PUBLIC—REDACTS MATERIAL FROM CONDITIONALLY SEALED RECORD,

IN THE CALIFORNIA COURT OF APPEAL

IN AND FOR THE SECOND APPELLATE DISTRICT

DIVISION FIVE

In re JOSEPH HUNT,	)	Case No.: B313344
	)	
	)	Los Angeles County
Petitioner,	)	Superior Court Case
	)	No.: A090435
	)	
	)	Previous Related Case:
On Habeas Corpus.	)	B110428
_____	)	

PETITION FOR WRIT OF HABEAS CORPUS
AND MEMORANDUM OF POINTS AND AUTHORITIES

Tracy Renee Lum, SBN 256703
Law Office of Tracy Renee Lum
46 South Del Puerto Ave., Ste. B, #106
Patterson, CA 95363
(209) 894-7794 (T)
(209) 894-7239 (F)
trlum@hotmail.com

TABLE OF CONTENTS

Table of Authorities

Cases

Statutes

APPLICATION FOR WRIT OF HABEAS CORPUS

I.

INTRODUCTION

1. Petitioner Joseph Hunt (Hunt) was convicted of a murder that never occurred and has spent 35 years serving a life without the possibility of parole sentence.

2. In 1993, Hunt filed a petition for writ of habeas corpus challenging his conviction under Penal Code section[1] 1473, based on newly discovered evidence. Primarily, the new evidence was several witnesses who had seen Ronald Levin, the alleged victim, alive after Hunt allegedly murder him in 1984. This Court ordered the trial court to conduct an evidentiary hearing to hear the witnesses. After the evidentiary hearing, the court found several witnesses to be credible, some more credible, some less than others. However, this Court denied Hunt relief because the new evidence did not meet the standard for overturning his conviction in effect at that time, which was that the evidence must "undermine the entire prosecution case and point unerringly to innocence or reduced culpability."

3. In 2017, the Legislature amended section 1473 to require reversal of a conviction based on new evidence that is “of such decisive force and value that it would have more likely than not changed the

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[1] All code references are to the Penal Code unless otherwise indicated.

outcome of the trial." Based on this change in the law, Hunt now refiles his habeas corpus petition challenging his conviction on the newly discovered evidence that the victim of the alleged murder was seen by several witnesses alive after he was allegedly murdered. This is evidence is highly probative because there is no evidence that the alleged victim actually died the night that it is alleged he was murdered other than his disappearance. While the fact that several witnesses saw the alleged victim alive after the date he was allegedly murdered may not have undermined the entire prosecution case such that it proved Hunt's innocence, this evidence does make it more likely than not that at least one juror would have a reasonable doubt as to Hunt's guilt. This is the exact type of case that the Legislature had in mind when it amended section 1473.

4. This petition deserves full consideration on the merits as it is based on the only new evidence Hunt has discovered since the trial. Thus, this is his last opportunity for relief from the travesty of justice of his conviction and imprisonment for the past 34 years for a murder which he did not commit.

II.

PARTIES

5. Petitioner is a prisoner of the State of California who is currently incarcerated at the California Health Care Facility in Stockton.

6. Respondent, Robert Burton, is the warden of California Health Care Facility, in Stockton, California, and is the legal custodian of petitioner.

III.

PROCEDURAL HISTORY

7. On April 22, 1987, Hunt was convicted by a jury of murder in the first degree of Ronald George Levin in violation of section 187. (Exhibits, p. 7.) Defendant also was found guilty of robbery in violation of section 211 and that Levin was murdered while defendant was engaged in the commission of robbery within the meaning of section 190.2(a)(l7). (*Ibid*.) The jury fixed the penalty as life imprisonment without the possibility of parole. The court sentenced defendant to state prison for life without the possibility of parole for the murder. (*Ibid*.)

8. On November 23, 1993, Hunt's conviction was upheld on appeal. (Exhibits, pp. 3-193.) On March 17, 1994, the California Supreme affirmed the conviction. (Case No. S037111.)

9. In 1993, Hunt filed a petition for writ of habeas corpus in this Court challenging his conviction based on newly discovered evidence under the previous standard.[2] (Exhibits, pp. 194-206.) This Court issued an

[2] The previous standard to overturn a conviction based on newly discovered evidence must be credible and "must undermine the entire prosecution case

order to show cause (OSC) and directed the Los Angeles County Superior Court to conduct an evidentiary hearing. (Exhibits, p. 195.) The superior court denied Hunt's petition on July 12, 1996. (Exhibits, 207-244.) This Court denied his petition on January 15, 1998. (Exhibits, 194-206.) Hunt filed a petition for review in the California Supreme Court on this issue which was denied on April 15, 1998. (Case No. S067504.)

10. On January 30, 2017, Hunt filed another petition for writ of habeas corpus in the Los Angeles Superior Court challenging his conviction based on newly discovered evidence based on recent amendments to section 1473, which changed the standard for vacating a conviction based on newly discovered evidence.[3] On October 5, 2018, the superior court summarily denied the petition. (Exhibits, 245-249.)

IV.

JURISDICTION/TIMELINESS

11. Although the claim raised in this petition is identical to a claim raised in a previous petition in case number B110428 and based on identical facts, it is not procedurally barred as the legislature amended section 1473 to change the standard for vacating a conviction based on the

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and point unerringly to innocence." (*In re Hall* (1981) 30 Cal.3d 408, 423 (Hall).)

[3] A conviction can now successfully be vacated based on newly discovered evidence, if "it would have more likely than not changed the outcome at trial." (§ 1473, subd. (b)(3)(A).)

discovery of new evidence. A change in the law will excuse a successive or repetitive habeas corpus petition. (*In re Reno* (2012) 55 Cal.4th 428, 476 (Reno), citing *In re Martinez* (2009) 46 Cal.4th 945, 950 & fn. 1; (*In re Sagin* (2019) 39 Cal.App.5th 570, 579 (Sagin).)

12. The claims of this petition are not time barred as Petitioner has filed the petition in the superior court promptly, within one month of the effective of the amendments to section 1473. (*Reno*, Cal.4th at pp. 460-461.) The delay in filing the instant petition to this Court is excused by good cause as Hunt fell ill with heart failure. (Confidential Exhibits, pp. 9-10, 12, 15-16, 18-19, 23, 28, 33, 37-38, 41, 45, 50, 55, 61, 65-66.) His physical strength and cognitive abilities were severely diminished rendering him unable to continue prosecuting the instant petition. (Confidential Exhibits, pp. 199-201.)

V.

STATEMENT OF FACTS

A. Los Angeles Murder Trial

13. In the early 1980's, Hunt formed a group which came to be known as the "Bombay Bicycle Club" (BBC).[4] (Exhibits, pp. 10-11; Exhibits, p. 194.) The group's purpose was to invest in commodities, cyclotron technology, and arbitrage. (Exhibits, p. 194.) Ronald Levin, the

[4] The group was referred to as the "Billionaire Boys Club" was by the media. (Exhibits, p. 11, fn. 2.)

alleged decedent, persuaded the group he was a wealthy individual with money to invest. (*Ibid*.) In fact, Mr. Levin was a "con man" who perpetrated an elaborate hoax on Hunt and the BBC. (*Ibid*.)

14. Hunt was convicted of murdering Mr. Levin on June 6, 1984, with the aid of James Pittman. (Exhibits, p. 194.) Hunt's conviction is based solely on circumstantial evidence. There is no physical evidence that a murder even occurred. (Exhibits, p. 139.) Although the prosecution contends that Mr. Levin was shot in the head in his house, investigators did not recover any physical evidence indicating that a murder had occurred – no blood, no bullets, no DNA and most importantly, no corpse. (Exhibits, pp. 23, 139, 236:18-20.) Neither was there any blood found in the car the prosecution alleges Hunt and his accomplice used to transport Mr. Levin's body after he was shot. (Exhibits, p. 236.) Nor did Mr. Levin's neighbor who lived directly above him and often heard him yelling at his dog, hear a gunshot the night he was purportedly murdered. (Exhibits, p. 203, 239.) Mr. Levin's body was never found despite extensive efforts by the authorities to locate it. (Exhibits, pp. 35, 139, 213.)

15. Mr. Levin was a notorious conman. (Exhibits, p. 13, fn. 6.) There was substantial evidence that he planned and executed his own disappearance in order to avoid prosecution on grand theft charges and the prospect of a lengthy prison sentence. At the time of his disappearance, Mr. Levin was being investigated by the F.B.I. on numerous other charges.

(Exhibits, pp. 64, 138-139.) In the days before his disappearance, Mr. Levin had researched extradition treaties between the U.S. and Brazil, purchased clothes that were not his usual style, dyed his hair and purchased a large quantity of traveler's checks. (Exhibits, pp. 64, 236-238.) At trial two people, Carmen Canchola and Jesus Lopez testified that they saw Mr. Levin alive in September 1986, three months after his disappearance and alleged murder. (Exhibits, p. 36, fn. 29.)

16. The primary prosecution witness was Dean Karny, who testified under a grant of immunity.[5] (Exhibits, pp. 9, 194.) A central piece of evidence in the prosecution case was a seven-page "to do" list authored by Hunt that was purported to be the recipe for the alleged murder. This list was discovered at Mr. Levin residence after he disappeared. (Exhibits, p. 21, fn. 12.)

B. San Mateo Murder Case

17. Hunt had another trial for the murder of Hedayat Eslaminia in San Mateo County, at which the prosecution presented evidence related to the disappearance of Mr. Levin. (Exhibits, p. 250.) The jury in this case voted 8 to 4 in favor of acquittal. (Exhibits, p. 272.) The jury in the San Mateo case also stated their belief that he was not guilty of the murder of

[5] Karny's grant of immunity encompassed both the alleged murder of Mr. Levin and the separate murder Hedayat Eslaminia. (Exhibits, pp. 114-115.)

Mr. Levin, whom they believe was still alive after June 6, 1984 and staged his own disappearance. (Exhibits, pp. 250-318.)

18. Karen Marmor, Mr. Levin's neighbor, testified that she saw the seven-page "to do" list on Mr. Levin's desk before his disappearance. (Exhibits, pp. 582-600.)

19. Several jurors, including Joseph Carsanaro, Ardath Sorelle, Harry Morrow, David Saperstein, Barry Creekmore, and Sandra Achiro, found Ms. Marmor to be credible and persuasive. (Exhibits, pp. 252, 270, 273-275, 277-278, 294-295, 308-310.)

20. Several witnesses also testified that they had seen Mr. Levin alive after June 6, 1984, the date he was allegedly murdered. Among these witnesses were Connie and Jerry Gerrard, Nadia Ghaleb, Ivan Werner, Robert Robinson, Carmen Canchola and Jesus Lopez. (Exhibits, pp. 322- Mr. and Mrs. Gerrard testified that they saw Mr. Levin in Greece on Christmas Day 1987, after Hunt had been convicted of Mr. Levin's murder. (Exhibits, pp. 322-415.) Ms. Ghaleb testified that she saw Mr. Levin alive in approximately March 1987, while driving in West Los Angeles. (Exhibits, pp. 417-502.) Ivan Werner worked as a funeral director and saw a man at a funeral who he later identified as Mr. Levin at a funeral in 1985 or 1986. (Exhibits, pp. 667-720.) Robert Robinson was a reporter for City News Service and knew Mr. Levin because Mr. Levin paid him for tips,

saw Mr. Levin in Westwood while in line at a movie theater and spoke with him briefly in October 1986. (Exhibits, pp. 721-853.)

21. Several jurors, including Joseph Carsanaro, Ardath Sorelle, Harry Morrow, David Saperstein, Barry Creekmore, Diane Farrar, Beverly Paustenbach and Sandra Achiro, found some or all of these witness to be credible and persuasive. (Exhibits, pp. 254-255, 268, 272-275, 278-281, 297-298, 300, 302, 305-307.)

22. Juror Carsonaro found that Karen Marmor's testimony that she saw the "to do" list on Mr. Levin's desk to be "very credible." (Exhibits, p. 252.) Juror Carsonaro also believed the testimony of witnesses Connie Gerrard, Nadia Ghaleb, and Robert Robinson. (Exhibits, p. 254-255.)

23. After hearing the testimony of Ghaleb, Robinson, Gerrard, and others, Juror Sorelle believed that Mr. Levin was still alive. (Exhibits, pp. 265-268.) Juror Sorelle found each of these witness to be credible. (Exhibits, p. 265.)

24. Juror Morrow found Karen Marmor and the five witnesses who testified they saw Mr. Levin alive after June 6, 1984 to be credible and significant. (Exhibits, pp. 272-273.) Morrow found Gerrard to be the most believable sighting witness. (Exhibits, p. 273.) He also found Marmor to be "a very credible witness." (Exhibits, pp. 274-275.)

25. Juror David Saperstein found Karen Marmor to be credible. (Exhibits, p. 277.) Saperstein explained how Marmor's testimony impacted his view of the case as follows:

> I did not think that she came to court to lie for Mr. Hunt or that she had some reason to fabricate her testimony for Mr. Hunt's behalf. Obviously, it was a little peculiar that it took her seven years to recognize the significance of what she saw. I had some doubt about her testimony because of that. I understood that her testimony was somewhat inconsistent with the people's theory and specifically inconsistent with the details of Dean Karny's testimony. If one simplified that theory and Karny's testimony, one could still see the "to do" list as a step leading up to a homicide. However, the overall [e]ffect of Ms. Marmor's testimony on me was to reduce the impact of the people's case. Her testimony added to the reasonable doubt that I came to believe. Standing alone, her testimony would not have been enough to raise a reasonable doubt about the truth of the people's allegation that Mr. Hunt killed and robbed Ron Levin, but seen in conjunction with the [five] sighting[] witnesses (Connie Gerrard, Robert Robinson, Nadia Ghaleb, Carmen Canchola, and Jesus Lopez), her testimony had the [e]ffect of deepening my belief that the people had not met their burden of proof on the Levin allegations. (Exhibits, pp. 277-278.)

26. Saperstein found Nadia Ghaleb and Connie Gerrard to be the most credible of the sighting witnesses. (Exhibits, pp. 279-280.)

27. Juror Barry Creekmore found Karen Marmor testimony that she saw the "to do" list on Ron Levin's desk to be credible and very important. Creekmore also found sighting witnesses Ghaleb, Robinson, Canchola and Lopez to be credible, Gerrard not as much. (Exhibits, pp. 297-298.)

28. Juror Sandra Achiro was "bowled over" by Connie and Jerry Gerrard's testimony that they had seen Mr. Levin at a restaurant on Christmas Day in 1987. (Exhibits, pp. 306-307.) Achiro also found Marmor to be credible. (Exhibits, pp. 308-310.)

29. Based on the above information, the lead detective in the Levin murder investigation believed it was be difficult to convict Hunt if his conviction were overturned on appeal based on the evidence from the original trial. (Exhibits, 857-858.)

C. Initial Habeas Petition on New Evidence

30. In 1993, this Court issued an order to show cause on five issues and directed the Los Angeles Superior Court to conduct an evidentiary hearing. (Exhibits, p. 195.) The first issue was concerning "purported newly discovered evidence that Mr. Levin was still alive and additional impeachment evidence which casts a fundamental doubt on the accuracy and reliability of the jury's verdict." (*Ibid*.) This newly discovered evidence issue was limited to: sightings of Mr. Levin; the seven-page "to do" list which was left at Mr. Levin's house prior to June 6, 1984; and evidence contained in a "Dear Dean" letter that prosecution witness, Mr. Karny, committed perjury in another case. (*Ibid*.)

31. In 1996, the superior court conducted an evidentiary hearing and heard testimony from several witnesses who had seen Mr. Levin alive after June 6, 1984. (Exhibits, p. 216-220.)

i. **Connie Gerrard**

32. Connie Gerrard testified that she first met Mr. Levin sometime in the 1980's and had interacted with him approximately ten times. (Exhibits, p. 867.) Ms. Gerrard and Mr. Levin visited each other in their respective homes on multiple occasions for substantial periods of time (45 minutes to an hour). (Exhibits, p. 868.) Ms. Gerrard testified that she saw Mr. Levin alive in Greece on Christmas Day 1987. (Exhibits, pp. 216-217, 877-905, 909-930.) Ms. Gerrard and her husband were in a very small restaurant when two men entered. (Exhibits, pp. 880-883.) Ms. Gerrard immediately recognized one of the men as Mr. Levin. (Exhibits, p. 883.) When Ms. Gerrard saw Mr. Levin she pointed him out and whispered to her husband, George Gerard, that this was Mr. Gerrard. (Exhibits, pp. 217, 883-884.) Mr. Levin sat at the table right next to the Gerrards. (Exhibits, pp. 883-884.) Mr. Levin got up to go to the restroom and as he was passing the Gerrards' table, he saw Mrs. Gerrard. (Exhibits, pp. 885-887.) Mr. Levin's expression changed when he saw Mrs. Gerrard and he appeared to recognize her. (Exhibits, p. 887.) Immediately after recognizing Mrs. Gerrard, Mr. Levin went back to his table and told his companion they were leaving. (Exhibits, p. 888.) Mr. Levin paid the bill and left the restaurant. (Exhibits, p. 888.) Mrs. Gerrard told her youngest daughter about seeing Mr. Levin when she returned home. (Exhibits, p. 889.) Ms. Gerrard does not know Mr. Hunt. (Exhibits, p. 890.)

33. Mr. Gerrard also testified and substantiated Ms. Gerrard's testimony. (Exhibits, p. 217, fn. 10.) Mrs. Gerrard's testimony was found to be credible. (Exhibits, pp. 197, 223.)

ii. **Nadia Ghaleb**

34. Nadia Ghaleb met Mr. Levin in the early 1970's. (Exhibits, pp. 217, 1162-1163.) She saw him many times and had conversations with him. (Exhibits, p. 1167.) The last time Ms. Ghaleb saw Mr. Levin prior to his disappearance was 1982. (Exhibits, p. 1178.) In approximately March 1987, Ms. Ghaleb saw Mr. Levin getting into a car in a parking lot when she was driving to work. (Exhibits, pp. 1178-1186.) The trial court did not question the credibility of Ms. Ghaleb's testimony, but deemed it insufficient to overturn the verdict because she only saw Mr. Levin in a "passing glance." (Exhibits, p. 222.) Thus the trial court gave her testimony little weight. (Exhibits, p. 197.)

iii. **Ivan Werner**

35. Ivan Werner worked as a funeral director in Westwood. (Exhibits, p. 219.) In 1985 or 1986, he saw a man he later identified as Mr. Levin attending a funeral. (Exhibits, pp. 219, 1325-1329, 1331-1334.) Mr. Werner believes that Mr. Levin signed the guestbook at the funeral. (Exhibits, p. 1328.) Mr. Werner took note of Mr. Levin's appearance because he was "immaculately, impeccable dressed." (Exhibits, p. 1329.) Mr. Werner also testified that Mr. Levin had gold filings in his teeth.

(Exhibits, p. 1340.) Mr. Werner is positive that the man he saw at the funeral was Mr. Levin. (Exhibits, p. 1334.) The trial court found that Mr. Werner's testimony was not credible. (Exhibits, pp. 197, 222.)

iv. **Robert Robinson**

36. Robert Robinson was a reporter who knew Mr. Levin because Mr. Levin paid him for tips. (Exhibits, pp. 218, 1119.) Mr. Robinson testified that he saw Mr. Levin in 1986 in Westwood. (Exhibits, pp. 218, 1124.) Mr. Levin walked up to Mr. Robinson one afternoon while in line at a movie theater and said "Hi, Robbie." (Exhibits, p. 218, 1124, 1126.) The trial court found that Mr. Robinson was a "pathetic" witness whose testimony "lacks all credibility." (Exhibits, pp. 197, 221.)

v. **Karen Sue Marmor**

37. Karen Sue Marmor met Mr. Levin in the 1970's when he came into the bank where she worked and threw a fit when she would not open some corporate accounts because he did not have identification. (Exhibits, pp. 219, 977-978.) Years later after marrying, she was reintroduced to Mr. Levin by her husband, Len Marmor. (Exhibits, pp. 219, 979.) Ms. Marmor lived next door to Mr. Levin and they visited each other "all the time." (Exhibits, p. 982.) Ms. Marmor came into contact with Mr. Levin at least two to three times a week. (Exhibits, p. 986.)

38. Around the end of May 1984, approximately a week before his disappearance, Mr. Levin called Ms. Marmor over to his apartment.

(Exhibits, pp.993-994, 1021-1022.) Mr. Levin was very upset and was screaming, “I am not going back to jail.” (Exhibits, p. 994.) While Ms. Marmor was in Mr. Levin’s apartment, the phone rang and Mr. Levin went to answer it. (Exhibits, pp. 995, 1027.) While Mr. Levin was on the phone discussing financial matters, Ms. Marmor saw a legal pad on his desk. (Exhibits, pp. 996, 1027-1029.) “To-Do” was written on the top of the pad. (Exhibits, pp. 996, 1029.) Mr. Levin quickly pulled the pad away from her, but before he did she was that an item on the list was to “kill dog” and another was something about handcuffs. (Exhibits, p. 997.) There was also a movie script on the desk that was about a man going to New York and disappearing. (Exhibits, p. 998.) Mr. Levin told Ms. Marmor that the “To-Do” list had to do with the movie script. (Exhibits, p. 999.) When she asked him why kill the dog, he said “because the dog is neurotic.” (Exhibits, pp. 999, 1035, 1039-1040.) When Ms. Marmor was shown a copy of the “to-do” list from Mr. Hunt’s trial, she confirmed that this was the list she had seen on Mr. Levin’s desk around the end of May 1984. (Exhibits, p. 1002.)

39. Later, when Ms. Marmor commented that the movie script seemed to pertain to Mr. Levin, he replied “Maybe I just won’t come back.” (Exhibits, p. 999.) When Mr. Levin had calmed down, she asked him if there was something bothering him, to which he replied, “I am not going back to jail, Karen. I am not going back.” (Exhibits, p. 999.) After this conversation, Ms. Marmor never saw Mr. Levin again. (Exhibits, p. 1000.)

40. Ms. Marmor's learned from her husband that someone was convicted of killing Mr. Levin but Ms. Marmor didn't believe that Mr. Levin was dead. (Exhibits, pp. 1003-1003.)

41. The trial court found that Mrs. Marmor "has no credibility at all." (Exhibits, pp. 197, 224.)

vi. **Evidence Of Levin's Financial Means To Disappear**

42. Evidence in the form of a declaration from Stephen Plafker, who conducted a forensic examination of Mr. Levin's estate, was presented indicating that in excess of $500,000 from his estate was unaccounted for. (Exhibits, pp. 237-238, 1393-1395.)

vii. **Court's Evaluation Of Evidence**

43. The trial court found that Mr. Robinson and Ms. Marmor had no credibility, and gave little weight to the testimony of Ms. Ghaleb and Mr. Werner. (Exhibits, pp. 197-198.) The trial court found the testimony of Connie Gerrard, that she was Mr. Levin alive in 1987, to be credible. (Exhibits, pp. 197, 223.) However, the trial court held that her testimony did not undermine the prosecution's entire case and point unerringly to Hunt's innocence, which was the standard to overturn a conviction at the time. (Exhibits, p. 223, citing *People v. Gonzalez* (1990) 51 Cal.3d, 1179, 1246.) This Court agreed with the trial court's findings. (Exhibits, pp. 197-198.) This Court also held that the trial court had properly ruled that the testimony of Louise Waller, Carmen Canchola and Jesus Lopez was

inadmissible in the habeas corpus evidentiary hearing because these witnesses had testified at Hunt's trial, making their testimony cumulative. (Exhibits, p. 198.)

D. New Evidence Habeas Petition Under New Legal Standard.

44. Effective January 1, 2017, the Legislature amended section 1473 to require reversal of a conviction based on new evidence that is "of such decisive force and value that it would have more likely than not changed the outcome of the trial." (§ 1473, subd. (b)(2); 2016 Cal Stats. ch. 785, § 1.) On January 30, 2017, Hunt promptly filed a new petition for habeas corpus petition based on the newly discovered evidence from the 1996 evidentiary hearing under the amended standard. (Exhibits, p. 245.)

45. On October 5, 2018, the superior court summarily denied Hunt's petition on a procedural bar, finding that the evidence from the 1996 case was not "new" under section 1473.[6] (Exhibits, p. 246.) Nevertheless, the trial court considered the allegations and evidence contained in Hunt's petition and held that they "were not of such force and value that it would have more likely than not changed the outcome of the trial." (*Ibid*.)

46. Mr. Hunt has [redacted] for

[6] The superior court also held that Hunt's claim of false evidence used at trial was untimely, and that other issues were previously raised on appeal. These issues are not raised in the instant petition.

several years. (Confidential Exhibits, pp. 9-10, 12, 15-16, 18-19, 23, 28, 33, 37-38, 41, 45, 50, 55, 61, 65-66.) He has a [redacted] (Confidential Exhibits, p. 9-10, 23, 38, 41, 45, 50, 66.) He also has had [redacted]. (Confidential Exhibits, pp. 180-182.)

47. As a result of the above medical issues, Hunt experienced [redacted]. (Confidential Exhibits, pp. 199.) He was also [redacted]. (Confidential Exhibits, pp. 9, 200.)

VI.

CONTENTIONS

A.

THE CLAIM OF THE PETITION ARE NOT PROCEDURALLY BARRED.

B.

HUNT IS ENTITLED TO HAVE HIS CONVICTION OVERTURNED BECAUSE NEWLY DISCOVERED EVIDENCE THAT THE ALLEGED MURDER VICTIM WAS ALIVE AFTER THE ALLEGED DATE OF HIS MURDER IS OF SUCH DECISIVE FORCE AND VALUE THAT IT WOULD HAVE MORE LIKELY THAN NOT CHANGED THE OUTCOME AT TRIAL.

VII.

PRAYER FOR RELIEF

Petitioner Hunt is without remedy save for habeas corpus.

Accordingly, the court should:

1. Issue a writ of habeas corpus;

2. Issue an order to show cause;

3. Declare the rights of the parties;

4. Vacate Hunt's conviction;

5. Grant any and all other relief deemed appropriate.

Date: June 25, 2021

/s/ *Tracy Lum*

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Tracy Renee Lum
Attorney for Petitioner Joseph Hunt

MEMORANDUM OF POINTS AND AUTHORITIES

I.

THE CLAIMS OF THE PETITION ARE NOT PROCEDURALLY BARRED.

A. Petitioner's Is Not Barred From Filing A Successive Habeas Petition.

Although the claim raised in this petition is identical to a claim raised in a previous petition in case number B110428 and based on identical facts, it is not procedurally barred as the legislature amended section 1473 to change the standard for vacating a conviction based on the discovery of new evidence. A change in the law will excuse a successive or repetitive habeas corpus petition. (*Reno*, 55 Cal.4th at p. 476, citing *In re Martinez, supra*, 46 Cal.4th at p. 950 & fn. 1.).)

The bar to reverse a conviction based on newly discovered evidence used to be considerably higher for a petition of this nature. (*Sagin*, supra, 39 Cal.App.5th at p. 579.) Before the Legislature amended section 1473 in 2016 to provide for habeas corpus relief when new evidence more likely than not would have changed the trial outcome, a habeas corpus petitioner proceeding on this ground had to show the new evidence pointed "'unerringly to innocence'" and "undermine[d] the entire case of the prosecution." (*In re Hall, supra*, 30 Cal.3d at p. 423.) That former standard required a petitioner to conclusively establish innocence. (*Ibid*.) Under the former version of the statute, it is not sufficient that the evidence might

have weakened the prosecution case or presented a more difficult question for the judge or jury. (*In re Clark* (1993) 5 Cal.4th 750, 766, quotation marks and citations omitted.) Habeas corpus relief was thus previously reserved for those cases where newly discovered evidence essentially on its own proved a petitioner did not commit the crime. (*Sagin*, 39 Cal.App.5th at p. 579.)

The amendment to section 1473 changed that. A petitioner no longer has to prove innocence but rather must show that the new evidence—viewed in relation to the evidence actually presented at trial—would raise a reasonable doubt as to guilt. (*Sagin*, 39 Cal.App.5th at p. 579.)

B. The Petition is Timely.

There is a three-level analysis for assessing whether claims in a petition for a writ of habeas corpus have been timely filed. (*Reno*, 55 Cal.4th at p. 460.) First, a claim must be presented without substantial delay. (*Ibid*.) Second, if a petitioner raises a claim after a substantial delay, a court will nevertheless consider it on its merits if the petitioner can demonstrate good cause for the delay. (*Ibid*.) Third, a claim presented after a substantial delay without good cause will still be considered on the merits if it falls under one of four narrow exceptions: "(i) that error of constitutional magnitude led to a trial that was so fundamentally unfair that absent the error no reasonable judge or jury would have convicted the petitioner; (ii) that the petitioner is actually innocent of the crime or crimes

of which he or she was convicted; (iii) that the death penalty was imposed by a sentencing authority that had such a grossly misleading profile of the petitioner before it that, absent the trial error or omission, no reasonable judge or jury would have imposed a sentence of death; or (iv) that the petitioner was convicted or sentenced under an invalid statute." (*Ibid*., quoting *In re Robbins* (1998) 18 Cal.4th 770, 780–781 (Robbins).)

In California, there are no set determinate time limits for seeking relief on habeas corpus. (*Reno*, 55 Cal.4th at p. 460.) Instead, California courts apply a general "reasonableness" standard to judge whether a habeas petition is timely filed. (*Ibid*.) Accordingly, a habeas corpus petition should be filed as promptly as the circumstances allow, as measured from the time the petitioner or counsel knew, or reasonably should have known, of the information offered in support of the claim and the legal basis for the claim. (*Reno*, 55 Cal.4th at p. 460; *Robbins*, 18 Cal.4th at p. 780 ["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."].)

1. There Has Not Been A Substantial Delay In Filing The Habeas Petition In The Superior Court.

The amendment to standard to overturn a conviction based on new evidence under section 1473 became effective on January 1, 2017 (§ 1473, subd. (b)(2); 2016 Cal Stats. ch. 785, § 1.) On January 30, 2017, Hunt

promptly filed a new petition for habeas corpus petition based on the newly discovered evidence from the 1996 evidentiary hearing under the amended standard. (Exhibits, p. 245.) Thus, Hunt's petition in the superior court was timely as there was not a substantial delay. (*Reno*, 55 Cal.4th at p. 460.)

There are no requirements as to how quickly a habeas petition that was denied in the superior court must be filed in the court of appeal. Thus because the petition was timely filed in the superior court, this petition is timely.

2. Good Cause Exists For The Delay In Filing The Instant Petition.

Even if a petitioner raises a claim after a substantial delay, a court must nevertheless consider it on its merits if the petitioner can demonstrate good cause for the delay. (*Reno*, 55 Cal.4th at p. 460; *Robbins*, 18 Cal.4th at pp. 780-781.)

In past cases the California Supreme Court has excused delays of many years between conviction and filing of a collateral attack on a judgment. (*In re Saunders* (1970) 2 Cal.3d 1033, 1040 (five-year delay; see also *In re Perez* (1966) 65 Cal.2d 224, 228 [three-year delay between sentencing and filing of petition excused.].) Courts have also excused delays between the denial of a habeas petition in the superior court and filing in the court of appeal. (*In re Burdan* (2008) 169 Cal.App.4th 18, 31.)

Here, Hunt, who for years has worked on his own legal challenges, experienced significant health issues [redacted]. (Confidential Exhibits, pp. 199-200.) After three years and no improvement in his health, Hunt recently hired the undersigned to represent him and file the instant petition (Confidential Exhibits, p. 200.) This is good cause for the delay between when the superior court denied the habeas petition and when the instant petition was filed in the superior court.

3. Even If Good Cause Is Not Established For Any Delay, The Court Should Consider The Merits of Hunt's Claims Because Hunt is Actually Innocent of Murder.

A claim presented after a substantial delay without good cause will still be considered on the merits if it falls under one of four narrow exceptions: "(i) that error of constitutional magnitude led to a trial that was so fundamentally unfair that absent the error no reasonable judge or jury would have convicted the petitioner; (ii) that the petitioner is actually innocent of the crime or crimes of which he or she was convicted; (iii) that the death penalty was imposed by a sentencing authority that had such a grossly misleading profile of the petitioner before it that, absent the trial error or omission, no reasonable judge or jury would have imposed a sentence of death; or (iv) that the petitioner was convicted or sentenced under an invalid statute." (*Reno*, 55 Cal.4th at p. 460; *Robbins*, 18 Cal.4th at pp. 780-781.)

The second exception applies here because Hunt is claiming that he is actually innocent of the crime of murder for which he is currently sentenced to life with the possibility of parole. In amending the standard of proof to overturn a conviction based on new evidence under section 1473. "[t]he Legislature has chosen to more closely protect society's interest in ensuring that a person convicted of a crime is the person who committed it." (*Sagin*, 39 Cal.App.5th at p. 580.) Indeed, the Legislative intent of SB 1134 was to SB 1134 give individuals who are falsely convicted "a fair chance to prove their innocence and the criminal justice system a chance to rectify the wrongful imprisonment of innocent individuals." (Exhibits, p. 1392.) Thus, Hunt himself is the only person prejudiced by the delay in the adjudication of his claim that he is innocent of the crime for which he has been incarcerated for more than 30 years. (*In re Burdan*, *supra*, 169 Cal.App.4th at p. 31.)

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II.

HUNT IS ENTITLED TO HAVE HIS CONVICTION OVERTURNED BECAUSE NEWLY DISCOVERED EVIDENCE THAT THE ALLEGED MURDER VICTIM WAS ALIVE AFTER THE ALLEGED DATE OF HIS MURDER IS OF SUCH DECISIVE FORCE AND VALUE THAT IT WOULD HAVE MORE LIKELY THAN NOT CHANGED THE OUTCOME AT TRIAL.

A. Controlling Legal Principles.

The writ of habeas corpus is the "'highest safeguard of liberty.'" (*People v. Villa* (2009) 45 Cal.4th 1063, 1068, quoting *Smith v. Bennett* (1961) 365 U.S. 708, 712 [6 L. Ed. 2d 39, 81 S. Ct. 895].) Its purpose is to determine whether a person imprisoned by the state is being legally held and to provide summary relief if the imprisonment is unlawful. (*People v. Romero* (1994) 8 Cal.4th 728, 736–737.) "Despite the substantive and procedural protections afforded those accused of committing crimes, the basic charters governing our society wisely hold open a final possibility for prisoners to prove their convictions were obtained unjustly." (*In re Sanders* (1999) 21 Cal.4th 697, 703.) When a defendant has been wrongly convicted, a writ of habeas corpus serves to vacate the judgment of conviction and restore the defendant "to the position she or he would be in if there had been no trial and conviction." (*In re Cruz* (2003) 104 Cal.App.4th 1339, 1346.) When reviewing the superior court's decision on the previous petition and this Court owes it no

deference; rather, this Court exercises its independent judgment to decide whether relief is warranted. (*Sagin*, 39 Cal.App.5th at p. 578.)

The bar for relief was considerably higher when this Court considered Hunt's claims in 1996. At that time, a habeas corpus petitioner proceeding on the ground of newly discovered evidence had to show the new evidence pointed "unerringly to innocence" and "undermine[d] the entire case of the prosecution." (*In re Hall*, supra, 30 Cal.3d at p. 423; Exhibits, p. 197) That former standard required a petitioner to conclusively establish innocence. (*Ibid*.)

However, in 2016 the Legislature amended section 1473 to provide for habeas corpus relief when new evidence more likely than not would have changed the trial outcome. (§ 1473, subd. (b)(3)(A) [Habeas corpus relief based on newly discovered evidence may be granted when "[n]ew evidence exists that is credible, material, presented without substantial delay, and of such decisive force and value that it would have more likely than not changed the outcome at trial."].) Habeas corpus relief was thus previously reserved for those cases where newly discovered evidence essentially on its own proved a petitioner did not commit the crime. Now, a petitioner no longer has to prove innocence but rather must show that the new evidence—viewed in relation to the evidence actually presented at trial would raise a reasonable doubt as to guilt. (*Sagin,* 39 Cal.App.5th at p. 579.) The statute creates a sliding scale: in a case where the evidence of

guilt presented at trial was overwhelming, only the most compelling new evidence will provide a basis for habeas corpus relief; on the other hand, if the trial was close, the new evidence need not point so conclusively to innocence to tip the scales in favor of the petitioner. (*Ibid*.) The change in the law represents an overall lower tolerance for wrongful convictions. (*Ibid*.) The Legislature has chosen to more closely protect society's interest in ensuring that a person convicted of a crime is the person who committed it. (*Ibid*.)

A changed trial outcome means a result different from the guilty verdict Hunt's jury returned. Significantly, that definition does not require an acquittal, but also encompasses a hung jury. (*Sagin*, 39 Cal.App.5th at p. 579, citing *People v. Soojian* (2010) 190 Cal.App.4th 491, 521.) "More likely than not" means just that. Hunt's burden in this habeas corpus proceeding is to show it is more likely than not the new witness citing evidence would have led at least one juror to maintain a reasonable doubt of guilt. (*Sagin*, 39 Cal.App.5th at p. 579.)

When determining whether new evidence is more likely than not to change the outcome of the trial, the new evidence must be analyzed in the context of the rest of the evidence presented at trial. (*Sagin*, 39 Cal.App.5th at p. 582.)

B. New Evidence Exists That Is Credible, Material, Presented Without Substantial Delay, And Of Such Decisive Force And Value That It Would Have More Likely Than Not Changed The Outcome At Trial.

This Court has previously determined newly discovered evidence existed that Mr. Levin was still alive and additional impeachment evidence which casts a fundamental doubt on the accuracy and reliability of the jury's verdict and procured testimony from the witnesses who have seen Mr. Levin since he was allegedly murdered by Hunt. (Exhibits, pp. 195, 197-198, 216-223.) Because the factual allegations in this petition are based on both evidence presented at that hearing that has already been evaluated, and on witnesses who testified at a hearing whom the trial court has already found credible, an evidentiary hearing is not required to resolve the issues in the instant petition. (*In re Hardy* (2007) 41 Cal.4th 977, 991.)

This Court has already reviewed the testimony of the so called "sighting" evidence and ruled that Connie Gerrard, Nadia Ghaleb and Iva Werner's testimony that they each separately saw Mr. Levin alive after he was purportedly murdered in 1984.[7] (Exhibits, p. 197.) However, this Court must now reevaluate its holding whether this evidence is sufficient to overturn Hunt's murder conviction under the new standard that it is more

[7] In evaluating the evidence presented at hearing in the previous habeas case, this Court implicitly held that the evidence was not cumulative. (Exhibits, p. 197.)

likely than not that at least one juror would have had a reasonable doubt as to Hunt's guilt. (*Sagin*, 39 Cal.App.5th at p. 579.)

"The corpus delicti of a homicide consists of: (1) the death of the alleged victim, and (2) the existence of some criminal agency as the cause." (*People v. Mitchell* (1982) 132 Cal.App.3d 389, 401.) "It is the settled rule, however, that the corpus delicti must be established independently of admissions of the defendant." (*People v. Cullen* (1951) 37 Cal.2d 614, 624.)

In 1996, the trial court reasoned that the evidence against Hunt was "overwhelming" summarizing the evidence as follows:

> Petitioner planned the Levin murder. He had motive as well as opportunity to do it. He had been conned by a con man and that fraud was about to bring down his own schemes and organization. He had real animosity towards Levin. He told others that he would do the murder. He told others afterwards that he and Pittman had committed the crime. He flew to New York the day after the murder to rescue Pittman who had been arrested using Levin's credit cards. He attempted.to hide his deeds, fabricate evidence and thereafter, he threatened those who might report his crime. (Exhibits, p. 223.)

This Court agreed with this assessment, stating that "[t]he prosecution case conclusively demonstrated petitioner killed Mr. Levin…." (Exhibits, p. 206.) However, the evidence cited above goes to only to the corpus delecti of criminal agency. There is little evidence the death of the alleged victim beyond Hunt's own statements. (*People v. Mitchell, supra*, 132 Cal.App.3d at p. 401; *People v. Cullen, supra*, 37 Cal.2d at p. 624.)

When determining whether the sighting evidence is more likely than not to change the outcome of the trial, the new evidence must be analyzed in the context of the rest of the evidence presented at trial. (*Sagin*, 39 Cal.App.5th at p. 582.) This includes the fact that Hunt's conviction is based solely on circumstantial evidence, and that there is no physical evidence that a murder even occurred – no blood, no bullets, no DNA and most importantly, no corpse. (Exhibits, pp. 23, 139, 236:18-20.) Nor did Mr. Levin's neighbor who lived directly above him and often heard him yelling at his dog, hear a gunshot the night he was purportedly murdered. (Exhibits, p. 203, 239.) Mr. Levin's body was never found despite extensive efforts by the authorities to locate it. (Exhibits, pp. 35, 139, 213.)

The only evidence of Mr. Levin's death was his disappearance. However, the evidence at trial also showed that Mr. Levin was a notorious conman who was being investigated by the F.B.I. on numerous other charges and the time of his disappearance. (Exhibits, pp. 13, fn. 6, 64, 138-139.) In the days before his disappearance, Mr. Levin had researched extradition treaties between the U.S. and Brazil, purchased clothes that were not his usual style, dyed his hair and purchased a large quantity of traveler's checks. (Exhibits, pp. 64, 236-238.) At trial two people, Carmen Canchola and Jesus Lopez testified that they saw Mr. Levin alive in September 1986, three months after his disappearance and alleged murder. (Exhibits, p. 36, fn. 29.) Five hundred thousand dollars is unaccounted for

from his estate and could have been used by him to fund his disappearance. (Exhibits, p. 1394.)

When the above evidence is examined in light of the testimony of the sighting witnesses and other new evidence presented in 1996, there is more than a reasonable doubt as to the element of the death of the alleged victim. (*People v. Mitchell*, *supra*, 132 Cal.App.3d at p. 401.) It is a certainty that at least one juror would have had a reasonable doubt as to Hunt's guilt. (*Sagin*, 39 Cal.App.5th at p. 579.) We know this for certain because actual jurors heard the new evidence in conjunction with the evidence presented at trial and believed that Mr. Levin was still alive. (Exhibits, pp. 265-268.) Several other jurors had a reasonable doubt as to Hunt's guilt for the murder of Levin. (Exhibits, pp. 272-273.) Morrow found Gerrard to be the most believable sighting witness. (Exhibits, p. 273, 277-280, 297-298, 306-307.)

Based on the above information, the lead detective in the Levin murder investigation believed it was be difficult to convict Hunt if his conviction were overturned on appeal based on the evidence from the original trial. (Exhibits, 857-858.)

Based on the above, this Court must overturn Hunt's murder conviction as it is more likely than not to change the outcome of the trial, the new evidence must be analyzed in the context of the rest of the evidence presented at trial. (*Sagin*, 39 Cal.App.5th at p. 582.)

C. Petitioner's Evidence Would Have "More Likely Than Not" Resulted In A Different Outcome As A Result of the Jury's Application of the Corpus Delicti Rule.

The jury was instructed:

> "No person may be convicted of a criminal offense unless there is some proof of each element of the crime independent of any confession or admission made by him outside of trial." (Exhibits, pp. 1396-1397.)

The jury was also told that the elements of murder were death and malice. (Exhibits, p. 1398.) The jury would bear in mind that Mr. Levin disappeared on bail and just ahead of the filing of other charges, after otherwise wasting $10,000 by taking a bail lien off his mother's home. (Exhibits, pp. 1433-1436.) There was also evidence before the jury that Mr. Levin was skilled at impersonating other people, having previously established false identities as a doctor, lawyer and a Rothschild. (Exhibits, pp. 1401-1412, 1416.)

Excluding the statements attributed to petitioner as "admission made … outside of trial," the jury would have weighed an alleged crime scene, that is Mr. Levin's flat, devoid as it was of any direct evidence of foul play. The chief detective on the case disclaimed an opinion as to Mr. Levin's fate until after he had heard about the statements attributed to Hunt. (Exhibits, pp. 1464-1469, 1481.) Furthermore, the judge who presided over Petitioner's preliminary hearing found the evidence supporting the robbery allegation insufficient to make out the corpus delicti thereof. Even the "to

do" list, arguably, would be beyond the ambit of the evidence that a jury would deem relevant when passing on the preliminary question of corpus delicti, as it consists of nothing more that statements made by petitioner "other than at trial." (Exhibits, pp. 1396-1397.)

Pains must be taken on this head to recognize that the jury would have to evaluate the evidence relevant to the corpus delicti question both in terms of the robbery allegations and the murder allegation. Even if they were to find sufficient evidence to support corpus delicti as to the murder charge (i.e., of death and death by criminal means), they would still have to consider whether the State had met its burden of proof with respect to the robbery corpus delicti.

Fairly considered, the evidence not presented at trial which supports the petition would likely lead at least one juror having a reasonable doubt as to petitioner's guilt on both charges owing to the insufficiency of the State's evidence of corpus delicti. Absent the statement evidence from Petitioner – which truly is the Alpha and Omega of the State's case – the remaining evidence supports only one conclusion: that Mr. Levin fled. Absent the statement evidence, there are eight neutral witnesses professing to have seen Mr. Levin in 1986 and 1987. Absent the statement evidence, there is no reason whatsoever to gainsay their testimony, particularly when it is bolstered by facially impressive evidence that Mr. Levin decided to flee and took affirmative steps consistent with flight, such as the dyeing of

his hair and research into Brazilian extradition treaties. (*Summit v. Blackburn* (5th Cir. 1987) 795 F.2d 1237 [reversing under the *Strickland* Standard after finding prejudice in light of the corpus delicti rule.].)

Bearing in mind that the basis of the robbery allegation was the taking of the $1.5 million check, the testimony of Jerry Verplancke would demonstrate that Mr. Levin was involved in raising money for Microgenesis Corporation, the payee on that check. Given that there was no evidence that Mr. Levin even signed the check, outside of admissions attributed to Petitioner, and given that Mr. Levin self-identified as a "venture capitalist" raising money for that company, there is no basis, in the jury's consideration of the corpus delicti would they find "some proof" thereof. Nabil Abifadel, of the bank that processed the $1.5 million check, testified that it was returned as both "NSF" and "signature missing". The only signature that appears on the check, if it can even be called such, is a round loop that resembles a capital "R". There was no testimony at trial that the ink on that check was Mr. Levin's signature, and thus no basis for the jury to conclude that the check was taken by force or threat of force – a necessary precondition for finding robbery. Beyond even that, without that statement evidence, there evidence is no evidence that the check was obtained through "force or fear".

D. The Juror Declarations From The San Mateo Trial Are Highly Probative Evidence Bearing On Determining Whether The New Evidence Would More Likely Than Not Have Changed The Outcome At Trial.

After Petitioner was convicted in the murder of Mr. Levin, he was tried in San Mateo Superior Court for the murder of Hedayat Eslaminia. (Exhibits, p. 250.) In that proceeding, the jury heard from many of the witnesses whose testimony is the new evidence presented in this petition. (Exhibits, pp. 250-318.) Many of the jurors in the San Mateo case stated their belief that Hunt was not guilty of the murder of Mr. Levin, whom they believe was still alive after June 6, 1984 and staged his own disappearance. (Exhibits, pp. 250-318.) Thus, it is a certainty that at least one juror would have had a reasonable doubt as to Hunt's guilt if he were granted a new trial. (*Sagin*, 39 Cal.App.5th at p. 579.) We know this for certain because actual jurors heard the new evidence in conjunction with the evidence presented at trial and believed that Mr. Levin was still alive. (Exhibits, pp. 265-268.) Several other jurors had a reasonable doubt as to Hunt's guilt for the murder of Levin. (Exhibits, pp. 272-273.)

The declarations in question contain ppinions and observations of the San Mateo jurors with respect to the credibility and probative impact of witnesses such as Gerrard, Ghaleb, Robinson, Werner, and Marmor.

The juror declarations are not barred as they are declarations from jurors that were not a part of the juror who convicted Hunt of murdering Mr. Levin.

California Evidence Code section 1150, subdivision (a) states:

> Upon an inquiry as to the validity of a verdict, any otherwise admissible evidence may be received as to statements made, or conduct, conditions, or events occurring, either within or without the jury room, of such a character as is likely to have influenced the verdict improperly. No evidence is admissible to show the effect of such statement, conduct, condition, or event upon a juror either in influencing him to assent to or dissent from the verdict or concerning the mental processes by which it was determined.

Section 1150 does not operate to exclude the declaration of the San Mateo jurors or any aspect of their content.

First, the San Mateo juror declarations are not evidence of some "statements made, or conduct, condition, or events occurring, either within or without" the Los Angeles trial jury room. Even if one accepts for the sake of argument that a petition under section 1473, subdivision (b)(3)(A) is an "inquiry as to the validity of a verdict" rather than an inquiry which assumes the verdict was valid, but is convened to assess whether a retrial is justified based upon evidence the trial jury neither heard nor considered, it should be plain that no effort is being made to present evidence "to show the effect" of any "statement, conduct, condition, or event" upon any of the Los Angeles trial jurors. Petitioner's point is that the second sentence of subdivision (a) of Evidence Code section 1150 incorporates, and flows

from, the context established in the first sentence of that section. Both sentences address an effort to "impeach a verdict" based upon evidence of the mental processes of those that rendered it, and specifically bar the use of evidence in "an inquiry as to the validity of a verdict" as to "the mental processes by which it was determined." Thus, Petitioner could not use declarations such as these to challenge a verdict rendered by the San Mateo jurors, not could he use evidence of the mental processes of the Los Angeles jurors to challenge the verdict rendered. But, nothing in the statute prevents Petitioner from using the opinions and conclusions of the San Mateo jurors on a matter they did not render a verdict upon; nor does the statute bar the use of their opinions and conclusions as to circumstances and events that they witnessed years after the Los Angeles trial.

Evidence Code section 351 instructs, "except as otherwise provided by statute … relevant evidence shall not be excluded in any criminal proceeding, including pretrial and post-trial … hearings."

Thus, unless subdivision (a) of Evidence Code section 1150 directly bars the use of the San Mateo juror declarations, California's overarching evidentiary policy requires that they be considered.

Further, Evidence Code section 210 states that "[r]elevant evidence means evidence, … hearsay, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or

disprove any disputed fact that is of consequence to the determination of the action."

Whether actual jurors would find Petitioner's habeas witnesses credible is the most basic question posed by this action. The fact that actual jurors found witnesses such as Gerrard, Ghaleb, Robinson, Werner and Marmor credible regarding the same testimony presented in this petition, is both admissible and dispositive.

The relevant case law supports the above analysis. For example, writing for the panel, then Chief Judge Kozinski held in *Miller v. City of Los Angeles* (9th Cir. 2011) 661 F.3d 1024, 1030, that the comparable provisions of Federal Rules of Evidence, Rule 606(b), did not bar evidence of the opinions and impressions of jurors when the jurors in question "returned not verdict" i.e. deadlocked. The San Mateo jury deadlocked 8 to 4 in favor of acquittal and did not render in verdict related to the murder of Mr. Levin. (Exhibits, p. 272.)

As the Ninth Circuit noted in *Sassounian v. Roe* (9th Cir. 2000) 230 F.3d 1097, 1109, the thoughts and opinions of actual jurors can be "the most direct evidence of prejudice" theoretically available. The exclusion of evidence such as the San Mateo juror declaratons, can "lend[] an Alice in Wonderland quality" to a court's efforts to assess prejudice. (*Ibid*.) There is not a valid reason to exclude such evidence unless it is necessary to protect the jury system. Where as here, the admission of the evidence in no way

discredits any juror or the jury system, only some agenda other than justice or the search for the truth underlying this action could justify a ruling excluding it.

Put another way, to ignore the real-world evidence that proves that actual jurors found Petitioner's habeas witnesses credible, in favor of ivory tower conjecture as to how a jury would likely perceive them, would indeed "lend[] an Alice in Wonderland quality" to the ultimate decision with respect to petitioner's fate, especially since subdivision (a) of Evidence Code section 1150 compels no such methodology. To hold that witnesses such as Gerrard, Ghaleb, Robinson, Werner and Marmor would be rejected by real jurors as trivial or incredible, or both is simply in defiance of incontrovertible fact.

The juror declarations are objective, reliable, admissible, relevant, unrefuted, and unmarginalized. Though they did appear in the context of a different proceeding, one that would not have the more limited scope of an actual rtrial, the fact remains that the declarations prove that eight jurors did not find Ghaleb, Robinson, Werner and Marmor inherently incredible, but rather found them persuasive. Moreover, regardless of any observations as to aspects of the San Mateo proceeding that would vary from that of the retrial, the observations the jurors made as to the probative significance of witnesses such as Gerrard, Ghaleb, Robinson, Werner and Marmor, are not logically diminished. Those declarations remain the best available evidence

of how actual jurors would assess and define the significance of what those witnesses recall.

People v. Steele (2002) 27 Cal.4th 1230, 1261 perfectly illuminates why the declarations do not offend the literal terms and underlying intent behind subdivision (a) of Evidence Code section 1150" "This limitation prevents one juror from upsetting a verdict of the whole jury by impugning his own of his fellow jurors' mental processes or reasons for assent or dissent."

There is no "impugning" going on here, nor attempt to use a San Mateo juror's mental processes to undermine any resulting verdict. (See also *In re Stankewitz* (1985) 40 Cal.3d 931; *People v. Hutchinson* (1969) 71 Cal.2d 342; *People v. Gray* (1894) 61 Cal. 164, 183; *People v. Stokes* (1894) 103 Cal. 193, 196-197 [cases that go into depth with respect to the prudential considerations underying subdivision (a) of Evidence Code section 1150 and its ban on the use of a juror's mental processes to impeach the verdict that a jury rendered.].)

CONCLUSION

The newly discovered evidence presented in this petition is highly probative because there is no evidence that the alleged victim actually died the night that it is alleged he was murdered other than his disappearance. While the fact that several witnesses saw the alleged victim alive after the date he was allegedly murdered may not have undermined the entire

prosecution case such that it proved Hunt's innocence, this evidence does make it more likely than not that at least one juror would have a reasonable doubt as to Hunt's guilt. This is the exact type of case that the Legislature had in mind when it amended section 1473.

Thus, this Court must vacated Hunt's conviction, reverse the travesty of justice of and end his 34 years of imprisonment for a murder he did not commit.

Dated: June 25, 2021

Respectfully submitted.

/s/ *Tracy Lum*

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TRACY RENEE LUM,
Attorney for Petitioner Joseph Hunt

VERIFICATION

I, Tracy Lum, declare:

1) I am the attorney for petitioner in this matter;

2) I have read the petition and verify that the contents thereof are true and correct;

3) This petition is brought in good faith as to the merits and that I am entitled to the relief prayed for in this petition.

EXECUTED this 25th day of June 2021, under penalty of perjury by the laws of the State of California.

/s/ *Tracy Lum*
_____
TRACY RENEE LUM,
Attorney for Petitioner Joseph Hunt

CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, Rule 8.360, I certify that this brief was prepared in Microsoft Word using Times New Roman font in 13 point size. According to the word count function in Microsoft Word, this document contains 9,683 words, including footnotes and excluding Table of Contents and Table of Authorities.

Dated: June 25, 2021

/s/ *Tracy Lum*

_____

Tracy Renee Lum, Counsel for
Petitioner Joseph Hunt