IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re DEREK MARTINEZ
on Habeas Corpus.

S265089

Third Appellate District, Case No. C085284

Shasta County Superior Court Case Nos.
04F4728, 16CRHB6278

INFORMAL REPLY TO THE INFORMAL RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

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TABLE OF CONTENTS **Page(s)**

TABLE OF AUTHORITIES....3

INTRODUCTION....5

I. THE CLAIMS IN THE PETITION ARE PROPERLY RAISED....14

II. MR. MARTINEZ IS ENTITLED TO AN ORDER TO SHOW CAUSE ON EACH OF HIS CLAIMS FOR RELIEF....19

A. CLAIM ONE: The Prosecution Failed To Disclose Exculpatory Evidence That Undermined Confidence In The Outcome Of Petitioner's Trial In Violation Of His Right To Due Process Under *Brady*....19

B. CLAIM TWO: 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* 32

C. CLAIM THREE: The Recantation Of The State's Sole Witness Implicating Petitioner Constitutes Both False Material Evidence As Well As New Evidence Of Petitioner's Actual Innocence....43

D. CLAIM FOUR: DNA Expert Analysis Of Forensic Evidence Constitutes Strong Evidence Of Petitioner's Actual Innocence 46

E. CLAIM FIVE: Petitioner's Conviction For First Degree Premeditated Murder Must Be Reversed Under *People V. Chiu*……....49

III. CONCLUSION…….....50

TABLE OF AUTHORITIES

Page(s)

Federal Cases

Brady v. Maryland (1963) 373 U.S. 83 5

Brewster v. County of Shasta, et al (E.D. 2000) 112 F.Supp.2d 1185 ..... 5, 10

Lunbery v. Hornbeak (9th Cir. 2010) 605 F.3d 754 25

Milke v. Ryan (9th Cir. 2013) 711 F.3d 998 ..... 6, *passim*

Youngblood v. Virginia (2006) 547 U.S. 867 20

State Cases

In re Clark (1993) 5 Cal.4th 750 ..... 15, 18

In re Gallego (1998) 18 Cal.4th 825 16

In re Harris (1993) 5 Cal.4th 834 15

In re Lynch (1972) 8 Cal.3d 410 18

In re Robbins (1993) 5 Cal.4th 291 15

Weiner v. Mitchell, Silberberg & Knupp (1980) 114 Cal.App.3d 39 ..... 20, 27

Miscellaneous

Catherine Hancock, *Reflections on the* Brady *Violations in* Milke v. Ryan*: Taking Account of Risk Factors for Wrongful Conviction*; N.Y.U. REVIEW OF LAW & SOCIAL CHANGE, Vol.38 : 464-465 (2015) 5, 6

Weisselburg, *In the Stationhouse*, note 95; Weisselberg *Saving* Miranda, note 3 12

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. S265089** **(Nos. 04F4728,16CRHB6278** **COA No. C085284)**

INFORMAL REPLY TO THE INFORMAL RESPONSE TO THE PETITION FOR WRIT OF HABEAS CORPUS

TO: THE HONORABLE TANI CANTIL-SAKAUYE, CHIEF JUSTICE OF CALIFORNIA AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA.

Petitioner, Derek Martinez, by this Informal Reply to Respondent's Informal Response, hereby incorporates the allegations of his Petition for Writ of Habeas Corpus, and the facts contained in the exhibits filed in support of the Corrected Amended Petition, as if fully set forth herein, and offers the following additional legal authority and factual submissions in support of the issuance of an Order to Show Cause, order for discovery, order for an evidentiary hearing, and grant habeas relief so that he may have the fair trial to which he was entitled.

INTRODUCTION

> One of the *Brady* and *Giglio* violations in *Milke* involved the prosecutor's longstanding resistance to the disclosure of the detective's personnel file.... The other violations concerned the resistance to the disclosure of court records, unknown to the defense, which contained judicial findings regarding the detective's false testimony and unconstitutional interrogations in prior cases. As it turned out, the discovery of the court records by post-conviction counsel accomplished more than support for a renewed request for access to the file. The "pattern" of misconduct revealed in the court records constituted "highly relevant" and "highly probative" evidence that "would certainly cast doubt" on the detective's credibility if used to impeach his testimony at trial. Yet in the years before the Ninth Circuit's decision, no reviewing court recognized either the impeachment value of the court records of the merit of Milke's *Brady* violation claims regarding their non-disclosure. Eighteen years after the discovery and presentation of the records in the post-conviction petition, the Ninth Circuit granted a new trial for Milke based on the [*Brady* violation].[1]

Respondent asks this Court to ignore the relevant and compelling pattern of Shasta County law enforcement misconduct recently discovered by petitioner – as set forth in the civil rights case of *Brewster v. Shasta County* (E.D. 2000) 112 F.Supp.2d 1185.[2] The federal civil rights case provides a context for understanding the underlying facts of this case and the claims set forth in the petition, as the case identifies a practice or pattern of officer conduct which the Shasta County Sheriff has adopted as its official practice.

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[1] Catherine Hancock, *Reflections on the* Brady *Violations in* Milke v. Ryan*: Taking Account of Risk Factors for Wrongful Conviction*; N.Y.U. REVIEW OF LAW & SOCIAL CHANGE, Vol. 38: 444 (2015).

[2] Respondent has filed a formal Opposition to petitioner's request for judicial notice of the three federal cases. Petitioner maintains that this Court may properly take judicial notice of the cases, and petitioner has filed a response to the Opposition. However, petitioner has also filed the three federal cases and filings from the cases as Exhibits hereto.

During the civil rights case, Shasta County Sheriff Pope's representative testified at a deposition that all of the actions by the officers in the *Brewster* case were acting pursuant to the official practice and policies of the department (when they violated Brewster's constitutional rights). The *Brewster* case is both probative and relevant to this case. Not only does it reflect the same practices and policies adopted by the Shasta County Sheriff that were at issue in *Brewster*, it involves the same officers from the sheriff's office – Officers McDannold, Clemens and Compomizzo. Mr. Martinez asks the Court to consider his claim under *Brady v. Maryland* (1963) 373 U.S. 83 (*Brady*), through the lens of the *Milke v. Ryan* (9th Cir. 2013) 711 F.3d 998. Mr. Martinez contends that the actions of sheriffs in *Brewster* which were adopted as official practice or policy by the Shasta County Sheriff constitutes "highly relevant" and "highly probative" evidence to the claims of law enforcement misconduct as set forth in his petition. For, "[a]s long as localized resistance to *Brady* remains an acceptable legal norm for prosecutors and judges alike, the enforcement of *Brady* will remain a matter of geographic justice, and some [law enforcement] will continue to operate in a *Brady*-free zone of their own making." (Catherine Hancock, *Reflections on the* Brady *Violations in* Milke v. Ryan*: Taking Account of Risk Factors for Wrongful Conviction*; N.Y.U. REVIEW OF LAW & SOCIAL CHANGE, Vol.38 : 464-465 (2015).) The constitutional protections of Californians simply cannot be determined by a zip code.

Mr. Martinez maintains that the three cases present a pattern and practice of law enforcement and official misconduct which illuminates the circumstances which resulted in his wrongful conviction. These patterns and practices were not known at the time of Mr. Martinez's trial, and they were not discovered until present counsel recently made the independent discovery. Respondent would have this Court turn a blind eye to the pattern of constitutional violations and employ rote procedural bars.

Confronted with compelling evidence of Derek Martinez's innocence and stark evidence of systemic misconduct, the absence of evidence - of any kind – implicating Mr. Martinez, the significant incriminating evidence implicating a third party with motive,

opportunity and means, respondent clings to a simplistic, driven narrative which doesn't comport with the evidence in the case from 1997. (Response at 10-11.) Respondent insists that the narrative for the case begins in 2004, with the statement by Helana Martinez.

Respondent's narrative omits the significant investigation, beginning in 1997, which surrounded Christopher Kohn's murder and minimizes the investigation of John Harris as the primary suspect. (Response at 9.) If the discovery that Mr. Martinez received in 2018 is to be considered complete, the Shasta County Sheriff interviewed few if any other "people of interest" related to the murder of Chris Kohn other than John Harris. Indeed, no other in custody interrogation tapes were provided to Mr. Martinez other than John Harris, Taskeen Tyler and Nate Chatman. (Petitioner attaches the transcripts of videotaped interrogations for all three individuals as Exhibits II, JJ, KK and MM.) Contrary to the Shasta County Sheriff testimony at trial, all three taped interrogations focused on John Harris as the primary suspect in the murder of Chris Kohn. Further, John Harris was ostensibly arrested related to the Super Bowl Sunday burglary. However, many of the items seized during the search of his apartment were only relevant to Chris Kohn's murder – forensic evidence seized from the yellow Chevy pick-up truck (officers understood from multiple witnesses that the Chevy was not involved in the Super Bowl Sunday Burglary), cigarettes seized for comparison to the freshly smoked cigarette from outside Chris Kohn's apartment the morning of the murder, two pairs of Harris' shoes (size 9.5), 2 pieces of black plastic, and various items identified as stolen from Chris Kohn's apartment *after* Super Bowl Sunday.

Respondent next suggests that the cold case "broke" with Helana Martinez's report in 2004 about a memory that she had that Mr. Martinez had "confessed" to a murder. This oversimplification of the record overlooks several critical facts. The cold case was "reopened" in April of 2004, when Chris Kohn's mother (Susan Sellers) posted reward posters around Redding, offering $10,000 for information regarding his murder. (See Exh. FF.) Two notes were lodged with the detective assigned to the cold case, Tom

Campbell shortly after the posting of the reward offer. (Exh. FF.) The first note was from Susan Sellers. Ms. Sellers expressed anger and frustration that "nothing was being done" to solve her son's murder. Along with Ms. Sellers, Roberta Douglas (Debbie Harris', aka Debbie Butler's mother) reported that her daughter was married to one of the individuals involved in the murder of Chris Kohn. She stated several facts known to officers in 1997: John Harris drove a yellow Chevy to Chris' residence on the night of the murder; John Harris was observed acting very strange and sweating the morning of the murder; and there was a bloody jacket left in Harris' bedroom on the day of the murder. (See Exh. FF.) Ms. Douglas stated that all of this evidence was given to investigators right after the murder, and she was "surprised that nothing was done with it." She added that she was "100% certain" that John Harris was responsible for Chris Kohn's murder. After receiving these reports, Officer Campbell got a call from Debbie Butler. He interviewed her on June 4, 2004. (See Exhs. FF, GG.)

During the interview, Ms. Butler told Officer Campbell much of the same incriminating information regarding John Harris that implicated him in the murder of Chris Kohn. She explained: she knew that he had borrowed the yellow Chevy truck to go out to Kohn's the night of the murder; she found a white jacket, covered in blood in her bedroom the night of the murder; he told her that he was going back for the money that he missed during the Super Bowl Sunday burglary; she found a number of items from the reported list of Kohn's stolen property in her bedroom just after the murder; Harris had been acting "evil" around the time of the murder; and, he had a history of extreme violence and was capable of murder, especially when he was using crack (as he was at the time of the murder). (See Exh GG.) Butler acknowledged that Harris had burglarized Kohn twice, the second time *on the night of the murder*. (Exh. GG at pp. 17, 18, 31.) She described two men in a neon green, '62 Malibu, "box-looking" car, who followed her just after John was taken into custody after the murder. She had last seen them at her house the night of the murder, but she didn't know who they were. (Exh. GG at p. 28.) In response, Officer Campbell tells Butler, "Unfortunately, I think it's gonna be one of

those cases that we're gonna have to get John to admit this." (Exh. GG at p. 30.) Butler responded, "But there, I was with, you can't tell with the, the evidence that you have?" (Exh. GG at p. 30.)

Thus, two weeks before Respondent declares the "case broke" in 2004, the initial suspect, John Harris, was identified by his ex-wife as a person who had motive, opportunity and means to murder Kohn. Moreover, Butler reiterated much of the same incriminating evidence that specifically linked Harris to the murder. Finally, contrary to the officers' testimony at Mr. Martinez's trial, Harris was acknowledged as a continued "person of interest" in the murder of Kohn by Officer Campbell of the Shasta County Sheriff.

Two weeks later, Helana Martinez made several statements to law enforcement. Unlike Butler's coherent statements that corroborated evidence discovered in 1997, Helana's came after prompting from her witness advocate, Carol Gall. No other witness, no other evidence corroborated a connection between Chris Kohn and Mr. Martinez. On the day before Helana's initial recorded statement, Helana was sent to a new therapist to explain her feeling or belief that Mr. Martinez had "just" killed someone. Ms. Gall and the Victim/Witness program were well aware that Helana suffered from a mental disorder. The initial therapist sent her home, telling her that the things that she was reporting "did not seem real." That same night, Helana went to the Redding Police Department and reported that she believed that she had information on a murder that had taken place somewhere in Shasta County, as some point in time. Helana never claimed to be an eyewitness. Rather, she came forward because she had a dream or a belief that Mr. Martinez had killed someone. Contrary to respondent's assertions, Helana described a gun that Mr. Martinez owned as one having paint chipped off the handle "like it was used a lot," stating that the "paint looked worn off." (Pet. Exh. F, p. 30-31.) Helana also suggested that she might have seen a gun, "with part of the handle thing" gone, but she only saw it for a second. (Pet. Exh. F, pp. 31-32.)

Helana did *not* report that Mr. Martinez had confessed committing a murder in Mt. Gate, nor did she report that he had identified Michael Johnson as an accomplice.[3] Helana was never able to identify Mt. Gate, even with multiple prompts and photographs offered by the sheriff. Rather, much of Helana's initial statement was extremely vague. She could not name a time or place that the murder had taken place, nor could she name the victim. Helana's mother, Shyla Hill, believed that the murder had "just" taken place, because this is what Helana had told her, repeatedly. (Pet. Exh. B, at p. 113.) Helana testified at Mr. Martinez's trial from notes that were typed by the prosecution. In the end, the details are not as important as the stunning fact that Helana - a woman who suffers from a severe form of PTSD who cannot tell her memories from reality, an individual that was not in fact an eyewitness to any aspect of Kohn's murder, an individual has since recanted her testimony at trial as statements that she no longer believes to be true – offered the only "evidence" implicating Mr. Martinez in the murder of Kohn.

Respondent argues that Mr. Martinez relies upon several erroneous assertions in his claims for relief. Respondent is wrong in every respect, as summarily set forth below and set forth in full in the body of the informal briefing:

- Mr. Martinez reasserts that the district court in *Brewster v. County of Shasta* (E.D. Cal. 2000) CIV.S-98-2157 LKK/PAN found that Sergeant Brad McDannold and Deputy David Compomizzo were acting for Shasta County relative to the established policies and practices when they violated Brewster's constitutional rights. (See Pet. Exh. EE, at p. 10-12 [Captain Jarret testified during his deposition that both officers McDannold and Compomizzo were acting within the practices and policies set forth by Sheriff Pope when they violated the constitutional rights of Thomas Brewster] see also *Brewster v. County of Shasta* (E.D. 2000) 112 F.Supp.2d 1185 [published order denying

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[3] As noted in an offhand correction by respondent in a footnote (Response at 81), Helana actually stated that Mr. Martinez once told her that he and a "friend" – not Mr. Johnson - had beaten someone who owed them money.

the Motion for Summary Judgment].) In the summary of undisputed facts, the Court noted that Brewster alleged that the Shasta County Sheriff violated his Fourth and Fourteenth Amendment rights through manipulation of the state's primary witness, through the suppression of exculpatory evidence, including the failure to conduct forensic investigation. (See Pet. Exhs. Y, EE.)

- As argued in full in the attached briefing, Mr. Martinez maintains that the prosecution's suppressed evidence implicating John Harris prior to trial – including the February 11, 1997 interview and the transcript of the voice stress test and post-test interview on February 5, 1997[4]. Mr. Martinez submits to this Court that the prosecution's intentional suppression of the voice stress test and post-test interrogation of Harris further supports his claim that the mid-trial submission of the transcripts constitutes *Brady*. When considered in light of the content of the interrogations and the suppression of the voice stress interrogation, it is most certainly *Brady* by substance and intent. By suppressing the evidence of the 2/11/97 interview (which had *no* corresponding police report) prior to trial, the prosecution limited the defense's ability to impeach Officers Clemens, Compomizzo and Campbell, and effectively prevented Mr. Martinez's third party culpability defense. The suppression of the "full" interrogation transcript further supports this claim, as this evidence is also *Brady* evidence. (See Exh. II.) The release of the 2/11/97 interrogation tape late in the trial, after Officer Clemens had already testified, deprived Mr.

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

Martinez of the opportunity to impeach the officer on his claim that he had "ruled out" Harris, while also depriving him of an extremely strong third party culpability defense. Mr. Martinez submits that this is *Brady* compliance with a wink and a nod. Indeed, the release of critical, exculpatory evidence mid-trial is comparable to the police practice of interrogating "outside *Miranda*."[5] Respondent suggests that this practice is outside of the Court's purview because defense counsel did not object. (Response at 29-30.) Mr. Martinez asks this Court to look at the evidence within the context of this case and determine if the prosecution's mid-trial release of exculpatory evidence complies with the spirit and substance of *Brady*.

- Respondent erroneously contends that there is reliable evidence which contradicts Officer Compomizzo's police report and the Shasta County Sheriff "confidential" internal office memo which both acknowledge two black pieces of plastic that came from the same source (as per the DOJ testing) but which were not found at the murder scene. (Response at 10.) Respondent does not immediately identify the source or substance of the contradiction. Mr. Martinez reasserts that Officer Compomizzo's police report identifies the two pieces of plastic as being discovered at Harris' residence (which he personally photographs) and the internal police memo portrays two pieces of black plastic, but does not reveal where they were discovered.[6] (See Pet. Exh. L.)

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interviews of Taskeen Tyler and Nate Chatman transcribed (with her own funds), and the transcriptions are attached hereto as Exhibits JJ and KK.

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

[6] Mr. Martinez reasserts that discovery of the photographs taken by Officer Compomizzo of the two pieces of plastic at Harris' residence would both confirm that the pieces are the same as those pictures in the internal police memo as well as confirm the location where they were discovered. (See Prayer for Relief, requesting discovery of photographs and chain of custody related to the black pieces of plastic.)

- Respondent suggests that the evidence provided by Mr. Martinez only reveals one burglary of Kohn's apartment, and this evidence contradicts the assertion that Harris burglarized Kohn twice with the second burglary on the evening of the murder. Respondent is wrong. There is considerable evidence in the record that Harris burglarized Kohn's apartment twice, with the second burglary taking place on the day of Kohn's murder. Moreover, it is abundantly clear from the record that the officers all knew this information. Because respondent refutes this evidence, Mr. Martinez is attaching additional evidence which corroborates the allegation, including: the transcripts of the two interviews of John Harris' wife, Debbie (Harris, aka Butler), regarding the murder of Kohn and the evidence of two burglaries (attached hereto as Exhs. FF, GG and HH), the newly transcribed interrogation tape of John Harris (2/5/97) during and after the voice stress test that he failed with respect to questions regarding Kohn's murder (Exh. II)[7], the newly transcribed interrogation tape of Taskeen Tyler (2/6/97) regarding questions with respect to Kohn's murder (Exh. JJ) and the newly transcribed interrogation tape of Nate Chatman regarding questions with respect to Kohn's murder (Exh. KK).
- Respondent suggests that Helana's recantation of her testimony- of the State's only evidence implicating Mr. Martinez - does not constitute new evidence of actual innocence. Respondent's assertion is disingenuous. Helana's testimony from typed notes provided by the prosecution was not "eyewitness" testimony,

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[7] There is no transcription of this video, and there are no audio tapes of the stress test interrogation. As with the two other transcribed interrogations of John Harris, the interrogation is profoundly incriminating. There is simply nothing exculpatory in the interrogation which would have "ruled out" Mr. Harris as a suspect in the murder of Kohn. This is also true for the initial interrogation transcript and the subsequent interrogation on 2/11/97, which does not have a corresponding police report. This is why there are multiple references to Mr. Harris "remaining a person of interest" for the murder of Kohn in 2004, up until Mr. Martinez was arrested based solely upon Helana's

but rather a series of contradictory anecdotes and confused statements. The key testimony that the prosecution provided to Helana was the identification of the murder weapon. Indeed, Helana felt pressured to say certain things, she read from typed notes made by the prosecution, and the prosecution implored Helana to "put the gun in his hands." (Pet. Exh. B, at p. 77.) This was the State's sole evidence against Mr. Martinez. Helana has questioned her own testimony for years, and it was not until the evidence was reviewed by her therapist and an expert witness did Helana have the means to express and understand her doubt in a rational manner. At the 2019 evidentiary hearing, Helana testified that she does not believe that her testimony at trial reflects her actual memory nor does she believe that her testimony reflects reality. In particular, Helana does not believe that her testimony about the gun reflects reality. Accordingly, Helana has recanted her testimony regarding the gun.

I. THE CLAIMS IN THE PETITION ARE PROPERLY RAISED

Respondent contends petitioner's habeas corpus Claims I, II, IV and V are procedurally barred because they are untimely and successive. (Response at 23-90.) Respondent's contention is contrary to the record and the evidence presented by petitioner. Moreover, respondent's perfunctory reliance upon claims of procedural bars would have this Court ignore the substantial constitutional violations and errors presented in the petition, along with the new evidence of actual innocence. As set forth below, respondent's assertion that procedural rules bar merits review of the four claims is flawed for several reasons.

A. The Claims Are Timely

Respondent contends that Mr. Martinez's Claims I, II, IV and V are all untimely. (Response at 23-90.) Respondent is wrong, as Mr. Martinez's claims were made without undue delay after he was noticed of the information in support of his claims.

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largely incoherent statements about a murder that she believed "just" occurred. (Pet. Exh. B, at p. 113, 114, 127.)

The general rule is that a petition must be filed "as promptly as the circumstances allow." (*In re Clark* (1993) 5 Cal.4th 750, 765, fn. 5.) " ' "[A]ny significant delay in seeking collateral relief . . . must be fully justified. [Citations.]" [Citation.] . . .'" (*In re Sodersten (*2007) 146 Cal.App.4th 1163, 1221.) Delay is measured from the time a petitioner knew, or reasonably should have known, the information in support of the claim and the legal basis for the claim (*In re Robbins* (1998) 18 Cal.4th 770, 780), beginning as early as the date of conviction (*In re Clark, supra,* 5 Cal.4th at p. 765, fn. 5). Further, even if the Court finds "substantial" delay, then Mr. Martinez has established good cause for any delay. Finally, respondent fails to acknowledge that the claims involve clear and fundamental constitutional errors that strike at the heart of the trial process, and which are exempt from the procedural bars. (See *In re Harris* (1993) 5 Cal.4th 834.)

Claims I, II, IV and V were all presented to the Court with due diligence, based upon the time that Mr. Martinez became aware of the substantive factual basis for the claims. Mr. Martinez represented himself in both prior habeas petitions in state and federal district court, and he did not have access to much of the information and documentation related to the initial investigation in 1997, until present counsel was granted partial discovery following appointment in 2017 and 2018. (See Pet., Exh. Q.) Mr. Martinez did not receive the results from the final DNA testing until the end of 2016, despite the fact that he had motioned the court for DNA testing since 2008. (See Pet., Exh. J, pp .405-407.) Moreover, Mr. Martinez never received any of the audio or video interrogation and interview recordings as part of this file from trial counsel. Therefore, it was not until late 2018 and into 2019, that present counsel was able to digitize and review the evidence in context of the case and record on appeal. (See Pet., Exh. Q.) Upon review of the evidence, present counsel noticing stark contradictions in the testimony at trial, the record and investigation related to John Harris. Accordingly, Mr. Martinez was not on notice of the facts supporting the *Brady* and *Napue* claims until late 2019, into

2020. Accordingly, Claims I and II were presented to the Court with due diligence, and within a reasonable amount of time after being noticed of the factual basis for the claims.

With respect to Claim III, Mr. Martinez could not have reasonably discovered the facts supporting Helana's recantation based upon her belief that her testimony represents "false memories" before trial. Further, investigation of the supporting facts related to this claim required analysis by Helana's therapist (given her mental state) and an expert in the field of forensic psychology. This evidence could not have reasonably been discovered until: present counsel received discovery of the video recording of Helana's interview with Officer Campbell in 2018; present counsel obtained access to Helana in 2018-2019; present counsel secured the court appointments of Helana's therapist and the forensic psychologist, Deborah Davis, Ph.D. Mr. Martinez presented Claim III in this petition to superior court through the evidentiary hearing, in June 2019. Accordingly, this Claim has been timely presented with due diligence.

Furthermore, it was through this discovery that present counsel discovered the relevant and illuminating case – *Brewster v. Shasta* - which provides probative and relevant evidence of the practice and policies of the Shasta County Sheriff's Office which are related to Claims I, II, III, and IV, set forth in the present petition. Present counsel's appointment ended with the Shasta County Superior Court denial on November 7, 2019. Present counsel continued to represent Mr. Martinez *pro bono*. Thus, to the extent that present counsel has conducted and paid for investigation and presented claims on a *pro bono* basis since November 7, 2019, counsel asks the Court to find minor delays to be reasonable, as the lack of funding is a valid justification for at least some of the delay. (See *In re Gallego* (1998) 18 Cal.4th 825, 834-835.)

On January 28, 2020, present counsel filed a petition on behalf of Mr. Martinez, presenting the two claims of actual innocence related to Helana's recantation and the newly discovered DNA evidence. The Court of Appeal summarily denied the petition on May 4, 2020. Present counsel notes that the Court of Appeal denial came during the peak of the COVID pandemic. To the extent that this Court finds undue delay in the

presentation of to this Court following the denial of habeas relief in the Court of Appeal, present counsel requests that this Court accept the delay as reasonable under the circumstances of present counsel's *pro bono* representation and the nature of the COVID pandemic, which caused significant delays to many aspects of life and difficulties throughout 2020, extending into 2021.

Furthermore, present counsel notes that the *Brady* and *Napue* claims had not been fully investigated and developed prior to the filing of the petition in the Court of Appeal. Therefore, these claims were not presented to the Court of Appeal, contrary to respondent's assertion. (Response at 24.) Present counsel tried to obtain the filed exhibits and depositions cited in the Court's Order in the *Brewster* case at the federal district court. However, many of the documents from the case had been destroyed by the court when Justice Karlton passed away[8], as the filed exhibits remained in Justice Karlton's chambers after Shasta County settled with Brewster on his claims for violations of his constitutional rights. (Exh. LL.) After requests to both law offices that represented Brewster in federal district court on his civil rights claims, present counsel was able to obtain access to some additional portions of the record in the case. On June 11, 2020, Rolland Papendick provided documents from the *Brewster* case, including some of the deposition transcripts. (Exh. LL.)

After obtaining some of the record from the *Brewster* civil rights case, present counsel sought additional discovery related to the gaps in the investigation related to John Harris. On or about July 6, 2020, Petitioner filed a Motion for Disclosure of Chain of Custody, Reports and Status of Physical Evidence.[9] (Attached hereto as Exh. AA, BB.)

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

[9] 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

The Shasta County Superior Court denied the Motion and Supplement on October 2, 2020. (Exh. CC.) Present counsel filed the present underlying petition in this Court on October 20, 2020. Given the foregoing circumstances, there have been no gaps in Mr. Martinez's diligence in pursuing and presenting the underlying claims to this Court.

Moreover, to the extent that Mr. Martinez presents claims of significant constitutional error, Mr. Martinez asks this Court to excuse any finding of undue lapse of time. Respondent's assertions of procedural bars should be denied, and the Court should reach the substance of Mr. Martinez's claims.

B. The Claims Are Not Successive

Respondent also asserts that Mr. Martinez's Claims I, II, IV and V, are procedurally barred as successive claims. (See Response at 23-90.) Respondent's erroneous claim regarding the successive procedural bar to presentation of the claims mirrors the claim of untimeliness, thus Mr. Martinez relies primarily upon the factual basis for the recently discovered claims as set forth above and in the petition. Accordingly, Mr. Martinez asks this Court to deny respondent's assertion of the procedural bar to his claims.

A habeas petition should allege no other habeas petition had been filed or, if another had been filed, when the previous petition was filed and the court's ruling. (Pen. Code, §1475, ¶ 2; see *In re Lynch* (1972) 8 Cal.3d 410, 439, fn. 26.) To justify a successive petition, it must be shown that the factual basis for the claim was not known and the petitioner had no reason to believe the claim might be made at the time of the

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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.

previous habeas petition. (*Clark, supra,* 5 Cal.4th at pp. 774, 782.) A change in law can be a sufficient reason for a successive petition. (*Id*., at p. 775.)

As set forth above, the factual basis for the claims set forth in the petition before this Court were all recently discovered and presented with due diligence. Petitioner filed a Motion for Discovery in late 2017, 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 course of 2018. Present counsel's discovery of evidence contradicting the state's assertion at trial that John Harris had been "ruled out," prompted her subsequent investigation which resulted in the claims presented to this Court. As set forth above, the factual basis for Mr. Martinez's claims were not known at the time of his prior *pro se* habeas, and he had no reason to know of the claim, because he did not have access to the evidence which formed the factual basis. Accordingly, the claims set forth in the present petition are not barred as successive claims.

MEMORANDUM OF POINTS AND AUTHORITIES

II. MR. MARTINEZ IS ENTITLED TO AN ORDER TO SHOW CAUSE ON EACH OF HIS CLAIMS FOR RELIEF

A. CLAIM ONE: 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*

Respondent contends that Mr. Martinez has not set forth sufficient evidence of his *Brady* claims to satisfy a prima facie case for relief. (Response at 23.) Respondent minimizes and misconstrues the evidence before the Court and actively ignores the significant corroborating evidence that supports Mr. Martinez's *Brady* claims. Mr. Martinez is entitled to an Order to Show Cause for his *Brady* claims.

1. 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*

Initially, respondent misconstrues the significance of the holding in *Milke v. Ryan* (9th Cir. 2013) 711 F.3d 998, and its application to the present case. In *Milke*, the 9th Circuit Court of Appeal considered the evidence of documents from other superior court cases that depicted the arresting officer and state's primary witness' pattern of misconduct. (*Id.* at pp. 1004-1005.) The evidence was presented to the federal court of appeal, and found timely, approximately two decades after the judgment and the sentence of death was entered in her case. The *Milke* court did not rely on the ultimate judicial holdings in those cases or take judicial notice of the cases, but considered the underlying facts related to the orders of the courts which noted the officer's record of misconduct – such as the officer's repeated violation of suspects' *Miranda* rights. The court found the state's suppression of the officer's record of misconduct to constitute a *Brady* violation, noting that the "prosecutor is charged with knowledge of any *Brady* material of which the prosecutor's office *or* the investigating police agency is aware." (*Id.* at 1012 [emphasis added], citing *Youngblood v. Virginia* (2006) 547 U.S 867, 869-870 [because the state did not provide the evidence of the officer's misconduct to defense.].)

Respondent misconstrues Mr. Martinez's request for judicial notice and the relevance of the *Brewster* case and the Shasta County's duty to disclose the law enforcement misconduct in that case. Respondent initially suggests that there was no evidence to suggest that the District Attorney knew about the *Brewster* case, and therefore was not on notice to disclose. District Attorney Jerry Benito was deposed by Brewster's counsels on October 20, 1999, thus he was aware of the underlying lawsuit and the claims of law enforcement misconduct. (Pet. Exh. Y, at p. 20.) However, even if he weren't a deposed witness, the prosecution is charged with the knowledge of any of the *Brady* evidence which the "investigating police agency is aware." (See *Youngblood v. Virginia, supra,* 547 U.S 869-870.)

Respondent contends that judicial notice of the Brewster case is inappropriate, because the district court's order is irrelevant. Respondent's contention is misguided.

Mr. Martinez seeks judicial notice of the district court's denial of summary judgement with respect to Shasta County's denial of liability for the actions of the officers. Mr. Martinez maintains that the court's finding that certain investigative practices by the Shasta County Sheriff constitute practices and policies adopted by the agency is the proper subject for judicial notice as the primary source is the federal district court's Order. Mr. Martinez requests judicial notice of documents, including orders, depositions and findings of fact and legal conclusions that reflect the judicial determinations in the *Brewster* case, as this evidence is probative of an acknowledged official pattern and practice of the Shasta County Sheriff's Office. (See *Weiner v. Mitchell, Silberberg & Knupp* (1980) 114 Cal.App.3d 39, 45-46; see also Pet., Exh. EE.) The district court considered the evidence supported by documents and depositions and found that Officers Compomizzo and McDannold[10] were acting pursuant to the practices and policies of the Shasta County Sheriff when they committed the conduct alleged as violations of Mr. Brewster's constitutional rights. The court relied upon Shasta County Sheriff, Captain Jarret's deposition in making this finding. In his deposition, Captain Jarret was questioned under oath regarding the practice and policies exhibited by Officer McDannold as the lead investigator of the *Brewster* case. Captain Jarret testified that the sheriffs in the *Brewster* case acted "within the general guidelines" of the "practices" and "policies" adopted by the Shasta County Sheriff's Department. (Pet. Exh. EE at p. 11, fn 5. [quoting Captain Jarret's Deposition at 10:3-11:5.[11])

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[10] Respondent questions McDannold being cited as a lead investigator in the Kohn murder. Mr. Martinez cites Officer McDannold because he was present during the 1997 interrogations of John Harris and Taskeen Tyler, and he was responsible for the internal "confidential memo" regarding the two separate pieces of black plastic. (See Exhs. II, JJ.)

[11] Present counsel has made considerable efforts to obtain the copies of the original deposition transcripts for the Brewster case. (See Exh. LL.) Given the district court's inadvertent destruction of the documents in the case, it is believed that the State is the only party with access to these transcripts. Present counsel will seek disclosure of these documents should an Order to Show cause issue in this case. (See Exh. LL.)

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

- Immediately after the murder in 1984, the day after the murder, and 4 years after the murder, the assault victim, Gillaspey, viewed line-ups containing a photo of Brewster, but she never identified him as the responsible party.
- In 1995, 11 years after the murder, Officers McDannold and Clemens personally transported Gillaspey from Eureka to Shasta County, a three-hour drive, for a participation in a fourth line-up. During the drive, Officer McDannold told Gillaspey about Brewster's culpability for the murder and other crimes, and specifically told her that there was other evidence implicating him in the murder (other than her identification).
- Officers Compomizzo and McDonnald placed Brewster's photo on a desk and in a couple locations visible to Gillaspey prior to her viewing of the photographic line-up in 1995. Officer Compomizzo actively depreciated a line-up which did not contain Brewster's photo. He then discussed which of the line-ups containing Brewster's photograph would be used by telling Gillaspey that the line-up contained a photograph of the perpetrator, reflecting his appearance at the time of the crime.

- Officers McDannold and Clemens met with Gillaspey the night before the live line-up (where she positively identified Brewster after 11 years), but there was no report or recording of this meeting.
- Officer McDannold advised Gillaspey that she did not have to be certain about her identification, as long as she was "relatively certain." Officer McDannold further informed Gillespey that she "flushed" when she looked at Brewster's photo. He further advised her not to put any comments form because "he did not want to have to explain her comments at trial."
- Officers took Gillespey to a clearing where they advised her that they believed the crime occurred. They falsely advised her that there was a full moon on the night in question, so she would have been able to see the perpetrator's face by the light of the moon. The moon had not risen at the time of the murder.
- Gillespey identified the suspect's vehicle as a Buick Rivera in 1984. During the cold case investigation, Officer Compomizzo was told that Brewster had owned a Camaro. On August 2, 1995, Gillespey met with Officers McDannold and Compomizzo. During this meeting, Gillespey identified the suspect's car as a Camaro. Officer Compomizzo subsequently met with witness, Helena Cotham, on September 1, 1995, and Cotham told him that Brewster had purchased the Camaro with rehabilitation money that he received on January 11, 1985 – *27 days after the murder*. Officer McDannold testified at Brewster's Preliminary Hearing on February 21, 1996, and declared under oath that Officer Compomizzo had discovered that Brewster owned the Camaro on the night of the murder. Officer McDannold knew that the evidence that he gave was false at the time that he gave it.
- Days after the murder Brewster was interviewed by the Shasta County Sheriff regarding the murder. Brewster told Officer Jarrett that he was at the Velvet Garter on the night of the murder and saw Officers Bushey and Van Laak walking a woman out of the bar while he was there. Police reports confirmed

that the officers arrested a woman at the Velvet Garder for public intoxication at approximately 10:40 p.m. The murder took place at approximately the same time. Officer McDannold and Officer Compomizzo intentionally failed to pursue the potentially exculpatory alibi evidence.

- The physical evidence, including Gillaspey's clothing from the night of the murder and assault, was maintained by the Shasta County Sheriff's Department since the crime was committed in 1984. The evidence was resubmitted to the DOJ for review in 1996. The clothes were never tested. Officer McDannold never asked the DOJ to review Gillaspey's clothes for DNA evidence despite the fact that she wore the clothes during the assault.

(See Pet. Exhs. Y and EE.)

While Justice Karlton did not "find" that the officers committed misconduct, he did acknowledge the specific acts of the officers which constitute misconduct were officially adopted by the Shasta County Sheriff as conduct which comports with their practice and policies. (See Pet. Exh. EE.) Upon review of the evidence and the Shasta County Sheriff's declared policy, Justice Karlton queried, "Unfortunately, neither party has provided the court with evidence concerning the Attorney General's supervision of the sheriff of Shasta County in his investigative function." (Pet. Exh. EE, at p. 9.) "There is no evidence about how frequently, ***if ever***, the Attorney General actually supervises the sheriff's conduct of his office, reviews the policies adopted by the sheriff, or otherwise limits the discretion of the sheriff as to how his offers shall conduct investigations." (Pet. Exh. EE, at p. 9.) Thus, while respondent may not have been aware of the Shasta County Sheriff practice and policies as exhibited by the conduct of Officers McDannold and Compomizzo, the prosecution and law enforcement were aware. Indeed, many of them testified as to the misconduct that was alleged by Brewster.

Here, as in *Milke,* the suppressed evidence of the law enforcement practice and policies deprived Mr. Martinez of due process. Much as the evidence of a pattern or practice of law enforcement misconduct in *Milke* was directly relevant and probative to

the defendant's case, evidence of Shasta County Sheriff's pattern or practice of misconduct was both relevant and probative to Mr. Martinez's case. Just as in *Milke*, there was no other evidence linking Mr. Martinez to the crime or the victim other than the false evidence of Helana's testimony. Deprived of the evidence of Shasta County Sheriff's past pattern or practice of manipulating the primary state's witness to secure false evidence, Mr. Martinez was not able to properly cross-examine Helana within the context of their practice of using suggestive techniques to create a false narrative.

In addition, Mr. Martinez was prejudiced by the suppression of evidence regarding Shasta County Sheriff's adopted practice of intentionally failing to pursue exculpatory evidence and third party culpability evidence, and to conduct basic forensic investigation in the cold case review.[12] As in *Brewster*, there was potentially exculpatory evidence which implicated a third party which was never investigated, such as the swabs of blood-like substance (sent to DOJ, but never "tested" while at DOJ lab in 1997), black pieces of plastic found at Harris' apartment, 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), a "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

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[12] Mr. Martinez refers the Court to his citation of *Lunbery v. Hornbeak* (9th Cir. 2010) 605 F.3d 754. Mr. Martinez notes that the Court's finding in its reversal of the Shasta County conviction, reflects the adopted policy of the Shasta County Sheriff's Office in so far as the cold case prosecution employed Shasta County Sheriff tactics of: witness manipulation, suppressing strong third party culpability evidence and intentionally failing to investigate exculpatory evidence related to the defendant. Again, to Petitioner seeks judicial notice of the 9th Circuit Court's published decision and the facts set forth in the case, in so far as the official holding of the Court reflect the practices as acknowledged in *Brewster.*

murder as part of its original investigation or cold case investigation, despite the availability of both the evidence and the technology. (Pet. Exhs. D, pp. 197-231, AA and BB.)

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. Accordingly, the Mr. Martinez has present sufficient evidence to support the issuance of an order to show cause.

2. Officer Clemens and Officer "McDannold"[13] Interrogations of John Harris

Respondent contends that the prosecution complied with *Brady* when it put the transcript of the February 11, 1997 interview of John Harris into the record with the transcript of his first interrogation, at the end of trial in 2006 (Mr. Martinez was arrested in late June 2004), after Officer Clemens had testified a second time (to "rehabilitate" his earlier testimony). (Response at 29.) The transcript was put into the record during Campbell's direct testimony, towards the very end of trial. (6RT 2410-2411, 2415.) The prosecution did not play the audio of either interrogation for the jury, nor did the prosecution refer to any specific portions of the interrogations in questioning Officers Clemens (the officer who conducted all of the interviews with Harris) and Campbell. The prosecution further presented this evidence as though it represented the entire interrogation of Harris. The prosecution intentionally suppressed the second portion of the interrogation with Harris, on February 5, 1997, during and after his voice stress test.

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[13] After review of corresponding police reports from 1997, it appears that the transcripts provided by the prosecution mistakenly identify the name of Officer McDannold as "Officer McDaniel." Officer McDannold is identified in police reports as the officer present during the interrogations of John Harris and Taskeen Tyler. (See, e.g., Exh. K.) Present counsel cannot find any reference to Officer McDaniel in any of the police reports. Mr. Martinez seeks to correct the error in the record. Thus, anywhere there is reference in the record to "Officer McDaniel," it should be corrected to "Officer McDannold."

(See Exh. II.) The prosecution did not reference the omission, and no transcript of this portion of the interrogation with Harris was ever produced. In this context, the prosecution's late-trial release of portions of the transcripts of the interrogations of Harris were meant as a means of circumventing *Brady*.

Respondent argues that the release of the transcript at the end of trial complies with *Brady*, and, in any event, Mr. Martinez has forfeited this challenge because his defense attorney did not object to the untimeliness of the disclosure. (Response at 30.) Respondent's assertion undercuts the spirit and intent of *Brady*, which serves to promote notice and fairness in the proceedings – to allow a criminal defendant access to exculpatory evidence so that it might be used in a coherent defense. There should be no "gotcha" moments in arguing *Brady* compliance. The prosecution either released all material exculpatory evidence to the defendant prior to trial with the intention of providing notice of the evidence and its contents, or it didn't comply with *Brady*. Respondent's argument to the contrary would allow for tactical circumvention of *Brady*. It would render *Brady* meaningless.

By suppressing the evidence of the interview (which had no corresponding police report) prior to trial, the prosecution limited the defense's ability to impeach Officers Clemens, Compomizzo and Campbell. The release of evidence near the end of trial, after the interrogating officer, Officer Clemens had already testified, deprived the defense of impeachment evidence while allowing the prosecution the cover of *Brady* compliance. It is *Brady* compliance with a wink and a nod. Indeed, the release of critical, exculpatory evidence mid-trial is comparable to the police practice of interrogating "outside *Miranda*."[14] Respondent suggests that this practice is outside of the Court's purview because defense counsel did not object. (Response at 29-30.) Mr. Martinez asks this Court to look at the evidence within the context of this case and determine if the

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[14] The prevalent unconstitutional practice of interrogating "outside of Miranda" was addressed in part by Justice Souter in his majority opinion in *Missouri v. Seibert* (2004)

prosecution's mid-trial release of exculpatory evidence complies with the spirit and substance of *Brady*.

In this case, the suppressed interrogations clearly and unambiguously identify John Harris as the primary suspect in the murder of Chris Kohn. Contrary to respondent's assertions and Officer Clemens' testimony, Harris' interrogations provide evidence that he was interrogated as a suspect in Kohn's murder. In the initial portion of the interrogation on 2/5/97 which was transcribe, Harris repeatedly denies involvement in the Super Bowl Sunday burglary. (See Exh. MM, at pp. 1-91.) He does not accept responsibility for the initial burglary until he is confronted with the names of the other responsible parties (which were provided by his wife). (Exh. MM at p. 92.) It is also clear that Harris is being less than honest throughout the interrogations, and the interrogating officers acknowledge this repeatedly. Given the content of the interrogation transcripts, it is clear that the end-of-trial submission of the transcripts was not a genuine offer on behalf of the prosecution in support of Officer Clemens' testimony that he "ruled out" Harris because Harris denied his culpability for the murder. (See Response at 29.) At no point in the interrogations does it appear to a rational person that the officers believe Harris. In fact, the opposite is true. The officers repeatedly catch Harris lying and repeatedly remind him of his lies. Thus, it appears the prosecution's submission of the transcripts at the end of trial and after Clemens' testimony appears to be disingenuous at best, as the transcripts do not support the prosecution's stated intent.

Respondent spends much time dissecting the substance of Harris' statement to officers that "Nick" had confessed to killing Kohn in the context of *Brady*. (Response at 30-33.) Respondent's analysis of the evidence regarding "Nick" is a red herring. It is a distraction. Much like the interrogating officers themselves, Mr. Martinez does not believe Harris' "tip." Mr. Martinez does not believe that "Nick" did it, nor does he believe that he confessed to Harris. Rather, Mr. Martinez cites the interrogation

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542 U.S. 600, 609), as well as Weisselburg, *In the Stationhouse*, note 95; Weisselberg *Saving* Miranda, note 3.

transcript substance as incriminating material evidence which corroborates the other incriminating evidence implicating Harris in Kohn's murder. To the extent that respondent's discussion regarding "Nick" is relevant, Mr. Martinez notes that there were several individuals named "Nick" who were identified by various witnesses, including Debbie Harris (Harris' ex-wife). (See Exh. at 40-41.) There is a corroborating police report on 2/11/97 with John Douglas, in which Nick Curran is identified as John Harris' teenage neighbor who has gone out to Kohn's residence to buy weed with John Douglas. (See Exh. NN.) And, in this context, it is most likely that the "Nick" that Harris is trying to pin the murder on is his teenage neighbor, Nick Curran,[15] not Nicholas Kirberger, as suggested by respondent. (See Response at 32.) Again, Mr. Martinez does not believe that "Nick" confessed the murder to Harris, nor does he believe that "Nick" bragged about getting the cash that was "right under Harris' nose." Unsurprisingly, there are no police reports regarding follow up with Nick Curran and no taped custodial interviews of Officers McDannold and Clemens questioning him as to his possible involvement in Kohn's murder.

During the first portion of the first interrogation, Officer Clemens asked general questions regarding Kohn in a relatively non-confrontational manner. (See Exh. MM, at pp. 1-80.) Harris repeatedly denied involvement in the Super Bowl Sunday burglary of Kohn's apartment (Exh. MM, at pp. 52, 76, 77, 78, 81). When questioned regarding his possession of glass pipes, Harris told Officer Clemens and McDannold that had purchased the stolen glass pipes from Kohn (Exh. MM, at p. 54) Halfway through the initial interrogation, Officer McDannold takes over from Officer Clemens in questioning Harris. (See Exh. MM, p. 81.) Officer McDannold directly accuses Harris of being responsible for Kohn's murder. (Exh. MM, at pp. 82-90.) Officer McDannold tells Harris directly that he has been watching him throughout the interrogation and he

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[15] Nicholas Curran, or "Nick" was John Harris' neighbor, described by Debbie Harris as the "white boy" who used to borrow her brother's yellow Chevy truck on occasion.

believes that Harris has been lying throughout the interrogation. (Exh. MM, at p. 86.) Officer Clemens takes over questioning again and confronts Harris with the specific evidence of his involvement in the Super Bowl Sunday burglary. (Exh. MM, at p. 91.) Harris backtracks with the confrontation and admits that he was lying throughout the entire interrogation, conceding that he had burglarized Kohn's apartment on Super Bowl Sunday. (Exh. MM, at p. 92.) At first Harris tried to implicate John Douglas in the burglary, but he took that back when confronted by additional evidence. (Exh. MM, at p. 93) Harris admits that he took clothes, bags and some pipes from the Super Bowl Sunday burglary. (Exh. MM, at p. 98.) He claims that he got rid of the pipes that he took in the initial burglary, and they were different from the stolen pipes that he had described as "purchased" from Kohn. (Exh. MM, at p. 98.) Harris then admitted that he had been to Kohn's residence more than the one time he had previously mentioned. He lied about not owning guns. He further conceded that he had told several people that he was going to take Kohn's money. (Exh. MM, at pp. 107, 112.)

Officer McDannold tells Harris, "We know you did it, John.... What if I knew and I could prove that you were there and part of it, and in fact, planned it, and helped carry the whole damn thing out, and I can prove it..." (Exh. MM, at pp. 110, 115.) He further tells Harris, "My experience has been with you today, since one o'clock this afternoon is that you will lie. That's my experience and you admitted that that you will lie...." (Exh. MM, at p. 117.) The officers then leave and Officer Carroll gives Harris a voice stress test regarding his involvement in Kohn's murder. (Previously suppressed John Harris second half of interrogation tape on 2/5/97, attached hereto as Exh. II.) Harris is found to be deceptive regarding every question related to Kohn's murder. (Exh. II, at pp. 1-65.) After Harris is found to be deceptive, Officers McDannold and Clemens return and question Harris further regarding the Kohn murder. (See Exh. II, at pp. 65-77.) At end of their interrogation, the officers arrest Harris, telling him, "Seems to me like we got a little

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Officer Campbell acknowledges that this is the "Nick" that he was reading about in a previous report from Harris (the 2/11/97 transcript). (See Exh. at pp. 39-41.)

house up in Mountain Gate that you went up and went into on Super Bowl Sunday. And the guy that owns that house is dead. That's what we're going to book you for." (Exh. II, at p. 29.).

On February 11, 1997, Officers Clemens and McDannold interviewed Harris, again, at the Shasta County Sheriff's Office at Harris' request. (Pet., 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. (Pet., Exh. T.) 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 – 6 days prior to the suppressed interview with Harris and the day before he brought Taskeen Tyler and Nate Chatman in for questioning regarding the Kohn murder and their connection to Harris. He further affirmatively stated that there was *no evidence* implicating Harris. (RT 2209.) 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.)

The evidence in the record confirms that the State suppressed material incriminating evidence related to Harris, including the transcripts of the interrogations with Harris and the interrogations of Nate Chatman and Taskeen Tyler – but the record reveals that there is even more evidence that corroborates Harris' third party culpability. There is no exculpatory evidence in the record which excludes Harris as a prime suspect in Kohn's murder, and there is no in the record of subsequent interviews with Harris. 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. Mr. Martinez continues to question the fate of much of the evidence collected in 1997. Accordingly, Mr. Martinez has sought the chain of custody and present status for this evidence, but has been denied at the Shasta County Superior Court. (See Pet. Exhs. AA, BB.)

All of the evidence in the record related to Harris is exculpatory for Mr. Martinez. 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.

As set forth above, the suppressed evidence of Harris' interrogation and 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 this Court should issue an Order to Show Cause.

B. CLAIM TWO: 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*

Respondent contends that Officers Clemens, Compomizzo and Campbell did not give false testimony. (Response at 41-55.) The record unequivocally shows otherwise.

1. Officer Clemens gave false testimony

Respondent initially argues that Officer Clemens' was not false. Respondent's contention is disingenuous. As previously noted, Officer Clemens was the primary investigator, interviewing witnesses and suspects for the original investigation in 1997, including the interrogations of John Harris, Nate Chatman and Taskeen Tyler. (Exhs. II, JJ, KK, MM; see also Pet. Exhs. M and P.) He also was aware of the interview with Debbie Harris, as he utilized information derived from her interview on 2/5/97 during the

interrogations of Harris. (See Exh. HH.) The interviews with Chatman, Tyler and Debbie Harris all confirmed that Harris committed *two* burglaries of Kohn's residence. Again, Officer Clemens also took photos of the guns and inventoried the evidence as related to the Kohn murder. (Pet., Exh. L.) Respondent does not address this evidence in suggesting that Officer Clemens' testimony was truthful when he suggested – without explanation or evidence – that he had "ruled out" Harris on 2/5/97.

The evidence implicating Harris as the primary suspect in the murder was substantial. Officer Clemens would have known this firsthand, as he collected it and presented it against Harris during the interrogations. In addition to the evidence set forth in Mr. Martinez's original petition, Officer Clemens was aware of the following evidence in 1997, when he supposedly "rule out" Harris:

- Debbie Harris knew that John Harris had borrowed her brother's yellow Chevy truck to go out to Kohn's place on the night of the murder, because she helped get it for him. (Exh. HH, at pp. 13, 15-17; see also Exh. GG, at p. 8.) Originally, Harris was denied access to the truck, but Debbie Harris made a call from work to get him access. (Exh. HH, at pp. 13, 15.) She knew that he planned to go to Kohn's, to find the money.
- Debbie Harris described John Harris as "extremely violent," "crack addicted" and capable of anything at the time of the murder. (Exh. HH, at p. 50, 52; Exh. GG, at p. 9.) She explained that he had been acting especially "evil" around the time of the murder. (Exh. HH, at pp. 8-9.) He was frothing at the mouth and pacing, "like a lion," when talking about how he had failed to find Kohn's money during the first burglary. (Exh. GG, at p. 36.) He vowed that he would return and do whatever he needed to do in order to get the money. (Exh. GG, at p. 36.)
- Debbie Harris described a bloody white jacket that appeared in her house on the day of the murder, along with a group of men that she did not know. (Exh. HH, at p. 7; see also Exh. GG, at pp. 5-6, 25-26.) She further told officers that

John Harris' white tennis shoes (size 9 ½) appeared to be missing after the day of the murder. (Exh. HH, at pp. 4-5.) He had just bought a new pair of boots, which Debbie Harris found odd, because he went barefoot most days. (Exh. HH at pp. 5.)

- Debbie Harris told officers that she knew that John Harris had burglarized Kohn's place twice. (Exh. GG, at pp. 27, 31, 33.) The second burglary occurred on the night of the murder, and she identified several new stolen items that appeared after the murder, including: a samurai sword, a clock, and some particular glass pipes. (Exh. GG, at pp. 27, 31, 33.) At the end of the interview in 2004, Debbie Harris described John Harris as a "drug lord," who had been caught "left and right. " (Exh. GG, at p. 36.)
- Nate Chatman and Taskeen Tyler were interrogated the day after John Harris, on 2/6/97. Remarkably, both men were brought in for the sole purpose of questioning regarding Kohn's murder and Harris' involvement. They were both subjected to voice stress tests throughout the questioning, without any initial interviews. (See Exhs. JJ, KK.) They both told officers that they believed that Harris murdered Kohn. (Exhs. JJ, KK.) They both told the officers that Harris had the motive (i.e. he told both of them that Harris said that he was going to get Kohn's money even if he had to kill Kohn), opportunity (i.e. he was using Douglas' yellow Chevy truck seen at Kohn's on the night of the murder), and he had the means (i.e. he had access to the firearms that were stolen from the Alta Mesa burglary on the night of the murder). (See Exhs. JJ, KK.)

In addition, there were statements from witnesses which corroborated the fact that there were two burglaries. These included the recorded statements from Deborah Harris, Taskeen Tyler, and Nate Chatman. In addition, the statements from witnesses close to Kohn, such as Nita Gibbens, also corroborated the fact that there was a second burglary. Mr. Martinez maintains that Nita's declaration to the officers that if they found the person

in possession of a certain pipe, then they found the murderer was an acknowledgment that there were items stolen on the night that Kohn was murdered. (See Pet., Exh. N.) This is further supported by the fact that Nita visited Kohn and smoked with him on that night that he was murdered. (See Exh. OO; see also Pet. Exh. N).

Further, Harris' own statement to Officers Clemens and McDannold corroborate a finding that he burglarized Kohn on two occasions. During the interrogation, Harris identified the pipes at his residence during the search as pipes that he obtained from Kohn. He claimed that he had "purchased" these pipes after the initial Super Bowl Sunday burglary. (Exh. MM, at p. 54.) He further told the officers that he had given away the pipes stolen from the Super Bowl Sunday burglary. (Exh. MM, at p. 98.)

Moreover, there was the physical forensic evidence that Officer Compomizzo collected from Harris' residence which was pertinent only to Kohn's murder and was never tested. On February 5, 1997, Officer Compomizzo collected swabs of a blood-like substance from hand prints on the driver's side door of the yellow Chevy truck that was in Harris' possession and which was identified at Kohn's residence at the time of the murder. (See Pet. Exhs. K, AA.) The swabs were never tested for blood in 1997, despite the fact that they were sent to the Department of Justice (ostensibly for that purpose) on February 6, 1997. (See Exh. AA.) Similarly, Officer Compomizzo collected a cigarette butt from a recently smoked cigarette at Kohn's residence the morning of the murder, and also collected a pack of cigarettes from Harris' residence for comparison. (See Exh. AA.) The cigarette butt was never tested for any forensic information that might have "ruled out" Harris. Officer Compomizzo also took Harris' size 9.5 tennis shoes from his residence during the search on 2/5/97. (See Exh. AA.) They were never tested for blood residue or even compared to the bloody prints from the murder scene. Conspicuously, Officer Clemens did not cite any of the above evidence, or any evidence as exculpatory evidence that he relied upon to "rule out" Harris as a suspect despite the overwhelming evidence that implicated him in Kohn's murder. Finally, there were photographs detailing scratches to Harris' neck, back and head which were taken when Harris was

arrested after Officer Clemens' three interviews with Harris on 2/5/97. As Officer Clemens was aware, it was estimated that the injuries were approximately 5 days old, which placed them at the same time as Kohn's murder. Harris did not provide an innocent explanation for the injuries.

Despite the above, 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.) Mr. Martinez acknowledges the fact that Officer Clemens did not pursue further investigation of John Harris after February 11, 1997, but the record does not support respondent's suggestion that this intentional failure to investigate was based upon exculpatory evidence which allowed Officer Clemens to rule Harris out. Indeed, Officer Clemens failed to state a single exculpatory piece of evidence which would support his testimony. Respondent contends that this testimony accurately reflects the record and Officer Clemens' understanding of the evidence. There is no reading of the record which allows for this finding.

There are numerous examples of Officer Clemens' statements which are directly controverted by the record – the record that he was an active participant in. For instance, Officer Clemens testified that Harris did not have any handguns. (RT 2210.) During the interrogations of Harris, Officer Clemens was informed by Harris himself, Debbie Harris, Taskeen Tyler and Nate Chatman – on several occasions – that Harris both had access to firearms and had firearms in his possession at the time of Kohn's murder. (See Exhs. GG, HH, II, JJ, KK, and MM.) Officer Clemens' testimony to the contrary is patently false.

As set forth in the original petition, Officer Clemens' testimony did not reflect a reasonable honest narrative of the investigation that he himself conducted as a sheriff for Shasta County. As set forth in full in the original petition, Officer Clemens' false testimony had the direct impact of depriving Mr. Martinez of a very strong third party culpability defense – a potential defense that was exceptionally strong given the

overwhelming incriminating evidence implicating Harris and the complete absence of evidence implicating Mr. Martinez.

2. Officer Compomizzo gave false testimony

Respondent initially argues that Officer Compomizzo's was not false. Respondent's contention is disingenuous, as respondent merely reiterates Officer Compomizzo's testimony at trial and declares that the testimony must reflect the truth despite the fact that the testimony is contradicted by the physical record and reports which Officer Compomizzo authored and created with Officer Clemens. The restatement of the testimony does not alter the record. His testimony was false.

a. Black pieces of plastic

Respondent suggests that the contradiction in the record is due to a typo – that Officer Compomizzo "mistakenly" identified the two pieces of plastic separately as found at Harris' residence. (Response at 44.) Mr. Martinez will point out that almost all of the police reports that he has been given through discovery are "Supplemental" reports. The reports are almost all written days, and sometimes months after the incident and evidence described. (See Pet. Exhs. K, L, O.) Officer Compomizzo's report in question is one such report. (See Pet. Exh. L.) The "supplemental" report was submitted on 2/19/97, well-after the events that Officer Compomizzo described in the report. Indeed, there are handwritten corrections written on the report, suggesting that the report was edited after it was typed. Officer Compomizzo's description of the discovery of the pieces of plastic at Harris' residence was not altered or edited. Rather, the report specifically states that Officer Compomizzo discovered the pieces of plastic when conducting the search of the Harris residence, after the paragraph regarding his search of Harris' vehicle. (See Pet. Exh. L at p. 430.) Moreover, Officer Compomizzo states that he personally photographed the pieces of plastic, as separate from the photographs taken by Sandbloom and photographed in the lab. (See Pet. Exh. L at p. 430.) As set forth in Mr. Martinez's original petition, Mr. Martinez requests discovery of the photos taken by Officer Compomizzo, because he would like to compare the photo with the two black

pieces of plastic pictured on the bizarre internal memo, which was shown to Helana during her subsequent taped interview. (See Pet. Exh. H.)

Officer Compomizzo's testimony regarding the pieces of plastic cannot be removed from the context of the case and trial, as suggested by respondent. (Response at 44-45.) There was no evidence connecting Mr. Martinez to Kohn or the murder other than Helana's scant, bizarre, typed statements authored by the prosecution. In this context, the most critical aspect of Helana's testimony was her "identification" of a gun that was owned by Mr. Martinez. In context, Officer Compomizzo's testimony regarding the black pieces of plastic needed to minimize the size of the pieces so that it would comport with Helana's suggestion that the gun was "chipped," rather than "was missing a large portion of the grip." Further, Officer Compomizzo's testimony was also critical to the effort to remove Harris from the narrative as the obvious suspect. Respondent's scattered justification for Officer Compomizzo's testimony contrary to the evidence in the record is insincere at best.

b. Search of Harris residence

Respondent also argues that Officer Compomizzo's testimony was truthful regarding his "confusion" over which crime he was investigating when he searched Harris' residence. (Response at 46-47.) Mr. Martinez maintains that Officer Compomizzo's testimony was false, as his search of Harris' residence was always focused on Kohn's murder *and the burglaries* of Kohn's apartment. As noted throughout, the investigating officers were aware from the beginning that Harris was potentially involved in two burglaries of Kohn's residence in addition to his murder, because multiple witnesses told officers that Harris had openly declared that he was returning to Kohn's apartment to get the money that he failed to find during the initial burglary. It was established early on in the investigation of Kohn's murder that Harris had motive to murder Kohn, as Harris was focused on stealing Kohn's cash, hidden at his apartment. This was corroborated by several witnesses and by the stolen evidence identified by Debbie Harris. Indeed, Debbie Harris noted that John Harris had thrown out

most of the items that he stole from Kohn's apartment during the Super Bowl Sunday burglary. (Exh. GG, at p. 8.) After Kohn's murder, several newly stolen items appeared in Harris' home, including: a samurai sword, an alarm clock, a gun (.38 special), and several new glass pipes. (See Exh. GG.) In addition, Officer Compomizzo took several items into evidence from Harris' residence which bore no relevance to the Super Bowl Sunday burglary, including Harris' shoes and a pack of cigarettes. (See Pet. Exh. W.) These items were relevant to the murder case only. Officer Compomizzo's testimony was false, as his testimony intentionally obfuscated the fact that they were investigating Harris' potential *burglaries* of Kohn's apartment and the murder, which overlapped. His testimony served to corroborate Officer Clemens' testimony and discredit Mr. Martinez's third party culpability defense – that Harris was responsible for Kohn's murder.

c. Marijuana pipes

Respondent suggests that Officer Compomizzo was testifying truthfully when he explained that he did not remember if the smoking pipes he confiscated from Harris' residence were identified as Kohn's *because it was not part of his investigation*. (Response at 47; RT 1673-1674.) Again, as stated in full above, and as previously argued by respondent - Officer Compomizzo was investigating *both* the burglaries of Kohn's apartment as well as his murder when he collected evidence from Harris' residence. (Response at 45-47.) Officer Compomizzo was investigating both crimes, and it was presumed that there was a second burglary as a predicate to Kohn's murder. Moreover, if Officer Compomizzo was actually confused about the source of the pipes, he could have checked the notes on the case to refresh his recollection. Finally, it was known from the interrogation of John Harris that the pipes were from Kohn's residence. In fact, John Harris claimed that he both stole Kohn's pipes during the Super Bowl Sunday Burglary, and "bought" a few of Kohn's pipes after the initial burglary. (See Exhs. MM, at pp. 54, 98.) Those were the pipes taken into evidence by Officer Compomizzo during his search on 2/5/97. (See Pet., Exh. W.) Despite Officer's knowledge and access to the foregoing

evidence, he followed Officer Clemens' lead and did not acknowledge the evidence which implicated Harris in the second burglary and Kohn's murder.

d. Evidence collection and testing

Respondent suggests that Officer Compomizzo's testimony was truthful regarding the potentially incriminating evidence related to Harris which was collected and never tested. (Response at 50.) In making this contention, respondent erroneously asserts that Mr. Martinez "does not question the truthfulness about the collection and testing" of the evidence. (Response at 50.) To clarify for respondent and the Court, Mr. Martinez does believe that Officer Compomizzo falsely testified regarding the collection and testing of evidence which was highly probative of Harris' guilt for Kohn's murder. As set forth above, Officer Compomizzo's deceptive testimony intentionally diminished the importance of the evidence related to Harris as a means of corroborating Officer Clemens' false testimony that he had been "ruled out."

Officer Compomizzo's testimony is particularly stark when considering the "evidence" of the cotton swabs that he collected from the blood-like handprints on the driver's side door of the yellow Chevy truck that Harris had driven to Kohn's, which was identified at Kohn's on the night of the murder. Despite the extremely incriminating nature of this evidence, it apparently was not tested when it was submitted to the DOJ in early February of 1997. (See Pet. Exhs. K, AA.) Officer Compomizzo was in charge of the swabs as part of his investigation. He photographed the swabs upon their collection, placed them in evidence envelopes, and personally delivered them. But, the swabs were not tested until the middle of Mr. Martinez's trial, in 2006. The extremely "unusual" circumstances regarding this evidence should give pause. Again, the only relevance of the swabs was that they would have served as additional, extremely incriminating evidence against Harris. The swabs had no relevance to the prosecution of Mr. Johnson or Mr. Martinez. They were only relevant to the third party culpability defense directed at John Harris. Mr. Martinez questions the investigation of this evidence, including the chain of custody, and the testing of the swabs 9 years after they were relevant.

It is in this context that Mr. Martinez questions Officer Compomizzos' testing of evidence collected related to Harris and his testimony as to his efforts in the investigation. Ultimately, the direct impact of the failure to test the evidence related to Harris is that it deprived Mr. Martinez of a defense.

3. Officer Campbell gave false testimony

Respondent argues that Officer Campbell testified truthfully about his investigation of the Kohn murder, including his testimony that he also believed that Harris had been ruled out, as well as his testimony reciting Helana's statements to him. (Response at 51.) The record belies respondent's assertions and Officer Campbell's testimony.

Officer Campbell's testimony regarding the status of the cold case and his statement that there was "nothing left to do" with investigation of Harris is contrary to the record, and it is therefore false. This is not merely Mr. Martinez's "interpretation" of the evidence – none of the evidence implicating Harris in Kohn's murder in 1997 was ever controverted or challenged. Indeed, when Kohn's mother, Susan Sellers, first posted a reward for information leading to the prosecution of Kohn's murderer, she contacted Officer Campbell and Debbie Harris' mother, Roberta Douglas. (See Exh. FF.) Susan Sellers and Roberta Douglas both contacted Officer Campbell. (Exh. FF.) Roberta Douglas' message to Officer Campbell was pointed. In the message, Douglas noted that she "100%" believed that her ex-son-in-law, John Harris, was responsible for Kohn's murder based upon the following: 1) Harris was driving the yellow Chevy truck which was identified as the vehicle seen at Kohn's apartment on the night of the murder; 2) on the night of the murder, Debbie Harris returned home with two other men and they were all acting nervous; Debbie Harris found a bloody white jacket in her bedroom on the night of the murder; Connie Garcia went to get the truck back from Harris on the day of the murder and Harris was acting "very weird" and was sweaty. (Exh. FF.) Subsequently, Officer Campbell met with Douglas in person, on 4/28/04. (Exh. FF.) During her meeting with Officer Campbell, Douglas relayed much of the same

information and described Harris as the "violent type," who would "have taken great pleasure in beating someone to death," as he had "bragged about murders he committed in the past." (Exh. FF.)

A couple of weeks later, on June 4, 2004, Officer Campbell interviewed Debbie Harris (aka Butler). (Exh. GG.) Debbie told Officer Campbell much of the same incriminating information that she had previously told officers regarding Harris. In addition, Debbie confirmed John Harris had burglarized Kohn's residence twice, with the second time being the night of his murder. (Exh. GG, at pp. 5-6, 8, 11.) She also told Officer Campbell that she believed that two other black men who drove a neon green '82 Malibu were accomplices. (Exh. GG, at p. 8.) After he missed the money during the first burglary, Harris told Debbie that he was "foaming at the mouth over it," and "pacing like a lion." (Exh. GG, at p. 13.) During his interview of Debbie, Officer Campbell referred to Harris as a "person of great interest" in the Kohn murder. (Exh. GG, at p. 15.)

This evidence does not comport with Officer Campbell's testimony that he "ruled out" Harris as a suspect because Officer Clemens ruled him out in 1997. (RT 2342, 2354, 2417.) Officer Campbell's testimony appears contrary to his actual understanding of the evidence before him.

In assessing Officer Campbell's interview of Helana (approximately three weeks after the interview with Debbie), respondent queries the relevance of Officer Campbell's use of photos depicting Harris, Harris' truck, and pieces of black plastic that may reflect pieces found at Harris' residence. (Response at 52.) Mr. Martinez contends that Officer Campbell's references to Harris in questioning Helana shows that Officer Campbell believed that Harris, the yellow Chevy truck, and the black pieces of plastic constituted evidence probative to Kohn's murder. This evidence in the record contradicts Officer Campbell's testimony that he had "ruled out" Harris. It renders Officer Campbell's testimony false.

In addition, respondent suggests that Officer Campbell's repeated false testimony regarding Helana's "statements" did not affect the jury's verdict. (Response at 53.)

Respondent's attempt to construe Officer Campbell's repeated false testimony related to Helana's statements as his "interpretation" of her statements is disingenuous.[16] As discussed in full in the petition, Claim III, Helana's testimony at trial was remarkably confused, conflicting and often contradictory. In the context, Officer Campbell's false testimony bolstered Helana's testimony, by attributing Kohn's name to Helana's statements. *Helana never identified Kohn, ever*. Helana never told Officer Campbell any information which named Kohn. Here, Officer Campbell's fallacious testimony was meant to accomplish what the prosecution was unable to do – even after giving typed testimony to Helana: put the gun in Mr. Martinez's hands and connect him to Kohn's murder.

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 and deprived Mr. Martinez of a third party culpability defense. The false testimony impacted the fairness of Mr. Martinez'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. This Court should issue an Order to Show Cause as to the false testimony of the State's witnesses in this case.

C. CLAIM THREE: The Recantation Of The State's Sole Witness Implicating Petitioner Constitutes Both False Material Evidence As Well As New Evidence Of Petitioner's Actual Innocence

Respondent argues that Helana's recantation and supporting expert witness evidence does not constitute "new" or "false" evidence under the law. (Response at 78-79. Respondent is wrong.

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[16] Respondent further misidentifies the photo of black pieces of the plastic as evidence discovered at Kohn's apartment. (Response at 54.) There is no evidence in the record as to where the pieces of plastic were discovered, and the very existence of the bizarre "internal memo" picturing only two pieces suggests that the pieces were not found with the other pieces found at the murder scene.

Respondent's response to Mr. Martinez' does not meaningfully address the significant new evidence in the petition which corroborates Helana's recantation of her testimony as false memories. (Response at 54-82.) Indeed, respondent does not address the core of Mr. Martinez's claim. Rather, respondent's response is largely a transcription of Officer Campbell's interview of Helana (which is already included in the record) and his testimony – without reference to the underlying evidence and argument as set forth in the petition including the substantial evidence provided by both Keith Manner (Helana's therapist) and Deborah Davis, Ph.D (forensic psychologist). (See Response at 60-78.)

To the extent that respondent has misunderstood his claim, Mr. Martinez claims that Helana has recently discovered that her testimony at trial is likely the result of false memories. While she has been uncomfortable about her testimony for a long time, she did not know how to articulate her understanding of her memories related to her testimony which she does not believe reflect her own, true memories or reality. She insists that she wasn't committing perjury or lying, but rather she did not believe that her memories were actually her own. It was through the collection of discovery in this case (in 2018-2019), the analysis of Helana's therapist, along with the analysis of forensic psychologist, Deborah Davis, Ph.D, that Helana identified her testimony as the result of false memories. As set forth above and in the petition, this claim is timely presented, with due diligence. Moreover, Helana's recantation and identification of her testimony as representing "false memories" is evidence that could not have been discovered before trial, or before it was actually discovered with reasonable efforts. Helana's testimony was the only evidence implicating Mr. Martinez. There was no other evidence. Thus, her recantation is not "collateral" as charged by respondent. (Response at 79.) It is direct and strong "new" evidence of actual innocence. It is neither untimely nor collateral. Respondent's claims to the contrary should be rejected.

Respondent further argues that because Helana does not identify her testimony as lies or calculated untruths, she is not recanting the testimony as perjury, therefore the evidence is not "false." (Response at 79-80.) Again, respondent's recitation of Helana's

testimony at trial does not address the underlying substance of Mr. Martinez's claim or Helana's present testimony that she no longer believes that the statements that she made at trial represent real, true memories of her own. She believes that her statements represent false memories. Accordingly, Helana's testimony at trial is both "false" evidence and "new" evidence of actual innocence.

Finally, respondent inexplicably argues that portions of Helana's hearsay statements in her testimony, which she has identified as the product of manipulated and false memories, bear some similarities to the evidence related to the murder and therefore must represent corroborating evidence. (Response at 81.) Respondent's desperate circular argument ignores the basic bounds of due process, the evidence in the record, and Helana's corroborated recantation. Here, the record supports a finding that Helana's statements cultivated by Carol Gall,[17] tailored by Officer Campbell[18] and edited into a carefully typed statement by the district attorney. There is nothing in this record which contradicts Helana's claim that her memory has been manipulated by the aforementioned

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[17] As set forth in the petition and attached hereto in full, the Shasta County District Attorney's Office and its Victim/Witness Assistance Program were held liable for the misconduct and malpractice of Carole Gall and Jerry Benito. (See Exhs. PP, QQ.) Mr. Martinez attaches these exhibits and the related documents from the lawsuit as probative and corroborating evidence of Helana's testimony regarding the misconduct and manipulation which she suffered at the hands of the program. Again, the program is under the umbrella of the Shasta County District Attorney's Office. In addition, Mr. Martinez attaches a formal complaint that was filed against the Victim/Witness Assistance Program by Shyla Hill. (See Exh. RR.) The letter was provided to present counsel along with the most recent discovery in 2018, as noted by the Bates stamp and date.

[18] Again, respondent asks this Court to ignore the profoundly probative fact of the federal court's acknowledgment of Shasta County Sheriff's adoption of the actions of the officers in the Brewster case as representing official practices and policies of Sheriff Pope. Indeed, the Sheriff adopted the specific acts of Officer McDannold, Officer Clemens and Officer Compomizzo, as they manipulated the statements and memory of the State's only witness (in a death penalty prosecution). As noted, the Shasta County Sheriff employed many of the same specific acts of manipulation in the present case. Mr. Martinez charges that this is further evidence that the policies and practices which were employed in

– and does not reflect her actual, true memory. Rather, this is exactly what the record reflects. Indeed, the only aspect of Helana's testimony that is corroborated is her recantation.

There was no physical evidence connecting Mr. Martinez to the murder, the victim, the victim's apartment, or the individuals connected to the victim and his apartment in 1997. This was so clear from the record that law enforcement, including the district attorney, never bothered to interview Mr. Martinez – ever. Finally, as set forth throughout this reply and in the petition in full, there is significant, reliable and contemporaneous evidence of third party culpability. There is simply nothing in the far reaches of the record or numerous police reports and interviews which counters the overwhelming evidence of John Harris's culpability for Kohn's murder. In this context, Helana's recantation constitutes undeniable evidence of Petitioner's innocence.

In this context, 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, this Court should issue an Order to Show Cause on this claim.

D. CLAIM FOUR: DNA Expert Analysis Of Forensic Evidence Constitutes Strong Evidence Of Petitioner's Actual Innocence

Respondent contends that the post-trial DNA evidence (all tested years after the trial, upon *pro se* motions of Mr. Martinez, by order from the court) excluding Mr. Martinez as a contributor to the DNA found on the evidence directly connected to Kohn's murder and the expert witness testimony accompanying the evidence is not "new" evidence. Respondent's claim is inexplicable, irrational and should be rejected.

Respondent repeatedly suggests that the new DNA evidence, which excludes Mr. Martinez as a contributor, but cannot exclude John Harris, is "cumulative." (Response

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Brewster, were employed in this case to the same end – the deprivation of the constitutional rights of the accused.

83-90.) Initially, it must be acknowledged that, pursuant to its adopted policy[19] as acknowledged in *Brewster*, Shasta County did not conduct basic forensic investigation after Kohn's murder despite the fact that they collected a lot of relevant evidence, ostensibly for the purpose of forensic testing. Thus, even at the time of trial, the State had not conducted a single DNA test. At the request of defense, during trial in March of 2006, law enforcement conducted a DNA investigation of three of the black pieces of plastic.

Remarkably, the mid-trial DNA testing only compared the DNA evidence with Mr. Martinez. Law enforcement did not seek to include the DNA profiles of any of the other suspects for comparison DNA testing. Further, law enforcement had already disclosed to defense that they had scrubbed the pieces of the plastic (believed to be the murder weapon) with a wire brush, *to clean them,* before they took evidence swabs from the plastic. As noted in the petition, the results of the mid-trial DNA analysis on the pieces of plastic revealed partial DNA profiles. Mr. Martinez was excluded as a possible contributor to the DNA evidence collected from the plastic pieces. Respondent contends that this limited test renders all of the subsequent, post-trial DNA tests cumulative and therefore not "new" evidence. (Response at 83.)

Respondent's argument is disingenuous and contrary to basic science. First, the testing was limited to three pieces of plastic from the believed murder weapon. No explanation has been provided for the seemingly restricted DNA testing and investigation. This is especially strange given the amount of evidence collected. Thus, it is hardly "collateral" or "cumulative" to conduct additional testing of the other available evidence from the murder scene. It would be cumulative to test the same evidence multiple times for no apparent evidentiary benefit. Here, Mr. Martinez's new DNA tests focused on *previously untested* evidence which were all reasonably likely to have DNA

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[19] During the evidentiary hearing in this case, Officer Campbell testified that Shasta County Sheriff rarely conducts DNA testing in their cases. (Pet. Exh. B, at pp. 260, 267-268.)

evidence from the individual responsible for Kohn's murder. Thus, as a matter of investigation, the DNA results from the newly submitted pieces of evidence most certainly constitute "new" evidence under the law.

Further, respondent suggests that the new DNA evidence is not "new" evidence of Mr. Martinez's actual innocence because the single, mid-trial DNA test already ruled him out as a contributor. (Response at 83.) Respondent's argument carefully avoids the fact that the mid-trial test only ruled out Mr. Martinez. The prosecution limited its investigation and did not seek any information as to the DNA as compared with other suspects, like John Harris. The new DNA evidence is important, not only because it decisively "rules out" Mr. Martinez as a contributor to the DNA found on numerous relevant pieces of evidence collected from the crime scene, but also because it corroborates the overwhelming evidence implicating John Harris. The new DNA evidence that cannot exclude John Harris as a contributor. This was not known at trial, nor could it reasonably have been discovered prior to or after trial before it was actually discovered, as the District Attorney's Office actively Opposed every request that Mr. Martinez made for DNA testing. It took Mr. Martinez, as a *pros se* litigant, almost a decade to get the DNA testing completed.

Respondent suggests that the DNA evidence is not conclusive. (Response at 90.) It does not need to be given the very significant, overwhelming, uncontroverted corroborating evidence implicating Harris. Mr. Martinez maintains that the new DNA evidence, viewed in light of Helana's recantation and the significant third party culpability evidence which was suppressed at trial, would have more than likely changed the outcome at trial. It is decisive in the context of the "new" evidence of actual innocence and the "false" evidence which Mr. Martinez has presented to this Court. Mr. Martinez's claim of new evidence of actual innocence based upon the DNA evidence presented is sufficient. Respectfully, this Court must issue an Order to Show Cause on the claim.

E. CLAIM FIVE: Petitioner's Conviction For First Degree Premeditated Murder Must Be Reversed Under *People V. Chiu*

Finally, respondent contends that Mr. Martinez has not stated sufficient evidence in support of his claim, because the prosecution did not rely upon a natural-and-probable -consequences doctrine in securing his conviction. (Response at 90.) Respondent is wrong.

As set forth in the petition in full, *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 prosecution 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.) 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 Mr. Martinez 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."

Again, as previously noted, Mr. Martinez 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 Mr. Martinez of first degree premeditated murder as the natural and probable consequence of the conspiracy to "collect a debt." This theory that is legally invalid after the Court's holding in *Chiu*.

Accordingly, this Court should issue an Order to Show Cause on this claim.

III. 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 16, 2021

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 Informal Reply in this matter contains 15,185 words, inclusive of footnotes.

Executed under penalty of perjury this 18th day of October, 2021, at Mill Valley, California.

Jennifer M. Sheetz

RE:*In re Derek Martinez* Case No. S265089

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 18, 2021, I served the within PETITIONER'S INFORMAL REPLY AND EXHIBITS by electronic mail to each of the following parties using the email addresses indicated:

Xavier Becerra, Attorney General
Office of the Attorney General
SacAWTTrueFiling@doj.ca.gov
Office of the Attorney General
P.O. Box 944255
Sacramento, CA 94244-2550

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 18, 2021, in Mill Valley, CA.

_____

Jennifer Sheetz, Esq.