No. 22-858

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DEREK MARTINEZ,
Petitioner-Appellant,

v.

LUIS MARTINEZ, et. al,
Respondent-Appellee.

On Appeal From The United States District Court
For The Eastern District Of
California DC No.: D.C. No. 2:12-cv-02273-JKS

PETITIONER-APPELLANT'S AMENDED MOTION FOR AUTHORIZATION TO FILE SECOND OR SUCCESSIVE PETITION FOR WRIT OF HABEAS CORPUS UNDER 28 U.S.C. § 2254

Jennifer M. Sheetz (SBN 233375)
775 E. Blithedale Avenue, PMB 146
Mill Valley, CA 94941
Tel : (415) 305-2256
Fax : (415) 634-1382
Email : jmsheetz@hotmail.com

Attorney for Petitioner-Appellant
DEREK MARTINEZ

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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I. INTRODUCTION

Movant Derek Martinez requests permission under 28 U.S.C. § 2244(b) to file a second petition for writ of habeas corpus in federal district court, raising newly-discovered evidence of his actual innocence, including: 1) exculpatory foreign DNA evidence which excludes Martinez from critical pieces of evidence collected from the murder scene, including pieces of the suspected murder weapon; 2) new evidence establishing that the sole evidence implicating Martinez, Helana Martinez's testimony identifying a firearm (suspected to be same make and model as the murder weapon) as one of Martinez's firearms, is false evidence; 3) the newly discovered

violations of due process under *Brady v. Maryland*, 373 U.S. 83 (1963) which deprived Martinez of a compelling third party culpability defense and impeachment evidence; 4) the related new discovery that the prosecution failed to correct false testimony used to wrongfully convict Martinez (see *Giglio v. United States,* 405 U.S. 150, 153, 154 (1972); *Napue v. Illinois,* 360 U.S. 264, 271 (1959). Martinez could not present these claims in his initial federal habeas petition, because: 1) the evidence underlying each claim had not been discovered at the time of the original filing due to no fault of Martinez; 2) the state affirmatively suppressed material exculpatory evidence in violation of *Brady* and *Napue*, preventing Martinez from discovering the evidence until it was released to Martinez during state habeas discovery in 2018-2019; 3) and, because he was incarcerated, indigent and *pro se* for much of his post-conviction proceedings. To obtain authorization to file the new petition, Martinez need only make a *prima facie* showing that one of the new claims satisfies §2244(b)'s standards. *Woratzeck v. Stewart*, 118 F.3d 648, 650 (9th Cir. 1997).

The state's cold case against Martinez rested entirely upon the vacillating and unreliable testimony of his ex-wife, Helana, who testified that, she remembered seven years after the murder, that Martinez referenced an incident where he and an accomplice beat up someone who owed him

money, and a gun went off. There was no physical or circumstantial evidence to connect Martinez to Chris Kohn or the crime. The DNA evidence contradicted this story. There were no witnesses, including Helana, that connected Martinez to the victim. And, more importantly, there was no evidence to suggest that Kohn owed Martinez money or even knew Martinez, as neither Kohn's pay-owe sheets or address book referenced Martinez or co-defendant Johnson. Because there is literally no other evidence that corroborates Helana's testimony implicating Martinez, her testimony was the only evidence which convicted him. Moreover, Helana's essential circumstantial testimony implicating Martinez in the murder was her description of a gun.

Here, the newly discovered evidence includes the evidence from two psychological experts who have analyzed the police interrogation tape of Helana, her mental disability, and her own statement, establishing that specific evidence in her testimony was false evidence. This newly discovered evidence undermines the state's extreme circumstantial case against Martinez, all predicated upon Helana's tenuous identification of a gun[1] – which has now been shown to be false evidence.

In the context of this evidence, the newly discovered DNA evidence

[1] Martinez notes that the actual murder weapon in this case was never discovered or produced by law enforcement.

corroborates the evidence that her testimony constitutes false evidence, as the DNA evidence excludes Martinez from the murder scene. Here, new DNA evidence on the pieces of a suspected firearm found next to Kohn have other unknown individuals' DNA on them, not Martinez's DNA. (See Exh. E.)[2] Indeed, all of the foreign DNA newly discovered on critical pieces of evidence from the crime scene excludes Martinez as a contributor. (Exh. E.) The foreign DNA was discovered under the fingernails of the victim's right hand, the interior door knob of the front door, a portion of the suspected murder weapon, and a black case found near the victim. (Exh. E.) While Martinez is excluded from all foreign DNA evidence discovered at the murder scene, John Harris, the original suspect, cannot be excluded as a contributor from several key pieces of evidence. (Exh. E.) The newly discovered DNA evidence is particularly compelling because it both exculpates Martinez, and also because it renders the state's theory of the murder an impossible fiction.

In addition to the new exculpatory evidence which eviscerates the state's case against Martinez, he presents this Court with evidence that the state suppressed third party culpability and impeachment evidence, in

[2] All citations to "Exhibits" herein reference the Exhibits filed with the California Supreme Court, which were filed with this Court simultaneously with the original application in this case.

violation of *Brady* and *Napue*. As noted in the California Court of Appeal's statement of the facts of the case, the prosecution presented significant evidence to support the finding that, " [t]he police found no evidence linking Harris to the killing of Kohn and ruled him out as a suspect." This was established through the testimony of investigating Officers Clemens, Compomizzo and Campbell who repeatedly and summarily stated that Harris had been "ruled out." This testimony is false.

Martinez's recent discovery of suppressed statements from Harris, Taskeen Tyler and Nate Chatman contradict the testimony of the officers and the basic factual premise. These recently discovered recorded interviews establish critical facts that were known to Officers Clemens and Compomizzo (as well as McDannold) at the time of the offense – 1) Harris was involved in two separate burglaries of Kohn's apartment, 2) Harris was arrested based upon the evidence that implicated him in the second burglary, 3) Tyler and Chatman both implicated Harris directly in the second burglary, and established that Harris had possession of guns of makes and models (that they had stolen in a separate, unrelated burglary) that fit the description of the suspected murder weapon at the time of the murder. (See Exhs. II, JJ, KK.) These facts contradict the officers' testimony at trial and would have served to establish a formidable third party culpability defense for Martinez.

The suppression of these interviews deprived Martinez of that defense.

Initially, Martinez discovered two suppressed recordings of interviews with the initial suspect, John Harris. The recordings were conducted during a lie detector test and post-test. (Exh. II.) The import of these suppressed interviews with Harris is two-fold. First, the interviews were conducted well after Harris admitted his responsibility for the Super Bowl Sunday burglary, and the entirety of the interrogations are focused on Harris' involvement in a second burglary of Kohn's apartment. (See Exh. II.) Secondly, the suppressed interviews also affirmatively prove that Harris was in no way ruled out as a suspect. (See Exhs. II, JJ, KK.) Importantly, the interrogations of Tyler and Harris took place the day after Harris' arrest, and their interviews focused entirely upon the evidence related to Harris and their interactions with him in the 48 hours around Kohn's murder. (See Exhs. JJ, KK.) Tyler and Chatman established that Harris had the guns that they had stolen from Alta Mesa on the night of the murder and that he came to their apartment early on the morning of the murder, telling them to dispose of the guns because Kohn had been murdered. (Exhs. JJ, KK.) In sum, the suppressed interviews provide powerful evidence contradicting the prosecution's evidence at trial, which was directed at depriving Martinez of a third party culpability defense related to Harris. (See Exhs. II, JJ, KK.)

Martinez also asks this Court to consider this evidence in context of the relevant pattern of Shasta County law enforcement misconduct as set forth in the civil rights case of *Brewster v. Shasta County,* 112 F.Supp.2d 1185 (E.D. 2000). The newly discovered evidence of police misconduct underlying the *Brewster* case presents a parallel set of circumstances within the context of *Brady* violations and resulting wrongful convictions based largely upon (false) officer testimony. The federal civil rights case provides a context for understanding the newly discovered evidence in this case and the corresponding claims, as the *Brewster* case identifies a practice or pattern of officer conduct which the Shasta County Sheriff adopted as its official practice.

During the litigation of the civil rights case, Shasta County Sheriff Pope's representative testified at a deposition that all of the actions by the officers in the *Brewster* case were acting pursuant to the official practice and policies of the department (when they violated Brewster's constitutional rights). The *Brewster* case is both probative and relevant to this case. Not only does the present case reflect the same practices and policies adopted by the Shasta County Sheriff that were at issue in *Brewster*, it involves the same officers from the sheriff's office – Officers McDannold, Clemens and Compomizzo.

Martinez asks the Court to consider his *Brady* claims through the lens of the *Milke v. Ryan* 711 F.3d 998 (9th Cir. 2013). Martinez contends that the actions of sheriffs in *Brewster* which were adopted as official practice or policy by the Shasta County Sheriff constitutes "highly relevant" and "highly probative" evidence to the claims of law enforcement misconduct as set forth in his petition. For, "[a]s long as localized resistance to *Brady* remains an acceptable legal norm for prosecutors and judges alike, the enforcement of *Brady* will remain a matter of geographic justice, and some [law enforcement] will continue to operate in a *Brady*-free zone of their own making." Catherine Hancock, *Reflections on the* Brady *Violations in* Milke v. Ryan*: Taking Account of Risk Factors for Wrongful Conviction*; N.Y.U. REVIEW OF LAW & SOCIAL CHANGE, Vol.38 : 464-465 (2015). The constitutional protections of Californians simply cannot be determined by a zip code.

Ultimately, the recently discovered evidence identified above, and discussed in full in the following application, establishes clearly and convincingly that, but for the exclusion and suppression of newly discovered exculpatory evidence and constitutional violations, no reasonable factfinder would have convicted Martinez. 28 U.S.C. § 2244(b)(2)(B). Accordingly, this Court should grant him leave to file a subsequent federal habeas petition

and establish his innocence.

II. PROCEDURAL HISTORY[3]

Petitioner is confined pursuant to the judgment of the California Superior Court for the County of Shasta rendered on June 22, 2007. The underlying case stems from the murder of Christopher Kohn, on January 30, 1997, in Shasta County. The case went cold for approximately 7 years. On September 29, 2004, Petitioner was charged with the murder of Kohn along with co-defendant, Michael Johnson. Petitioner was charged by felony information with one count of murder (Pen. Code § 187), one count of personal gun use (Pen. Code § 12022(a)(1)), and it was further alleged that petitioner had suffered a strike prior (Pen. Code § 1170.2) for felony assault. In a bifurcated proceeding, a jury found Petitioner guilty of the charged allegations, and the court found the strike prior allegation to be true. On

[3] Petitioner requests that the Court take judicial notice of the record of the proceedings in Petitioner's case before Shasta County in case no. 04F4728, as set forth in the transcripts of the record on appeal and the Court's decision affirming Petitioner's conviction in *People v. Martinez*, Nos. C056029, C058137, 2009 WL 287158/7, at *1-4 (Cal. Ct. App. Sept. 8, 2009)[footnotes omitted]. Petitioner also requests that the Court take judicial notice of the record of the post-conviction habeas proceedings related to the underlying case, as set before the Shasta County Superior Court, the Third District Court of Appeal, the California Supreme Court, the Federal Eastern District Court, and this Court in the prior proceeding, Case No. 15-16082.

June 22, 2007, Petitioner was sentenced to an indeterminate term of 54 years to life. Petitioner filed a notice of appeal on the same day.

Petitioner raised several issues not relevant to the present proceedings in his direct appeal. On September 8, 2009, the Court of Appeal affirmed Petitioner's conviction. Following his conviction, Petitioner filed several motions requesting DNA analysis of crime scene evidence under Penal Code section 1405. Subsequent motions requesting DNA analysis were granted on February 13, 2014 and January 26, 2015.

The California Supreme Court denied review on December 17, 2009, and the U.S. Supreme Court denied certiorari on April 5, 2010. Petitioner filed an original *pro se* habeas petition in Shasta County Superior Court on June 18, 2010. The superior court summarily denied all but a claim of ineffective assistance of counsel of the petition on July 23, 2010, in a reasoned opinion. Petitioner filed a petition in the Court of Appeal on March 22, 2011. The Court of Appeal summarily denied the petition on April 7, 2011. Petitioner raised the same claims in a petition to the California Supreme Court. The court summarily denied Petitioner's petition on November 16, 2011. Petitioner filed a federal habeas petition raising

claims on September 4, 2012. (Dkt. 1.)[4] None of the claims originally raised are set forth in the proposed petition here. Simultaneous with the original petition, Petitioner filed a Motion for Stay and Abeyance in order to exhaust his newly discovered DNA evidence (which was still pending) in state court. (Dkt. 4.) The district court denied the motion on September 9, 2013. (Dkt. 29.) The district court denied the habeas petition on May 12, 2015. (Dkt. 70-71.) This Court appointed counsel and issued a Certificate of Appealability on February 17, 2016, for two claims: 1) Prosecutorial Misconduct Related to Witness Manipulation Related to Helana Martinez; 2) Actual Innocence Based on Evidence of Helana Martinez's Manipulation By the Prosecution's Witness Protection Program. (Dkt. 77.) Martinez filed an Opening Brief with the foregoing two claims on November 14, 2016. This Court denied Martinez's appeal on May 24, 2018.

Petitioner filed a *pro se* subsequent Petition for Writ of Habeas Corpus to Shasta County Superior Court on September 21, 2016, presenting a claim of new evidence of actual innocence based upon witness recantation and the new DNA evidence excluding Petitioner from the crime scene. The Court denied the petition without issuing an Order to Show Cause on June 9,

[4] Docket references in this section are to Martinez's initial federal petition, as set fort in D.C. No. 2:12-cv-02273-JKS and COA No. 15-16082.

2017. Petitioner subsequently filed the petition in the Third District Court of Appeal on or about August 14, 2017, Case No. C085284.

On October 26, 2017, the Court found sufficient evidence to support a prima facie showing for relief in the petition and issued an order to show cause returnable to the superior court. Present counsel was appointed to represent Petitioner subsequent to the order to show cause accepted in Shasta County. Petitioner filed a Motion for Discovery, requesting all tapes and videos of interrogations and interviews, all police reports, all forensic reports, and forensic testing. The court granted the motion, and the prosecution provided the discovery over the period of the year, from 2018-2019. The court denied Petitioner's request for additional information regarding the missing recordings in the case, additional information regarding Harris' history of arrests in Shasta County and additional DNA testing. The court ordered an evidentiary hearing on Petitioner's claim of new evidence of actual innocence related to Helana Martinez's recantation and claim of witness manipulation and the new DNA evidence excluding Petitioner from the scene of the murder.

Following an evidentiary hearing on Petitioner's claim of new evidence of actual innocence from June 11- Jun 14, 2019, the superior court requested briefing. Ultimately, the superior court denied the petition in a

reasoned opinion mailed to Petitioner on November 7, 2019. (Exh. A.) Petitioner, through present *pro bono* counsel, filed a Petition for Writ of Habeas Corpus in the Court of Appeal based upon the two claims of Actual Innocence at issue in the evidentiary hearing on January 28, 2020. The Third District Court of Appeal summarily denied the petition on May 5, 2020. (Exh. DD.) On or about July 6, 2020, Petitioner filed a Motion for Disclosure of Chain of Custody, Reports and Status of Physical Evidence. (Attached hereto as Exh. AA, BB.) The Shasta County Superior Court denied the Motion and Supplement to the Motion on October 2, 2020. (Exh. CC.) Petitioner filed a Petition for Writ of Habeas Corpus in the California Supreme Court on October 20, 2020. The California Supreme Court denied the petition after informal briefing, on February 16, 2022.

Petitioner filed an Application for Leave to File a Subsequent Petition with this Court, on May 11, 2022. This Court ordered appointment of counsel and an amended application on October 14, 2022. This application follows.

III. THE STATE'S CASE AGAINST MARTINEZ

In affirming the conviction, the California Court of Appeal recounted the following facts:

Christopher Kohn and the Super Bowl Sunday Burglary

Christopher Kohn lived on Wonderland Boulevard in Mountain Gate in a house that had been converted into three studio apartments. Kohn did not work, but sold marijuana; he had 20 to 30 visitors a day. He flashed around a lot of money; everyone knew he had money. January 26, 1997 was Super Bowl Sunday. While Kohn was at the Red Lion Inn celebrating, his apartment was burglarized and ransacked. Several items were stolen, but not his money.

On January 29, several people visited Kohn and some purchased marijuana. One visitor watched a man sell Kohn a pound of marijuana, which Kohn paid for. Kohn had $9,000 in his couch and a stack of money in a wooden box. When two potential purchasers arrived about 10:00 p.m., Kohn sent them away. Kohn's girlfriend called about the same time and Kohn sounded fine.

Kohn's Neighbors Hear the Killing

When Kohn's neighbor Sandra Drewek got home from work about 10:30 or 11:00 that night, it was quiet. Later, through the thin walls, she heard three male voices from Kohn's apartment. It sounded like they were partying. She was awakened at 4:20 a.m. by the sound of a body hitting the wall. She heard Kohn screaming for help. She heard one man say "don't do that" and another say there was a girl next door. She heard Kohn call for help in a low and shallow voice and called 911. Then she heard a shot. A spent bullet was found on her bed.

The neighbor who lived in apartment 3 heard a lot of thumping and screams at 4:30 a.m.; it sounded like a bad fight. He opened his door and saw

someone being thrown against the blinds. He heard someone say “shut up” and then Kohn screaming in a muffled voice.

Initial Police Investigation and Forensic Evidence

When the police arrived they found Kohn lying near the north wall of the apartment. His face was bloody and he was dead. There was no sign of a forced entry, but it was obvious there had been an assault. There were several cuts on Kohn’s head and face and a possible defensive wound on his arm. The evidence also suggested ligature strangulation. There were bloody palm prints on the wall. These prints were later identified as Johnson’s.

There was a bullet hole leading to apartment 2. The bullet was fired from a steep upwards angle and landed on the bed in apartment 2. The bullet could have come from any of several guns; it would fit a .38, .357, .380 and a 9 millimeter. It was not fired from any of the guns recovered during the investigation.

Three pieces of black plastic were found on the bed and floor in Kohn’s apartment. They appeared to be from the grip of a handgun. They had parallel lines on them that were consistent with the pattern found on Kohn’s forehead. A criminalist testified the wounds to Kohn could have been caused by a Walther P-38 handgun. The identity of that gun was not conclusive, but the criminalist knew of no other gun with that distinctive pattern on the grip. A factory authorized Walther dealer testified for the defense that these plastic pieces were from a handgun grip and the Walther was the only gun he knew of with a ribbed grip. He had no doubt the pieces came from a Walther P- 38. The dealer

testified, however, that the bullet found in the next apartment had land and groove parameters that did not fall within the Walther specifications. In rebuttal, a criminalist testified the Walther P-38 had a greater range for land and grooves than the dealer testified to. The bullet was within that broader range and could have been fired from a Walther P-38.

Kohn had hair in his hand, which was consistent with his own. DNA analysis showed it was Kohn's hair. Pay/owe sheets were found in Kohn's apartment. Martinez was not listed on these sheets. No significant amount of money was found in Kohn's wallet.

In the original investigation, the police interviewed over a hundred people. One of Kohn's friends told the police Kohn was worried about being killed in the next three days. Kohn owed people from Oregon $14,000, but he was not afraid because he had the money.

Suspect John Harris

The police identified several persons of interest, including John Harris. Harris had burglarized Kohn on Super Bowl Sunday. Another person of interest was Taskeen Tyler, who committed a burglary in Alta Mesa shortly before Kohn was killed. Tyler had given Harris the items from that burglary, including guns, ammunition and a Samurai sword, to hold. Tyler knew Harris was involved in the Super Bowl Sunday burglary. Harris told Tyler that Kohn had $10,000 but he could not find it. Harris said he would kill Harris [sic] if he had to for the money.

The morning of the killing, Harris arrived at Tyler's at 6:00 a.m. nervous and agitated. He told Tyler he

had to get the guns because "they killed the boy." Tyler knew Harris was talking about Kohn.

The police searched Harris's house and found ammunition, marijuana, but no large amount of money. They found smoking pipes similar to those at Kohn's. They also found the Samurai sword from the Alta Mesa burglary.

Harris was interviewed and at first denied the Super Bowl Sunday burglary, but ultimately admitted it. He strongly denied the murder. Harris said he wanted money but would not kill for it. Harris had scratches on his face.

The police found no evidence linking Harris to the killing of Kohn and ruled him out as a suspect. Harris died in 2005. The police also heard a report that three black men were discussing the killing in a bar in Cottonwood. They said it was not supposed to happen like that; no one was to get killed. The police determined the report was not true.

At trial, Harris's former wife Deborah Butler testified for Martinez. She testified to Harris's plan to rob Kohn on Super Bowl Sunday. Afterwards, Harris was upset he failed to find the money, pacing the floor and "foaming at the mouth." He asked his wife where she would hide money. A few days after Super Bowl Sunday, there were six to eight black men in her house. She saw guns, knives, a Samurai sword and a white jacket with blood on it. Harris then folded the jacket so the blood was not visible. Butler saw Harris throw clothes away and a pair of his tennis shoes was missing. Butler had told the police about the bloody jacket and missing clothes. Harris never told his wife he killed Kohn.

Helena Martinez

The star prosecution witness was Helena Martinez, defendant Martinez's ex-wife. She had lived with Martinez since she was 17. They married in August of 1997 and divorced before trial.

On June 24, 2004, Helena was going to the Public Safety Building when she saw a flyer regarding the Mountain Gate murder. The flyer triggered her memory, which was poor. After talking to her therapist, she went to the police.

She told the police Martinez had told her he committed the murder. One dawn he woke her up and told her he had been watching a guy in Mountain Gate who owed him money for drugs. He went to the guy's house and hit him several times in the back of the head with a gun because the guy would not sit still. While Martinez was hitting his victim, the gun discharged. The bullet went into the wall. A neighbor interrupted by turning on a light. Martinez was dressed in black. Afterwards he changed the tires on his car. Martinez told Helena he would kill her if she told anyone. He said he was with a friend when he did the killing.

In August of 1998, Martinez drove her to some cabins off Interstate 5 and said this is where he killed the guy. Another time he drove her to a cemetery and said his victim was buried there. Martinez had a headache and seemed sad. At the time, Helena thought Martinez was just trying to scare her.

Helena testified Martinez had a silver gun with a black handle that had ridges. The handle was broken. When Helena asked Martinez about the gun, he said he got it cheap and needed it for show to sell drugs. Martinez also had a small black gun

with scratches on it. Helena reported Martinez and Johnson were friends. She remembered Johnson coming by four or five times in 1997.

Helena claimed she did not believe Martinez's confession at the time. She decided it was true when she saw the poster. She had told a friend about it in 2003. Despite the confession, Helena married Martinez five months later. In the spring of 1997, Martinez told her the police found the people who did the killing.

Helena admitted she had accused Martinez's mother of molesting her child. The accusation was based on the child's report. Helena told her therapist who contacted the police. After the child said her grandmother had not molested her, Helena let the grandmother watch the children. Helena claimed she had a good relationship with Martinez's mother.

Helena's original statement to the police was probably videotaped, as was the usual practice, but the tape was lost. Helena explained that when she originally told the police Martinez said he "just" killed someone, the use of "just" was a reference to Martinez thinking the killing was no big deal not a reference to the timing of the killing.

Helena was interviewed in more depth by Detective Thomas Campbell. She was very nervous and anxious, but eager to talk. Campbell asked her if any of Martinez's guns had missing pieces. She responded one was chipped or scratched. Campbell showed her a picture of the black plastic pieces found at the crime scene. She said Martinez's gun had ridges. When Campbell told her where the pieces were found, she began to cry uncontrollably and urinated on herself. She was frightened.

Helena gave the detective the names of several of Martinez's friends. She identified one as Michael Pajarro, but later clarified his last name was Johnson.

Christina Goodwin

The police then contacted Christina Goodwin in Oregon, looking for Johnson. During a second interview in Redding, the police told Goodwin they had arrested Martinez for murder. Goodwin had been roommates with Johnson; then they became a couple. They had an on and off relationship from 1996 to 2004.

Goodwin told the police that one night in 1997 Johnson awoke her when he came home with Martinez. Johnson was carrying a shotgun wrapped in a blanket and asked her to put it in the shed. Johnson was wearing dark clothes and gloves. Johnson threw his clothes in a dumpster. Johnson was anxious and did not want to talk. Goodwin described him as acting "sketchy"; he was paranoid and thought people were following him.

Prior to this night Johnson had no money. Afterwards he gave Goodwin $300 for rent and spent money on clothes, cars and taking another girl out of town. Johnson also had a large amount of marijuana; it filled the bottom of a large dog food bag.

Goodwin was uncertain of the date of this shotgun incident. She thought her Christmas tree was still up and she usually took the tree down a week or two after New Year's. She believed she was six months pregnant and her daughter was born in April. It could have been the end of January. She first told the police it was February or March, then she remembered it was cold and said January.

People v. Martinez, Nos. C056029, C058137, 2009 WL 2871587, at *1-4 (Cal. Ct. App. Sept. 8, 2009)[footnotes omitted].

Petitioner was never considered a suspect during the initial investigation. None of the witnesses interviewed ever identified Petitioner. Petitioner's name was not listed on any of the "pay-owe" sheets, nor in the address book found at the scene. (RT 2371-2372.) Petitioner was *never* interviewed by the Shasta County Sheriff's Office or Shasta County District Attorney.

IV. THE NEWLY DISCOVERED EVIDENCE OF MARTINEZ'S INNOCENCE

A. DNA Expert Analysis Of Forensic Evidence Constitutes Strong Evidence Of Petitioner's Actual Innocence

Petitioner submits the newly discovered DNA evidence, resulting from tests conducted based upon Petitioner's post-conviction motions, and the report from DNA experts, Technical Associates Incorporated (TAI). (Exh. E.) TAI reviewed the DNA evidence and forensic background of the record for a 2019 evidentiary hearing in this case. Their findings, like the results themselves, corroborate Petitioner's claim of actual innocence. The DNA evidence excludes Petitioner from the pieces of black plastic (believed to be portions of the murder weapon), the door knobs leading from the apartment to the outside and Kohn's fingernails. (Exhs. E, J.)

Petitioner sought and received DNA testing of the forensic evidence collected from the scene of the violent murder in this case. Petitioner has been excluded as a possible contributor from all of the DNA evidence collected from the crime scene. In addition, the TAI report corroborates the initial findings of the DOJ tests which all affirmatively exclude Petitioner as a contributor to the DNA in evidence, but cannot exclude John Harris and Michael Johnson as contributors. (Exh. J.) Further, the TAI expert, Jessica Bickham, notes that the failure to conduct basic DNA investigation with both the original investigation and cold case investigation is counter to a basic practice in criminal investigation and unreasonable given the available technology at the time. (Exh. E.) Finally, the expert notes that collection of evidence by Shasta County Sheriff and the "cleaning" of pieces of evidence compromised the DNA evidence from the start. (Exh. E.)

In context, the DNA expert's report reinforces Petitioner's claim that cold case investigators actively failed to investigate the murder of Kohn by investigating hard, physical evidence, and instead focused on prosecuting Petitioner without regard to exculpatory evidence.

1. Factual and procedural background

There was no DNA investigation conducted as part of the original investigation of the murder in 1997 even though the evidence and

technology was readily available. (See RT 2295, 2357, 2358.) Approximately 6 days after the murder, Harris was photographed with scratches on his face and back which appeared to be 5 to 6 days old. (RT 1910; RT 2219-2220, 2357-2358.) Moreover, despite the violent encounter which resulted in Kohn's death, and despite the fact that Harris was found with scratches to his face and back within days of the murder, investigators never forwarded Kohn's fingernails to the DOJ to be tested for DNA. (RT 2295, 2357-2358.)

Harris was questioned extensively during the initial investigation. Harris knew Kohn and had been to his apartment on numerous prior occasions in addition to the Super Bowl burglary. During questioning, Harris was given lie detector test regarding the murder and found to have been deceptive. Harris was never arrested or charged for the murder in 1997. There is no evidence in the record that exonerates Harris, and he never provided an alibi for the time of the murder.

Investigators largely focused on fingerprint evidence for forensic evidence. None of the palmprint or fingerprint evidence linked Petitioner to the crime scene. (RT 2520.) Police also confiscated pay-owe sheets from Kohn's apartment, and Petitioner's name was not listed on any of the sheets. (RT 2371-2372.) In the end, no one related to the initial investigation even

mentioned Petitioner and there was no physical evidence which connected Petitioner to the victim or the crime scene. (RT 2520-2560.)

Dark, curly hairs taken from Kohn's shorts and a black beanie found at the scene which did not appear to match Kohn's hair were never forwarded to the Department of Justice (DOJ) for DNA or mitochondrial DNA ("mtDNA") testing. (RT 2582, 2584; see also Exh. B.) The only DNA testing conducted by the DOJ occurred after 2004 and was limited to comparing the DNA profile from the bloody palm print (identified as Johnson's) and root material from a single hair found at the scene, and compared it solely to a sample of Petitioner's DNA. No foreign DNA evidence was discovered. Investigators never forwarded DNA samples from any of the other suspects, including Harris, Tyler or Johnson. (RT 2543-2544.) Petitioner requested that all biological evidence be tested before his trial (see RT 190, 206, 210), but only the above two evidentiary items were sent to DOJ for testing prior to Petitioner's trial and neither were tested against Harris' DNA profile.

Prior to his trial and following his conviction, Petitioner made numerous requests for DNA testing. Following his conviction, Petitioner filed several motions for the Department of Justice (DOJ) to conduct DNA testing of evidence from the crime scene maintained by the Shasta County

Sheriff. Petitioner's motions were granted in a series of orders, from 2008 through 2015. The testing was concluded by the DOJ in 2016. Petitioner was excluded as the possible contributor to all of the foreign DNA found on all items tested. (See Exhs. E, J.) However, Michael Johnson and John Harris could not be excluded from several pieces of evidence with foreign DNA.

Expert witness, Jessica Bickham from TAI Assoc., reviewed the forensic investigation and DNA reports in this case and provided a review and analysis. (See Exh. E.) Bickham initially noted that the collection of evidence during the crime scene investigation is one of the most important steps to the basic analysis of a case. (Exh. B, p. 198.) Bickham further explained that any mishandling of evidence during the initial steps can have a critical impact on subsequent DNA examinations, as wiping down a single item can eradicate or transfer DNA material. (Exh. B, p. 198.) Once evidence has been compromised, it cannot be undone. (Exh. B, p. 198.)

Bickham explained that forensic DNA analysis has been commonly used in crime scene investigation across the United States for decades, with significant technological advances in 1994. (Exh. B, p. 199.) In particular, Bickham noted that the short tandem repeat (STR) systems which provided the most discrimination came into use in the mid-1990's, with laboratories

performing individual validation studies to demonstrate the validity of such testing kits. (Exh. B, p. 199.) Bickham also noted that the Applied Biosystems (ABI) Profiler Plus testing kit was commercially released in December 1997, with availability across the country. (Exh. B, p. 199.) Soon after, the ABI Cofiler system was released soon after in May 1998. (Exh. B, p. 200.) The combination of these two STR kits gave DNA results at thirteen STR locations plus Amelogenin. (Exh. B, p. 200.)

Moreover, Bickham explained that the California DOJ was performing Profiler Plus STR DNA testing in 2004, as evident in the September 23, 2004 report conducted in the present case. (Exh. B, p. 200.) In analyzing the 2004 report, Bickham noted that only two or three items of evidence were tested in 2004, and the DNA evidence was only compared against the victim's DNA profile and Petitioner's DNA profile. (Exh. B, p. 200.) Bickham queried as to why additional testing was not done at that time since there were additional items collected from the crime scene that were pertinent but untested, like the victim's fingernails. (Exh. B, p. 208.) Further, Bickham noted that while there were other suspects in this case, there was no DNA testing comparing the DNA evidence to profiles from Michael Johnson or John Harris until 2015, when Petitioner requested the comparative analysis as part of his motions. (Exh. B, p. 206.) In particular,

Bickham stated that it was particularly unusual that the sheriff did not request that the DOJ compare the DNA evidence to Michael Johnson's profile and other suspects' profiles in 2004, when they conducted the limited review comparing the DNA evidence only to Petitioner's profile. (Exh. B, p. 201.) In the most recent testing, conducted in 2015, the DOJ found evidence from the scene which excluded Petitioner as a contributor to the DNA profiles, but John Harris and Michael Johnson could not be excluded as contributors. (Exh. B, p. 206.)

Ultimately, Bickham concluded that the lack of forensic investigation was surprising. (Exh. B, p. 208.) She further noted that it was strange that there were multiple suspects at the time when charges were first brought against Petitioner, but no DNA testing was done to compare their DNA profiles. (Exh. B, p. 208.) Finally, Bickham emphasized that it was remarkable that Petitioner was affirmatively excluded as a possible contributor to all DNA evidence that was collected and tested in this case. (Exh. B, p. 209.)

B. New Evidence that the State's Sole Witness Testimony Implicating Martinez Constitutes False Evidence

Martinez also presents new evidence of actual innocence through evidence refuting Helana Martinez's trial testimony and related statements, including her 2019 testimony, along with the corroborating new evidence

from psychological and forensic psychological experts. The experts opine that the known mental disability that Helana suffers from put her at risk to the manipulation of suggestion, and Helana confirms that she believes that her testimony at trial was the result of the manipulation and does not reflect her actual memory. Upon reviewing the circumstances and substance of her testimony and interview with Officer Campbell, Helana no longer believes that her statements and testimony at trial reflect her actual memory. Most importantly, Helana does not believe that she has a memory of the gun that she testified was Martinez's during trial. This testimony was the only testimony connecting Martinez to the Kohn murder.

Helana's long-time therapist, Keith Manner, acknowledges that Helana suffers from an "extreme" form of post-traumatic stress disorder (PTSD) that has afflicted her for the majority of her life. Manner further acknowledges that Helana's disability renders her largely incapable of distinguishing her memories from visions and renders her compliant. Forensic Psychology Expert, Deborah Davis, opined that Helana's PTSD made her particularly vulnerable to suggestive interrogation tactics utilized by the sheriff, and the suggestive questioning and surrounding circumstances support a finding that Helana's statement and testimony was subject to coercion. Further, Davis finds that Helana's claim that her memory was

manipulated is born out in the record and her testimony may in fact reflect false memories. Finally, Davis notes that Helana's conflicting testimony serves to corroborate her opinion and Helana's claim. Ultimately, because Helana's testimony is the *only* evidence implicating petitioner, Helana's recantation and corroborating evidence from expert witnesses constitutes decisive evidence that would have changed the outcome of the trial.

1. Factual Background

The evidence of Helana Martinez's recantation is accompanied by the analysis and corroboration of two expert witnesses. First, Keith Manner, Helana's therapist, confirms that Helana suffers from a mental disability that directly impacts her memory and ability to recall events and memories, and her condition was exacerbated in her reporting in this case based upon her reported experience with her victim advocate and the methods employed by Shasta County Sheriff during her interview.

Second, Deborah Davis reviewed Helana's statement of recantation, police reports, interviews of witnesses, including the June 25, 2004 interview of Helana, conducted by Officer Campbell. Davis found that the techniques employed by Shasta County Sheriff were objectively manipulative and suggestive and directly impacted Helana's reporting and subsequent testimony in this case.

a. Helana's Original Testimony in 2006

Helana testified at trial using notes. (RT 2088.) Helana testified that the prosecutor asked her to write down what she remembered. She wrote down notes for her testimony and gave them to the prosecutor, and the prosecutor gave her back a typed version of the notes for her testimony. (RT 1197.) At trial, Helana could not remember if she had told someone that the members of the prosecutor's office had tried to put words in her mouth. (RT 1303.)

At trial, Helana reported specifically that Petitioner had driven her to Mountain Gate, and reported four cabins rather than 2. (RT 2067.) She also reported them as light tan, and as on a road parallel to I-5. (RT 2067). Neither of these responses fit the facts of the case.

When questioned about the gun, Helana described a broken part on the handle without hesitation and the location of that break. (RT 2047-2051.) She also added to her story that she had seen the gun during the time surrounding when Petitioner had told her about the murder, and that he was talking to somebody and had the broken gun, and it caught her eye. (RT 2051.)

Helana further testified that she and petitioner had visited a number of cemeteries over the years, because she enjoyed walking around cemeteries. (RT 2061, 2063.) Helana also admitted that the confession that she recounted did not fit the facts of the actual murder, as Petitioner never told her that he had partied with the victim for hours prior to the alleged assault. (RT 2402.) Rather, Helana's description was that petitioner had stalked the victim and snuck up to assault him. (RT 2402.)

In addition, defense counsel brought out at trial that Helana testified inconsistently regarding (a) whether defendant told her of the killing the night it happened or some later time, (b) whether he was covered in blood (no originally, equivocal at trial), (c) whether she had seen news related to the killing during late winter, early spring of 1997, (d) the description and owner of the car defendant had told her he used, (e) whether she had previously identified a specific photo of a specific gun type, and (f) whether defendant had a clump of hair missing during 1997. (See RT 1994-5; 1979; 2033; 2035; 2060; 2102-3.) Helana changed her description of the car defendant supposedly told her about, and admittedly did so after talking to Detective Campbell. (RT 2035.) Finally, Helana also changed her testimony regarding the name "Jarro" in her initial interview to the name Johnson by trial.

At trial, Helana often responded that she could not remember when she was questioned. Helana's lack of memory was so prevalent that codefendant's counsel motioned for a mistrial, because he was unable to cross-examine her. (RT 2007-2008.)

b. Helana's Evidentiary Hearing Testimony in 2019[5]

Helana Martinez initially acknowledged that she has struggled with an anxiety disorder and symptoms of post-traumatic stress disorder for as long as she can remember. (Exh. B, p. 68.) As a result of her condition, she is unable to remember things clearly, and she gets confused about what memories are real, as her memories often play in her head like it is a movie. (Exh. B, p. 68.) Many times, she can't remember things at all. (Exh. B, p. 68.) And, at other times, Helana suffers from anxiety attacks. (Exh. B, p. 68.)

In part, Helana's post-traumatic stress disorder stems from abuse that occurred during her childhood. (Exh. B, p. 68.) One of the abusers in her childhood was her mother's boyfriend, James Norton, who lived in Mt. Gate, in the same cabin where Kohn was murdered. (Exh. B, p. 69.) Helana has known Petitioner since high school. (Exh. B, p. 69.) They married in 1997, and they have two children together. (Exh. B, p. 69.) They always had a

[5] Helana was permitted to testify in the presence of her therapist, Keith Manner due to her mental disability.

tumultuous relationship, and Petitioner was often verbally abusive. (Exh. B, p. 70.) In 2002, their marriage started to fall apart. (Exh. B, p. 70.)

In 2002, after Petitioner assaulted Helana, she sought help from the Shasta County Victim/Witness Assistance Program. (Exh. B, p. 69-70.) At the program, she met with Carol Gall, and Gall helped Helana to fill out a request for a restraining order. (Exh. B, p. 69.) Gall became Helana's victim advocate during this process. (Exh. B, p. 69.) Helana received therapy as part of her treatment when she was in the Victim/Witness program. Keith Manner of Creekside Counseling was Helana's assigned therapist through the program. (Exh. B, p. 70.)

Helana's assault case against Petitioner was pending in 2004 when she first made a report to police in this case, on June 24, 2004. (Exh. B, p. 72.) Because of her mental disability, Helana responds to triggers. Helana experienced a trigger when she saw the poster about Chris Kohn's murder posted in Gall's office on or around June 24, 2004. (Exh. B, p. 72.) She had not seen it before that date. Helana does not know exactly what it was about the poster that caused the trigger – if was the location of Mt. Gate or

something about Kohn's eyes – but she felt fear when she saw it.[6] (Exh. B, p. 72.)

After Helana made the report to police, Carol Gall advised her to leave her house because Petitioner and his associates would be after her, and her life was in danger. (Exh. B, p. 75-76.) Helana was made to believe that Petitioner or people connected to him were coming after her for the months that followed. (Exh. B, p. 76.) She was terrified. (Exh. B, p. 76.) Helana left her house with her children and Hill, and they stayed in a series of hotels for months after she made the report. (Exh. B, p. 76.) While they were at the hotels, Carol Gall fueled their fears that they were targeted. (Exh. B, p. 76.)

Helana felt that the district attorney put a lot of pressure on her to say things a certain way. (Exh. B, p. 77.) In particular, Helana was told to "put the gun in Derek's hands." (Exh. B, p. 77.) She remembers testifying from notes. (Exh. B, p. 77.) At the time, Helana was not concerned about the fact that she was testifying from notes, but now she is concerned. (Exh. B, p. 77.) Helana now believes some things that she described at trial do not make sense or were not actually her own memories. (Exh. B, p. 77.) The gun is one of the aspects of her testimony that she believes is a "false

[6] At trial, Helana testified that the words "Mt. Gate" on the poster was the first thing that struck her and triggered memories for her. (RT 1972.)

memory," because she does not trust that this is the product of her own memory or experience. (Exh. B, p. 77.) She also doubts her testimony regarding Mt. Gate, as Mt. Gate is a place that she associates with abuse from her childhood. (Exh. B, p. 77.)

Throughout the trial, the Sheriff and District Attorney gave Helana the impression that there was a lot of other evidence implicating Petitioner, including physical evidence. (Exh. B, p. 78.) Based upon statements from officers and prosecutors, Helana believed that there was blood and other evidence that linked Petitioner to the murder and corroborated her testimony. (Exh. B, p. 78.) She did not know until after the trial that her testimony was the only evidence implicating him in the murder. (Exh. B, p. 78.) When Helana learned from her mother, Shyla, that her testimony was the sole evidence implicating petitioner, she felt confused. (Exh. B, p. 78-9.)

Recently, Helana has discussed the underlying case and her feeling that she had been manipulated with her therapist, Keith Manner. (Exh. B, p. 79.) Manner has helped Helana to understand the factors that lead to her feeling that her statements at trial may not reflect actual memories. (Exh. B, p. 79.) He further help her to realize that her belief that her memory had been manipulated is valid. (Exh. B, p. 79.)

c. Psychological Analysis

Keith Manner, a licensed psychotherapist, testified as a qualified expert witness regarding Helana Martinez's psychological diagnosis of Post Traumatic Stress Disorder (PTSD) and the relationship of this disorder to Helana's underlying statement and current recantation. (Exh. B, pp. 21, 29.) Manner has been a clinical supervisor for Creekside Counseling for approximately 18 years. (Exh. B, p. 21.) Helana Martinez was referred to Keith Manner in 2003, as a victim under the Shasta County Victim Assistance Program. (Exh. B, p. 29.) She was referred based upon a domestic violence case involving petitioner. (Exh. B, p. 29.) Manner diagnosed Helana with PTSD, and he noted that her condition was in part due to her lifetime of trauma and abuse. (Exh. B, p. 30.)

The reports conducted by Manner were reported to the Victim/Witness Assistance Program and Carol Gall, Helana's victim advocate and a wife of a district attorney. (Exh. B, p. 33.) Manner noted that Helana's mental state is remarkable in that she presents with prominent dissociative features of derealization and depersonalization. (Exh. B, p. 34.) In that state, a person will often report that they have a feeling that what they are experiencing is not real, but a movie. (Exh. B, p. 34.) Manner also noted that Helana suffered from frequent panic attacks as part of her condition. (Exh. B, p. 31-32.) Manner stated that his treatment of Helana

abruptly ceased in 2004, when Helana was referred by the Victim/Witness Assistance Program to another therapist. (Exh. B, p. 34-35.) A referral under the program is usually made by the victim advocate, in Helana's case that was Carole Gall. The random transfer of a client like Helana was unusual, as Manner was her current assigned therapist. (Exh. B, p. 34-35.)

Because Helana was referred to a different therapist at the time of her reporting in 2004, Manner did not have any prior knowledge or review of Helana's statements in the case against Petitioner or her interviews with the sheriff. (Exh. B, pp. 34-35.) In particular, Manner reviewed the video of Helana's interview/interrogation by Officer Campbell and noted the parts of the video which depicted isolation, grooming and manipulation. (See Exh. D.) Manner notes that during the interview with Officer Campbell, Helana appears clearly isolated and afraid. (Exh. B, p. 36.) Manner observes that people with PTSD like Helana seek safety and structure and are particularly susceptible to seeking safety from other people – particularly a person in authority. (Exh. B, p. 36.) Manner identifies Helana's description to Campbell that her mind remembers things as "a movie, and she doesn't know what is 'real,' as a typical characteristic of an individual who suffers from PTSD, as they have difficulty expressing their memories." (Exh. B, pp. 36-37.)

During the interview, Manner noted that directed imagery was used. In this regard, Manner explains that Helana initially describes a handgun owned by Petitioner as black with paint that was "scratched and chipped." (Exh. B, p. 37; see also D-2, Video at 22 min.) Campbell later shows Helana some photographs of guns, and she repeats her memory of the scratched paint on the gun that she remembers, but eventually states that the gun looks like the one pictured with part of the handle missing. (Exh. B, p. 39; Video at 55 min.; Exh. F, p. 31, Line 9.) Manner also noted that Helana was vulnerable to suggestion with regard to describing Mt. Gate or where the crime occurred. (Exh. B, p. 38.) Manner acknowledges that Helana seems isolated and overwhelmed throughout the interview, and Officer Campbell reassures her by offering protection and resources. (Exh. B, p. 39; Exh. F, p. 44, Line 1.) Manner notes that individuals with PTSD like Helana feel extremely unsafe generally, and this fear is so overwhelming that they can't function in their daily life. (Exh. B, pp. 36-37.) Ultimately, Manner finds that Helana's PTSD repeatedly caused her to negotiate between her memory and what she believed Campbell wanted to hear during the interview. (Exh. B, p. 38.)

The interview also highlights Helana's extreme state of PTSD and her accompanying dissociative state, as she repeatedly states that her memories

are like a movie. In this respect, Manner explains that people with severe PTSD similar to Helana can confuse reality and real memories with false memories with the right stimulation or overstimulation. (Exh. B, p. 64.) In these scenarios, the traumas blend together and false memory can replace true memory so that a person reporting it is not able to discern whether it is in fact a reflection of reality. (Exh. B, p. 64.) A person with PTSD like Helana is also vulnerable to suggestion and can easily confuse their memories with suggestions. (Exh. B, p. 65.) Manner notes that there is no way to restore memories once they have become false memories. (Exh. B, p. 64.)

Prior to trial, Helana's mother, Shyla Hill, requested that Manner help her with a complaint against their victim advocate, Carole Gall. (Exh. B, p. 41.) Hill made reports to Manner that they weren't receiving proper services from Victim/Witness, and Manner helped them to file a formal complaint against Carole Gall. (Exh. B, p. 41.) Included in the complaint was a report that Gall directly influenced Hill and Helana, causing them undue fear. (Exh. B, p. 42.) Following Manner's report and meetings on Hill and Helana's behalf, Gall was removed as their victim advocate. (Exh. B, p. 42.)

d. Forensic Psychological Analysis – Suggestion And Coercion

Deborah Davis testified as an expert witness on the issue of forensic psychology as it pertains to the interview of witnesses in this case. (Exh. B, p. 135.) Initially, Davis defined suggestion as anything that a person might say or do or a reaction that they might have which suggests either what they believe to be the truth or what they expect the person to say or what they would prefer that person to say. (Exh. B, p. 138.) Davis stated that suggestion can influence witnesses to give false accounts. (Exh. B, p. 138.)

i. Unrecorded Interviews

Davis noted initially that the most obvious problem with an unrecorded interview is that people can lie about what occurred and get away with it. (Exh. B, p. 140.) When there is no recording of the original interview or interrogation there is no direct way to assess the degree of suggestion and coercion leading up to the recorded statements. (Exh. B, p. 140.) In particular, Davis noted that in cases like the present one, where you have a particularly vulnerable witness who doesn't necessarily know the right answer, or they have a compliant personality, then they may adopt something stated by the speaker and it would go undetected without a recording. (Exh. B, p. 141.)

ii. Vulnerability to Suggestion and/or Coercion

Davis identified several reasons that a witness can be unusually suggestible or susceptible to coercion. (Exh. B, p. 141.) First, Davis noted that a person who suffers impaired cognition, whether dispositionally or as the result of situational impairment (such as by alcohol, fatigue, illness, etc.), is more vulnerable to suggestion. (Exh. B, p. 141.) Ultimately, a person who has a poor memory for what actually happened is more likely to believe another who might be thought to have more accurate information. (Exh. B, p. 141.) Therefore, it is very easy for other people to suggest an answer to a person with impaired cognition.

Davis also acknowledged that people suffering from high anxiety or stress in a given situation have poor cognitive abilities and are also more likely to have poor memory recall and therefore be less confident and more vulnerable to suggestion. (Exh. B, p. 142.) Further, Davis explained that various kinds of mental illness or cognitive disabilities can impair a person's ability to encode a moment as a memory and may also impair memory retrieval. (Exh. B, p. 142.) In this respect, Davis identified individuals with dissociative disorders as particularly vulnerable to suggestion, as these individuals, by the very nature of their disorder, are not able to track what's real from what is not real. (Exh. B, p. 143.) Therefore, a person suffering from a dissociative disorder is more susceptible to false memories. (Exh. B,

p. 143.) Finally, Davis identified people who are compliant and dependent as more susceptible to suggestion, as they find it difficult or impossible to defy others and are therefore more likely to adopt suggestions or the truth presented to them. (Exh. B, p. 143.)

iii. Application To The Present Case

In applying the noted issues related to suggestiveness to the present case, Davis first acknowledged that Keith Manner's evaluation and diagnosis of Helana as someone who suffers from an extreme form of PTSD as significant to understanding her claim of memory manipulation and her susceptibility to suggestion and coercion. (Exh. B, p. 149.) While Manner did not identify the aspects of Helana's mental disability in terms of reality monitoring, dissociative disorders like PTSD are associated with reality monitoring issues. (Exh. B, p. 149.) Moreover, Helana's memory problems are well-documented both in her psychological report and in the record. (Exh. B, p. 149.) Davis found, based upon Manner's observations of Helana, as well as scientific literature on memory and suggestibility, that Helana would be particularly susceptible to both failures of memory (and unintentional false reports) and to compliance with others' suggestions (and knowing false reports). (Exh. B, pp. 149-150.)

Davis also acknowledged that the unrecorded statements in this case were very problematic in the context of Helana's claim that her memory was manipulated. (Exh. B, p. 150.) Here, there is no way to determine how Helana's first recorded statement came into being, because there is no record of her statement as it developed from a report that petitioner "just killed someone" in 2004 to the statement that it had occurred in 1997. (Exh. B, pp. 150-151.) Davis also noted that it is troubling that the sheriff drove Helana to the station without recording the interaction, as important things often go on in police cars before the tape recorder ever goes on for the formal police interview. (Exh. B, p. 151.) Without a recording, it is impossible to determine how Helana's initial story was shaped to the point when she went in for the first recorded interview with Officer Campbell. (Exh. B, p. 151.)

Davis further explained that Helana's mental disability and poor memory exacerbated the normal memory impairment that occurs over the passing of time, which in turn, made her more susceptible to suggestion and false memories. (Exh. B, p. 151.) Here, the simple amount of time that passed between 1997 when the murder occurred and 2004, when the reporting took place, is significant in terms of even normal memory impairment. (Exh. B, p. 151.) Davis noted that even a person who is free from mental disabilities is going to lose most memory details after seven

years. (Exh. B, p. 151.) Indeed, Davis remarked that the general problem in trials is that the demands that people have for detail are incompatible with the way that memory works. (Exh. B, p. 152.) It is simply not the way that people encode information, and it is incompatible with the way that people remember over time. (Exh. B, p. 152.)

In this context, Davis noted that it is unrealistic for people to remember peripheral details over a period of time. (Exh. B, p. 152.) In a case like the present one, it is impossible to tell whether the story is remembered because that's the way that it happened originally, or because it's the way it's been developed long after the fact – through suggestion. (Exh. B, p. 152.) Here, the basic passage of time between the events that occurred in 1997 and the report in 2004 is problematic even for a person who had normal memory function. (Exh. B, p. 152.)

Davis was particularly concerned with Helana's self-reported concern regarding her "bad" memory at many points throughout her interviews, as well as Helana's dissociative description which highlights her problems with reality monitoring. (Exh. B, p. 153.) Davis referred to Helana's stated concern during the interviews that "she's not sure," and that it all seems "like a movie," as the question then becomes "where is this movie coming from?" (Exh. B, p. 153.) Moreover, if there is a lot of detail, then it is very

unlikely to be a real memory. (Exh. B, p. 153.) In this context, Davis explains that Helana's dissociative experience fundamentally makes her susceptible to false memories. (Exh. B, p. 155.)

A false memory is, by definition, something that feels like an actual memory, and if you create a "rich false memory" you can actually picture it in your head. (Exh. B, p. 156.) People who report false memories get as emotional as a person with real memory, because they believe that it happened. (Exh. B, p. 156.) Further, in the case of Helana, her mental disabilities are going to prevent her from being able to sort real from false memories, because she suffers from an extreme form of PTSD which causes a fundamental failure in reality monitoring, so her self-insight is lacking - if not non-existent. (Exh. B, p. 156.)

Here, Davis notes that this problem is realized in Helana's interview in the present case, where facts were discussed in great detail, in 2004 (7 years after the murder), and suggestive techniques are used and photos are shown to Helana. (Exh. B, 153.) Davis states that it impossible to determine where Helana's descriptions and statements come from, especially where there are numerous inconsistencies in statements with respect to the description and identification of the gun and crime scene. (Exh. B, p. 154.) Ultimately, Davis finds that the odds are vanishingly small that if Helana

saw the actual gun for a couple of seconds in 1997, that she can draw the details of the gun now. (Exh. B, p. 154.) In fact, Davis does not believe that is possible. (Exh. B, p. 154.)

In assessing the suggestiveness of the first recorded interview with police, Davis notes that it took place in two important contexts: (1) great fear of Petitioner and intense victim emotionality, and (2) efforts to work with a victim protective service to prevent Petitioner's access to his children, and possibly relocate the family to provide protection from him. (Exh. B, p. 157.) Moreover, this interview took place after several unrecorded statements and interviews, and it is unknown whether any additional incentive was mentioned or promised in one of the unrecorded interactions. (Exh. B, p. 158.) In this respect, it is important to note that there seemed to be a conversation between Helana and the detective on the way to her interview, as the detective stated at one point "Remember we talked about it in the car on the way over?" (Exh. B, p. 158; Exh. F, p. 35.)

In addition to the problematic unrecorded interactions, Davis noted the clear suggestive portions of the interview with Officer Campbell which may inform and corroborate her feeling that her memory was manipulated. (Exh. B, p. 158-159.) Davis opines that the tape of the interview clearly shows that Helana was suggested into describing a gun with a broken, ribbed

handle after when she initially described an old gun with chipped paint. (Exh. B, p. 159.) The suggestiveness is even more stark in reviewing the evolution of Helana's initial statement to the description that she provided from the notes prepared for her at trial. (Exh. B, p. 159.)

In part, the suggestiveness is presented in direct fashion, with Officer Campbell showing Helana pictures, as this is a fundamental way of overriding people's memories, especially when memories are vague, as was the case here. (Exh. B, p. 161.) The suggestiveness is also apparent in Officer Campbell's request that Helana draw the gun after she refuses, stating that she does not know. (Exh. B, p. 160.) Officer Campbell shows her photos of guns and this act basically suggests to Helana that the photo represents what the gun should look like, and this simple act further suggests that there is additional evidence that the police are privy to which corroborate her memory. (Exh. B, p. 160.)

In addition to Helana's problematic, conflicting statement regarding the gun, her description of the murder scene also presents as the result of suggestive questioning and coercion. (Exh. B, p. 161.) Again, when Helana lacks a concrete memory and description of the location of the murder, she is shown photographs of the scene, and Davis notes that this is one of the best known ways for information to creep into people's memories as

corroboration of evidence. (Exh. B, p. 161.) With memory vague after more than 7 years, a photograph tells Helana "This is the place. This is what you should be remembering." (Exh. B, p. 161.) And, when Helana expressed uncertainty, Officer Campbell went to get "better pictures." (Exh. B, p. 161.) As with Helana's uncertain description of the gun, Officer Campbell's direct suggestion with photos is basically telling Helana, "I'm getting these photos from the file," which suggests that the photos reflect what is true, what is correct. (Exh. B, p. 161.)

iv. Report Conclusions

In her report, Davis concludes that there were many factors to suggest that Helana's statements and testimony were the product of suggestive questioning and circumstances that tended to influence her. (Exh. C.) Davis notes that Detective Campbell's interview was suggestive with regard to crucial evidence linking Petitioner to the crime. (Exh. C.) Davis explains that he engaged in suggestive behavior regarding the description of the gun Helana allegedly saw Petitioner holding, and the location of the murder. (Exh. C.) Further, Davis concludes that to the extent that Helana was told of evidence that Petitioner was guilty, this would tend to support any false memories she might have of bad or violent behavior on his part. (Exh. C.) Known as "negative stereotyping" this kind of information serves to

convince a witness that the target is the type of person who *would do* the behavior in question, making it easier to believe or to falsely remember that he *did do* it. Such stereotyping and fears of Petitioner were reportedly fueled by the behavior of victim advocate Carol Gall, who falsely led Helana and Hill to believe they were being followed and stalked by Petitioner and his associates, again something that would support false memories of his involvement in the murder. (Exh. C.) All of these factors and suggestive behaviors would impart undue influence over Helana, resulting in false memories and false evidence.

C. The Prosecution Failed To Disclose Material Exculpatory Evidence That Undermined Confidence In The Outcome Of Petitioner's Trial In Violation Of His Right To Due Process Under *Brady*

Under *Brady v. Maryland,* 373 U.S. 83, (1963), "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Id.* at p. 87. Accordingly, the State has a duty to disclose any favorable and material evidence even without a request. *Id.*; *United States v. Bagley,* 473 U.S. 667, 678 (1985).

There are three elements to a *Brady* violation. First, evidence must be suppressed, either willfully or inadvertently. *Strickler v. Greene,* 527 U.S. 263, 282 (1999). Second, the suppressed evidence must be favorable to the prosecution, meaning it either helps the defendant or hurts the prosecution in that it is exculpatory or has impeachment value. *Id.* at 282. Lastly, the suppressed evidence must be "material," meaning there is "a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *United States v. Bagley,* at 682. "Moreover, the rule encompasses evidence 'known only to police investigators and not to the prosecutor.' [Citation.] In order to comply with *Brady*, therefore, 'the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in this case, including the police.'" *Strickler,* 527 U.S. at 280-281.

In *Brady v. Maryland,* 373 U.S. 83, the United States Supreme Court held that a defendant's right to due process is violated when 'favorable' evidence that has been 'suppressed' by the prosecution is 'material' to the issue of guilt or punishment. The violation occurs even when the prosecution has not acted in bad faith and the favorable evidence has not been requested.

The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence.'" *Kyles v. Whitley* 514 U.S. 419, 434 (1995). "One does not show a *Brady* violation by demonstrating that some of the inculpatory evidence should have been excluded, but by showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Kyles,* 514 U.S. at 435.

1. Suppressed Interrogation Tapes of Harris Constitute Newly Discovered *Brady* Evidence

Martinez presents newly discovered evidence that the prosecution suppressed evidence implicating John Harris – including two recordings of interrogations with Harris that were never submitted to the defense or the Court. Here, the prosecution submitted Trial Exhibits IV–V(h) in response to the Court's request for all of the recorded interviews of Harris, which the Court requested in conducting a review of evidence of the defendants' *in limine* motions to present third party culpability defenses related to Harris. (RT 2411.) The exhibits, consisting of two transcripts (the first interview with Harris on 2/5/97 and a short interview at Harris' request on 2/11/97) and 8 cassette tapes (20 min. per cassette). (RT 2411; Trial Court Exhibits IV, V, V(a)- V(h).) The prosecution represented to the Court and defense

that the tapes and transcripts represented "all" of the Harris interrogations. (RT 2411.) They were disclosed to the Court and defense at the very end of the prosecution's case. (RT 2411; see Trial Court Exhibits IV, V, V(a)-V(h).)

Contrary to the prosecutor's affirmative representations to the Court, the transcripts and tapes do not represent all of the interrogations with Harris. In fact, the prosecution omitted the most important interviews with Harris. The recordings of the two suppressed interviews were provided to Martinez in late 2018, through early 2019, via post-OSC discovery. The suppressed recordings were provided as videos on VHS tapes, along with two other recordings related to Harris – the 2/6/97 interviews of Taskeen Tyler and Nate Chatman. (See Exhs. II, JJ, KK.) Neither Tyler nor Chatman's interviews were transcribed or discovered to the court as part of the relevant incriminating evidence implicating Harris. Martinez believes that these two recordings were suppressed as well, but there is no discussion of the request for these interviews in the record. Accordingly, Martinez relies upon this evidence as corroborating evidence to the clear *Brady* violation represented by the suppressed tapes of Harris.

Martinez submits to this Court the newly discovered, transcribed voice stress test and post-test interview of Harris on February 5, 1997[7] along with the transcripts of the subsequent interrogations of Taskeen Tyler and Nate Chatman, conducted on February 6, 1997. (See Exhs. II, JJ, KK.) These were never disclosed. It is apparent from the prosecution's affirmative representation to the defense and the Court that the prosecution intentionally suppressed the record of Harris' voice stress test and post-test interrogation. (See Exh. II.) These interviews take place after Harris has admitted his involvement in the Super Bowl Sunday burglary, and both interviews focus on evidence related to Harris' involvement in the second burglary at Kohn's apartment, the night he was murdered. (See Exh. II.) Importantly, Harris refuses to answer questions related to Kohn's murder at the end of the second suppressed interview, and this is when he is arrested. (Exh. II.) The suppressed evidence contained in the interviews contradicts

[7] Present counsel recently had the second portion of the 2/5/97 interrogation of Harris digitized and transcribed (with her own personal funds). It is attached hereto as Exhibit II. The transcript was never produced by the State, and it was remarkably not submitted to the court with the two other interrogation transcripts. Present counsel received a VHS copy of the video with the video interrogations of Taskeen Tyler and Nate Chatman. These were the only other video interviews produced in this case other than Helana's interview in 2004. The VHS tapes of the interviews were turned over with the requested discovery at the end of 2018 and early 2019. Present counsel has also gotten the taped interviews of Taskeen Tyler and Nate Chatman transcribed, and the transcriptions are attached hereto as Exhibits JJ and KK.

the state's evidence related to the investigation and arrest of Harris. Absent the suppressed evidence, the state's narrative deprived Martinez of a strong third party culpability defense and shielded Officers Clemens, Compomizzo and Campbell from impeachment in their portraits of the 1997 investigation. Significantly, the suppression of the Harris, Tyler and Chatman interviews permitted the state to present uncontroverted evidence that the officers "ruled out" Harris as a suspect. In addition, Martinez notes that this claim is corroborated by the prosecution's mid-trial submission of the transcripts of the two other interviews of Harris to the Court and defense as constituting "all" of the interviews with Harris.

In addition to the suppressed interviews of Harris, Tyler and Chatman, Martinez asks this Court to consider this evidence in light of the prosecution's incomplete mid-trial disclosure of the two Harris transcribed interrogations. When considered in light of the content of the interrogations and the suppression of the voice stress and post-test interrogations where Harris is arrested, it is most certainly *Brady* by substance and intent. By suppressing the evidence of other two Harris interrogations, the prosecution limited the defense's ability to impeach Officers Clemens, Compomizzo and Campbell, and effectively prevented Martinez's third party culpability defense focused on Harris.

Indeed, the release of the 2/11/97 interrogation tape late in the trial, after Officer Clemens had already testified, also had the effect of depriving Martinez of the opportunity to impeach the officer on his claim that he had "ruled out" Harris, and preventing the jury from hearing an extremely strong third party culpability defense. Martinez submits that the prosecution's submission of the 2/11/97 interview resulted in deception and violated the spirit and intent of *Brady*. Indeed, the release of critical, exculpatory evidence mid-trial is comparable to the police practice of interrogating "outside *Miranda*."[8] Mr. Martinez asks this Court to look at the evidence within the context of this case and determine if the prosecution's mid-trial release of exculpatory evidence complies with the spirit and substance of *Brady*.

The prosecution submitted the transcript of the February 11, 1997 interview of John Harris into the record with the transcript of his first interrogation, at the end of trial in 2006 (Mr. Martinez was arrested in late June 2004), after Officer Clemens had testified a second time (to "rehabilitate" his earlier testimony). The transcript was put into the record during Campbell's direct testimony, towards the very end of trial. (6RT

[8] The prevalent unconstitutional practice of interrogating "outside of *Miranda*" was addressed in part by Justice Souter in his majority opinion in *Missouri v. Seibert* (2004) 542 U.S. 600, 609), as well as Weisselburg, *In the Stationhouse*, note 95; Weisselberg *Saving* Miranda, note 3.

2410-2411, 2415.) The prosecution did not play the audio of either interrogation for the jury, nor did the prosecution refer to any specific portions of the interrogations in questioning Officers Clemens (the officer who conducted all of the interviews with Harris) and Campbell. The prosecution further presented this evidence as though it represented the entire interrogation of Harris. In this context it is apparent that the prosecution intentionally suppressed the second and third portions of the interrogations with Harris, on February 5, 1997, during and after his voice stress test. (See Exh. II.) The prosecution did not reference the omission, and no transcript of this portion of the interrogation with Harris was never produced. In this context, the prosecution's late-trial release of portions of the transcripts of the interrogations of Harris were meant as a means of circumventing *Brady*.

The *Brady* violation resulted in significant prejudice to Martinez as the prosecution limited the defense's ability to impeach the testimony of Officers Clemens, Compomizzo and Campbell, and, more importantly, prevented Martinez from presenting a compelling third party culpability defense focused on Harris.

a. Suppressed Harris Interrogations on 2/5/97 – Voice Stress Test And Post-Test Interrogation and Arrest

In this case, the suppressed interrogations clearly and unambiguously identify John Harris as the primary suspect in the murder of Chris Kohn. Contrary to respondent's assertions and Officer Clemens' testimony, Harris' interrogations provide evidence that he was interrogated as a suspect in Kohn's murder. During the first portion of the first interrogation, Officer Clemens asked general questions regarding Kohn in a relatively non-confrontational manner. (See Exh. MM, at pp. 1-80.) Harris repeatedly denied involvement in the Super Bowl Sunday burglary of Kohn's apartment (Exh. MM, at pp. 52, 76, 77, 78, 81). Harris eventually admits that he took clothes, bags and some pipes from the Super Bowl Sunday burglary at Kohn's apartment. (Exh. MM, at p. 98.) He further conceded that he had told several people that he was going to take Kohn's money. (Exh. MM, at pp. 107, 112.)

Officer McDannold tells Harris, "We know you did it, John.... What if I knew and I could prove that you were there and part of it, and in fact, planned it, and helped carry the whole damn thing out, and I can prove it..." (Exh. MM, at pp. 110, 115.) He further tells Harris, "My experience has been with you today, since one o'clock this afternoon is that you will lie. That's my experience and you admitted that that you will lie...." (Exh. MM, at p. 117.)

The officers then leave and Officer Carroll gives Harris a voice stress test regarding his involvement in Kohn's murder. (Suppressed John Harris second half of interrogation tape on 2/5/97, attached hereto as Exh. II.) In the suppressed interrogations of Harris, the officers intensified their accusations and questions. Harris is found to be deceptive regarding every question related to Kohn's murder. (Exh. II, at pp. 1-65.) After Harris is found to be deceptive, Officers McDannold and Clemens return and question Harris further regarding the Kohn murder. (See Exh. II, at pp. 65-77.) At end of their interrogation, the officers arrest Harris, telling him, "Seems to me like we got a little house up in Mountain Gate that you went up and went into on Super Bowl Sunday. And the guy that owns that house is dead. That's what we're going to book you for." (Exh. II, at p. 29.)

Nate Chatman and Taskeen Tyler were interrogated the day after John Harris, on 2/6/97. Remarkably, both men were brought in for questioning regarding Harris' role in the second burglary of Kohn's apartment and Kohn's murder. (Exh. JJ, KK.) They were both subjected to voice stress tests throughout the questioning, without any initial interviews. (See Exhs. JJ, KK.) Through their separately conducted interviews, the two independently establish that they recently met Harris. (Exh. JJ, KK.) They also explained that Harris was given the guns (by a third party while they

were in custody) that they had stolen from Alta Mesa on the day before Kohn's murder. (Exh. JJ, KK.) The record establishes that there were at least two guns amongst the stolen firearms that fit the make and model of the suspected murder weapon. (See list of guns stolen from Alta Mesa burglary, Exh. O.) They both told officers that they believed that Harris murdered Kohn. (Exhs. JJ, KK.) They both told the officers that Harris had the motive (i.e. he told both of them that Harris said that he was going to get Kohn's money even if he had to kill Kohn), opportunity (i.e. he was using Douglas' yellow Chevy truck which his wife got him access to the night of the murder), and he had the means (i.e. he had access to the firearms that were stolen from the Alta Mesa burglary on the night of the murder). (See Exhs. JJ, KK.) None of the evidence set forth in the parallel, separate interviews is controverted by any evidence in the record from 1997 to the present day.

There is no evidence in the record which excludes Harris as a prime suspect in Kohn's murder, and there are no subsequent interviews with Harris in the record. Without the suppressed evidence of Harris' interviews during the lie detector test and post-test with Officers Clemens and McDannold and the interviews of Tyler and Chatman, the jury was led to

believe, without question, Officer Clemens' repeated false testimony that Harris had been "ruled out."

2. The State Suppressed Shasta County Sheriff's History of Misconduct –Including Manipulation of Witnesses, Failure to Investigate Evidence Implicating Suspects and Failure to Conduct Exculpatory Forensic Investigation Under *Brady* and *Milke v. Ryan*

In 1990, a jury convicted Debra Milke of murdering her four-year-old son based solely upon the testimony of Officer Armando Saldate, Jr. *Milke v. Ryan,* 711 F.3d 998, 1002–03 (9th Cir. 2013). Officer Saldate testified that Milke, then twenty-five years old, had waived her *Miranda* rights and confessed during an interrogation. There were no other prosecution witnesses or direct evidence linking Milke to the murder. The judge and jury believed Saldate, and found Milke guilty of capital murder. However, the jury didn't know about Saldate's long history of lying under oath and other misconduct. The state knew about this misconduct but failed to disclose it, despite the requirements of *Brady* and *Giglio v. United States*, 405 U.S. 150, 153–55 (1972). This Court found the State's suppression of Officer Saldate's prior misconduct to be unconstitutional under *Brady* and reversed Milke's conviction.

In *Milke*, this Court found that post-conviction counsel's discovery of the court records concerning Officer Saldate's past misconduct revealed a

"pattern" of misconduct and constituted "highly relevant" and "highly probative" evidence that "would certainly have cast doubt" on the detective's credibility if used to impeach his testimony at trial. *Milke,* 711 F.3d at 1008. Ultimately, the court found that the State suppressed the past officer misconduct when it failed to affirmatively provide the information to the defense in pre-trial discovery, preventing Milke from presenting a defense, and the court reversed her conviction under *Brady* and *Giglio*. *Id*. at p. 1019.

Much as in *Milke,* there is evidence of past misconduct by law enforcement who were directly involved in the investigation of the underlying murder, Petitioner's prosecution and trial which was never revealed to Petitioner or his attorney prior to trial. Further, similar to Milke, this *Brady* evidence is presented by way of a federal case and a federal court's finding of misconduct and constitutional violations committed by the individual Officers Compomizzo and McDonnald, as well as the Shasta County Sheriff's Office as a whole.

To this end, Petitioner requests that the Court give judicial notice to the case of *Brewster v. County of Shasta* – both with respect to the findings in the Eastern District and the ultimate affirmation by this Court. *See Brewster v. County of Shasta, et al*., 112 F.Supp.2d 1185 (E.D. 2000);

Brewster v. County of Shasta, 275 F.3d 803 (9th Cir. 2001); see also Exhs. Y and EE.) Petitioner makes the request for Judicial Notice under the Federal Rules of Evidence, Rule 201. Much as in *Milke,* the jury was deprived of evidence critical to their ability to determine the strength and veracity of the law enforcement witnesses -especially in light of the contradicting evidence in the record.

In *Brewster*, Thomas Brewster was exonerated eight weeks into his 1997 capital murder trial by DNA testing initiated by his defense team on a semen-stained blouse that had been in Shasta County's possession since 1984. Brewster brought suit under 42 U.S.C. § 1983 against the County of Shasta, the Shasta County District Attorney, and two Shasta County Sheriff deputies. Both named sheriffs, Officers Compomizzo and McDonnald, were involved in the investigation in the present case. Brewster alleged that the deputies violated his civil rights during the investigation of a murder and sexual assault by manipulating a witness into giving a false identification, presenting false evidence, failing to test physical evidence, and ignoring exculpatory evidence.

In his civil rights suit, Brewster claimed that his injuries were caused by the deputies' execution of the Sheriff's policies on arrests and cold case crime investigations because the Sheriff is a final policymaker for the

county. (See Exh. Y.) The federal district court considered a motion for summary judgment regarding Shasta County's liability based upon their claim of government immunity, and the court denied summary judgment and found that Officers Compomizzo and McDannold were acting pursuant to Shasta County Sheriff's Office practice or policy under Sheriff Pope when they committed misconduct and violated Brewster's constitutional rights. (See Exh. EE.) In deciding the motion for summary judgment, the federal court made a factual finding that the misconduct of Officers Compomizzo and McDannold was consistent with the official practice or policy of the Shasta County Sheriff, thus the County was liable for the sheriffs' unconstitutional witness manipulation, falsification of evidence and failure to conduct basic forensic investigation.

The State failed to disclose the *Brewster* case and its findings to Petitioner and his counsel prior to trial in violation of *Brady*. The two named Shasta County Sheriff's in the *Brewster* case, Officers Compomizzo and McDonnald, were two of the primary sheriffs involved in the investigation of the present case. In reciting the facts of the case, the federal court found that the sheriffs had manipulated the primary victim witness in the case by using unconstitutional, suggestive techniques that secured the false identification of Brewster as the suspect approximately a decade after

the murder and purposely failed to conduct basic forensic investigation. Petitioner was prejudiced by the State's suppression of this evidence, as Petitioner's conviction was procured with the use of the same suggestive practices and policies and lack of basic investigation that resulted in wrongful prosecution in the *Brewster* case. Moreover, the present case involves many of the same Shasta County Sheriffs, including Officers Compomizzo, Clemens and McDannold, who were identified in both the *Brewster* case.

Petitioner attaches the orders and filings from the *Brewster* case which include portions of depositions and documentary evidence as highly probative evidence of policies and practices followed by the Shasta County Sheriff's Department, and which were employed in Petitioner's case. Initially, as set forth in an Order allowing the case to proceed, Justice Karlton noted several undisputed facts related to the conduct of the officers in manipulating the state's witness. Brewster further set forth additional evidence of the officer's misconduct related to the stated claim that they manipulated the state's witness, the only evidence implicating Brewster, to falsely identify him, as well as intentionally failing to fully investigate exculpatory evidence. The evidence presented through the court's Order and the Plaintiff's post-deposition briefing:

- Immediately after the murder in 1984, the day after the murder, and 4 years after the murder, the assault victim, Gillaspey, viewed line-ups containing a photo of Brewster, but she never identified him as the responsible party.
- In 1995, 11 years after the murder, Officers McDannold and Clemens personally transported Gillaspey from Eureka to Shasta County, a three-hour drive, for a participation in a fourth line-up. During the drive, Officer McDannold told Gillaspey about Brewster's culpability for the murder and other crimes, and specifically told her that there was other evidence implicating him in the murder (other than her identification).
- Officers Compomizzo and McDonnald placed Brewster's photo on a desk and in a couple locations visible to Gillaspey prior to her viewing of the photographic line-up in 1995. Officer Compomizzo actively depreciated a line-up which did not contain Brewster's photo. He then discussed which of the line-ups containing Brewster's photograph would be used by telling Gillaspey that the line-up contained a photograph of the perpetrator, reflecting his appearance at the time of the crime.
- Officers McDannold and Clemens met with Gillaspey the night before the live line-up (where she positively identified Brewster after 11 years), but there was no report or recording of this meeting.
- Officer McDannold advised Gillaspey that she did not have to be certain about her identification, as long as she was "relatively certain." Officer McDannold further informed Gillespey that she "flushed" when she looked at Brewster's photo. He further advised her not to put any comments on the form because "he did not want to have to explain her comments at trial."
- Officers took Gillespey to a clearing where they advised her that they believed the crime occurred. They falsely advised her that there was a full moon on the night in question, so she would have been able to see the perpetrator's face by the light of the moon. The moon had not risen at the time of the murder.
- Gillespey identified the suspect's vehicle as a Buick Rivera in 1984. During the cold case investigation, Officer Compomizzo was told that Brewster had owned a Camaro. On August 2, 1995, Gillespey met with Officers McDannold and Compomizzo. During this meeting, Gillespey identified the suspect's car as a

Camaro. Officer Compomizzo subsequently met with witness, Helena Cotham, on September 1, 1995, and Cotham told him that Brewster had purchased the Camaro with rehabilitation money that he received on January 11, 1985 – *27 days after the murder*. Officer McDannold testified at Brewster's Preliminary Hearing on February 21, 1996, and declared under oath that Officer Compomizzo had discovered that Brewster owned the Camaro on the night of the murder. Officer McDannold knew that the evidence that he gave was false at the time that he gave it.

- Days after the murder Brewster was interviewed by the Shasta County Sheriff regarding the murder. Brewster told Officer Jarrett that he was at the Velvet Garter on the night of the murder and saw Officers Bushey and Van Laak walking a woman out of the bar while he was there. Police reports confirmed that the officers arrested a woman at the Velvet Garder for public intoxication at approximately 10:40 p.m. The murder took place at approximately the same time. Officer McDannold and Officer Compomizzo intentionally failed to pursue the potentially exculpatory alibi evidence.
- The physical evidence, including Gillaspey's clothing from the night of the murder and assault, was maintained by the Shasta County Sheriff's Department since the crime was committed in 1984. The evidence was resubmitted to the DOJ for review in 1996. The clothes were never tested. Officer McDannold never asked the DOJ to review Gillaspey's clothes for DNA evidence despite the fact that she wore the clothes during the assault.

(See Pet. Exhs. Y and EE.)

While Justice Karlton did not "find" that the officers committed misconduct, he did acknowledge the specific acts of the officers which constitute misconduct were officially adopted by the Shasta County Sheriff as conduct which comports with their practice and policies. (See Pet. Exh. EE.) Upon review of the evidence and the Shasta County Sheriff's declared

policy, Justice Karlton queried, "Unfortunately, neither party has provided the court with evidence concerning the Attorney General's supervision of the sheriff of Shasta County in his investigative function." (Pet. Exh. EE, at p. 9.) "There is no evidence about how frequently, ***if ever***, the Attorney General actually supervises the sheriff's conduct of his office, reviews the policies adopted by the sheriff, or otherwise limits the discretion of the sheriff as to how his offers shall conduct investigations." (Pet. Exh. EE, at p. 9 [emphasis added].)

Here, as in *Milke,* the suppressed evidence of the law enforcement practice and policies deprived Petitioner of due process. Much as the evidence of a pattern or practice of law enforcement misconduct in *Milke* was directly relevant and probative to the defendant's case, evidence of Shasta County Sheriff's pattern or practice of misconduct was both relevant and probative to Petitioner's case.

a. Factual Comparison to *Brewster*

The federal court found that the Shasta County Sheriff's unconstitutional manipulation of the witness included: (1) sheriffs[9] showing the witness photos of Brewster multiple times during the identification

[9] Officers Compomizzo, Clemens and McDonnald were the three primary investigating officers involved in witness preparation and the identification process.

process; (2) sheriffs coaching the witness in her identification of the suspect by encouraging or discouraging her; (3) sheriffs driving the witness to and from the station for an interview while telling the witness false information regarding Brewster's culpability; (4) Sheriffs falsely telling the witness that they had secured other testimony and physical evidence implicating Brewster, so that she believed that her identification was not the only evidence implicating Brewster; Sheriffs falsely telling the victim that the moon was full on the night of the assault and murder (so there was ample light for her to have seen the suspect's face during the assault); Sheriffs taking the victim to an area near where the assault took place to find a clearing that they identified as the location where the assault took place (i.e. an area where the light from the moon could have illuminated the suspect's face to the victim); and, (6) sheriffs telling the witness that Brewster had been involved in other crimes and was a known criminal.

In addition, the *Brewster* court found that the sheriff failed to conduct basic forensic investigation in the cold case review. Instead, the Shasta County Sheriff's Office failed to investigate exculpatory evidence and the potential DNA evidence in their possession when they investigated the case. The court acknowledged that the sheriffs failed to investigate exculpatory evidence, including: 1) that Brewster was at a bar where Shasta County

Sheriffs responded to a public disturbance (and spoke to Brewster) at the exact time of the murder; 2) the initial suspect, Perry, was found to possess the murder weapon (identified through bullet forensics which matched the bullet removed from the victim's skull); 3) the fact that the surviving victim failed to identify Brewster in a line-up shortly after the assault and murder took place and a few days after the murder; and 4) the sheriffs failure to investigate DNA evidence from the victim's clothing which had been in the evidence locker since the assault.

Here, as in *Brewster*, the cold case prosecution of Petitioner hinged upon a single witness, Helana Martinez. Unlike the witness in *Brewster*, Helana was not an eyewitness and had no first-hand knowledge of the victim or murder itself. Further, as in *Brewster*, there were many irregularities with the sheriff's handling of the State's primary witness. Officer Campbell personally drove Helana to and from the station to her interview and had unrecorded conversations with Helana regarding Petitioner, falsely told her that Petitioner had committed other crimes and had been running a prostitution ring. (Exh. B, pp. 74-75.) Also, as in *Brewster*, the sheriff showed Helana photos as prompts and suggestion, including the following photos: the suspected firearm used in the assault, pieces of the murder weapon, a photo of John Harris with scratches to his face and neck and the

truck that Harris drove on the night of the murder, a photo of Mt. Gate apartments where Kohn was murdered, and a photo from the crime scene depicting the pieces of the gun, found covered with blood and hair. (Exh. D, p.74; Exh. H.) Also, as in *Brewster*, the sheriffs gave Helana the false impression that there was additional physical evidence linking Petitioner to the murder, and her testimony merely corroborated the physical evidence implicating Petitioner, including the suggestion that there were "bloody clothes" discovered after the murder which implicate Petitioner.[10] (Exh. D, pp. 74-75.)

In addition, in the present case, just as in *Brewster*, the sheriff failed to conduct basic forensic investigation of the physical evidence collected from the crime scene and Harris' apartment which were maintained by the Shasta County Sheriff. As in *Brewster*, there was potentially exculpatory evidence which implicated a third party which was never investigated, such as the swabs of blood-like substance (sent to DOJ, but never "tested" while at DOJ lab in 1997), black pieces of plastic which matched the murder weapon found at Harris' apartment never tested for DNA, Harris' shoes which were specifically taken into evidence from his apartment during the murder

[10] Officer Campbell's reference to "bloody clothes" found after the murder is a direct reference to Debra Butler's (aka Harris) statement that she found a bloody white jacket the day of the murder. (See Exh. I.)

investigation (presumably taken into evidence because the crime scene reflected evidence that the perpetrator walked through the blood on the floor), "fresh" cigarette taken into evidence from the murder scene (Harris was a known smoker and the victim did not smoke cigarettes), and the firearms received by Officer Clemens and identified as connected to the murder and inventoried by Officer Compomizzo, but never put into evidence or tested for DNA or trace blood. Further, as in *Brewster,* the sheriff did not investigate DNA evidence collected from the scene of the murder as part of its original investigation or cold case investigation, despite the availability of both the evidence and the technology. (Exhs. D, pp. 197-231, AA and BB.)

Ultimately, the lack of DNA investigation in both cases deprived both Brewster and Petitioner of exculpatory evidence and further deprived the state of physical evidence implicating the actual individuals who committed the murders. Remarkably, no DNA analysis was conducted in the present case from 1997 to 2004, despite the wrongful prosecution of Brewster and the finding of Shasta County's liability by the federal court in *Brewster* in 2001.

In the end, had the past pattern of misconduct and unconstitutional practices of the Shasta County Sheriff been presented to a fair and just judge

and jury applying the law, they would have undoubtedly developed "questions of guilt" as suggested by the *Milke* court.

D. The Prosecution Failed To Correct False Testimony Of Officers Clemens, Campbell And Compomizzo That Undermined Confidence In The Outcome Of Petitioner's Trial In Violation Of His Right To Due Process Under *Brady* And *Napue*

In Petitioner's case, the State focused much of its case-in-chief upon defending against Petitioner's third party culpability defense. The State offered no physical evidence, circumstantial or otherwise, implicating Petitioner in the murder of Kohn. Rather, the State relied entirely upon Helana's testimony which was bolstered testimony from Officer Clemens, Officer Campbell and Officer Compomizzo. As set forth in the previous claim, the false testimony of the officers set forth in full below, must be considered in light of the significant *Brady* evidence in this case.

The Supreme Court has long held that a conviction obtained using knowingly perjured testimony violates due process. *Mooney v. Holohan*, 294 U.S. 103, 112 (1935). It has long been held that knowingly presenting false testimony to a fact-finder necessitates reversal of a conviction if "the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury." *Giglio v. United States,* 405 U.S. 150, 153, 154 (1972) (quoting *Napue v. Illinois,* 360 U.S. 264, 271(1959); *Dow v. Virga,*

729 F.3d 1041, 1047-1049 (9th Cir. 2013). This is known as a *Napue* violation. *See Dow*, 729 F.3d at 1047. "In addition, the state violates a criminal defendant's right to due process of law when, although not soliciting false evidence, it allows false evidence to go uncorrected when it appears." *Soto v. Ryan,* 760 F.3d 947, 957-958 (9th Cir. 2014).

The prosecution in the present case had a duty to correct the false testimony from the Officers related to the *Brady* evidence, and the prosecution's failure to correct the testimony violated Petitioner's right to due process.

A. Factual Background

Pursuant a Post-Order to Show Cause discovery request, present counsel received thousands of pages of discovery as well as cassette tapes and VHS tapes of interviews and interrogations over the course of a year, from 2018 through 2019. The ordered discovery was to include all police reports, interviews and interrogations related to John Harris which were conducted by Shasta County Sheriff's Office during the investigation of Chris Kohn's murder in 1997. Counsel received cassette tapes and some VHS video of the interviews with John Harris, corresponding police reports and some transcripts of the interviews. The Shasta County Sheriff interviews were conducted with Officer Clemens, and each interview had a

corresponding police report. The received police reports, tapes, video and transcripts were primarily related to his initial arrest interrogation conducted on February 5, 1997. The only police reports of the Harris interrogations were the police reports related to his initial interrogation and the subsequent lie detector test regarding the Kohn murder. These interrogations and the lie detector test all took place on February 5, 1997.

Amidst the tapes of interviews, counsel discovered two interviews with John Harris, conducted on February 5, 1997, that which were included in the discovery or produced by the prosecutor during trial. (Exh. II.) In addition, Petitioner was not aware of the contents of the February 11, 1997 interview with Harris, which was provided by the prosecution in the last days of trial. (Exh. Q.) The February 11, 1997 interview with Harris was particularly compelling in light of the suppressed interviews, which included the circumstances of Harris' arrest. (See Exh. II.)

On February 11, 1997, Officers Clemens and McDannold interviewed Harris at the Shasta County Sheriff's Office at Harris's request. (Exh. T.) While all other interviews and interrogations were conducted in the interrogation rooms at the office, this interview was conducted in a sheriff's office, and only the audio was recorded. (Exh. T.) During the interview, Harris told the officers that he had "made the one phone call after Chris'

death," and talked to "Nick," indicating to the officers that he had used his one free call to contact Nick. (Exh. T.) Harris told officers that on the call, Nick told him he went to Chris Kohn's place, and Chris told him that Harris had gone right over the cash and "missed it."[11] (Exh. T.)

Harris suggested to the officers that they needed to be talking to "Nick," because he was probably one of the last persons to see Kohn alive. (Exh. T.) Harris explained to the officers that he did not remember Nick's last name, but he described him as a "short...white guy." (Exh. T.) He could not recall the color of Nick's hair or where he lived, but he knew that he drove a yellow vehicle. Harris told the officers that he had "been praying" about the murder and "wondering if this boy really did do something... Everybody kind of thinks I did it or had something to do with it and I'm sorry, I really didn't have anything to do with that." (Exh. T.) Harris told the officers that John Douglas had taken "Nick" out to Kohn's place on other occasions. (Exh. T.) When questioned about the amount of money hidden at Kohn's place, Harris told the officers, "Maybe it was the good Lord busy trying to show [me] that I wasn't supposed to get that money, because if I had [] got the money, then someone would [have] come and killed him later,

[11] Law enforcement never recovered the money from Kohn's apartment. It was assumed that the person responsible for Kohn's murder took the money. Law enforcement did not release any information about the money to the media.

I would've been prime suspect number one, especially the money." (Exh. T.)

The officers asked Harris if he had anything else "on [his] chest. Harris responded, "I'm in jail now, I ain't got nothin' to lose, right, but I just don't want to be accused of something that I didn't do and had no part of... I don't want to uphold it and have someone running free that you do need to be taking pictures of and you do need to see, you know if the fight was that bad like you say, then whoever it is should have marks and bruises and if I sat and don't tell you about Nick...." (Exh. T.)

At the end of the interview, Harris implored the officers:

> I hope you believe. I know you guys took my shoes and everything else, but I don't know how I'll get my shoes back and everything else, but I do know that you won't find anything, any blood or anything on any of my stuff, because I had nothing to do with that, okay. So, if you guys can help me out in any way of turning this back into something, just a misdemeanor, cause I feel like I did really misdemeanor stuff, okay.

The officers assured Harris that they would be coming back and talk to him again, and Harris told them to come talk to him whenever they want. (Exh. T.) Petitioner did not receive a corresponding police report or interview summary that correlates with the interview or any subsequent interview with Harris or "Nick." (Exh. T.) Petitioner did not receive a

transcript of any recorded jail calls made by Harris, nor did Petitioner receive any police reports following up with an investigation of Nick. (Exh. T.)

Officer Clemens was the primary investigator, interviewing witnesses and suspects for the original investigation in 1997, including the original interrogation of John Harris. (Exhs. M and P.) He was also the officer that received the stolen guns from the Alta Mesa burglary, after Harris had given them back to Taskeen Tyler and Nate Chatman the morning after Kohn's murder. (Exhs. L.) Officer Clemens also assisted in the interviews of Taskeen Tyler and Nate Chatman, the day after Harris' interrogation and arrest. (See Exhs. JJ, KK.) Officer Clemens took photos of the individual guns and bagged them. (Exh. L.) Officer Compomizzo also took photos of the guns and inventoried the evidence as related to the Kohn murder. (Exh. L.)

In 2006, the prosecution called Officer Clemens in their case in chief against Petitioner. Officer Clemens testified that he "ruled out" Harris as a suspect on February 5, 1997. (RT 1825, 2927-2928.) He further stated that there was no evidence, "nothing," connecting Harris to Kohn's murder. (RT 1826, 1829, 1836-1837, 2209.) Officer Clemens further testified that Harris did not have any handguns. (RT 2210.) Throughout his testimony, Officer

Clemens declared that he could not remember evidence from his police reports, investigation and photographs. He declared that he could not remember at least 84 times during his testimony, and denied that review of photographs and police reports "refreshed his recollection." In one instance, Officer Clemens testified that he could not remember if they ever followed up investigation regarding the injuries that they had photographed on Harris which matched the timeline of Kohn's murder, nor could he remember Harris' injuries or any photographs of the injuries. (RT 2220-2222.) Moreover, Officer Clemens declared that looking at the photographs that he had taken of Harris' injuries did not refresh his recollection. (RT 2222.)

Officer Clemens testified that, after conducting all of the interrogations of Harris, he could not remember Harris' arrest and the circumstances surrounding it. (RT 2222.) In support of his decision to "rule out" Harris, Officer Clemens testified that Harris "was quite clear all the way through... that he did not commit the homicide." (RT 2930.) During his second time on the witness stand, Officer Clemens explained that he had created a law enforcement memo depicting two pieces of black plastic which were believed to have come from the murder weapon. (RT 2202-2204.) The confidential internal memo was intended to show other law enforcement the pieces to see if the officers recognized the pieces or a possible source

firearm. (RT 2202-2204.) Officer Clemens testified that Officer Compomizzo was the case agent in charge of collecting evidence from the murder scene. (RT 1831.)

Officer Compomizzo was also called in the prosecution's case in chief. Despite being the lead investigator in charge of evidence collection for Kohn's murder, Officer Compomizzo explained that he was not sure which crime he was investigating when the Sheriff's Office obtained the search warrant to search Harris' yellow truck and apartment. (RT 2455.) In police report #97-2754, Officer Compomizzo identified the pieces of plastic found at Harris' apartment, photographed the pieces, and then noted that they would be placed into evidence along with the matching other pieces of plastic found at the scene of the murder. (Exh. L, pg. 3.) The 5 pieces of plastic were all identified together, without any distinction for sourcing, as evidence # 167-18, 167-19 (actually 2 pieces), 167-22, 167-44. (Exh. L.) At trial, Officer Compomizzo testified that he found "four" pieces of black plastic in total, and these pieces of plastic were all found at the murder scene, around the body of the victim. (RT 1595-1596, 1605, 1606-1607.) On cross-examination, Officer Compomizzo identified several smoking pipes that were seized from Harris' apartment, and he explained that he did

not remember if the pipes were identified as Kohn's because it was not part of the investigation. (RT 1673-1674.)

In addition, Officer Compomizzo acknowledged that there was blood transfer evidence from the sole of a shoe found at the scene of the murder, and he further acknowledged seizing Harris' shoes during the search of Harris' apartment. (RT 1657-1658, 1662-1663, 1672-1673, 1676.) Officer Compomizzo admitted that the shoes were never investigated. (RT 1676-1677.) In addition, Officer Compomizzo testified that he collected a "fresh" cigarette butt from the scene of the murder, he was aware of the fact that Kohn did not smoke, and he subsequently took photographs of the cigarettes at Harris' apartment, but he did not investigate the evidence any further. (RT 2466-2468,) Further, when questioned on direct as to whether he was looking for the firearms stolen from the Alta Mesa burglary during his search of Harris' apartment, Officer Compomizzo testified that he was not sure, but he noted that no firearms were found at Harris's apartment. (RT 2455.) In police report #97-2754, Officer Compomizzo acknowledged receiving the stolen firearms from the Alta Mesa burglary on 1/31/97 from Officer Clemens, and both officers itemized, photographed the firearms and logged them as evidence in the Kohn murder. (Exh. L, p. 1.) In the report, Officer Compomizzo also noted that he and Officer Clemens both believed

the recovered firearms from Alta Mesa were connected to the Kohn murder through Harris. (Exh. L, p. 1.) Officer Compomizzo testified that his job was to see that the relevant evidence was tested after being collected as part of his effort of determining how the crime occurred. (RT 1578, 1596-1597.) Officer Compomizzo testified that Officer Clemens was the lead investigator and case agent in charge of evidence collection and processing for the case. (RT 1653.)

Officer Campbell testified as to his role in the 2004 cold case investigation. In his testimony, he did not acknowledge any connection to the 2/11/97 interview of Harris. His name and badge number are included in the footer of the transcript of the interview. (See Exh. T.) At trial, Officer Campbell testified repeatedly that he "ruled out" Harris as a suspect because Officer Clemens ruled him out as a suspect in 1997. (RT 2342, 2354, 2417.) During examination, Officer Campbell testified that Helana had told him that Kohn owed Petitioner money, that Petitioner was supplying marijuana to Kohn, and that Petitioner had beaten Kohn with a gun. (RT 2370, 2420, 2424.) Officer Campbell also testified that it appeared that Helana recognized the pieces of broken black plastic, and that she pointed to where the pieces of the gun were from. (RT 2338, 2426.) In her original statement, Helana did not recognize or remember a "broken" gun, she stated

that she did not recognize Kohn, had never heard of Kohn or Harris when she described in vague terms that she believed that someone had been murdered at some point in time, somewhere in Shasta County. (See Exh. F.) At the evidentiary hearing, Helana testified that prior to her interview with Officer Campbell she was shown a photograph of black pieces of plastic with blood and pieces of human scalp attached. (Exh. B, p. 74.) During the interview, Officer Campbell showed Helana a photograph of cleaned pieces of the black plastic, and she became emotional when she saw the pieces of plastic. She did not indicate that she recognized them in relation to Petitioner or any firearm that he may have owned. (See Exh. F.)

All three officers were aware of the initial interview of Debbie Harris[12], John Harris' wife. She was initially interviewed during the search of the Harris residence on February 5, 1997. (See Exh. HH.) Officer Campbell subsequently interviewed her, at her request, when she called to report information in response to the 2004 posters offering a reward. (See Exh. GG.) Through these interviews, the officers discovered that:

> • Debbie Harris knew that John Harris had borrowed her brother's yellow Chevy truck to go out to Kohn's place on the night of the murder, because she helped get it for him. (Exh. HH, at pp.

[12] John Harris' wife, Debbie Harris, is also known as Deborah Butler. Officer Campbell interviewed her as Deborah Butler in the first recorded interview of the cold case investigation, in 2004. (See Exh. GG.)

13, 15-17; see also Exh. GG, at p. 8.) Originally, Harris was denied access to the truck, but Debbie Harris made a call from work to get him access. (Exh. HH, at pp. 13, 15.) She knew that he planned to go to Kohn's, to find the money.

- Debbie Harris described John Harris as "extremely violent," "crack addicted" and capable of anything at the time of the murder. (Exh. HH, at p. 50, 52; Exh. GG, at p. 9.) She explained that he had been acting especially "evil" around the time of the murder. (Exh. HH, at pp. 8-9.) He was frothing at the mouth and pacing, "like a lion," when talking about how he had failed to find Kohn's money during the first burglary. (Exh. GG, at p. 36.) He vowed that he would return and do whatever he needed to do in order to get the money. (Exh. GG, at p. 36.)
- Debbie Harris described a bloody white jacket that appeared in her house on the day of the murder, along with a group of men that she did not know. (Exh. HH, at p. 7; see also Exh. GG, at pp. 5-6, 25-26.) She further told officers that John Harris' white tennis shoes (size 9 ½) appeared to be missing after the day of the murder. (Exh. HH, at pp. 4-5.) He had just bought a new pair of boots, which Debbie Harris found odd, because he went barefoot most days. (Exh. HH at pp. 5.)
- Debbie Harris told officers that she knew that John Harris had burglarized Kohn's place twice. (Exh. GG, at pp. 27, 31, 33.) The second burglary occurred on the night of the murder, and she identified several new stolen items that appeared after the murder, including: a samurai sword, a clock, and some particular glass pipes. (Exh. GG, at pp. 27, 31, 33.) At the end of the interview in 2004, Debbie Harris described John Harris as a "drug lord," who had been caught "left and right. " (Exh. GG, at p. 36.)

B. The Prosecution Knowingly Presented False Testimony

Under the prosecution's direction, all three officers testified falsely as to critical facts related to John Harris' involvement in the underlying murder, the investigation undertaken by Shasta County Sheriff, as well as Helana's actual statement to law enforcement, and the prosecution did not endeavor to correct the false testimony at any time during the trial. (See Exhs. II, JJ, KK.) The false testimony which was used to wrongly convict Petitioner constitutes a violation of his due process rights.

The prosecution called Officer Clemens in their case in chief against Petitioner. Officer Clemens testified that he "ruled out" Harris as a suspect on February 5, 1997. (RT 1825, 2927-2928.) He further stated that there was no evidence, "nothing," connecting Harris to Kohn's murder. (RT 1826, 1829, 1836-1837, 2209.) Officer Clemens further testified that he never discovered any handguns in Harris' possession. (RT 2210.) However, throughout his testimony, Officer Clemens declared that he could not remember evidence from his police reports, investigation and photographs. He was defiant in his testimony, declaring that he could not remember at least 84 times during his testimony, and refused to even attempt to "refresh his recollection" with viewing past police reports or photographs.

Officer Clemens testified that, after conducting all of the interrogations of Harris, he could not remember Harris' arrest and the

circumstances surrounding it. (RT 2222.) In support of his decision to "rule out" Harris, Officer Clemens testified that Harris "was quite clear all the way through... that he did not commit the homicide." (RT 2930.) During his second time on the witness stand, Officer Clemens explained that he had created a law enforcement memo depicting two pieces of black plastic which were believed to have come from the murder weapon. (RT 2202-2204.) The confidential internal memo was intended to show other law enforcement the pieces to see if the officers recognized the pieces or a possible source. (RT 2202-2204.) Officer Clemens testified that Officer Compomizzo was the case agent in charge of collecting evidence from the murder scene. (RT 1831.)

In addition to the evidence in the record in 1997, Officer Clemens was aware of the evidence contained in the suppressed and undisclosed interrogations with Harris (during the lie detector test and post-test arrest interview) along with the interrogations of Taskeen Tyler and Nate Chatman, when he supposedly "ruled out" Harris. (See Exhs. II, JJ, KK.) Officer Clemens was the primary investigating Officer responsible for interviewing the witnesses and possible suspects. He interviewed Harris on several occasions, and he was present when Harris failed the lie detector test at the end of his interviews on February 5, 1997. He was present when the

Sheriff's Office took photos documenting the 5-day old scratches to Harris' face and neck, approximately 5 days after Kohn's murder. He was the primary Officer who interviewed Harris on February 11, 1997, when Harris attempted to implicate a third party named "Nick" in Kohn's murder, while revealing several facts that could only have been known by a person present at Kohn's murder. (See Exh. T.) Indeed, Officer Clemens listened as Harris told him that he needed to find Nick so that he could photograph the injuries that he likely sustained in the struggle with Kohn, that Nick had taken the cash from Kohn's place and that they "would not find blood" on his shoes. Further, Officer Clemens was the officer who received the guns from the Alta Mesa burglary and catalogued them with Officer Compomizzo as related to the Kohn murder through Harris' possession of the guns. Officer Clemens also was aware of the fact that Officer Compomizzo found two of the black pieces of plastic at Harris' apartment. (Exh. L.) His testimony that he created a confidential law enforcement memo depicting two pieces of black plastic because he was trying to find the source belies the facts as recorded by the Shasta County Sheriff's Office. Moreover, Officer Clemens' testimony that Harris was not a suspect, and there was no evidence implicating Harris is fundamentally false.

As the lead investigative officer, Officer Clemens was well aware of the significant direct, physical and circumstantial evidence which he himself collected which directly implicated Harris, including: interviews with Taskeen Tyler and Nate Chatman, Harris' own inculpatory statements during his interrogations and interviews, the fact that he failed a lie detector test with regard to questions related to Kohn's murder, the injuries to Harris' face and neck which fit the exact date of the Kohn's murder, the black pieces of plastic found at Harris' apartment which matched the source of the pieces of plastic found at the murder scene, and the receipt of the firearms stolen from Alta Mesa which had been in Harris' possession at the time of the murder. Officer Clemens' repeated testimony to the contrary that was false, and the prosecution knew or should have known that it was false.

Officer Compomizzo was also called in the prosecution's case in chief. Despite being the lead investigator in charge of evidence collection for Kohn's murder, Officer Compomizzo explained that he was not sure which crime he was investigating when the Sheriff's Office obtained the search warrant to search Harris' yellow truck and apartment. (RT 2455.) Officer Compomizzo's testimony belies his role in investigating Kohn's murder and the related search of Harris' apartment, as Officer Compomizzo's police reports all identified the search as directly related to

the Kohn murder investigation. (See Exh. L.) A quick review of any of his police reports related to the search of Harris' apartment would have "refreshed" his memory to this fact. Officer Compomizzo's testimony to the contrary is deceptive.

Officer Compomizzo's testimony regarding the black pieces of plastic believed to have been derived from the murder weapon was also false. In his original police report related to the murder and search of Harris' apartment, Officer Compomizzo identified and photographed pieces of black plastic at Harris' apartment which he took into evidence as identical to the pieces of black plastic found around Kohn's body, which together totaled 5 pieces of plastic. (Exh. L.) At trial, Officer Compomizzo testified that there were 4 pieces in total, and these pieces of plastic were all found at the murder scene, around the body of the victim. (RT 1595-1596, 1605, 1606-1607.)

On cross-examination, Officer Compomizzo identified several smoking pipes that were seized from Harris' apartment, and he explained that he did not remember if the pipes were identified as Kohn's because it was not part of the investigation. (RT 1673-1674.) Officer Compomizzo's testimony is false, as he was aware of the fact that Kohn's girlfriend, Nita Gibbens, identified a glass pipe that she had used the night of Kohn's

murder, and the pipe had been found in Harris' possession. (Exh. N.) The pipe was significant because it could not have been stolen during the Super Bowl burglary, and Kohn's girlfriend emphasized that if they found who had the pipe, the would find Kohn's murderer. Much as with the other false testimony, Officer Compomizzo's false testimony was intended to obfuscate the evidence implicating Harris in Kohn's murder.

In addition, Officer Compomizzo's testimony regarding the untested evidence and lack of forensic investigation which implicated Harris was deceptive, as Officer Compomizzo gave the impression that the items which were taken into evidence were unimportant and not tested because they were found irrelevant. This evidence included: Harris's shoes, the blood-like substance on the driver's side door of Harris's truck, the fresh cigarette found at the murder scene, the stolen firearms from the Alta Mesa burglary. Ultimately, Officer Compomizzo testified that Officer Clemens was the lead investigator and case agent in charge of evidence collection and processing for the case. (RT 1653.) Again, as noted above and in the *Brady* claim, Officer Compomizzo's testimony is false in that the evidence was not tested by Shasta County Sheriff as part of a purposeful decision to avoid forensic investigation of the case with respect to Harris.

At trial, Officer Campbell testified repeatedly that he "ruled out" Harris as a suspect because Officer Clemens ruled him out as a suspect in 1997. (RT 2342, 2354, 2417.) Officer Campbell's testimony regarding "ruling out" Harris is false based upon his personal knowledge of the 2/11/97 interview with Harris, and it is reflected in his repeated acknowledgement of Harris as the primary suspect in 2004. Officer Campbell interviewed Debra Butler (aka Harris) on 5/28/97, and acknowledged throughout the interview that there was significant evidence implicating Harris – even in 2004. Further, in his interview of Helana, Officer Campbell showed Helana photos of Harris, Harris' truck and two pieces of black plastic, all of which implicate Harris as the primary suspect in the murder. Helana did not recognize Harris or the other pieces of evidence which implicated Harris, nor did she remember the bloody clothes that Debra Butler mentioned during her interview with Campbell. Again, Officer Campbell's repeated acknowledgment of the relevance of Harris and evidence implicating Harris in 2004 fundamentally contradicts his testimony at trial and evidence in the record, as it proves that Harris was never actually "ruled out" by any exculpatory evidence. Moreover, Officer Campbell's false testimony regarding Harris mirrors the false testimony by Officers Clemens and Compomizzo to the extent that Officer Campbell's false

testimony created a narrative intended to undercut Petitioner's third party culpability claim focused on Harris.

In addition, Officer Campbell testified falsely with respect to Helana in several important respects. First, Officer Campbell falsely testified that Helana had told him that Kohn owed Petitioner money, that Petitioner was supplying marijuana to Kohn, and that Petitioner had beaten Kohn with a gun. (RT 2370, 2420, 2424.) As acknowledged by Helana in her 2019 testimony and made clear throughout her testimony from the DA's type-written notes: 1) Helana had no clear memory of any aspect of her testimony; 2) she did not know Kohn or even his name; 3) she did not recognize Harris by name or photo; and 4) she questioned the reality of her statement to law enforcement even as she testified. **(**See Exh. B at 68-79; RT 1994-1995, 1979, 2033, 2035, 2060, 2102-2103.**)** Officer Campbell also falsely testified that it appeared that Helana recognized the pieces of broken black plastic, and that she pointed to where the pieces of the gun were from. (RT 2338, 2426.) Officer Campbell was aware of the origin of the black pieces of plastic pictured in the photo, and he knew that Helana did not "recognize" them in relation to any independent memory of the Kohn murder. Again, even in Helana's manipulated statement and testimony she did not recognize or remember any "broken" gun. Officer Campbell's false

testimony was intended to embellish or replace Helana's actual statement and testimony with the narrative that implicated Petitioner. (See Exh. F.)

V. THIS COURT SHOULD AUTHORIZE REVIEW OF MARTINEZ'S NEWLY-DISCOVERED CLAIMS UNDER 28 U.S.C. § 2244(B)

"28 U.S.C. §§ 2244(b)(1)-(3), impose[s] three requirements on second or successive habeas petitions: First, any claim that has already been adjudicated in a previous petition must be dismissed. §2244(b)(1)." *Gonzalez v. Crosby*, 545 U.S. 524, 529-530 (2005). None of Martinez's proposed claims were presented in his prior federal habeas petition, so none of the claims are barred by this provision.

Second, where a claim "was not presented in a prior application," the movant must show that "(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense." 28 U.S.C. § 2244(b)(2)(B)(i)-(ii).

Third, this Court, acting in a "gatekeeping" function, must determine whether a petitioner has made a *prima facie* showing that his application

satisfies the requirements of section 2244(b). 28 U.S.C. § 2244(b)(3)(C). A "*prima facie*" showing is "simply a sufficient showing of possible merit to warrant a fuller exploration by the district court." *Woratzeck v. Stewart*, 118 F.3d 648, 650 (9th Cir. 1997).

The applicant's allegations are to be accepted as true, "unless [they] are fanciful or otherwise demonstrably implausible." *Quezada v. Smith*, 624 F.3d 514, 521 (2d Cir. 2010). If the applicant makes a *prima facie* showing as to one of the claims, he may proceed in the district court on his entire successive habeas petition. *Woratzeck*, 118 F.3d at 650.

A. A Prima Facie Case Exists that the Newly Discovered DNA Evidence that Excludes Martinez as a Contributor Satisfies § 2244(b)

In *Herrera v. Collins*, 506 U.S. 390, 398-399 (1993), the U.S. Supreme Court relied upon an Eighth Amendment analysis, finding that "constitutional provisions [] have the effect of ensuring against the risk of convicting an innocent person." Since *Herrera* was decided 30 years ago, the country has come to realize the fallibility of our criminal justice system. Indeed, 30 years ago DNA investigation and analysis was in its rudimentary stage. Today, DNA evidence has been instrumental in exonerating 375

wrongfully convicted men and women – 21 of whom were on death row.[13] In response to the public awareness of wrongful convictions, all 50 states now have enacted post-conviction DNA testing statutes.

Martinez discovered the exculpatory DNA evidence in the present case using California's statutory provisions for post-conviction DNA testing as set forth under Penal Code section 1405. Martinez successfully filed three separate requests for DNA testing through pro se motions.

i. The Factual Predicate Became Discoverable in late 2016[14]

The exculpatory DNA evidence discovered by Martinez could not have been prior to trial or the filing of his initial federal habeas petition, because the factual predicate was not discoverable prior to the return of the Department of Justice reports and tests of the evidence, which were not finalized until September 2016. (See Exh. J.)

Here, Petitioner sought DNA testing since he was charged in the underlying case, in 2004. Over the course of years following his conviction, Petitioner moved *pro se* for testing of all available evidence from the crime scene maintained by Shasta County Sheriff. The testing took over ten years

[13] See Innocence Project, *DNA Exonerations in the United States* (last updated April 20, 2022), https://innocenceproject.org/dna-exonerations-in-the-united-states/.
[14] The last DOJ report on DNA investigation was issued in September 2016. (See Exh. J.)

to complete, due to no fault of Petitioner. (See Exh. J.) It is clear based on the facts of this case that the DNA evidence could not have been discovered prior to trial by the exercise of due diligence, and Petitioner presented the evidence within a reasonable period of time after the evidence was available.

ii. The Fact of the Exculpatory DNA Evidence Clearly and Convincingly Shows Martinez Would Not have been Convicted

In the present case, Shasta County Sheriff employed their practice of failing to conduct basic forensic investigation just as in *Brewster*. Here, as in *Brewster*, the sheriff did not investigate DNA evidence from the scene of the murder as part of its initial investigation and cold case investigation despite the availability of both the evidence and technology. Much as in *Brewster,* the DNA evidence is not merely collateral, as it goes to the heart of the issue in this case – identifying the murderer.

The exculpatory DNA evidence excluding Petitioner as a potential contributor to the evidence collected from the crime scene, cannot be considered merely collateral because it strongly suggests that Petitioner was not present at the victim's apartment when he was murdered. There evidence of the murder suggests that Kohn was violently murdered during an altercation with a known attacker. In this context, the fact that Petitioner is excluded as a contributor is significant because there is no evidence to

suggest that he knew or had contact any prior contact with Kohn. Further, because the crime was extremely violent and the crime scene was not cleaned prior to the collection of evidence, the absence of Petitioner's DNA at the scene strongly suggests that he was not present. Moreover, the fact that other suspects cannot be excluded as possible DNA contributors is corroborative. This evidence must be considered in the context of its overall value as exculpatory evidence which affirmatively excludes Petitioner from all of the evidence collected by the Shasta County Sheriff.

The exculpatory DNA evidence is particularly strong evidence of Petitioner's actual innocence in light of the bloody crime scene that was left in haste, with bloody palm prints and fingerprints left behind. Initially, the sheriff's failure to conduct minimal DNA investigation as part of the basic review of the evidence in the case is remarkable. Given both the availability of evidence maintained by the sheriff, including the fingernail clippings of the victim, and the availability of technology, the failure is stark. DNA expert, Jessica Bickham, noted that the technology was available as of 1997, so there is no reasonable explanation for the failure to conduct basic DNA testing where the evidence presented itself. Had the sheriff requested that the DOJ conduct testing of the available DNA evidence and compared the evidence to all suspects, the findings would have proven decisive in

Petitioner's favor. The evidence would have excluded him as a possible DNA contributor to a bloody crime scene. Moreover, the evidence would have been further exculpatory because the DNA results cannot exclude at least two alternate suspects as potential DNA contributors. Again, given the very weak case against Petitioner, the DNA evidence excluding Petitioner as a contributor to the murder scene constitutes strong and decisive evidence that would have more likely than not changed the outcome at trial.

B. A Prima Facie Case Exists that the Newly Discovered Evidence Suggesting that the Testimony of the State's Sole Witness Against Martinez was False Satisfies § 2244(b)

i. The Factual Predicate Became Discoverable in 2019

Martinez could not have reasonably discovered the facts supporting the finding that Helana's trial testimony constituted false evidence before the psychological experts provided analysis in 2019 and Helana provided her own testimony. Further, investigation of the supporting facts related to this claim required analysis by Helana's therapist (given her mental state) and an expert in the field of forensic psychology. This evidence could not have reasonably been discovered until: present counsel received discovery of the video recording of Helana's interview with Officer Campbell in 2018; present counsel obtained access to Helana in 2018-2019; present counsel secured the court appointments of Helana's therapist and the forensic

psychologist, Deborah Davis, Ph.D. Martinez presented this evidence through an evidentiary hearing in the Shasta County Superior Court, in June 2019. Accordingly, this claim has been presented in federal court with due diligence, as the factual predicate was not discoverable prior to 2019.

ii. The False Evidence Claim Clearly and Convincingly Shows Martinez Would Not Have Been Convicted Had The False Evidence Been Excluded

Martinez presents new evidence that Helana's testimony specifically identifying the suspected murder weapon as Martinez's gun, which was the product of unduly suggestive tactics by Shasta County, constitutes false evidence. As Helana testified at the 2019 evidentiary hearing, she no longer believes that her testimony represents her actual memories. Her own testimony and feeling that her testimony is the result of "false memories" is corroborated by the new evidence presented through psychological experts – forensic psychologist, Deborah Davis and licensed therapist, Keith Manner. Based upon these assertions, Martinez asserts that Helana's testimony at trial constitutes false evidence. This false evidence constituted the only evidence implicating Martinez in the murder. Accordingly, had Helana's false evidence been excluded from trial, no reasonable factfinder would have found him guilty.

Based upon their analysis of Helana's mental disability, the video evidence of Helana's interview with Officer Campbell, and Helana's statements, both concluded that Helana's testimony at trial with regard to both identifying the murder weapon as Petitioner's gun and identifying the location of the murder were the product of direct suggestion from the investigating officer and were not her own memories. As the product of "false memories," Helana's testimony at Martinez's trial constitutes false evidence.

The evidence of supporting a finding that Helana's trial testimony constitutes false evidence is particularly strong in light of the fact that her testimony was the only evidence implicating Petitioner in the murder in an exceptionally weak case, where there was incredibly strong, unanswered evidence of third party culpability. Here, Helana's unreliable hearsay testimony at trial was contradictory and confused. She offered no direct eyewitness evidence of Petitioner's connection to Kohn's murder other than her identification of the gun.

Most of the other circumstantial evidence that Helana's testimony established was actually counter to the known evidence surrounding the murder. First, Helena testified that Petitioner had "stalked" the individual and assaulted him by surprise. This evidence does not fit with the reports

from Kohn's neighbors that the murder suspect "partied" with Kohn for hours before assaulting him. Second, the DNA evidence excludes Martinez as a contributor to the parts of the suspected murder weapon found at the scene. Third, Helana's description of the location of the assault does not comport with the physical appearance and geographic location of Mt. Gate as it appeared at the time of the murder.

Additionally, there was no physical evidence connecting petitioner to the murder, and ample evidence of third party culpability. As noted above, there remains considerable evidence implicating third party, John Harris, as the responsible party in the murder. In this context, the claim that Helana's testimony was false evidence that should have been excluded, constitutes undeniable evidence of Petitioner's innocence. Furthermore, no reasonable factfinder would have found Martinez guilty had Helana's false testimony identifying the gun not been admitted at trial.

C. A Prima Facie Case Exists That The *Brady* Claims Satisfy § 2244(b)

1. The *Brady* Claims Should Not Be Subject to § 2244(b)

"[N]ot all second-in-time petitions are 'second or successive.'" *In re Wogenstahl*, 902 F.3d 621, 627 (6th Cir. 2018). Instead, "[t]he phrase 'second or successive petition' is a term of art," *Slack v. McDaniel*, 529 U.S. 473, 486 (2000), and the supreme court "has declined to interpret 'second or

successive' as referring to all [] applications filed second or successively in time, even when the later filings address a state court judgment already challenged in a prior [] application." *Panetti v. Quarterman*, 551 U.S. 930, 944 (2007). To determine whether a second-in-time petition constitutes a "second or successive" petition, this Court relies on the abuse-of-the-writ doctrine. See *Stewart v. Martinez-Villareal*, 523 U.S. 637, 645 (1998).

"The doctrine of abuse of the writ defines the circumstances in which federal courts decline to entertain a claim presented for the first time in a second or subsequent petition for a writ of habeas corpus." *McCleskey v. Zant*, 499 U.S. 467, 470 (1991). A numerically second petition is "second" when it raises a claim that could have been raised in the first petition but was not, due to abandonment or neglect. *Id*. at 489. An application is not second or successive if it presents a claim that would have been unripe if it had been presented in an earlier application. *Panetti*, 551 U.S. at 945.

Martinez can make a *prima facie* case that the *Brady/Napue* claims' "factual predicate[s].... could not have been discovered previously through the exercise of due diligence." 28 U.S.C. § 2244(b)(2)(B)(i). The factual predicates that the state failed to disclose include: 1) all of the recorded interviews with the original suspect John Harris (Exh. II) ; 2) the recorded interrogations of Taskeen Tyler and Nate Chatman (Exhs. JJ, KK) ; and, 3) the admitted unconstitutional practices and procedures of the Shasta County Sheriff's Department as set forth in the *Brewster* federal civil rights case.

Martinez acknowledges that this Court has held that a *Brady* claim constitutes a "successive petition" because the factual predicate of the claim- the unlawful withholding of evidence- occurred before the petitioner files his first habeas petition. *Brown v. Muniz*, 889 F.3d 661, 674 (9th Cir. 2018); see also *Gage v. Chappell,* 793 F.3d 1159, 1165 (9th Cir. 2015). Martinez acknowledges the precedent and urges the Court to reconsider in light of the U.S. Supreme Court's recent Memorandum.

The U.S. Supreme Court recently found that this understanding of the writ doctrine is "illogical." Indeed, in a memorandum, the U.S. Supreme Court found that it is illogical to hold that the abuse of the writ doctrine is abused when a petitioner seeks vindication for a previously unknown *Brady* violation. *Storey v. Lumpkin*, 142 S.Ct. 2576, 2578 (2022) (mem)

(Sotomayor, J.). Rather, "[w]here a prisoner can show that the state purposefully withheld exculpatory evidence, that prisoner should not be forced to bear the burden of section 2244, which is meant to protect against the prisoner himself withholding such information or intentionally prolonging the litigation." *Workman v. Bell,* 227 F.3d 331, 335 (6th Cir. 2000) (en banc) (Merritt, J., dissenting). In fact, *Brady* claims seem to fall perfectly within the realm of claims that should not be considered "second or successive."

Petitioner notes that several circuits have second-guessed the inclusion of *Brady* claims within the realm of claims that are considered "second or successive." See, e.g., *Scott v. United States*, 890 F.3d 1239, 1243 (11th Cir. 2018) ("though we have great respect for our colleagues, we think *Tompkins* got it wrong: Tompkins's rule eliminates the sole fair opportunity for these petitioners to obtain relief."); *Gage v. Chappell,* 793 F.3d at 1165 ("we acknowledge that Gage's argument for exempting his *Brady* claim from the § 2244(b)(2) requirements has some merit.... But as a three- judge panel, we are bound to follow [Circuit precedent]."); *Long v. Hooks*, 972 F.3d 442, 487 (4th Cir. 2020) (Wynn, J., concurring) (expressing doubt that *Brady* claims should be subjected to § 2244(b)'s gatekeeping

mechanism, but ultimately following circuit precedent that held § 2244(b) applies).

Unfortunately, as ill-guided as *Brown v. Muniz* may seem, it remains the law of Ninth Circuit, so this Court must hold that Martinez's petition alleging *Brady* violations is "second or successive." Accordingly, Martinez sets forth below evidence that he could not have discovered the exculpatory evidence through due diligence, and that this evidence establishes clear and convincing evidence of his innocence such that no reasonable factfinder would have found him guilty.

2. Martinez's *Brady* Claims Satisfy the § 2244(b) Standards

As to the due diligence prong, 28 U.S.C. § 2244(b)(2)(b)(i), it is well established under U.S. Supreme court precedent, that the state is responsible for ultimately providing any exculpatory evidence to the charged defendant. Indeed, "[w]hen police or prosecutors conceal significant exculpatory or impeaching material . . . It is ordinarily incumbent on the state to set the record straight." *Banks v. Dretke,* 540 U.S. 668, 675-76 (2004).

a. The State Concealed Third Party Culpability and Impeachment Evidence

Here, both Martinez and his co-defendant, Michael Johnson, repeatedly requested the discovery of evidence related to John Harris as part

of a third party culpability defense. The court considered the third party culpability defense all the way through the trial. (See RT 2411.) Indeed, it was during the trial that the prosecution "re-sent" the purported swabs that were taken from the blood-like hand prints on the Harris' truck, taken by Officer Compomizzo on February 5, 1997 and sent to the Department of Justice for testing (but never tested) on February 6, 1997. (Exh. X.) The prosecution presented to the court mid-trial in 2006, a report from DOJ that the swabs were finally tested and found not be blood. (Exh. X.) The court then excluded reference of this discovery as part of any third party culpability defense.

At the same time, the prosecution presented the testimony of Officer Clemens who repeatedly and summarily testified that he had "ruled out" Harris as a suspect in the murder. (RT 1825, 1826, 1836-1837, 2209, 2927-2928.) As part of his testimony, Officer Clemens repeatedly testified approximately 84 times that he "did not remember" facts related to the initial investigation (he was the investigating officer). (See RT 1825-1837, 2202-2222.)

During the post-Order to Show Cause discovery in this case, during 2018- 2019, the prosecution provided audio recordings (on cassette tapes), video files (on VHS tapes) and transcripts related to the 1997 investigation

of John Harris. (Exh. LL.) Some of this evidence was presented to the court on the last day of trial, through Officer Campbell, as evidence supporting the claim that Harris had been "ruled out," and in support of the prosecution's opposition to the third party culpability defense focused on Harris. (See RT 2411; see also Trial Exhs. V- V(h).) The transcripts included an initial interview with Harris on February 5, 1997 (133 pgs.) and a subsequent interview, initiated by Harris, on February 11, 1997 (8 pgs.). (See Trial Exh. V.) This evidence was presented to the defense and the court as the complete set of interviews conducted with Harris. However, the tapes and transcripts that were affirmatively presented by the prosecution, and introduced into evidence as trial exhibits, did not include two critical interviews of Harris, conducted on February 5, 1997 – the interview conducted during the lie detector test and the interview conducted by Officer McDannold following the lie detector test. (Exh. II) Nor did the prosecution provide the court or the defense with the tapes or transcripts of Taskeen Tyler or Nate Chatman, conducted on February 6, 1997.[15] (Exhs. JJ, KK.)

[15] There were no requests in the record from the defense or the Court for the transcripts or recordings of the interviews with Taskeen Tyler and Nate Chatman, conducted the day after Harris' arrest. (See Exhs. JJ, KK.) These interviews are not presented as *Brady* evidence, but as corroborating

The two suppressed interviews of Harris were never acknowledged by the prosecution, thus the defense was not on notice as to their existence or the state's suppression. Moreover, the prosecution affirmatively represented to the defense and the court that the two transcribed interviews and the cassette tapes constituted the entirety of the interviews with Harris. The prosecution's affirmative misrepresentations justified Martinez in "assum[ing] . . . That the evidence d[id] not exist." *United States v. Bagley*, 473 U.S. 667, 682-83 (1985).

i. The Factual Predicate Became Discoverable in 2019

Here, the factual predicate of the claim did not become reasonably discoverable until the date that the withheld information was revealed, therefore Martinez has exercised reasonable diligence. *Gage*, 793 F.3d at 1165; *Quezada v. Scribner*, 611 F.3d 1165, 1168 (9th Cir. 2010).[16] As noted

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evidence to the *Brady* evidence as set forth in the transcripts of the two suppressed Harris interviews.

[16] Though an inquiry into timeliness is not appropriate at the motion for authorization stage, see, e.g., *In re McDonald*, 514 F.3d 539, 542-44 (6th Cir. 2008), Martinez has made at least a *prima facie* case that his claims are timely because the claims were filed within a year of when he could have discovered its factual predicate with reasonable diligence (i.e. May 2019), 28 U.S.C. § 2244(d)(1)(D), and he is entitled to statutory tolling for the time that his state petitions were pending. 28 U.S.C. § 2244(d)(2). Martinez has also made a *prima facie* showing that his state court petition is properly filed because the Court of Appeal issued an order to show cause and ordered an evidentiary hearing on Martinez's claims, indicating he had made "a *prima facie* showing [under state law] that he . . . is entitled to relief." Cal. Rule of

above, the two suppressed interviews of Harris were affirmatively suppressed by the prosecution during Martinez's trial. He had no way of knowing that the recordings of the two Harris interviews were in the state's possession. More importantly, Martinez had no legal means of obtaining post-conviction discovery until the Court of Appeal issued an Order to Show Cause for his Petition for Writ of Habeas Corpus, on October 26, 2017. Petitioner filed a Motion for Discovery, primarily requesting evidence related to the initial suspect, John Harris. The motion was granted on or about March 23, 2018, and the prosecution provided evidence throughout 2018 and early 2019. As part of the discovery, the prosecution provided audio cassettes, VHS videos and transcripts of interviews with some witnesses directly connected to John Harris. Accordingly, the factual predicate for the *Brady* violation did not become discoverable until 2019.

ii. The Evidence Underlying the *Brady* Claim Clearly and Convincingly Shows Martinez Would Not have been Convicted

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Court 4.551(c), (f). Even assuming the claims would not be timely under 28 U.S.C. § 2244(d), Martinez qualifies for the "miscarriage of justice" exception to the timeliness requirement under *McQuiggin v. Perkins,* 133 S. Ct. 1924, 1928, 1931 (2013) because the record shows he is actually innocent. The innocence showing required under Perkins is less demanding than the "clear and convincing" showing required under § 2244(b)(2)(B)(ii) which, as explained below, Martinez satisfies. *Gage,* 793 F.3d at 1168-69.

The facts of this *Brady* claim establish by clear and convincing evidence that, but for the constitutional violation, no reasonable factfinder would have convicted him. 28 U.S.C § 2244(b)(2)(B)(ii). "When . . . prosecutors conceal significant exculpatory or impeaching material in the State's possession, it is ordinarily incumbent on the State to set the record straight." *Banks,* 540 U.S. at 675-76. "The *Brady* rule is based on the requirement of due process. Its purpose is . . . to ensure that a miscarriage of justice does not occur." *Bagley,* 473 U.S. at 675. "Indeed, the Court has repeatedly emphasized the fundamental importance of th[is] federal right." *Murray v. Carrier*, 477 U.S. 478, 499 (1986) (citing *Brady*, 373 U.S. at 87). In the present case, the suppressed evidence of the voice stress test interview with Harris and the subsequent interview which resulted in his arrest by Officer McDannold served to deprive Martinez with due process and resulted in a miscarriage of justice. (See Exh. II.)

The interviews of Harris during his lie detector test and following the test would have provided the defense with valuable impeachment evidence against Officer Clemens who claimed repeatedly that Harris was "ruled out" as a suspect during his interview. (See Exh. II.) In addition to its impeachment value, the interviews would have provided Martinez with a strong third party culpability defense. In the interviews, Harris admitted that

he had property from Kohn's apartment that he had obtained after the initial burglary, he had no alibi for the time of the murder, and he denied having any recent physical injuries right before he was arrested and photographed with scratches to his face and neck that were approximately 5-6 days old.

Indeed, at the end of the interrogation, the officers arrested Harris, telling him, "Seems to me like we got a little house up in Mountain Gate that you went up and went into on Super Bowl Sunday. And the guy that owns that house is dead. That's what we're going to book you for." (Exh. II, at p. 29.) The suppression of this evidence deprived Martinez of the opportunity impeach the testimony of Officers Clemens, Compomizzo and Campbell, regarding their investigations or lack of investigation of Harris, and, more importantly, the suppression prevented Martinez from presenting the evidence in the interviews (including the interviews of Taskeen Tyler and Nate Chatman) as a compelling third party culpability defense focused on Harris. Given the significant amount of evidence implicating Harris in the murder and the complete lack of evidence implicating Martinez, had the jury heard the evidence of the lie detector test and post-test interviews of Harris, the evidence would have constituted clear and convincing evidence of Martinez's innocence.

b. The State Concealed The Prior Police Misconduct

i. The Factual Predicate Became Discoverable in 2019

Here, the factual predicate of the claim did not become reasonably discoverable until the date that the withheld information was revealed, therefore Martinez has exercised reasonable diligence. *Gage,* 793 F.3d at 1165; *Quezada v. Scribner,* 611 F.3d 1165, 1168 (9th Cir. 2010). As noted above, the two suppressed interviews of Harris were affirmatively suppressed by the prosecution during Martinez's trial. He had no way of knowing that the recordings of the two Harris interviews were in the state's possession. More importantly, Martinez had no legal means of obtaining post-conviction discovery until the Court of Appeal issued an Order to Show Cause for his Petition for Writ of Habeas Corpus, on October 26, 2017. Petitioner filed a Motion for Discovery, primarily requesting evidence related to the initial suspect, John Harris. The motion was granted on or about March 23, 2018, and the prosecution provided evidence throughout 2018 and early 2019.

Present counsel tried to obtain the filed exhibits and depositions cited the Court's Order in the *Brewster* case at the federal district court. However, many of the documents from the case had been destroyed by the court when

Justice Karlton passed away[17], as the filed exhibits remained in Justice Karlton's chambers after Shasta County settled with Brewster on his claims for violations of his constitutional rights. (Exh. LL.) After requests to both law offices that represented Brewster in federal district court on his civil rights claims, present counsel was able to obtain access to some additional portions of the record in the case. On June 11, 2020, Rolland Papendick provided documents from the *Brewster* case, including some of the deposition transcripts. (Exh. LL.) Accordingly, the factual predicate of this claim was not discoverable until approximately 2019, when the pattern or practice of the Shasta County Sheriff, as acknowledged in *Brewster*, became apparent in this case.

ii. The Facts Underlying the *Brady* Claim Clearly and Convincingly Show Martinez Would Not have been Convicted

"To find prejudice under *Brady* and *Giglio*, it isn't necessary to find that the jury would have come out differently. (Citation.) Prejudice exists "when the government's evidentiary suppression undermines the confidence in the outcome of the trial. (Citation.)" *Milke*, 711 F.3d at 1018. In *Milke*, the court found that the suppression of the lead investigator's past

[17] Justice Karlton passed away on July 11, 2015. (See https://www.latimes.com/local/obituaries/la-me-controversial-judge-lawrence-karlton-dies-20150714-story.html.)

misconduct was prejudicial because the officer's testimony was the only evidence linking Milke to the murder, thus his credibility was critical.

In the present case, just as in *Milke*, there was no physical or circumstantial evidence linking Petitioner to the murder and the suppressed past pattern of practice law enforcement misconduct was directly relevant to Petitioner's case. The unconstitutional policies and practices employed by Shasta County Sheriff's Office in the prior suppressed case mirror the conduct in Petitioner's case.

Here, as in *Brewster*, the cold case prosecution of Petitioner hinged upon a single witness, Helana Martinez. Unlike the witness in *Brewster*, Helana was not an eyewitness and had no first-hand knowledge of the victim or murder itself. Further, as in *Brewster*, there were many irregularities with the sheriff's handling of the State's primary witness. Officer Campbell personally drove Helana to and from the station to her interview and had unrecorded conversations with Helana regarding Petitioner, falsely told her that Petitioner had committed other crimes and had been running a prostitution ring. (Exh. B, pp. 74-75.) Also, as in *Brewster*, the sheriff showed Helana photos as prompts and suggestion, including the following photos: the suspected firearm used in the assault, pieces of the murder weapon, a photo of John Harris with scratches to his face and neck and the

truck that Harris drove on the night of the murder, a photo of Mt. Gate apartments where Kohn was murdered, and a photo from the crime scene depicting the pieces of the gun, found covered with blood and hair. (Exh. D, p.74; Exh. H.) Also, as in *Brewster*, the sheriffs gave Helana the false impression that there was additional physical evidence linking Petitioner to the murder, and her testimony merely corroborated the physical evidence implicating Petitioner, including the suggestion that there were "bloody clothes" discovered after the murder which implicate Petitioner.[18] (Exh. D, pp. 74-75.)

In addition, in the present case, just as in *Brewster*, the Shasta County Sheriff failed to conduct basic forensic investigation of the physical evidence collected from the crime scene and Harris' apartment which were maintained by the Shasta County Sheriff. As in *Brewster*, there was potentially exculpatory evidence which implicated a third party which was never investigated, such as the swabs of blood-like substance (sent to DOJ, but never "tested" while at DOJ lab in 1997), black pieces of plastic which matched the murder weapon found at Harris' apartment never tested for DNA, Harris' shoes which were specifically taken into evidence from his

[18] Officer Campbell's reference to "bloody clothes" found after the murder is a direct reference to Debra Butler's (aka Harris) statement that she found a bloody white jacket the day of the murder. (See Exh. I.)

apartment during the murder investigation (presumably taken into evidence because the crime scene reflected evidence that the perpetrator walked through the blood on the floor), "fresh" cigarette taken into evidence from the murder scene (Harris was a known smoker and the victim did not smoke cigarettes), and the firearms received by Officer Clemens and identified as connected to the murder and inventoried by Officer Compomizzo, but never put into evidence or tested for DNA or trace blood. Further, as in *Brewster,* the sheriff did not investigate DNA evidence collected from the scene of the murder as part of its original investigation or cold case investigation, despite the availability of both the evidence and the technology. (Exhs. D, pp. 197-231, AA and BB.)

Ultimately, the direct witness manipulation and lack of DNA investigation in both cases deprived both Brewster and Petitioner of exculpatory evidence and further deprived the state of physical evidence implicating the actual individuals who committed the murders. The State's suppression of the Shasta County Sheriff's past pattern or policies of misconduct and constitutional violations in both cases undoubtedly prejudiced the defendants as "the government's evidentiary suppression undermine[d] the confidence in the outcome of the trial. (Citation.)" *Milke, supra*, 711 F.3d at 1018. Here, had the jury heard the facts underlying the

Shasta County Sheriff's Department practice and policies of manipulating witnesses, failing to conduct basic forensic investigation and suppressing evidence related to initial suspects, a reasonable jury would not have convicted Petitioner.

D. A *Prima Facie* Case Exists That The *Brady/Napue* Claim Satisfies § 2244(b)

i. The Factual Predicate Became Discoverable in 2019

Here, the factual predicate of the claim did not become reasonably discoverable until the date that the withheld information was revealed, therefore Martinez has exercised reasonable diligence. *Gage*, 793 F.3d at 1165; *Quezada v. Scribner*, 611 F.3d 1165, 1168 (9th Cir. 2010). As noted above, the two suppressed interviews of Harris were affirmatively suppressed by the prosecution during Martinez's trial. He had no way of knowing that the recordings of the two Harris interviews were in the state's possession. More importantly, Martinez had no legal means of obtaining post-conviction discovery until the Court of Appeal issued an Order to Show Cause for his Petition for Writ of Habeas Corpus, on October 26, 2017. Petitioner filed a Motion for Discovery, primarily requesting evidence related to the initial suspect, John Harris. The motion was granted on or about March 23, 2018, and the prosecution provided evidence throughout 2018 and early 2019. Accordingly, Martinez had no means of discovering

the factual predicate until he obtained post-order to show cause discovery in 2018-2019.

ii. The Facts Underlying the *Brady/Napue* Claim Clearly and Convincingly Show Martinez Would Not have been Convicted

In this case, whether relief is warranted hinges upon the definition of "materiality" under *Napue* and *Brady*. It is well-established that a *Napue* violation is "material" and results in the reversal of a conviction "if the false testimony could in any reasonable likelihood have affected the judgment of the jury." *Dow v. Virga*, 729 F.3d 1041, 1047 (9th Cir. 2013) (citing *Napue*, *supra*, 360 U.S. at p. 271; and *Giglio v. United States* (1972) 405 U.S. 150, 153.

Ultimately, the false testimony of Officers Clemens, Campbell and Compomizzo directly contributed to Petitioner's conviction. Their false testimony served to strengthen the very weak and unreliable testimony of Helana by attributing statements to her through their own testimony, while undercutting the real and damning evidence implicating Harris as the culpable party responsible for Kohn's murder. Indeed, their testimony served to deprive Petitioner of a third party culpability defense. The undeniable impact of the false testimony is apparent in the Court of Appeal's rendition of the facts of this case. In addressing Harris, the court noted

"[t]he police found no evidence linking Harris to the killing of Kohn and ruled him out as a suspect."

The false testimony impacted the fairness of Petitioner's trial, and now casts extreme, grave doubt on whether the verdict can be viewed as "worthy of confidence" given the evidence presented to this Court. To assess the materiality of this error, the Court need look no further than the direct impact of the false testimony. This is not a case where the false testimony could have had any other impact than to contribute to the wrongful conviction of Petitioner. The prejudice is undeniable. Absent the false testimony of the officers in this case, the jury would not have convicted Petitioner.

VI. CONCLUSION

Because a *prima facie* case exists that at least one claim satisfies § 2244(b), this Court should authorize the filing of Martinez's second federal petition.

Date: February 21, 2023

Respectfully Submitted,

/s/ Jennifer M. Sheetz
Jennifer M. Sheetz (SBN 233375)

Attorney for Defendant/Appellant
DEREK MARTINEZ

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BRIEF FORMAT CERTIFICATION IN EXCESS OF PAGE LIMIT PURSUANT TO CIRCUIT RULE 32-1

Pursuant to California Rule 32 (a)(7)(C), Federal Rules of Appellate Procedure 27(d)(2) and Ninth Circuit Rule 32-1. I hereby certify that this brief is in Times New Roman monospaced typeface, has 10.5 characters per inch and contains approximately , inclusive of footnotes. I further certify that the motion encompasses more than the twenty (20) page limit, and I have filed a Motion for Leave to File the Motion in Excess of the page limit, filed simultaneously with the present Motion.

Executed under penalty of perjury this 21st day of February, 2023, at Mill Valley, CA.

/s/ Jennifer M. Sheetz

Jennifer M. Sheetz

CERTIFICATE OF SERVICE

On February 21, 2023, I electronically filed Petitioner-Appellant's Amended Motion for Leave to File a Subsequent or Successive Habeas Petition, case number 22-858, with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate **ACMS** system.

I declare under penalty of perjury that the foregoing is true and correct. Executed on February 21, 2023, in Mill Valley, CA by

/s/Jennifer M. Sheetz

Jennifer M. Sheetz