicial notice of the materials that accompanied his petition, including our records on appeal in case number D069310 and the Riverside County Superior Court order denying Moore's habeas corpus petition. Having done so, we summarize below the trial evidence from our opinion on direct appeal. (*Moore, supra*, D069310.)

Charlotte lived with her mother, Laura Morales, and Moore, who cared for her while Morales worked. (*Moore, supra*, D069310.) On the afternoon of July 27, 2010, when Charlotte was about three and a half months old, Moore called Morales and told her "she needed to hurry home" because Charlotte was not breathing. (*Ibid.*) When paramedics responded, Charlotte was

"slightly blue," not breathing, and in cardiopulmonary arrest, "meaning her heart was beating but not effectively." (*Ibid.*)

Charlotte was taken to Loma Linda University Medical Center, where "she died from her injuries about a week later." (*Moore, supra*, D069310.) Dr. Mark Massi, a forensic pediatrician, examined her upon arrival. (*Ibid.*) Charlotte "had elevated intracranial pressure and her entire brain was swelling." (*Ibid.*) Dr. Massi observed subdural bleeding in Charlotte's brain, "which, for a child of [Charlotte]'s age, is mainly caused by some sort of trauma such as shaking." (*Ibid.*) Dr. Massi also saw "extensive retinal bleeding[,] which suggested that [Charlotte] has suffered child abuse." (*Ibid.*)

"Dr. Massi felt a swollen area on the right side of [Charlotte]'s head and the ridge of a skull fracture, consistent with a fracture he saw on [her] CT scan." (*Moore, supra*, D069310.) "Looking at a 3D rendering of [Charlotte]'s skull, Dr. Massi explained that [Charlotte] suffered a fracture of the right parietal bone that continued past the suture (fibrous tissue between the skull bones that allow the skull to compress during birth) into the temporal bone." (*Ibid.*) To Dr. Massi, this suggested Charlotte "suffered a traumatic event." (*Ibid.*)

According to Dr. Massi, a child may suffer a skull fracture in a fall of two to three feet, such as from a bed, but he opined Charlotte's particular skull fracture and her other injuries were "more traumatic than a 'common household injury.' " (*Moore, supra*, D069310.) Dr. Massi observed no bruising elsewhere to suggest Charlotte had been shaken. Yet he still opined Charlotte had been shaken, that "the shaking caused the skull fracture," and her "injuries were due to nonaccidental abusive head trauma." (*Ibid.*)

Dr. Mark McCormick performed Charlotte's autopsy. (*Moore, supra*, D069310.) "In examining [Charlotte]'s skull, Dr. McCormick noted a fracture

to the right parietal area of the skull that extended into a suture. Dr. McCormick opined that a fall from a bed would not have caused the fracture and brain injuries similar to [Charlotte]'s, even if she had hit her head on a wooden bed frame. [He] believed [Charlotte]'s injuries were of the type he would expect to see in an unrestrained infant involved in a car accident or from a fall out of a second or third story building onto concrete. In Dr. McCormick's opinion, [Charlotte]'s injuries were likely inflicted and not accidental." (*Ibid*.)

"Dr. Christina Stanley, a forensic pathologist and neuropathologist, examined [Charlotte]'s preserved brain." (*Moore, supra*, D069310.) According to her, the subdural hemorrhaging's location "suggested inflicted head trauma." (*Ibid*.) She opined Charlotte's hemorrhaging "was inconsistent with a three-month-old infant falling off a bed" and "agreed with Dr. McCormick that the injuries [Charlotte] suffered had been inflicted and were consistent with abusive head trauma." (*Ibid*.)

Moore, testifying on his own behalf, "stated that he set [Charlotte] on the bed and went to take a shower. From the shower, Moore heard [Charlotte] crying loudly. He left the shower and found [Charlotte] on the floor. [Charlotte] cried as Moore checked to see if she had broken any limbs. A short time later[,] as Moore held [Charlotte], she went limp and stopped breathing. Moore began administering CPR as he called 911 and Morales. Moore never mentioned to Morales, the paramedics[,] or law enforcement that [Charlotte] had fallen." (*Moore, supra*, D069310.) He admitted at trial to "staging the bed with blankets to make himself look better." (*Ibid*.)

The defense's expert, pediatrician and neurologist Dr. Ronald Gabriel, prepared a report opining Charlotte "had suffered a skull fracture." (*Moore, supra*, D069310.) Like Dr. Massi, "Dr. Gabriel testified that a three- or four-

month-old infant could suffer a parietal skull fracture from a fall of one to two feet from a bed onto the floor" and "opined that [Charlotte] could have suffered a parietal skull fracture falling from a bed and hitting a hard railing during the fall." (*Ibid.*) But Dr. Gabriel changed his opinion at trial "and stated that [Charlotte] had not suffered a skull fracture[,] and what he initially believed was a skull fracture, was actually a 'congenital accessory variant suture' or anomalous suture that was there long before [Charlotte]'s birth." (*Ibid.*) He "concluded that [Charlotte] suffered a fall[,] and after she stopped crying, [Charlotte] had an apnea spell and stopped breathing. This caused her to turn blue," meaning "she was not getting enough oxygen." (*Ibid.*) This "caused the heart to stop, which in turn stopped the flow of blood to [Charlotte]'s brain. The lack of blood flow to the brain caused [Charlotte]'s brain cells to die," and "when the cells start to die, the brain swells. As the brain swells, it takes the path of least resistance and begins poking through the sutures," which Dr. Gabriel opined caused Charlotte's death. (*Ibid.*)

Dr. Gabriel believed Charlotte's "subdural and subgaleal hemorrhaging . . . were the result of the combination of a fall to the floor and a blood clotting deficiency noted by the hospital upon her admission." (*Moore, supra*, D069310.) As to "the notion that retinal hemorrhaging indicated abuse, Dr. Gabriel testified that this has been proven false on many occasions," with "[w]orld literature on this subject and his personal experience indicat[ing] that such hemorrhaging cannot be used as a diagnostic tool because it can result from clotting problems, leukemia, or infections." (*Ibid.*) Dr. Gabriel was not surprised by the retinal hemorrhaging "because of [Charlotte]'s blood clotting problem and the very high pressure in her brain." (*Ibid.*)

B.

In May 2022, Moore filed a habeas corpus petition in the superior court, presenting the same three claims he presents here.

In support, Moore submitted many scientific articles showing injuries like Charlotte's can result from short accidental falls. He also submitted a report from Dr. Gregory D. Reiber, a forensic pathologist with the Placer County Sheriff-Coroner Department. Dr. Reiber has also been an educator in the field of forensic pathology for 20 years, most recently as a Clinical Professor of Pathology at the University of California, Davis.

Dr. Reiber explained the trial testimony of the prosecution's medical experts regarding abusive head trauma and the likely causes of Charlotte's injuries was consistent with the general consensus in the pediatric community at that time. But recent studies "have made it clearer that impacts from short falls generate rotational forces consistent with those needed to produce subdural hemorrhage and brain injury, while shaking alone does not," and retinal hemorrhages "can be seen in accidental household fall settings, as can simple and complex skull fractures." According to Dr. Reiber, these scientific and medical advances have undermined the prosecution's medical testimony at Moore's trial, specifically the "testimony that Charlotte Moore's injuries and death are inconsistent with a short fall." Dr. Reiber opined that "Charlotte's injuries are consistent with a short fall of 26 inches."

In his report, Dr. Reiber addressed each of Charlotte's injuries that the prosecution's witnesses relied on to find she was the victim of abuse:

First, Dr. Reiber concluded the trial testimony that Charlotte's subdural hemorrhage is inconsistent with a household accident has been undermined by scientific developments since trial. According to Dr. Reiber,

short falls that have been observed or caught on video resulted in subdural hemorrhage and were fatal. And "biomechanical studies have shown that short falls generate forces sufficient to result in [subdural hemorrhage], while shaking alone does not."

Second, Dr. Reiber opined that "scientific and medical advances, along with case reports and proven short falls, have undermined [Drs. Stanley and McCormick's] trial testimony [that Charlotte's diffuse subarachnoid hemorrhage was inconsistent with a short fall] and shown that bilateral, diffuse [subarachnoid hemorrhage] can result from and has resulted from short falls."

Third, Dr. Reiber concluded that Dr. Massi's testimony that Charlotte's retinal hemorrhages are not characteristic of any process other than abuse has been undermined by post-trial medical developments. More recent studies have shown shaking does not generate sufficient force to cause such an injury, while "short falls can and do sometimes result in multiple or extensive, multilayered [retinal hemorrhages]."

Fourth, Dr. Reiber clarified the "testimony [of Drs. Stanley, McCormick, and Massi that a short fall was insufficient to cause Charolotte's brain injury] has been undermined" because "[i]t is now beyond dispute that short falls can and have caused brain swelling, brain injury, and brain death." He highlighted that, in 2020, the American Academy of Pediatrics acknowledged for the first time case reports showing "short falls can be fatal and that there is no pattern of injury unique to [abusive head trauma]." And "a 2018 'Consensus Statement' signed by many pediatric societies agreed that short falls can be fatal and cause intracranial injury, including focal and non-focal (diffuse) [subdural hemorrhage]."

Fifth, Dr. Reiber concluded that "[Dr. Stanley's] testimony [that Charlotte's axonal injury was caused by forces such as shaking a baby, not from impact,] has been undermined" by "[b]iomechanical studies . . . [showing] short falls generate sufficient forces to cause axonal injury, while shaking alone does not." Recent studies have also shown oxygen deprivation can cause axonal injury and retraction bulbs. According to Dr. Reiber, it is not surprising Charlotte suffered axonal injury given the deprivation of oxygen to her brain and massive and increasing brain swelling.

Sixth, Dr. Reiber opined, based on biomechanical research and studies, Charlotte's skull fracture "is consistent with a short fall." "It has become increasing[ly] clear that parietal skull fractures are the most common fracture seen with accidental short falls, and short falls can cause both simple and complex fractures. The testimony to the contrary has been undermined."

Seventh, Dr. Reiber concluded that medical advances undermined (1) the testimony and opinions of Drs. Stanley, Massi, and McCormick that Charlotte's combination of injuries was inconsistent with a short fall, and (2) the opinion that Charlotte's combination of injuries was consistent with shaking. He stated these scientific developments "have shown that the [observed] injuries and any combination thereof are consistent with a short fall[,]" and emphasized that it has been discovered that "rotational forces associated with impact are much more severe than those achievable by shaking." "Years after th[e] trial, the first and only systematic review of the evidence for [shaken baby syndrome] was conducted . . . [and it] concluded the evidence is insufficient and unreliable, largely due to the circular reasoning in classifying cases and controls and other methodological flaws."

Finally, Dr. Reiber found it significant that Charlotte lacked any other injuries suggestive of abuse.

C.

In February 2024, the court held a three-day evidentiary hearing, Drs. Reiber, McCormick, and Massi testified.

Dr. Reiber largely testified in conformity with his report. He further testified it was his opinion Charlotte's injuries were equally as likely to have been caused by a short fall from a bed as from abuse, and a short fall may be more likely in the absence of other injuries. He testified shaking would be considered and investigated but accidental injury could not be ruled out as the cause of Charlotte's injuries. According to Dr. Reiber, Charlotte's injuries were consistent with Moore's report of an accidental fall from the bed. He explained case studies showed Charlotte's injuries—such as bilateral multilayered retinal hemorrhage, subdural hemorrhage, skull fractures, and fatality—individually and in combination, could result from an accidental fall. Dr. Reiber concluded that, based on current medical understanding, it is "not responsible" to testify Charlotte's injuries could only come from a multistory fall or traffic collision.

Dr. Reiber admitted "short fall accidental injuries rarely produce fatal outcomes." He also testified he would classify Charlotte's manner of death as "undetermined" because (1) the medical evidence showed her injuries to be just as likely caused by accident as abuse, (2) Moore gave different statements regarding the cause of Charlotte's injuries, and (3) an undetermined designation "wouldn't preclude any sort of criminal proceedings if there was enough information to push it in that direction."

Dr. McCormick maintained he would not expect a fall from a bed to generate enough force to cause Charlotte's combination of injuries, although

he conceded it would not be impossible. Based on his review of scientific literature, he agreed a fall of two to three feet can sometimes generate the forces necessary to result in a skull fracture and, rarely, subarachnoid and subdural hemorrhage. He testified a short fall could possibly cause a brain injury and death, but it is rare and "even less likely." It was Dr. McCormick's opinion that it was "extremely unlikely" Charlotte's injuries were caused by a short accidental fall.

Dr. Massi testified a changing story regarding an incident and an admission of deception, such as Moore's, are "red flags" for abuse. Dr. Massi explained Charlotte could not fully roll over on her own and swaddling an infant further restricts their ability to roll over. But he conceded an infant could wiggle and move as to end up in different positions. He concluded, as he did at the time he cared for Charlotte and at the time of trial, that Charlotte's injuries were most likely caused by abusive head trauma and that her combination of injuries indicated shaking plus impact.

Dr. Massi acknowledged prior studies may have underestimated the amount of retinal hemorrhaging that can result from a rotational fall. He also conceded there is now controversy about (1) the diagnosis of abusive head trauma in infants and (2) the types and scope of injuries that can be inflicted by a short fall. He acknowledged more recent case reports have shown short falls can result in death, subdural hemorrhage, retinal hemorrhage, and extensive multi-layer hemorrhage. Although he acknowledged this new information has been discovered since Moore's trial, it was his opinion that the information is not relevant to this case because falls cannot be compared on a one-on-one basis and, when making a diagnosis, he cannot look at a single injury in isolation but must take all injuries and circumstances into account.

D.

The superior court denied Moore's petition.

As to Moore's false evidence claim, the court first found the experts provided false trial testimony when they testified Charlotte's injuries could not have been caused by a fall from the bed onto the carpeted floor. But it found the false testimony was not "material" because Moore "failed to prove by a preponderance of the evidence that, even if the false evidence described above had not been presented at trial, there is reasonable probability of a more favorable result."

Similarly, as to Moore's new evidence claim, the court found "new evidence does exist," but the "new evidence would not more likely than not have changed the outcome of the trial."

Last, as to Moore's claim of a scientific dispute, the court found "there is an emerging consensus in a relevant field regarding the possibility of short falls causing significant injuries or death." But Moore "failed to establish by a preponderance of the evidence that the evidence subject to the emerging dispute more likely than not affected the outcome of the case."

II.

A.

Moore argues the experts offered false evidence at trial by testifying in absolute and unequivocal terms that a short fall from a bed could not have caused Charlotte's injuries. He contends later scientific developments have shown a short fall can cause the types of injuries Charlotte sustained, thus undermining the experts' testimony to the contrary. Moore also argues the false evidence presented at trial was material. He explains this was a close case, and the false evidence "was extensive, pervasive, and impactful." And the false evidence overshadowed other evidence that he was a good and

loving father, justified in failing to immediately disclose that Charlotte had fallen off the bed.

The People counter that the experts at trial did not frame their opinions in "absolute terms" but merely explained, in their own experiences, they had not seen injuries such as Charlotte's caused by a fall from a bed and that such a fall did not explain the unique circumstances of this case. The People conclude the scientific developments "merely show differences of opinion and outlier cases; they do not establish that any aspect of the prosecution expert's testimony was false or based on a methodology that is no longer accepted." Even if some of the evidence presented at trial can be deemed false, the People respond it was not material. According to the People, Moore's evolving story, his delay in telling the truth, Charlotte's inability to roll over, and the separate contusions on her scalp all show the jury correctly found Moore's explanation not credible.

B.

Because a habeas corpus petition collaterally attacks a presumptively valid judgment, a petitioner carries a heavy burden to prove, by a preponderance of the evidence, entitlement to relief. (*In re Lewis* (2018) 4 Cal.5th 1185, 1191 (*Lewis*).)

When the superior court has denied habeas corpus relief after an evidentiary hearing, the petitioner files a petition in the appellate court based upon the transcript of the evidentiary hearing below, and the appellate court issues an order to show cause, the appellate court is not required to order an additional evidentiary hearing. (*In re Resendiz* (2001) 25 Cal.4th 230, 249 & fn. 11.) Such a scenario "is essentially the same as where the appellate court has made a reference" and, thus, the same rules apply. (*In re Wright* (1978) 78 Cal.App.3d 788, 801.) Accordingly, when considering a

petition for habeas corpus based on the record of an evidentiary hearing conducted in the lower court, the appellate court affords great weight to, but is not bound by, the superior court's factual determinations that are supported by the record. (*Lewis, supra*, 4 Cal.5th at p. 1191; *Resendiz,* at p. 249.) The appellate court therefore may make its own factual determinations based on an independent review of the record. (*Lewis,* at p. 1191; *Resendiz*, at p. 249.) "Conclusions of law and resolution of mixed questions of fact and law are subject to independent review." (*In re Parks* (2021) 67 Cal.App.5th 418, 443–444 (*Parks*).)

In this original habeas corpus action, we apply the current version of section 1473. (Cf. *In re Richards* (2016) 63 Cal.4th 291, 307–311 [discussing amendment of section 1473 after resolution of petitioner's prior petition and applying amended version of statute to subsequent petition].) Section 1473, subdivision (b)(1) currently provides that a petitioner may bring a petition for writ of habeas corpus on the ground that "[f]alse evidence that is material on the issue of guilt or punishment was introduced" at trial. To obtain relief, the petitioner must "prove, by a preponderance of the evidence," the false evidence was (1) "introduced against" the petitioner at trial and (2) " 'material . . . on the issue' of" the petitioner's guilt. (*Parks, supra*, 67 Cal.App.5th at p. 444.)

C.

1.

" '[F]alse evidence' includes opinions of experts that have either been repudiated by the expert who originally provided the opinion at a hearing or trial or that have been undermined by the state of scientific knowledge or later scientific research or technological advances." (§ 1473, subd. (b)(2).) To show an expert's opinion has been undermined by scientific developments, a

petitioner must show the " 'underlying facts essential to the expert's inferential method and opinion' " no longer support that opinion. (*Richards, supra*, 63 Cal.4th at p. 311; *Parks, supra*, 67 Cal.App.5th at p. 445.) This requires more than showing two experts could reasonably disagree (*Parks*, at pp. 447, 450) or that the scientific developments simply expand on issues addressed at trial (*id*. at p. 452). But a petitioner presenting a false evidence claim does not need to show the prosecutor knew or should have known the testimony was false. (§ 1473, subd. (b)(3).)

2.

Though the prosecution's medical experts couched much of their testimony in terms of their personal experiences and the types of injuries they would or would not expect to see under certain circumstances, we agree with Moore that the prosecution's medical experts offered absolute conclusions that a fall from a bed could not have caused Charlotte's combination of injuries. We further determine their absolute conclusions were essential to their opinions regarding the cause of Charlotte's injuries. And the experts now agree that scientific developments after trial have undermined such an unequivocal conclusion.

At trial, Dr. Massi testified Charlotte's injuries were "[a]bsolutely" inconsistent with a short fall from a bed and such a fall "would not account for her condition." Rather, her injuries were "more consistent with the forces to which an infant would be subjected in a car crash or a fall from multiple stories." He stated the level of force required to cause Charlotte's injuries was such that "if there were an observer in the room [when Charlotte was injured], the observer would have been distressed by the violence with which these injuries were inflicted." He further explained Charlotte's retinal hemorrhaging was different from hemorrhaging seen outside of the child

abuse context and Charlotte's hemorrhaging was "not characteristic of any other process" besides abuse. Given the nature of Charlotte's injuries, he testified "something much more traumatic [than a fall from the bed] had happened to her." He twice stated, "This was a major traumatic event."

Similarly, Dr. McCormick testified Charlotte's brain hemorrhaging was indicative of a fall from two or three stories or a car accident. It was his opinion a fall such as that described by Moore would not account for Charlotte's injuries and "there's no convincing evidence to me that a child could sustain a fracture from . . . a fall of that height." He explained that, even if an infant's head hit a wooden bed frame as the infant fell to the floor, one would not see "the skull fracture[,] . . . the internal injuries to the brain," the "tremendous amount of swelling," or "the optic nerve sheath hemorrhages" that Charlotte suffered. When asked about injuries an infant might suffer from falling off a changing table or out of a car seat, Dr. McCormick testified "[t]hey are not these kind[s] of injuries." He could not think of any household accident involving an infant falling off something that would cause Charlotte's combination of injuries.

And Dr. Stanley testified Charlotte's injuries were not "consistent with a three-month-old who allegedly sustained a short fall of 26 inches or so onto a carpeted surface." Such a fall would not "adequately explain the extent of" her injuries. Dr. Stanley explained the short fall scenario "just would not be the way a child would die." She concluded "someone did something to [Charlotte] that caused this. I don't know exactly what. A person did it."

In contrast, Drs. Reiber, Massi, and McCormick testified at the evidentiary hearing that the current scientific data does not support an absolute conclusion that a short fall cannot cause the types of injuries Charlotte sustained.

Dr. Reiber testified case studies showed injuries such as bilateral multilayered retinal hemorrhage, subdural hemorrhage, skull fractures, and fatality, individually and in combination, can result from an accidental fall, although he admitted such scenarios are rare. Because of this evidence, Dr. Reiber explained it is "not responsible" to testify Charlotte's injuries could only come from a multistory fall or traffic collision.

Dr. McCormick conceded the scientific literature showed a fall of two to three feet can sometimes generate the forces necessary to result in a skull fracture, subarachnoid and subdural hemorrhage, brain injury and death, although it would be "rare" and "extremely unlikely." Despite continuing to believe Charlotte's "fatal brain injury . . . doesn't really track with a short fall," Dr. McCormick admitted there have been at least two documented cases in which a child suffered a fatal brain injury from a short fall.

And Dr. Massi acknowledged prior studies may have underestimated the amount of retinal hemorrhaging that can result from a rotational fall. He conceded there is now controversy about the diagnosis of abusive head trauma in infants. He confirmed more recent case reports have shown short falls can result in death, subdural hemorrhage, retinal hemorrhage, and extensive multi-layer hemorrhage. Dr. Massi agreed that in 2020 the American Academy of Pediatrics for the first time acknowledged case reports showing short falls can result in severe neurological injury and death.

This record evidence shows more than a mere difference of expert opinion. In fact, there is no disagreement as to whether the expert testimony at trial was contrary to current scientific understanding of the injuries at issue. The experts now agree scientific developments have established a short fall can cause the types of injuries Charlotte suffered, even if rare. The trial testimony of Drs. Massi, McCormick, and Stanley to the contrary, which

was essential to their opinions that Moore abused Charlotte, was false. (§ 1473, subd. (b)(2); *Richards, supra*, 63 Cal.4th at p. 311; *Parks, supra*, 67 Cal.App.5th at p. 454 [finding expert trial testimony false where all experts who testified at later evidentiary hearing agreed trial expert had been mistaken about an essential fact underlying his testimony].)

D.

1.

"Determining that the evidence was false clears the first hurdle," but to show an entitlement to relief a petitioner must also show that the false evidence was "material." (*In re Figueroa* (2018) 4 Cal.5th 576, 588–589 (*Figueroa*).)

False evidence is material if there is a reasonable probability the result "would have been different" in its absence. (*Figueroa, supra*, 4 Cal.5th at p. 589.) A "reasonable probability" is one that undermines our confidence in the outcome of trial when viewed objectively in light of the totality of the relevant circumstances. (*In re Sassounian* (1995) 9 Cal.4th 535, 546 (*Sassounian*).) This standard is the same as the state test for harmless error under *People v. Watson* (1956) 46 Cal.2d 818, 836. (*Figueroa*, at p. 592.) "[T]he crucial question is whether the false evidence was material—not whether, without the false evidence, there was still substantial evidence to support the verdict." (*Richards, supra*, 63 Cal.4th at p. 312.)

2.

When viewed objectively and in the totality of the relevant circumstances, we find there is a reasonable probability the result of Moore's trial would have been different had the jury not heard the testimony of the three medical experts that a short fall absolutely could not have caused Charlotte's injuries. In other words, in light of the scientific developments

since trial, which have undermined the medical experts' trial testimony, we no longer have confidence in the outcome of Moore's trial.

Putting aside the experts' testimony regarding the cause of Charlotte's death, the totality of which was tainted by their false conclusions that Charlotte could not have sustained her injuries by falling off the bed, the prosecution's case consisted of three categories of evidence: (1) Dr. Massi's testimony that Charlotte could not roll over, suggesting she could not have rolled off the bed; (2) Dr. McCormick's testimony that Charlotte suffered two impacts, suggesting her injuries could not have been caused by a single fall from the bed; and (3) Moore's delayed disclosure regarding the fall, suggesting he was being deceptive. Upon closer look, however, the first two pieces of evidence are not as they appear.

First, although Dr. Massi testified Morales reported to him that Charlotte was unable to roll over on her own, he also testified Morales reported to a social worker that Charlotte was beginning to roll, could move from her back to her side, and was "wiggly." And Dr. Massi testified that if an infant of Charlotte's age and development were placed too close to the edge of a bed she could fall off. In addition, it is not disputed that Charlotte had fallen from the couch just two weeks before the incident at issue here. Thus, the evidence shows Charlotte could have fallen off the bed unassisted.

Second, Dr. McCormick testified at trial that Charlotte's subdural hemorrhaging demonstrated "two areas of impact." But this does not prove the cause was two *abusive* impacts. Even accepting Dr. McCormick's opinion that Charlotte suffered two areas of impact, the medical data now shows subdural hemorrhaging can result from short falls. And, thus, the evidence

shows it is possible Charlotte could have been injured by, for example, one impact on a bed frame and another impact on the floor.

Thus, Moore's delayed disclosure remains the only evidence suggestive of his guilt. But even that becomes less compelling when considering the totality of the relevant circumstances. While Moore initially failed to tell anyone Charlotte fell off the bed, he offered a plausible justification for this. He testified at trial he did not initially disclose Charlotte's fall because she had fallen off the couch about two weeks prior while in his care, he had promised Morales he would not let it happen again, and he was afraid Morales would hate him and would never forgive him. Though Moore was withholding information about the fall, he was under the impression that Charlotte's condition was stabilizing and she was expected to be okay. As long as he believed she was going to be okay, he sought to avoid being held accountable for allowing her to fall off the bed. But once he was told Charlotte was in critical condition, he decided to admit she had fallen. Moore's jury might not have seen a reason to even consider his justifications for his delayed disclosure because *three* doctors testified conclusively that Charlotte's injuries *could not* have been caused by the fall from the bed he described.

In contrast to this evidence suggestive of Moore's guilt, other circumstances support his claim that Charlotte's injuries were accidental. For example, there is *no* evidence Moore abused Charlotte on any other occasion. Rather, Morales's trial testimony portrayed Moore as a devoted stay-at-home father to Charlotte and Morales's two other children. Nor was there any sign of other injury to Charlotte's body from this incident that was suggestive of abuse. Her only injuries were to her head, which, as we

explain, the new medical data shows could have been caused by a fall from the bed, even if such an event would be exceptionally rare.

In addition, this is not a case where the false evidence was already substantially challenged at trial by strong rebuttal experts such that the new scientific developments would only "have provided more fodder for the defense in th[e] debate [already presented] at trial." (*Parks, supra*, 67 Cal.App.5th at pp. 451, 455–456; *Sassounian, supra*, 9 Cal.4th at p. 548.) In fact, the *only* evidence the defense presented at trial to rebut the prosecution's expert testimony regarding the cause of Charlotte's injuries came from the defense expert, Dr. Gabriel. Dr. Gabriel testified a skull fracture could result from a short fall but he did not opine as to whether a short fall could cause the other types of injuries Charlotte suffered. And, importantly, Dr. Gabriel's testimony was undermined by Moore's own defense counsel at trial.

On appeal from Moore's judgment of conviction, we found Moore received ineffective assistance of counsel at trial because his defense lawyer undermined Dr. Gabriel by failing to provide him with all of Charlotte's CT scans and instructing him not to spend time considering whether she suffered a skull fracture. (*Moore, supra*, D069310.) Then, when Dr. Massi testified at trial that Charlotte's skull fracture was inconsistent with a short fall, counsel provided Charlotte's CT scans to Dr. Gabriel. (*Ibid*.) Upon reviewing the scans, Dr. Gabriel opined Charlotte had not suffered a skull fracture at all and admitted before the jury that he had changed his opinion on this issue. (*Ibid*.) We found counsel was ineffective but Moore was not prejudiced given the other circumstances of trial. (*Ibid*.) But this conclusion did not account for the fact that some of the prosecution's medical expert testimony was false. Where previously acknowledged errors by trial counsel left the sole defense

expert flat-footed at best, and not credible at worst, the united, albeit false, conclusion of all three prosecution experts about the cause of Charlotte's injuries would have been even more influential on the jurors.

Last, we recognize that, at the evidentiary hearing, Dr. McCormick stood by his opinion that he would not expect Charlotte's injuries to have resulted from a fall from the bed, and Dr. Massi still held the opinion that Charlotte's injuries were caused by abusive head trauma. But, at trial, their opinions were bolstered by the false testimony that such a fall absolutely could not have caused Charlotte's injuries. The jury would have viewed the doctors' opinions in a different light if, rather than hearing the unqualified testimony discounting accident as a cause of Charlotte's injuries, it heard the admissions of Drs. McCormick and Massi that new evidence contradicts some of their opinions.

The totality of the relevant circumstances here are analogous to those the Supreme Court considered in *Figueroa*. There, our high court considered the materiality of false medical expert testimony regarding the cause of a child's injuries. (*Figueroa, supra*, 4 Cal.5th at pp. 588–589.) As is the case here, "[s]tripped of falsity, the evidence [in *Figueroa*] would show that [the victim] suffered profound injuries while in petitioner's care," but it was not certain whether the cause of the injuries was accident or abuse. (*Id*. at pp. 590–591.) And, as here, the jury in *Figueroa* was invited to convict the petitioner based on a theory that was "tainted by the false evidence" and "[i]n that light, the jury had scant need to consider other theories, and no ability to do so outside the pall cast by the completely repudiated testimony." (*Id*. at p. 591.) In other words, "[t]he jury had no opportunity to evaluate the likelihood of . . . an accident [such as that alleged by the petitioner] divorced from the specter of the false evidence." (*Ibid*.) Thus, "[w]hat the jury might

have concluded" absent the "extensive, pervasive, and impactful" false testimony was "an exercise in speculation." (*Ibid.*)

Ultimately, this is not a case where "[t]he evidence . . . left the jury little choice but to find" Moore guilty despite the false evidence. (*In re Malone*, 12 Cal.4th 935, 968.) Nor is there "only one reasonable inference" the jury could have drawn from the remaining evidence. (*Sassounian, supra*, 9 Cal.4th at p. 549.) Had the jury known it was possible, even if rare, for injuries such as Charlotte's to result from a short fall as shown by scientific case studies, the jury would have had to weigh all the evidence, including Moore's explanation of the fall and his delay in offering his explanation and the evidence supporting his claim of an accidental fall, to determine whether this was a case of intentional abuse beyond a reasonable doubt, or rather may have been one of the rare cases in which an infant suffered fatal head injuries from a short fall. We conclude the false evidence "established 'a direct and visceral link' between" Charlotte's injuries and the allegations of an abusive assault by Moore, "and the remaining evidence was too close for us to have confidence in the verdict." (*Richards, supra*, 63 Cal.4th at p. 320.)

E.

In addition to vacating his conviction, Moore requests that we release him on his own recognizance pending further proceedings in the superior court. We recognize our authority to release a habeas petitioner on bail or on petitioner's own recognizance. (§ 1476; *People v. Romero* (1994) 8 Cal.4th 728, 744.) But Moore has failed to persuade us to exercise this authority under the circumstances of his case. (Compare *In re Kreitman* (1995) 40 Cal.App.4th 750, 752 [petitioner incarcerated for contempt of court released on own recognizance] with *In re Chavez* (2004) 114 Cal.App.4th 989, 991, 993 [petitioner incarcerated for filing false tax returns denied release

pending the People's appeal from superior court order granting habeas relief].)

This is not, however, to be interpreted as an indication as to whether Moore might be entitled to release by the trial court upon remand. Nor does it preclude his release should the People fail to timely elect to commence a retrial.

III.

Let a writ of habeas corpus issue vacating the judgment of conviction in *People v. Jason Harley Moore* (Super. Ct. Riverside County, 2014, No. SWF10001680) in its entirety, and remanding the matter to the Riverside County Superior Court. The People may elect within the time allowed by law to conduct a retrial.

CASTILLO, J.

WE CONCUR:

McCONNELL, P. J.

DATO, J.