No. 19-7670

In the Supreme Court of the United States

HOOMAN ASHKAN PANAH,

Petitioner,

v.

RON BROOMFIELD, WARDEN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTION PRESENTED

Whether the introduction of certain scientific evidence at petitioner's trial violated his right to due process.

DIRECTLY RELATED PROCEEDINGS

California Supreme Court:

In re Hooman Ashkan Panah, No. S246758, petition denied November 13, 2019 (this case below).

People v. Panah, No. S045504, affirmed March 14, 2005 (direct appeal).

California Court of Appeal:

In re Hooman Ashkan Panah, No. B283818, petition denied November 27, 2017 (state collateral review).

California Superior Court, Los Angeles County:

People v. Panah, No. BA080702, petition denied May 15, 2017 (state collateral review).

People v. Panah, No. BA080702, judgment entered March 6, 1995.

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STATEMENT

1. In 1993, eight-year-old Nicole Parker disappeared while playing near some apartments, one of which petitioner Hooman Ashkan Panah shared with his mother. Pet. App. J52-J53. Police arrived at the apartment complex shortly thereafter and began searching for Parker. *See id.* at J53-J54. Later that day, Panah told Rauni Campbell that "I have done something very bad," and asked her to tell his mother and friends goodbye because he would not be seeing them again. *Id.* at J55. The next morning, Campbell was awakened by Panah knocking at her window; his wrists were slashed and he asked her to buy sleeping pills for him. *Id.* Panah admitted to Campbell that he had something to do with Parker's disappearance and told Campbell that Parker was not alive. *Id*. at J56. Campbell called 911 to report that Panah was attempting suicide. *Id*. Panah fled when a police officer arrived, but was later apprehended. *Id*. at J56-J57. The police obtained a warrant and searched Panah's bedroom late that night, about 36 hours after Parker had disappeared. *Id*. at J57. They found Parker's naked, lifeless body wrapped in a bed sheet and hidden inside a suitcase on the floor of Panah's closet. *Id*.

2. The State charged Panah with capital murder, among other things, on the theory that he had killed Parker while engaged in the commission of a sex offense. Pet. App. J50-J51. The specified sex offenses were sodomy, oral copulation, and lewd or lascivious acts on a child. *Id*.

To prove the oral copulation, the State relied on testimony from forensic serologist William Moore. Pet. App. E28, J164-J165. He testified that there were stains containing a mixture of semen and large quantities of amylase indicative of saliva on the bed sheet and on some discarded tissue paper. *Id*. at N567-N568, N572, N604-N607. He also testified that there were stains containing blood and saliva on a silk robe or kimono. *Id*. at N569, N571. He testified that all of the stains contained type A and B antigens, which could have come from a mixture of type A antigens from Parker and type B antigens from Panah. *Id*. at N566-N572, N575-N576, N579-N581.[1] Moore also cautioned that "I cannot establish any certainty based on conventional serology. I can only demonstrate consistency." *Id*. at N614-N615.

To prove the sodomy and lewd acts, the prosecution relied on testimony from Dr. Eva Heuser, a forensic pathologist. Dr. Heuser testified that Parker's vaginal opening was "outlined by a band of dark purple bruising" consistent with digital penetration. Pet. App. N730-N733. Parker's anus and rectum also had a "bruised appearance." *Id*. at N734, N738. And there were "two tears of

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[1] DQ Alpha typing (a type of DNA test) conducted pretrial and provided to the defense showed Parker could not have contributed the saliva on the tissue paper. Pet. App. M497-M501, M503, M539, N557-N558. But this evidence was not introduced at trial. *See id*. at M538-M539. Postconviction analysis confirmed that Parker was excluded as a source of the saliva on the tissue paper (*id*. at L427, L434) and also confirmed that Panah was excluded as a source of the saliva on the robe stain about which Moore testified (*id*. at L435) but not excluded as a source of a different stain on the robe (*id*.).

the skin running from the anus frontwards." *Id*. at N736. The injuries were consistent with penile penetration of the rectum. *Id*. at N739-N740.

Dr. Heuser also testified about several injuries to Parker's neck, which were indicative of manual strangulation. Pet. App. N689, N699-N701, N751-N752. An examination of Parker's lungs indicated she had inhaled her own vomit, which trapped air in her lungs. *Id*. at N750-N751. Dr. Heuser also observed other bruises and abrasions to Parker's face. *Id*. at N683, N694-N695, N697-N698, N706. A bruise on her forehead was consistent with impact with a wall or the floor or being struck with a fist. *Id.* at N678-N681, N689. Other bruises were caused by finger pressure. *Id*. at N695. Scratches on the inside of her thighs were consistent with having been made by Panah's ring. *Id*. at N688-N689; *see id*. at J145. Dr. Heuser opined that Parker had died as a result of the cumulative effect of her injuries. *Id*. at N751. But the "genital trauma" and the injures to her neck were the "most lethal." *Id*. at N752.

Although Dr. Heuser was unable to establish a precise time of death, she opined that Parker had still been alive at the time she suffered the injuries. Pet. App. N748, N754. Dr. Heuser also opined that the appearance of certain food in Parker's stomach was consistent with normal digestion for four hours or less. *Id*. at N754-N756. Because stress slows digestion, however, there was "quite a range" of time within which Parker could have died. *Id*. at N755-N756. Dr. Heuser testified that the discovery of Parker's body in full rigor mortis 36 hours after her disappearance was "a little surprising," but was "certainly

within the parameters given in the textbooks," especially because there was no evidence regarding the surrounding air temperature. *Id*. at N756-N757.

The jury convicted Panah of first degree murder (among other crimes) and found that he had committed the murder while engaged in sodomy and lewd acts on a child, but not while engaged in oral copulation with a child. Pet. App. J51. The jury ultimately returned a verdict of death. *Id*. at J52.

3. In separate habeas proceedings in state and federal court, Panah raised claims related to the ones he brings here.[2] For example, he claimed that the prosecution had knowingly introduced false or misleading evidence from Moore regarding the possibility that (i) Parker had been a source of a stain on the bed sheet and a stain on the tissue paper and (ii) Panah had been a source of a stain on the silk robe. *See* Pet. App. E30-E31. Panah also claimed that trial counsel had provided ineffective assistance by not investigating the cause or time of death. *See id*. at E40-E45.

The California Supreme Court summarily denied his petition. Pet. App. G47. The federal district court ruled that the denial had not been unreasonable under 28 U.S.C. § 2254(d). *See id*. at E31. And the Ninth Circuit affirmed the district court's decision. *Id.* at E22. The Ninth Circuit explained that the state court "reasonably could have found" that the evidence from Moore was "an

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[2] The related claims are the subject of a separate petition for a writ of certiorari that is currently pending before this Court. *See Panah v. Broomfield*, No. 19-8009 (filed March 13, 2020).

immaterial part of the State's case because it offered the jury, at most, hypotheticals and wavering findings." *Id*. at E36. And, even without that evidence, the case against Panah was "powerful" and "devastating." *Id*. at E34-E35.

4. While Panah's federal habeas case was pending in the Ninth Circuit Court of Appeals, the California Legislature expanded the availability of habeas relief under state law in two ways. First, the Legislature broadened the scope of "false" evidence warranting habeas relief to include "opinions of experts . . . that have been undermined by later scientific research or technological advances." Cal. Penal Code § 1473(e)(1). Second, the Legislature authorized habeas relief if "[n]ew evidence exists that is . . . of such decisive force and value that it would have more likely than not changed the outcome at trial." Cal. Penal Code § 1473(b)(3)(A).

Panah filed a new state habeas petition in Los Angeles County Superior Court alleging that the same evidence he had previously proffered on collateral review in state and federal court qualified as "new" evidence, Cal. Penal Code § 1473(b)(3)(A), and that it "undermined" the forensic evidence from Moore and Dr. Heuser, Cal. Penal Code § 1473(e)(1); *see* Resp. App. 19. He also claimed that he was entitled to relief as a matter of federal constitutional law based on the recent decision in *Gimenez v. Ochoa*, 821 F.3d 1136, 1145 (9th Cir. 2016), in which the court stated that "habeas petitioners can allege a constitutional violation from the introduction of flawed expert testimony at trial if they show

that the introduction of this evidence 'undermined the fundamental fairness of the entire trial.'" Resp. App. 10, 19-20.

The superior court denied the petition on the merits. The court explained that Panah was not entitled to relief on his state and federal claims involving false evidence, because he failed to make a prima facie showing that the evidence at trial had actually been false. Pet. App. C11-C12. Nor was Panah entitled to relief on his state claim involving new evidence, because (i) the evidence could have been discovered through the exercise of due diligence at trial and (ii) the evidence would not have changed the outcome of the trial. *Id*. at C12-C13.

Panah filed a new petition raising the same claims in the California Court of Appeal. Resp. App. 68-102. The court denied relief on the merits. Pet. App. B2-B3.[3] The court explained that the proffered evidence (i) "dat[ed] from at least a decade ago," (ii) was "based on testimony and material available to the defense at the time of trial," (iii) "offer nothing more than impeachment," and (iv) would not "probably have resulted in a different outcome at trial given the totality of the evidence." *Id*.

Panah renewed his claims, including his federal constitutional claim, in a habeas petition to the California Supreme Court. Resp. App. 131-165. When

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[3] The court also denied the petition on the procedural ground that Panah had failed to "attach all reasonably available documentation relied upon in the petition." Pet. App. B2 (citing *People v. Duvall*, 9 Cal. 4th 464, 474 (1995)).

he subsequently addressed whether the petition was successive, Cal. Penal Code §§ 1509(d), 1509.1(a), he did not mention the federal constitutional claim. Instead, he repeatedly described the petition as being based on the recent amendments to state law. *Id*. at 178, 190, 195. The California Supreme Court subsequently and summarily denied relief without comment. Pet. App. A1.

ARGUMENT

Panah claims that prosecutors violated his right to due process by introducing "false or faulty scientific evidence at trial that was *not* known to be false at the time by State actors." Pet. 14. That claim does not warrant certiorari. Panah did not suffer any due process violation, and although he asserts that there is "a circuit split" on "what the proper standard is" for this type of constitutional claim (*id.* at 12, 16), he fails to demonstrate any actual conflict. In any event, Panah's briefing below—and the decisions of the state trial and intermediate courts—focused on the application of a state habeas statute without separately exploring the constitutional issues that he now seeks to litigate. That focus on state law was understandable, because California's statute governing state habeas relief is at least as favorable to defendants as the constitutional standard embraced by Panah. Under the particular circumstances of this case, moreover, Panah cannot establish that he would be entitled to relief under any plausible constitutional standard.

1. Panah contends (Pet. 14-16) that there is a conflict in the federal courts over how to analyze due process claims involving scientific evidence that is

later discredited. He asks this Court to adopt the Ninth Circuit's rule in *Gimenez v. Ochoa*, 821 F.3d 1136, 1145 (9th Cir. 2016) and not the Third Circuit's supposedly "more stringent test" (Pet. 14) in *Lee v. Glunt*, 667 F.3d 387, 403 (3d Cir. 2012) (*Lee I*). When the Ninth Circuit decided *Gimenez*, however, it "join[ed] the Third Circuit in recognizing that habeas petitioners can allege a constitutional violation from the introduction of flawed expert testimony at trial if they show that the introduction of this evidence 'undermined the fundamental fairness of the entire trial.'" *Id.* at 1145 (quoting *Lee v. Houtzdale SCI*, 798 F.3d 159, 162 (3d Cir. 2015) (*Lee II*)). Although Panah also points to cases from the D.C. Circuit (*see* Pet. 15), those cases involve evidence that the government "knew or should have known" was false or misleading at the time of trial. *United States v. Ausby*, 916 F.3d 1089, 1090 (D.C. Cir. 2019); *see United States v. Butler*, 955 F.3d 1052, 1053 (D.C. Cir. 2020). They offer no support for Panah's suggestion that there is a division of authority regarding evidence "that was *not* known to be false at the time by State actors." Pet. 14.

Regardless, California has chosen to adopt a standard for granting relief under state law that is at least as favorable to defendants as any plausible standard under federal constitutional law. The state standard directs that an "allegation that the prosecution knew or should have known of the false nature of the evidence . . . is immaterial to the prosecution of a writ of habeas corpus . . . ." Cal. Penal Code § 1473(c). A convicted defendant need only prove

that (i) "false" evidence was introduced against him at trial and (ii) that evidence was "substantially material or probative on the issue of guilt or punishment." *Id.* § 1473(b)(1). California's standards for determining falsity require a defendant to show only that expert testimony has either been "repudiated" by the same expert or "undermined by later scientific research or technological advances." *Id.* § 1473(e)(1). A defendant who makes either such showing is entitled to relief without regard to prosecutorial knowledge if the evidence was "substantially material or probative." *Id.* § 1473(b)(1). And that standard requires only "a reasonable probability the result would have been different without the false evidence." *In re Figueroa*, 4 Cal. 5th 576, 589 (2018); *see id.* at 588-589 (granting relief without a showing of prosecutorial knowledge); *In re Rogers*, 7 Cal. 5th 817, 848-850 (2019) (same); *In re Richards*, 63 Cal. 4th 291, 309-316 (2019) (*Richards II*) (same).[4]

Panah appears to acknowledge that California's statutory standard is at least as favorable to defendants as the constitutional standard that he asks this Court to adopt: In briefing his claim before the court below, Panah relied on the Ninth Circuit's standard from *Gimenez*, and argued that "the standard for determining prejudice under [his] due process claim is identical to the

[4] Before 2015, a convicted defendant raising a claim of false evidence under state law was required to show that the evidence was "objectively untrue." *In re Richards*, 55 Cal. 4th 948, 963 (2012) (*Richards I*).

materiality standard for his section 1473 claim." Resp. App. 132-133.[5] Indeed, California's statutory standard may be more favorable to defendants than the *Gimenez* standard, which requires a showing that the trial evidence had been "so extremely unfair that it[] . . . violate[d] fundamental conceptions of justice." *Gimenez*, 821 F.3d at 1145 (quoting *Dowling v. United States*, 493 U.S. 342, 352 (1990)).

In any event, because Panah did not see any material difference between California's statutory standard and the *Gimenez*-style constitutional standard that he now asks this Court to adopt, his discussion of his statutory and constitutional claims below did not draw any distinction between state and federal law. *See* Resp. App. 134-165. And the decisions of the lower state courts did not explore at any length the federal constitutional issues that he asks this Court to address. *See* Pet. App. A1-C15. Those circumstances render this case a uniquely poor vehicle for resolving "what the proper standard is" under the federal Due Process Clause. Pet. 16.

2. What is more, the state courts reached the correct result in rejecting Panah's claim regarding the scientific evidence introduced at his trial. That result is faithful to the state statutory standards that were the focus of Panah's

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[5] He also briefed his statutory and constitutional claims "together to avoid repetition." Resp. App. 132 n.4; *accord id.* at 19 n.4, 68 n.4. And, when he addressed whether his petition was successive, he described the petition as being based on recent amendments to state law—without mentioning that it also had a federal component. *Id*. at 178, 190, 195.

state habeas petitions below, and it is consistent with the due process principles that are the focus of his petition in this Court.

The serology evidence at Panah's trial established that: (1) blood and saliva consistent with Parker and semen consistent with Panah were present on the bed sheet; (2) blood consistent with Parker and saliva consistent with Panah were present on a stain on his robe; and (3) semen consistent with Panah and saliva consistent with Parker were present on a piece of tissue paper found at the crime scene. Pet. App. E31, N572, N579-N581, N590-N591, N595, N601-N602, N604-N608. It is true that postconviction analysis of the DNA testing results was inconsistent with the serology data in some ways. *See id*. at L427, L434-L435, M497-M501, M503, M539, N557-N558. From this, Panah argues that it was "false" for Moore to testify that the stains showed a mixture of bodily fluids from Panah and Parker. Pet. 7. But the postconviction analysis actually confirmed the presence of both Panah and Parker at the crime scene, even if it did not show the identical mixture of fluids described by Moore. Pet. App. L427-L431, L434-L435. Parker was *not* excluded as a contributor to the saliva on the bed sheet, and Panah was not excluded as a contributor to a second stain on the robe. *Id*. at L427-L431, L434-L435. At most, Panah established that Parker was excluded as a contributor to a stain on the tissue paper. That does not undermine the prosecution's central theory that bodily fluids from Panah and Parker were found in the same location where her sexually brutalized body was found stuffed in his suitcase. The

tissue paper evidence was in no way necessary for the prosecution to properly argue that the overwhelming evidence against Panah showed he sexually assaulted Parker before killing her. *See id*. at J162-J164 & n.37. On this record, the California Court of Appeal was correct in determining that Panah offered "nothing more than impeachment of the expert testimony offered at trial." *Id*. at B2; *cf. Gimenez v. Ochoa*, 821 F.3d at 1142-43.

The same is true of Panah's challenge to Dr. Heuser's testimony regarding the cause of death. Panah contends that postconviction "experts found that no brain and sexual assault injuries caused Parker's death." Pet. 8. But that falls far short of establishing that Dr. Heuser's testimony was false. For example, Dr. Michael Baden opined, "to a reasonable degree of medical certainty, that neither craniocerebral injuries nor a sexual assault caused Parker's death[.]" Pet. App. L438. Dr. Gregory Reiber concluded that "[t]he head and brain examinations reveal no injuries of a severity to account for the child's death or to result in a significant contribution to her death." *Id*. at M466 ¶ 8. But Dr. Heuser never opined that a brain injury caused Parker's death; rather, she opined that the primary cause of death was the traumatic injuries suffered by Parker to her neck and genital areas. *Id*. at N705, N740, N747-N748, N752. In addition, Dr. Reiber noted that "no semen or foreign DNA was found in the swab samples taken from the child's body cavities, including the anal samples," and concluded that "this also disfavors the concept of penile penetration as the cause of the injury." *Id*. at M467 ¶ 11. As noted by the

California Supreme Court on direct appeal, however, the serologist "also examined the anal swab. The swab produced a positive acid phosphatase result indicative of the presence of semen, but was inconclusive." *Id*. at J59. The fact that the anal swab was "inconclusive" does not mean "that there was no semen in the victim's anus." *Id*. at J161 n.36.

Panah further contends that Dr. Heuser's testimony about Parker's time of death was found to be false by Dr. Reiber. Pet. 8. Dr. Reiber was critical of using stomach contents to determine the time of death, faulted Dr. Heuser's alleged failure to take an air temperature, and disagreed with Dr. Heuser's testimony about rigor mortis. Pet. App. M468-M469. But Dr. Heuser acknowledged at trial that the appearance of fully set rigor mortis was "a little surpris[ing]," that the investigator did not provide an air temperature as investigators "often" do, *id*. at N757, and that Parker's stomach contents yielded a broad range for a possible time of death, *id*. at N755-N756. Moreover, Dr. Reiber did not contest Dr. Heuser's testimony that an air temperature in the 70s or lower would delay the onset of rigor mortis or that full rigor after 48 hours was "certainly within the parameters given in the textbooks," *id.* at N757.

Dr. Reiber's opinions were based primarily on a review of reports prepared years after the trial. His differing conclusions about Parker's time of death are not sufficient to establish that Dr. Heuser's testimony was false. "To the extent that this new testimony contradicts the prosecution's expert

testimony, it's simply a difference in opinion—not false testimony." *Gimenez*, 821 F.3d at 1142 (citations omitted). As the petitioner in *Gimenez* did, Panah "presents a battle between experts who have different opinions about how [the victim] died. Introducing expert testimony that is contradicted by other experts, whether at trial or at a later date . . . is standard litigation." *Id*. at 1143. Panah has not established any error by the courts below, let alone any "fundamental unfairness" that would entitle him to relief under his preferred constitutional standard.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted

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May 12, 2020

1. Petition for Writ of Habeas Corpus Pursuant to Penal Code section 1473 filed in Los Angeles Superior Court case number BA090702.

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FOR THE COUNTY OF LOS ANGELES

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff/Respondent,

v.

HOOMAN ASHKAN PANAH

Defendant/Petitioner.

[DEATH PENALTY CASE]

Los Angeles Superior Court Case No. BA090702 [Related to California Supreme Court Case No. S155942]

PETITION FOR WRIT OF HABEAS CORPUS PURSUANT TO PENAL CODE SECTION 1473

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STATE STATUTES

PETITION FOR WRIT OF HABEAS CORPUS

Petitioner, Hooman Ashkan Panah, by and through his undersigned counsel, hereby petitions for a writ of habeas corpus, and by this verified petition states as follows:

I. INTRODUCTION

A jury convicted Panah of first-degree murder based on a felony-murder theory that he sexually assaulted and killed a girl who lived in his apartment complex. The jury further found two special circumstances to be true in arriving at a verdict of death: sodomy and lewd acts with a minor under 14.

To prove that Panah was responsible for the murder, the prosecution relied on circumstantial scientific evidence by a novice serology expert purporting to link Panah to the victim through a novel theory that a mixture of Panah's and the victim's bodily fluids was found on items from the scene of the crime based on blood-type evidence. The serologist's theory has since been proven false by DNA evidence. Yet, this testimony was the springboard for the prosecutor to argue that Panah was guilty of sodomy and lewd acts, the felonies underlying the prosecution's felony-murder theory.

Furthermore, the prosecution relied on the pathologist's testimony on the time of death to prove that Panah had the opportunity to commit the murder before he left for work that afternoon. The prosecution further relied on the pathologist's testimony that the traumatic injuries to the decedent's brain, neck, and anus caused her death. The pathologist's testimony was critical to Panah's conviction. Moreover, this same evidence was used by the prosecution as aggravating evidence concerning the nature of the crime during the penalty-phase. Accordingly, both Panah's conviction and death sentence must be vacated.

Panah is entitled to habeas relief on two grounds: his conviction violated (1) the due process clause of the Fifth and Fourteenth Amendments of the United States Constitution based on the introduction of faulty scientific evidence, and (2) California Penal Code section 1473, as the prosecution secured a conviction and sentence based on expert testimony that has been shown to be false, and that is undermined by

scientific research or technological advances. But for the prosecution's presentation of false expert testimony, Panah could not have been convicted at the guilt-phase of his trial. Moreover, absent the false evidence introduced at the guilt-phase, the jury would have had a reasonable doubt of the truth of the special circumstances. Finally, absent the false-testimony introduced at the guilt-phase, the prosecutor could not have secured a death sentence at the penalty phase. Accordingly, Panah files this petition seeking relief.

II. PROCEDURAL HISTORY

A. State Court proceedings

On December 19, 1994, a Los Angeles County jury found Hooman Panah guilty of the first-degree murder of Nicole Parker. Panah was also convicted of sodomy by force, lewd acts upon a child under the age of fourteen, penetration of genital or anal openings by a foreign object with a person under fourteen years of age, and oral copulation of a person under fourteen years of age. The jury found true the special circumstance allegations that the murder was committed while Panah was engaged in the crime of sodomy and lewd acts upon a child under the age of fourteen. The trial court dismissed the kidnaping charges and related special circumstance, and the jury found not true the special circumstance allegation that the murder was committed while Panah was engaged in the crime of oral copulation. *People v. Panah*, 35 Cal. 4th 395, 409 (2005). After deliberating for four days, the jury reached a verdict of death. (4 CT 961.) Panah was sentenced to death on January 23, 1995. *Id.*

The California Supreme Court denied Panah's automatic appeal on March 14, 2005. *Panah*, 35 Cal. 4th 395 (2005). Panah's initial state habeas petition was summarily denied without an evidentiary hearing on August 30, 2006. *In re Panah*, Case No. S123962. He filed an exhaustion petition in the California Supreme Court in district court on August 30, 2007 which was summarily denied on March 16, 2011 without a hearing. *In re Panah*, Case No. S155942.

B. Federal Court Proceedings

Panah filed a Protective Petition for Writ of Habeas Corpus in the federal district court on February 26, 2007. (USDC Dkt. Nos. 36-39.) Panah filed a First Amended Petition for Writ of Habeas Corpus on August 30, 2007. The district court stayed the proceedings pending exhaustion. (USDC Dkt. Nos. 52-54.) Following the California Supreme Court's denial of the exhaustion petition, Panah filed a Second Amended Petition for Writ of Habeas Corpus on June 24, 2011. (USDC Dkt. No. 102.)

After the filing of Respondent's Answer and Panah's Traverse, the district court ordered briefing on whether Panah's claims satisfied 28 U.S.C. § 2254(d) based on the state court record. (USDC Dkt. No. 127.) The court denied Panah's requests for discovery and an evidentiary hearing. On November 14, 2013, the district court dismissed the petition without a hearing, entered judgment against Panah, and issued a Certificate of Appealability on one claim. (USDC Dkt. No. 164.)

On November 20, 2014, Panah filed an opening brief in the Ninth Circuit Court of Appeals. (USDC Dkt. No. 175.) The case became fully briefed when Panah filed his reply brief on March 9, 2016.

III. TIMELINESS OF ALLEGATIONS

This petition is timely pursuant to the timeliness standards set forth in Policy Statement 3 of the Supreme Court Policies Regarding Cases Arising from Judgments of Death ("Policies"), and must be considered on its merits. *See In re Sanders*, 21 Cal. 4th 697 (1999); *In re Robbins*, 18 Cal. 4th 770 (1998); *In re Clark*, 5 Cal. 4th 750 (1993).

This Court applies a four-step analysis to determine if a capital habeas corpus petition is timely:

> (i) the petition is *presumptively timely*, having been filed within ninety[1] days of the filing of the reply brief on appeal;

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[1] This rule was subsequently amended from ninety to 180 days. Policies, Timeliness Requirements 1-1.1.

> (ii) even if not presumptively timely, the petition was filed *without substantial delay;* (iii) even if the petition was filed after a substantial delay, *good cause* justifies the delay; or (iv) even if the petition was filed after a substantial delay without good cause, the petitioner comes within one of the four *Clark exceptions.*

Sanders, 21 Cal. 4th at 705 (footnote added).

This petition raises three claims: a Due Process violation based on the introduction of faulty scientific evidence, and two claims based on the newly amended penal code 1473. Panah's Due Process claim of faulty expert testimony is timely because it is based on new law—identifying a claim based on faulty evidence—announced by the Ninth Circuit just this year. In *Gimenez v. Ochoa*, the Ninth Circuit recently held that the introduction of flawed expert testimony at trial violates due process "if . . . the introduction of this evidence 'undermined the fundamental fairness of the entire trial.'" 821 F.3d 1136, 1145 (9th Cir. 2016).

Panah's claims based on the newly amended penal code section 1473 is timely because it was filed without substantial delay. "Substantial delay is measured from the time the petitioner or his or her counsel knew, or reasonably should have known, of the information offered in support of the claim and the legal basis for the claim." *Robbins*, 18 Cal. 4th at 780. In *Clark*, 5 Cal. 4th at 775, this Court held that "claims which are based on a change in the law which is retroactively applicable to final judgments will be considered if promptly asserted and if application of the former rule is shown to have been prejudicial."

The legal basis for Panah's "new evidence" claim is based on the amendment of Penal Code section 1473(b)(3). This amendment became effective on January 1, 2017. Panah's other statutory claim, based on Penal Code section 1473(e), became effective January 1, 2015. Section 1473(b)(3) and (e) are retroactively applicable to final judgments because the statute specifically provides a basis for pursuing a petition for

writ of habeas corpus. *See* Cal. Penal Code § 1473. Because Panah promptly filed this petition following discovery of the legal basis of these claims, they are timely.

If this Court concludes that the filing of this petition is substantially delayed based on the time section 1473(e) was amended, that delay is justified. On November 20, 2014, Panah filed his opening brief in the Ninth Circuit Court of Appeals. Briefing in that case did not conclude until March 9, 2016, with the filing of the Appellant's Reply Brief. Accordingly, counsel could not have reasonably focused its attention on the instant petition while that briefing was taking place.

Regardless, even if this Court were to find the petition substantially delayed, and that the delay is unjustified, the merits of the claims in this Petition indicate a fundamental miscarriage of justice; thus, it would be a fundamental miscarriage of justice to forego merits-review of the claims based on a procedural obstacle.[2] The California Supreme Court requires merits review of claims that are even justifiably substantially delayed if the claim alleges "facts that a fundamental miscarriage of justice has occurred[.]" *In re Clark*, 5 Cal. 4th 750, 775 (1993). Here, the facts below demonstrate that Panah is both innocent of the conviction offenses and death penalty, warranting merits review of his claims. *Id.* at 761.

Moreover, Panah has a death sentence. The state cannot execute a person whose conviction and sentence were unconstitutionally and unreliably obtained, at least not without affording a full and fair opportunity for the petitioner to demonstrate the errors in his trials. *See Ford v. Wainwright*, 477 U.S. 399, 410-11 (1986). Thus, this Court should review the merits of this case, and look beyond any procedural technicalities. *See In re Gallego*, 18 Cal. 4th 825, 842-52 (1998) (Brown, J., concurring and dissenting).

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[2] For these reasons these claims also overcome any procedural bars that may take effect with the passage of Proposition 66, which in any event is currently not effective pending appeal.

IV. INCORPORATION

Panah hereby incorporates by reference his prior state habeas corpus petitions and accompanying exhibits and briefs (Case Nos. S123962, S155942), and the record and briefs in his direct appeal (Case. No. S045504). All exhibits attached hereto are true and correct copies of what they purport to be.

If Respondent disputes any of the facts alleged herein, Panah requests an evidentiary hearing in this Court so that the factual disputes may be resolved. After Panah has been afforded discovery and the disclosure of material evidence by the prosecution, the use of this Court's subpoena power, funds, and an opportunity to investigate fully, Panah requests an opportunity to supplement or amend this petition.

V. RELEVANT FACTS

On Saturday, November 20, 1993, Nicole Parker went missing from her father's Woodland Hills, California apartment. (CSC Opinion S045504, *People v. Panah.*) The following morning, after several warrantless searches found no evidence of wrongdoing, police found Parker's dead body in a suitcase in Panah's bedroom closet in the apartment he shared with his mother in the same complex. *Id.*

A. The use of serology evidence by the prosecution

During the guilt phase of Panah's trial, Prosecutor Patrick Couwenberg presented the testimony of criminalist William Moore on serology issues. (19 RT 2016.) William Moore had qualified as an expert serologist about six times before Panah's trial; this case was the first time he testified as an expert at a trial. (19 RT 2017.) Moore testified about the results of ABO blood typing and PGM (phosphoglucomutase) sub-typing he performed on evidence collected from the crime-scene. (19 RT 2061.) Moore found that Panah carries type "B" and "H" antigens, while the victim carried type "A" antigens. (19 RT 2019-28.) Moore testified that a stain containing "A" and "B" antigens "could be indicative of a mixture of physiological fluids [from two separate people]." (19 RT 2022.) He relied on this "mixture" theory to form

conclusions that stains found on items collected from the crime scene, including a bed sheet, tissue paper, and a robe, contained mixtures of blood and other bodily fluids that could have come from Panah and Parker. (CSC Opinion S045504.) No other traces of blood, fluids, or other signs of struggle were found in the apartment.

The prosecution never presented that it had ordered DQ-Alpha (DQA1) DNA testing on the stains that disproved Moore's findings.[3] These DNA results were given to the defense but never presented at trial. (11 RT 715-17.) Defense counsel cross-examined Moore about whether "there are techniques in existence that would narrow" the number of people who could be excluded as a contributor to the tissue paper stain. (20 RT 2130.) Moore agreed that there were more "recent techniques that are more refined than" the ABO and PGM sub-typing Moore used. (20 RT 2130.) These techniques, according to Moore, included "PCR, which is short for polymerase chain reaction, which is a DNA based technique which has the power of amplifying the DNA so that it can be detected more easily." (20 RT 2130.) Counsel asked Moore whether the DNA methods were "workable," to which Moore replied, "the case received consideration by the people at our laboratory who are knowledgeable in the PCR technique" and "the specific results of that I believe were that there was inadequate DNA for a conclusion." (20 RT 2131.) Moore failed to add that DQA1 testing was available and had, in fact, been done by the prosecution.

Moore also testified that he swabbed the victim's body in various areas, including the anal, oral, genital, and chest area. (19 RT 2029-30.) No semen was found on any of these swabs. (20 RT 2102.) While anal and oral swabs produced "positive acid phosphatase result[s]," (19 RT 2029), "upon further testing for the

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[3] The prosecutor who presented Moore's testimony later admitted to being a pathological liar and was removed from the Bench following his appointment as a Los Angeles Superior Court Judge. (*See* Ex. 10, Order of Removal at 212-14; Ex. 9, Hearing Before Special Master at 191-92.)

presence of the P30 protein and a negative result, the presence of semen could not be conclusively identified." (20 RT 2104.). "P30" is a "semen specific protein not found in any other human physiological fluid." (20 RT 2106.)

1. Tissue paper stain

Moore examined a tissue paper found in Panah's bathroom trashcan that, he said, "bore semen stains, and high amylase activity." (19 RT 2026.) The high level of amylase, according to Moore, "indicate[s] the presence of saliva." (20 RT 2079; *see also* 20 RT 2124 (Moore testifies that "the amylase present on that wad of tissue paper was from saliva and no other bodily fluid").

Moore stated that the stain contained "A, B, and H antigens." (20 RT 2076.) The "B and H antigenic activity" was consistent with Panah's semen. (19 RT 2028.) According to Moore, the "A antigenic activity" "could have" come from the victim's saliva. 20 RT 2077, 2079, 2028.) As a result of the purported mixture of Panah's semen and the victim's saliva, Moore concluded that the tissue-paper stain "could be consistent with the product of an oral copulation." (20 RT 2079.)

2. Bed sheet stains

Moore testified about two groups of stains found on Panah's bed sheet. He testified that the larger group (displayed in trial exhibit 15-B) "showed the presence of spermatozoa," (20 RT 2066), and contained A and B antigens. (20 RT 2065-66.) The stains demonstrated "amylase activity that could not have originated from the semen itself" and which "was consistent with no other biological fluid, aside from saliva [.]" Based on these findings, Moore agreed with the prosecutor that (1) it would "be reasonable to believe then that the semen could have come from a B secretor," (2) "Mr. Panah is a B secretor[,]" (20 RT 2067), and (3) the saliva could "relate" to the victim "through the A antigenic activity demonstrated by the stain." (20 RT 2073.) As a whole, Moore's testimony created the impression that this larger grouping of stains included a mixture of Panah's semen and the victim's saliva. The pattern of the stains,

he said, was consistent with "the spewing of semen across the bed sheet." (20 RT 2067-68.)

The smaller stain (shown in trial exhibit 15-A) exhibited A and B antigens. (20 RT 2064-65.) Moore concluded, though, that background contamination at the location of this smaller stain accounted for the B antigens. (20 RT 2065-66.) Thus, given the contaminated background, Moore could not determine whether this smaller stain contained a mixture of fluids. (20 RT 2066-67.)

3. Stains found on a robe

Moore testified that a robe found in Panah's bedroom had two blood stains: one large stain on the upper left front side of the robe and another smaller stain near the lower left hem. (19 RT 2025.) Moore did not testify about the latter.

Moore identified "high amylase activity" on the stain on the upper left side of the robe, (20 RT 2075), which he had earlier explained indicated the presence of saliva. (19 RT 2025.) He further testified that this blood stain contained "A, B, and H" antigens, with the PGM sub-typing consistent with the victim. (20 RT 2075.) Moore opined that the "blood stain was consistent with Nicole Parker" while the "B antigen was the result of the saliva or the amylase[.]" (19 RT 2023.) Moore agreed with the prosecutor "that the B and H antigenic material can be traced to Mr. Panah," thus resulting in a stain containing a mixture of Panah's saliva with the victim's blood. (20 RT 2076.)

The first piece of evidence the prosecutor cited in his closing was Moore's testimony that there was a mixture of blood and body fluids on the bed sheet from two separate people: Parker's blood and saliva and Panah's semen. (24 RT 238.) He emphasized Moore's mixture theory throughout his argument and said it showed that Panah's motive was sexual gratification and proved the lewd act and oral copulation special circumstances. (24 RT 2842-46, 2849.)

The prosecutor argued that the crime "was done to satisfy [defendant's] own lust based upon the kind of evidence that you have of ejaculation, semen which is found,

semen and saliva, a mixture of which is found on the sheets in the bed." (24 RT 2844.) The prosecutor further argued that the tissue paper with semen and "a concentration of amylase so high that the opinion of the expert was that it came from saliva," demonstrating that Panah "ejaculate(d) in Nicole Parker's mouth" and "that the child was allowed to spit it into a kleenex or toilet paper which was then discarded into the waste basket." (24 RT 2876.) He emphasized "the opinion of the expert that the blood [on the robe] was that of type A, which matched Nicole Parker's," and "the saliva was of type B," "which would match the defendant." (24 RT 2877.) "It was a mixture in the same area and it appeared to be deposited at about the same time." (24 RT 2877.).

B. The use of pathology evidence by the prosecution

The prosecution relied on testimony by forensic pathologist Eva Heuser, M.D., a Deputy Medical Examiner from the Los Angeles County Coroner's Office, to establish the victim's time and cause of the death during the guilt phase of the trial. (21 RT 2331.)

In conducting an autopsy of Parker, Heuser testified that she observed bruising on the victim's head that had caused hemorrhaging and swelling in the brain. (21 RT 2332-35.) She concluded the bruising was consistent with Parker's head striking a wall or floor. (21 RT 2338.) Her right cheek was swollen as a result of lividity, which is the appearance the skin takes on after death. (21 RT 2344.) With respect to bruising she found on the left side of Parker's face, she opined that it appeared to be finger pressure marks. (21 RT 2348.) She also testified that Parker had bruising on the muscle that runs from behind the ear to the collar bone, consistent with a thumb being pressed to the neck compressing the jugular vein. (21 RT 2353-54.) There was also bruising in the area of the vagina, which she testified was consistent with a finger or penis in the area of the anus consistent with anal penetration, possibly due to sodomy. (21 RT 2385-93.) Heuser went on to testify that sodomy could cause bradycardia, i.e. a slowing of the heart. (21 RT 2400.) In return she opined that the bradycardia caused the victim to asphyxiate. (21 RT 2403.)

According to Heuser, all of these injuries resulted in death:

> What I conceptualize, it is the incident that resulted in the traumatic injuries, so even though the little bruises are not in and of themselves significant, they are part of a set of circumstances that led to her death. So all her injuries caused her death in that sense.

(21 RT 2404.) Ultimately, Heuser concluded that the victim died from "'[t]raumatic injuries," which consisted of "[c]raniocerebral trauma," "[n]eck compression," and "[s]exual assault with anal lacerations." (Ex. 6, Autopsy Report of E. Heuser, at 21; see also Ex. 7, Autopsy Notes.)

The prosecution used Heuser's testimony to argue that Panah strangled the victim during the commission of sexual assaults including oral copulation, finger penetration of the victim's vagina and sodomy. (24 RT 2881-83.)

Further, the prosecution's theory of the time of death rested on Heuser's pathology evidence. The victim's father testified that Parker went missing at approximately 11:40 a.m. on November 20, 1993. (17 RT 1629-30.) The police claimed to have discovered the body at 10:30 p.m. on November 21, 1993, and they transported the body at 4:10 a.m. on November 22, 1993. Although initially testifying that it was impossible to ascertain the exact time of death (21 RT 2407), Heuser proceeded to give a probable time of death that coincided with the prosecution's theory that Panah was the killer. Heuser testified rigor mortis was "fully set" when the body was found (21 RT 2409), but it would be possible for the body to be in full rigor even thirty-six hours after death. (21 RT 2409.) Moreover, Heuser found what she assumed to be undigested eggs in the victim's stomach, which the victim had eaten the morning of November 20, 1993. (21 RT 2408-09.) Thus, Heuser testified the victim "probably" died within four hours of the ingestion. (21 RT 2408-09.) Panah was seen at his job by 3:00 p.m., and he never returned to his residence before being arrested the following day miles away from his apartment. Heuser's testimony permitted the inference that the victim died

while Panah was still in his apartment between 11:40 a.m. and 3:00 p.m. As such, the prosecution argued at trial that Panah killed Parker in his apartment in the late morning or early afternoon hours on Saturday, November 20, 1993 and left her body in a suitcase in his closet when he left for work at 3 p.m. (*See* 21 RT 2407-10; 24 RT 2855-59.)

C. Jury deliberations and verdicts

On December 13, 1994, the prosecution rested. (3 CT 617.) All kidnaping accusations were dismissed from the indictment including counts 2 and 3 and the special circumstance allegation in count 1 pursuant to a defense motion for judgment of acquittal. (*Id.*; *see also* 3 CT 515-19; 22 RT 2504-06.) Trial counsel presented no opening statement, which had been reserved at the beginning of the guilt phase on December 5th. (3 CT 601.) The defense rested the next day, December 14. (3 CT 4102; 23 RT 2789.)

On December 19, 1994, during the second day of deliberations, the jury found Petitioner guilty of all charges, except for the charge of oral copulation. (4 CT 859, 862-65.) Two of the four special circumstances were determined to be true: sodomy and lewd act upon a child. The remaining special circumstance, oral copulation, was found to be not true. (4 CT at 859-60.)

In the penalty phase, the prosecution rested its case in aggravation solely on the circumstances of the crime and the special circumstances found to be true. (33 RT 4102.) The prosecutor emphasized the victim impact evidence and the alleged facts of the crime, including the oral copulation, much of which depended on the serology evidence. (33 RT 4102-06.) After deliberating for four days, the jury returned a death verdict on January 23, 1995. (34 RT 4234.)

D. Postconviction Evidence

As discussed in more detail in the claims below, Panah's post-conviction counsel hired experts who reviewed the pathology and blood evidence. Two independent pathologists found that Parker likely died outside of the time-frame in which Panah was

present in his apartment and did not die as a result of craniocerebral injuries or sexual assault, refuting Heuser's testimony regarding cause and time of death. (Ex. 6, Autopsy Rpt. of E. Heuser; *see also* Ex. 7, Autopsy Notes; Ex. 13, Rpt. of M. Baden; Ex. 15, Decl. of G. Reiber)

Two independent forensic scientists found that DNA evidence which the prosecutor failed to present to the jury refuted Moore's testimony that the stains found on the tissue paper, bed sheets, and robe consisted of a mixture of Panah's and Parker's bodily fluids. (Ex. 11, Forensic Analytical Rpt., 2/27/2004.)

Postconviction discovery also revealed that in addition to the warrantless searches that were conducted of Panah's apartment and yielded negative results, even more searches were conducted by law enforcement, including dog searches, none of which pointed to Panah's apartment as the location where Parker's body was located. (Ex. 1, Watch Comm. Rpt., 11/21/1993.)

VI. CLAIMS FOR RELIEF

A. The admission of false and faulty expert testimony violated Panah's due process rights and warrants relief under Penal Code section 1473(e)(1).

Panah is entitled to habeas relief under section 1473(e)(1) because expert testimony that was presented at his trial has been undermined by later scientific research or technological advances, and such testimony was substantially material or probative on the issue of guilt or punishment. The admission of the faulty scientific evidence also violated Panah's federal due process rights under the Fifth and Fourteenth Amendments to the United States Constitution.[4]

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[4] Because Panah's due process and section 1473 claims rely on the same factual bases, they are discussed together to avoid repetition and to aid in the efficiency of this Court's review.

1. Legal Standards

a. Due Process

In *Gimenez v. Ochoa*, the Ninth Circuit recently held that the introduction of flawed expert testimony at trial violates due process "if . . . the introduction of this evidence 'undermined the fundamental fairness of the entire trial.'" 821 F.3d at 1145 (9th Cir. 2016) (*quoting Lee v. Houtzdale SCI*, 798 F.3d 159, 162 (3d Cir. 2015)). Moreover, the use of flawed evidence to convict Panah denied him due process because it was so arbitrary that "the factfinder and the adversary system [were] not . . . competent to uncover, recognize, and take due account of its shortcomings." *Barefoot v. Estelle*, 463 U.S. 880, 899 (1983), *superseded on other grounds by* 28 U.S.C. § 2253(c)(2); *see Hicks v. Oklahoma*, 447 U.S. 343, 346 (1980) ("Such arbitrary disregard of the petitioner's right to liberty is a denial of due process of law.").

A "conviction based on false evidence warrants a new trial if there is a reasonable probability that, without the evidence, the result of the proceeding would have been different." *Spivey v. Rocha*, 194 F.3d 971, 979 (9th Cir. 1999) (internal quotation marks and alteration omitted). As such, the standard for determining prejudice under Panah's due process claim is identical to the materiality standard for his section 1473 claim. *Compare Cox*, 30 Cal. 4th at 1008-09 *with Spivey*, 194 F.3d at 979. A new trial is the only just result when a person is convicted on false testimony. *See Mesarosh v. United States*, 352 U.S. 1, 9 (1956) ("The dignity of the United States Government will not permit the conviction of any person on tainted testimony.").

b. California Penal Code section 1473

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

False evidence includes opinions of experts "that have been undermined by later scientific research or technological advances." Cal. Penal Code 1473(e)(1). False

evidence is "substantially material or probative" if there is a reasonable probability that, had the evidence not been introduced, the result of the trial would have been different. *In re Cox*, 30 Cal. 4th 974, 1008-09 (2003); *see In re Richards*, 55 Cal. 4th 948, 961 (2012). Whether there is a reasonable probability that the result would have been different is an objective determination based on the totality of the circumstances. *Cox*, 30 Cal. 4th at 1008-09; *see In re Malone*, 12 Cal. 4th 935, 965-66 (1996). Courts have looked at the strength of evidence admitted against a defendant, including circumstantial evidence, to determine whether false evidence was material. *In re Richards*, 63 Cal. 4th 291, 313-15 (2016) (granting habeas corpus because, given weak circumstantial evidence, it was reasonably probable that faulty expert testimony about bite mark evidence affected trial's outcome); *see also Strickland v. Washington*, 466 U.S. 668, 696 (1984) ("[A] verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support.").

Under section 1473, Panah need not prove that the false testimony was perjurious. *See Richards*, 55 Cal. 4th at 961; *In re Roberts*, 29 Cal. 4th 726, 741-42 (2003). Nor must he prove that the prosecution knew or should have known of its falsity. *Id.* § 1473(c); *People v. Marshall*, 13 Cal. 4th 799, 829-30 (1996); *see In re Hall*, 30 Cal. 3d 408, 424 (1981); *see also Richards*, 55 Cal. 4th at 960-62. "So long as some piece of evidence at trial was actually false, and so long as it is reasonably probable that without that evidence the verdict would have been different, habeas corpus relief is appropriate." *Richards*, 55 Cal. 4th at 961.

2. Serologist Moore presented false and faulty expert testimony about the origin of stains found in Panah's bedroom.

Before trial, the prosecutor ordered DQ-Alpha (DQA1) DNA testing on the stains found on the tissue paper, bed sheet, and robe. (9 RT 518, 517-18.) Some of the raw results were given to the defense but never presented at trial. (11 RT 715-17.) On cross examination, Moore agreed that there were more "recent techniques that are more

refined than" the ABO and PGM sub-typing Moore used, but he did not acknowledge that DQA1 testing was available and had, in fact, been performed by the prosecution. (20 RT 2130.)

In connection with his habeas petition, Panah had the prosecution's DNA testing analyzed by two experts from an independent forensic laboratory: Dr. Lisa Calandro, a DNA laboratory supervisor for Forensic Analytical, on February 27, 2004 and Keith Inman, a senior forensic scientist at Forensic Analytical on May 25, 2006. (Ex. 11, Calandro at 223-32; Ex. 12, Inman at 233-34.) Calandro's and Inman's later analyses of the DQA1 testing completely undermines Moore's testimony about each of the stains he analyzed.

a. Tissue paper stain

The DNA experts reviewed the prosecution's testing of the stain found on a tissue paper in Panah's bathroom. Both sides agree that Panah's DQA1 type is 1.3, 4 and the victim's DQA1 type is 2, 4; both have the "4" allele. (Ex. 11, Calandro at 232.) According to Dr. Calandro's review, the tissue paper stain contained DQ-alpha type 1.3, 4 for both the sperm and epithelial cell fractions tested. *Id.* at 227. Thus, the DNA results conclusively eliminate the victim "as a contributor to the tissue stain sample." *Id.* At 228. Dr. Colandro summarized: the "DNA results contradict the State's assertion that the sample from the tissue contained a mixture of body fluids from Hooman Panah and Nicole Parker." (Ex. 11, Calandro at 227.)

Inman's supplemental report, based on his "review of the hybridization record[,] supports the findings and observations of Dr. Calandro, specifically that no evidence exists to support a mixture of semen and saliva from Mr. Panah and Ms. Parker." (Ex. 12, Inman at 233.) Therefore, Moore presented false and faulty testimony that the tissue paper contained a mixture of Panah's semen and the victim's saliva, suggesting sexual activity between them, in support of the prosecution's felony murder theory and the special allegations in support of the death penalty.

b. Bed sheet stains

Dr. Calandro reviewed the prosecution's testing of the two separate groupings of stains on the bed sheets that Moore analyzed. First, for the larger grouping of the five stains containing spermatozoa, Dr. Calandro found that the stains "either yielded 'inconclusive' results or DQA1 type 1.3, 4, which is consistent with Mr. Panah's type." (Ex. 11, Calandro at 229.) Dr. Calandro noted that if the victim had "'spit out' ejaculate onto the bed sheet, one would have expected . . . to detect [the victim's] DNA in significant quantities on the bed sheet." *Id.* Yet, "[n]o DNA typing results consistent with that of Nicole Parker were obtained from any of the samples from the bed sheet." *Id.* Thus, the "DNA typing results do not support the hypothesis that the areas tested contain a mixture of semen and saliva stains from Mr. Panah and Ms. Parker, respectively." *Id.*

Dr. Calandro's report had a caveat: the "inconclusive" results on the various stains could not be reviewed without copies of the "DQA1 typing strip photographs[.]" *Id.* Inman's supplemental report, made after counsel for Panah obtained the strips, assessed the inconclusive results. Inman found that for the five semen stains tested, two had a DNA type consistent with Panah (thus excluding the victim as a contributor) and three "gave weak 4 activity in both the non-sperm and sperm fractions." (Ex. 12, Inman at 234.) The weak activity was called inconclusive in the LAPD report, presumably because "the control 'C' dot was weak or absent." *Id.* Inman agreed with the LAPD's conclusion that the "weak 4 activity" was inconclusive based on the weak or absent control "C" dot. He opined that the findings "further supports the finding that no evidence exists of a mixture of biological material from Mr. Panah and Ms. Parker" on the bed sheet. *Id.* As such, Moore provided false and faulty testimony that the larger grouping of stains included a mixture of Panah's semen and the victim's saliva.

For the smaller stain, Dr. Calandro confirmed Moore's testimony that the control sample for the bed sheet contained type B antigens, which "suggests that the type B in the stain could be due to a background source of biological material on the sheet." (Ex

11, Calandro at 228.) Thus, she confirmed that the smaller stain lacked evidentiary value since it could have resulted from background material unrelated to the victim or the crime. Similar to her conclusion regarding Moore's testimony about this stain, Dr. Calandro concluded that there was no evidence of a mixture of bodily fluids.

c. Stains found on a robe

DNA expert Dr. Lisa Calandro analyzed the stains on the robe, as well, in connection with Panah's habeas petition. She concluded that contrary to Moore's testimony, the amount of amylase found on the robe "is not necessarily indicative of the presence of saliva and may be the result of perspiration." (Ex. 11, Calandro at 230.) Dr. Calandro reported that the DQA1 results show that while the victim "could not be eliminated as a contributor . . . Hooman Panah was eliminated as a contributor to the DNA stain from this sample." (*Id.* at 231.) Thus, the DNA results "do not provide evidence of a mixture of body fluids from Nicole Parker and Hooman Panah." Inman's supplemental report confirmed Dr. Calandro's conclusion that the prosecution's DQA1 results eliminated Panah as a contributor to the stain that Moore told the jury could "be traced to Mr. Panah." (Ex. 12, Inman; 20 RT 2076.)

Dr. Calandro's report also addressed the stain that Moore did not testify about, noting that the prosecution obtained DNA testing of "an additional cloth sample and control area from the kimono robe [that] yielded inconclusive results[.]" (Ex 11, Calandro at 231.) Dr. Calandro stated that she needed copies of the typing strips to review the LAPD's inconclusive finding. Id. Inman reviewed the strips and found "weak 4 activity" in this stain, which the prosecution's lab labeled inconclusive, again "because the control 'C' dot was weak or absent." (Ex. 12, Inman at 234.) Inman concluded "[n]o evidence exists in the DNA evidence of a mixture of biological material from Mr. Panah and Ms. Parker on this item." *Id.*

In sum, Dr. Calandro concludes that "the biological evidence analyses reviewed . . . do not support the hypothesis that intimate sexual contact occurred between Hooman Panah and Nicole Parker. Testimony regarding the DNA analyses would not have

supported the conclusions that the stains tested were mixture of body fluids." (Ex. 11, Calandro at 232.) Inman was similarly unequivocal: "No biological evidence exists to support the hypothesis that a mixture of biological fluids from Mr. Panah and Ms. Parker was present on the tissue, bedsheet, or kimono" and "there is no evidence to suggest intimate sexual contact between Mr. Panah and Parker." (Ex. 12, Inman at 231.) Thus, Moore presented false and faulty serology testimony to the jury.

3. Pathologist Heuser presented false and faulty expert testimony about the cause and time of the victim's death.

In connection with Panah's habeas petition, two pathologists, Dr. Gregory Reiber and Dr. Michael Baden, reviewed the prosecution's pathology evidence. Their analyses expose as faulty and false Heuser's testimony about the cause and time of the victim's death.

a. Cause of death

Pathologist Heuser concluded that the victim died from "'[t]raumatic injuries," which consisted of "[c]raniocerebral trauma," "[n]eck compression," and "[s]exual assault with anal lacerations." (Ex. 6, Autopsy Rpt. of E. Heuser at 21; *see also* Ex. 7, Autopsy Notes.) These conclusions were false. The independent pathologists concluded that head trauma did not cause the victim's death. Dr. Reiber found that a "head and brain examination reveal no injuries of a severity to account for the child's death or to a result in a significant contribution to her death." (Ex. 15, G. Reiber Decl., at 8.) Similarly, Dr. Baden found that "there was no injury to the brain – no trauma to the brain – and that Nicole's brain was entirely normal." He concluded that "craniocerebrial injuries" did not cause the victim's "death and a forensic pathologist expert would have been able to explain this to counsel and the jury." (Ex. 13, Rep. of M. Baden, at 236.)

Nor was the victim strangled. Dr. Reiber concluded that "there is limited and equivocal evidence of neck compression, and manual strangulation is very unlikely due to the lack of bilateral neck hemorrhages and lack of petechial hemorrhages in the

eyes." (Ex. 15, G. Rieber Decl., ¶ 15.) Reiber's declaration explains that the prosecution's evidence of strangulation was likely the result of "post mortem positioning of the child on the right side of the suitcase," making the "scant hemorrhages in the neck and the petechiae in the facial skin" "be representative of exaggerated hypostasis (lividity)." (*Id.* at ¶ 9.)

Heuser's testimony that sexual assault contributed to the victim's death was also false and premised on faulty science. Dr. Baden explains that "the full autopsy and the examination of the microscopic slides showed that the sexual assault did not produce injuries sufficient to cause death." (Ex. 13, Rep. of M. Baden at 236.) More specifically, Dr. Reiber found that the prosecution's theory that anal penetration could have contributed to the victim's death "is a novel theory of causation not found in the published literature, and as such forms an improper basis for offering expert opinion." (Ex. 15, G. Reiber Decl., ¶ 10.) Further, Dr. Reiber found that a penis was not responsible for the lacerations found on the victim because of the lack of semen or other biological evidence retrieved from the victim. (*Id.* ¶ 11.)

Thus, "neither craniocerebral injuries nor a sexual assault caused [Parker's] death." (Ex. 13, Rep. of M. Baden at 236.)

b. Time of death

Heuser's testimony about the time of death was also flawed. At trial, the prosecution argued, through the help of Heuser's testimony that the victim died in Panah's apartment on Saturday, November 20, 1993. All parties agree that Panah left the apartment that day to go to work, and he was seen at his job by 3 p.m. He never returned to the residence and was arrested the following day miles away from his apartment. Accordingly, if the victim did not die on November 20, 1993, Panah could not have been responsible for her death.

In fact, post-conviction expert Dr. Reiber explains that the victim died "a significant number of hours" later than what Heuser testified to, exonerating Panah. (Ex. 15, Decl. of G. Reiber, ¶ 13.) He explains that rigor mortis takes six to eight hours

to fully develop, and it decreases in intensity twenty-four hours after the time of death. (*Id.*) If the victim died when the prosecution theorized she did, in the late-morning or early afternoon hours of November 20, 1993, "rigor should have been significantly decreased from a maximal or 'fully fixed' condition by late evening of 11-21-93, approximately 36 hours since death" when the victim's body was found by police. (*Id.*) Heuser explained this discrepancy by opining that under "cool conditions" rigor mortis can be delayed. (21 RT 2410.) Dr. Reiber, however, refutes this theory by noting that the "child was found in a suitcase, wrapped in a sheet, under a pile of other objects," and in such a situation there would be "insulation causing retention of body heat and promoting more rapid disappearance of rigor." (Ex. 15, Decl. of G. Reiber, ¶ 13.)

Heuser also falsely opined that undigested eggs found in the victim indicates that she died not long after she had eaten breakfast on the morning of November 20, 1993. (21 RT 2407-08.) Dr. Reiber explains that Heuser's opinion was false and faulty because it was based on unreliable science:

> The use of stomach contents as a basis for time of death estimation is unreliable; stomach emptying can be delayed by severe stress, and if the child were abducted before a breakfast meal had emptied from the stomach, the stress of the ensuing captivity could significantly delay emptying of the stomach and cause the estimated time of death to be much earlier than actually occurred. The lack of any additional analysis to confirm the identity and condition of the material in the stomach renders this basis for time of death even more unreliable.

(Ex. 15, Decl. of G. Reiber, ¶ 13.) Accordingly, the later analyses by habeas experts show Heuser presented false and faulty pathology evidence in Panah's trial.[5]

4. Taken together, the false and faulty evidence admitted at trial was substantially material and undermined the fairness of the entire trial.

The post-conviction DNA and pathology evidence disprove the prosecution's entire theory of the case: that the victim died during the commission of a sodomy or other sexual assault committed by Panah. Instead, the DNA evidence does not link Panah to the victim at all. Moreover, the post-conviction pathology evidence demonstrates that the victim died at a time when Panah could not have been present in his apartment. As such, there is a reasonable probability that had the substantial false and faulty serology and pathology evidence not been presented, the result of Panah's trial would have been different.

a. The false serology and pathology testimony was significant and prejudicial.

The prosecution used the false and faulty serology and pathology evidence to push his case for first-degree murder and Panah's death eligibility.

The prosecution argued that Moore's serology testimony helped prove each special circumstance and underlying felony except the one involving a foreign object. The prosecution greatly emphasized Moore's testimony in the guilt phase closing argument. For example, the prosecutor relied on Moore's testimony to link the bed

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[5] Even the California Supreme Court, in recounting the facts of the case, stated that Heuser "was unable to state a time of death" suggesting that the Court also found Heuser's testimony regarding time of death not to be credible. *People v. Panah*, 35 Cal 4th 395, 415 (2005). The Attorney General adopted the California Supreme Court's characterization by quoting this language in multiple briefs throughout the federal litigation of Panah's claims. (*See, e.g.,* USDC Case No. 05-07606, Dkt No. 44 at 18, Dkt No. 118 at 17, Dkt. No. 155 at 11.) Parker's death certificate is also inconsistent with Heuser's testimony. (Ex. 8, Cert of Death.)

sheet stains to the tissue paper stain, arguing that together they proved the oral copulation felony and special-circumstance charges. He told the jurors that:

> the evidence that was presented to you is very consistent with the fact that he ejaculated in her mouth, that he allowed her to spit it out in a kleenex, because we have the evidence of semen of his blood type, high amylase content, indicating saliva which matches her blood type on the kleenex, as well as having a spattering on the bed sheet of a mixture of semen and saliva — again high amylase indicating saliva — of his type B and her type A. ...
>
> And what you can reasonably infer from that is that Nicole was on the bed. When he ejaculated in her mouth, he got kleenex had her spit it out, he went back to throw it away. She didn't like the taste in her mouth and continued to spit it out, what was left, on the bed. That's why there's traces of it on the sheet.

(24 RT 2847.) (*see also* 24 RT 2961.) ("There is also semen and saliva mixture on the bed sheet, the bed sheet that she was wrapped in. That, too, matches with Nicole Parker and Mr. Panah.").

The prosecution also relied on Moore's testimony about the purported mixture present in the stains on the robe to support the sodomy and oral copulation felony and special circumstance arguments. The prosecution explained that "[i]f [Panah] had orally copulated Nicole Parker, and if the robe had been taken off, and the attack of sodomy . . . caused bleeding then occurred [sic] on top of the robe, the saliva of the defendant could have been deposited on the robe at that time from her body, the same time that the act of sodomy occurred." (24 RT 2817.)

During rebuttal argument, the prosecution argued that Moore's testimony—that the stains contained a mixture of Panah's and the victim's fluids—were supported by the fact that "type A happens to be one of the people in this case. The B type happens to be the other person involved in this case. There's no person with AB type that we know of that anybody could show." (24 RT 2959.)

The prosecution then addressed the issue of DNA testing, telling the jury that "it's ordered in some cases, but it's usually ordered in a situation where you don't have other types of proof available. In this situation we have the proof available." That proof, according to the prosecution, is, in part, that the defendant and the victim's "blood typing matches," the evidence recovered at the scene. (24 RT 2963.) The prosecution told the jury, "nobody has attempted to pull the wool over your eyes." (24 RT 2959.) The prosecution failed to inform the jury that it had, in fact, ordered DNA testing, which is far more scientifically precise than serology evidence, or that the results of that testing wholly contradicted the serology evidence presented to the jury. Thus, this false testimony, couched in science and presented by an "expert," allowed the jury to convict Panah and find true the sodomy and lewd acts special circumstances. Indeed, in the absence of this false evidence, the jury had no basis to find Panah guilty of first-degree murder or other charged offenses. Nor would the jury have found Panah guilty of the special circumstances making him death eligible. Finally, because the prosecutor relied on the false evidence to make its case in aggravation at the penalty phase, Panah's death sentence is also impacted by the false testimony.

Similar to the serology evidence, the prosecution presented false and faulty pathology evidence to paint an inflammatory picture of the victim's death. The state pathologist's testimony allowed the prosecution to conclude that the cause of death was "[t]raumatic injuries," consisting of "[c]raniocerebral trauma," [n]eck compression," and "[s]exual assault with anal lacerations." (Ex. 6; Autopsy Rpt.; Ex. 7, Autopsy Notes.) These erroneous conclusions were critical to establish Panah's guilt of the underlying felonies supporting his first-degree murder conviction. The prosecutor was

also able to inflame the juror's passion by inferring from the pathology evidence that Panah's "penis [was] moving in and out inside the rectum and banging against the vaginal wall" that "the doctor said, could have caused death" by placing pressure on an artery to slow the victim's heart rate (24 RT 2885.) Again, this false evidence allowed the prosecution to argue that the victim was killed in the course of sodomy. The prosecution also used the false evidence of the time of the victim's death to establish that Panah killed the victim in the early afternoon of November 20, 1993, and also as evidence that "she was killed during the commission of [the underlying] felonies." (24 RT 2889.)

Therefore, without this flawed pathology evidence, it is reasonably probable that the outcome of Panah's guilt phase trial would have been different.

The prosecution's false and faulty evidence about sexual contact between Panah and the victim was not only incriminating at the guilt phase of Panah's trial, but was also highly prejudicial at the penalty phase. Significantly, the prosecution's case at the penalty phase consisted solely of reintroducing the nature and circumstances of the crime, including victim impact evidence. *See* Cal. Pen. Code § 190.3(a). For example, the prosecutor used the serology and pathology evidence to argue at penalty that Panah killed the victim "intentionally by cutting off the blood supply that's coming back from her brain, by holding his hand over her mouth . . . and then [she] dies by the sheer brutality of the sexual assault itself that you found him guilty of." (33 RT 4088.) Thus, the inferred sexual contact from the prosecution's false evidence was a prominent aggravating factor. As such, had the jury known the truth about the prosecution's false serology and pathology testimony, it would have neither convicted Panah at the guilt phase nor sentenced him to death at the penalty phase.

b. The evidence of guilt against Panah was not strong.

Given the weakness of the prosecution's case, there is a reasonable probability that absent the false and faulty scientific evidence, Panah would not have been convicted or sentenced to death. The prosecution's case was weak because there was

little to no physical evidence placing Panah at the scene of the discovery of the body at the time of death or establishing that the special circumstance crimes making him death eligible had occurred. For example, Panah's DNA was not found anywhere on the victim. Indeed, Moore's false serology testimony was the sole scientific evidence presented at trial that linked Panah as the perpetrator.

Without Heuser's false and faulty pathology evidence about the cause of death, there was no evidence that the victim's death resulted from a sexual assault or that she had been sexually assaulted to such a degree that could have caused her heart to stop.

Further, without Heuser's false pathology evidence about the time of death, the fact the victim was found in Panah's bedroom is not dispositive, especially given trial counsel's argument and the fact that someone else had access to the apartment. (*See* 24 RT 2912-18, 2946-47.) Ahmad Seihoon was staying with Panah and his mother, had access to Panah's bedroom, and was the last person seen with the victim. (18 RT 1687, 1751, 1784.) He also had keys to the apartment. (Ex. 5, LAPD Follow Up Rpt. 12/9/1993, at 13.) Indeed, at 11:00 a.m., on the day that the victim disappeared, Seihoon was seen leaving Panah's apartment with a suitcase. (*See Id.*; Ex. 3, LAPD Chron., 11/20-21/1993; *see also* Ex. 2, West Valley Rpt. Severns, 11/22/1993.) No traces of blood, fingerprints, or other evidence of any struggle inside Panah's room were identified by the police. Thus, Seihoon could have easily killer Parker and planted her body in a suitcase in Panah's bedroom. Seihoon's guilt would have explained why multiple searches of the apartment and Panah's room —including dog and suitcase searches — had come back empty until Parker's body was discovered the night of Sunday November 21, 1993.[6]

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[6] An initial search of the apartment was conducted by 4 officers and included an examination of the entire apartment including bedrooms and closets. (9 RT 457-58; Ex. 2; West Valley Rpt. Severns at 6.2; Ex. 4, Incident Summary Rpt., 12/6/1993.) Another search was conducted by at least 7 officers and included a search of Panah's closet and suitcases. (8 RT 264-65, 289-90.) Another search of the apartment was

Notably, the jury took four days to determine Panah's penalty (4 CT 909-10, 914-15, 961), indicating it was a close and difficult decision. *See Thomas v. Chappell*, 678 F.3d 1086, 1098 (9th Cir. 2012) ("lengthy deliberations suggest a difficult case"); *Mayfield v. Woodford*, 270 F.3d 915, 932 (9th Cir. 2001) (relying on the fact that jury deliberated for four hours before writing a note to the judge asking whether all jurors must agree). Therefore, had the jury been presented the true pathology and serology evidence, it is reasonably probable that at least one juror would have found that there was insufficient evidence of Panah's guilt, let alone to sentence him to death.

B. The new evidence demonstrating that the prosecution's serologist and pathologist testified falsely is of such decisive force and value that it would have more likely than not changed the outcome at trial.

Even if the false serology and pathology evidence do not violate federal due process or Penal Code section 1473(b)(1) or (b)(2), the evidence demonstrating the falsity of the prosecution's evidence separately warrants habeas relief under the newly amended Penal Code section 1473)(b)(3)(A).

1. The Legislature recently lowered the burden of demonstrating relief based on new evidence.

Until this year, a petitioner could not obtain relief based upon new evidence unless that evidence pointed "unerringly" to innocence and "completely undermine[d] the entire structure of the case presented by the prosecution at the time of the conviction." *In re Lindley*, 29 Cal. 2d 709, 724 (1947). Effective January 1, 2017, the burden of proof to obtain relief for new-evidence claims was significantly lowered. Relief is now required where a petitioner brings new evidence that is "of such decisive

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conducted after Panah's car was searched. (2 CT 488.) Police dogs were also used to search the premises. (9 RT 530; Ex. 1, LAPD Watch Comm. Rpt.) Parker's body was found after a search conducted between 9:30 and 10:00 p.m. the night of November 21, 1993. (2 CT 430, 438-45.)

force and value that it would have more likely than not changed the outcome at trial." Pen. Code § 1473(b)(3)(A). Because this claims is "based on a change in the law" it must be "considered [on the merits] if promptly asserted[.]" *In re Clark*, 5 Cal. 4th 750, 775 (1993). Under the new codified standard, Panah is entitled to habeas relief.

2. The DNA and pathology analyses are "new evidence" within the meaning of the statute.

The newly-codified new-evidence claim defines "new evidence" as "evidence that has been discovered after trial, that could not have been discovered prior to trial by the exercise of due diligence, and is admissible and not merely cumulative, corroborative, collateral, or impeaching." Pen. Code § 1473(b)(3)(B). The California Court of Appeal for the Third Appellate District recently interpreted the "new evidence" standard to be "similar to the 'new evidence' standard in a motion for new trial under California law." *In re Miles*, 2017 Cal. App. LEXIS 37, *26 (Jan. 19, 2017). The new-trial standard defines new evidence as evidence that "is in fact newly discovered; that is not merely cumulative to other evidence bearing on the factual issue; . . . and that the moving party could not, with reasonable diligence have discovered and produced [ ] at trial." *Id.* at *26-27 citing *People v. McDaniel*, 16 Cal. 3d 156, 178 (1976). The *Miles* Court also found that the newly-codified standard is similar to the federal new-trial standard, which states that the evidence "was unknown or unavailable to the defendant at the time of trial" and that the "failure to learn of the evidence was not due to lack of diligence by the defendant[.]" *Miles*, 2017 Cal. App. LEXIS at *27 citing *United States v. Colon-Munoz*, 318 F.3d 348, 358 (1st Cir. 2003).

Here, the analysis of the DNA collected from stains on items found in Panah's bedroom constitutes new evidence within the meaning of the newly-codified statute. The DNA analysis—contained in two reports by experts Lisa Colandro and Keith Inman—was unavailable to Panah at trial despite his personal diligence in attempting to

obtain DNA testing of the stains. Panah took the only step available to him at trial to obtain a DNA analysis—he raised a *Marsden*[7] motion to fire his lawyer in order to obtain the necessary investigation into the DNA and other issues surrounding Panah's innocence. The trial court and Panah's counsel stifled Panah's efforts. The failure to obtain the exculpatory DNA analysis was, therefore, in spite of Panah's diligence.

Panah's trial counsel first learned of the prosecution's DNA testing on October 14, 1994. (9 RT 519-20.) At that time, the trial court strongly implied that counsel needed an expert, telling him "hopefully you have somebody lined up already, or if not, you'll . . . take care of that." (9 RT 521.) Trial counsel reassured the court "that will be taken care of." (9 RT 521.) But trial counsel never retained an expert despite learning that the prosecution made a tactical decision to not use the DNA results as part of its case. A month after disclosing the DNA testing, the prosecutor stated on the record that it "decided not to offer any DNA evidence[.]" (11 RT 715.) The prosecution's decision to forego presenting forensic evidence that is almost universally regarded as the most reliable available is a glaring red-flag that indicates the DNA must have been exculpatory—or at least unhelpful to the prosecution's case.

Trial counsel could have no reasonable strategic justification for failing to appoint an expert under such circumstances. *Hinton v. Alabama*, 134 S. Ct. 1081, 1088 (2014) (consultation with forensic expert necessary where the core of the prosecution's case relied forensic evidence). To the contrary, trial counsel's choice to forego retaining experts was borne out of desire to save money; he promised as much when he wrote a letter asking to be appointed to the case. In asking to be appointed, trial counsel told the trial court that "it appears likely that the court system would be saved a great deal of money time and money and the taxpayers would be saved a great deal of money" if he was appointed to the case because "it is probable" that Panah would

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[7] *People v. Marsden*, 2 Cal. 3d 118 (1970).

"enter a plea at an early stage of [the] proceedings" whereas if the public defender was appointed "the result might be an extremely costly trial." (5 CT 1107.) Cost-savings is not a reasonable justification for denying Panah the DNA analysis necessary to defend the case. Nor is a desire to safe taxpayer money related to defending Panah and, thus, the failure to request funding for a DNA analysis cannot be imputed onto Panah.

Panah was diligent in attempting to obtain a DNA analysis despite his counsel's abdication of his basic duties of representation. At a hearing to remove his counsel, Panah requested that an analysis of DNA be done. (*Marsden* Hearing RT 1012, 11/21/1994.) In response, counsel stated that he believed retaining an independent expert to provide him with a DNA analysis would be harmful to the case and only confirm the prosecution's results. (*Marsden* Hearing RT 1004-08, 1016, 11/21/1994.) Not so.

Without an analysis of the DNA, counsel could not know whether the results were harmful or not. And as shown above, Callandro's and Inman's analysis is exculpating—demonstrating that the prosecution lacked evidence that Panah sexually assaulted Parker. Trial counsel's failure to obtain these results was uninformed and based on a "blind acceptance of the State's forensic evidence," i.e., that the prosecution's DNA results were harmful to Panah. *Elmore v. Ozmint*, 661 F.3d 783, 786 (4th Cir. 2011). Such blind acceptance would be unreasonable in most cases. Duncan, 528 F.3d at 1235 (emphasis in original) (quoting *Jennings v. Woodford*, 290 F.3d 1006, 1014 (9th Cir. 2002) ("When defense counsel merely believes certain testimony might not be helpful, no reasonable basis exists for deciding not to investigate."). But it is particularly deficient here, because the prosecution's decision not to present the results suggested that they were not harmful to Panah.

Counsel's ignorance of the test results was apparent on the record. He told the trial court at the *Marsden* hearing that the DNA results of the tissue paper and bed sheet did not "pan out." (*Marsden* Hearing RT 1006, 11/2/1994.) That the results did not "pan out" for the prosecution could not reasonably suggest that they would not benefit

Panah. In fact, the DNA results contradicted the prosecution's "mixture" theory. "Under these circumstances, a reasonable defense lawyer would take some measures to [first] understand the laboratory tests performed and the inferences that one could logically draw from the results." *Driscoll v. Delo*, 71 F.3d 701, 709 (8th Cir. 1995).

Moreover, Panah was adamant at trial that the DNA results would be helpful to his case. In response to the trial court's uninformed assertion that it would be a "terrible tactic 'to get a DNA expert that confirmed the prosecution's case, Panah responded rhetorically, "What if I know it's not mine, your honor? What [ ] if I'm confident it can't be mine?" (*Marsden* Hearing RT 1024, 11/21/1994.) As shown above, Panah was right—the DNA results contradicted the prosecution's case. Counsel's failure to listen to his client and, at the very least, consult confidentially with a DNA expert to interpret the prosecution's testing is unreasonable and cannot be attributed to Panah, particularly in light of Panah's attempts to have the DNA results independently analyzed.

Another of counsel's justifications for ignoring the DNA—that he did not want to confirm the prosecution's theory—fails based on both the facts and California law. "[T]here would have been no harm in" retaining an expert to independently review the prosecution's DNA results. *Duncan v. Ornoski*, 528 F.3d 1222, 1238 (9th Cir. 2008). This review did not entail additional testing, so counsel did not have to reveal the review's conclusions if they were harmful or merely confirmed the prosecutor's theory. Pen. Code§ 987.9(a). Indeed, the trial court earlier advised counsel to have an expert "appointed confidentially" to question the DNA results. (7 RT 237.) Accordingly, retaining a DNA expert to independently review the prosecution's results "posed no risk to [Panah's] defense, but the potential benefit was enormous." *Duncan*, 528 F.3d at 1236.

Trial counsel's complete failure to subject the prosecution's case to meaningful adversarial testing should not —for purposes of determining whether the DNA analysis is "new evidence" for purposes of the instant Section 1473 claims—be imputed on

Panah. Instead, the DNA analysis is "new" within the meaning of the statute because it was unavailable despite Panah's diligence in attempting to obtain despite his own counsel preventing him from doing so. Indeed, trial counsel's second chair admitted why no experts were retained, stating in a post-trial declaration that the belief was "that the case would settle, therefore, such expenses were unnecessary, [s]o none were retained." (Ex. 14, Decl. of Syamak Shafi-Nia, 4/5/2004.) That is not a strategy made in the course of representing Panah's interests—it is instead an effective abandonment of zealous advocacy that is contrary to the diligent efforts Panah made on his own behalf to develop the DNA analysis before his trial started.

3. It is more likely that the jury would have reached a different outcome had they learned of the new evidence.

For Panah to get relief on this claim, the DNA evidence must have been "of such decisive force and value that it would have more likely than not changed the outcome of trial." Pen. Code § 1473(b)(3)(A). This burden is the same burden of proof as in civil proceedings, and only requires a party to show that "'its version of fact is more likely than not the true version.'" *In re Miles*, 7 Cal App. 5th 821, 849 (Cal. App. 4th Dist. 2017) (quoting *Beck Development Co. v. Southern Pacific Transportation Co.* 44 Cal. App. 4th 1160, 1205 (1996). The possibility that the DNA evidence would have changed the outcome includes that the trial would have resulted in acquittal, deadlock, or a hung jury. *Id.* at 850. Here the DNA evidence been offered would have undoubtedly changed the outcome of trial.

As discussed in Claim One, the prosecution's case against Panah rested on the serology evidence. The serology evidence was used to identify Panah as the killer and to argue that he committed the special-circumstance crimes of sodomy, oral copulation, and lewd acts upon a child, crimes that made him death-eligible. The DNA evidence refuting that the stains found on the tissue paper, bed sheets, and kimono consisted of a mixture of Panah's and Parker's bodily fluids would have thus refuted both the prosecution's argument that Panah killed Parker and the argument that Parker was

sexually abused by Panah. The DNA evidence would have also allowed Panah to refute the prosecution's argument that Panah's suicide attempt and alleged remarks the night of November 20th constituted consciousness of guilt. (24 RT 2966-67.) The DNA evidence would have also bolstered the defense arguments that the serology evidence was questionable (24 RT 2915, 2951) and that the case against Panah was circumstantial and had not been proven beyond a reasonable doubt. (24 RT 2904, 2925.)

Additionally, at trial, Panah's counsel attempted to elicit evidence that law enforcement had failed to investigate leads pointing to third-party culpability. (21 RT 2282-83, 2605.) However, the trial court prevented defense counsel from conducting this inquiry, finding that defense counsel did not have evidence that others were involved in the crime. (21 RT 2284-85, 2626.)

Had the DNA evidence been available, however, trial counsel could have used the DNA evidence to support a defense based on third-party culpability. Panah would have been able to present a defense pointing to Ahmed Seihoon as the actual killer. Seihoon had keys to the apartment where Panah and his mother lived. (Ex. 5, LAPD Follow Up Rpt., 12/9/1992 at 13.) Seihoon had arrived at the apartment on Friday November 19, 1993 and spent the night. (18 RT 1752.) On Saturday, November 20, 1993, Seihoon spoke with Nicole Parker at 11 am. (Ex. 5, LAPD Follow Up Rpt., 12/9/1993, at 13.) This was the last time that Parker was seen alive. (17 RT 1596.) Seihoon admitted to have been carrying a suitcase and a bag at that time. (Ex. 5, LAPD Follow Up Rpt., 12/9/1992, at 13.) Seihoon returned to the apartment later that evening and was questioned by police about Parker. (18 RT 1784; Ex. 5, LAPD Follow Up Rpt., 12/9/1992, at 13.) He remained at the apartment until early the next morning. (*Id.* at 8.) Seihoon went into Panah's room that evening. (18 RT 1785-86.) Thus, Seihoon had both the access and opportunity to have killed Parker. Further, as discussed *supra*, Seihoon having removed and later planted Parker's body would have explained why

multiple searches of the apartment including of Panah's closet and suitcases therein had failed to uncover Parker's body.

The DNA evidence would have also allowed Panah to present evidence pointing to other possible suspects. (*See* 22 RT 2605 (tape-recorded conversation where Panah is threatened by "Sean", 21 RT 2283 (3 unidentified males seen on the premises of the apartment complex around time Parker disappeared.)

Thus, Panah can meet his burden of showing that the DNA evidence would have more likely than not changed the outcome of the guilt phase of his trial.

The DNA evidence would have also more likely than not changed the outcome of the penalty phase. The prosecutor rested his case in aggravation on the circumstances of the crime. (27 RT 3117.) He emphasized that Parker was sexually abused. (33 RT 4105-7.) The DNA evidence would have refuted the prosecutor's graphic depiction of the sexual and violent nature of Parker's death, thus diminishing its aggravating force. Given that the jury deliberated more than 3 full days before sentencing Panah to death (4 CT 908-10, 914-15, 961), it is more likely than not that at least one juror would have been persuaded to vote against death.

VII. PRAYER FOR RELIEF

WHEREFORE, Panah prays that this Court:

1. Permit Panah, who is indigent, to proceed without prepayment of costs or fees;

2. Grant Panah authority to obtain subpoenas in forma pauperis for witnesses and documents necessary to prove facts alleged herein;

3. Grant Panah the right to conduct discovery, including the right to take depositions, request admissions, and propound interrogatories, and the means to preserve the testimony of witnesses;

4. Order Respondent to show cause why Panah is not entitled to relief;

5. Permit Panah to amend this petition to allege any other basis for his unconstitutional confinement as it is discovered;

6. Conduct an evidentiary hearing at which proof may be offered concerning the allegations in this petition;

7. Issue a writ of habeas corpus to have Panah brought before this Court to the end that he might be discharged from his unconstitutional confinement and relieved of his unconstitutional sentences, including the death sentence;

8. Make a finding that Petitioner is actually innocent pursuant to Penal Code § 1485.55, and

9. Grant such other relief as this Court may deem appropriate.

Respectfully submitted,

HILARY POTASHNER
Federal Public Defender

DATED: April 7, 2017

By: _____
JOSEPH A. TRIGILIO
SUSEL CARRILLO-ORELLANA
Deputy Federal Public Defenders

PROOF OF SERVICE

I, De Anna Dove, declare that I am a resident or employed in Los Angeles County, California; that my business address is the Office of the Federal Public Defender, 321 East 2nd Street, Los Angeles, California 90012-4202, Telephone No. (213) 894-2854; that I am over the age of eighteen years; that I am not a party to the action entitled above; that I am employed by the Federal Public Defender for the Central District of California, who is a member of the Bar of the State of California, and at whose direction I served a copy of the attached **PETITION FOR WRIT OF HABEAS CORPUS PURSUANT TO PENAL CODE SECTION 1473** on the following individual(s) by:

[X] Placing same in a sealed envelope for collection and interoffice delivery addressed as follows:	[ ] Placing same in an envelope for hand delivery addressed as follows:	[ ] Placing same in a sealed envelope for collection and mailing via the United States Post Office addressed as follows:	[ ] Faxing same via facsimile machine addressed as follows:

Ana Duarte
Office of the Attorney General
300 South Spring St.
Los Angeles, CA 90013

Hooman Ashkan Panah,
CDC# J-55600, 2E-B-87
San Quentin State Prison
San Quentin, CA 94974

Los Angeles County District Attorney's Office
ATTN: Habeas Corpus Litigation Team
Section
320 West Temple Street, Room 540
Los Angeles, CA 90012

This proof of service is executed at Los Angeles, California, on April 7, 2017.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

DE ANNA DOVE

2. Petition for Writ of Habeas Corpus Pursuant to Penal Code section 1473 filed in California Court of Appeal case number B283818.

IN THE COURT OF APPEAL OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

HOOMAN ASHKAN PANAH, Petitioner, v. PEOPLE OF THE STATE OF CALIFORNIA, Respondent. --- In Re Hooman Ashkan Panah On Habeas Corpus.	CASE NO. PETITION FOR WRIT OF HABEAS CORPUS PURSUANT TO PENAL CODE SECTION 1473 Related Cases: Habeas Petition No. S155942 (Los Angeles County Superior Court - No. BA090702) **CAPITAL CASE**

PETITION FOR WRIT OF HABEAS CORPUS PURSUANT TO PENAL CODE SECTION 1473

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IN THE COURT OF APPEAL OF CALIFORNIA

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HOOMAN ASHKAN PANAH, Petitioner, v. PEOPLE OF THE STATE OF CALIFORNIA, Respondent. --- In Re Hooman Ashkan Panah On Habeas Corpus.	CASE NO. PETITION FOR WRIT OF HABEAS CORPUS PURSUANT TO PENAL CODE SECTION 1473 Related Cases: Habeas Petition No. S155942 (Los Angeles County Superior Court - No. BA090702) **CAPITAL CASE**

PETITION FOR WRIT OF HABEAS CORPUS PURSUANT TO PENAL CODE SECTION 1473

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PETITION FOR WRIT OF HABEAS CORPUS

Petitioner, Hooman Ashkan Panah, by and through his undersigned counsel, hereby petitions for a writ of habeas corpus, and by this verified petition states as follows:

I. INTRODUCTION

A jury convicted Panah of first-degree murder based on a felony-murder theory that he sexually assaulted and killed a girl who lived in his apartment complex. The jury further found two special circumstances to be true in arriving at a verdict of death: sodomy and lewd acts with a minor under 14.

To prove that Panah was responsible for the murder, the prosecution relied on circumstantial scientific evidence by a novice serology expert purporting to link Panah to the victim through a novel theory that a mixture of Panah's and the victim's bodily fluids was found on items from the scene of the crime based on blood-type evidence. The serologist's theory has since been proven false by DNA evidence. Yet, this testimony was the springboard for the prosecutor to argue that Panah was guilty of sodomy and lewd acts, the felonies underlying the prosecution's felony-murder theory.

Furthermore, the prosecution relied on the pathologist's testimony on the time of death to prove that Panah had the opportunity to commit the murder before he left for work that afternoon. The prosecution further relied on the pathologist's testimony that the traumatic injuries to the decedent's brain, neck, and anus caused her death. The pathologist's testimony was critical to Panah's conviction.

Moreover, this same evidence was used by the prosecution as aggravating evidence concerning the nature of the crime during the penalty-phase. Accordingly, both Panah's conviction and death sentence must be vacated.

Panah is entitled to habeas relief on two grounds: his conviction violated (1) the due process clause of the Fifth and Fourteenth Amendments of the United States Constitution based on the introduction of faulty scientific evidence, and (2) California Penal Code section 1473, as the prosecution secured a conviction and sentence based on expert testimony that has been shown to be false, and that is undermined by scientific research or technological advances. But for the prosecution's presentation of false expert testimony, Panah could not have been convicted at the guilt-phase of his trial. Moreover, absent the false evidence introduced at the guilt-phase, the jury would have had a reasonable doubt of the truth of the special circumstances. Finally, absent the false-testimony introduced at the guilt-phase, the prosecutor could not have secured a death sentence at the penalty phase. Accordingly, Panah files this petition seeking relief.

II. PROCEDURAL HISTORY

A. Initial State Court proceedings

On December 19, 1994, a Los Angeles County jury found Hooman Panah guilty of the first-degree murder of Nicole Parker. Panah was also convicted of sodomy by force, lewd acts upon a child under the age of fourteen, penetration of genital or anal openings by a

foreign object with a person under fourteen years of age, and oral copulation of a person under fourteen years of age. The jury found true the special circumstance allegations that the murder was committed while Panah was engaged in the crime of sodomy and lewd acts upon a child under the age of fourteen. The trial court dismissed the kidnaping charges and related special circumstance, and the jury found not true the special circumstance allegation that the murder was committed while Panah was engaged in the crime of oral copulation. *People v. Panah*, 35 Cal. 4th 395, 409 (2005). After deliberating for four days, the jury reached a verdict of death. (4 CT 961.) Panah was sentenced to death on January 23, 1995. *Id.*

The California Supreme Court denied Panah's automatic appeal on March 14, 2005. *Panah*, 35 Cal. 4th 395 (2005). Panah's initial state habeas petition was summarily denied without an evidentiary hearing on August 30, 2006. *In re Panah*, Case No. S123962. He filed an exhaustion petition in the California Supreme Court in district court on August 30, 2007 which was summarily denied on March 16, 2011 without a hearing. *In re Panah*, Case No. S155942.

B. Federal Court Proceedings

Panah filed a Protective Petition for Writ of Habeas Corpus in the federal district court on February 26, 2007. (USDC Dkt. Nos. 36-39.) Panah filed a First Amended Petition for Writ of Habeas Corpus on August 30, 2007. The district court stayed the proceedings pending exhaustion. (USDC Dkt. Nos. 52-54.) Following the California Supreme Court's denial of the exhaustion petition, Panah

filed a Second Amended Petition for Writ of Habeas Corpus on June 24, 2011. (USDC Dkt. No. 102.)

After the filing of Respondent's Answer and Panah's Traverse, the district court ordered briefing on whether Panah's claims satisfied 28 U.S.C. § 2254(d) based on the state court record. (USDC Dkt. No. 127.) The court denied Panah's requests for discovery and an evidentiary hearing. On November 14, 2013, the district court dismissed the petition without a hearing, entered judgment against Panah, and issued a Certificate of Appealability on one claim. (USDC Dkt. No. 164.)

On November 20, 2014, Panah filed an opening brief in the Ninth Circuit Court of Appeals. (USDC Dkt. No. 175.) The case remains pending and has been fully briefed since March 9, 2016.

C. The Instant State Proceeding

On April 7, 2017, Panah filed a petition for writ of habeas corpus in the Los Angeles Superior Court. That petition alleged the same claims as in this petition. On May 19, 2017, the Superior Court addressed Panah's claims on the merits, and it dismissed each of the claims. (*See* Ex. 24, Superior Court Minute Order.) Panah addresses the Superior Court's erroneous denial of relief in the argument below.

III. TIMELINESS OF ALLEGATIONS

This petition is timely pursuant to the timeliness standards set forth in Policy Statement 3 of the Supreme Court Policies Regarding Cases Arising from Judgments of Death ("Policies"), and must be

considered on its merits. *See In re Sanders*, 21 Cal. 4th 697 (1999); *In re Robbins*, 18 Cal. 4th 770 (1998); *In re Clark*, 5 Cal. 4th 750 (1993).

This Court applies a four-step analysis to determine if a capital habeas corpus petition is timely:

(i) the petition is *presumptively timely*, having been filed within ninety[1] days of the filing of the reply brief on appeal; (ii) even if not presumptively timely, the petition was filed *without substantial delay;* (iii) even if the petition was filed after a substantial delay, *good cause* justifies the delay; or (iv) even if the petition was filed after a substantial delay without good cause, the petitioner comes within one of the four *Clark exceptions. Sanders,* 21 Cal. 4th at 705 (footnote added).

This petition is filed sixty days after the Superior Court's denial of relief on the same claims. The Superior Court did not conclude that the petition was time-barred. (*See* Ex. 24.)

The petition raises three claims: a Due Process violation based on the introduction of faulty scientific evidence, and two claims based on the newly amended penal code 1473. Panah's Due Process claim of faulty expert testimony is timely because it is based on new law—identifying a claim based on faulty evidence—announced by the Ninth Circuit just this year. In *Gimenez v. Ochoa*, the Ninth Circuit recently held that the introduction of flawed expert testimony at trial violates due process "if . . . the introduction of this evidence

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[1] This rule was subsequently amended from ninety to 180 days. Policies, Timeliness Requirements 1-1.1.

'undermined the fundamental fairness of the entire trial.'" 821 F.3d 1136, 1145 (9th Cir. 2016).

Panah's claims based on the newly amended penal code section 1473 is timely because it was filed without substantial delay. "Substantial delay is measured from the time the petitioner or his or her counsel knew, or reasonably should have known, of the information offered in support of the claim and the legal basis for the claim." *Robbins*, 18 Cal. 4th at 780. In *Clark*, 5 Cal. 4th at 775, the California Supreme Court held that "claims which are based on a change in the law which is retroactively applicable to final judgments will be considered if promptly asserted and if application of the former rule is shown to have been prejudicial."

The legal basis for Panah's "new evidence" claim is based on the amendment of Penal Code section 1473(b)(3). This amendment became effective on January 1, 2017. Panah's other statutory claim, based on Penal Code section 1473(e), became effective January 1, 2015. Section 1473(b)(3) and (e) are retroactively applicable to final judgments because the statute specifically provides a basis for pursuing a petition for writ of habeas corpus. *See* Cal. Penal Code § 1473. Because Panah promptly filed this petition following discovery of the legal basis of these claims, they are timely.

If this Court concludes that the filing of this petition is substantially delayed based on the time section 1473(e) was amended, that delay is justified. On November 20, 2014, Panah filed his opening brief in the Ninth Circuit Court of Appeals. Briefing in that

case did not conclude until March 9, 2016, with the filing of the Appellant's Reply Brief. Accordingly, counsel could not have reasonably focused its attention on the instant petition while that briefing was taking place.

Regardless, even if this Court were to find the petition substantially delayed, and that the delay is unjustified, the merits of the claims in this Petition indicate a fundamental miscarriage of justice; thus, it would be a fundamental miscarriage of justice to forego merits-review of the claims based on a procedural obstacle.[2] The California Supreme Court requires merits review of claims that are even justifiably substantially delayed if the claim alleges "facts that a fundamental miscarriage of justice has occurred[.]" *In re Clark*, 5 Cal. 4th 750, 775 (1993). Here, the facts below demonstrate that Panah is both innocent of the conviction offenses and death penalty, warranting merits review of his claims. *Id.* at 761.

Moreover, Panah has a death sentence. The state cannot execute a person whose conviction and sentence were unconstitutionally and unreliably obtained, at least not without affording a full and fair opportunity for the petitioner to demonstrate the errors in his trials. *See Ford v. Wainwright*, 477 U.S. 399, 410-11 (1986). Thus, this Court should review the merits of this case, and

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[2] For these reasons these claims also overcome any procedural bars that may take effect with the passage of Proposition 66, which in any event is currently not effective pending appeal.

look beyond any procedural technicalities. *See In re Gallego*, 18 Cal. 4th 825, 842-52 (1998) (Brown, J., concurring and dissenting).

IV. INCORPORATION

Panah hereby incorporates by reference his prior state habeas corpus petitions and accompanying exhibits and briefs (Case Nos. S123962, S155942), and the record and briefs in his direct appeal (Case. No. S045504). All exhibits attached hereto are true and correct copies of what they purport to be.

If Respondent disputes any of the facts alleged herein, Panah requests an evidentiary hearing in this Court so that the factual disputes may be resolved. After Panah has been afforded discovery and the disclosure of material evidence by the prosecution, the use of this Court's subpoena power, funds, and an opportunity to investigate fully, Panah requests an opportunity to supplement or amend this petition.

V. RELEVANT FACTS

On Saturday, November 20, 1993, Nicole Parker went missing from her father's Woodland Hills, California apartment. (CSC Opinion S045504, *People v. Panah*.) The following morning, after several warrantless searches found no evidence of wrongdoing, police found Parker's dead body in a suitcase in Panah's bedroom closet in the apartment he shared with his mother in the same complex. *Id.*

A. The use of serology evidence by the prosecution

During the guilt phase of Panah's trial, Prosecutor Patrick Couwenberg presented the testimony of criminalist William Moore on

serology issues. (19 RT 2016.) William Moore had qualified as an expert serologist about six times before Panah's trial; this case was the first time he testified as an expert at a trial. (19 RT 2017.) Moore testified about the results of ABO blood typing and PGM (phosphoglucomutase) sub-typing he performed on evidence collected from the crime-scene. (19 RT 2061.) Moore found that Panah carries type "B" and "H" antigens, while the victim carried type "A" antigens. (19 RT 2019-28.) Moore testified that a stain containing "A" and "B" antigens "could be indicative of a mixture of physiological fluids [from two separate people]." (19 RT 2022.) He relied on this "mixture" theory to form conclusions that stains found on items collected from the crime scene, including a bed sheet, tissue paper, and a robe, contained mixtures of blood and other bodily fluids that could have come from Panah and Parker. (CSC Opinion S045504.) No other traces of blood, fluids, or other signs of struggle were found in the apartment.

The prosecution never presented that it had ordered DQ-Alpha (DQA1) DNA testing on the stains that disproved Moore's findings.[3] These DNA results were given to the defense but never presented at trial. (11 RT 715-17.) Defense counsel cross-examined Moore about whether "there are techniques in existence that would narrow" the

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[3] The prosecutor who presented Moore's testimony later admitted to being a pathological liar and was removed from the Bench following his appointment as a Los Angeles Superior Court Judge. (*See* Ex. 10, Order of Removal at 212-14; Ex. 9, Hearing Before Special Master at 191-92.)

number of people who could be excluded as a contributor to the tissue paper stain. (20 RT 2130.) Moore agreed that there were more "recent techniques that are more refined than" the ABO and PGM sub-typing Moore used. (20 RT 2130.) These techniques, according to Moore, included "PCR, which is short for polymerase chain reaction, which is a DNA based technique which has the power of amplifying the DNA so that it can be detected more easily." (20 RT 2130.) Counsel asked Moore whether the DNA methods were "workable," to which Moore replied, "the case received consideration by the people at our laboratory who are knowledgeable in the PCR technique" and "the specific results of that I believe were that there was inadequate DNA for a conclusion." (20 RT 2131.) Moore failed to add that DQA1 testing was available and had, in fact, been conducted at the request of the prosecution.

Moore also testified that he swabbed the victim's body in various areas, including the anal, oral, genital, and chest area. (19 RT 2029-30.) No semen was found on any of these swabs. (20 RT 2102.) While anal and oral swabs produced "positive acid phosphatase result[s]," (19 RT 2029), "upon further testing for the presence of the P30 protein and a negative result, the presence of semen could not be conclusively identified." (20 RT 2104.). "P30" is a "semen specific protein not found in any other human physiological fluid." (20 RT 2106.)

1. Tissue paper stain

Moore examined a tissue paper found in Panah's bathroom trashcan that, he said, "bore semen stains, and high amylase activity." (19 RT 2026.) The high level of amylase, according to Moore, "indicate[s] the presence of saliva." (20 RT 2079; *see also* 20 RT 2124 (Moore testifies that "the amylase present on that wad of tissue paper was from saliva and no other bodily fluid").

Moore stated that the stain contained "A, B, and H antigens." (20 RT 2076.) The "B and H antigenic activity" was consistent with Panah's semen. (19 RT 2028.) According to Moore, the "A antigenic activity" "could have" come from the victim's saliva. (20 RT 2077, 2079, 2028.) As a result of the purported mixture of Panah's semen and the victim's saliva, Moore concluded that the tissue-paper stain "could be consistent with the product of an oral copulation." (20 RT 2079.)

2. Bed sheet stains

Moore testified about two groups of stains found on Panah's bed sheet. He testified that the larger group (displayed in trial exhibit 15-B) "showed the presence of spermatozoa," (20 RT 2066), and contained A and B antigens. (20 RT 2065-66.) The stains demonstrated "amylase activity that could not have originated from the semen itself" and which "was consistent with no other biological fluid, aside from saliva [.]" Based on these findings, Moore agreed with the prosecutor that (1) it would "be reasonable to believe then that the semen could have come from a B secretor," (2) "Mr. Panah is

a B secretor[,]" (20 RT 2067), and (3) the saliva could "relate" to the victim "through the A antigenic activity demonstrated by the stain." (20 RT 2073.) As a whole, Moore's testimony created the impression that this larger grouping of stains included a mixture of Panah's semen and the victim's saliva. The pattern of the stains, he said, was consistent with "the spewing of semen across the bed sheet." (20 RT 2067-68.)

The smaller stain (shown in trial exhibit 15-A) exhibited A and B antigens. (20 RT 2064-65.) Moore concluded, though, that background contamination at the location of this smaller stain accounted for the B antigens. (20 RT 2065-66.) Thus, given the contaminated background, Moore could not determine whether this smaller stain contained a mixture of fluids. (20 RT 2066-67.)

3. Stains found on a robe

Moore testified that a robe found in Panah's bedroom had two blood stains: one large stain on the upper left front side of the robe and another smaller stain near the lower left hem. (19 RT 2025.) Moore did not testify about the latter.

Moore identified "high amylase activity" on the stain on the upper left side of the robe, (20 RT 2075), which he had earlier explained indicated the presence of saliva. (19 RT 2025.) He further testified that this blood stain contained "A, B, and H" antigens, with the PGM sub-typing consistent with the victim. (20 RT 2075.) Moore opined that the "blood stain was consistent with Nicole Parker" while the "B antigen was the result of the saliva or the amylase[.]"

(19 RT 2023.) Moore agreed with the prosecutor "that the B and H antigenic material can be traced to Mr. Panah," thus resulting in a stain containing a mixture of Panah's saliva with the victim's blood. (20 RT 2076.)

The first piece of evidence the prosecutor cited in his closing was Moore's testimony that there was a mixture of blood and body fluids on the bed sheet from two separate people: Parker's blood and saliva and Panah's semen. (24 RT 238.) He emphasized Moore's mixture theory throughout his argument and said it showed that Panah's motive was sexual gratification and proved the lewd act and oral copulation special circumstances. (24 RT 2842-46, 2849.)

The prosecutor argued that the crime "was done to satisfy [defendant's] own lust based upon the kind of evidence that you have of ejaculation, semen which is found, semen and saliva, a mixture of which is found on the sheets in the bed." (24 RT 2844.) The prosecutor further argued that the tissue paper with semen and "a concentration of amylase so high that the opinion of the expert was that it came from saliva," demonstrating that Panah "ejaculate(d) in Nicole Parker's mouth" and "that the child was allowed to spit it into a kleenex or toilet paper which was then discarded into the waste basket." (24 RT 2876.) He emphasized "the opinion of the expert that the blood [on the robe] was that of type A, which matched Nicole Parker's," and "the saliva was of type B," "which would match the defendant." (24 RT 2877.) "It was a mixture in the same area and it appeared to be deposited at about the same time." (24 RT 2877.).

B. The use of pathology evidence by the prosecution

The prosecution relied on testimony by forensic pathologist Eva Heuser, M.D., a Deputy Medical Examiner from the Los Angeles County Coroner's Office, to establish the victim's time and cause of the death during the guilt phase of the trial. (21 RT 2331.)

In conducting an autopsy of Parker, Heuser testified that she observed bruising on the victim's head that had caused hemorrhaging and swelling in the brain. (21 RT 2332-35.) She concluded the bruising was consistent with Parker's head striking a wall or floor. (21 RT 2338.) Her right cheek was swollen as a result of lividity, which is the appearance the skin takes on after death. (21 RT 2344.) With respect to bruising she found on the left side of Parker's face, she opined that it appeared to be finger pressure marks. (21 RT 2348.) She also testified that Parker had bruising on the muscle that runs from behind the ear to the collar bone, consistent with a thumb being pressed to the neck compressing the jugular vein. (21 RT 2353-54.) There was also bruising in the area of the vagina, which she testified was consistent with a finger or penis in the area of the anus consistent with anal penetration, possibly due to sodomy. (21 RT 2385-93.) Heuser went on to testify that sodomy could cause bradycardia, i.e. a slowing of the heart. (21 RT 2400.) In return she opined that the bradycardia caused the victim to asphyxiate. (21 RT 2403.)

According to Heuser, all of these injuries resulted in death:

> What I conceptualize, it is the incident that resulted in the traumatic injuries, so even though the little bruises are not in and of

> themselves significant, they are part of a set of circumstances that led to her death. So all her injuries caused her death in that sense.

(21 RT 2404.) Ultimately, Heuser concluded that the victim died from "'[t]raumatic injuries," which consisted of "[c]raniocerebral trauma," "[n]eck compression," and "[s]exual assault with anal lacerations." (Ex. 6, Autopsy Report of E. Heuser, at 21; see also Ex. 7, Autopsy Notes.)

The prosecution used Heuser's testimony to argue that Panah strangled the victim during the commission of sexual assaults including oral copulation, finger penetration of the victim's vagina and sodomy. (24 RT 2881-83.)

Further, the prosecution's theory of the time of death rested on Heuser's pathology evidence. The victim's father testified that Parker went missing at approximately 11:40 a.m. on November 20, 1993. (17 RT 1629-30.) The police claimed to have discovered the body at 10:30 p.m. on November 21, 1993, and they transported the body at 4:10 a.m. on November 22, 1993. Although initially testifying that it was impossible to ascertain the exact time of death (21 RT 2407), Heuser proceeded to give a probable time of death that coincided with the prosecution's theory that Panah was the killer. Heuser testified rigor mortis was "fully set" when the body was found (21 RT 2409), but it would be possible for the body to be in full rigor even thirty-six hours after death. (21 RT 2409.) Moreover, Heuser found what she assumed to be undigested eggs in the victim's stomach, which the victim had eaten the morning of November 20, 1993. (21 RT 2408-

09.) Thus, Heuser testified the victim "probably" died within four hours of the ingestion. (21 RT 2408-09.) Panah was seen at his job by 3:00 p.m., and he never returned to his residence before being arrested the following day miles away from his apartment. Heuser's testimony permitted the inference that the victim died while Panah was still in his apartment between 11:40 a.m. and 3:00 p.m. As such, the prosecution argued at trial that Panah killed Parker in his apartment in the late morning or early afternoon hours on Saturday, November 20, 1993 and left her body in a suitcase in his closet when he left for work at 3 p.m. (*See* 21 RT 2407-10; 24 RT 2855-59.)

C. Jury deliberations and verdicts

On December 13, 1994, the prosecution rested. (3 CT 617.) All kidnaping accusations were dismissed from the indictment including counts 2 and 3 and the special circumstance allegation in count 1 pursuant to a defense motion for judgment of acquittal. (*Id.*; *see also* 3 CT 515-19; 22 RT 2504-06.) Trial counsel presented no opening statement, which had been reserved at the beginning of the guilt phase on December 5th. (3 CT 601.) The defense rested the next day, December 14. (3 CT 4102; 23 RT 2789.)

On December 19, 1994, during the second day of deliberations, the jury found Petitioner guilty of all charges, except for the charge of oral copulation. (4 CT 859, 862-65.) Two of the four special circumstances were determined to be true: sodomy and lewd act upon a child. The remaining special circumstance, oral copulation, was found to be not true. (4 CT at 859-60.)

In the penalty phase, the prosecution rested its case in aggravation solely on the circumstances of the crime and the special circumstances found to be true. (33 RT 4102.) The prosecutor emphasized the victim impact evidence and the alleged facts of the crime, including the oral copulation, much of which depended on the serology evidence. (33 RT 4102-06.) After deliberating for four days, the jury returned a death verdict on January 23, 1995. (34 RT 4234.)

D. Postconviction Evidence

As discussed in more detail in the claims below, Panah's post-conviction counsel hired experts who reviewed the pathology and blood evidence. Two independent pathologists found that Parker likely died outside of the time-frame in which Panah was present in his apartment and did not die as a result of craniocerebral injuries or sexual assault, refuting Heuser's testimony regarding cause and time of death. (Ex. 6, Autopsy Rpt. of E. Heuser; *see also* Ex. 7, Autopsy Notes; Ex. 13, Rpt. of M. Baden; Ex. 15, Decl. of G. Reiber)

Two independent forensic scientists found that DNA evidence which the prosecutor failed to present to the jury refuted Moore's testimony that the stains found on the tissue paper, bed sheets, and robe consisted of a mixture of Panah's and Parker's bodily fluids. (Ex. 11, Forensic Analytical Rpt., 2/27/2004.)

Postconviction discovery also revealed that in addition to the warrantless searches that were conducted of Panah's apartment and yielded negative results, even more searches were conducted by law

enforcement, including dog searches, none of which pointed to Panah's apartment as the location where Parker's body was located. (Ex. 1, Watch Comm. Rpt., 11/21/1993.)

VI. CLAIMS FOR RELIEF

A. The admission of false and faulty expert testimony violated Panah's due process rights and warrants relief under Penal Code section 1473.

Panah is entitled to habeas relief under Penal Code section 1473 because expert testimony that was presented at his trial has been undermined by later scientific research or technological advances, and such testimony was substantially material or probative on the issue of guilt or punishment. The admission of the faulty scientific evidence also violated Panah's federal due process rights under the Fifth and Fourteenth Amendments to the United States Constitution.[4]

1. Legal Standards

a. Due Process

In *Gimenez v. Ochoa*, the Ninth Circuit recently held that the introduction of flawed expert testimony at trial violates due process "if . . . the introduction of this evidence 'undermined the fundamental fairness of the entire trial.'" 821 F.3d at 1145 (9th Cir. 2016) (*quoting Lee v. Houtzdale SCI*, 798 F.3d 159, 162 (3d Cir. 2015)). Moreover, the use of flawed evidence to convict Panah denied him due process because it was so arbitrary that "the factfinder and the adversary

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[4] Because Panah's due process and section 1473 claims rely on the same factual bases, they are discussed together to avoid repetition and to aid in the efficiency of this Court's review.

system [were] not . . . competent to uncover, recognize, and take due account of its shortcomings." *Barefoot v. Estelle*, 463 U.S. 880, 899 (1983), *superseded on other grounds by* 28 U.S.C. § 2253(c)(2); *see Hicks v. Oklahoma*, 447 U.S. 343, 346 (1980) ("Such arbitrary disregard of the petitioner's right to liberty is a denial of due process of law.").

A "conviction based on false evidence warrants a new trial if there is a reasonable probability that, without the evidence, the result of the proceeding would have been different." *Spivey v. Rocha*, 194 F.3d 971, 979 (9th Cir. 1999) (internal quotation marks and alteration omitted). As such, the standard for determining prejudice under Panah's due process claim is identical to the materiality standard for his section 1473 claim. *Compare Cox*, 30 Cal. 4th at 1008-09 *with Spivey*, 194 F.3d at 979. A new trial is the only just result when a person is convicted on false testimony. *See Mesarosh v. United States*, 352 U.S. 1, 9 (1956) ("The dignity of the United States Government will not permit the conviction of any person on tainted testimony.")

b. California Penal Code section 1473

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

False evidence includes opinions of experts "that have been undermined by later scientific research or technological advances." Cal. Penal Code 1473(e)(1). False evidence is "substantially material or probative" if there is a reasonable probability that, had the evidence not been introduced, the result of the trial would have been different. *In re Cox*, 30 Cal. 4th 974, 1008-09 (2003); *see In re Richards*, 55 Cal. 4th 948, 961 (2012). Whether there is a reasonable probability that the result would have been different is an objective determination based on the totality of the circumstances. *Cox*, 30 Cal. 4th at 1008-09; *see In re Malone*, 12 Cal. 4th 935, 965-66 (1996). Courts have looked at the strength of evidence admitted against a defendant, including circumstantial evidence, to determine whether false evidence was material. *In re Richards*, 63 Cal. 4th 291, 313-15 (2016) (granting habeas corpus because, given weak circumstantial evidence, it was reasonably probable that faulty expert testimony about bite mark evidence affected trial's outcome); *see also Strickland v. Washington*, 466 U.S. 668, 696 (1984) ("[A] verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support.").

Under section 1473, Panah need not prove that the false testimony was perjurious. *See Richards*, 55 Cal. 4th at 961; *In re Roberts*, 29 Cal. 4th 726, 741-42 (2003). Nor must he prove that the prosecution knew or should have known of its falsity. *Id.* § 1473(c); *People v. Marshall*, 13 Cal. 4th 799, 829-30 (1996); *see In re Hall*, 30 Cal. 3d 408, 424 (1981); *see also Richards*, 55 Cal. 4th at 960-62.

"So long as some piece of evidence at trial was actually false, and so long as it is reasonably probable that without that evidence the verdict would have been different, habeas corpus relief is appropriate." *Richards*, 55 Cal. 4th at 961.

2. Serologist Moore presented false and faulty expert testimony about the origin of stains found in Panah's bedroom.

Before trial, the prosecutor ordered DQ-Alpha (DQA1) DNA testing on the stains found on the tissue paper, bed sheet, and robe. (9 RT 518, 517-18.) Some of the raw results were given to the defense but never presented at trial. (11 RT 715-17.) On cross examination, Moore agreed that there were more "recent techniques that are more refined than" the ABO and PGM sub-typing Moore used, but he did not acknowledge that DQA1 testing was available and had, in fact, been performed at the request of the prosecution. (20 RT 2130.)

In connection with his habeas petition, Panah had the prosecution's DNA testing analyzed by two experts from an independent forensic laboratory: Dr. Lisa Calandro, a DNA laboratory supervisor for Forensic Analytical, on February 27, 2004 and Keith Inman, a senior forensic scientist at Forensic Analytical on May 25, 2006. (Ex. 11, Calandro at 223-32; Ex. 12, Inman at 233-34.) Calandro's and Inman's later analyses of the DQA1 testing completely undermines Moore's testimony about each of the stains he analyzed.

a. Tissue paper stain

The DNA experts reviewed the prosecution's testing of the stain found on a tissue paper in Panah's bathroom. Both sides agree that Panah's DQA1 type is 1.3, 4 and the victim's DQA1 type is 2, 4; both have the "4" allele. (Ex. 11, Calandro at 232.) According to Dr. Calandro's review, the tissue paper stain contained DQ-alpha type 1.3, 4 for both the sperm and epithelial cell fractions tested. *Id.* at 227. Thus, the DNA results conclusively eliminate the victim "as a contributor to the tissue stain sample." *Id.* At 228. Dr. Colandro summarized: the "DNA results contradict the State's assertion that the sample from the tissue contained a mixture of body fluids from Hooman Panah and Nicole Parker." (Ex. 11, Calandro at 227.)

Inman's supplemental report, based on his "review of the hybridization record[,] supports the findings and observations of Dr. Calandro, specifically that no evidence exists to support a mixture of semen and saliva from Mr. Panah and Ms. Parker." (Ex. 12, Inman at 233.) Therefore, Moore presented false and faulty testimony that the tissue paper contained a mixture of Panah's semen and the victim's saliva, suggesting sexual activity between them, in support of the prosecution's felony murder theory and the special allegations in support of the death penalty.

b. Bed sheet stains

Dr. Calandro reviewed the prosecution's testing of the two separate groupings of stains on the bed sheets that Moore analyzed. First, for the larger grouping of the five stains containing

spermatozoa, Dr. Calandro found that the stains "either yielded 'inconclusive' results or DQA1 type 1.3, 4, which is consistent with Mr. Panah's type." (Ex. 11, Calandro at 229.) Dr. Calandro noted that if the victim had "'spit out' ejaculate onto the bed sheet, one would have expected . . . to detect [the victim's] DNA in significant quantities on the bed sheet." *Id.* Yet, "[n]o DNA typing results consistent with that of Nicole Parker were obtained from any of the samples from the bed sheet." *Id.* Thus, the "DNA typing results do not support the hypothesis that the areas tested contain a mixture of semen and saliva stains from Mr. Panah and Ms. Parker, respectively." *Id.*

Dr. Calandro's report had a caveat: the "inconclusive" results on the various stains could not be reviewed without copies of the "DQA1 typing strip photographs[.]" *Id.* Inman's supplemental report, made after counsel for Panah obtained the strips, assessed the inconclusive results. Inman found that for the five semen stains tested, two had a DNA type consistent with Panah (thus excluding the victim as a contributor) and three "gave weak 4 activity in both the non-sperm and sperm fractions." (Ex. 12, Inman at 234.) The weak activity was called inconclusive in the LAPD report, presumably because "the control 'C' dot was weak or absent." *Id.* Inman agreed with the LAPD's conclusion that the "weak 4 activity" was inconclusive based on the weak or absent control "C" dot. He opined that the findings "further supports the finding that no evidence exists of a mixture of biological material from Mr. Panah and Ms. Parker"

on the bed sheet. *Id.* As such, Moore provided false and faulty testimony that the larger grouping of stains included a mixture of Panah's semen and the victim's saliva.

For the smaller stain, Dr. Calandro confirmed Moore's testimony that the control sample for the bed sheet contained type B antigens, which "suggests that the type B in the stain could be due to a background source of biological material on the sheet." (Ex 11, Calandro at 228.) Thus, she confirmed that the smaller stain lacked evidentiary value since it could have resulted from background material unrelated to the victim or the crime. Similar to her conclusion regarding Moore's testimony about this stain, Dr. Calandro concluded that there was no evidence of a mixture of bodily fluids.

c. Stains found on a robe

DNA expert Dr. Lisa Calandro analyzed the stains on the robe, as well, in connection with Panah's habeas petition. She concluded that contrary to Moore's testimony, the amount of amylase found on the robe "is not necessarily indicative of the presence of saliva and may be the result of perspiration." (Ex. 11, Calandro at 230.) Dr. Calandro reported that the DQA1 results show that while the victim "could not be eliminated as a contributor . . . Hooman Panah was eliminated as a contributor to the DNA stain from this sample." (*Id.* at 231.) Thus, the DNA results "do not provide evidence of a mixture of body fluids from Nicole Parker and Hooman Panah." Inman's supplemental report confirmed Dr. Calandro's conclusion that the prosecution's DQA1 results eliminated Panah as a contributor to the

stain that Moore told the jury could "be traced to Mr. Panah." (Ex. 12, Inman; 20 RT 2076.)

Dr. Calandro's report also addressed the stain that Moore did not testify about, noting that the prosecution obtained DNA testing of "an additional cloth sample and control area from the kimono robe [that] yielded inconclusive results[.]" (Ex 11, Calandro at 231.) Dr. Calandro stated that she needed copies of the typing strips to review the LAPD's inconclusive finding. Id. Inman reviewed the strips and found "weak 4 activity" in this stain, which the prosecution's lab labeled inconclusive, again "because the control 'C' dot was weak or absent." (Ex. 12, Inman at 234.) Inman concluded "[n]o evidence exists in the DNA evidence of a mixture of biological material from Mr. Panah and Ms. Parker on this item." *Id.*

In sum, Dr. Calandro concluded that "the biological evidence analyses reviewed . . . do not support the hypothesis that intimate sexual contact occurred between Hooman Panah and Nicole Parker. Testimony regarding the DNA analyses would not have supported the conclusions that the stains tested were mixture of body fluids." (Ex. 11, Calandro at 232.) Inman was similarly unequivocal: "No biological evidence exists to support the hypothesis that a mixture of biological fluids from Mr. Panah and Ms. Parker was present on the tissue, bedsheet, or kimono" and "there is no evidence to suggest intimate sexual contact between Mr. Panah and Parker." (Ex. 12, Inman at 231.) Thus, Moore presented false and faulty serology testimony to the jury.

d. The new DNA analysis stems from an entirely different field than serology and demonstrates that the serology expert's theory was false.

The Superior Court, in its decision dismissing this claim, found that the fact that DNA analysis undermining Moore's serology testimony did not make Moore's testimony "false" within the meaning of Penal Code 1473. Rather, the Superior Court concluded that Panah simply "presented differing expert opinions." (Ex. 24, Superior Court Minute Order, at 320-21.) Citing *In re Richards*, 55 Cal. 4th 948, 963 (2012), the Superior Court reasoned that "[t]he contradictory testimony of different experts in the same field does not qualify as new scientific research within the meaning of section 1473, subdivision (E)(1), and therefore does not serve to render the testimony given at trial false." (*Id.* at 320.) The Superior Court's reasoning is wrong and inconsistent with the California Supreme Court's holding in *Richards*.

The Superior Court is correct that *Richards* holds that "when new expert opinion testimony is offered that criticizes or casts doubt on opinion testimony given at trial . . . one has merely demonstrated the subjective component of expert opinion testimony." 55 Cal. 4th at 963. But that is not the full holding. *Richards* also explains that when there is an advancement "in the witness's field of expertise" that "allow[s] experts to reach an objectively more accurate conclusion," the trial expert testimony may be considered false under Penal Code §

1473. *Id.* The DNA analysis demonstrating that Moore's trial testimony was false falls into the former category and not, as the Superior Court concluded the latter.

Moore's testimony at trial was based on his expertise in the field of serology. At trial, he described the field of serology as the characterizing of stains from "human body fluids" and to "derive some information about that stain that could lead to the identity of a suspect or a victim." (19 RT 2017-18.) Postconviction experts Lisa Colandro and Keith Inman did not provide expert opinions on serology; rather, they provided an analysis of the DNA—the deoxyribonucleic acid—found in the tested stains. They did not opine on the blood-typing of the stains, which was the sole basis for Moore's testimony. Indeed, Moore testified at trial that he does not do DNA testing. (20 RT 2137.) More importantly, Moore admitted that DNA testing, including "polymerase chain reaction" testing, is a more refined technique than serology, which was the subject of his testimony. (20 RT 2130.) As explained above, the DNA analysis provides an objective basis to conclude that Moore's testimony—that there was a mixture of Panah's and Parker's bodily fluids on the stains—was false.

Callandro's and Inman's reports are not merely subjective disagreements with Moore's testimony. They are objective conclusions based on an analysis of the DNA material found in the same stains for which Moore offered his testimony. The differing results are based on DNA, which Moore admitted at trial is a more

refined method of testing than his serological (*i.e.*, blood-typing) examination. (20 RT 2130.) Accordingly, because Collandro's and Inman's DNA analysis is not merely a differing opinion of an expert "in the same field" as Moore, and because the DNA analysis provides for "an objectively more accurate conclusion," it properly renders Moore's testimony false within the meaning of Section 1473(e). *Richards*, 55 Cal. 4th at 963.

e. The falsity of Moore's testimony is further shown by the materials in the prosecution's possession at the time of trial.

On October 17, 1994, the prosecution represented to the trial court that it expected to introduce DNA results into evidence. (9 RT 517.) On November 14, 1994, however, the prosecution reversed course by informing the trial court that it "decided for tactical reasons not to present DNA evidence during the case in chief." (11 RT 718.) As a result of that announcement, the trial court found that a *Kelly-Frye* hearing was unnecessary to determine the reliability of any DNA analysis or results. (*Id.*)

In reality, the DQ Alpha testing that the prosecution ordered supported the later conclusions by Drs. Inman and Callandro that there was no mixture of fluids. Collin Yamauchi, a criminalist at the Los Angeles Police Department, tested various stains including those on the kimono, sheet and tissue, and did not find that any of these stains contained genetic material belonging to both Parker and Panah.

(Ex. 17, C. Yamauchi Rpt., 7/15/94.) In fact, these results were reviewed in the year 2000 by deputy district attorney Lisa Kahn, from the complaints division of the Los Angeles District Attorney's Office and also found not to contain a mixture of Parker and Panah's DNA. (Ex. 18, L. Kahn Memo.) Thus, the prosecution's "strategic reason" for not presenting the DNA evidence was most likely that it would have disproved Moore's mixture theory.

Panah's allegations concerning the falsity of Moore's are supported by the Exhibits cited above, which is the totality of what is reasonably available to him.[5] An Order to Show Cause—and discovery power—are necessary to obtain any documents that have not been disclosed by the Los Angeles Police Department's Forensic Laboratory or the Los Angeles County District Attorney's Office related to Moore's serology testing and testimony as well as Yamauchi's DNA testing. Absent subpoena power, any undisclosed materials that may substantiate Panah's allegations are not reasonably available to Panah. *See People v. Duval*, 9 Cal. 4th 464, 474 (1995).

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[5] Panah previously requested post-conviction discovery concerning the forensic evidence in his case pursuant to Penal Code Section 1054.9 and the Los Angeles District Attorney's Office represented that all materials were disclosed. (Ex. 23, B. Ferriera Decl., at ¶ 7.)

3. Pathologist Heuser presented false and faulty expert testimony about the cause and time of the victim's death.

In connection with Panah's habeas petition, two pathologists, Dr. Gregory Reiber and Dr. Michael Baden, reviewed the prosecution's pathology evidence. Their analyses expose as faulty and false Heuser's testimony about the cause and time of the victim's death.

a. Cause of death

Pathologist Heuser concluded that the victim died from "'[t]raumatic injuries," which consisted of "[c]raniocerebral trauma," "[n]eck compression," and "[s]exual assault with anal lacerations." (Ex. 6, Autopsy Rpt. of E. Heuser at 21; *see also* Ex. 7, Autopsy Notes.) These conclusions were false. The independent pathologists concluded that head trauma did not cause the victim's death. Dr. Reiber found that a "head and brain examination reveal no injuries of a severity to account for the child's death or to a result in a significant contribution to her death." (Ex. 15, G. Reiber Decl., at 8.) Similarly, Dr. Baden found that "there was no injury to the brain – no trauma to the brain – and that Nicole's brain was entirely normal." He concluded that "craniocerebrial injuries" did not cause the victim's "death and a forensic pathologist expert would have been able to explain this to counsel and the jury." (Ex. 13, Rep. of M. Baden, at 236.)

Nor was the victim strangled. Dr. Reiber concluded that "there is limited and equivocal evidence of neck compression, and manual strangulation is very unlikely due to the lack of bilateral neck hemorrhages and lack of petechial hemorrhages in the eyes." (Ex. 15, G. Rieber Decl., ¶ 15.) Reiber's declaration explains that the prosecution's evidence of strangulation was likely the result of "post mortem positioning of the child on the right side of the suitcase," making the "scant hemorrhages in the neck and the petechiae in the facial skin" "be representative of exaggerated hypostasis (lividity)." (*Id.* at ¶ 9.)

Heuser's testimony that sexual assault contributed to the victim's death was also false and premised on faulty science. Dr. Baden explains that "the full autopsy and the examination of the microscopic slides showed that the sexual assault did not produce injuries sufficient to cause death." (Ex. 13, Rep. of M. Baden at 236.) More specifically, Dr. Reiber found that the prosecution's theory that anal penetration could have contributed to the victim's death "is a novel theory of causation not found in the published literature, and as such forms an improper basis for offering expert opinion." (Ex. 15, G. Reiber Decl., ¶ 10.) Further, Dr. Reiber found that a penis was not responsible for the lacerations found on the victim because of the lack of semen or other biological evidence retrieved from the victim. (*Id.* ¶ 11.)

Thus, "neither craniocerebral injuries nor a sexual assault caused [Parker's] death." (Ex. 13, Rep. of M. Baden at 236.)

b. Time of death

Heuser's testimony about the time of death was also flawed. At trial, the prosecution argued, through the help of Heuser's testimony that the victim died in Panah's apartment on Saturday, November 20, 1993. All parties agree that Panah left the apartment that day to go to work, and he was seen at his job by 3 p.m. He never returned to the residence and was arrested the following day miles away from his apartment. Accordingly, if the victim did not die on November 20, 1993, Panah could not have been responsible for her death.

In fact, post-conviction expert Dr. Reiber explains that the victim died "a significant number of hours" later than what Heuser testified to, exonerating Panah. (Ex. 15, Decl. of G. Reiber, ¶ 13.) He explains that rigor mortis takes six to eight hours to fully develop, and it decreases in intensity twenty-four hours after the time of death. (*Id.*) If the victim died when the prosecution theorized she did, in the late-morning or early afternoon hours of November 20, 1993, "rigor should have been significantly decreased from a maximal or 'fully fixed' condition by late evening of 11-21-93, approximately 36 hours since death" when the victim's body was found by police. (*Id.*) Heuser explained this discrepancy by opining that under "cool conditions" rigor mortis can be delayed. (21 RT 2410.) Dr. Reiber, however, refutes this theory by noting that the "child was found in a suitcase, wrapped in a sheet, under a pile of other objects," and in such a situation there would be "insulation causing retention of body

heat and promoting more rapid disappearance of rigor." (Ex. 15, Decl. of G. Reiber, ¶ 13.)

Heuser also falsely opined that undigested eggs found in the victim indicates that she died not long after she had eaten breakfast on the morning of November 20, 1993. (21 RT 2407-08.) Dr. Reiber explains that Heuser's opinion was false and faulty because it was based on unreliable science:

The use of stomach contents as a basis for time of death estimation is unreliable; stomach emptying can be delayed by severe stress, and if the child were abducted before a breakfast meal had emptied from the stomach, the stress of the ensuing captivity could significantly delay emptying of the stomach and cause the estimated time of death to be much earlier than actually occurred. The lack of any additional analysis to confirm the identity and condition of the material in the stomach renders this basis for time of death even more unreliable. (Ex. 15, Decl. of G. Reiber, ¶ 13.) Accordingly, the later analyses by habeas experts show Heuser presented false and faulty pathology evidence in Panah's trial.[6]

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[6] Even the California Supreme Court, in recounting the facts of the case, stated that Heuser "was unable to state a time of death" suggesting that the Court also found Heuser's testimony regarding time of death not to be credible. *People v. Panah*, 35 Cal 4th 395, 415 (2005). The Attorney General adopted the California Supreme Court's characterization by quoting this language in multiple briefs throughout the federal litigation of Panah's claims. (*See, e.g.,* USDC Case No. 05-07606, Dkt No. 44 at 18, Dkt No. 118 at 17, Dkt. No. 155 at 11.) Parker's death certificate is also inconsistent with Heuser's testimony. (Ex. 8, Cert of Death.)

4. Taken together, the false and faulty evidence admitted at trial was substantially material and undermined the fairness of the entire trial.

The post-conviction DNA and pathology evidence disprove the prosecution's entire theory of the case: that the victim died during the commission of a sodomy or other sexual assault committed by Panah. Instead, the DNA evidence does not link Panah to the victim at all. Moreover, the post-conviction pathology evidence demonstrates that the victim died at a time when Panah could not have been present in his apartment. As such, there is a reasonable probability that had the substantial false and faulty serology and pathology evidence not been presented, the result of Panah's trial would have been different.

a. The false serology and pathology testimony was significant and prejudicial.

The prosecution used the false and faulty serology and pathology evidence to push his case for first-degree murder and Panah's death eligibility.

The prosecution argued that Moore's serology testimony helped prove each special circumstance and underlying felony except the one involving a foreign object. The prosecution greatly emphasized Moore's testimony in the guilt phase closing argument. For example, the prosecutor relied on Moore's testimony to link the bed sheet stains to the tissue paper stain, arguing that together they proved the oral

copulation felony and special-circumstance charges. He told the jurors that:

> the evidence that was presented to you is very consistent with the fact that he ejaculated in her mouth, that he allowed her to spit it out in a kleenex, because we have the evidence of semen of his blood type, high amylase content, indicating saliva which matches her blood type on the kleenex, as well as having a spattering on the bed sheet of a mixture of semen and saliva — again high amylase indicating saliva — of his type B and her type A. ...
>
> And what you can reasonably infer from that is that Nicole was on the bed. When he ejaculated in her mouth, he got kleenex had her spit it out, he went back to throw it away. She didn't like the taste in her mouth and continued to spit it out, what was left, on the bed. That's why there's traces of it on the sheet.

(24 RT 2847.) (*see also* 24 RT 2961.) ("There is also semen and saliva mixture on the bed sheet, the bed sheet that she was wrapped in. That, too, matches with Nicole Parker and Mr. Panah.").

The prosecution also relied on Moore's testimony about the purported mixture present in the stains on the robe to support the sodomy and oral copulation felony and special circumstance arguments. The prosecution explained that "[i]f [Panah] had orally copulated Nicole Parker, and if the robe had been taken off, and the attack of sodomy . . . caused bleeding then occurred [sic] on top of the robe, the saliva of the defendant could have been deposited on the robe at that time from her body, the same time that the act of sodomy occurred." (24 RT 2817.)

During rebuttal argument, the prosecution argued that Moore's testimony—that the stains contained a mixture of Panah's and the victim's fluids—were supported by the fact that "type A happens to be one of the people in this case. The B type happens to be the other person involved in this case. There's no person with AB type that we know of that anybody could show." (24 RT 2959.)

The prosecution then addressed the issue of DNA testing, telling the jury that "it's ordered in some cases, but it's usually ordered in a situation where you don't have other types of proof available. In this situation we have the proof available." That proof, according to the prosecution, is, in part, that the defendant and the victim's "blood typing matches," the evidence recovered at the scene. (24 RT 2963.) The prosecution told the jury, "nobody has attempted to pull the wool over your eyes." (24 RT 2959.) The prosecution failed to inform the jury that it had, in fact, ordered DNA testing, which is far more scientifically precise than serology evidence, or that the results of that testing wholly contradicted the serology evidence presented to the jury. Thus, this false testimony, couched in science and presented by an "expert," allowed the jury to convict Panah and find true the sodomy and lewd acts special circumstances. Indeed, in the absence of this false evidence, the jury had no basis to find Panah guilty of first-degree murder or other charged offenses. Nor would the jury have found Panah guilty of the special circumstances making him death eligible. Finally, because the prosecutor relied on the false

evidence to make its case in aggravation at the penalty phase, Panah's death sentence is also impacted by the false testimony.

Similar to the serology evidence, the prosecution presented false and faulty pathology evidence to paint an inflammatory picture of the victim's death. The state pathologist's testimony allowed the prosecution to conclude that the cause of death was "[t]raumatic injuries," consisting of "[c]raniocerebral trauma," [n]eck compression," and "[s]exual assault with anal lacerations." (Ex. 6; Autopsy Rpt.; Ex. 7, Autopsy Notes.) These erroneous conclusions were critical to establish Panah's guilt of the underlying felonies supporting his first-degree murder conviction. The prosecutor was also able to inflame the juror's passion by inferring from the pathology evidence that Panah's "penis [was] moving in and out inside the rectum and banging against the vaginal wall" that "the doctor said, could have caused death" by placing pressure on an artery to slow the victim's heart rate (24 RT 2885.) Again, this false evidence allowed the prosecution to argue that the victim was killed in the course of sodomy. The prosecution also used the false evidence of the time of the victim's death to establish that Panah killed the victim in the early afternoon of November 20, 1993, and also as evidence that "she was killed during the commission of [the underlying] felonies." (24 RT 2889.)

Therefore, without this flawed pathology evidence, it is reasonably probable that the outcome of Panah's guilt phase trial would have been different. Indeed, in a sexual assault kit performed

on Parker, none of Panah's biological material—including Panah's blood type of saliva—was identified. Nor was semen detected on swabs and slides from samples of Parker's anal area. (19 RT 2028-30; 20 RT 2106-07.)

The prosecution's false and faulty evidence about sexual contact between Panah and the victim was not only incriminating at the guilt phase of Panah's trial, but was also highly prejudicial at the penalty phase. Significantly, the prosecution's case at the penalty phase consisted solely of reintroducing the nature and circumstances of the crime, including victim impact evidence. *See* Cal. Pen. Code § 190.3(a). For example, the prosecutor used the serology and pathology evidence to argue at penalty that Panah killed the victim "intentionally by cutting off the blood supply that's coming back from her brain, by holding his hand over her mouth . . . and then [she] dies by the sheer brutality of the sexual assault itself that you found him guilty of." (33 RT 4088.) Thus, the inferred sexual contact from the prosecution's false evidence was a prominent aggravating factor. As such, had the jury known the truth about the prosecution's false serology and pathology testimony, it would have neither convicted Panah at the guilt phase nor sentenced him to death at the penalty phase.

b. The evidence of guilt against Panah was not strong.

Given the weakness of the prosecution's case, there is a reasonable probability that absent the false and faulty scientific

evidence, Panah would not have been convicted or sentenced to death. The prosecution's case was weak because there was little to no physical evidence placing Panah at the scene of the discovery of the body at the time of death or establishing that the special circumstance crimes making him death eligible had occurred. For example, Panah's DNA was not found anywhere on the victim. Indeed, Moore's false serology testimony was the sole scientific evidence presented at trial that linked Panah as the perpetrator.

Without Heuser's false and faulty pathology evidence about the cause of death, there was no evidence that the victim's death resulted from a sexual assault or that she had been sexually assaulted to such a degree that could have caused her heart to stop.

Further, without Heuser's false pathology evidence about the time of death, the fact the victim was found in Panah's bedroom is not dispositive, especially given trial counsel's argument and the fact that someone else had access to the apartment. (*See* 24 RT 2912-18, 2946-47.) Ahmad Seihoon was staying with Panah and his mother, had access to Panah's bedroom, and was the last person seen with the victim. (18 RT 1687, 1751, 1784.) He also had keys to the apartment. (Ex. 2, Crime Scene Rpts, at 6.) Indeed, at 11:00 a.m., on the day that the victim disappeared, Seihoon admitted leaving Panah's apartment with a suitcase. (*See Id.*; Ex. 3, LAPD Chron., 11/20-21/1993; *see also* Ex. 2, West Valley Rpt. Severns, 11/22/1993.) No traces of blood, fingerprints, or other evidence of any struggle inside Panah's room were identified by the police. Thus, Seihoon could

have easily killer Parker and planted her body in a suitcase in Panah's bedroom. Seihoon's guilt would have explained why multiple searches of the apartment and Panah's room —including dog and suitcase searches — had come back empty until Parker's body was discovered the night of Sunday November 21, 1993.[7]

Notably, the jury took four days to determine Panah's penalty (4 CT 909-10, 914-15, 961), indicating it was a close and difficult decision. *See Thomas v. Chappell*, 678 F.3d 1086, 1098 (9th Cir. 2012) ("lengthy deliberations suggest a difficult case"); *Mayfield v. Woodford*, 270 F.3d 915, 932 (9th Cir. 2001) (relying on the fact that jury deliberated for four hours before writing a note to the judge asking whether all jurors must agree). Therefore, had the jury been presented the true pathology and serology evidence, it is reasonably probable that at least one juror would have found that there was insufficient evidence of Panah's guilt, let alone to sentence him to death.

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[7] An initial search of the apartment was conducted by 4 officers and included an examination of the entire apartment including bedrooms and closets. (9 RT 457-58; Ex. 2; West Valley Rpt. Severns at 6.2; Ex. 4, Incident Summary Rpt., 12/6/1993.) Another search was conducted by at least 7 officers and included a search of Panah's closet and suitcases. (8 RT 264-65, 289-90.) Another search of the apartment was conducted after Panah's car was searched. (2 CT 488.) Police dogs were also used to search the premises. (9 RT 530; Ex. 1, LAPD Watch Comm. Rpt.) Parker's body was found after a search conducted between 9:30 and 10:00 p.m. the night of November 21, 1993. (2 CT 430, 438-45.)

B. The new evidence demonstrating that the prosecution's serologist and pathologist testified falsely is of such decisive force and value that it would have more likely than not changed the outcome at trial.

Even if the false serology and pathology evidence do not violate federal due process or Penal Code section 1473(b)(1) or (b)(2), the evidence demonstrating the falsity of the prosecution's evidence separately warrants habeas relief under the newly amended Penal Code section 1473)(b)(3)(A).

1. The Legislature recently lowered the burden of demonstrating relief based on new evidence.

Until this year, a petitioner could not obtain relief based upon new evidence unless that evidence pointed "unerringly" to innocence and "completely undermine[d] the entire structure of the case presented by the prosecution at the time of the conviction." *In re Lindley*, 29 Cal. 2d 709, 724 (1947). Effective January 1, 2017, the burden of proof to obtain relief for new-evidence claims was significantly lowered. Relief is now required where a petitioner brings new evidence that is "of such decisive force and value that it would have more likely than not changed the outcome at trial." Pen. Code § 1473(b)(3)(A). Because this claims is "based on a change in the law" it must be "considered [on the merits] if promptly asserted[.]" *In re Clark*, 5 Cal. 4th 750, 775 (1993). Under the new codified standard, Panah is entitled to habeas relief.

2. The DNA and pathology analyses are "new evidence" within the meaning of the statute.

The newly-codified new-evidence statute defines "new evidence" as "evidence that has been discovered after trial, that could not have been discovered prior to trial by the exercise of due diligence, and is admissible and not merely cumulative, corroborative, collateral, or impeaching." Pen. Code § 1473(b)(3)(B). The California Court of Appeal for the Third Appellate District recently interpreted the "new evidence" standard to be "similar to the 'new evidence' standard in a motion for new trial under California law." *In re Miles*, 2017 Cal. App. LEXIS 37, *26 (Jan. 19, 2017). The new-trial standard defines new evidence as evidence that "is in fact newly discovered; that is not merely cumulative to other evidence bearing on the factual issue; . . . and that the moving party could not, with reasonable diligence have discovered and produced [ ] at trial." *Id.* at *26-27 citing *People v. McDaniel*, 16 Cal. 3d 156, 178 (1976). The *Miles* Court also found that the newly-codified standard is similar to the federal new-trial standard, which states that the evidence "was unknown or unavailable to the defendant at the time of trial" and that the "failure to learn of the evidence was not due to lack of diligence by the defendant[.]" *Miles*, 2017 Cal. App. LEXIS at *27 citing *United States v. Colon-Munoz*, 318 F.3d 348, 358 (1st Cir. 2003).

Here, the analysis of the DNA collected from stains on items found in Panah's bedroom constitutes new evidence within the meaning of the newly-codified statute. The DNA analysis—contained

in two reports by experts Lisa Calandro and Keith Inman—was unavailable to Panah at trial despite his personal diligence in attempting to obtain DNA testing of the stains because his trial counsel refused to seek such testing. Panah took the only step available to him at trial to obtain a DNA analysis—he raised a *Marsden*[8] motion to fire his lawyer in order to obtain the necessary investigation into the DNA and other issues surrounding Panah's innocence. (*Marsden* Hearing RT 1024, 11/21/1994.) The trial court and Panah's counsel stifled Panah's efforts. The failure to obtain the exculpatory DNA analysis was, therefore, in spite of Panah's diligence.

a. Trial counsel's failure to expose the false serology and pathology cannot be imputed to Panah; doing so would result in a miscarriage of justice.

The Superior Court below concluded that the DNA results—exposing Moore's false serology reports—were not "new" because they could have been discovered by due diligence, *to wit*, the due diligence of Panah's trial counsel. (Ex. 24, Sup. Ct. Decision, at 2.) In doing so, the Superior Court erroneously rejected Panah's argument that trial counsel acted unreasonably and outside the agency-principle relationship by failing to consult with a DNA expert and bylying to the court about the steps he had taken, *vel non*, to acquire expert

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[8] *People v. Marsden*, 2 Cal. 3d 118 (1970).

consultants, despite Panah's specific request for DNA testing when seeking to remove his trial counsel .

The Superior Court reasoned that "trial counsel made a tactical decision not to seek the services of a DNA expert, meaning that had he exhausted all avenues of investigation he could certainly have hired one." (*Id.*) The Superior court also found that trial counsel could have similarly "hired an expert pathologist" and that Panah "failed to provide a reason" why counsel did not. (*Id.*) The court then dismissed Panah's argument that the attorney-client relationship was severed based on counsel's incompetence by relying on the California Supreme Court's opinion on direct appeal upholding the trial court's denial of Panah's motion to remove counsel. (*Id.*) Each finding is erroneous.

The Superior Court's reliance on the direct appeal decision is improper because that opinion is based only on the record. It does not take into account the evidence Panah presented in postconviction demonstrating that trial counsel acted unreasonably and without a tactical basis.

First, regarding pathology, counsel committed fraud on the trial court and Panah by promising and insisting that he had retained a pathologist when, in fact, he had not. Counsel called the prosecution's pathologist "the most important witness for the people" and acknowledged that "the question of whether Mr. Panah lives or dies will rise and fall on her testimony." (21 RT 2221.) Counsel further claimed to the trial court to "have on board" pathologist Dr.

Griffith Thomas. (21 RT 2221, 2324.) This was a lie. Thomas has stated in a sworn declaration that he was "never retained or appointed to assist Mr. Sheahen" and "never received any material for review from Mr. Sheahen to the best of [his] recollection." (Ex. 19, G. Thomas Decl., at ¶ 4.) Sheahen's co-counsel, Symak Shafi-Nia and William Chais confirm that Sheahen never retained a pathologist. (Ex. 22, S. Shafi-Nia Decl., at ¶ 21; Ex. 20, W. Chais Decl., at ¶ 13.) Thus, contrary to his representations, trial counsel neither consulted with nor retained to testify an expert pathologist. Such misrepresentation to the court cannot be attributed to Panah.

Second, regarding the serology evidence, trial counsel acted unreasonably by failing to retain a DNA expert. Panah's trial counsel first learned of the prosecution's DNA testing on October 14, 1994. (9 RT 519-20.) At that time, the trial court strongly implied that counsel needed an expert, telling him "hopefully you have somebody lined up already, or if not, you'll . . . take care of that." (9 RT 521.) Trial counsel reassured the court "that will be taken care of." (9 RT 521.) But trial counsel never retained an expert despite learning that the prosecution made a tactical decision to not use the DNA results as part of its case. A month after disclosing the DNA testing, the prosecutor stated on the record that it "decided not to offer any DNA evidence[.]" (11 RT 715.) The prosecution's decision to forego presenting forensic evidence that is almost universally regarded as the most reliable scientific evidence available was a glaring red-flag that

indicated the DNA must have been exculpatory—or at least unhelpful to the prosecution's case.

But counsel did not make an informed choice to forego a DNA analysis. Rather, his "decision" was uninformed. All members of Panah's defense team, including lead trial counsel, have signed declarations admitting that they did not conduct a constitutionally-mandated investigation. Sheahen admits that "[a]ll of our efforts had gone into the aborted settlement and a full factual investigation had simply not been done." (Ex. 21, R. Sheahen Decl., at ¶ 17.) Second counsel Shafi-Nia, also admits that no pre-trial investigation was conducted "due to [his] reliance on the assurances of lead counsel . . . that the prosecution would" settle the case. (Ex. 22, S. Shafi-Nia Decl., at ¶ 20.) Similarly, Chais, who replaced Shafi-Nia, declared that by the time of trial "the case was not prepared for trial" and "there had been no investigation in advance of trial, there was no planned defense." (Ex. 20, W. Chais Decl., at ¶ 7.)

Counsel's uninformed decision to forego DNA analysis was unreasonable. *See Correll v. Ryan*, 539 F.3d 938, 949 (9th Cir. 2008) ("An uninformed strategy is not a reasoned strategy. It is, in fact, no strategy at all. Given that trial counsel knew that the prosecutor was performing DNA testing, "[u]nder these circumstances, a reasonable defense lawyer would take some measures to [first] understand the laboratory tests performed and the inferences that one could logically draw from the results." *Driscoll v. Delo*, 71 F.3d 701, 709 (8th Cir. 1995); *see also Hinton v. Alabama*, 134 S. Ct. 1081, 1088 (2014)

(consultation with forensic expert necessary where the core of the prosecution's case relied forensic evidence.) Here, trial counsel made no such efforts to understand the tests.

To the contrary, counsel's lack of information—and apparent confusion—was apparent on the record. He told the trial court that he did not want to obtain DNA results because the testing on the tissue paper and bed sheet did not "pan out." (13 RT 1006.) Not so. In fact, as shown above, the DNA results contradicted the prosecution's "mixture" theory. The only party who could view the DNA results as not "panning out" would be the prosecution, since the results undermined its entire theory of how the crime took place.

The result of counsel's abdication of his duty resulted in "blind acceptance of the State's forensic evidence" to Panah's detriment. *Elmore v. Ozmint*, 661 F.3d 783, 786 (4th Cir. 2011). Indeed, even after the prosecution declined to present its DNA results, the record shows that counsel simply assumed that the results inculpated Panah. *See Panah*, 35 Cal. 4th at 428. Reasonable counsel would have retained an expert and discovered the opposite. Accordingly, contrary to the Superior Court's opinion below, counsel abandoned his duty to investigate the DNA issue in this case and that failure cannot be attributed to Panah for purposes of determining whether the DNA results obtained in post-conviction were available to Panah at trial with reasonable diligence.

Finally, the severing of the attorney-client relationship is evident by the motivation for trial counsel's failure to conduct any

pre-trial investigation. Documentary evidence confirms that counsel's choice to forego retaining experts was borne out of his desire to save money; he promised as much when he wrote a letter asking to be appointed to the case. In asking to be appointed, trial counsel told the trial court that "it appears likely that the court system would be saved a great deal of money time and money and the taxpayers would be saved a great deal of money" if he was appointed to the case because "it is probable" that Panah would "enter a plea at an early stage of [the] proceedings" whereas if the public defender was appointed "the result might be an extremely costly trial." (5 CT 1107.)

Cost-savings is not a reasonable justification for denying Panah the DNA analysis necessary to defend the case. Nor is a desire or belief that Panah would plead guilty an appropriate basis to forego a pre-trial investigation when, from the beginning, Panah has maintained his innocence. Rather, abandoning an investigation in the hopes of such a guilty-plea—in spite of Panah's insistence on his innocence—is the epitome of severing the attorney-client agency relationship. *See Frazer v. United States,* 18 F.3d 778, 782 (9th Cir. Cal. Mar. 10, 1994) ("A defense attorney who abandons his duty of loyalty to his client and effectively joins the state in an effort to attain a conviction or death sentence suffers from an obvious conflict of interest.") Trial counsel's complete failure to subject the prosecution's case to meaningful adversarial testing should not —for purposes of determining whether the DNA analysis obtained in post-conviction constitutes "new evidence" for purposes of the instant

Section 1473 claims—be imputed to Panah. Instead, this Court should find that the DNA analysis is "new" evidence within the meaning of the statute because it was unavailable to Panah at the time of trial despite hiss diligence due to his own counsel's ineffectiveness.

b. Panah was diligent in attempting to obtain the appropriate expert testimony.

Despite trial counsel's abandonment of his constitutional duty to perform a minimally competent investigation, Panah was diligent in attempting to obtain a DNA analysis. At a hearing to remove his counsel, Panah requested that an analysis of DNA be done. (*Marsden* Hearing RT 1012, 11/21/1994.) Panah was adamant that the DNA results would be helpful to his case. In response to the trial court's uninformed assertion that it would be a "terrible tactic 'to get a DNA expert that confirmed the prosecution's case, Panah responded rhetorically, "What if I know it's not mine, your honor? What [ ] if I'm confident it can't be mine?" (*Marsden* Hearing RT 1024, 11/21/1994.) As shown above, Panah was right—the DNA results contradicted the prosecution's case. Counsel's failure to listen to his client and, at the very least, consult confidentially with a DNA expert to interpret the prosecution's testing is unreasonable and cannot be attributed to Panah, particularly in light of Panah's attempts to have the DNA results independently analyzed.

3. It is more likely that the jury would have reached a different outcome had they learned of the new evidence.

For Panah to get relief on this claim, the DNA evidence must have been "of such decisive force and value that it would have more likely than not changed the outcome of trial." Pen. Code § 1473(b)(3)(A). This burden is the same burden of proof as in civil proceedings, and only requires a party to show that "'its version of fact is more likely than not the true version.'" *In re Miles*, 7 Cal App. 5th 821, 849 (Cal. App. 4th Dist. 2017) (quoting *Beck Development Co. v. Southern Pacific Transportation Co.* 44 Cal. App. 4th 1160, 1205 (1996). The possibility that the DNA evidence would have changed the outcome includes that the trial would have resulted in acquittal, deadlock, or a hung jury. *Id.* at 850. Here, had the DNA evidence been offered would have undoubtedly changed the outcome of trial.

As discussed in Claim One, the prosecution's case against Panah rested on the serology evidence. The serology evidence was used to identify Panah as the killer and to argue that he committed the special-circumstance crimes of sodomy, oral copulation, and lewd acts upon a child, crimes that made him death-eligible. The DNA evidence refuting that the stains found on the tissue paper, bed sheets, and kimono consisted of a mixture of Panah's and Parker's bodily fluids would have thus refuted both the prosecution's argument that Panah killed Parker and the argument that Parker was sexually abused

by Panah. The DNA evidence would have also allowed Panah to refute the prosecution's argument that Panah's suicide attempt and alleged remarks the night of November 20th constituted consciousness of guilt. (24 RT 2966-67.) The DNA evidence would have also bolstered the defense arguments that the serology evidence was questionable (24 RT 2915, 2951) and that the case against Panah was circumstantial and had not been proven beyond a reasonable doubt. (24 RT 2904, 2925.)

Additionally, at trial, Panah's counsel attempted to elicit evidence that law enforcement had failed to investigate leads pointing to third-party culpability. (21 RT 2282-83, 2605.) However, the trial court prevented defense counsel from conducting this inquiry, finding that defense counsel did not have evidence that others were involved in the crime. (21 RT 2284-85, 2626.)

Had the DNA evidence been available, however, trial counsel could have used the DNA evidence to support a defense based on third-party culpability. Panah would have been able to present a defense pointing to Ahmed Seihoon as the actual killer. Seihoon had keys to the apartment where Panah and his mother lived. (Ex. 2, Crime Scene Rpts. at 6.) Seihoon had arrived at the apartment on Friday November 19, 1993 and spent the night. (18 RT 1752.) On Saturday, November 20, 1993, Seihoon spoke with Nicole Parker at 11 am. (Ex. 2, Crime Scene Rpts. at 6.) This was the last time that Parker was seen alive. (17 RT 1596.) Seihoon admitted to have been carrying a suitcase and a bag at that time. (Ex. 2, Crime Scene Rpts.

at 6.).) Seihoon returned to the apartment later that evening and was questioned by police about Parker. (18 RT 1784; Ex. 2, Crime Scene Rpts. at 6.) He remained at the apartment until early the next morning. (*Id.* at 8.) Seihoon went into Panah's room that evening. (18 RT 1785-86.) Thus, Seihoon had both the access and opportunity to have killed Parker. Further, as discussed *supra*, Seihoon having removed and later planted Parker's body would have explained why multiple searches of the apartment including of Panah's closet and suitcases therein had failed to uncover Parker's body.

The DNA evidence would have also allowed Panah to present evidence pointing to other possible suspects. (*See* 22 RT 2605 (tape-recorded conversation where Panah is threatened by "Sean", 21 RT 2283 (3 unidentified males seen on the premises of the apartment complex around time Parker disappeared.)

Thus, Panah can meet his burden of showing that the DNA evidence would have more likely than not changed the outcome of the guilt phase of his trial.

The DNA evidence would have also more likely than not changed the outcome of the penalty phase. The prosecutor rested his case in aggravation on the circumstances of the crime. (27 RT 3117.) He emphasized that Parker was sexually abused. (33 RT 4105-107.) The DNA evidence would have refuted the prosecutor's graphic depiction of the sexual and violent nature of Parker's death, thus diminishing its aggravating force. Given that the jury deliberated more than 3 full days before sentencing Panah to death (4 CT 908-10,

914-15, 961), it is more likely than not that at least one juror would have been persuaded to vote against death.

VII. PRAYER FOR RELIEF

WHEREFORE, Panah prays that this Court:

1. Permit Panah, who is indigent, to proceed without prepayment of costs or fees;

2. Grant Panah authority to obtain subpoenas in forma pauperis for witnesses and documents necessary to prove facts alleged herein;

3. Grant Panah the right to conduct discovery, including the right to take depositions, request admissions, and propound interrogatories, and the means to preserve the testimony of witnesses;

4. Order Respondent to show cause why Panah is not entitled to relief;

5. Permit Panah to amend this petition to allege any other basis for his unconstitutional confinement as it is discovered;

6. Conduct an evidentiary hearing at which proof may be offered concerning the allegations in this petition;

7. Issue a writ of habeas corpus to have Panah brought before this Court to the end that he might be discharged from his unconstitutional confinement and relieved of his unconstitutional sentences, including the death sentence;

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8. Make a finding that Petitioner is actually innocent pursuant to Penal Code § 1485.55, and

9. Grant such other relief as this Court may deem appropriate.

Respectfully submitted,

HILARY POTASHNER
Federal Public Defender

Dated: July 18, 2017

By _____
JOSEPH A. TRIGILIO

CERTIFICATE OF COMPLIANCE

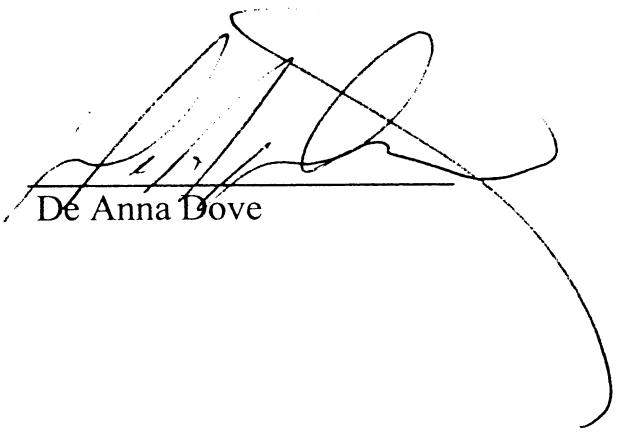
I hereby certify that the foregoing Petition for Writ of Habeas Corpus Pursuant to Penal Code Section 1473 is 14,531 words in length, as counted by the computer program used to prepare the petition.

JOSEPH A. TRIGILIO
Deputy Federal Public Defender

PROOF OF SERVICE

I declare that I am a resident or employed in Los Angeles County, California; that my business address is the Office of the Federal Public Defender, 321 E. 2nd Street, Los Angeles, California 90012-4202, Tel. No. (213) 894-2854; that I am over the age of eighteen years; that I am not a party to the action entitled below; that I am employed by the Federal Public Defender for the Central District of California, who is a member of the Bar of the State of California, and at whose direction I served a copy of the attached **Petition For Writ of Habeas Corpus Pursuant to Penal Code Section 1473** on the following individuals by placing same in a sealed envelope for collection and mailing via the United States Postal Service, addressed as follows to the attached address list.

This proof of service is executed at Los Angeles, California, on July 18, 2017. I declare under penalty of perjury that the foregoing is true and correct.



De Anna Dove

PROOF OF SERVICE ADDRESS LIST

Petition for Writ of Habeas Corpus Pursuant to Penal Code Section 1473

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Ana Duarte
300 South Spring St.
Los Angeles, CA 90032

Los Angeles County District Attorney's Office
Attn: Habeas Corpus Litigation Team Section
320 West Temple Street, Room 540
Los Angeles, CA 90012

Petitioner
Hooman Ashkan Panah
CDC# J-55600, 2E-B-87
San Quentin State Prison

3. Petition for Writ of Habeas Corpus filed in California Supreme Court case number S246758.

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re HOOMAN ASHKAN PANAH, Petitioner, On Habeas Corpus.	**CAPITAL CASE** No. Related Cases: S155942 Automatic Appeal No.: Habeas No.: , Los Angeles County Superior Court No.: BA090702

PETITION FOR WRIT OF HABEAS CORPUS

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PETITION FOR WRIT OF HABEAS CORPUS

Petitioner, Hooman Ashkan Panah, by and through his undersigned counsel, hereby petitions for a writ of habeas corpus, and by this verified petition states as follows:

I. INTRODUCTION

A jury convicted Panah of first-degree murder based on a felony-murder theory that he sexually assaulted and killed a girl who lived in his apartment complex. The jury further found two special circumstances to be true in arriving at a verdict of death: sodomy and lewd acts with a minor under 14.

To prove that Panah was responsible for the murder, the prosecution relied on circumstantial scientific evidence by a novice serology expert purporting to link Panah to the victim through a novel theory that a mixture of Panah's and the victim's bodily fluids was found on items from the scene of the crime based on blood-type evidence. The serologist's theory has since been proven false by DNA evidence. Yet, this testimony was the springboard for the prosecutor to argue that Panah was guilty of sodomy and lewd acts, the felonies underlying the prosecution's felony-murder theory.

Furthermore, the prosecution relied on the pathologist's testimony on the time of death to prove that Panah had the opportunity to commit the murder before he left for work that afternoon. The prosecution further relied on the pathologist's testimony that the traumatic injuries to the decedent's brain, neck, and anus caused her death. The pathologist's testimony was critical to Panah's conviction. Moreover, this same evidence was used by the prosecution as aggravating evidence concerning the nature

of the crime during the penalty-phase. Accordingly, both Panah's conviction and death sentence must be vacated.

Panah is entitled to habeas relief on two grounds: his conviction violated (1) the due process clause of the Fifth and Fourteenth Amendments of the United States Constitution based on the introduction of faulty scientific evidence, and (2) California Penal Code section 1473, as the prosecution secured a conviction and sentence based on expert testimony that has been shown to be false, and that is undermined by scientific research or technological advances. But for the prosecution's presentation of false expert testimony, Panah could not have been convicted at the guilt-phase of his trial. Moreover, absent the false evidence introduced at the guilt-phase, the jury would have had a reasonable doubt of the truth of the special circumstances. Finally, absent the false-testimony introduced at the guilt-phase, the prosecutor could not have secured a death sentence at the penalty phase. Accordingly, Panah files this petition seeking relief.

II. PROCEDURAL HISTORY

A. Initial State Court proceedings

On December 19, 1994, a Los Angeles County jury found Hooman Panah guilty of the first-degree murder of Nicole Parker. Panah was also convicted of sodomy by force, lewd acts upon a child under the age of fourteen, penetration of genital or anal openings by a foreign object with a person under fourteen years of age, and oral copulation of a person under fourteen years of age. The jury found true the special circumstance allegations that the murder was committed while Panah was engaged in the crime of sodomy and lewd acts upon a child under the age of fourteen. The

trial court dismissed the kidnaping charges and related special circumstance, and the jury found not true the special circumstance allegation that the murder was committed while Panah was engaged in the crime of oral copulation. *People v. Panah*, 35 Cal. 4th 395, 409 (2005). After deliberating for four days, the jury reached a verdict of death. (4 CT 961.) Panah was sentenced to death on January 23, 1995. *Id*.

The California Supreme Court denied Panah's automatic appeal on March 14, 2005. *Panah*, 35 Cal. 4th 395 (2005). Panah's initial state habeas petition was summarily denied without an evidentiary hearing on August 30, 2006. *In re Panah*, Case No. S123962. He filed an exhaustion petition in the California Supreme Court in district court on August 30, 2007 which was summarily denied on March 16, 2011 without a hearing. *In re Panah*, Case No. S155942.

B. Federal Court Proceedings

Panah filed a Protective Petition for Writ of Habeas Corpus in the federal district court on February 26, 2007. (USDC Dkt. Nos. 36-39.) Panah filed a First Amended Petition for Writ of Habeas Corpus on August 30, 2007. The district court stayed the proceedings pending exhaustion. (USDC Dkt. Nos. 52-54.) Following the California Supreme Court's denial of the exhaustion petition, Panah filed a Second Amended Petition for Writ of Habeas Corpus on June 24, 2011. (USDC Dkt. No. 102.)

After the filing of Respondent's Answer and Panah's Traverse, the district court ordered briefing on whether Panah's claims satisfied 28 U.S.C. § 2254(d) based on the state court record. (USDC Dkt. No. 127.) The court denied Panah's requests for discovery and an evidentiary hearing.

On November 14, 2013, the district court dismissed the petition without a hearing, entered judgment against Panah, and issued a Certificate of Appealability on one claim. (USDC Dkt. No. 164.)

On November 20, 2014, Panah filed an opening brief in the Ninth Circuit Court of Appeals. (USDC Dkt. No. 175.) The case remains pending and has been fully briefed since March 9, 2016.

C. The Instant State Proceedings

On April 7, 2017, Panah filed a petition for writ of habeas corpus in the Los Angeles Superior Court. That petition alleged the same claims as in this petition. On May 19, 2017, the Superior Court addressed Panah's claims on the merits, and it dismissed each of the claims. (*See* Ex. 24, Superior Court Minute Order.) On July 18, 2017 Panah filed his petition with the California Court of Appeal. On November 27, 2017 the California Court of Appeal denied Panah's petition. This Court has original jurisdiction over this petition. Cal. Const., art. VI, § 10; *In re Roberts* 36 Cal.4th 575, 582–83 (2005). However, Panah addresses both lower court's erroneous denials of relief in the argument below.

On January 12, 2018, Panah filed a motion for postconviction discovery pursuant to Penal Code § 1054.9. The motion followed unsuccessful informal attempts to obtain, *inter alia*, documents from DNA LAPD criminalist Yamauchi that may substantiate or corroborate Panah's allegations in the instant proceeding. The motion explains the efforts by Panah to obtain the materials informally; if those materials are ultimately discovered. Panah may move to supplement this Petition with those exhibits. Such a supplement would be timely because the materials were

not previously disclosed, or because they do not alter the allegations presented herein.

III. TIMELINESS OF ALLEGATIONS

This petition is timely pursuant to the timeliness standards set forth in Policy Statement 3 of the Supreme Court Policies Regarding Cases Arising from Judgments of Death ("Policies"), and must be considered on its merits. *See In re Sanders*, 21 Cal. 4th 697 (1999); *In re Robbins*, 18 Cal. 4th 770 (1998); *In re Clark*, 5 Cal. 4th 750 (1993).

This Court applies a four-step analysis to determine if a capital habeas corpus petition is timely:

(i) the petition is *presumptively timely*, having been filed within ninety[1] days of the filing of the reply brief on appeal; (ii) even if not presumptively timely, the petition was filed *without substantial delay;* (iii) even if the petition was filed after a substantial delay, *good cause* justifies the delay; or (iv) even if the petition was filed after a substantial delay without good cause, the petitioner comes within one of the four *Clark exceptions. Sanders,* 21 Cal. 4th at 705 (footnote added).

This petition is filed sixty days after the California Court of Appeal's denial of relief on the same claims. The courts below did not conclude that the petition was time-barred. (*See* Ex. 24.)

The petition raises three claims: a Due Process violation based on the introduction of faulty scientific evidence, and two claims based on the newly amended penal code 1473. Panah's Due Process claim of faulty

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[1] This rule was subsequently amended from ninety to 180 days. Policies, Timeliness Requirements 1-1.1.

expert testimony is timely because it is based on new law—identifying a claim based on faulty evidence—announced by the Ninth Circuit just this year. In *Gimenez v. Ochoa*, the Ninth Circuit recently held that the introduction of flawed expert testimony at trial violates due process "if . . . the introduction of this evidence 'undermined the fundamental fairness of the entire trial.'" 821 F.3d 1136, 1145 (9th Cir. 2016).

Panah's claims based on the newly amended penal code section 1473 is timely because it was filed without substantial delay. "Substantial delay is measured from the time the petitioner or his or her counsel knew, or reasonably should have known, of the information offered in support of the claim and the legal basis for the claim." *Robbins*, 18 Cal. 4th at 780. In *Clark*, 5 Cal. 4th at 775, the California Supreme Court held that "claims which are based on a change in the law which is retroactively applicable to final judgments will be considered if promptly asserted and if application of the former rule is shown to have been prejudicial."

The legal basis for Panah's "new evidence" claim is based on the amendment of Penal Code section 1473(b)(3). This amendment became effective on January 1, 2017. Panah's other statutory claim, based on Penal Code section 1473(e), became effective January 1, 2015. Section 1473(b)(3) and (e) are retroactively applicable to final judgments because the statute specifically provides a basis for pursuing a petition for writ of habeas corpus. *See* Cal. Penal Code § 1473. Because Panah promptly filed this petition following discovery of the legal basis of these claims, they are timely.

If this Court concludes that the filing of this petition is substantially delayed based on the time section 1473(e) was amended, that delay is justified. On November 20, 2014, Panah filed his opening brief in the Ninth Circuit Court of Appeals. Briefing in that case did not conclude until March 9, 2016, with the filing of the Appellant's Reply Brief. Accordingly, counsel could not have reasonably focused its attention on the instant petition while that briefing was taking place.

Regardless, even if this Court were to find the petition substantially delayed, and that the delay is unjustified, the merits of the claims in this Petition indicate a fundamental miscarriage of justice; thus, it would be a fundamental miscarriage of justice to forego merits-review of the claims based on a procedural obstacle.[2] The California Supreme Court requires merits review of claims that are even justifiably substantially delayed if the claim alleges "facts that a fundamental miscarriage of justice has occurred[.]" *In re Clark*, 5 Cal. 4th 750, 775 (1993). Here, the facts below demonstrate that Panah is both innocent of the conviction offenses and death penalty, warranting merits review of his claims. *Id*. at 761.

Moreover, Panah has a death sentence. The state cannot execute a person whose conviction and sentence were unconstitutionally and unreliably obtained, at least not without affording a full and fair opportunity for the petitioner to demonstrate the errors in his trials. *See Ford v. Wainwright*, 477 U.S. 399, 410-11 (1986). Thus, this Court should review

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[2] For these reasons these claims also overcome any procedural bars that may take effect with the passage of Proposition 66, which in any event is currently not effective pending appeal.

the merits of this case, and look beyond any procedural technicalities. *See In re Gallego*, 18 Cal. 4th 825, 842-52 (1998) (Brown, J., concurring and dissenting).

IV. INCORPORATION

Panah hereby incorporates by reference his prior state habeas corpus petitions and accompanying exhibits and briefs (Case Nos. S123962, S155942), and the record and briefs in his direct appeal (Case. No. S045504). All exhibits attached hereto are true and correct copies of what they purport to be.

If Respondent disputes any of the facts alleged herein, Panah requests an evidentiary hearing in this Court so that the factual disputes may be resolved. After Panah has been afforded discovery and the disclosure of material evidence by the prosecution, the use of this Court's subpoena power, funds, and an opportunity to investigate fully, Panah requests an opportunity to supplement or amend this petition.

V. RELEVANT FACTS

On Saturday, November 20, 1993, Nicole Parker went missing from her father's Woodland Hills, California apartment. (CSC Opinion S045504, *People v. Panah*.) The following morning, after several warrantless searches found no evidence of wrongdoing, police found Parker's dead body in a suitcase in Panah's bedroom closet in the apartment he shared with his mother in the same complex. *Id.*

A. The use of serology evidence by the prosecution

During the guilt phase of Panah's trial, Prosecutor Patrick Couwenberg presented the testimony of criminalist William Moore on

serology issues. (19 RT 2016.) William Moore had qualified as an expert serologist about six times before Panah's trial; this case was the first time he testified as an expert at a trial. (19 RT 2017.) Moore testified about the results of ABO blood typing and PGM (phosphoglucomutase) sub-typing he performed on evidence collected from the crime-scene. (19 RT 2061.) Moore found that Panah carries type "B" and "H" antigens, while the victim carried type "A" antigens. (19 RT 2019-28.) Moore testified that a stain containing "A" and "B" antigens "could be indicative of a mixture of physiological fluids [from two separate people]." (19 RT 2022.) He relied on this "mixture" theory to form conclusions that stains found on items collected from the crime scene, including a bed sheet, tissue paper, and a robe, contained mixtures of blood and other bodily fluids that could have come from Panah and Parker. (CSC Opinion S045504.) No other traces of blood, fluids, or other signs of struggle were found in the apartment.

The prosecution never presented that it had ordered DQ-Alpha (DQA1) DNA testing on the stains that disproved Moore's findings.[3] These DNA results were given to the defense but never presented at trial. (11 RT 715-17.) Defense counsel cross-examined Moore about whether "there are techniques in existence that would narrow" the number of people who could be excluded as a contributor to the tissue paper stain. (20 RT 2130.) Moore agreed that there were more "recent techniques that are more

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[3] The prosecutor who presented Moore's testimony later admitted to being a pathological liar and was removed from the Bench following his appointment as a Los Angeles Superior Court Judge. (*See* Ex. 10, Order of Removal at 212-14; Ex. 9, Hearing Before Special Master at 191-92.)

refined than" the ABO and PGM sub-typing Moore used. (20 RT 2130.) These techniques, according to Moore, included "PCR, which is short for polymerase chain reaction, which is a DNA based technique which has the power of amplifying the DNA so that it can be detected more easily." (20 RT 2130.) Counsel asked Moore whether the DNA methods were "workable," to which Moore replied, "the case received consideration by the people at our laboratory who are knowledgeable in the PCR technique" and "the specific results of that I believe were that there was inadequate DNA for a conclusion." (20 RT 2131.) Moore failed to add that DQA1 testing was available and had, in fact, been conducted at the request of the prosecution.

Moore also testified that he swabbed the victim's body in various areas, including the anal, oral, genital, and chest area. (19 RT 2029-30.) No semen was found on any of these swabs. (20 RT 2102.) While anal and oral swabs produced "positive acid phosphatase result[s]," (19 RT 2029), "upon further testing for the presence of the P30 protein and a negative result, the presence of semen could not be conclusively identified." (20 RT 2104.). "P30" is a "semen specific protein not found in any other human physiological fluid." (20 RT 2106.)

1. Tissue paper stain

Moore examined a tissue paper found in Panah's bathroom trashcan that, he said, "bore semen stains, and high amylase activity." (19 RT 2026.) The high level of amylase, according to Moore, "indicate[s] the presence of saliva." (20 RT 2079; *see also* 20 RT 2124 (Moore testifies

that "the amylase present on that wad of tissue paper was from saliva and no other bodily fluid").

Moore stated that the stain contained "A, B, and H antigens." (20 RT 2076.) The "B and H antigenic activity" was consistent with Panah's semen. (19 RT 2028.) According to Moore, the "A antigenic activity" "could have" come from the victim's saliva. (20 RT 2077, 2079, 2028.) As a result of the purported mixture of Panah's semen and the victim's saliva, Moore concluded that the tissue-paper stain "could be consistent with the product of an oral copulation." (20 RT 2079.)

2. Bed sheet stains

Moore testified about two groups of stains found on Panah's bed sheet. He testified that the larger group (displayed in trial exhibit 15-B) "showed the presence of spermatozoa," (20 RT 2066), and contained A and B antigens. (20 RT 2065-66.) The stains demonstrated "amylase activity that could not have originated from the semen itself" and which "was consistent with no other biological fluid, aside from saliva [.]" Based on these findings, Moore agreed with the prosecutor that (1) it would "be reasonable to believe then that the semen could have come from a B secretor," (2) "Mr. Panah is a B secretor[,]" (20 RT 2067), and (3) the saliva could "relate" to the victim "through the A antigenic activity demonstrated by the stain." (20 RT 2073.) As a whole, Moore's testimony created the impression that this larger grouping of stains included a mixture of Panah's semen and the victim's saliva. The pattern of the stains, he said, was consistent with "the spewing of semen across the bed sheet." (20 RT 2067-68.)

The smaller stain (shown in trial exhibit 15-A) exhibited A and B antigens. (20 RT 2064-65.) Moore concluded, though, that background contamination at the location of this smaller stain accounted for the B antigens. (20 RT 2065-66.) Thus, given the contaminated background, Moore could not determine whether this smaller stain contained a mixture of fluids. (20 RT 2066-67.)

3. Stains found on a robe

Moore testified that a robe found in Panah's bedroom had two blood stains: one large stain on the upper left front side of the robe and another smaller stain near the lower left hem. (19 RT 2025.) Moore did not testify about the latter.

Moore identified "high amylase activity" on the stain on the upper left side of the robe, (20 RT 2075), which he had earlier explained indicated the presence of saliva. (19 RT 2025.) He further testified that this blood stain contained "A, B, and H" antigens, with the PGM sub-typing consistent with the victim. (20 RT 2075.) Moore opined that the "blood stain was consistent with Nicole Parker" while the "B antigen was the result of the saliva or the amylase[.]" (19 RT 2023.) Moore agreed with the prosecutor "that the B and H antigenic material can be traced to Mr. Panah," thus resulting in a stain containing a mixture of Panah's saliva with the victim's blood. (20 RT 2076.)

The first piece of evidence the prosecutor cited in his closing was Moore's testimony that there was a mixture of blood and body fluids on the bed sheet from two separate people: Parker's blood and saliva and Panah's semen. (24 RT 238.) He emphasized Moore's mixture theory throughout

his argument and said it showed that Panah's motive was sexual gratification and proved the lewd act and oral copulation special circumstances. (24 RT 2842-46, 2849.)

The prosecutor argued that the crime "was done to satisfy [defendant's] own lust based upon the kind of evidence that you have of ejaculation, semen which is found, semen and saliva, a mixture of which is found on the sheets in the bed." (24 RT 2844.) The prosecutor further argued that the tissue paper with semen and "a concentration of amylase so high that the opinion of the expert was that it came from saliva," demonstrating that Panah "ejaculate(d) in Nicole Parker's mouth" and "that the child was allowed to spit it into a kleenex or toilet paper which was then discarded into the waste basket." (24 RT 2876.) He emphasized "the opinion of the expert that the blood [on the robe] was that of type A, which matched Nicole Parker's," and "the saliva was of type B," "which would match the defendant." (24 RT 2877.) "It was a mixture in the same area and it appeared to be deposited at about the same time." (24 RT 2877.).

B. The use of pathology evidence by the prosecution

The prosecution relied on testimony by forensic pathologist Eva Heuser, M.D., a Deputy Medical Examiner from the Los Angeles County Coroner's Office, to establish the victim's time and cause of the death during the guilt phase of the trial. (21 RT 2331.)

In conducting an autopsy of Parker, Heuser testified that she observed bruising on the victim's head that had caused hemorrhaging and swelling in the brain. (21 RT 2332-35.) She concluded the bruising was consistent with Parker's head striking a wall or floor. (21 RT 2338.) Her

right cheek was swollen as a result of lividity, which is the appearance the skin takes on after death. (21 RT 2344.) With respect to bruising she found on the left side of Parker's face, she opined that it appeared to be finger pressure marks. (21 RT 2348.) She also testified that Parker had bruising on the muscle that runs from behind the ear to the collar bone, consistent with a thumb being pressed to the neck compressing the jugular vein. (21 RT 2353-54.) There was also bruising in the area of the vagina, which she testified was consistent with a finger or penis in the area of the anus consistent with anal penetration, possibly due to sodomy. (21 RT 2385-93.) Heuser went on to testify that sodomy could cause bradycardia, i.e. a slowing of the heart. (21 RT 2400.) In return she opined that the bradycardia caused the victim to asphyxiate. (21 RT 2403.)

According to Heuser, all of these injuries resulted in death:

What I conceptualize, it is the incident that resulted in the traumatic injuries, so even though the little bruises are not in and of themselves significant, they are part of a set of circumstances that led to her death. So all her injuries caused her death in that sense. (21 RT 2404.) Ultimately, Heuser concluded that the victim died from "'[t]raumatic injuries," which consisted of "[c]raniocerebral trauma," "[n]eck compression," and "[s]exual assault with anal lacerations." (Ex. 6, Autopsy Report of E. Heuser, at 21; see also Ex. 7, Autopsy Notes.)

The prosecution used Heuser's testimony to argue that Panah strangled the victim during the commission of sexual assaults including oral copulation, finger penetration of the victim's vagina and sodomy. (24 RT 2881-83.)

Further, the prosecution's theory of the time of death rested on Heuser's pathology evidence. The victim's father testified that Parker went missing at approximately 11:40 a.m. on November 20, 1993. (17 RT 1629-30.) The police claimed to have discovered the body at 10:30 p.m. on November 21, 1993, and they transported the body at 4:10 a.m. on November 22, 1993. Although initially testifying that it was impossible to ascertain the exact time of death (21 RT 2407), Heuser proceeded to give a probable time of death that coincided with the prosecution's theory that Panah was the killer. Heuser testified rigor mortis was "fully set" when the body was found (21 RT 2409), but it would be possible for the body to be in full rigor even thirty-six hours after death. (21 RT 2409.) Moreover, Heuser found what she assumed to be undigested eggs in the victim's stomach, which the victim had eaten the morning of November 20, 1993. (21 RT 2408-09.) Thus, Heuser testified the victim "probably" died within four hours of the ingestion. (21 RT 2408-09.) Panah was seen at his job by 3:00 p.m., and he never returned to his residence before being arrested the following day miles away from his apartment. Heuser's testimony permitted the inference that the victim died while Panah was still in his apartment between 11:40 a.m. and 3:00 p.m. As such, the prosecution argued at trial that Panah killed Parker in his apartment in the late morning or early afternoon hours on Saturday, November 20, 1993 and left her body in a suitcase in his closet when he left for work at 3 p.m. (*See* 21 RT 2407-10; 24 RT 2855-59.)

C. Jury deliberations and verdicts

On December 13, 1994, the prosecution rested. (3 CT 617.) All kidnaping accusations were dismissed from the indictment including counts 2 and 3 and the special circumstance allegation in count 1 pursuant to a defense motion for judgment of acquittal. (*Id.*; *see also* 3 CT 515-19; 22 RT 2504-06.) Trial counsel presented no opening statement, which had been reserved at the beginning of the guilt phase on December 5th. (3 CT 601.) The defense rested the next day, December 14. (3 CT 4102; 23 RT 2789.)

On December 19, 1994, during the second day of deliberations, the jury found Petitioner guilty of all charges, except for the charge of oral copulation. (4 CT 859, 862-65.) Two of the four special circumstances were determined to be true: sodomy and lewd act upon a child. The remaining special circumstance, oral copulation, was found to be not true. (4 CT at 859-60.)

In the penalty phase, the prosecution rested its case in aggravation solely on the circumstances of the crime and the special circumstances found to be true. (33 RT 4102.) The prosecutor emphasized the victim impact evidence and the alleged facts of the crime, including the oral copulation, much of which depended on the serology evidence. (33 RT 4102-06.) After deliberating for four days, the jury returned a death verdict on January 23, 1995. (34 RT 4234.)

D. Postconviction Evidence

As discussed in more detail in the claims below, Panah's post-conviction counsel hired experts who reviewed the pathology and blood

evidence. Two independent pathologists found that Parker likely died outside of the time-frame in which Panah was present in his apartment and did not die as a result of craniocerebral injuries or sexual assault, refuting Heuser's testimony regarding cause and time of death. (Ex. 6, Autopsy Rpt. of E. Heuser; *see also* Ex. 7, Autopsy Notes; Ex. 13, Rpt. of M. Baden; Ex. 15, Decl. of G. Reiber)

Two independent forensic scientists found that DNA evidence which the prosecutor failed to present to the jury refuted Moore's testimony that the stains found on the tissue paper, bed sheets, and robe consisted of a mixture of Panah's and Parker's bodily fluids. (Ex. 11, Forensic Analytical Rpt., 2/27/2004.)

Postconviction discovery also revealed that in addition to the warrantless searches that were conducted of Panah's apartment and yielded negative results, even more searches were conducted by law enforcement, including dog searches, none of which pointed to Panah's apartment as the location where Parker's body was located. (Ex. 1, Watch Comm. Rpt., 11/21/1993.)

VI. CLAIMS FOR RELIEF

A. The admission of false and faulty expert testimony violated Panah's due process rights and warrants relief under Penal Code section 1473.

Panah is entitled to habeas relief under Penal Code section 1473 because expert testimony that was presented at his trial has been undermined by later scientific research or technological advances, and such testimony was substantially material or probative on the issue of guilt or

punishment. The admission of the faulty scientific evidence also violated Panah's federal due process rights under the Fifth and Fourteenth Amendments to the United States Constitution.[4]

1. Legal Standards

a. Due Process

In *Gimenez v. Ochoa*, the Ninth Circuit recently held that the introduction of flawed expert testimony at trial violates due process "if . . . the introduction of this evidence 'undermined the fundamental fairness of the entire trial.'" 821 F.3d at 1145 (9th Cir. 2016) (*quoting Lee v. Houtzdale SCI*, 798 F.3d 159, 162 (3d Cir. 2015)). Moreover, the use of flawed evidence to convict Panah denied him due process because it was so arbitrary that "the factfinder and the adversary system [were] not . . . competent to uncover, recognize, and take due account of its shortcomings." *Barefoot v. Estelle*, 463 U.S. 880, 899 (1983), *superseded on other grounds by* 28 U.S.C. § 2253(c)(2); *see Hicks v. Oklahoma*, 447 U.S. 343, 346 (1980) ("Such arbitrary disregard of the petitioner's right to liberty is a denial of due process of law.").

A "conviction based on false evidence warrants a new trial if there is a reasonable probability that, without the evidence, the result of the proceeding would have been different." *Spivey v. Rocha*, 194 F.3d 971, 979 (9th Cir. 1999) (internal quotation marks and alteration omitted). As such, the standard for determining prejudice under Panah's due process

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[4] Because Panah's due process and section 1473 claims rely on the same factual bases, they are discussed together to avoid repetition and to aid in the efficiency of this Court's review.

claim is identical to the materiality standard for his section 1473 claim. *Compare Cox*, 30 Cal. 4th at 1008-09 *with Spivey*, 194 F.3d at 979. A new trial is the only just result when a person is convicted on false testimony. *See Mesarosh v. United States*, 352 U.S. 1, 9 (1956) ("The dignity of the United States Government will not permit the conviction of any person on tainted testimony.")

b. California Penal Code section 1473

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

False evidence includes opinions of experts "that have been undermined by later scientific research or technological advances." Cal. Penal Code 1473(e)(1). False evidence is "substantially material or probative" if there is a reasonable probability that, had the evidence not been introduced, the result of the trial would have been different. *In re Cox*, 30 Cal. 4th 974, 1008-09 (2003); *see In re Richards*, 55 Cal. 4th 948, 961 (2012). Whether there is a reasonable probability that the result would have been different is an objective determination based on the totality of the circumstances. *Cox*, 30 Cal. 4th at 1008-09; *see In re Malone*, 12 Cal. 4th 935, 965-66 (1996). Courts have looked at the strength of evidence admitted against a defendant, including circumstantial evidence, to determine whether false evidence was material. *In re Richards*, 63 Cal. 4th 291, 313-15 (2016) (granting habeas corpus because, given weak

circumstantial evidence, it was reasonably probable that faulty expert testimony about bite mark evidence affected trial's outcome); *see also Strickland v. Washington*, 466 U.S. 668, 696 (1984) ("[A] verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support.").

Under section 1473, Panah need not prove that the false testimony was perjurious. *See Richards*, 55 Cal. 4th at 961; *In re Roberts*, 29 Cal. 4th 726, 741-42 (2003). Nor must he prove that the prosecution knew or should have known of its falsity. *Id*. § 1473(c); *People v. Marshall*, 13 Cal. 4th 799, 829-30 (1996); *see In re Hall*, 30 Cal. 3d 408, 424 (1981); *see also Richards*, 55 Cal. 4th at 960-62. "So long as some piece of evidence at trial was actually false, and so long as it is reasonably probable that without that evidence the verdict would have been different, habeas corpus relief is appropriate." *Richards*, 55 Cal. 4th at 961.

2. Serologist Moore presented false and faulty expert testimony about the origin of stains found in Panah's bedroom.

Before trial, the prosecutor ordered DQ-Alpha (DQA1) DNA testing on the stains found on the tissue paper, bed sheet, and robe. (9 RT 518, 517-18.) Some of the raw results were given to the defense but never presented at trial. (11 RT 715-17.) On cross examination, Moore agreed that there were more "recent techniques that are more refined than" the ABO and PGM sub-typing Moore used, but he did not acknowledge that DQA1 testing was available and had, in fact, been performed at the request of the prosecution. (20 RT 2130.)

In connection with his habeas petition, Panah had the prosecution's DNA testing analyzed by two experts from an independent forensic laboratory: Dr. Lisa Calandro, a DNA laboratory supervisor for Forensic Analytical, on February 27, 2004 and Keith Inman, a senior forensic scientist at Forensic Analytical on May 25, 2006. (Ex. 11, Calandro at 223-32; Ex. 12, Inman at 233-34.) Calandro's and Inman's later analyses of the DQA1 testing completely undermines Moore's testimony about each of the stains he analyzed.

a. Tissue paper stain

The DNA experts reviewed the prosecution's testing of the stain found on a tissue paper in Panah's bathroom. Both sides agree that Panah's DQA1 type is 1.3, 4 and the victim's DQA1 type is 2, 4; both have the "4" allele. (Ex. 11, Calandro at 232.) According to Dr. Calandro's review, the tissue paper stain contained DQ-alpha type 1.3, 4 for both the sperm and epithelial cell fractions tested. *Id*. at 227. Thus, the DNA results conclusively eliminate the victim "as a contributor to the tissue stain sample." *Id*. At 228. Dr. Colandro summarized: the "DNA results contradict the State's assertion that the sample from the tissue contained a mixture of body fluids from Hooman Panah and Nicole Parker." (Ex. 11, Calandro at 227.)

Inman's supplemental report, based on his "review of the hybridization record[,] supports the findings and observations of Dr. Calandro, specifically that no evidence exists to support a mixture of semen and saliva from Mr. Panah and Ms. Parker." (Ex. 12, Inman at 233.) Therefore, Moore presented false and faulty testimony that the tissue paper

contained a mixture of Panah's semen and the victim's saliva, suggesting sexual activity between them, in support of the prosecution's felony murder theory and the special allegations in support of the death penalty.

b. Bed sheet stains

Dr. Calandro reviewed the prosecution's testing of the two separate groupings of stains on the bed sheets that Moore analyzed. First, for the larger grouping of the five stains containing spermatozoa, Dr. Calandro found that the stains "either yielded 'inconclusive' results or DQA1 type 1.3, 4, which is consistent with Mr. Panah's type." (Ex. 11, Calandro at 229.) Dr. Calandro noted that if the victim had "'spit out' ejaculate onto the bed sheet, one would have expected . . . to detect [the victim's] DNA in significant quantities on the bed sheet." *Id.* Yet, "[n]o DNA typing results consistent with that of Nicole Parker were obtained from any of the samples from the bed sheet." *Id.* Thus, the "DNA typing results do not support the hypothesis that the areas tested contain a mixture of semen and saliva stains from Mr. Panah and Ms. Parker, respectively." *Id.*

Dr. Calandro's report had a caveat: the "inconclusive" results on the various stains could not be reviewed without copies of the "DQA1 typing strip photographs[.]" *Id.* Inman's supplemental report, made after counsel for Panah obtained the strips, assessed the inconclusive results. Inman found that for the five semen stains tested, two had a DNA type consistent with Panah (thus excluding the victim as a contributor) and three "gave weak 4 activity in both the non-sperm and sperm fractions." (Ex. 12, Inman at 234.) The weak activity was called inconclusive in the LAPD report, presumably because "the control 'C' dot was weak or absent." *Id.*

Inman agreed with the LAPD's conclusion that the "weak 4 activity" was inconclusive based on the weak or absent control "C" dot. He opined that the findings "further supports the finding that no evidence exists of a mixture of biological material from Mr. Panah and Ms. Parker" on the bed sheet. *Id*. As such, Moore provided false and faulty testimony that the larger grouping of stains included a mixture of Panah's semen and the victim's saliva.

For the smaller stain, Dr. Calandro confirmed Moore's testimony that the control sample for the bed sheet contained type B antigens, which "suggests that the type B in the stain could be due to a background source of biological material on the sheet." (Ex 11, Calandro at 228.) Thus, she confirmed that the smaller stain lacked evidentiary value since it could have resulted from background material unrelated to the victim or the crime. Similar to her conclusion regarding Moore's testimony about this stain, Dr. Calandro concluded that there was no evidence of a mixture of bodily fluids.

c. Stains found on a robe

DNA expert Dr. Lisa Calandro analyzed the stains on the robe, as well, in connection with Panah's habeas petition. She concluded that contrary to Moore's testimony, the amount of amylase found on the robe "is not necessarily indicative of the presence of saliva and may be the result of perspiration." (Ex. 11, Calandro at 230.) Dr. Calandro reported that the DQA1 results show that while the victim "could not be eliminated as a contributor . . . Hooman Panah was eliminated as a contributor to the DNA stain from this sample." (*Id*. at 231.) Thus, the DNA results "do not

provide evidence of a mixture of body fluids from Nicole Parker and Hooman Panah." Inman's supplemental report confirmed Dr. Calandro's conclusion that the prosecution's DQA1 results eliminated Panah as a contributor to the stain that Moore told the jury could "be traced to Mr. Panah." (Ex. 12, Inman; 20 RT 2076.)

Dr. Calandro's report also addressed the stain that Moore did not testify about, noting that the prosecution obtained DNA testing of "an additional cloth sample and control area from the kimono robe [that] yielded inconclusive results[.]" (Ex 11, Calandro at 231.) Dr. Calandro stated that she needed copies of the typing strips to review the LAPD's inconclusive finding. Id. Inman reviewed the strips and found "weak 4 activity" in this stain, which the prosecution's lab labeled inconclusive, again "because the control 'C' dot was weak or absent." (Ex. 12, Inman at 234.) Inman concluded "[n]o evidence exists in the DNA evidence of a mixture of biological material from Mr. Panah and Ms. Parker on this item." *Id.*

In sum, Dr. Calandro concluded that "the biological evidence analyses reviewed . . . do not support the hypothesis that intimate sexual contact occurred between Hooman Panah and Nicole Parker. Testimony regarding the DNA analyses would not have supported the conclusions that the stains tested were mixture of body fluids." (Ex. 11, Calandro at 232.) Inman was similarly unequivocal: "No biological evidence exists to support the hypothesis that a mixture of biological fluids from Mr. Panah and Ms. Parker was present on the tissue, bedsheet, or kimono" and "there is no evidence to suggest intimate sexual contact between Mr. Panah and

Parker." (Ex. 12, Inman at 231.) Thus, Moore presented false and faulty serology testimony to the jury.

d. The postconviction DNA analysis and an advanced and more precise identification method than the serology evidence and is not merely impeaching.

The courts below found that the expert analyses offered by petitioner consisted of "nothing more than impeachment of the expert testimony offered at trial." (Ex. 25.) This characterization is incorrect and inconsistent with the California Supreme Court's holding in *In re Richards*, 55 Cal. 4th 948, 963 (2012). The postconviction DNA evidence is not merely an alternative expert opinion from Moore's testimony about a mixture based on A and B antigen mixing. Rather, it is an advancement from serological foundation of Moore's trial theory that entirely refutes it and proves that Moore's mixture theory is not just impeachable, but verifiably false.

Richards holds that "when new expert opinion testimony is offered that criticizes or casts doubt on opinion testimony given at trial . . . one has merely demonstrated the subjective component of expert opinion testimony." 55 Cal. 4th at 963. Here, however, the DNA analysis offered in postconviction is not merely a subjective disagreement with Moore's mixture theory. Indeed, R*ichards* explains that when there is an advancement "in the witness's field of expertise" that "allow[s] experts to reach an objectively more accurate conclusion," the trial expert testimony may be considered false under Penal Code § 1473. *Id*. That is the case

here. The DNA analysis—by looking at specific alleles of DNA and not just the much broader categorization of A and B antigens—demonstrates that Moore's theory of a mixture of A and B antigens forming an AB blood type is objectively false.

Moore's testimony at trial was based on his expertise in the field of serology. At trial, he described the field of serology as the characterizing of stains from "human body fluids" and to "derive some information about that stain that could lead to the identity of a suspect or a victim." (19 RT 2017-18.) Postconviction experts Lisa Colandro and Keith Inman did not provide expert opinions on serology; rather, they provided an analysis of the DNA—the deoxyribonucleic acid—found in the tested stains. They did not opine on the blood-typing of the stains, which was the sole basis for Moore's testimony. Indeed, Moore testified at trial that he does not do DNA testing. (20 RT 2137.) More importantly, Moore admitted that DNA testing, including "polymerase chain reaction" testing, is a more refined technique than serology, which was the subject of his testimony. (20 RT 2130.) As explained above, the DNA analysis provides an objective basis to conclude that Moore's testimony—that there was a mixture of Panah's and Parker's bodily fluids on the stains—was false.

Callandro's and Inman's reports are not merely subjective disagreements with Moore's testimony. They are objective conclusions based on an analysis of the DNA material found in the same stains for which Moore offered his testimony. The differing results are based on DNA, which Moore admitted at trial is a more refined method of testing than his serological (*i.e.*, blood-typing) examination. (20 RT 2130.)

Accordingly, because Collandro's and Inman's DNA analysis is not merely a differing opinion of an expert "in the same field" as Moore, and because the DNA analysis provides for "an objectively more accurate conclusion," it properly renders Moore's testimony false within the meaning of Section 1473(e). *Richards*, 55 Cal. 4th at 963.

e. The falsity of Moore's testimony is further shown by the materials in the prosecution's possession at the time of trial.

On October 17, 1994, the prosecution represented to the trial court that it expected to introduce DNA results into evidence. (9 RT 517.) On November 14, 1994, however, the prosecution reversed course by informing the trial court that it "decided for tactical reasons not to present DNA evidence during the case in chief." (11 RT 718.) As a result of that announcement, the trial court found that a *Kelly-Frye* hearing was unnecessary to determine the reliability of any DNA analysis or results. (*Id*.)

In reality, the DQ Alpha testing that the prosecution ordered supported the later conclusions by Drs. Inman and Callandro that there was no mixture of fluids. Collin Yamauchi, a criminalist at the Los Angeles Police Department, tested various stains including those on the kimono, sheet and tissue, and did not find that any of these stains contained genetic material belonging to both Parker and Panah. (Ex. 17, C. Yamauchi Rpt., 7/15/94.) In fact, these results were reviewed in the year 2000 by deputy district attorney Lisa Kahn, from the complaints division of the Los

Angeles District Attorney's Office and also found not to contain a mixture of Parker and Panah's DNA. (Ex. 18, L. Kahn Memo.) Thus, the prosecution's "strategic reason" for not presenting the DNA evidence was most likely that it would have disproved Moore's mixture theory.

Panah's allegations concerning the falsity of Moore's are supported by the Exhibits cited above, which is the totality of what is reasonably available to him. An Order to Show Cause—and discovery power—are necessary to obtain any documents that have not been disclosed by the Los Angeles Police Department's Forensic Laboratory or the Los Angeles County District Attorney's Office related to Moore's serology testing and testimony as well as Yamauchi's DNA testing. Absent subpoena power, any undisclosed materials that may substantiate Panah's allegations are not reasonably available to Panah. *See People v. Duval*, 9 Cal. 4th 464, 474 (1995).

3. Pathologist Heuser presented false and faulty expert testimony about the cause and time of the victim's death.

In connection with Panah's habeas petition, two pathologists, Dr. Gregory Reiber and Dr. Michael Baden, reviewed the prosecution's pathology evidence. Their analyses expose as faulty and false Heuser's testimony about the cause and time of the victim's death.

a. Cause of death

Pathologist Heuser concluded that the victim died from "'[t]raumatic injuries," which consisted of "[c]raniocerebral trauma," "[n]eck compression," and "[s]exual assault with anal lacerations." (Ex. 6, Autopsy

Rpt. of E. Heuser at 21; *see also* Ex. 7, Autopsy Notes.) These conclusions were false. The independent pathologists concluded that head trauma did not cause the victim's death. Dr. Reiber found that a "head and brain examination reveal no injuries of a severity to account for the child's death or to a result in a significant contribution to her death." (Ex. 15, G. Reiber Decl., at 8.) Similarly, Dr. Baden found that "there was no injury to the brain – no trauma to the brain – and that Nicole's brain was entirely normal." He concluded that "craniocerebrial injuries" did not cause the victim's "death and a forensic pathologist expert would have been able to explain this to counsel and the jury." (Ex. 13, Rep. of M. Baden, at 236.)

Nor was the victim strangled. Dr. Reiber concluded that "there is limited and equivocal evidence of neck compression, and manual strangulation is very unlikely due to the lack of bilateral neck hemorrhages and lack of petechial hemorrhages in the eyes." (Ex. 15, G. Rieber Decl., ¶ 15.) Reiber's declaration explains that the prosecution's evidence of strangulation was likely the result of "post mortem positioning of the child on the right side of the suitcase," making the "scant hemorrhages in the neck and the petechiae in the facial skin" "be representative of exaggerated hypostasis (lividity)." (*Id*. at ¶ 9.)

Heuser's testimony that sexual assault contributed to the victim's death was also false and premised on faulty science. Dr. Baden explains that "the full autopsy and the examination of the microscopic slides showed that the sexual assault did not produce injuries sufficient to cause death." (Ex. 13, Rep. of M. Baden at 236.) More specifically, Dr. Reiber found that the prosecution's theory that anal penetration could have contributed to

the victim's death "is a novel theory of causation not found in the published literature, and as such forms an improper basis for offering expert opinion." (Ex. 15, G. Reiber Decl., ¶ 10.) Further, Dr. Reiber found that a penis was not responsible for the lacerations found on the victim because of the lack of semen or other biological evidence retrieved from the victim. (*Id.* ¶ 11.)

Thus, "neither craniocerebral injuries nor a sexual assault caused [Parker's] death." (Ex. 13, Rep. of M. Baden at 236.)

b. Time of death

Heuser's testimony about the time of death was also flawed. At trial, the prosecution argued, through the help of Heuser's testimony that the victim died in Panah's apartment on Saturday, November 20, 1993. All parties agree that Panah left the apartment that day to go to work, and he was seen at his job by 3 p.m. He never returned to the residence and was arrested the following day miles away from his apartment. Accordingly, if the victim did not die on November 20, 1993, Panah could not have been responsible for her death.

In fact, post-conviction expert Dr. Reiber explains that the victim died "a significant number of hours" later than what Heuser testified to, exonerating Panah. (Ex. 15, Decl. of G. Reiber, ¶ 13.) He explains that rigor mortis takes six to eight hours to fully develop, and it decreases in intensity twenty-four hours after the time of death. (*Id.*) If the victim died when the prosecution theorized she did, in the late-morning or early afternoon hours of November 20, 1993, "rigor should have been significantly decreased from a maximal or 'fully fixed' condition by late evening of 11-21-93, approximately 36 hours since death" when the

victim's body was found by police. (*Id.*) Heuser explained this discrepancy by opining that under "cool conditions" rigor mortis can be delayed. (21 RT 2410.) Dr. Reiber, however, refutes this theory by noting that the "child was found in a suitcase, wrapped in a sheet, under a pile of other objects," and in such a situation there would be "insulation causing retention of body heat and promoting more rapid disappearance of rigor." (Ex. 15, Decl. of G. Reiber, ¶ 13.)

Heuser also falsely opined that undigested eggs found in the victim indicates that she died not long after she had eaten breakfast on the morning of November 20, 1993. (21 RT 2407-08.) Dr. Reiber explains that Heuser's opinion was false and faulty because it was based on unreliable science:

The use of stomach contents as a basis for time of death estimation is unreliable; stomach emptying can be delayed by severe stress, and if the child were abducted before a breakfast meal had emptied from the stomach, the stress of the ensuing captivity could significantly delay emptying of the stomach and cause the estimated time of death to be much earlier than actually occurred. The lack of any additional analysis to confirm the identity and condition of the material in the stomach renders this basis for time of death even more unreliable. (Ex. 15, Decl. of G. Reiber, ¶ 13.) Therefore, the falsity of Heuser's testimony is not merely a subjective opinion by Reiber, but rather Reiber exposes Heuser's trial testimony as objectively false. [5]

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[5] Even the California Supreme Court, in recounting the facts of the case, stated that Heuser "was unable to state a time of death"

4. Taken together, the false and faulty evidence admitted at trial was substantially material and undermined the fairness of the entire trial.

The post-conviction DNA and pathology evidence disprove the prosecution's entire theory of the case: that the victim died during the commission of a sodomy or other sexual assault committed by Panah. Instead, the DNA evidence does not link Panah to the victim at all. Moreover, the post-conviction pathology evidence demonstrates that the victim died at a time when Panah could not have been present in his apartment. As such, there is a reasonable probability that had the substantial false and faulty serology and pathology evidence not been presented, the result of Panah's trial would have been different.

a. The false serology and pathology testimony was significant and prejudicial.

The prosecution used the false and faulty serology and pathology evidence to push his case for first-degree murder and Panah's death eligibility.

The prosecution argued that Moore's serology testimony helped prove each special circumstance and underlying felony except the one

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suggesting that the Court also found Heuser's testimony regarding time of death not to be credible. *People v. Panah*, 35 Cal 4th 395, 415 (2005). The Attorney General adopted the California Supreme Court's characterization by quoting this language in multiple briefs throughout the federal litigation of Panah's claims. (*See, e.g.,* USDC Case No. 05-07606, Dkt No. 44 at 18, Dkt No. 118 at 17, Dkt. No. 155 at 11.) Parker's death certificate is also inconsistent with Heuser's testimony. (Ex. 8, Cert of Death.)

involving a foreign object. The prosecution greatly emphasized Moore's testimony in the guilt phase closing argument. For example, the prosecutor relied on Moore's testimony to link the bed sheet stains to the tissue paper stain, arguing that together they proved the oral copulation felony and special-circumstance charges. He told the jurors that:

the evidence that was presented to you is very consistent with the fact that he ejaculated in her mouth, that he allowed her to spit it out in a kleenex, because we have the evidence of semen of his blood type, high amylase content, indicating saliva which matches her blood type on the kleenex, as well as having a spattering on the bed sheet of a mixture of semen and saliva — again high amylase indicating saliva — of his type B and her type A.

And what you can reasonably infer from that is that Nicole was on the bed. When he ejaculated in her mouth, he got kleenex had her spit it out, he went back to throw it away. She didn't like the taste in her mouth and continued to spit it out, what was left, on the bed. That's why there's traces of it on the sheet. (24 RT 2847.) (*see also* 24 RT 2961.) ("There is also semen and saliva mixture on the bed sheet, the bed sheet that she was wrapped in. That, too, matches with Nicole Parker and Mr. Panah.").

The prosecution also relied on Moore's testimony about the purported mixture present in the stains on the robe to support the sodomy and oral copulation felony and special circumstance arguments. The prosecution explained that "[i]f [Panah] had orally copulated Nicole Parker, and if the robe had been taken off, and the attack of sodomy . . . caused bleeding then occurred [sic] on top of the robe, the saliva of the defendant

could have been deposited on the robe at that time from her body, the same time that the act of sodomy occurred." (24 RT 2817.)

During rebuttal argument, the prosecution argued that Moore's testimony—that the stains contained a mixture of Panah's and the victim's fluids—were supported by the fact that "type A happens to be one of the people in this case. The B type happens to be the other person involved in this case. There's no person with AB type that we know of that anybody could show." (24 RT 2959.)

The prosecution then addressed the issue of DNA testing, telling the jury that "it's ordered in some cases, but it's usually ordered in a situation where you don't have other types of proof available. In this situation we have the proof available." That proof, according to the prosecution, is, in part, that the defendant and the victim's "blood typing matches," the evidence recovered at the scene. (24 RT 2963.) The prosecution told the jury, "nobody has attempted to pull the wool over your eyes." (24 RT 2959.) The prosecution failed to inform the jury that it had, in fact, ordered DNA testing, which is far more scientifically precise than serology evidence, or that the results of that testing wholly contradicted the serology evidence presented to the jury. Thus, this false testimony, couched in science and presented by an "expert," allowed the jury to convict Panah and find true the sodomy and lewd acts special circumstances. Indeed, in the absence of this false evidence, the jury had no basis to find Panah guilty of first-degree murder or other charged offenses. Nor would the jury have found Panah guilty of the special circumstances making him death eligible. Finally, because the prosecutor relied on the false evidence to make its case

in aggravation at the penalty phase, Panah's death sentence is also impacted by the false testimony.

Similar to the serology evidence, the prosecution presented false and faulty pathology evidence to paint an inflammatory picture of the victim's death. The state pathologist's testimony allowed the prosecution to conclude that the cause of death was "[t]raumatic injuries," consisting of "[c]raniocerebral trauma," [n]eck compression," and "[s]exual assault with anal lacerations." (Ex. 6; Autopsy Rpt.; Ex. 7, Autopsy Notes.) These erroneous conclusions were critical to establish Panah's guilt of the underlying felonies supporting his first-degree murder conviction. The prosecutor was also able to inflame the juror's passion by inferring from the pathology evidence that Panah's "penis [was] moving in and out inside the rectum and banging against the vaginal wall" that "the doctor said, could have caused death" by placing pressure on an artery to slow the victim's heart rate. (24 RT 2885.) Again, this false evidence allowed the prosecution to argue that the victim was killed in the course of sodomy. The prosecution also used the false evidence of the time of the victim's death to establish that Panah killed the victim in the early afternoon of November 20, 1993, and also as evidence that "she was killed during the commission of [the underlying] felonies." (24 RT 2889.)

Therefore, without this flawed pathology evidence, it is reasonably probable that the outcome of Panah's guilt phase trial would have been different. Indeed, in a sexual assault kit performed on Parker, none of Panah's biological material—including Panah's blood type of saliva—was

identified. Nor was semen detected on swabs and slides from samples of Parker's anal area. (19 RT 2028-30; 20 RT 2106-07.)

The prosecution's false and faulty evidence about sexual contact between Panah and the victim was not only incriminating at the guilt phase of Panah's trial, but was also highly prejudicial at the penalty phase. Significantly, the prosecution's case at the penalty phase consisted solely of reintroducing the nature and circumstances of the crime, including victim impact evidence. *See* Cal. Pen. Code § 190.3(a). For example, the prosecutor used the serology and pathology evidence to argue at penalty that Panah killed the victim "intentionally by cutting off the blood supply that's coming back from her brain, by holding his hand over her mouth . . . and then [she] dies by the sheer brutality of the sexual assault itself that you found him guilty of." (33 RT 4088.) Thus, the inferred sexual contact from the prosecution's false evidence was a prominent aggravating factor. As such, had the jury known the truth about the prosecution's false serology and pathology testimony, it would have neither convicted Panah at the guilt phase nor sentenced him to death at the penalty phase.

b. The evidence of guilt against Panah was not strong.

Given the weakness of the prosecution's case, there is a reasonable probability that absent the false and faulty scientific evidence, Panah would not have been convicted or sentenced to death. The prosecution's case was weak because there was little to no physical evidence placing Panah at the scene of the discovery of the body at the time of death or establishing that the special circumstance crimes making him death eligible had occurred.

For example, Panah's DNA was not found anywhere on the victim. Indeed, Moore's false serology testimony was the sole scientific evidence presented at trial that linked Panah as the perpetrator.

Without Heuser's false and faulty pathology evidence about the cause of death, there was no evidence that the victim's death resulted from a sexual assault or that she had been sexually assaulted to such a degree that could have caused her heart to stop.

Further, without Heuser's false pathology evidence about the time of death, the fact the victim was found in Panah's bedroom is not dispositive, especially given trial counsel's argument and the fact that someone else had access to the apartment. (*See* 24 RT 2912-18, 2946-47.) Ahmad Seihoon was staying with Panah and his mother, had access to Panah's bedroom, and was the last person seen with the victim. (18 RT 1687, 1751, 1784.) He also had keys to the apartment. (Ex. 2, Crime Scene Rpts, at 6.) Indeed, at 11:00 a.m., on the day that the victim disappeared, Seihoon admitted leaving Panah's apartment with a suitcase. (*See Id.*; Ex. 3, LAPD Chron., 11/20-21/1993; *see also* Ex. 2, West Valley Rpt. Severns, 11/22/1993.) No traces of blood, fingerprints, or other evidence of any struggle inside Panah's room were identified by the police. Thus, Seihoon could have easily killed Parker and planted her body in a suitcase in Panah's bedroom. Seihoon's guilt would have explained why multiple searches of the apartment and Panah's room —including dog and suitcase

searches — had come back empty until Parker's body was discovered the night of Sunday November 21, 1993.[6]

Notably, the jury took four days to determine Panah's penalty (4 CT 909-10, 914-15, 961), indicating it was a close and difficult decision. *See Thomas v. Chappell*, 678 F.3d 1086, 1098 (9th Cir. 2012) ("lengthy deliberations suggest a difficult case"); *Mayfield v. Woodford*, 270 F.3d 915, 932 (9th Cir. 2001) (relying on the fact that jury deliberated for four hours before writing a note to the judge asking whether all jurors must agree). Therefore, had the jury been presented the true pathology and serology evidence, it is reasonably probable that at least one juror would have found that there was insufficient evidence of Panah's guilt, let alone to sentence him to death.

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[6] An initial search of the apartment was conducted by 4 officers and included an examination of the entire apartment including bedrooms and closets. (9 RT 457-58; Ex. 2; West Valley Rpt. Severns at 6.2; Ex. 4, Incident Summary Rpt., 12/6/1993.) Another search was conducted by at least 7 officers and included a search of Panah's closet and suitcases. (8 RT 264-65, 289-90.) Another search of the apartment was conducted after Panah's car was searched. (2 CT 488.) Police dogs were also used to search the premises. (9 RT 530; Ex. 1, LAPD Watch Comm. Rpt.) Parker's body was found after a search conducted between 9:30 and 10:00 p.m. the night of November 21, 1993. (2 CT 430, 438-45.)

B. The new evidence demonstrating that the prosecution's serologist and pathologist testified falsely is of such decisive force and value that it would have more likely than not changed the outcome at trial.

Even if the false serology and pathology evidence do not violate federal due process or Penal Code section 1473(b)(1) or (b)(2), the evidence demonstrating the falsity of the prosecution's evidence separately warrants habeas relief under the newly amended Penal Code section 1473)(b)(3)(A).

1. The Legislature recently lowered the burden of demonstrating relief based on new evidence.

Until this year, a petitioner could not obtain relief based upon new evidence unless that evidence pointed "unerringly" to innocence and "completely undermine[d] the entire structure of the case presented by the prosecution at the time of the conviction." *In re Lindley*, 29 Cal. 2d 709, 724 (1947). Effective January 1, 2017, the burden of proof to obtain relief for new-evidence claims was significantly lowered. Relief is now required where a petitioner brings new evidence that is "of such decisive force and value that it would have more likely than not changed the outcome at trial." Pen. Code § 1473(b)(3)(A). Because this claims is "based on a change in the law" it must be "considered [on the merits] if promptly asserted[.]" *In re Clark*, 5 Cal. 4th 750, 775 (1993). Under the new codified standard, Panah is entitled to habeas relief.

2. The DNA and pathology analyses are "new evidence" within the meaning of the statute.

The newly-codified new-evidence statute defines "new evidence" as "evidence that has been discovered after trial, that could not have been discovered prior to trial by the exercise of due diligence, and is admissible and not merely cumulative, corroborative, collateral, or impeaching." Pen. Code § 1473(b)(3)(B). The California Court of Appeal for the Third Appellate District recently interpreted the "new evidence" standard to be "similar to the 'new evidence' standard in a motion for new trial under California law." *In re Miles*, 2017 Cal. App. LEXIS 37, *26 (Jan. 19, 2017). The new-trial standard defines new evidence as evidence that "is in fact newly discovered; that is not merely cumulative to other evidence bearing on the factual issue; . . . and that the moving party could not, with reasonable diligence have discovered and produced [ ] at trial." *Id*. at *26-27 citing *People v. McDaniel*, 16 Cal. 3d 156, 178 (1976). The *Miles* Court also found that the newly-codified standard is similar to the federal new-trial standard, which states that the evidence "was unknown or unavailable to the defendant at the time of trial" and that the "failure to learn of the evidence was not due to lack of diligence by the defendant[.]" *Miles*, 2017 Cal. App. LEXIS at *27 citing *United States v. Colon-Munoz*, 318 F.3d 348, 358 (1st Cir. 2003).

Here, the analysis of the DNA collected from stains on items found in Panah's bedroom constitutes new evidence within the meaning of the newly-codified statute. The DNA analysis—contained in two reports by experts Lisa Calandro and Keith Inman—was unavailable to Panah at trial

despite his personal diligence in attempting to obtain DNA testing of the stains because his trial counsel refused to seek such testing. Panah took the only step available to him at trial to obtain a DNA analysis—he raised a *Marsden*[7] motion to fire his lawyer in order to obtain the necessary investigation into the DNA and other issues surrounding Panah's innocence. (*Marsden* Hearing RT 1024, 11/21/1994.) The trial court and Panah's counsel stifled Panah's efforts. The failure to obtain the exculpatory DNA analysis was, therefore, in spite of Panah's diligence.

a. Trial counsel's failure to expose the false serology and pathology cannot be imputed to Panah; doing so would result in a miscarriage of justice.

The California Court of Appeal found that the testing presented by Panah was "testing and material available to the defense at the time of trial." (Ex. 25.) Presumably, the Court of Appeal was persuaded by the Superior Court's reasoning that the DNA results—exposing Moore's false serology reports—were not "new" because they could have been discovered by due diligence, *to wit*, the due diligence of Panah's trial counsel. (Ex. 24, Sup. Ct. Decision, at 2.) The courts below are wrong.

The test for "new evidence" under the statute is whether the evidence was discoverable with the exercise of due diligence. Pen. Code § 1473(b)(3)(B). In the unique circumstances presented in this case, the post-conviction DNA analysis and pathology evidence were not discoverable *to Panah*, despite his due diligence in obtaining the evidence. It is true that

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[7] *People v. Marsden*, 2 Cal. 3d 118 (1970).

trial counsel failed to obtain the evidence, but his failure to do so was unreasonable and outside the agency-principle relationship. Counsel did not just fail to consult with a DNA expert, he lied to the court about the steps he had taken, *vel non*, to acquire expert consultants. More importantly, counsel's omissions were despite Panah's *specific request for DNA testing*, which he made to the trial court when he sought to remove his trial counsel.

Because the Court of Appeal did not explain its reasoning regarding its conclusion for why Panah's postconviction evidence is not new, Panah addresses the more detailed reasoning of the Superior Court below. It reasoned that "trial counsel made a tactical decision not to seek the services of a DNA expert, meaning that had he exhausted all avenues of investigation he could certainly have hired one." (*Id*.) The Superior court also found that trial counsel could have similarly "hired an expert pathologist" and that Panah "failed to provide a reason" why counsel did not. (*Id*.) The court then dismissed Panah's argument that the attorney-client relationship was severed based on counsel's incompetence by relying on the California Supreme Court's opinion on direct appeal upholding the trial court's denial of Panah's motion to remove counsel. (*Id*.) Each finding is erroneous.

The Superior Court's reliance on the direct appeal decision is improper because that opinion is based only on the record. It does not take into account the evidence Panah presented in postconviction demonstrating that trial counsel acted unreasonably and without a tactical basis.

First, regarding pathology, counsel committed fraud on the trial court and Panah by promising and insisting that he had retained a pathologist when, in fact, he had not. Counsel called the prosecution's pathologist "the most important witness for the people" and acknowledged that "the question of whether Mr. Panah lives or dies will rise and fall on her testimony." (21 RT 2221.) Counsel further claimed to the trial court to "have on board" pathologist Dr. Griffith Thomas. (21 RT 2221, 2324.) This was a lie. Thomas has stated in a sworn declaration that he was "never retained or appointed to assist Mr. Sheahen" and "never received any material for review from Mr. Sheahen to the best of [his] recollection." (Ex. 19, G. Thomas Decl., at ¶ 4.) Sheahen's co-counsel, Symak Shafi-Nia and William Chais confirm that Sheahen never retained a pathologist. (Ex. 22, S. Shafi-Nia Decl., at ¶ 21; Ex. 20, W. Chais Decl., at ¶ 13.) Thus, contrary to his representations, trial counsel neither consulted with nor retained to testify an expert pathologist. Such misrepresentation to the court cannot be attributed to Panah.

Second, regarding the serology evidence, trial counsel acted unreasonably by failing to retain a DNA expert. Panah's trial counsel first learned of the prosecution's DNA testing on October 14, 1994. (9 RT 519-20.) At that time, the trial court strongly implied that counsel needed an expert, telling him "hopefully you have somebody lined up already, or if not, you'll . . . take care of that." (9 RT 521.) Trial counsel reassured the court "that will be taken care of." (9 RT 521.) But trial counsel never retained an expert despite learning that the prosecution made a tactical decision to not use the DNA results as part of its case. A month after

disclosing the DNA testing, the prosecutor stated on the record that it "decided not to offer any DNA evidence[.]" (11 RT 715.) The prosecution's decision to forego presenting forensic evidence that is almost universally regarded as the most reliable scientific evidence available was a glaring red-flag that indicated the DNA must have been exculpatory—or at least unhelpful to the prosecution's case.

But counsel did not make an informed choice to forego a DNA analysis. Rather, his "decision" was uninformed. All members of Panah's defense team, including lead trial counsel, have signed declarations admitting that they did not conduct a constitutionally-mandated investigation. Sheahen admits that "[a]ll of our efforts had gone into the aborted settlement and a full factual investigation had simply not been done." (Ex. 21, R. Sheahen Decl., at ¶ 17.) Second counsel Shafi-Nia, also admits that no pre-trial investigation was conducted "due to [his] reliance on the assurances of lead counsel . . . that the prosecution would" settle the case. (Ex. 22, S. Shafi-Nia Decl., at ¶ 20.) Similarly, Chais, who replaced Shafi-Nia, declared that by the time of trial "the case was not prepared for trial" and "there had been no investigation in advance of trial, there was no planned defense." (Ex. 20, W. Chais Decl., at ¶ 7.)

Counsel's uninformed decision to forego DNA analysis was unreasonable. *See Correll v. Ryan*, 539 F.3d 938, 949 (9th Cir. 2008) ("An uninformed strategy is not a reasoned strategy. It is, in fact, no strategy at all. Given that trial counsel knew that the prosecutor was performing DNA testing, "[u]nder these circumstances, a reasonable defense lawyer would take some measures to [first] understand the laboratory tests performed and

the inferences that one could logically draw from the results." *Driscoll v. Delo*, 71 F.3d 701, 709 (8th Cir. 1995); *see also Hinton v. Alabama*, 134 S. Ct. 1081, 1088 (2014) (consultation with forensic expert necessary where the core of the prosecution's case relied forensic evidence.) Here, trial counsel made no such efforts to understand the tests.

To the contrary, counsel's lack of information—and apparent confusion—was apparent on the record. He told the trial court that he did not want to obtain DNA results because the testing on the tissue paper and bed sheet did not "pan out." (13 RT 1006.) Not so. In fact, as shown above, the DNA results contradicted the prosecution's "mixture" theory. The only party who could view the DNA results as not "panning out" would be the prosecution, since the results undermined its entire theory of how the crime took place.

The result of counsel's abdication of his duty resulted in "blind acceptance of the State's forensic evidence" to Panah's detriment. *Elmore v. Ozmint*, 661 F.3d 783, 786 (4th Cir. 2011). Indeed, even after the prosecution declined to present its DNA results, the record shows that counsel simply assumed that the results inculpated Panah. *See Panah*, 35 Cal. 4th at 428. Reasonable counsel would have retained an expert and discovered the opposite. Accordingly, contrary to the lower court's opinions, counsel abandoned his duty to investigate the DNA issue in this case and that failure cannot be attributed to Panah for purposes of determining whether the DNA results obtained in post-conviction were available to Panah at trial with reasonable diligence.

Finally, the severing of the attorney-client relationship is evident by the motivation for trial counsel's failure to conduct any pre-trial investigation. Documentary evidence confirms that counsel's choice to forego retaining experts was borne out of his desire to save money; he promised as much when he wrote a letter asking to be appointed to the case. In asking to be appointed, trial counsel told the trial court that "it appears likely that the court system would be saved a great deal of money time and money and the taxpayers would be saved a great deal of money" if he was appointed to the case because "it is probable" that Panah would "enter a plea at an early stage of [the] proceedings" whereas if the public defender was appointed "the result might be an extremely costly trial." (5 CT 1107.)

Cost-savings is not a reasonable justification for denying Panah the DNA analysis necessary to defend the case. Nor is a desire or belief that Panah would plead guilty an appropriate basis to forego a pre-trial investigation when, from the beginning, Panah has maintained his innocence. Rather, abandoning an investigation in the hopes of such a guilty-plea—in spite of Panah's insistence on his innocence—is the epitome of severing the attorney-client agency relationship. *See Frazer v. United States,* 18 F.3d 778, 782 (9th Cir. Cal. Mar. 10, 1994) ("A defense attorney who abandons his duty of loyalty to his client and effectively joins the state in an effort to attain a conviction or death sentence suffers from an obvious conflict of interest.") Trial counsel's complete failure to subject the prosecution's case to meaningful adversarial testing should not —for purposes of determining whether the DNA analysis obtained in post-conviction constitutes "new evidence" for purposes of the instant Section

1473 claims—be imputed to Panah. Instead, this Court should find that the DNA analysis is "new" evidence within the meaning of the statute because it was unavailable to Panah at the time of trial despite hiss diligence due to his own counsel's ineffectiveness.

b. Panah was diligent in attempting to obtain the appropriate expert testimony.

Despite trial counsel's abandonment of his constitutional duty to perform a minimally competent investigation, Panah was diligent in attempting to obtain a DNA analysis. At a hearing to remove his counsel, Panah requested that an analysis of DNA be done. (*Marsden* Hearing RT 1012, 11/21/1994.) Panah was adamant that the DNA results would be helpful to his case. In response to the trial court's uninformed assertion that it would be a "terrible tactic 'to get a DNA expert that confirmed the prosecution's case, Panah responded rhetorically, "What if I know it's not mine, your honor? What [ ] if I'm confident it can't be mine?" (*Marsden* Hearing RT 1024, 11/21/1994.) As shown above, Panah was right—the DNA results contradicted the prosecution's case. Counsel's failure to listen to his client and, at the very least, consult confidentially with a DNA expert to interpret the prosecution's testing is unreasonable and cannot be attributed to Panah, particularly in light of Panah's attempts to have the DNA results independently analyzed.

3. It is more likely that the jury would have reached a different outcome had they learned of the new evidence.

Contrary to the California Court of Appeal decision, (Ex. 25), Panah's new evidence probably would have resulted in a different outcome at trial. For Panah to get relief on this claim, the DNA evidence must have been "of such decisive force and value that it would have more likely than not changed the outcome of trial." Pen. Code § 1473(b)(3)(A). This burden is the same burden of proof as in civil proceedings, and only requires a party to show that "'its version of fact is more likely than not the true version.'" *In re Miles*, 7 Cal App. 5th 821, 849 (Cal. App. 4th Dist. 2017) (quoting *Beck Development Co. v. Southern Pacific Transportation Co.* 44 Cal. App. 4th 1160, 1205 (1996). The possibility that the DNA evidence would have changed the outcome includes that the trial would have resulted in acquittal, deadlock, or a hung jury. *Id*. at 850. Here, had the DNA evidence been offered would have undoubtedly changed the outcome of trial.

As discussed in Claim One, the prosecution's case against Panah rested on the serology evidence. The serology evidence was used to identify Panah as the killer and to argue that he committed the special-circumstance crimes of sodomy, oral copulation, and lewd acts upon a child, crimes that made him death-eligible. The DNA evidence refuting that the stains found on the tissue paper, bed sheets, and kimono consisted of a mixture of Panah's and Parker's bodily fluids would have thus refuted both the prosecution's argument that Panah killed Parker and the argument

that Parker was sexually abused by Panah. The DNA evidence would have also allowed Panah to refute the prosecution's argument that Panah's suicide attempt and alleged remarks the night of November 20th constituted consciousness of guilt. (24 RT 2966-67.) The DNA evidence would have also bolstered the defense arguments that the serology evidence was questionable (24 RT 2915, 2951) and that the case against Panah was circumstantial and had not been proven beyond a reasonable doubt. (24 RT 2904, 2925.)

Additionally, at trial, Panah's counsel attempted to elicit evidence that law enforcement had failed to investigate leads pointing to third-party culpability. (21 RT 2282-83, 2605.) However, the trial court prevented defense counsel from conducting this inquiry, finding that defense counsel did not have evidence that others were involved in the crime. (21 RT 2284-85, 2626.)

Had the DNA evidence been available, however, trial counsel could have used the DNA evidence to support a defense based on third-party culpability. Panah would have been able to present a defense pointing to Ahmed Seihoon as the actual killer. Seihoon had keys to the apartment where Panah and his mother lived. (Ex. 2, Crime Scene Rpts. at 6.) Seihoon had arrived at the apartment on Friday November 19, 1993 and spent the night. (18 RT 1752.) On Saturday, November 20, 1993, Seihoon spoke with Nicole Parker at 11 am. (Ex. 2, Crime Scene Rpts. at 6.) This was the last time that Parker was seen alive. (17 RT 1596.) Seihoon admitted to have been carrying a suitcase and a bag at that time. (Ex. 2, Crime Scene Rpts. at 6.).) Seihoon returned to the apartment later that

evening and was questioned by police about Parker. (18 RT 1784; Ex. 2, Crime Scene Rpts. at 6.) He remained at the apartment until early the next morning. (*Id*. at 8.) Seihoon went into Panah's room that evening. (18 RT 1785-86.) Thus, Seihoon had both the access and opportunity to have killed Parker. Further, as discussed *supra*, Seihoon having removed and later planted Parker's body would have explained why multiple searches of the apartment including of Panah's closet and suitcases therein had failed to uncover Parker's body.

The DNA evidence would have also allowed Panah to present evidence pointing to other possible suspects. (*See* 22 RT 2605 (tape-recorded conversation where Panah is threatened by "Sean", 21 RT 2283 (3 unidentified males seen on the premises of the apartment complex around time Parker disappeared.)

Thus, Panah can meet his burden of showing that the DNA evidence would have more likely than not changed the outcome of the guilt phase of his trial.

The pathology evidence would have also more likely than not changed the outcome of the penalty phase. Neither the Superior Court nor the Court of Appeal appear to have addressed the impact that the new evidence would have had on the penalty phase. The prosecutor rested his case in aggravation on the circumstances of the crime. (27 RT 3117.) He emphasized that Parker was sexually abused. (33 RT 4105-107.) The pathology evidence would have refuted the prosecutor's graphic depiction of the sexual and violent nature of Parker's death, thus diminishing its aggravating force. Given that the jury deliberated more than 3 full days

before sentencing Panah to death (4 CT 908-10, 914-15, 961), it is more likely than not that at least one juror would have been persuaded to vote against death.

4. Panah has included reasonable available materials that support allegations that, if taken as true, warrant relief. An order to show cause is required.

The California Court of Appeal below found that Panah had failed "to attach all reasonably available documentation relied upon in the petition." The Court of Appeal does not explain what more Panah could have included to support his claims. This Court has held that to satisfy the initial pleading burden, a petitioner filing a habeas petition must: (1) "state fully and with particularity the facts on which relief was sought" and (2) "include copies of reasonable available documentary evidence supporting the claim." *People v. Duvall*, 9 Cal. 4th 464, 474 (1995). Panah has submitted all relevant exhibits supporting his claims concerning the DNA and pathology evidence. Further, Panah has incorporated by reference all briefing and exhibits from his prior state habeas corpus petitions (Case Nos. S123962, S155942), and the record and briefs in his direct appeal (Case. No. S045504) which consist of hundreds of pages of briefing and exhibits. Accordingly, Panah has submitted all "reasonably available documentary evidence" supporting his claim. Further, because this Court is required to assume that Panah's factual allegations are true, Panah has made a prima facie case for relief, requiring the issuance of an order to show cause. *See Duvall*, 9 Cal. 4th at 474.

VII. PRAYER FOR RELIEF

WHEREFORE, Panah prays that this Court:

1. Permit Panah, who is indigent, to proceed without prepayment of costs or fees;

2. Grant Panah authority to obtain subpoenas in forma pauperis for witnesses and documents necessary to prove facts alleged herein;

3. Grant Panah the right to conduct discovery, including the right to take depositions, request admissions, and propound interrogatories, and the means to preserve the testimony of witnesses;

4. Order Respondent to show cause why Panah is not entitled to relief;

5. Permit Panah to amend this petition to allege any other basis for his unconstitutional confinement as it is discovered;

6. Conduct an evidentiary hearing at which proof may be offered concerning the allegations in this petition;

7. Issue a writ of habeas corpus to have Panah brought before this Court to the end that he might be discharged from his unconstitutional confinement and relieved of his unconstitutional sentences, including the death sentence;

8. Make a finding that Petitioner is actually innocent pursuant to Penal Code § 1485.55, and

9. Grant such other relief as this Court may deem appropriate.

Respectfully submitted,

HILARY POTASHNER
Federal Public Defender

Dated: January 26, 2018 By 
JOSEPH A. TRIGILIO

VIII. VERIFICATION

I, Joseph A. Trigilio, declare as follows:

1. I am a Deputy Federal Public Defender in the Central District of California. I represent Hooman Ashkan Panah in his federal habeas corpus proceeding, *Hooman Ashkan Panah v. Robert L. Ayers, Jr.*, CV 05-7606-RGK (C.D. Cal.).

2. Panah is confined and restrained of his liberty at San Quentin State Prison, San Quentin, California. He is incarcerated in a county different from my office. I have read this Petition and know the contents of the Petition to true.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 26th day of January , at Los Angeles, California.

JOSEPH A. TRIGILIO
Deputy Federal Public Defender

IX. CERTIFICATE OF COMPLIANCE

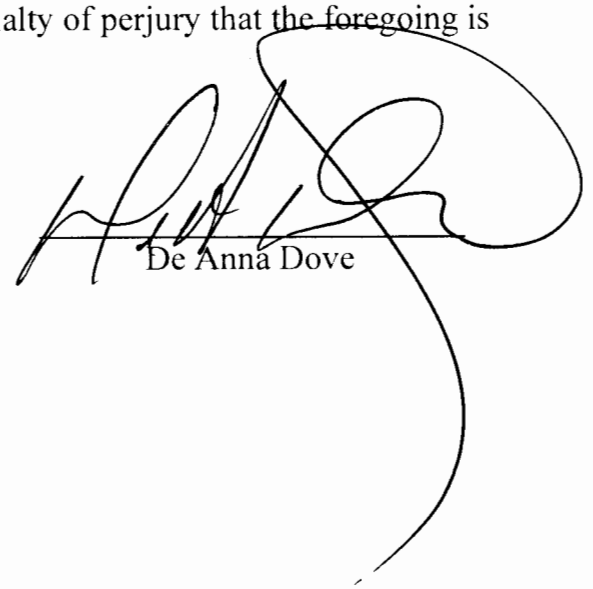
I hereby certify that the foregoing Petition for Writ of Habeas Corpus Pursuant to Penal Code Section 1473 is 13,863 words in length, as counted by the computer program used to prepare the petition.

JOSEPH A. TRIGILIO
Deputy Federal Public Defender

PROOF OF SERVICE

I declare that I am a resident or employed in Los Angeles County, California; that my business address is the Office of the Federal Public Defender, 321 E. 2nd Street, Los Angeles, California 90012-4202, Tel. No. (213) 894-2854; that I am over the age of eighteen years; that I am not a party to the action entitled below; that I am employed by the Federal Public Defender for the Central District of California, who is a member of the Bar of the State of California, and at whose direction I served a copy of the attached **PETITION FOR WRIT OF HABEAS CORPUS** on the following individuals by placing same in a sealed envelope for collection and mailing via the United States Postal Service, addressed as follows to the attached address list.

This proof of service is executed at Los Angeles, California, on January 26, 2018. I declare under penalty of perjury that the foregoing is true and correct.



De Anna Dove

PROOF OF SERVICE ADDRESS LIST

Petition for Writ of Habeas Corpus

Office of the Attorney General

Ana Duarte
300 South Spring St.
Los Angeles, CA 90032

Los Angeles County District Attorney's Office

Attn: Habeas Corpus Litigation Team Section
320 West Temple Street, Room 540
Los Angeles, CA 90012

Petitioner

Hooman Ashkan Panah
CDC# J-55600, 2E-B-87
San Quentin State Prison

4. Informal Reply filed in California Supreme Court case number S246758.

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re HOOMAN ASHKAN PANAH, Petitioner, On Habeas Corpus.	**CAPITAL CASE** No. S246758 Los Angeles County Superior Court No.: BA090702

INFORMAL REPLY

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I. INTRODUCTION

Penal Code section 1473 provides for habeas relief upon proof of false evidence presented at trial. Petitioner Hooman Ashkan Panah has presented allegations that—following an evidentiary hearing—prove the prosecution presented false and misleading testimony at the guilt and penalty phase of his capital trial. This testimony, presented by serology and pathology "experts" gave the jury a false impression of the nature of the crimes and identity of the perpetrator. Panah seeks review of his allegations in the pending petition by this Court on the merits.

Having received no indication that the Court of Appeal had applied Proposition 66, or made any "good cause" determination to keep the case, Panah filed an original petition in this Court after Proposition 66's effective date. The Warden now urges this Court to dismiss Panah's entire petition, claiming that Penal Code section 1509.1(a) precludes this Court from adjudicating an original petition. But this Court limited section 1509.1(a)'s restriction on habeas review by construing it as a procedural (and not a jurisdictional) bar, that can be challenged in a particular ("peculiar") case. *Briggs*, 3 Cal. 5th at 841.

This is such a case. As this Court acknowledged in *Briggs*, Proposition 66 is silent about the procedure for seeking review of a Court of Appeal denial. *Briggs*'s instruction (in a footnote) for a petitioner to apply section 1506 and file a petition for review did not address the circumstances of this case—where the Court of Appeal applied pre-Proposition 66 rules and did not decide retain the case pursuant to section 1509(a)'s "good cause" requirement. If anything, *Briggs*'s approval of section 1506's procedures when a "good cause" determination has been made, while not addressing other contexts, suggested that section 1506

should not be the procedure absent such a determination. Nor are there any guiding rules in this situation, as the Judicial Council has not yet promulgated rules effectuating Proposition 66's new appellate procedures.

Panah, in murky procedural waters absent any clear case law or rules, and where he lacked notice that he must file a petition for review to obtain this Court's review of his new claims. Dismissing Panah's claims because he did not correctly guess the procedure this Court or the Judicial Council will ultimately adopt, and where he was guided by only an ambiguous statute with no rules yet effectuating it, would offend due process. It would also constitute a fundamental miscarriage of justice, given that Panah has presented substantial allegations of innocence.

II. BACKGROUND OF PROPOSITION 66 AND THE PROCEDURAL HISTORY IN THIS CASE

On November 8, 2016, the voters passed Proposition 66, the Death Penalty Procedures Initiative. This Court stayed the proposition pending its review of the proposition's constitutionality.

On April 7, 2017, before proposition 66 was effective, Petitioner Hooman Panah petitioned the Los Angeles Superior Court for a writ of habeas corpus. His petition was based on new legal bases for habeas relief: an amendment to Penal Code section 1473 that provides habeas relief based on new and/or false evidence that would have changed the outcome of trial. On April 19, 2017, the Superior Court declined to issue an order to show cause and dismissed the petition in a reasoned decision.

On July 18, 2017, still before Proposition 66's effective date, Petitioner Hooman Panah petitioned the California Court of Appeal for a writ of habeas corpus, raising the same claims that he did in the Superior Court.

While Panah's petition was pending, this Court published *Briggs v. Brown*, 3 Cal. 5th 808 (2017). The date the decision was published, October 25, 2017, marked the effective date of Proposition 66 (Penal Code section 1509, *et seq*.). Penal Code section 1509.1(a) alters California's postconviction review procedures in capital cases by requiring that a superior court denial be reviewed only through an appeal, rather than by the filing of a new habeas corpus petition in the Court of Appeal. It also states, more generally, that a "successive petition" shall not be a "means of reviewing a denial of habeas relief." *Id*.

In contrast to its clear rules about review of superior-court habeas decisions, nothing in Proposition 66 specifically addresses review in the California Supreme Court following the denial of a petition by the Court of Appeal. To attempt to clarify that process, this Court in *Briggs* presumed that Penal Code section 1506—permitting as optional a petition for review to this Court—would apply to habeas petitioners seeking this Court's review in a specific situation—where a Court of Appeal found "good cause" to retain the petition under § 1509(a). 3 Cal. 5th at 808 n.19. Panah's case, as explained below, was not in that situation.

Rather, on November 27, 2017, the Court of Appeal denied Panah's petition in a reasoned decision, but without relying on § 1509(a) or finding good cause to retain the case. The Court of Appeal's decision instead noted that Panah filed his petition in that court before Proposition 66 went into effect.

On January 26, 2018, Panah filed a petition for writ of habeas corpus in this Court that raises the same claims he did in the Superior Court and Court of Appeal.

III. ARGUMENT

A. Panah's compliance with pre-Proposition 66 rules was appropriate, because Penal Code section 1509(a) did not apply to his petition in the Court of Appeal.

The Warden argues that *Briggs*'s interpretation of section 1509.1(a) instructed Panah to file a petition for review with this Court pursuant Penal Code section 1506. (Inf. Resp. at 11.) But the language in *Briggs* on which the Warden relies is expressly limited to seeking review of claims that the Court of Appeal has reviewed under Proposition 66 rules. In this case, the Court of Appeal did not apply Proposition 66 rules to retain and adjudicate Panah's claims. Panah, therefore, lacked adequate notice or guidance from either the statute or this Court's decision in *Briggs* for how to obtain this Court's review of his new claims. This Court should, therefore, exercise its original jurisdiction to consider the merits of Panah's claims.

1. Penal Code section 1509.1(a) has a prospective application when read in its entirety.

The Warden argues that the last sentence of Penal Code section 1509.1(a)—that a "successive petition shall not be used as a means of reviewing a denial of habeas relief"—is a "stand-alone" provision, separate from the first two sentences of section 1509.1(a). (Inf. Resp. at 9.) Such a reading contradicts long-established principles of statutory construction. *See Tires Unlimited v. Superior Court*, 180 Cal. App. 3d 974, 980 (1986) ("It is a cardinal rule of statutory construction that provisions of an act must be read together.")

Rather, the successive-petition language of § 1509.1(a) must be read in the context of the entire subsection. Such an interpretation makes clear that § 1509.1(a) is prospective. It is intended to apply to cases initiated

within section 1509.1(a)'s framework: where a case was originated in the superior court and then appealed to the Court of Appeal through the filing of a notice of appeal. This case is outside of that framework because Panah's petition in the superior court pre-dated Proposition 66's effective date. Section 1509.1(a)'s first two sentences—requiring appeal "be taken by filing a notice of appeal"—did not, therefore, apply to Panah. And accordingly, neither should the last sentence of § 1509.1(a) prohibiting successive petitions apply here; rather, the entire subsection applies only prospectively to cases initiated in the trial court after Proposition 66's effective date.

2. This Court advised petitioners to file a petition for review pursuant to Penal Code section 1506 only in cases filed after Proposition 66's effective date, where the Court of Appeal has applied Penal Code Section 1509(a).

In *Briggs*, this Court acknowledged that Proposition 66 is silent about the procedures necessary for having this Court review claims after the Court of Appeal denies a petition pursuant to section 1509.1(a). 3 Cal. 5th at 840 n.19. This Court explained that the Judicial Council must promulgate new "rules to effectuate" the new appellate-review provisions set forth in section 1509.1(a). *Id.* at 872. The Judicial Council has until April 25, 2019, eighteen months after Proposition 66's effective date, to publish those rules. Pen. Code § 190.6(d).[1] Despite the absence of these forthcoming rules, the Warden argues that *Briggs* somehow put petitioners

[1] This Court cautioned the Judicial Council, in drafting the rules, to "take care to preserve the courts' inherent authority over their dockets." *Briggs*, 3 Cal. 5th at 861.

like Panah, who filed their petitions before Proposition 66 took effect, on notice of the need to file a petition for review in this Court after having their claims denied by the Court of Appeal. (Inf. Resp. at 11.) That is incorrect.

a. *Briggs* limited section 1509.1 review procedures to cases where a court of appeal applied Proposition 66 rules.

Briggs expressly limited section 1506's review provisions—permitting the filing of a petition for review to this Court—to cases in which the Court of Appeal has made a "good cause" determination under section 1509—a provision that, as explained, applies only to cases that were filed in the Court of Appeal after Proposition 66's effective date. *See Briggs*, 3 Cal. 5th at 840 n.19 ("[s]*hould a court of appeal determine that good cause exists under section 1509, subdivision (a)* for it to hear a capital habeas corpus petition [instead of transferring it to the convicting court]. . . section 1506 would be applicable.")(emphasis added).[2] In cases where the Court of Appeal did not make a determination under section 1509(a), the footnote by its express language does not apply. This is such a case.

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[2] Penal Code section 1506 states, in relevant part, "[I]n all criminal cases where an application for a writ of habeas corpus has been heard and determined in a court of appeal, either the defendant or the people *may apply for a hearing in the Supreme Court*. Such appeal shall be taken and such application for hearing in the Supreme Court shall be made *in accordance with rules to be laid down by the Judicial Council*." (emphasis added). Applied to cases governed by Proposition 66, it is reasonable to operate under the pre-Proposition 66 structure until the Judicial Council promulgates rules effectuating the Proposition (and presumably section 1506's relationship with it).

b. Section 1509(a), the provision *Briggs* made a prerequisite for section 1506 procedures, applies only prospectively, to cases filed in a court of appeal after Proposition 66's effective date

Legislative enactments "are generally presumed to operate prospectively and not retroactively." *In re Marriage of Bouquet*, 16 Cal. 3d 583, 587 (1976); *see also Landgraf v. USI Film Products*, 551 U.S. 244, 272 (1994) ("Congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result.") (quoting *Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204, 208 (1988)). That presumption may be overcome if the statute clearly indicates a retroactive intent. *Id*. at 587-88.

Here, the presumption against retroactivity holds. Proposition 66's limitations on habeas review, including section 1509, *et. seq.*, are not retroactive; they apply only to petitions that were filed after Proposition 66's effective date. This Court indicated as much in *Briggs*, deeming "it desirable for all parties affected by the initiative measure to be allowed to strive for compliance in an efficient manner, unencumbered by considerations of retroactive application upon the dissolution of our stay." 3 Cal. 5th at 861.

The language of Section 1509 indicates that its provisions were not intended to be applied retroactively. The only provision of Proposition 66 the voters saw fit to make applicable to "pending" cases is a wholly different section—section 1509(g). That subdivision states that "[i]f a habeas corpus petition is pending on the effective date of this section, the court may transfer the petition to the court which imposed the sentence."

No other provision of section 1509 purports to apply to cases filed before the effective date of the act. The inclusion of "pending" petitions in subdivision (g) indicates that the omission of that language in other subdivisions was intentional. *Klein v. United States*, 50 Cal. 4th 68, 80 (2010) (The Court "give[s] meaning to every word in the statute and . . . avoid[s] constructions that render words, phrases, or clauses superfluous.") There is no indication that the provisions of section 1509—other than section 1509(g)—were intended to be applied retroactively to pending cases, and the presumption against retroactive application cannot be overcome.[3] Accordingly, section 1509(a) did not control Panah's petition in the Court of Appeal, making footnote 19 of *Briggs* inapposite.

3. The Court of Appeal adjudicated Panah's petition under pre-Proposition 66 rules, and did not find good cause under section 1509(a) to retain the petition.

The Warden nevertheless argues that the Court of Appeal "presumably" applied section 1509(a) and found good cause to retain Panah's case. (Inf. Resp. at 10.) The Warden is wrong. As explained, Section 1509(a) was not in effect when Panah filed his petition in the Court of Appeal. Section 1509(a) applies only prospectively, pursuant to its statutory language and the general presumption against retroactivity. *See Bouquet*, 16 Cal. 3d at 587; *Landgraf*, 551 U.S. at 272 (1994). The Court

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[3] The non-retroactivity of Proposition 66 is further demonstrated by this Court's declining to apply Proposition 66's timeliness rules to a pending capital case; this Court instead applied the timeliness standards that were in effect when counsel was appointed. *See People v. Lopez*, Case No. S065877 (May 23, 2018 order granting motion for an order reaffirming the applicability of the timeliness standards in effect that the time counsel was appointed).

of Appeal therefore could not have applied section 1509(a)'s "good cause" provision to Panah's pre-proposition 66 claims. A closer look at Panah's petition in the Court of Appeal and its reasoned decision further demonstrates that the Court did not apply section 1509(a).

Panah's filed his petition in the Court of Appeal on July 18, 2017, before Proposition 66's effective date. Panah did not argue that "good cause" existed for the Court of Appeal to retain his petition under section 1509(a) because that provision did not yet apply. Nor did he make any showing that he satisfied Proposition 66's rules at all—he did not have to since Proposition 66 was not yet in effect.

The Court of Appeal confirmed in its reasoned decision that Panah's petition was filed "prior to the effective date of Penal Code section 1509.1." (Pet. Ex. 25 at 1.) The Court made no reference in its reasoned opinion to any provision of Proposition 66. It said nothing about "good cause" to retain the petition, as subdivision (a) would have required, nor did it provide *any* justification for retaining the case. It did not need to. Rather, the court of appeal adjudicated Panah's claims *de novo*, without addressing any of the reasons that the Superior Court denied relief. This type of original review by a non-trial court is in contrast to the appellate review envisioned by Proposition 66. *See Briggs .v. Brown*, 3 Cal. 5th 808, 837 (2017) ("appellate review of habeas corpus rulings is distinct from review of the underlying judgment of death").[4]

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[4] In contrast to the adjudication by the Court of Appeals in this case, in cases governed by Proposition 66, an appeal of a denial of a habeas petition to the Court of Appeal is limited to the claims raised in the superior court, and if a denial of relief is on a successive petition, the petitioner must obtain a certificate of appealability from the superior court. *See Briggs*, 3

The only provision of section 1509 that applied to Panah's petition in the court of appeal after Proposition 66 became effective was section 1509(g). Subdivision (g) was the only provision that—by its express terms—applied to cases pending when Proposition 66 became effective.[5] Subdivision (g) permits—but does not require—higher courts to transfer to the trial court petitions pending on the effective date of Proposition 66. Subdivision (g) has no "good cause" requirement for a court of appeal to retain a case; it merely permits a court to transfer a petition in its discretion. Rather than applying section 1509(a), the court of appeal in this case could only have determined that it was unnecessary to transfer the case pursuant to 1509(g). The Court instead retained the Panah's petition pursuant to its original jurisdiction under Article VI, section 10 of the California Constitution and not section 1509(a).

Accordingly, the Warden is wrong to suggest that the court of appeal retained Panah's case under section 1509(a). That provision did not apply here. The only provision of Proposition 66 that applied to petitions pending on its effective date was section 1509(g), and the Court of Appeal must have declined transfer the case pursuant to that provision. The fact that the Court of Appeal was not bound by section 1509(a) renders footnote 19 in *Briggs* inapposite to Panah's circumstance, undermining the Warden's argument that the instant petition should be dismissed for failure that footnote's instruction.

Cal. 5th at 825. The Court of Appeal properly applied neither of these rules to Panah's petition.

[5] Section 1509(g) states, "If a habeas corpus petition is pending on the effective date of this section, the court *may* transfer the petition to the court which imposed the sentence." (emphasis added).

4. This Court should not dismiss Panah's petition based on a rule requiring him to file a petition for review when that rule has yet to be promulgated and, at this time, is ambiguous.

Basic notions of due process require that a litigant have notice of how to comply with a state's rules—indeed, that is the fundamental premise of the presumption against retroactive legislation. *Landgraf*, 511 U.S. at 267 ("The Due Process Clause also protects the interests in fair notice and response that may be compromised by retroactive legislation"); *Mackey v. Montrym*, 443 U.S. 1 (1979); *Hall v. Superior Court*, 133 Cal. App. 4th 908, 918 (2005) ("A local rule or policy must be consistent with due process in order to be valid.") Here, absent any direction or rule from Proposition 66 or *Briggs*, Panah lacked adequate notice of how to comply with Proposition 66's new review requirements, and this Court should exercise its original jurisdiction to review his claims on the merits.

As explained above, neither Proposition 66 nor *Briggs* provided any rules or guidance to litigants like Panah, who filed a petition before Proposition 66 took effect, as to how they should go about obtaining review in this Court after being denied relief by the Court of Appeal based on pre-Proposition 66 rules. The Judicial Council is currently drafting rules that should provide clarity and guidance for seeking review in this Court. Absent those rules, applicable instruction from this Court, or any statutory guidance, it is fundamentally unfair to require Panah to have surmised that he must have filed a petition for review in order to obtain review in this Court. With no *new* rules that clearly apply, Panah reasonably and appropriately sought review in this Court under the pre-Proposition 66 framework, where a petitioner had the option to file a new habeas petition

following a denial by a lower court. *See In re Clark*, 5 Cal. 4th 750, 767 n. 21 (1993).

B. Even if section 1509.1(a) operates as a procedural bar that generally prohibits filing an original petition in this Court, Panah's peculiar procedural circumstances warrant this Court exercising its original jurisdiction to review his claims.

"Section 1509.1, subdivision (a)'s bar against renewed petitions in a higher court speaks not to jurisdiction, but to the use of habeas corpus for a particular purpose." *Briggs*, 3 Cal. 5th at 841. This Court characterized section 1509.1(a)'s restriction as "a procedural [bar], limited in scope and similar in effect to the *Waltreus* and *Dixon* rules." *Briggs*, 3 Cal. 5th at 841.[6]

As such, section 1509.1(a) serves as a statutorily-created bar, which—like other procedural bars—"does not prevent a court from exercising its writ jurisdiction" in a unique case where excusing the procedural bar is appropriate. *Id.* Indeed, this Court in *Briggs* was clear: a petitioner is "free to challenge [1509.1(a)'s] restriction on grounds peculiar to [his] own circumstances." *Id.*

Here, even if this Court determines that section 1509.1(a) should apply to Panah's petition in the absence of clear rules or notice of how to comply with it, this Court should exercise its discretion to exercise its original jurisdiction given these "peculiar" circumstances. Panah is not attempting to abuse the writ; he is simply bringing a new claim based on a

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[6] *In re Waltreus*, 62 Cal. 2d 218 (1965) and *In re Dixon*, 41 Cal. 2d 756 (1953) establish procedural bars to merits review of claims that either were previously raised or should have been raised on direct appeal.

new legal basis for habeas relief that this Court has not yet had an opportunity to adjudicate. And—given the ambiguity in the post-Proposition 66 rules—Panah should be excused from the procedural obstacle set forth in section 1509.1(a). Applying of this technical rule here would result in a fundamental miscarriage of justice, particularly as Panah's allegations raise a prima facie claim of innocence.

1. No state interest is served by denying Panah merits review.

A procedural rule need not be enforced where it would merely "force resort to an arid ritual of meaningless form . . . and would further no perceivable state interest." *James v. Kentucky*, 466 U.S. 341, 349 (1984); *see also In re Robbins*, 18 Cal. 4th 770, 780-81 (1998) (procedural bar that a claim is untimely may be considered on the merits under certain circumstances). This Court, in deciding whether to dismiss a petition based on a procedural bar, has balanced the state's interest with that of the petitioner. *See In re Harris*, 5 Cal.4th 813, 830 (1993).

Section 1509.1(a)'s restriction on renewed petitions is designed to serve the state's interest to combat "abusive practices[.]" *Briggs*, 3 Cal. 5th at 841. Abusive writ practices by a petitioner "burden[s]" a court with "repetitious petitions" that include claims that the court has already denied. *Clark*, 5 Cal. 4th at 771. Section 1509.1 attempts to tackle such abusive writ practices by having a petitioner bring his claims first to the trial court, and then prohibit a petitioner, absent ineffective assistance of habeas counsel, from bringing new claims in the higher courts. Pen. Code section 1509.1(b).

Here, the interests of section 1509.1 are not served by precluding merits review of Panah's claims in this Court. Panah did not abuse the writ

by filing his petition in this Court. By filing an original petition, instead of a petition for review, Panah is not seeking "unending litigation" of his claims. *In re Reno*, 55 Cal. 4th 428, 501 (2012) (describing justification for *Miller* bar of successive petitions). He merely is attempting to have this Court review, for the first time, the merits of a new claim based on a new legal basis that did not exist when Panah last presented claims to this Court. His claims are based on newly-amended penal code section 1473, and this Court could not have had any prior opportunity to adjudicate those claims until now. He is not burdening this court with repetitious petitions; he is merely seeking one chance at review of a new claim by the State's highest court. Given the ambiguity in the rules at this current time, Panah's claims should not be dismissed because he did not read into the ambiguous statute the appropriate procedure prior to the Judicial Council setting for the clear rules. *C.f. Hall*, 133 Cal. App. at 918 ("Court rules should be designed to accomplish the ends of justice, to protect rights, and to implement the substantive law. When a policy, practice or rule operates instead to defeat these purposes, and deprives an accused of a fair . . . determination on the merits, then the policy, practice or rule must give way.")

Accordingly, on balance, section 1509.1(a)'s restriction should not preclude this Court from exercising its original jurisdiction in this unique case, where no interest is served by denying merits review, and Panah—lacking the Judicial Council's rules effectuating Proposition 66—sought review of a new claim based on a new legal basis for relief for the first time in this Court.

2. Panah's allegations establish his innocence of the charged crimes, the special circumstances, and his death sentence, further warranting this Court's merits review.

Procedural bars, like section 1509(a), do not preclude merits review where the petitioner can show a fundamental miscarriage of justice, including a showing that the petitioner is actually innocent. *In re Reno*, 55 Cal. 4th at 497 (describing actual-innocence and other exceptions to procedural bar for bringing successive habeas corpus petitions). The Warden claims that Panah "has not made any showing of actual innocence." (Inf. Resp. at 12.) That claim is belied by the allegations in Panah's petition and the evidence supporting them.

Panah has alleged facts that, if found true—following an order to show cause and evidentiary hearing—would make Panah innocent of the charges and special circumstances against him at the guilt phase, and, at the very least, would have affected the outcome at the penalty phase. Panah's allegations, supported by reasonably available evidence including expert declarations, demonstrate that the state's serology and pathology evidence presented at this trial is false. For example, the prosecutor argued that fluids found on various items of evidence had a mixture of Panah's and the victim's bodily fluids. (Pet. at 15-20.) The prosecutor had DNA results that showed no such mixture, but he chose not to present them. (11 RT 715-17.) In post-conviction proceedings, Panah had those DNA results analyzed by two independent experts, who opined that the results contradict the "mixture theory" that the prosecutor presented. (*See* Pet. Exs. 11 and 12 (Lisa Calandro and Keith Inman Reports).) Each concluded that the biological evidence "do[es] not support the hypothesis that intimate sexual

contact occurred between Hooman Panah and Nicole Parker." (Pet. Ex. 11 at 232; Pet. Ex. 12 at 231.) Absent intimate sexual contact, the prosecution's theory for felony-murder and death eligibility is undermined and a different result at the guilt and penalty phases, is, at least, more likely than not.

Moreover, Panah alleged that the prosecution's pathology testimony is also false, and supported his allegations with the declarations of two independent pathologists. (Pet. Exs. 13 and 15 (Reports of Dr. Baden and Dr. Reiber).) These two pathologists found that the victim likely died outside the time-frame in which Panah was present in his apartment and did not die from craniocerebral injuries or sexual assault, refuting the pathology testimony at trial and exculpating Panah. (*Id*.)

Corroborating the exculpating evidence described above is the fact that Panah's bedroom, where the prosecutor argued the murder occurred, lacked any indication of a struggle or violent act. No blood was found in the room. No DNA or fluids linked to the victim. Nor was there any discharge from the victim anywhere in the bedroom or adjacent bathroom, despite the prosecution's pathologist opining that the victim's death was due to vomit with aspiration. The police searched Panah's bedroom multiple times, including the closet and suitcases where the victim was ultimately found, and yet did not identify a body until a day after their initial entry. This evidence, combined with the evidence of the victim's time of death, demonstrates that a third party—someone who had access to Panah's bedroom and closet—is responsible for the murder. That person is Ahmad Seihoon, the person last seen with the victim. (17 RT 1784.)

Indeed, Seihoon was seen holding a suitcase when he spoke with the victim. (Pet. Ex. 3, LAPD Chron, 11/20-21/1993; *see also* Pet. Ex. 2, West

Valley Rept. Severns, 11/22/193.) He was staying at Panah's apartment before and during the timeframe in which the murder would have occurred. (18 RT 1687.) He lied to a police officer by denying he had keys to the apartment, but then told another officer he had to return to the apartment to get his keys out of the door. (Ex. 2, Crime Scene Rpts, at 6.) Panah, meanwhile, had left his apartment earlier in the afternoon, was seen at his job at 3:00 p.m., and indisputably did not return. Panah, unlike Seihoon, could not have placed the victim in the apartment after the police had searched it. If given a chance to prove his allegations at a hearing, Panah can demonstrate his innocence.

Taken together, the allegations in Panah's petition demonstrate that the prosecution's evidence against Panah gave the jury a false impression at the guilt phase and the penalty phase, where the only aggravating factor against Panah was the circumstances of the guilt-phase offense. Panah deserves a chance to factually develop these allegations and have an evidentiary hearing to prove them, at which time he can demonstrate his innocence and entitlement to relief. Dismissing his petition based on an ambiguous procedural bar would, therefore, result in a fundamental miscarriage of justice.

C. Penal Code section 1509(d) does not apply to this Petition because it is not "successive" within the meaning of that subdivision.

The newly-effective Penal Code section 1509(d) requires that a "successive petition" be dismissed unless the court finds by a preponderance of evidence that the "defendant is actually innocent of the crime of which he or she was convicted or is ineligible for the sentence." The Warden argues that Panah's petition should be dismissed on the

separate basis that he cannot meet section 1509(d)'s innocence standard. (Inf. Resp. at 12.) The Warden is again wrong.[7] As shown in the Petition and summarized in Section II.B.2 above, Panah's allegations satisfy that standard. But more fundamentally, the petition pending in this Court is not a successive petition and section 1509(d) does not serve as a constraint on this Court's ability to adjudicate the merits of Panah's petition, issue an order to show cause, and grant relief.

1. A "successive petition" within the meaning of section 1509(d) refers to a petition that includes claims that were or could have been presented in a previous petition.

This Court has consistently defined a "successive petition" as a petition "raising claims that could have been presented in a previous petition." *Briggs*, 3 Cal. 5th 808, 836 n.14, citing *Robbins*, 18 Cal. 4th at 788 n.9; *Clark*, 5 Cal. 4th at 769-770. Indeed, in *In re Reno*, this Court described successive petitions as "inconsistent with our recognition that delayed and repetitious presentation of claims is an abuse of the writ." 55 Cal. 4th at 455.

Reno provides an overview of the judicially-created rules designed to prevent the abuse of the writ resulting from the filing of successive

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[7] The Warden's argument exceeds the scope of this Court's order requiring informal briefing. This Court limited the informal briefing "to the question whether the petition must be dismissed under Penal Code section 1509.1, subdivision (a)." (March 2, 2018 Letter from the California Supreme Court.) Panah addresses the Warden's argument to ensure his position is considered, but he reserves the opportunity to more fully address the merits of his claims, including his showing of innocence, when more broadly-construed informal briefing is requested or formal briefing is ordered.

petitions. *Id*., citing *Clark*, 5 Cal. 4th at 769. In *Briggs*, this Court explained section 1509(d)'s innocence-requirement in similar terms as *Reno* explained existing judicially-created bars to successive petitions, including citing to *Clark* to justify the subdivision's limitation. *Briggs*, 3 Cal. 5th at 847. In other words, both section 1509(d) and this Court's judicially-created procedural rules announced in *Clark* are designed to prevent successive petitions that abuse the writ. Accordingly, the term "successive petition" as used in section 1509(d) means what it meant in *Reno* and *Clark*—a petition that is raising repetitious claims that were or should have been raised in prior petitions.

This Court noted that a separate section of Proposition 66, section 1509.1(a), uses the term "successive petition" in a way that is "inconsistent with this court's terminology." *Id*. at 836 n.14. That subdivision refers to successive petitions as new habeas corpus petitions in higher courts that seek review of a lower court's ruling. *Id*. But that aberrant use of "successive" is, according to *Briggs*, limited to section 1509.1(a), and that definition does not extend to section 1509(d), which implicates the definition of successiveness that this Court has historically employed.

2. The pending petition is based on a new legal basis for relief that could not have been presented in a previous petition.

Panah's pending petition does not include claims that were or could have been raised in a previous petition. Rather, Panah's claims are based on the newly-amended Penal Code section 1473, providing for habeas relief upon a showing of material false evidence (including false expert opinions) or new evidence that could not have been presented at trial by the petitioner with due diligence. Such a claim is based on a new legal basis for relief;

hence, it could not have been raised in any prior petition. *See In re Richards*, 63 Cal. 4th 291, 293-94, 317 n.2 ("Because of the change in the applicable law concerning the definition of false evidence, the petition is not subject to the procedural bar of successiveness). Indeed, neither the Superior Court nor Court of Appeal below found any of Panah's claims procedurally defaulted as successive or untimely. (*See* Pet. Exs. 24 and 25.) Accordingly, Panah's pending petition is not successive within the meaning of section 1509(d) and it does not preclude this Court from reviewing the merits of Panah's claim.

Respectfully submitted,

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Federal Public Defender

Dated: June 8, 2018

By *Joseph A. Trigilio*
JOSEPH A. TRIGILIO

IV. CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Petition for Writ of Habeas Corpus Pursuant to Penal Code Section 1473 is 5,589 words in length, as counted by the computer program used to prepare the petition.

/s/ Joseph A. Trigilio
JOSEPH A. TRIGILIO
Deputy Federal Public Defender

PROOF OF SERVICE

I declare that I am a resident or employed in Los Angeles County, California; that my business address is the Office of the Federal Public Defender, 321 E. 2nd Street, Los Angeles, California 90012-4202, Tel. No. (213) 894-2854; that I am over the age of eighteen years; that I am not a party to the action entitled below; that I am employed by the Federal Public Defender for the Central District of California, who is a member of the Bar of the State of California, and at whose direction I served a copy of the attached **INFORMAL REPLY** on the following individuals by placing same in a sealed envelope for collection and mailing via the United States Postal Service, addressed as follows to the attached address list.

This proof of service is executed at Los Angeles, California, on June 8, 2018. I declare under penalty of perjury that the foregoing is true and correct.

/s/ De Anna Dove
De Anna Dove

PROOF OF SERVICE ADDRESS LIST

Petition for Writ of Habeas Corpus Pursuant to Penal Code Section 1473

Office of the Attorney General

Ana Duarte
300 South Spring St.
Los Angeles, CA 90032

Los Angeles County District Attorney's Office

Attn: Habeas Corpus Litigation Team Section
320 West Temple Street, Room 540
Los Angeles, CA 90012

Petitioner

Hooman Ashkan Panah
CDC# J-55600, 2E-B-87
San Quentin State Prison