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,

HILARY POTASHNER
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