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SUPERIOR COURT OF THE STATE OF CALIFORNIA

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

Dept: 100

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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. 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