IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re Derek Martinez

DEREK MARTINEZ, **Petitioner,** **v.** **SHAWN HATTON, et. al,** **Warden,** **PEOPLE OF THE STATE OF CALIFORNIA,** **Real Party in Interest.**	**No. _____** **Nos. 04F4728,16CRHB6278** **(COA No. C085284)**

VERIFIED PETITION FOR WRIT OF HABEAS CORPUS MEMORANDUM OF POINTS AND AUTHORITIES; SUPPORTING DECLARATIONS AND EXHIBITS

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TO THE HONORABLE JUDGE, TANI GORRE CANTIL-SAKAUYE PRESIDING JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Petitioner, Derek Martinez, by and through his counsel, respectfully petitions this court for a writ of habeas corpus and by this verified petition sets forth the following facts and causes for the issuance of said writ:

I.

Petitioner is presently restrained of his liberty in state custody based upon his conviction rendered by the Shasta County Superior Court in case numbered 04F4728, as Petitioner is currently in state custody for the present offense. (*In re Jones* (1962) 57 Cal.2d 860.)

II.

This petition is being filed in this Court pursuant to its original habeas corpus jurisdiction. (Cal. Const., Art. VI, § 10.)

III.

No other appellate proceedings exist with regard to the present confinement. No other petitions are pending in any other court with respect to this judgment.

IV.

Petitioner's conviction in case no. 04F4728 is unlawful because he is in fact innocent. Through the present petition and attached exhibits, Petitioner presents newly discovered *Brady* evidence and newly discovered exculpatory evidence in support of his actual innocence as well as evidence that he was convicted based upon false evidence. Petitioner provides the following summary of his claims and the general facts in support of the claims. The evidence in support of the claims is set forth in full in the body of the Petition and the attached Exhibits.

A. 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*

1. The State's Suppression of the Office Interview With Harris Constitutes a *Brady* Violation

The State suppressed the record of a February 11, 1997 interview between Officer Clemens, Officer McDaniel and John Harris. The interview took place in a private office one week after Harris was taken into custody following a lie detector test that he was found to be deceptive on the issue of Kohn's murder. There is no corresponding police report for the interview. Harris' statement to Officer Clemens constitutes a series of "admissions," or confessions. Harris' statement included many facts not released to the media, that only a person present at the murder of Kohn would know – that whoever killed Kohn took the cash hidden at his apartment, that a yellow car was identified at the Kohn's apartment on the night of the murder, that whoever killed Kohn walked through blood on the floor, and that whoever killed Kohn would have sustained injuries from the violent altercation that took place during the assault on Kohn. The media never reported the details regarding how Kohn was murdered or any particular details regarding the

murder scene. In addition to constituting material exculpatory evidence which supports Petitioner's third party culpability defense that Harris was responsible for Kohn's murder, the Harris interview impeaches the testimony and credibility of Officers Clemens, Compomizzo and Campbell. In the context of the extremely weak case against Petitioner, the *Brady* evidence prejudiced Petitioner and violated his due process rights in preventing him from presenting a full defense. Ultimately, there is more than a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different, thus reversal is required.

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 addition to the suppressed evidence of the Harris interview, the State suppressed evidence of past misconduct and constitutional violations of the Shasta County Sheriff's Office, the law enforcement agency responsible for the investigation of the underlying murder. (See *Milke v. Ryan* (9th Cir. 2013) 711 F.3d 998.) As in *Milke*, this *Brady* evidence is presented by way of public cases and a 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. (See *Brewster v. County of Shasta, et al.* (E.D. 2000) 112 F.Supp.2d 1185 ; *Brewster v. County of Shasta* (9th Cir. 2001) 275 F.3d 803.) *Milke* is both comparable and controlling in Petitioner's case, as the present case reveals a similar pattern of past law enforcement misconduct, suppressed by the State in violation of *Brady*, and the suppression contributed directly to Petitioner's conviction in this case. In *Brewster,* the federal court made a factual finding that the misconduct of Officers Compomizzo and McDonnald 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 same practices and policies identified in Brewster are alleged to have been employed in Petitioner's case - that the sheriffs manipulated the primary witness in the case by using unconstitutional, suggestive techniques and false evidence, and the sheriff's purposely failed to conduct basic forensic investigation. Petitioner was prejudiced by the State's suppression of Shasta County Sheriff's past misconduct and evidence of its unconstitutional practices and policies.

B. 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 Martinez's testimony which was bolstered testimony from Officer Clemens, Officer Campbell and Officer Compomizzo. As set forth in Claim I, the false testimony of the officers set forth in this claim, must be considered in light of the significant *Brady* evidence in this case.

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, while undercutting and suppressing the real and damning evidence implicating Harris as the culpable party responsible for Kohn's murder. 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. Petitioner's conviction secured by the false testimony of the State's witnesses must be reversed.

C. The Recantation Of The State's Sole Witness Implicating Petitioner Constitutes Both False Material Evidence That Was Relied Upon For Conviction As Well As New Evidence Of Petitioner's Actual Innocence

The primary state's witness, Helana Martinez, has recanted her testimony and alleged that her testimony was the result of manipulation by the Shasta County Sheriff and District Attorney. Helana Martinez's recantation serves both as new evidence of Petitioner's actual innocence and false evidence. Here, Helana Martinez has testified that she now no longer knows what memories are her own and which memories are false memories developed through suggestion. In particular, Helana Martinez believes that her testimony regarding the murder weapon is not based in fact and does not reflect her actual memory. In addition, Petitioner presents expert witness testimony through Helana Martinez's therapist Keith Manner and Forensic Psychologist, Deborah Davis, PhD, who both opine that Shasta County Sheriffs used suggestive techniques to secure her testimony implicating Petitioner. The expert witness' testimony along with Helana Martinez's recantation, constitute both new evidence of actual innocence and material, false evidence that was relied upon to secure Petitioner's conviction.

D. DNA Evidence Excluding Petitioner From The Crime Scene Constitutes Substantial New Evidence Of His Actual Innocence

Lastly, Petitioner presents new DNA evidence which excludes Petitioner from the murder scene but cannot exclude the other named suspects, including John Harris. Petitioner submits the report from DNA experts, Technical Associates Incorporated (TAI) who reviewed the DNA evidence and forensic background of the present case and find that the forensic evidence corroborates Petitioner's claims. The report analyzes the DNA evidence in the context of the forensic investigation conducted in this case, both as an initial crime scene in 1997 and as a cold case in 2004. The 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. Further, Petitioner's expert 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. 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. 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.

V.

This petition is being filed in this Court, requesting relief from the consequences of his conviction in Shasta County Superior Court No. 04F4728, the conviction from which this petition challenges as unlawful. Petitioner has no plain, speedy, or adequate remedy at law, save this petition, since the allegations of this petition involve matters outside the record, to wit, the matters contained in the exhibits attached thereto.

VII.

By this reference, the accompanying memorandum of points and authorities and exhibits are made part of this petition as if fully set forth herein. Petitioner's claims under this petition will be based on this petition, the accompanying memorandum of points and authorities, the exhibits attached thereto, and any further material to be developed at any future hearing which may be ordered.

PRAYER

WHEREFORE, Petitioner respectfully requests that this Court:

1. Order respondent to show cause why Petitioner is not entitled to the relief sought;

2. Appoint present counsel to represent Petitioner in the present proceeding for the consideration of this petition;

3. Grant Petitioner's request to order the chain of custody, accompanying documentation and photographic evidence, and relevant testing for several pieces of physical evidence critical to Petitioner's actual innocence claims, including: 1) the pieces of black plastic discovered around the victim's body and at Harris' apartment; 2) Harris' shoes taken into evidence from his residence on 2/5/97; 3) the swabs of "blood-like" substance taken into evidence on 2/5/97, sent to DOJ for testing on 2/6/97, not reported as being tested until 2006; 4) fresh cigarette butt discovered outside Kohn's apartment the morning of the murder; 5) the portion of the wall from Kohn's apartment with the palm print associated with co-defendant, Michael Johnson and the latent print compared to Johnson's palm print; and 6) the firearms recovered from the Alta Mesa burglary as secured by Officer Clemens and inventoried by Officer Compomizzo in report #97-2754.

4. Appoint a referee to hear any factual matters related to evidence which might come before the court by way of an Evidentiary Hearing;

5. After full consideration of the issues raised in this petition, issue a writ ordering the court to vacate the judgment of conviction in the Shasta County Superior Court No. 04F4728, based upon the manifest constitutional violations in this case as well as Petitioner's showing of his actual innocence; and

6. Grant Petitioner such other and further relief as is appropriate in the interests of justice.

Dated: October 20, 2020

Respectfully submitted,

Jennifer M. Sheetz

VERIFICATION

I, Jennifer M. Sheetz, state:

I am an attorney admitted to practice before the courts of the State of California, and have my office in the City of Mill Valley, California. I am the attorney for Petitioner herein and am authorized to file this Petition by virtue of my *pro bono* representation of Petitioner.

I am verifying this petition because the facts herein are within my knowledge as Petitioner's attorney, with the exception of those facts specifically set forth in the exhibits which are attached to this petition.

I have read the foregoing Petition for Writ of Habeas Corpus and verify that all the facts alleged herein are supported by citations to the record in *People v. Derek Martinez*, No. 04F4728, and are supported by declarations and the exhibits attached hereto.

I certify under penalty of perjury under the laws of the state of California that the foregoing is true and correct. Executed at Mill Valley, California on October 20, 2020.

_____

Jennifer M. Sheetz

INTRODUCTION

Derek Martinez ("Petitioner") challenges the judgment based upon his conviction for the 1997 murder of Chris Kohn, in case numbered 04F4728. Petitioner was convicted of the murder of a stranger after a cold case prosecution. The conviction was based solely upon the testimony of his ex-wife, Helana Martinez, who came forward in 2004 when she was "triggered" by a seeing a Reward poster recently posted in her victim advocate's office at the District Attorney's Office. Helana told the Shasta County Sheriff that she thought that Petitioner had just confessed to a murder, and that he owned a weapon similar to the murder weapon described by the sheriffs. There is no other corroborating evidence connecting Petitioner to the victim, the crime scene, the crime, or any of the individuals initially implicated in the murder. Petitioner's DNA is excluded from the murder scene and his fingerprints and palmprints did not match any of the prints found at the murder scene. Petitioner was not named by a single witness close to the victim. Petitioner's name did not appear in the victim's address book or on the victim's pay-owe sheets at the murder scene. Petitioner was never interviewed by law enforcement regarding any aspect of the case – in 1997 or anytime thereafter.

At trial, Petitioner presented a third party culpability defense focused on the original suspect in the murder, John Harris. The Shasta County Sheriff testified in the State's case in chief, specifically countering Petitioner's defense and repeatedly claiming that Harris had been "ruled out" as a suspect early on in the investigation. Recent habeas discovery has revealed new *Brady* evidence which has illuminated several contradictions in the State's presentation of evidence at Petitioner's trial, along with gaping holes in the forensic investigation in this case. This *Brady* evidence consists of a suppressed interview that took place in a private office on February 11, 1997, between Harris and the lead investigator, Officer Clemens. The interview took place one week after the last

known law enforcement interview with Harris, and it reveals that Harris knew information that only a person present at the murder scene could have known.

In addition to this significant *Brady* interview evidence, Petitioner has discovered critical *Brady* evidence regarding past misconduct and constitutional violations by the Shasta County Sheriff, as set forth in *Brewster v. County of Shasta, et al*. (E.D. 2000) 112 F.Supp.2d 1185, previously suppressed by the State. In *Brewster*, the district court found that that the Shasta County Sheriff deputies had acted pursuant to an official office policy or practice when they violated Brewster's constitutional rights during the death penalty investigation of murder and sexual assault. The Eastern District specifically found that the sheriffs violated Brewster's constitutional rights by manipulating the sole State's witness into giving a false identification, presenting false evidence, failing to test physical evidence, and purposefully ignoring exculpatory evidence. The Shasta County Sheriff's past pattern of misconduct is applicable and material to the present case – as there is evidence that the sheriffs manipulated the State's sole witness, presented false evidence, failed to test physical evidence and purposefully ignored and suppressed exculpatory evidence. holes is important to Petitioner's ability to prove his actual innocence through third party culpability – which is overwhelming in this case.

Helana Martinez's recantation serves both as new evidence of Petitioner's actual innocence and false evidence. Helana Martinez has testified that she now no longer knows what memories are her own and which memories are false memories developed through suggestion. In particular, Helana Martinez believes that her testimony regarding the murder weapon is not based in fact and does not reflect her actual memory. In addition, Petitioner presents expert witness testimony through Helana Martinez's therapist Keith Manner and Forensic Psychologist, Deborah Davis, PhD, who both opine that Shasta County Sheriffs used suggestive techniques to secure her testimony implicating Petitioner. The expert witness' testimony along with Helana Martinez's recantation, constitute both new evidence of actual innocence and material, false evidence that was relied upon to secure Petitioner's conviction.

The purposeful lack of forensic testing in the underlying investigation and prosecution ultimately impeded Petitioner's defense, as it provided no actual evidence implicating the Petitioner against which he could defend. Also, the complete lack of forensic testing of evidence implicating John Harris impeded the defense in much the same manner. In the years following his conviction, Petitioner won several motions for DNA testing. All DNA evidence that was tested excludes Petitioner from the crime scene. This later-tested evidence constitutes the only DNA evidence from the case with comparative analysis2, because the sheriff and prosecution conducted minimal forensic testing, including DNA testing, as part of their investigation of Kohn's murder.

I. STATEMENT OF THE CASE

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 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. While his direct appeal was pending, Petitioner filed a motion requesting DNA analysis of crime scene evidence under Penal Code section 1405. A 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 the same issues. While the case was pending in federal court, Petitioner received some of the DNA results. The federal court of appeal denied Petitioner's appeal without consideration of the new DNA evidence.

Petitioner filed a timely *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, 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. 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. 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 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.[1] (Attached hereto as Exh. AA, BB.) The Shasta County Superior Court denied the Motion and Supplement on October 2, 2020. (Exh. CC.) This petition follows.

II. FACTUAL AND PROCEDURAL BACKGROUND[2]

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[1] Petitioner renews his request in his Prayer for the Court to Order the evidence set forth in his Motion for Chain of Custody, Etc. To this end, Petitioner requests the chain of custody and accompanying documentation, as set forth in the attached motion (attached as Exhs. AA and BB), for several pieces of evidence critical to Petitioner's actual innocence claim, including: 1) the pieces of black plastic discovered around the victim's body and at Harris' apartment; 2) Harris' shoes taken into evidence from his residence on 2/5/97; 3) the swabs of "blood-like" substance taken into evidence on 2/5/97, sent to DOJ for testing on 2/6/97, not tested and not reported as being tested until 2006; 4) fresh cigarette butt discovered outside Kohn's apartment the morning of the murder; 5) the portion of the wall from Kohn's apartment with the palm print associated with co-defendant, Michael Johnson and the latent print compared to Johnson's print; and 6) the firearms recovered from the Alta Mesa burglary as secured by Officer Clemens and inventoried by Officer Compomizzo in report #97-2754.

[2] 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 2871587, 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 the Ninth Circuit Court of Appeals.

Initial investigation into the murder of Chris Kohn focused upon the connection between two related burglaries involving a known drug dealer with a history of violence – John Harris (age 41). Chris Kohn (age 24) was murdered at approximately 4:30 a.m. on January 30, 1997, three days after his apartment was burglarized by John Harris and two accomplices. (See Exhs. K, L, M, O, P.) Harris and his accomplices knew Kohn through their mutual drug dealing. (Exh. M.) Kohn sold large amounts of marijuana out of his apartment, along with handblown glass smoking pipes. (Exh. N.) Kohn often flashed large amounts of cash in front of people during transactions, and it was known that he hid the cash in his apartment. (Exhs. M, N.) Harris told several witnesses, and later Shasta Sheriffs, that he and his accomplices sought to burglarize Kohn's apartment and take the cash hidden there. (Exhs. I, M.) Officer Compomizzo was acknowledged as the primary Shasta County Sheriff collecting evidence on the murder case. (RT 1831.) In the initial days following the murder, Officer Compomizzo collected a significant amount of evidence implicating Harris in the murder, including:

> (1) a pipe in Harris' possession taken from Kohn's residence on the night of the murder – identified by Nita Gibbens;
> (2) 2 pieces of black plastic discovered by Officer Compomizzo at Harris' residence (which he photographed but did not take into evidence and assign an evidence number [see Exh. L, p. 3]) that were later found to have come from the same source as the three black pieces of plastic found around Kohn's body at the murder scene;
> (3) numerous witness statements corroborating Harris' intentions on returning to Kohn's residence to take the cash hidden there;
> (4) scratches on Harris' neck and face from approximately the same day as the murder;
> (5) witnesses identifying the Chevy truck that Harris was borrowing at Kohn's residence on the date of the murder;
> (6) palm prints made from a blood-like substance on the driver's side door of the Chevy truck that Harris was borrowing at the time of the murder;
> (7) statements from Harris' ex-wife, Debra Butler, explaining that Harris went back to Kohn's for the money that he did not find during the Super Bowl, there was a group

> of unknown men meeting at her house following the murder, there was a bloody white jacket in her bedroom at the time of the murder, there were new, stolen items in her bedroom just following the murder, including a sword, and Harris had more money following the murder;
> (8) statements from both Nathan Chatman and Taskeen Tyler that Harris came to their residence a couple hours after the murder, gave them back the bag of stolen guns that he had been holding, and told them that they had to get rid of the guns because "the money was gone" and Kohn had just been murdered; and,
> (9) interviews and statements from Harris, including the lie detector test and results showing that he was being deceptive about the murder.

(Exhs. H, I, L, K, N, M and P.)

The above evidence established basic means, motive and opportunity. In addition, no evidence collected at the time of the initial investigation offered Harris an alibi or proved to be exculpatory. However, Harris was never charged.

A. January 26, 1997 – John Harris' Initial Super Bowl Burglary

John Harris conspired with his brother in-law, John Douglas and Frank D. Benton, to burglarize Chris Kohn's apartment on Super Bowl Sunday in 1997, at 14700 #1 Wonderland Boulevard. The burglary was not reported until Chris Kohn was found murdered. The day of the murder, Kohn's girlfriend, Nita Gibbens, reported the January 26th burglary to police. In her report, Gibbens noted that they had not initially reported the burglary to police because Kohn sold marijuana out of his apartment. Gibbens reported that there were several items missing from the apartment at the time of the burglary, including several handblown glass smoking pipes, a backpack with clothes and miscellaneous items.

The day after the murder, Gibbens identified several items stolen during the Super Bowl burglary which were located in Harris' possession. (Exh. N.) One handblown pipe, Gibbens identified as her personal pipe, which she had last smoked at Kohn's

apartment the day before the murder. Gibbens was emotional when she saw the pipe and told sheriffs, "Oh, my God, where did you find that? That's my pipe. You find out who stole that and that's who killed Chris." (Exh. N.) Shasta County Sheriff determined that the pipe was stolen by John Harris. (Exh. N.)

B. January 28, 1997 – Alta Mesa Burglary

Noelle Lough reported a break-in at her father's home on Alta Mesa Dr., on January 28, 1997. (Exh. O.) Lough reported that her father's gun locker had been ransacked and 8 firearms were missing. (Exh. O.)

Nathan Chatman (age 18), Taskeen Tyler (age 19) and Ronnie Kyles (age 19) all later admitted to burglarizing the Lough property. (Exh. O.) At the time of the burglary, Taskeen and Nathan shared an apartment together, along with Taskeen's girlfriend, Grace Gaige and their new baby. (Exh. M.) Approximately a week before the burglary, Taskeen and Nathan had met John Harris for the first time, when they purchased marijuana through him. (Exh. M.) Following the burglary, Taskeen, Grace and Nathan got into an argument regarding the burglary, as Grace was upset that they had taken the guns. (Exh. O.) Police were called during the argument, and all three were arrested for disturbing the peace and put in custody. (Exh. O.) While they were in custody, Grace's sister, Heather got scared that the police would find the stolen firearms at the apartment and called Harris to take the firearms. (Exh. O.) Heather knew Harris because he often supplied her with marijuana. (Exh. O.) Harris agreed to take the firearms. (Exh. O.)

When the three were released from jail on January 29, 1997, they went to Harris' apartment to discuss the firearms. (Exh. M.) One of the firearms was already missing when they met with Harris. (Exh. M.) Included in list of stolen firearms was a Walther pistol and a Ruger Black Hawk revolver, which both fit the possible the make and model of the firearm believed to be the murder weapon based upon the black pieces of plastic found at the scene (and Harris' apartment). (Exhs. L, O.)

C. January 30, 1997 – Burglary and Murder of Chris Kohn

On the night of the murder, there was no evidence of forced entry. Rather, neighbors testified that they heard Kohn "partying" with two or more men during the evening of the murder and later heard two or more men attacking Kohn. (RT 1438-1441, 1470, 1476-1477, 1481.) Officer Compomizzo was one of the first officers to arrive at the scene of the murder. From the beginning of the murder investigation, officers acknowledged a connection between the initial burglary of Kohn's apartment, the stolen guns from the Alta Mesa burglary and Kohn's murder.

Taskeen Tyler called the police in the morning hours (first media report of the murder was reported after 1:30p.m [RT 2216-2218]), a couple hours after the murder, to report that he had information on Kohn's murder which implicated John Harris. (RT 1866-1867, 1870-1872,1880.) Tyler initially told police that he believed that Harris was setting him up to be charged in Kohn's murder. Tyler had recently met Harris through a mutual friend, when he was trying to buy marijuana.

Approximately 6 days after the murder, Officer Compomizzo discovered two pieces of black plastic at Harris' residence that resembled the pieces of black plastic found around Kohn's body. (Exh. L, p. 3.) On February 6, 1997, Officer Compomizzo photographed the plastic, but no evidence numbers were initially assigned to the pieces found at Harris' apartment, and the pieces were not logged as evidence taken from Harris' apartment. (Exh. L, p. 3.) In addition, during a search of Harris' apartment, officers found numerous pieces of property belonging to Kohn. Officers also found blood-like palm prints on the driver's side door of the Chevy truck that Harris had been driving.[3] (Exh. K.) The truck was identified by neighbors that saw the truck outside Kohn's apartment the night of the murder. (Exh. K.)

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[3] The evidence of the "blood-like" substance that Compomizzo took samples of from the driver's side door of the truck that Harris drove to and from Kohn's apartment on the night of the murder was not tested for DNA or blood during the initial investigation. (RT 1847; See Exh. K.) There is a DOJ report that the swabs were submitted for testing on by Detective Sandbloom on February 6, 1997. There are a handwritten notes from November 20, 1997, by Shasta County Sheriff, Criminalist J.J. Weiland acknowledging

Tyler told the sheriffs that he and two friends had burglarized a house just two days prior and took approximately 8 firearms from the gun locker at the residence. (Exh. M.) Heather Gaige explained that while they were in custody for an unrelated matter, the guns were transferred to Harris. (Exhs. M, O.) Approximately two or three hours after Kohn's murder, Tyler and Nate Chatman were awakened by a nervous, "strung out" Harris who told them that they had to take the guns back and dispose of them because Kohn was dead and "the money was gone." (Exh. M.) Tyler told police that Harris had burglarized Kohn's apartment three days prior to the murder, but he was unable to locate the cash in Kohn's apartment and had planned to return to the apartment to find the money. (RT 1874-1876, 2756-2758; Exh. M.) Tyler and Chatman believed that Harris had returned to Kohn's apartment the night of the murder to get the money. (Exh. M.) No money was ever taken into evidence during the search of Kohn's apartment following the murder. (Exh. L.)

At trial in 2006, Officer Clemens testified that Shasta County Sheriff interviewed Harris, "as well as numerous other people, and ruled them out." (RT 1825.) When asked "how" they were ruled out, Clemens explained, "By all the statements that were provided by them and/or other witnesses, they were just eliminated." (RT 1825.) Clemens then stated that he never found any evidence – including physical evidence - connecting

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the cotton swab evidence. Weiland's notes show DOJ results for ***all of the other evidence*** submitted in February 1997, but not the swabs. (See Exh. K, p. 3.) There is no DOJ report or analysis which provides results for testing on the swabs and no accounting for the swab evidence being put into long term storage or returned to Shasta County. (Exh. K.) The swab evidence is not mentioned in the report regarding long term storage, nor is it identified as evidence returned to Shasta County for storage. In 2006, during Petitioner's trial, the Shasta County Sheriff reportedly sent the *numbered swabs* for testing, and the subsequent analysis found that the swabs sent to DOJ did not test positive for blood. (See Exh. K, 18.) There is no chain of custody for the swabs and no accounting for why the swabs were not tested in 1997, or where they went after they weren't tested by DOJ. Petitioner requested a chain of custody for the evidence and the corresponding photos of the evidence, but the request was denied by the Shasta County Superior Court on October 2, 2020. (Exhs. AA, BB, CC.)

Harris to the homicide. (RT 1825-1826, 1827, 1837.) Officer Clemens testified that Officer Compomizzo was in charge of collecting evidence from the murder scene. (RT 1831.) Officer Compomizzo testified that Officer Clemens was the lead investigator in charge of evidence collection and process for the case. (RT 1653.)

Police never arrested Harris on allegations related to the murder of Kohn. Harris pled guilty to burglarizing Kohn's apartment and received a two-year sentence[4]. (Exh. S.) There is no evidence in the record which would serve to exonerate Harris. The only forensic investigation that was conducted during the initial investigation was fingerprint and palm print review. No forensic investigation, including DNA investigation, was conducted during the years that the case went cold. (See Exhs. E, J.)

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.

D. 2004 Cold Case Investigation

At the end of April 2004, Kohn's mother, Susan Sellers, distributed posters offering a $10,000 reward for information related to Kohn's murder. (Exh. R.)

1. Debra Butler (aka Harris)

After posting the reward, Sellers contacted John Harris' wife, Debra Butler (aka Harris). (Exh. I.) Sellers contacted Butler through her mother and directly. (Exh. I.) Butler then contacted the Shasta County Sheriff to give a statement. On June 4, 2004, Officer Campbell met with Butler at her place of employment, in Sacramento, CA, and took a statement. (Exh. I.) During the interview, Butler told Officer Campbell that she believed that Harris was responsible (along with her brother John Douglas) for Kohn's

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[4] In the Probation Officer's Report for the Kohn Super Bowl Sunday burglary, Harris complained about his 2-year sentence on the burglary, stating that "the investigators made promises they haven't kept." (Exh. S, p. 6.)

murder. (Exh. I.) Butler explained that she was very frightened of Harris, because he had a history of violence towards her and had threatened to kill her. (Exh. I.) Butler provided additional details of the night of the murder including that she returned home the night of the murder to find a group of African-American[5] men sitting around her kitchen table and found a white jacket with fresh blood on it in her bedroom along with other recently stolen items like a samurai sword. (Exh. I.) Harris threatened to kill her if she told anyone about it. (Exh. I.) When Officer Campbell took the information from Butler, he did not provide any substantial reason for the failure to prosecute Harris for the murder (i.e. no alibi, no evidence of Harris' innocence). (Exh. I.) Rather, Campbell just told Butler that if she could not tell him that Harris had confessed, they could not arrest or prosecute him. (Exh. I.) Butler reiterated her fear of Harris repeatedly, and further suggested that "he believes he is above and beyond the law." (Exh. I.) She also claimed that she had been throughout California in hopes of escaping him, but the "system" failed her in letting him know her whereabouts. (Exh. I.) The Sheriff did not offer Butler witness protection. (See Exh. I.)

2. Helana Martinez

a. First Unrecorded Statement – Shasta Treatment Center Therapist[6]

On the day that Helana first made a report to police, she told her mother, Shyla Hill, first thing in the morning that she was scared that Petitioner had killed someone. (Exh. B, p. 72.) Helana doesn't remember much about that day, but she remembers going to see a different therapist at Shasta Treatment Center, rather than her regular consular Keith Manner. (Exh. B, p. 72.) She had been consistently seeing Manner at Creekside Counseling as her primary counselor through the Victim/Witness program for a couple of years. (Exh. B, p. 72.) Keith Manner noted that Carol Gall had to have been responsible

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[5] Butler emphasized the point that the men were all African-American (along with Harris), because the African American community in Shasta County is very small.
[6] Helana's testimony at trial corroborates her memory that she went to a therapist to report the possible murder prior to her police report on June 24, 2004. (See RT 1972.)

for referring Helana to the new therapist on the day that she provided her statement regarding Petitioner. (Exh. B, pp.34-35.) Helana remembers that she told the new therapist that she thought that Petitioner had been involved in a murder and explained the reasons. (Exh. B, p. 73.) The therapist found that the things that she told him did not sound like actual events connected to a murder or a crime. (Exh. B, p. 73.) Instead, the therapist told her that it sounded as though Petitioner was trying to scare her and control her. (Exh. B, p. 73.) Helana went home after the therapy session. (Exh. B, p. 73.)

b. Second Unrecorded Statement

When Helana arrived at her house, she told her mother, Shyla Hill, that she had been to a new therapist who told her that the report about Petitioner did not seem real. (Exh. B, p. 73.) Hill was worried that the murder had just taken place and urged Helana to go to the police. (Exh. B, p. 73.) Helana eventually went to the police that night with her friend, Cheri. (Exh. B, p. 73.) She doesn't remember much about who she spoke to or what she said that night. (Exh. B, p. 73.)

Police reports indicate that she first met with Deputy Thompson of the Redding Police Department, at approximately 9p.m. (Exh. G.) Helana reported that she had information about a murder of an unknown individual that took place at an unknown location at an unknown time. (Exh. G.) Police referred Helana to the Major Crimes Unit of the Shasta County Sheriff. (Exh. G.)

c. Third Unrecorded Statement[7]

Officer Heberling of the Shasta County Sheriff met with Helana at approximately 11 p.m. Officer Heberling noted that the interview was recorded on audio and video, but no recording of this interview was ever produced by the Shasta County Sheriff before

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[7] At trial, Helana confirmed that she initially told the first interviewing officer, Officer Heberling, that petitioner had "just" killed someone. (RT 2038.) Helana also testified that she spent a "short time" with Officer Heberling during her first unrecorded interview with the Shasta County Sheriff. (RT 1975.) She estimated that the second, long, recorded interview with Officer Campbell was approximately two hours (the tape of the interview runs approximately two hours and 16 minutes). (RT 1975.)

trial.[8] (Exh. G.) Helana reported initially that she suffers from amnesia, so her memory was not very good. (Exh. G.) From the start, Helana explained that she had come forward because her memory was jogged by the poster regarding the Mt. Gate murder in 1997. (Exh. G.)

Officer Heberling wrote his summary following Officer Campbell's *recorded* interview of Helana on June 25, 2004. (Exh. G.) Based upon his reporting, Heberling met with Helana for approximately 40 minutes, and his summary report mirrored Officer Campbell's which summarized a more than two-hour interview. (RT 1975.) At the end of his police report, Officer Heberling bizarrely noted a conversation that he had with Carol Gall, Helana's victim advocate that morning. (Exh. G.) Officer Heberling reported that Gall told him that Helana had met with her the day before, and that Helana was a, "nice, truthful person *with no known mental illness*." (Exh. G.)

d. Fourth Unrecorded Statement

The following morning, June 25, 2004, Helana received a call from Officer Campbell. (Exh. B, p. 73.) Helana agreed to be interviewed by him at the station, and Campbell told Helana that he would come get her. (Exh. B, p. 74.) Helana does not remember the contents of her conversation with Officer Campbell when he drove her to the Sheriff's Office for the interview, but she remembers that an officer showed her photos from Chris Kohn's murder scene, including one photo which showed a bloody piece of a scalp and pieces of plastic from the gun handle. (Exh. B, p. 74.)[9] The unrecorded statement is refenced by Officer Campbell during the recorded interview, when he asked Helana, "Remember we talked about it in the car on the way over?" (Exh. F, p. 35.)

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[8] Petitioner requested the audio and video tapes which were noted on Heberling's police report, but they were not available (they were not available at the time of trial either). (Exh. Q.) There is no record of what happened to the tapes. (Exh. Q.)

[9] A handwritten forensic investigation report identifies a photo of the black pieces of plastic from the crime scene which had blood and hair on it. (Exh. L, p .5.)

e. First Recorded Statement

Helana was interviewed by Officer Campbell at the Shasta County Sheriff's Department on June 25, 2004. The recording was introduced into evidence in its entirety at the evidentiary hearing as an Exhibit D-2, and Petitioner requests that this Court take judicial notice of the recording.

During the interview, Helana began by reporting that defendant had awakened her during the middle of the night and told her that he and a friend (Mike Jarro: a black guy) had killed someone in Mountain Gate. (Exh. F, p. 8.) Petitioner had driven his mom's silver car, and parked down the road a little bit and walked to the victim's place. (Exh. F, p. 8.) They had hit the victim in the back of the head with a gun, and the gun went off in the struggle. (Exh. F, p. 9.) The incident occurred over issues of selling drugs. She reported that Petitioner was selling crank and marijuana at the time. (Exh. F, p. 9.)

Helana was not sure who hit the victim over the head, but the victim was struggling, and the neighbor woke up and "kind of caught them" so they both took off. (Exh. F, p. 10-11.) Petitioner told Helana that they would never get caught, and that if she told anyone he would kill her. (Exh. F, p. 11-12.)

When Helana complained that she could not remember, Officer Campbell used a "relaxation guided imagery" procedure in an attempt to prompt her memory. Helana was not sure she could do it, and the detective tried to reassure her. Helana apologized and told him "I want to remember bad." (Exh. F, p. 33.)

Helana initially stated that defendant had what she thought was a 9-millimeter revolver: two silver guns. (Exh. F, p. 11.) When asked further about Petitioner's guns Helana stated that he had a lot of guns. One was a small little black gun, and he had rifles and shotguns, sawed-off shotguns. (Exh. F, p. 14.)

The detective then asked, "Do you remember any of the guns having anything unique about it? Pieces missing off it, anything like that?" (Exh. F, p. 16.) Helana responded "I think I do remember seeing one of the---the little gun. It was one of the silver guns. I think it was a little cheap black gun or something like that. And he had a

little---broken on the… I wish I remembered… It's really hard because sometimes I get movies stuck in my head and then I don't want to be a movie. I'm trying to remember it because my whole life feels like a movie….Around that time he did have a little---it was a black gun. I remember that, because he took me out down a dirt road and he brought it out and was putting it to me, and then he laughed." (Exh. F, p. 16.) The detective then asked, "Anything distinctive about that gun?" (Exh. F, p. 16.) Helana responded, "It looked like the paint was kind of chipped a little bit, actually….I don't know if guns chip, their paint chips. It looked like it was scratched up…Like it was old, it was an old gun or something like that."[10] (Exh. F, p. 16.)

Helana was shown pictures of Walther pistols (the make of gun believed to be the murder weapon) and asked if any resembled those that petitioner had at the time of the murder. (Exh. F, p. 30-31; Exh. H.) Helana stated that she didn't remember seeing anything like them. (Exh. F, p. 30-31.) She said that he had a black one that did look like one of them. (Exh. F, p. 30-31.) She again described it as having paint chipped off the handle "like it was used a lot," stating that the "paint looked worn off." (Exh. F, p. 30-31.)

Helana pointed to another gun and said "And then I think—I think I might have saw a gun like this, but part of this gone…Part of the handle thing….It was gone, I think. He had so many guns that he got from people….I saw, like, 15 of them, but only briefly because I don't like guns that much." (Exh. F, p. 31.)

The detective then asked her to elaborate on when she might have seen the gun with part of the handle missing, whereupon she said she only saw it for a second and then saw it no more. (Exh. F, pp. 31-32.) She asked him why he had a broken gun, and Petitioner said he got it cheap. (Exh. F, pp. 31-32.)

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[10] Evidence collected during the murder investigation reveals 5 pieces of black plastic from the same origin, including the two pieces of plastic that Officer Compomizzo found at Harris' apartment. (See Exh. L, p. 3.) Given the number and size of the 5 plastic pieces, the missing surface area of the gun handle would be significant and obvious, not "chipped" or a "little broken piece."

Later in the interview, the detective asked Helana if she could draw a picture of the broken gun she had mentioned: where it was broken. (Exh. F, p. 55.) She said "no." But he persisted and had her draw something. (Exh. F, p. 55.) She described the drawing, saying, "That was black and it has a little broken piece right there." He asked her to draw the rest of the gun. She replied "That's one thing that caught my eye." [Detective: Was that the handle?] "That was the handle. (Detective: Can you just write "the handle" underneath it or something?" (Exh. F p. 55.)

Helana further noted that the gun was silver with a black handle with a piece missing. (Exh. F, p. 56.) The detective showed Helana a piece of paper that was a law enforcement flyer of the black piece of plastic that was found at the scene of the homicide, and that was believed to come from the grip of a handgun and asked "You said the piece that was missing looked something like that?" (Exh. F, p. 56.) Helana responds, "Yeah, I think so. Like little edges, the ridges…Possibly…I know it had ridges." (Exh. F, p. 56.) Helana realized as the result of the above exchange that the murder weapon had a missing piece and became very upset[11]. (Exh. F, p. 56-57.)

Helana reported that sometime later she and petitioner went for a little drive out in the boonies area. Petitioner stopped by at a particular area where Helana remembered that he had told her the murder had happened. (Exh. F, p. 14.)

When asked to describe the location, Helana first reported: "Over by the freeway going north, and there was, like, two little tiny cabin things. They (inaudible) houses." (Exh. F, p. 14.) Asked to describe more about them, she stated that they looked like little boxes, on a side road that paralleled the freeway. (Exh. F, p. 22.)

The detective stopped the interview and went to get pictures. (Exh. F, p. 26.)

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[11] Petitioner notes that there is a Shasta County Sheriff's Office internal flyer asking for information regarding two pieces of black plastic without evidence numbers. The flyer does not reference where the pieces were found. (See Exh. H, p. 4.) As previously noted, Officer Compomizzo did not cite specific evidence numbers to the pieces of plastic removed from Harris' apartment. (Exh. L, p.3.) He photographed them instead. (See Exh. L, p. 3; see also Exh. H, p. 4.)

He returned and showed her pictures depicting the location of the murder to ask if she recognized them as the location defendant had taken her to, stating "I had to dig through all the folders to get some pictures out," (conveying to Helana that there were pictures from the crime file and that they depict the right location). (Exh. F, p. 26)

Helana noted inconsistencies with her memory and the picture, asking "These are a different color maybe. They were smaller, I think." (Exh. F, p. 27.) The detective responded, "You've got to imagine that this is the road…" and proceeded to describe in some detail, the image depicted in the photo. (Exh. F, p. 27.)

Helana then asked if there was a bunch of trees depicted in the photo, and stated "I don't remember them that color." She then stated, "There was a bunch of trees, and it looks like they're kind of pointed in the area…There was a bunch of trees. I don't remember a big open… (Exh. F, p. 28.) Helana continued to express some confusion concerning what she was looking at, whereupon the detective stated that he would have to get some better pictures. Helana responded by stating that she was not certain whether the pictures depicted the correct location. (Exh. F, p. 29).

Throughout the interview, Officer Campbell showed Helana photos which related to the original investigation of Harris – including a photo of depicting Harris with scratches to his face and neck just after the murder. Officer Campbell asked Helana if she recognized Harris, and she did not. Officer Campbell also showed Helana a photo of Harris' truck and asked her if she recognized it. She did not. Finally, late in the interview Officer Campbell referenced the "bloody clothes" that Debra Butler had found in Harris' apartment just after the murder, asking Helana if she remembered "finding bloody clothes or anything like that?" (Exh. I, p. 35.)

MEMORANDUM OF POINTS AND AUTHORITIES

I. 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*

> The fact that a constitutional mandate elicits less diligence from a government lawyer than one's daily errands signifies a systemic problem: Some prosecutors don't care about *Brady* because courts don't *make* them care... *Brady* violations have reached epidemic proportions in recent years, and the federal and state reporters bear testament to this unsettling trend... When a public official behaves with such casual disregard for his constitutional obligations and the rights of the accused, it erodes the public's trust in our justice system, and chips away at the foundational premises of the rule of law. When such transgressions are acknowledged yet forgiven by the courts, we endorse and invite their repetition.

(*United States v. Olsen* (9th Cir. 2013) 737 F.3d 625, 631-632 (Kozinski, J., dissenting from denial of reh'g en banc).) In present case, the State withheld critical evidence and permitted related false testimony which seriously undermines confidence in Petitioner's conviction. Due process demands that the Court reverse Petitioner's unlawful judgment and conviction based false evidence.

Under *Brady v. Maryland* (1963) 373 U.S. 83, "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. (*Ibid.*; *United States v. Bagley* (1985) 473 U.S. 667, 678; *In re Sassounian* (1995) 9 Cal.4th 535, 543.)

There are three elements to a *Brady* violation. First, evidence must be suppressed, either willfully or inadvertently. (*People v. Salazar* (2005) 35 Cal.4th 1031, 1035.) Second, the suppressed evidence must be favorable to the prosecution, meaning it "either helps the defendant or hurts the prosecution" (*In re Sassounian, supra*, at p. 544) in that it is exculpatory or has impeachment value. (*Strickler v. Greene* (1999) 527 U.S. 263, 282 (*Strickler*).) 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, supra*, at p. 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, supra*, 527 U.S. at pp. 280-281.)

In the present case, the suppressed February 11, 1997 interview between Officer Clemens and John Harris is favorable, exculpatory and impeaching evidence which was kept from Petitioner and the jury. The suppression of this critical evidence (and the subsequent law enforcement contacts with Harris) was prejudicial to Petitioner and his defense.

A. Officer Clemens and Officer McDaniel February 11, 1997 Interview of John Harris

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 an interview with John Harris, conducted by Officer Clemens on February 11, 1997, that was not included in the initial discovery provided by the State prior to trial. (Exhs. Q and T.) Petitioner was not aware of the interview, had never heard the tape, or seen the transcript of the interview. (Exh. Q.) Petitioner did not receive a corresponding police report for the February 11, 1997 interview. (Exh. Q.) All other tapes and recordings received by Petitioner came with corresponding police reports denoting the details of the interview and the interviewer. (Exh. Q.)

On February 11, 1997, Officers Clemens and McDaniel interviewed Harris at the Shasta County Sheriff's Office at Harris' 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."[12] (Exh. T.)

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[12] 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.

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, 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 Campbell is identified by name and officer badge number in the footer of the transcript of the interview. The interview does not identify all participants in the beginning of the recording.

The primary investigating officer who conducted the interview, Officer Clemens, testified at Petitioner's trial that Harris was "ruled out" as a suspect on February 5, 1997, after his interrogations – 6 days prior to the suppressed interview with Harris. He further affirmatively stated that there was *no evidence* implicating Harris. (RT 2209.)

B. The State's Suppression of the Office Interview With Harris Constitutes a *Brady* Violation

Because neither Petitioner nor the jury was ever made aware of Officer Clemens' February 11, 1997 confessional interview with Harris or any subsequent interview or investigation, Petitioner did not receive a fair trial and the verdict is undermined. (*Kyles v. Whitely* (1995) 514 U.S. 419, 434.)

In *Brady v. Maryland, supra*, 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." (*In re Pratt* (1999) 69 Cal.App.4th 1294, 1312.)

"The defendant must establish that the undisclosed information was favorable to the defense and that there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the trial would have been different. [Citation.] Such a reasonable probability exists where the undisclosed evidence 'could reasonably be taken to put the whole case in such a different light as to undermine confidence in the

verdict.' [Citations.] Impeachment evidence, as well as exculpatory evidence, falls within the scope of *Brady*." (*Eulloqui v. Superior* Court (2010) 181 Cal.App.4th 1055, 1063.)

In California, under *Brady* and its progeny, the prosecution has a Fourteenth Amendment duty to disclose to a criminal defendant all evidence that is favorable to the defendant, that is material either to guilt or punishment, and that is in the possession of the prosecutor or an investigative agency to which the prosecutor has reasonable access. (*In re Sassounian* (1995) 9 Cal.4th 535, 543-45; *People v. Kasim* (1997) 56 Cal.App.4th 1360, 1379-80.) However, evidence is not suppressed in violation of *Brady*, "unless the defendant was actually unaware of it and could not have discovered it 'by the exercise of reasonable diligence.'" (*People v. Salazar* (2005) 35 Cal.4th 1031, 1049.) Additionally, the prosecution has "no general duty to seek out, obtain, and disclose all evidence that might be beneficial to the defense." (*Ibid.*) Furthermore, a *Brady* violation only occurs if there is a reasonable probability that the outcome of the criminal proceeding would have been different had the evidence been disclosed to the defense. (*Ibid.* at p. 1050.)

"The California Supreme Court has also repeatedly stressed the focus upon the importance of the undisclosed evidence to the trial. In *People v. Pensinger* (1991) 52 Cal.3d 1210, the court explained *Brady* materiality as follows: 'Under the federal Constitution, "the conviction must be reversed, only if the evidence is material in the sense that its suppression undermines confidence in the outcome of the trial."' (*Id.* at p. 1272, quoting [*United States v. Bagley* (1985) 473 U.S. 667, 678].) In *In re Brown* (1998) 17 Cal.4th 873 (*Brown*), the court again addressed the standard: '[W]e turn to the question of materiality, for not every nondisclosure of favorable evidence denies due process. "[S]uch suppression of evidence amounts to a constitutional violation only if it deprives the defendant of a fair trial. Consistent with 'our overriding concern with the justice of the finding of guilt,' [citation] a constitutional error occurs, and the conviction must be reversed, only if the evidence is material in the sense that its suppression undermines confidence in the outcome of the trial."' (*Id.* at p. 884, quoting *Bagley,*

supra, 473 U.S. at p. 678.) "'*Bagley's* touchstone of materiality is a 'reasonable probability' of a different result, and the adjective is important.

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.'" (*Brown,* at p. 886, quoting [*Kyles v. Whitley* (1995) 514 U.S. 419, 434].) "'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.'" (*Brown*, at p. 887, quoting *Kyles, supra*, 514 U.S. at p. 435.) In *People v. Zambrano* (2007) 41 Cal.4th 1082, disapproved on a different ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, footnote 22, the California Supreme Court reiterated the standard of materiality under *Brady*: "Evidence is material [under *Brady*] if there is a reasonable probability its disclosure would have altered the trial result." (*Zambrano*, at p. 1132.)

"The *Brown* court also explained, 'The sole purpose [of *Brady* and its progeny] is to ensure the defendant has all available exculpatory evidence to mount a defense." (*Brown, supra*, 17 Cal.4th at p. 881.) In *City of Los Angeles v. Superior Court* (*Brandon*) (2003) 29 Cal.4th 1, 8, the California Supreme Court found that the materiality standard of *Brady* does not vary based upon when a *Brady* claim is raised, holding: "Although *Brady* disclosure issues may arise 'in advance of,' 'during,' or 'after trial' [citation], the test is always the same. [Citation.] *Brady* materiality is a 'constitutional standard' required to ensure that nondisclosure will not 'result in the denial of defendant's [due process] right to a fair trial. [Citation.]'" (*Eulloqui v. Superior Court, supra*, 181 Cal.App.4th at p. 1067.)

1. The February 11, 1997 Interview With John Harris Was Suppressed

Evidence is "suppressed" where it is known to the State and not disclosed to the defendant. (*Strickler, supra*, 527 U.S. at p. 282.) The State's duty to disclose is affirmative; it applies "even though there has been no request by the accused." (*Id*. at p.

280 (citing *United States v. Agurs* (1976) 427 U.S. 97).) To satisfy its duty, the State must disclose evidence known to the prosecutor as well as evidence " 'known only to police investigators and not to the prosecutor.' " (*Id.* at pp. 280–81 (citing *Kyles v. Whitley* (1995) 514 U.S. 419, 438).) Thus, the prosecutor has an obligation "to learn of any favorable evidence known to the others acting on the government's behalf in [the] case, including the police." (*Id.* at p. 281 (citing *Kyles, supra*, 514 U.S. at p. 437).) Once the prosecutor acquires favorable information, even if she "inadvertently" fails to communicate it to the defendant, evidence has been suppressed. (*Id.* at p. 282.)

In the present case, the State failed to disclose the February 11, 1997 interview with Harris, as well as any subsequent meetings or agreements with Harris, "Nick," or any additional evidence related to Harris' claimed phone call with "Nick." (Exh.) The State devoted much of its case-in-chief defending against Petitioner's third party culpability defense and omitted the interview in their repeated claims that Harris was never a suspect and had been ruled out. Indeed, Officer Clemens, *the officer who conducted all of the interviews with Harris*, told the jury that he "ruled out" Harris as a suspect during the initial interrogation on February 5, 1997. (RT 1825, 2927-2928.) In addition to the State's witness evidence which supports a finding that the evidence was suppressed from the defense prior to trial, present counsel can attest to the fact that the trial file does not contain the interview, a signed form of discovery receipt, the transcript of the interview or any police reports related to the interview or subsequent interviews. (Exh.)

2. The February 11, 1997 Interview With John Harris Is Exculpatory And Impeaching

Evidence is "favorable to the accused" for *Brady* purposes if it is either exculpatory or impeaching. (*Strickler*, *supra*, 527 U.S. at pp. 281–82.) If information would be "advantageous" to the defendant (*Banks v. Dretke* (2004) 540 U.S. 668, 691, 124 S.Ct. 1256), or "would tend to call the government's case into doubt," (*Milke v. Ryan* (9th Cir.2013) 711 F.3d 998, 1012), it is favorable. Whether evidence is favorable is a

question of substance, not degree, and evidence that has any affirmative, evidentiary support for the defendant's case or any impeachment value is, by definition, favorable. (See *Strickler, supra*, 527 U.S. at pp. 281–82.) Although the weight of the evidence bears on whether its suppression was prejudicial, evidence is favorable to a defendant even if its value is only minimal. (See *Ibid*.; *Milke, supra*, 711 F.3d at p. 1012.)

Here, the February 11, 1997 interview between Officer Clemens, Officer McDaniel and Harris – conducted in a random sheriff's office at the Shasta County Sheriff rather than any of the interrogation rooms – is extremely favorable to Petitioner's case both as exculpatory evidence, corroborating Petitioner's third party culpability claim and as impeachment evidence against Officers Clemens, Compomizzo and Campbell.

Harris' statement to Officer Clemens constitutes a series of "admissions," or confessions. Harris' statement included many facts not released to the media, that only a person present at the murder of Kohn would know – that whoever killed Kohn took the cash hidden at his apartment, that a yellow car was identified at the Kohn's apartment on the night of the murder, that whoever killed Kohn walked through blood on the floor, and that whoever killed Kohn would have sustained injuries from the violent altercation that took place during the assault on Kohn. The media *never reported* the details regarding how Kohn was murdered or any particular details regarding the murder scene.

First, in the interview, Harris explains that he called for the interview because he knew that Nick was the one that took the money from Kohn's apartment, and therefore he was likely the last person to see Kohn alive. This statement is important because it confirms information that was never released to the public – that the $10,000 in cash at Kohn's apartment was the motive for Kohn's murder, and whoever murdered Kohn took the cash. Harris next tells the officers that Nick drove a "yellow" car of some sort. This is important because several witnesses identified Harris' yellow truck at Kohn's apartment the night of the murder. Additionally, Harris provides a deflective statement regarding the injuries that Nick was likely to have sustained during his fight with Kohn – injuries exactly like the ones that the sheriffs had photographed on Harris when they

arrested him on February 5, 1997. Harris suggests that the officers might want to photograph the injuries (as they had done with him the week prior). Then, Harris assures the officers that he knows that they have his shoes and they won't "find blood on them." This statement is particularly damning because there was no way for Harris to know that the crime scene was bloody, with blood on the floor, such that he would assume that the officers had taken his shoes into evidence in order to investigate trace blood evidence on them. Finally, at the end of the interview, Harris suggests that he offered the information on "Nick" in exchange for reduced criminal consequences, or "misdemeanor" punishment. Following Harris' suggestion, the parties intimate that they will meet again. This sequence suggests a proposed agreement between Harris and the sheriffs. All of the foregoing evidence set forth in the interview is exculpatory and favorable to Petitioner's case as it supports his third party culpability defense that Harris was responsible for Kohn's murder.

In addition to constituting exculpatory evidence of third party culpability, the Harris interview impeaches the credibility of Officers Clemens, Compomizzo and Campbell. All three officers testified that there was "no evidence" implicating Harris in Kohn's murder. The interview in and of itself clearly implicates Harris. Officer Clemens went further in his testimony, stating that he effectively ruled him out as a suspect during his February 5, 1997 interrogations. Officer Campbell's name and badge number are on the footer of the transcript of the interview, proving that he had knowledge of the interview regardless of whether he was present in 1997 or ordered a transcript as part of his 2004 cold case investigation.

Contrary to the testimony of law enforcement, the confessional interview constitutes a strong piece of evidence implicating Harris in the murder. For Officer Clemens in particular, the Harris interview presents strong impeachment evidence regarding both the claim that there was no evidence connecting Harris to the murder, and that he had personally ruled out Harris as a suspect following his initial interview on February 5, 1997. The interview contradicts much of Officer Clemens' testimony, and it

is exceptionally strong impeachment evidence since Officer Clemens was the investigating officer that conducted the February 11, 1997 interview. The interview is also strong impeachment evidence for Officer Campbell who testified that he reviewed the prior interviews which all "ruled out" Harris. There is simply nothing in the interview that would allow anyone to "rule out" Harris.

3. The February 11, 1997 Interview With John Harris Is Material

The suppression of favorable evidence is prejudicial if that evidence was "material" for *Brady* purposes. (*Strickler*, *supra*, 527 U.S. at 282.) Evidence is "material" if it "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." (*Id*. at p. 290 (citing *Kyles*, *supra*, 514 U.S. at p. 435). Similarly, California courts have held, "Evidence is material [under *Brady*] if there is a reasonable probability its disclosure would have altered the trial result." (*People v. Zambrano* (2007) 41 Cal.4th 1082, 1132.)

To establish materiality, a defendant need not demonstrate "that disclosure of the suppressed evidence would have resulted ultimately in [his] acquittal." (*Kyles, supra*, 514 U.S. at p. 434.) Rather, the defendant need only establish "a 'reasonable probability' of a different result." (*Ibid*. (quoting *United States v. Bagley* (1985) 473 U.S. 667, 678).) A "reasonable probability" exists if "the government's evidentiary suppression 'undermines confidence in the outcome of the trial.' " (*Ibid*. (quoting *Bagley*, *supra*, 473 U.S. at p. 678.); see also *United States v. Sedaghaty* (9th Cir.2013) 728 F.3d 885, 900 ("In evaluating materiality, we focus on whether the withholding of the evidence undermines our trust in the fairness of the trial and the resulting verdict.").

The disclosure of the February 11, 1997 interview with Harris would have transformed the trial. Exculpatory evidence is material if its introduction at trial "would have resulted in a markedly weaker case for the prosecution and a markedly stronger one for the defense." (*Kyles, supra*, 514 U.S. at p. 441.) Here, Harris' interview is powerful evidence that he was directly involved in Kohn's murder (if not the responsible party), thus if it were disclosed prior to trial it would have served to significantly bolster

Petitioner's third party culpability defense. The impact of the exculpatory evidence is strengthened by the fact that the only evidence implicating Petitioner was the unreliable State's witness, Helana - who read her testimony from type-written notes which were typed by the prosecution, and who was not an eyewitness to any aspect of the murder of Kohn or related events. In the context of this exceptionally weak case, the State's suppression of highly relevant evidence implicating Harris as the responsible third party, "the defense was empty handed" in presenting a defense and impeaching Officers Clemens, Campbell and Compomizzo. (See *Sedaghaty*, *supra*, 728 F.3d at p. 900.)

The courts have held that impeachment evidence is material "if it could have been used to impeach a key prosecution witness sufficiently to undermine confidence in the verdict." (*Paradis v. Arave* (9th Cir.2001) 240 F.3d 1169, 1179; see also *Sedaghaty, supra*, 728 F.3d at p. 900 ("[W]e zero in on whether the suppressed materials could have provided an effective means of impeachment."). Because the interview with Harris would have undermined the testimony of all three investigating officers – Clemens, Compomizzo and Campbell – the disclosure would have undermined confidence in the verdict.

Without the evidence of Harris' interview with Officers Clemens and McDaniels, the jury was led to believe, without question, Officer Clemens' repeated false testimony that Harris had been "ruled out" as a suspect early on in the investigation and there was "no evidence" which implicated him. The 2/11/97 interview shows Officer Clemens' testimony to be patently false, and it calls into question much of the related physical evidence implicating Harris which was not investigated and tested in 1997. Petitioner has sought the chain of custody and present status for this evidence, but has been denied at the Shasta County Superior Court. All of this evidence is exculpatory for Petitioner, as there is no evidence connecting him to Kohn, Harris, the scene of the murder, or any individual known to have contact with Kohn back in 1997. Accordingly, in light of the complete lack of evidence implicating Petitioner, the evidence of the Harris interview is material in that it would have undermined the State's entire case, which was already

weak. (See *Comstock v. Humphries* (9th Cir. 2015) 786 F.3d 701, 710-12 [suppressed evidence was material where there was a "lack of direct evidence," and "the State really had no direct proof], citing *Amado*, *supra*, 758 F.3d at pp. 1140–41 [holding that *Brady* evidence was material where other evidence was weak]; *Aguilar*, *supra*, 725 F.3d at p. 985 [same].)

As set forth above, the suppressed evidence of Harris' February 11, 1997 interview (and the subsequent interactions with Shasta County Sheriff) was used by the State to impede or prevent Petitioner from being able to present a third party defense. (See *Brown, supra*, 17 Cal.4th at p. 881.) The suppressed *Brady* evidence is undoubtedly material, and its suppression resulted in the denial of Petitioner's due process right to a fair trial, thus reversal is required. (See *Eulloqui v. Superior Court, supra*, 181 Cal.App.4th at p. 1067.)

C. 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*

> The jury [had] nothing more than [the detective's] word that Milke confessed. Everything the [S]tate claims happened in the interrogation room depends on believing the detective's testimony. Without [his] testimony, the prosecution had no case against Milke[.] [T]he Constitution requires a fair trial, and one essential element of fairness is the prosecution's obligation to turn over exculpatory evidence. This never happened in Milke's case and so the jury trusted [the detective] without hearing of his long history of lies and misconduct.

(*Milke v. Ryan* (9th Cir. 2013) 711 F.3d 998, 1002–03.)

In 1990, a jury convicted Debra Milke of murdering her four-year-old son based solely upon the testimony of Officer Armando Saldate, Jr. 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* (1972) 405 U.S. 150, 153–55. The Ninth Circuit found the State's suppression of Officer Saldate's prior misconduct to be unconstitutional under *Brady* and reversed Milke's conviction.

"As more than two decades passed while Milke lived on death row, exoneration reform expanded and litigation exposed the reality of wrongful convictions, including those based on *Brady* violations and false confessions procured through coercive interrogations or fabricated by police officers." (Reflections on the *Brady* Violations in *Milke v. Ryan*: Taking Account of Risk Factors for Wrongful Conviction; Catherine Hancock, NY 2015.) In *Milke*, the Ninth Circuit 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, supra*, 711 F.3d at p. 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 the Ninth Circuit Court of Appeal. (See *Brewster v. County of Shasta, et al*. (E.D. 2000) 112 F.Supp.2d 1185 ; *Brewster v. County of Shasta* (9th Cir. 2001) 275 F.3d 803; see also Exhs. Y and EE.) Petitioner makes the request for Judicial Notice under Evidence Code section 451, requesting that the Court take judicial notice of the factual findings of the federal court, as these factual matters are considered "matters that are indisputably true." (See *Fremont Indem. Co. v. Fremont Gen. Corp*. (2007) 148 Cal.App.4th 97, 113.) *Milke* is both comparable and controlling in Petitioner's case, as the present case reveals a similar pattern of past law enforcement misconduct, suppressed by the State in violation of *Brady*, and the suppression contributed directly to Petitioner's conviction in this case.

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 McDonnald 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 McDonnald 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[13] and McDannold, 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 McDonnald, who were identified in both the *Brewster* case. As set forth in full below, the State has suppressed material past officer misconduct when it failing to affirmatively

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[13] Petitioner also asks this Court to take judicial notice of the factual findings in *Lunbery v. Hornbeak* (9th Cir. 2010) 605 F.3d 754. In *Lunbery*, the Ninth Circuit reversed Petitioner's conviction based upon a finding that the defendant was prevented from presenting a defense as protected under the 6th Amendment of the Constitution. In addition, the concurrence noted, pursuant to the ineffective assistance of counsel claim, that there was unconstitutional witness manipulation which resulted in the claimed false confession. In the decision, the Ninth Circuit Court of Appeal identified Shasta County Sheriff as the investigating agency, and found that during the initial investigation, a motive, opportunity and witnesses identifying a drug dealer suspect was established by 4 separate witnesses. Despite the overwhelming evidence implicating the drug dealing initial suspect, the Shasta County Sheriff's Office conducted no further investigation, the officer with critical information on the Confidential Informant "lost his notes" as to the name of the informant, and no further information on the case was obtained until December 2001, when the case was pursued as a cold case. Petitioner notes that the

provide the information to the Petitioner in pre-trial discovery, preventing Petitioner from presenting a defense. His conviction must be reversed under *Brady* and *Giglio*. (*Milke, supra,* 711 F.3d at p. 1019.)

1. Factual Comparison to *Brewster*

The federal court found that the Shasta County Sheriff's unconstitutional manipulation of the witness included: (1) sheriffs[14] showing the witness photos of Brewster multiple times during the identification 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

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

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.) Finally, 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.[15] (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*,

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[15] 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.)

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 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 Clemens and identified as connected to the murder and inventoried by 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.

2. The State's Suppression of Shasta County Sheriff's Office's Past Misconduct and Constitutional Violations Was Unconstitutional

Due process imposes an "inescapable" duty on the prosecutor "to disclose known, favorable evidence rising to a material level of importance." (*Milke v. Ryan, supra,* 711 F.3d at p. 1012, citing *Kyles, supra*, 514 U.S. at p. 438.) Favorable evidence includes both exculpatory and impeachment material that is relevant either to guilt or punishment. (*Ibid.*)

As acknowledged by the *Milke* court, "A *Brady* violation has three elements. (Citation.) First, there must be evidence that is favorable to the defense, either because it is exculpatory or impeaching. (Citation.) Second, the government must have willfully or inadvertently failed to produce the evidence. (Citation.) Third, the suppression must have prejudiced the defendant. (Citation.)" (*Milke, supra*, 711 F.3d at p. 1012.) Here, the State suppressed material past officer misconduct and unconstitutional practices, resulting in an unfair trial and preventing Petitioner from presenting a defense. His conviction must be reversed under *Brady* and *Giglio*. (*Id.,* at p. 1019.)

a. The Past Misconduct and Constitutional Violations of Shasta County Sheriff's Office Constitutes Favorable Evidence

Any evidence that would tend to call the State's case into doubt is favorable for *Brady* purposes. (*Milke, supra*, 711 F.3d at p. 1012, citing *Strickler, supra*, 527 U.S. at p. 290.) In the present case, the federal court's finding that the Shasta County Sheriff maintained practices or policies that violated defendants' constitutional rights constituted favorable evidence as there was evidence of the sheriff's office employing many of the same practices in Petitioner's case. Comparably, in *Milke*, the court found that evidence of the officer's past misconduct would have been useful to the jury in determining whether the officer or the defendant was telling the truth. (*Ibid*.) Moreover, the court found that the past evidence of misconduct showed that the officer "lied under oath in order to secure a conviction or to further a prosecution" in past cases, and the same law enforcement and prosecutorial agencies were involved in those cases. (*Id*. at p. 1013.) Ultimately, the court found that if Milke had been able to present the jury and judge with evidence of the officer's past "menagerie of lies and constitutional violations," she likely would have been able to develop "legitimate questions concerning guilt." (*Id*. at p. 1015.)

Here, much as in *Milke*, the past misconduct and unconstitutional policies in *Brewster* inform the officers' conduct in Petitioner's case. Because both cases rested upon the testimony of a single witness who was manipulated by the sheriff in providing a

statement in support of the State's case, the information regarding Shasta County Sheriff's past unconstitutional practice of mendacity and manipulation of witnesses would have had a likely caused the jury to further question the reliability of Helana's testimony. As set forth above in full, the sheriffs in the present case subjected Helana to many of the same manipulative practices that they employed to obtain identification testimony from the victim witness in *Brewster*. For instance, the sheriff showed Helana photos as prompts and suggestions to get her to make critical identification (the firearm), they drove her to and from the Sheriff's Office, they told her that Petitioner was guilty of other offenses (so she was doing society a favor), and they repeatedly gave her the impression that there was considerable evidence which implicated Petitioner. (Exh. D, p.74; Exh. H.) Just as in *Brewster*, the sheriffs never informed Helana that her testimony was the only evidence implicating Petitioner in the murder.

Secondly, just as in *Brewster*, the sheriff purposefully 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. Had the judge and jury been informed of the Sheriff's policy of purposefully failing to pursue forensic investigation and DNA testing, it would have given the jury further legitimate questions concerning guilt. Moreover, discovery of the Sheriff's policy might have prompted Petitioner's counsel to push for additional investigation of the following: 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 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.

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.

b. The Past Misconduct and Constitutional Violations of Shasta County Sheriff's Office Was Suppressed

The courts have long held that the State bears a *Brady* obligation "to produce any favorable evidence in the personnel records" of an officer. (*Milke, supra,* 711 F.3d at p. 1016, citing *United States v. Cadet* (9th Cir. 1984) 727 F.2d 1453.) Moreover, a defendant does not have to make an affirmative request for exculpatory or impeachment evidence: "[T]he duty to disclose [exculpatory] evidence is applicable even though there has been no request by the accused, and ... the duty encompasses impeachment evidence as well as exculpatory evidence." (*Strickler, supra*, 527 U.S. at p. 280.) In *Milke,* the court found that the evidence of the misconduct and constitutional violations had an obligation to produce the documents related to the misconduct as they "no doubt knew of this misconduct... [and t]he police must have known, too." (*Milke, supra,* 711 F.3d at p. 1016.)

Much as in *Milke*, the prosecution should have been well aware of the federal court finding in *Brewster*, as the county was held liable for the Sheriff's misconduct in the federal civil rights suit. However, even if there "somehow weren't actual knowledge of [Sheriff's Office] misconduct, inadvertent failure to disclose is enough for a *Brady* violation." (*Milke, supra,* 711 F.3d at p. 1017.) It is also important to note the fact that the court documents showing the misconduct and constitutional violations were available in the public record doesn't diminish the State's obligation to affirmatively produce them under *Brady*. (See *Ibid*.) Because the State did not disclose the federal civil rights suit to Petitioner or his co-defendant, they did not have enough information to discover the *Brady* evidence. Where a defendant lacks the information to discover the *Brady* material

with reasonable diligence, the state's failure to produce the evidence is considered suppression. (*Id*. at p. 1018.)

In the present case, as in *Milke,* the misconduct in *Brewster* was not discovered until present post-conviction counsel researched Helana Martinez's claim of witness manipulation. Present counsel ultimately requested copies of the *Brewster* case file from the Eastern District Court of California and trial counsels. Without the information that the individual officers involved in the present case and the whole of Shasta County Sheriff's Office was involved in a federal civil rights case in federal district court (located in Sacramento), a reasonably diligent attorney couldn't have possibly discovered the documents related to the federal case in time to use in trial. Accordingly, the documents related to the *Brewster* case and the federal court's factual findings that the Shasta County Sheriff's Office had a practice or policy of witness manipulation and purposeful failure to investigate potentially exculpatory evidence and basic forensic evidence were suppressed by the State.

c. The Past Misconduct and Constitutional Violations of Shasta County Sheriff's Office Was Material To Petitioner's Defense

"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, supra*, 711 F.3d at p. 1018.) In *Milke*, the court found that the suppression of the lead investigator's past 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 law enforcement misconduct was directly relevant to Petitioner's case. Here, the unconstitutional policies and practices employed by Shasta County Sheriff's Office in the prior suppressed case mirrored Petitioner's case. Both cases were "cold" case prosecutions where initial

investigation supported a suspect that was never prosecuted despite significant evidence implicating the third party. Both cold case prosecutions were built around the testimony of a single witness who provided the only evidence implicating the defendant. Here, the Shasta County Sheriff also failed to interview Petitioner as part of their investigation. Thus, there was no confession or claimed confession from Petitioner. Rather, the only evidence implicating Petitioner was the often conflicting testimony of his estranged wife, Helana, who suffers from an "extreme form of PTSD." Due to her mental disability, Helana suffers from a lack of memory. During trial, she read her testimony from "notes" typed by the District Attorney's Office. As set forth in full in Claim III, the Shasta County Sheriff's practice of witness manipulation was particularly suggestive and impactful upon Helana due to her mental disability.

The reliability of Helana's testimony was at issue throughout the trial, as her initial statement to the sheriff, on June 24, 2004, was a report of a murder that had "just" taken place. This statement was reiterated by Helana's mother who maintained at the habeas evidentiary hearing in 2019, that she believed that the murder had "just taken place" for several months based upon Helana's statements. In addition, the original officer who took the report, Officer Heberling, ended his report with a statement that he had spoken to Helana's victim/witness advocate who reported that she "had no mental illness." The Shasta County Sheriff's initial recorded interview was lost and never recovered for trial. All that remained was Officer Campbell's recorded interview which took place the following day, on June 25, 2004. The prosecution had difficulty getting Helana to repeat the elements of her original statement on the stand – even with notes in hand. This included her testimony regarding her original statement about Petitioner's guns which was critical to the State's case as it was the only evidence that suggested Petitioner had any connection to the Kohn murder. Even this testimony was contradictory and confused, and this is the testimony that she now recants. (See Claim III.) Accordingly, the Shasta County Sheriff's past misconduct and unconstitutional practice of witness manipulation was a critical, material issue and its suppression prejudiced Petitioner.

In addition, the Shasta County Sheriff's past pattern of misconduct and purposeful failure to investigate forensic evidence in preparation for prosecution is material to the present case. As set forth in full above, the Shasta County Sheriff's practice of failing to conduct basic forensic investigation of the physical evidence collected from the crime scene and Harris' apartment was material to the present case, thus its suppression was undoubtedly prejudicial to Petitioner. Had the judge and jury been informed of the Sheriff's policy, the complete lack of physical evidence implicating Petitioner – despite the availability of forensic evidence - would have given the jury further legitimate questions concerning guilt.

The State's suppression of the Shasta County Sheriff's past pattern or policies of misconduct and constitutional violations in *Brewster* undoubtedly prejudiced Petitioner as "the government's evidentiary suppression undermine[d] the confidence in the outcome of the trial. (Citation.)" (*Milke, supra*, 711 F.3d at p. 1018.) Accordingly, the *Brady* violation requires reversal of Petitioner's conviction.

II. 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 I, 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* (1935) 294 U.S. 103, 112.) 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* (1972) 405 U.S. 150, 153, 154 (quoting *Napue v. Illinois* (1959) 360 U.S. 264, 271; *Dow v. Virga* (9th Cir. 2013) 729 F.3d 1041, 1047-1049.) This is known as a *Napue* violation. (See *Dow*, *supra,*729 F.3d at p. 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* (9th Cir. 2014) 760 F.3d 947, 957-958; *Reis-Campos v. Biter* (9th Cir. 2016)832 F.3d 968; *Alcorta v. Texas* (1957) 355 U.S. 28.

The Supreme Court in *Napue* held that "a conviction obtained through use of false evidence, known to be such by representatives of the State," violates the Fourteenth Amendment. (*Napue, supra*, 360 U.S. at p. 269.) Prosecutorial misconduct in the form of false testimony violates the constitutional rights of the defendant and requires a reversal of the conviction if the following three elements are met: "(1) the testimony was actually false, (2) the prosecutor knew it was false, and (3) the false testimony was material (i.e., there is a reasonable likelihood that the false testimony could have affected the judgment)." (*Dow, supra*, 729 F.3d at p. 1050; citing *Napue,* 360 U.S. at 271-72); see also *Alcorta v. Texas* (1957) 355 U.S. 28, 31 [the state cannot allow a witness to give a material false impression of the evidence].)

Napue applies whenever a prosecution "'knew or should have known that the testimony was false.'" (*Hayes v. Brown* (9th Cir. 2005) 399 F.3d 972, 984 (en banc).) As described in the previous Claim I, the prosecutor had a clear *Brady* obligation to disclose the evidence regarding Harris' interview and admissions to law enforcement as well as the Shasta County Sheriff's pattern of misconduct and constitutional violations as set forth in *Brewster*. (*Kyles, supra*, 514 U.S. at p. 438 ["any argument for excusing a prosecutor from disclosing what he does not happen to know about boils down to a plea to substitute the police for the prosecutor, and even for the courts themselves, as the final arbiters of the government's obligation to ensure fair trials"]; *Giglio, supra,* 405 U.S. at p.

154 [whether the nondisclosure was a result of negligence or design, it is the responsibility of the prosecutor].) If the prosecutor has a duty to investigate and disclose favorable evidence known only to the police, he "should know" when a witness testifies falsely about such evidence. (*Jackson v. Brown* (9th Cir. 2008) 513 F.3d 1057, 1075.) 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

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 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' 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 any "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.)

B. The Prosecution Knowingly Presented False Testimony

In Petitioner's case, the prosecution's use of false testimony constituted prosecutorial misconduct which violated Petitioner's right to due process under *Napue* and *Brady*. (See *Napue v. Illinois* (1959) 360 U.S. 264, 269; *Brady v. Maryland, supra,* 373 U.S. at p. 83.)

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. 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.)

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' shoes, the blood-like substance on the driver's side door of Harris' 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 recantation in full in Claim III 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. 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.)

C. The Evidence Was "Material"

A "prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." (*Kyles v. Whitley, supra*, 514 U.S. 419 at pp. 437-438; *Strickler v. Greene* (1999) 527 U.S. 263, 280-281. Further, the Ninth Circuit has observed that "[b]ecause the prosecution is in a unique position to obtain information known to other agents of the government, it may not be excused from disclosing what it does not know but could have learned." (*Amado v. Gonzalez* (9th Cir. 2014)758 F.3d 1119, 1134; *Carriger v. Stewart* (9th Cir. 1997) 132 F.3d 463, 480 (en banc). The prosecution should have known that the testimony provided by Officers Clemens, Campbell and Compomizzo was false as identified above and argued in full below. The prosecution was responsible for disclosing any information regarding Harris known by the State (law enforcement or the prosecution) and correcting any testimony regarding Helana that was known to be false. (See *Amado, supra*, 758 F.3d at p. 1134 [prosecution responsible for failing to disclose what it could have learned from other government agents.].)

In order to assess their materiality, *Napue* and *Brady* violations should be considered collectively. (*Jackson v. Brown* (9th Cir. 2008) 513 F.3d 1057, 1071 (stating

that courts should evaluate the "cumulative effect of the prosecutorial errors for purposes of materiality separately and at the end of the discussion.") (citing *Kyles v. Whitley*, *supra*, 514 U.S. at p. 436 n.10) (internal quotation marks omitted).) If the *Napue* errors are not material standing alone, the Court must consider the *Napue* and *Brady* errors together and determine whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (*Id.*)

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 (9th Cir. 2013) 729 F.3d 1041, 1047 (citing *Napue*, *supra*, 360 U.S. at p. 271; and *Giglio v. United States* (1972) 405 U.S. 150, 153.) Although the government's knowing use of false testimony does not per se require reversal, the *Napue* materiality standard is "less demanding" than "ordinary" harmless error review. (See *Dow, supra*, 729 F.3d at p. 1048 (citations omitted).) Furthermore, in discussing materiality under *Napue*, the Ninth Circuit has "gone so far as to say that 'if it is established that the government knowingly permitted the introduction of false testimony, reversal is virtually automatic.'" (*Jackson, supra*, 513 F.3d at p. 1076 (quoting *Hayes, supra,* 399 F.3d at p. 978) (emphasis added). Thus, the question of materiality 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." (*Hayes, supra*, 399 F.3d at p. 984 (citations omitted).)

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, while undercutting the real and damning evidence implicating Harris as the culpable party responsible for Kohn's murder. 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. Petitioner's conviction secured by the false testimony of the State's witnesses must be reversed.

III. THE RECANTATION OF THE STATE'S SOLE WITNESS IMPLICATING PETITIONER CONSTITUTES BOTH FALSE MATERIAL EVIDENCE THAT WAS RELIED UPON FOR CONVICTION AS WELL AS NEW EVIDENCE OF PETITIONER'S ACTUAL INNOCENCE

"The Supreme Court, courts of appeal, superior courts, and their judges have original jurisdiction in habeas corpus proceedings." (Cal. Const., art. VI, § 10.) "The writ of habeas corpus enjoys an extremely important place in the history of this state and this nation. Often termed the 'Great Writ,' it 'has been justifiably lauded as " 'the safe-guard and the palladium of our liberties.' " ' " (*People v. Villa* (2009) 45 Cal.4th 1063, 1068.)

"[A] habeas corpus proceeding is not a trial of guilt or innocence and the findings of the habeas corpus court do not constitute an acquittal. The scope of a writ of habeas corpus is broad, but in this case, as in most cases, it is designed to correct an erroneous conviction. It achieves that purpose by invalidating the conviction and restoring the defendant to the position she or he would be in if there had been no trial and conviction." (*In re Cruz* (2003) 104 Cal.App.4th 1339, 1346, citing *In re Crow* (1971) 4 Cal.3d 613, 620; see also *In re Hall* (1981) 30 Cal.3d 408, 417.) "[A] successful habeas corpus petition necessarily contemplates and virtually always permits a retrial. [Citations.] The possibility of a retrial is often assumed without discussion." (*In re Cruz, supra*, 104 Cal.App.4th at p. 1347.)

Prior to January 1, 2017, in order to grant habeas relief, the court needed to find that the "new evidence" completely undermined the prosecution's case and pointed " ' "unerringly to innocence." ' " (*In re Johnson* (1998) 18 Cal.4th 447, 462.) The law

has changed, effectively lowering the standard of proof for actual innocence. Effective January 1, 2017, relief may be granted when: "New evidence exists that is credible, material, presented without substantial delay, and of such decisive force and value that it would have more likely than not changed the outcome at trial." (§ 1473, subd. (b)(3)(A).) The statute defines "new evidence" as "evidence that has been discovered after trial, that could not have been discovered prior to trial by the exercise of due diligence, and is admissible and not merely cumulative, corroborative, collateral, or impeaching." (§ 1473, subd. (b)(3)(B).)

The standard is comparable to the new trial standard in California, or new evidence that "is in fact newly discovered; that is not merely cumulative to other evidence bearing on the factual issue;.. and that the moving party could not, with reasonable diligence have discovered and produced [] at trial." (*People v. McDaniel* (1976) 16 Cal.3d 156, 178.) The new standard is also comparable to the federal new trial standard, which provides that the new evidence "was unknown or unavailable to the defendant at the time of trial" and that the "failure to learn of the evidence was not due to lack of diligence by the defendant[,]" (*United States v. Colon-Munoz* (1st Cir. 2003) 318 F3d.348, 358.) The statute creates a sliding scale: in a case where the evidence of guilt presented at trial was overwhelming, only the most compelling new evidence will provide a basis for habeas relief; on the other hand, if the trial was close, the new evidence need not point so conclusively to innocence to tip the scales in favor of the petitioner. (*In re Sagin* (2019) 39 Cal.App.5th 570, 579-580.)

A. Helana Martinez's Recantation And Evidence That Her Testimony Was The Product Of A Mental Disability And Suggestive Techniques Constitutes Strong Evidence Of Petitioner's Actual Innocence

The strongest new evidence of actual innocence is Helana Martinez's recantation of her trial testimony and related statements along with the corroborating new evidence from psychological and forensic psychological experts. Helana acknowledges that she has suffered from a mental disability for most of her life, stemming from her life-long abuse. Upon reviewing the circumstances and substance of her testimony, Helana no

longer believes that her statements and testimony at trial reflect her actual memory. 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[16]

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 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.)

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[16] Helana was permitted to testify in the presence of her therapist, Keith Manner.

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.[17] (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 memory," because she does not trust that this is the product of her own memory or experience. (Exh. B, p. 77.)

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[17] 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.)

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. Shyla Hill Corroborating Testimony[18]

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[18] Petitioner asks the Court to take judicial notice of the Eastern District of California civil case, *Gardner v. Shasta County*, et al, case no. 2:06-CV-106 MCE-DAD. The civil case, brought by Joyce Gardner, charged two Shasta County District Attorneys and fellow employees of the Victim/Witness Assistance Program with misconduct, malfeasance and slander. Gardner's claim included accusations that the District Attorney's Office lied and manipulated individuals and agencies in order to secure grants and funding for the Victim/Witness Assistance Program. In addition, Gardner charged that the defendants had slandered her with false stories including a story that Gardner had embezzled thousands of dollars through her position as a victim advocate. The jury found in favor of Gardner, and the court ultimately held Shasta County liable for damages caused by the misconduct and malfeasance committed by District Attorney, Jerry Benito and Carol Gall (under the management of the District Attorney's Office). Petitioner offers the jury's finding as evidence of Carol Gall's bad character and propensity to lie which further corroborates Hill's account of Gall and her conduct as an abuser while in the role of victim advocate.

Shya Hill testified as the mother of Helana Martinez and the ex-mother-in-law of Derek Martinez, the Petitioner in this case. (Exh. B, p. 108.) Hill described herself as a survivor of abuse, who has always been acutely aware of the cycle of abuse. (Exh. B, p. 109.)

On the morning of June 24, 2004, Helana came to Hill and told her that Petitioner had "just killed someone." (Exh. B, p. 113.) Hill was very upset by this information, as it seemed like it had just happened. (Exh. B, p. 113.) Helana didn't return to the house until late in the afternoon. (Exh. B, p. 114.) Hill noted that Helana seemed exhausted and blank. (Exh. B, p. 114.) Helana reported to Hill that she had gone to a new therapist, not her assigned therapist, Keith Manner. (Exh. B, p. 114.) The new therapist had told her that he didn't believe that Petitioner had actually killed anyone, but he was just trying to scare her. (Exh. B, p. 114.)

Hill was very scared, because she believed that Helana had just been witness to a murder and they were in danger. (Exh. B, p. 114.) Hill called Helana's friend, Cheri, while she rested, and encouraged her to take Helana to the police so that she could file a report. (Exh. B, p. 115.) Cheri came by that evening and took Helana to the police department to file a report. (Exh. B, p. 115.)

The next morning, Helana was called to the Sheriff's Department. Officer Campbell came and got her from the house that morning, and Hill stayed with the children. (Exh. B, p. 116.) When Helana returned home, she told Hill that they needed to leave the house because her witness advocate and law enforcement believed that Petitioner was going to come after them. (Exh. B, p. 116.)

Hill remembers meeting Carol Gall, the victim advocate, at one of the first hotels. (Exh. B, p. 117-118.) Gall and Hill stepped outside the hotel room to talk. (Exh. B, p. 117-118.) During the conversation, Gall admitted to Hill that she was Frank Cibula's girlfriend, and she was aware that Frank Cibula was Petitioner's divorce attorney and his son was Petitioner's defense attorney. (Exh. B, p. 117.) Then, Gall told Hill a story

about the people that were "after them." (Exh. B, p. 118.) Gall told Hill that there were White Pride gang members that were coming for them. (Exh. B, p. 118.)

When they were at the hotels in the weeks that followed, they noticed the same people following them. (Exh. B, p. 118.) They were evicted from one of the hotels because the Victim/Witness Program didn't pay the bill. (Exh. B, p. 119.) Eventually, Hill made a formal complaint concerning Carol Gall, to her supervisor, Joyce Gardner. (Exh. B, p. 119.) Carol Gall was replaced as Helana's victim advocate, and Hill left the program as a result of the complaint. (Exh. B, p. 119.)

Hill started communicating with Derek after trial. (Exh. B, p. 120.) Eventually, Hill read the transcripts from trial and several aspects concerned her. (Exh. B, p. 120.)

d. 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. (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, 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, 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, p. 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.)

e. 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, 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. (EH RT 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. (EH RT 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. Davis notes that Detective Campbell's interview was suggestive with regard to crucial evidence linking Petitioner to the crime. 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. 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. 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 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.

2. The evidence corroborating Helana's recantation could not have been discovered prior to trial through the exercise of due diligence

The former habeas standard for new evidence claims required that a habeas petitioner act with " 'reasonable diligence' " in presenting his or her claim. (See *In re Hardy* (2007) 41 Cal.4th 977, 1016 [the petitioner's evidence was not " 'newly discovered' " because it was reasonably available to him prior to trial "had [he] conducted a reasonably thorough pretrial investigation"].) The terms " 'reasonable diligence' " and "due diligence" are essentially interchangeable. (See *People v. Cromer* (2001) 24 Cal.4th 889, 892; see also *People v. Herrera* (2010) 49 Cal.4th 613, 622.)

"What constitutes due diligence to secure the presence of a witness depends upon the facts of the individual case. [Citation.] The term is incapable of a mechanical definition. It has been said that the word 'diligence' connotes persevering application, untiring efforts in good earnest, efforts of a substantial character. [Citation.] The totality of efforts of the proponent to achieve presence of the witness must be considered by the court. Prior decisions have taken into consideration not only the character of the proponent's affirmative efforts but such matters as whether he reasonably believed prior to trial that the witness would appear willingly . , whether the search was timely begun, and whether the witness would have been produced if reasonable diligence had been exercised [citation]." (*People v. Linder* (1971) 5 Cal.3d 342, 346-347.)

Here, Petitioner could not reasonably have been expected to "discover" Helana's recantation prior to trial because she was the primary state's witness against him at trial. Moreover, Helana did not fully realize that her testimony didn't reflect her actual memory until years after the trial. Without the underlying realization, Helana was unable to articulate her concern that her testimony did not reflect her actual memories. In addition, it was not until she had the corroboration of her therapist, Keith Manner, that she began to consider how her memories were manipulated or replaced with "false memories." Thus, based on the facts of this case, Helana's recantation and corroborating evidence could not have been discovered prior to trial by the exercise of due diligence.

3. Helana's recantation and corroborating evidence of expert witnesses is not merely cumulative, corroborative, collateral, or impeaching

The "merely cumulative, corroborative, collateral, or impeaching" element of the new statutory definition of "new evidence" for habeas corpus purposes is similar to the considerations for excluding evidence under Evidence Code section 352. "Cross-examination is subject to restriction under Evidence Code section 352 if it is cumulative or if it constitutes impeachment on collateral issues." (*People v. Greenberger* (1997) 58 Cal.App.4th 298, 352.) "Because the prosecution intended to offer other evidence which would tend to prove the same facts, [the witness'] testimony was cumulative. But trial

courts are not required to exclude all cumulative evidence and if evidence has substantial relevance to prove material facts which are hotly contested and central to the case, it is not 'merely cumulative.' " (*People v. Lang* (1989) 49 Cal.3d 991, 1016, disapproved on another ground in *People v. Diaz* (2015) 60 Cal.4th 1176, 1190.)

A "trial court has discretion to exclude impeachment evidence if it is collateral, cumulative, confusing, or misleading." (*People v. Price* (1991) 1 Cal.4th 324, 412.) In this context, "impeach" means that the new evidence would tend to discredit the testimony of a prosecution witness who testified a trial. (*United States v. Atkinson* (E.D.N.C. 1977) 429 F.Supp. 880, 885 ["Newly discovered evidence that merely goes to impeach the credibility of a prosecution witness does not ordinarily warrant the granting of a new trial, [citations]; but in some circumstances the newly discovered evidence, although impeaching[,] is sufficiently important in the ascertainment of the truth and in the interests of justice that a new trial should be ordered"].)

Here, there is no dispute Helana's testimony regarding circumstantial evidence was the only evidence that implicated Petitioner in the murder of Christopher Kohn. It is undisputed that Helana was not an eye witness to any aspect of the murder. Further, there is no corroborating physical evidence which implicates Petitioner or places Petitioner at the scene of the crime. The only contested issue at trial was the identity of the murderer, and Helana's testimony was the only evidence identifying Petitioner as the murderer. Therefore, Helana's recantation cannot be considered merely "collateral."

Moreover, Helana's recantation and the corroborating evidence that her statements and testimony is the result of suggestive techniques and coercion is neither "cumulative" nor "corroborative" of the evidence at trial, because this evidence directly refutes the only evidence presented against petitioner at trial. Thus, this evidence is not "merely" cumulative, corroborative, or impeaching. (§ 1473, subd. (b)(3)(B).)

4. Helana's recantation and corroborating evidence of expert witnesses constitutes strong and decisive evidence of Petitioner's actual innocence that it would have more likely than not changed the outcome at trial

Initially, Helana's recantation and corroborating evidence must also be considered in the context of Shasta County's practice or policy of witness manipulation in order to secure a conviction, as found in the *Brewster* case. Here, there was strong, corroborated and unresolved evidence of third party culpability suggesting that John Harris was in fact the individual responsible for Kohn's murder. Despite this strong, unanswered evidence, the prosecution focused on Petitioner as the primary suspect based upon Helana's troubling, vague and often contradictory account *seven years* after the murder. Indeed, much as in *Brewster*, Shasta County created a narrative, identifying Petitioner as the murderer through Helana's testimony. Preying on her disability, Shasta County Sheriff's employed suggestive techniques to procure evidence implicating Petitioner where none existed.

Based upon analysis of the video evidence from Helana's only recorded interview, forensic psychologist, Deborah Davis concluded that investigators were directly suggestive and definitively influenced Helana's statement (at the very least) with regard to both identifying the murder weapon as Petitioner's gun and identifying the location of the murder. Davis further noted the troubling aspect of the suggestive questioning in the context of the lack of recordings for Helana's initial statements and her concern that the statements and testimony do not reflect her actual memory. Davis notes that Helana's claim of false memory is consistent with her PTSD condition and the suggestive tactics used in the recorded interview.

The evidence of Helana's recantation 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. Moreover, most of the evidence that she gave was 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, 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. Third, none of Helana's various descriptions of the gun would comport with how the gun handle would have looked after the 5 pieces of plastic on the grip were gone.

Additionally, there was no physical evidence connecting petitioner to the murder, and ample evidence of third party culpability. As noted above, there was considerable evidence implicating third party, John Harris, as the responsible party in the murder. In this context, Helana's recantation constitutes undeniable evidence of Petitioner's innocence.

In this context, the Helana's recantation and corroborating evidence of her claim that her testimony was the result of false or manipulated memories constitutes strong and decisive evidence that would have more likely than not changed the outcome at trial. Accordingly, relief must be granted.

B. Helana Martinez's Recantation Constitutes False Material Evidence That Was Relied Upon For Conviction

"A writ of habeas corpus may be prosecuted" where "[f]alse evidence that is substantially material or probative on the issue of guilt or punishment was introduced against a person at a hearing or trial relating to his or her incarceration." (§ 1473, subd. (b)(1).)

"Determining that the evidence was false clears the first hurdle to relief. 'The statute and the prior decisions applying section 1473 make clear that once a defendant shows that false evidence was admitted at trial, relief is available under section 1473 as long as the false evidence was "material." ' [Citation.] Materiality is shown if there is a reasonable probability the result would have been different without the false evidence."

(*In re Figueroa* (2018) 4 Cal.5th 576, 588–589.) "This required showing of prejudice is the same as the reasonably probable test for state law error established under *People v. Watson* (1956) 46 Cal.2d 818, 836. [Citation.] We make such a determination based on the totality of the relevant circumstances." (*In re Richards* (2016) 63 Cal.4th 291, 312–313.)

First, Helana's recanted testimony which was the product of unduly suggestive tactics by Shasta County, constitutes false evidence. As Helana testified at the evidentiary hearing, she no longer believes that her testimony represents her actual memories. Based upon these assertions, Helana's testimony at trial now constitutes false evidence which was used to convict Petitioner of the underlying murder in this case.

Second, as set forth in full above, Helana's testimony at trial was the only evidence that implicated Petitioner in Kohn's murder. As repeatedly noted, there was no physical evidence connecting Petitioner to the murder, and ample physical, anecdotal and circumstantial evidence of third party culpability. In this context, there is more than a reasonable probability that the outcome of the trial would have been different had Helana's testimony not been admitted at trial. Accordingly, Petitioner submits that relief should be granted in this case.

IV. DNA EXPERT ANALYSIS OF FORENSIC EVIDENCE CONSTITUTES STRONG EVIDENCE OF PETITIONER'S ACTUAL INNOCENCE

Finally, in support of his claim of actual innocence, Petitioner submits the newly discovered DNA evidence and the report from DNA experts, Technical Associates Incorporated (TAI) who reviewed the DNA evidence and forensic background of the present case and find that the forensic evidence corroborates Petitioner's claim of actual innocence. The DNA evidence excluding Petitioner is important in light of the facts related to the murder. Here, Kohn was brutally murdered in his apartment where there was no evidence of forced entry. Rather, neighbors heard Kohn "partying" with individuals in his apartment before the murder. There is no evidence in the record to suggest that Petitioner ever met Kohn on any occasion prior to his murder.

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. 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. 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.

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.

A. 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 connect 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.) 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 solely to a sample of Petitioner's DNA. 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.

Upon his conviction, beginning in 2006, Petitioner filed numerous motions for the Department of Justice (DOJ) to conduct DNA testing of evidence from the crime scene maintained by the Shasta County Sheriff. Petitioner was excluded as the possible contributor to the DNA found on all items tested. However, Michael Johnson and John Harris could not be excluded from several items tested.

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 was 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. (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. The DNA evidence discovered by petitioner through pro se motions constitutes evidence that could not have been discovered prior to trial through the exercise of due diligence

The former habeas standard for new evidence claims required that a habeas Petitioner act with " 'reasonable diligence' " in presenting his or her claim. (See *In re Hardy, supra,* 41 Cal.4th at p. 1016 [the petitioner's evidence was not " 'newly discovered' " because it was reasonably available to him prior to trial "had [he] conducted a reasonably thorough pretrial investigation"].) The terms " 'reasonable diligence' " and "due diligence" are essentially interchangeable. (See *People v. Cromer, supra,* 24 Cal.4th at p. 892; see also *People v. Herrera, supra,* 49 Cal.4th at p. 622.)

Here, Petitioner sought DNA testing since he was charged in the underlying case. 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 to complete, due to no fault of Petitioner. 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.

C. The exculpatory DNA evidence is not merely cumulative, corroborative, collateral, or impeaching

The "merely cumulative, corroborative, collateral, or impeaching" element of the new statutory definition of "new evidence" for habeas corpus purposes is similar to the considerations for excluding evidence under Evidence Code section 352. "Cross-examination is subject to restriction under Evidence Code section 352 if it is cumulative or if it constitutes impeachment on collateral issues." (*People v. Greenberger* (1997) 58 Cal.App.4th 298, 352.)

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.

Further, 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.

D. The exculpatory DNA evidence constitutes strong and decisive evidence of petitioner's actual innocence that it would have more likely than not changed the outcome at trial

In *In re Sagin*, the Court of Appeal recently granted habeas relief on a claim of actual innocence where the Petitioner presented DNA evidence which excluded him from the evidence at the crime scene that was available for testing. (See *In re Sagin, supra,* 39 Cal.App.5th at p. 570.) Much as in the present case, the DNA evidence in *Sagin* could not affirmatively exclude Petitioner from the crime scene. However, the court noted that it was significant, given the violent struggle, that the Petitioner could be excluded as a contributor to the DNA evidence found under the victim's fingernails and objects in her immediate surroundings. (*Id*. at p. 581) The Court further found that the DNA evidence which excluded Petitioner, taken with the lack of physical evidence linking him to the crime and the general closeness of the case, made it more likely than not that at least one juror would have maintained a reasonable doubt regarding guilt. (*Id*. at p. 582.)

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, further 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.

V. PETITIONER'S CONVICTION FOR FIRST DEGREE PREMEDITATED MURDER MUST BE REVERSED UNDER *PEOPLE V. CHIU*

Finally, Petitioner's conviction for first-degree murder must be reversed under *People v. Chiu* (2014) 49 Ca.4th 155. Here, the Court instructed the jury as to a felony-murder theory of liability, a willful, deliberate premeditated theory of liability and a natural and probable consequences theory of liability.

The natural and probable consequences doctrine applies not only to aiding and abetting but also to uncharged conspiracy. (*People v. Rivera* (2015) 234 Cal.App.4th 1350, 1356.) "Under both these theories, the extension of liability to additional reasonably foreseeable offenses rests on the 'policy [that] conspirators and aiders and abettors should be responsible for the criminal harms they have naturally, probably and foreseeably put in motion.'" (*Ibid.*)

In *Chiu, supra*, 59 Cal.4th 155, the California Supreme Court held "an aider and abettor may not be convicted of first degree premeditated murder under the natural and probable consequences doctrine." (*Id.* at pp. 158-159.) The *Chiu* court explained that the "connection between the defendant's culpability and the perpetrator's premeditative state is too attenuated to impose aider and abettor liability for first degree murder under the natural and probable consequences doctrine . . . ." (*Id.* at p. 166.) The court in *Chiu*, *supra*, 59 Cal.4th 155 also held that "[w]hen a trial court instructs a jury on two theories of guilt, one of which was legally correct and one legally incorrect, reversal is required unless there is a basis in the record to find that the verdict was based on a valid ground. [Citations.] Defendant's first degree murder conviction must be reversed unless we conclude beyond a reasonable doubt that the jury based its verdict on the legally valid

theory that defendant directly aided and abetted the premeditated murder." (*Id*. at p. 167.)

Chiu is retroactive to convictions, like Petitioner's here, that were final on appeal when *Chiu* was decided. (See *In re Lopez* (2016) 246 Cal.App.4th 350, 354.) Moreover, *Chiu* applies not only to aider and abettor liability, but also where the jury is instructed it may find first degree murder based on the theory that the murder was a natural and probable consequence of another target crime committed pursuant to an un charged conspiracy. (*Rivera, supra*, 234 Cal.App.4th at pp. 1355-1356.) *Chiu* applies to the present case based upon the prosecution's theory that the murder was the natural and probable consequence of the target crime of burglary, committed pursuant to an uncharged conspiracy. In closing argument, the prosecutor focused on the murder as the natural and probable consequence of their "plan" to collect a debt from the victim through a robbery. (RT 3128.)

"Pursuant to the high court's holding in *Chiu*, the jury was improperly instructed that it could find first degree premeditated murder was a natural and probable consequence" of their plan or conspiracy to "collect a debt" or robbery, and the instruction was not harmless.

A. The Instructional Error Was Prejudicial

Petitioner was prejudiced by the natural and probable consequence instruction, as there was insufficient evidence to prove Petitioner's mental state sufficient for first degree murder under a valid theory. In the present case, the standard for assessing the prejudicial effect of *Chiu* error when raised in a petition for habeas corpus is whether the error is harmless beyond a reasonable doubt. (*In re Johnson* (2016) 246 Cal.App.4th 1396, 1404.)

Based on the jury instructions and the prosecutor's closing argument in this case, the court cannot conclude beyond a reasonable doubt that the jury convicted Petitioner for first-degree murder on the legally valid theory that he directly aided and abetted the

premeditated murder, and not on the legally invalid natural and probable consequences doctrine in the context of an uncharged conspiracy "to collect a debt."

Petitioner and Michael Johnson were tried together, thus the instructions must be considered as applying to both defendants. It is clear from the record that there was insufficient evidence of direct or implied malice to support a theory of premeditated murder under that theory. (See RT 3016.) In this context, at the very least, without a clarification that the natural and probable consequences doctrine was limited to second degree murder, the instructions as a whole effectively permitted the jury to convict Petitioner of first degree premeditated murder as the natural and probable consequence of the conspiracy to "collect a debt." This theory that was legally invalid under *Chiu*.

The issue is not whether substantial evidence supports a first degree murder conviction on a theory of malice. The issue is whether the record shows beyond a reasonable doubt that the jury relied on a legally valid theory, and the record here falls well short. Because a robbery at gun point might result in death—under the erroneous natural and probable consequences instructions, the jury did not need to resolve whether Petitioner himself had the requisite mental state for premediated murder. Nothing in the record indicates the jury resolved that issue under some other finding, nor does the record demonstrate beyond a reasonable doubt the jury based its verdict on the legally valid theory.

Whatever the possible grounds for the jury's first degree murder verdict against Petitioner might have been in theory, in light of the jury instructions and the prosecutor's closing arguments, in reality the jury almost certainly convicted Petitioner of first degree murder under the natural and probable consequences doctrine—which is legally impermissible under *Chiu, supra*, 59 Cal.4th at page 159. Accordingly, this Court must grant Petitioner's requested relief.

VI. CONCLUSION

For the reasons described herein and attached exhibits, petitioner respectfully submits that this court should issue an order to show cause and grant his petition for relief.

Dated: October 20, 2020

Respectfully submitted,

Jennifer M. Sheetz

Attorney for Petitioner

CERTIFICATION

I, Jennifer M. Sheetz, declare under penalty of perjury:

I am an attorney admitted to practice law in the State of California. I represent Petitioner in the above case.

Pursuant to California Rule of Court, rule 8.204 subd. (c)(1), I hereby certify that the Petitioner's Habeas Petition in this matter contains 32,450 words, inclusive of footnotes. Petitioner recognizes that this is over the word limit and page limit provided by the statute, and Petitioner has filed a simultaneous motion to file an oversized petition.

Executed under penalty of perjury this 20th day of October, 2020, at Mill Valley, California.

Jennifer M. Sheetz

RE:*In re Derek Martinez* Case No.

CERTIFICATE OF SERVICE

I declare that I am over the age of 18, not a party to this action and my business address is 38 Miller Ave., PMB 113, Mill Valley, California 94941. My electronic service address is jmsheetz@hotmail.com. On October 20, 2020, I served the within APPELLANT'S HABEAS PETITION AND EXHIBITS by electronic mail to each of the following parties using the email addresses indicated:

Xavier Becerra, Attorney General
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SacAWTTrueFiling@doj.ca.gov
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California Third District Court of Appeal

X **BY MAIL** - Placing a true copy thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Mill Valley, California, addressed as follows:

Shasta County District Attorney
1355 West St.
Redding, CA 96001

Shasta County Superior Court
1500 Court St.
Redding, CA 96001

I declare under penalty of perjury that the foregoing is true and correct. Executed on October 20, 2020, in Mill Valley, CA.

Jennifer Sheetz, Esq.