CA NO. 13-99010

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

HOOMAN ASHKAN PANAH, Petitioner-Appellant, v. KEVIN CHAPPELL, Respondent-Appellee.	DC NO. CV 05-07606-RGK **DEATH-PENALTY CASE**

APPELLANT'S REPLY BRIEF

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

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United States District Judge

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TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

I. INTRODUCTION

Criminalist William Moore provided graphic expert testimony about a mixture of Panah's and the victim's bodily fluids on three pieces of evidence found in his bedroom. Moore's mixture theory gave a false and misleading impression to the jury. Yet, his testimony was critical to the prosecution, and allowed the jury to convict Panah and sentence him to death. Through Moore's testimony—that stains found on a tissue paper, bed sheet, and robe in Panah's bedroom contained an apparent mixture of his and the victim's bodily fluids—the prosecution painted a vivid and incendiary portrait of felony-murder based on sodomy, oral copulation, and other lewd acts. The prosecution presented this testimony despite knowing that DNA results had proved Moore's conclusions false. The prosecution's misconduct violated Panah's constitutional rights.

In post-conviction proceedings, Panah presented the state courts with the DNA results that the jury never heard, exposing the prosecution's misleading presentation. Despite this evidence, the state court did nothing—neither granting Panah a hearing for factual development, nor finding that Panah's allegations raised a prima facie claim entitling him to a new trial. The state court's decision- that Panah failed to meet even a prima facie threshold-was contrary to, and an unreasonable application of, Supreme Court law, as well as an unreasonable determination of facts.

In his attempt to insulate the jury's verdict from merits review, the Warden mischaracterizes Panah's claim and the constitutional test applicable to it. Under the standard articulated by the Supreme Court, Panah has alleged at least a prima facie claim for relief, and the state court's opinion denying it is unworthy of the deference afforded to reasonable merits adjudications. Accordingly, Panah is entitled to an evidentiary hearing and, ultimately, habeas relief.

II. ARGUMENT

A. Section 2254(d) review of the state court's summary denial of Panah's claims must include an intrinsic review of the state-court process.

The California Supreme Court summarily denied all of Panah's claims without affording him an opportunity for factual development or an evidentiary hearing. In California, a summary merits denial means that the state court concluded that a petitioner's allegations failed to allege a prima facie claim for relief. *People v. Duvall*, 9 Cal. 4th 464, 476 (1995); *People v. Romero*, 8 Cal. 45th 728, 740 (1994); *see also Cullen v. Pinholster*, 563 U.S. 170, 220 n.12 (2011). California courts purport to accept the petition's factual allegations as true to determine whether a prima facie case has been made. *Romero*, 8 Cal. 4th at 737. If a prima facie case is alleged, the state court issues an order to show cause (OSC), which gives the court jurisdiction to permit factual development (like subpoena power) and hold an evidentiary hearing. Cal. Rule of Court 4.551(c); Cal Pen. Code § 1484. A petitioner is not required to prove his claims at the pleading stage; only after a court issues an OSC must the petitioner prove his case. *In re Sassounian*, 9 Cal. 4th 535, 546-47 (1995). Indeed, the distinction between the denial of relief and the denial of an evidentiary hearing is important. "After all, had there been discovery or an evidentiary hearing, [a petitioner] may have been able to present more than 'speculation' and 'surmise.'" *Wellons v. Hall*, 558 U.S. 220, 223 (2010).

This Court has expressly considered California's special procedures as part of its review under § 2254(d)(2) by asking whether the state court was reasonable to conclude that no prima facie claim had been alleged at the petition-pleading stage. *Nunes v. Mueller*, 350 F.3d 1045, 1054 (9th Cir. 2003) ("With Nunes' claims being taken at face value as the state court claimed it had done," his allegations "certainly suffice[d] to support an ineffective assistance claim, and

there was ample evidence in the record before the state court to support those assertions"); *see also Earp v. Ornoski*, 431 F.3d 1158, 1172 (9th Cir. 2005) ("because we conclude that Earp has not had a full and fair opportunity to develop the facts . . . the state court's decision denying him relief without an evidentiary hearing to resolve the credibility dispute was based on an unreasonable determination of the facts"); *see also Taylor v. Maddox*, 366 F.3d 992, 1000-01 (9th Cir. 2004).

In contrast to this Court's authority, the Warden argues that the state court's summary denial is immune from § 2254(d)(2) review because Panah's allegations were "presumed to be true" and, thus, "no fact-finding has taken place[.]" Dkt. No. 62, Answering Brief ("Ans."), at 78. The United States Supreme Court's decision in *Brumfield v. Cain*, 135 S. Ct. 2269 (2015)—published after Panah filed his opening brief—undermines the Warden's position.

1. *Brumfield* requires that a state court follow its own rules for adjudicating a constitutional claim in order to satisfy § 2254(d)(2)

In *Brumfield*, the Supreme Court addressed the reasonableness of a Louisiana state court's denial of a claim that the petitioner was intellectually disabled within the meaning of *Atkins v. Virginia*, 536 U.S. 304 (2002). To assess the reasonableness of the state court's fact-finding under § 2254(d)(2), the Supreme Court applied Louisiana's standard for determining whether the petitioner was entitled to an evidentiary hearing to prove mental retardation. Under state law, that standard was satisfied when the petitioner "put forward sufficient evidence to raise a 'reasonable ground' to believe him to be intellectually disabled." *Brumfield*, 135 S. Ct. at 2274. The Supreme Court then looked to Louisiana's judicial and legislative standards before concluding that the state's own prior decisions "illustrated how low the threshold for an evidentiary hearing was intended to be." *Id.* at 2281. In other words, the Supreme Court's § 2254(d)(2)

analysis relied on whether the state's application of a state standard was reasonable.

Brumfield thus confirms this Court's view that when determining whether a claim overcomes § 2254(d)'s constraint on relief, a federal court must conduct an "intrinsic review of a state-court's processes," and determine whether the state court reasonably followed that process to decide threshold questions like petitioner's entitlement to an OSC and an evidentiary hearing. *Maddox*, 366 F.3d at 999. This Court must do the same.

2. Accepting as true Panah's allegations and supporting evidence, no reasonable state-court jurist could have concluded that he failed to allege at least a prima facie claim.

Adhering to *Brumfield*'s requirement to review Panah's claims in the context of California's procedures for adjudicating them, no fair-minded jurist could conclude that Panah failed to meet the preliminary pleading burden necessary to obtain an OSC. The unreasonableness of the state court's conclusion that Panah failed to meet that burden is demonstrated by Panah's certified claim. As described in detail below, Panah presented the state court with allegations, supported by expert declarations, that the prosecution presented testimony that the prosecution's own DNA results proved false. Given the less onerous prejudice standard governing false-evidence claims (*see infra* at Sec. D.1), Panah's allegations at least set forth a prima facie claim. Either the California Supreme Court unreasonably applied clearly established federal law by concluding a prima facie claim was not raised, or it dismissed or discredited Panah's DNA experts' reports about the prosecution's serology presentation, contrary to its own standard that a prima facie claim is assessed by assuming the truth of petitioner's allegations. *See Romero*, 8 Cal. 4th at 737. Indeed, regardless of California's own standard, discrediting Panah's evidence without affording him an evidentiary

hearing amounts to an unreasonable factual determination under § 2245(d)(2). *Maddox*, 366 F.3d at 1001.

The state court's unreasonable failure to find even a prima facie claim is also apparent in Panah's uncertified claims. For example, in support of his ineffective-assistance claim, Panah presented the state court with declarations from each member of his defense team. They all acknowledged that his trial counsel failed to adequately investigate and prepare for the guilt phase, and forewent any investigation whatsoever due to counsel's self-serving desire (and promise to the trial court) that the case would settle. ER 386, 409-10, 439-40. Taking Panah's allegations and evidence as true, the state court could not have reasonably concluded that he failed to allege, at least, a prima facie claim that counsel performed below professional norms. *See Sanders v. Ratelle*, 21 F.3d 1446, 1456 (9th Cir. 1994) ("counsel must, at a minimum, conduct a reasonable investigation enabling him to make informed decisions"); *Correll v. Ryan*, 539 F.3d 938, 949 (9th Cir. 2008) ("An uninformed strategy is not a reasoned strategy. It is, in fact, no strategy at all"); *People v. Ibarra*, 60 Cal. 2d 460, 464 (1963) (counsel in California has a "duty to investigate carefully all defenses of fact and law that may be available to the defendant"); *In re Hall*, 30 Cal. 3d 408 (1981) (habeas relief where counsel had "inappropriate" "reliance on the police to conduct an adequate investigation for the defense"). Indeed, the record exposed that counsel acknowledged the importance of—but misled the court about—retaining a pathologist, which counsel failed to do. 21 RT 2221, 2227, 2324. In finding that Panah failed to allege even a prima facie claim, the state court would have had to discredit or ignore this record and Panah's allegations and evidence. The failure to accept the evidence as true, and permit Panah factual development through the issuance of an OSC, therefore, either constitutes an unreasonable application of clearly established federal law, or it contravenes California's special procedures

and involved unreasonable fact-finding, making the denial of relief unreasonable within the meaning of § 2254(d)(2) as discussed in *Brumfield* and *Taylor*.

Similarly, the state court could not have reasonably complied with its own rules of accepting Panah's allegations as true while also concluding that he did not raise a prima facie claim that his constitutional rights were violated by the failure to move the trial to another courthouse. Panah's allegations supporting the need for a change of venue that the state court either ignored or discredited include: that jurors saw graffiti outside the courtroom saying "Anal sex kid must die," ER 441; that the victim's mother and the mother's fiancé worked in the courthouse, ER 412; that the victim's mother was seen talking with the trial judge in a private hallway reserved for court personnel, ER 392; and that a juror—who attended the same Catholic parish as the victim's family—was seen nodding heads with the parish priest who sat with the victim's family. ER 466, 478-79. No fair-minded jurist could accept these, and additional allegations, as true but conclude that the trial atmosphere had not been "utterly corrupted." *Murphy v. Florida*, 421 U.S. 794, 798 (1975).

Finally, no fair-minded jurist could deny, without an evidentiary hearing to test the evidence, Panah's claim that a juror committed misconduct by asking a third-party (a pastor at the same parish that the victim's family attended) about whether Panah should be sentenced to death following the guilty verdict. Panah presented the state court with a declaration from the juror's husband and an investigator who spoke with the juror. ER 448-51. A fair-minded jurist could not accept these declarations as true and still conclude that Panah had not alleged at least a prima facie claim of presumed prejudice that warranted an evidentiary hearing to explore whether the juror was actually biased. *See Remmer v. United States*, 347 U.S. 227, 229 (1954) (presuming prejudice for purposes of determining whether an evidentiary hearing should be held). Panah has never had the chance to have that hearing.

B. The Warden's interpretation of a colorable claim regarding the presentation of false or misleading evidence contradicts clearly established law.

1. The knowing presentation of misleading testimony that gives the jury a false impression of the evidence violates the Constitution even if the witness did not commit intentional perjury.

The Warden acknowledges that Panah presented the state court with the allegation that the prosecution's "serology evidence presented at trial was misleading" and the "product of prosecutorial misconduct[.]" Ans. at 21. The Warden disparages Panah's claim, however, for lacking the specific allegation that Moore's testimony was "false." Ans. at 22 & 42. The semantic distinction is irrelevant. Clearly established federal law prohibits a conviction that is *either* "obtained through the use of false evidence," *Napue v. Illinois*, 360 U.S. 264, 269 (1959), *or* that is obtained through evidence that gives the jury a "misleading" or "false impression" of the evidence. *Alcorta v. Texas*, 355 U.S. 28, 31 (1957); *Donnelly v. DeChristoforo*, 416 U.S. 637, 647 (1974) (stating that a constitutional violation could inure from "the introduction of specific misleading evidence important to the prosecution's case in chief" but concluding the evidence in that case did not rise to such a level); *see also Soto v. Ryan*, 760 F.3d 947, 958 (9th Cir. 2014) (AEDPA case discussing *Alcorta* under the *Napue* standard set forth by the Supreme Court).

Thus, even if Moore's testimony was an honestly held "opinion" about a mixture "theory," the prosecution violated the Fourteenth Amendment by presenting it because the prosecutor knew that that theory contradicted the more exacting DNA results that the prosecution had, but chose not to present. In doing

so, the prosecution knowingly gave the jury a false impression of the evidence found in Panah's bedroom.[1] Because the DNA evidence belied the serology testimony, and the prosecutor knew it, but still presented that testimony, Moore's expert opinion was "so misleading as to amount to falsity;" and it was a violation of the Fourteenth Amendment. *United States v. Vozzella*, 124 F.3d 389, 393 (2d Cir. 1997).

The Warden's implicit suggestion that Panah must show that Moore committed outright perjury, *see* Ans. at 39-40, finds no support in Supreme Court or Ninth Circuit law. In fact, this Court has rejected the same suggestion in another AEDPA case. *See Hayes v. Brown*, 399 F.3d 972, 980-81 (9th Cir. 2005). There, counsel for the Warden similarly argued that "*Napue* renders unconstitutional only acts of perjury" and that it is "constitutionally permissible for [the prosecution] knowingly to present false evidence to a jury in order to obtain a conviction, as long as the witness used to transmit the false information is kept unaware of the truth." *Id.* That view of *Napue* "is wrong." *Id.* at 981. To the contrary, "[t]he fact that the witness is not complicit in the falsehood is what gives the false testimony the ring of truth, and makes it all the more likely to affect the judgment of the jury. That the witness is unaware of the falsehood of his testimony makes it more dangerous, not less so." *Id.*

Here, that danger was realized. Moore, a serologist, testified about a novel mixture theory that he very well may have believed to be true and consistent with

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[1] While the Warden attempts to parse Panah's discussion of the prosecutor's closing argument into a separate allegation of prosecutorial misconduct, its relevance is three-fold: to (1) clarify the false impression of the serology evidence conveyed to the jury, (2) expose that the prosecutor knowingly misled the jury into thinking that Moore's mixture theory was the best scientific explanation available and (3) demonstrate the impact of Moore's testimony on the jury's verdict. Dkt. No. 16, Opening Brief (AOB), at 40-42.

the evidence. Nothing in his testimony or in the trial record as a whole indicates that he had any idea that the prosecution obtained DNA results that undermined and contradicted his theory. Thus, the jury—kept in the dark about the contrary DNA results—was more likely to have credited Moore's testimony due to his own erroneous belief that it was true. If the California Supreme Court adopted the restrictive view of a *Napue* violation that the Warden suggests it did, its decision constitutes an unreasonable application of clearly established law.[2]

The Warden also claims that the expert reports examining the prosecution's DNA results are not conclusive enough to render Moore's testimony false. Ans. at 45-46. This position ignores that the DNA results render false the overall "impression" that Moore's testimony allowed the prosecutor to give to the jury even if the DNA results were inconclusive for some items. *Alcorta*, 355 U.S. at 31. Indeed, the Supreme Court, in *Miller v. Pate*, found that the prosecution's evidence was "false" in violation of the constitution even where the petitioner's post-conviction expert could not say that the prosecution's serologist's testimony was entirely false because the samples had degraded. 386 U.S. 1, 3-5 (1967). Accordingly, if the state court's adjudication of this claim is based on the hyper-technical definition of falsity that the Warden adopts, especially where it denied Panah a chance to present the testimony of his experts at an evidentiary hearing, then its decision was unreasonable within the meaning of § 2254(d).

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[2] Respondent has acknowledged in other proceedings that when analyzing a summary denial on the merits by the California Supreme Court, a federal court may rely on state counsel "to explain why there is at least one theory under which a state decision cannot be said to be factually unreasonable or to contravene some specific holding of the United States Supreme Court" in conducting its review under AEDPA. *Jones v. Davis*, No. 14-56373 (9th Cir. Nov. 12, 2015), Appellant's Opening Brief at 15.

2. The prosecutor's admission that he is a "pathological liar," lends support for the allegation that he knowingly presented false evidence.

The Warden does not dispute that Panah presented the state court with allegations that prosecution witness Criminalist Moore provided "misleading" testimony that scientific evidence showed that Panah engaged in sexual contact with the victim. SER 118-55; Ans. at 21. The Warden mistakenly asserts, however, that Panah's claim is "predicated on allegations of [prosecutorial] misconduct that occurred subsequent to Petitioner's trial and had nothing to do with the prosecution's presentation of any evidence in this case." Ans. at 41; *see also id.* at 42-43. Not so.

The crux of Panah's claim, including as it was pled in Panah's initial state habeas petition, is that the prosecution committed misconduct by presenting misleading serology evidence through Moore's testimony, which the prosecution knew at the time was contradicted by the DNA results that it had ordered. SER 145, 154; 119-37, 139-43; Ans. at 21. Accordingly, the Warden's complaint that the Supreme Court has never protected defendants from "being prosecuted by a deceptive man" is a proverbial red herring. Ans. at 42. The Constitution protects defendants from the deliberate presentation of evidence, like Moore's testimony, that gives the jury a false impression of the evidence.

Even so, the state court should have considered the fact that the prosecutor handling the serology evidence, William Cowenberg, was an admitted pathological liar at the petition-pleading stage, where the state court was merely assessing whether Panah alleged a prima facie claim. That fact alone does not predicate a constitutional violation, but it does lend support for Panah's allegation that

Cowenburg knowingly presented false evidence.[3] First, the state court requires that Panah present "reasonably available documentary evidence" to support his allegations. *Duvall*, 9 Cal. 4th at 474. At the petition-pleading stage, Panah did not have the power to subpoena Cowenberg and cross-examine him to demonstrate his knowledge of the DNA results. What was reasonably available to Panah absent subpoena power was the circumstantial evidence of Cowenberg's willingness to lie for his own self-interest, including Cowenberg's misconduct records and status as a self-described "pathological" liar. ER 479. Because this evidence lends evidentiary support to *Napue*'s second element, it is relevant to whether Panah stated a prima facie claim and the state court was not entitled to disregard it in assessing Panah's entitlement to an evidentiary hearing.[4]

Second, Cowenberg's penchant for lying did not arise only after Panah's trial, as the Warden contends. Rather after Panah's trial is when Cowenberg was caught. Cowenberg admitted to falsifying information in a Personal Data Questionnaire in 1993—before Panah's trial—as part of his judicial appointment application. ER 468-69. The fact that he was caught afterwards about these lies is irrelevant. Accordingly, at least as to his falsifications that occurred before Panah's trial, Cowenberg's predisposition to fabricate facts for his own benefit provides substantial support for Panah's prima facie claim. Cowenberg presented

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[3] Even so, as explained in the AOB, the prosecution's knowledge of the false impression from Moore's testimony is demonstrated by the fact that it obtained and chose not to present the DNA results that refuted the serology testimony.

[4] If Panah had been granted an evidentiary hearing, or discovery power to depose Cowenberg, he could have elicited questions that directly exposed Cowenberg's knowledge. *See California v. Greene*, 399 U.S. 149, 158 (1970) (cross-examination is the "greatest legal engine ever invented for the discovery of truth").

Moore's testimony to the jury knowing that DNA evidence the jury never heard unequivocally refuted Moore's theory of blood mixture.

3. Panah's counsel's acknowledgement that the DNA results contradicted Moore's testimony serves as additional evidence that Panah's counsel was constitutionally ineffective; it does not insulate the prosecution from the fulfillment of its constitutional duties.

The Warden suggests that Panah's false-evidence claim was tardily raised to the state court in Panah's first habeas petition because, at least as to the stains on the tissue paper, "Petitioner was aware of this fact as early as November 21, 1994, when trial counsel informed the court that 'the DNA stuff didn't pan out[.]'" Ans. at 71 (quoting SER 4). The Warden's acknowledgement that counsel knew, but failed to present, that the DNA results refuted the prosecution's theory is "irrelevant," because defendants cannot "waive the freestanding ethical and constitutional obligation of the prosecutor as a representative of the government to protect the integrity of the court and the criminal justice system." *Sivak v. Hardison*, 658 F.3d 898, 909 (9th Cir. 2011) (citation omitted). Thus, the Warden's argument is another 'red herring.'

The fact that trial counsel failed to even *consult* with a DNA expert to independently (and confidentially) interpret the DNA results—when he knew that the results were unhelpful to the prosecution—demonstrates that counsel's performance fell below professional norms. *See* AOB at 70-78 (discussing Uncertified Claim one). Trial counsel's ineffective assistance is, however, a separate violation of a distinct constitutional guarantee. This Court should reject the Warden's attempt to conflate these issues.

C. The prosecution's DNA results demonstrate that the impression of the evidence based on Moore's testimony was false and misleading.

Moore testified about stains found on three items of evidence: (1) a tissue paper, (2) a bedsheet, and (3) a robe. Moore's testimony, based on AB blood typing, gave the jury the impression that these items were stained with a mixture of fluids from the victim and Panah, which in turn enabled the prosecutor to argue that sexual contact between the two had occurred.

1. The Warden now concedes that the DNA results render Moore's testimony about the tissue paper false.

In contrast to his pleadings in the district court, the Warden now acknowledges that Moore's testimony about the tissue paper was false. *Compare* Ans. at 49 ("it appears that Petitioner is correct that the DNA results showed Nicole was not a contributor to the stain on the tissue") *with* USDC Dkt. No. 155, Opp. to § 2254(d) Brief, at 121 (inference of a mixture between victim and Panah "holds true for the bath tissue, which bore the same . . . amylase mixture as on the bed sheet").[5] The tissue paper does not contain the victim's DNA, and so it contradicts the prosecution's theory and Moore's testimony that the tissue contained mixture of the victim's saliva and Panah's semen, as Moore testified. ER 460.

[5] The district court's order did not address whether the prosecution's DNA testing rendered Moore's testimony about the tissue paper false.

2. The DNA experts unequivocally found that there was no evidence of mixture of Panah's and the victim's biological material, and the state court's determination to the contrary is an unreasonable determination of the facts.

When DNA expert Lisa Calandro evaluated the DNA evidence, she found that some samples yielded "inconclusive" results." ER 10. She, however, clarified that the results were inconclusive because she was not able to make a conclusive determination without the photographs of the DNA hybridization strips, which were unavailable to her. ER 463-64. To justify the state court's denial of this claim, the district court and the Warden cite to Calandro's report that states that "[a] number of samples yielded 'inconclusive' results." ER 10.

Following the post-conviction disclosure of the DNA hybridization strips, Panah obtained a supplemental report by DNA expert Keith Inman to "resolve the issue of 'inconclusive findings' for the DNA results[.]" ER 381. The Warden relies on a statement in Inman's report that the portions of the stains that Calandro noted were inconclusive "gave weak 4 activity[.]" ER 382. From this statement, the Warden surmises that "'weak 4 activity' was consistent with, and did not eliminate, Panah, who was a type 1.3, 4, as the contributor." Ans. at 48. Thus, according to the Warden, Moore's testimony that Panah contributed to the mixtures is not technically false. This analysis is unreasonable in light of Inman's actual conclusions.

Inman explained that, for both the bedsheet and robe stains, the "weak activity was called inconclusive in the LAPD report, presumably because the control 'C' dot was weak or absent." ER 382. As to the bedsheet stains, Inman concluded that despite the weak 4 activity, his "review of the typing strips . . . further supports the finding that no evidence exists of a mixture of biological material from Mr. Panah and Ms. Parker." ER 382. Similarly, for the stain on the robe, and despite the weak 4 activity, Inman unequivocally found that "[n]o

evidence exists in the DNA evidence of a mixture of biological material from Mr. Panah and Ms. Parker at this time." ER 382. Addressing all of the stains, Inman concludes that "[n]o biological evidence exists to support the hypothesis that a mixture of biological fluids from Mr. Panah and Ms. Parker were present on the tissue, bedsheet, or kimono [robe]." ER 382. His ultimate opinion is that based on the DNA, there is "no evidence to suggest intimate sexual contact between Mr. Panah and the victim." ER 382. Moore's testimony at trial indicating that Panah and the victim *did* contribute to a mixture of fluids in the stains is rendered false by Inman's conclusions.

Because the state court denied relief without issuing an OSC or affording Panah an evidentiary hearing, it purported to accept Inman's report, and his conclusion that there is "no evidence" of a mixture, as true. *Romero*, 8 Cal. 4th at 737. Ignoring Inman's findings stated in his report by relying on an unexplained sentence about "weak 4 activity," either amounts to making "evidentiary findings without holding a hearing and giving petitioner an opportunity to present evidence" or to "a plain misstate[ment of] the record in making their findings[.]" *Taylor*, 366 F.3d at 1001. Indeed, neither Calandro nor Inman have testified to further explain their results, the meaning of the weak or absent control "C" dot, or whether it is possible, as the Warden opines, that Panah is a contributor. Accordingly, if the state court engaged in the same analysis as the Warden does now, and as the district court did below, its summary denial involved an unreasonable determination of facts under § 2254(d)(2).

3. The prosecution's DNA testing demonstrates that Moore's testimony about the bed sheet gave the jury a false impression of the evidence.

Even assuming the interpretation of the "inconclusive" findings was reasonable absent a hearing in which Calandro and Inman could testify; a close examination of the stains undermines the Warden's argument.

Moore testified that a large grouping of five stains found on a bedsheet in Panah's bedroom contained "A" and "B" antigens, ER 1248.12-48.13, a mixture of fluids that included "spermatozoa," ER 1248.13, and fluid that could only be consistent with saliva. ER 1248.14. Moore further testified that the sperm may have come from Panah because he is a B secretor and that the saliva may have come from the victim because she was an A secretor. ER 1248.14-48.20. Thus, Moore's testimony gave the jury the impression that the pattern and mixture of the stains was consistent with "the spewing of [Panah's] semen across the bed sheet." ER 1248.14-48.15. From Moore's testimony, the prosecution gave the jury the impression that—taken together—the mixture of the victim's saliva and the similar mixture found on the tissue paper show that Panah ejaculated in the victim's mouth, and that she then spit onto the tissue and onto the bed; "[t]hat's why there's traces of it on the sheet." ER 948.

Panah provided unequivocal evidence to the state court that the DNA results render the prosecution's impression of the evidence false. The semen stains on the sheet lacked any DNA typing consistent with the victim, despite the fact that "one would have expected . . . to detect [her] DNA in significant quantities" had she "spit out" ejaculate onto the sheet. ER 462. The Warden argues, however, that the DNA results do not render Moore's testimony false because they are not entirely conclusive. Ans. at 45-49. This assertion is unfounded for three reasons.

First, the prosecution's theory, based on Moore's testimony, was that the grouping of the five semen stains on the bedsheet originated from one action: the victim's "spewing of [Panah's] semen across the bed sheet[.]" ER 1248.14. The Warden relies on the fact that three of the five semen stains in that grouping yielded inconclusive results due to "weak 4 activity in both the non-sperm and sperm fractions." ER 382. But the two remaining stains in that same grouping *were* conclusive, exhibiting "a type 1.3, 4 in the non-sperm and sperm fractions, consistent with the type of Mr. Panah" but inconsistent with (and thus excluding)

the victim, who was a type 2, 4. ER 382. Taking this information together, Panah's jury—had it known of the DNA results excluding the victim from two of the five semen stains in the grouping—could not have reasonably believed that the grouping of stains came from the victim's spewing of Panah's semen, when nearly half of the stains tested in that grouping excluded the victim as a contributor. Accordingly, no fair-minded jurist could find that Panah failed to allege at least a prima facie claim. At a minimum, a reasonable court would have had a hearing to permit Panah's experts to testify and further explain why the prosecution's theory of the stains was false.

Second, relying on the inconclusive results to deny Panah's claim without an evidentiary hearing is unreasonable because DNA analyst Calandro explained in her report that "[h]ad Ms. Parker 'spit out' ejaculate onto the bed sheet, one would have expected . . . to detect Ms. Parker's DNA in significant quantities on the bed sheet." ER 462. Thus, the fact that there was (1) "weak 4 activity" rendering inconclusive results for three of the stains, and (2) a definitive exclusion of the victim's DNA on the other two stains, shows that Panah, at the very least, alleged a prima facie claim that Moore's testimony gave a false impression of the nature of the stains found on the bedsheet.

Finally, analysis of the stains on the bed sheet cannot be divorced from the impression the prosecutor gave of the stains on the tissue paper. The prosecutor linked both items to the jury, claiming that together they showed that the victim spit ejaculate onto the tissue paper and then onto the bed. ER 948. As explained above, *see supra* at Sec. C.1, there is no longer a dispute that Moore's testimony about the tissue paper was false, *i.e.*, nothing in the mixture on the tissue paper came from the victim. ER 460. This fact is particularly exonerating because the tissue paper, while excluding the victim, does have A and B antigens. ER 459. Thus, the stain on the tissue paper must have come from either one person who secretes AB antigens or two people, including Panah (a B secretor) and a third

person—other than the victim since DNA excludes her—who is an A secretor. Panah's ex-girlfriend Victoria Eckstone, who testified to having sex in Panah's bedroom, was an A secretor. 22 RT 2597.

With Moore's testimony allowing the prosecutor to link the origin of the stains on the tissue and bedsheet, the only reasonable inference from the DNA results that excluded the victim from the tissue—combined with her exclusion from two of the five stains on the bedsheet—is that she similarly did not contribute to the three inconclusive samples found on the bedsheet. Put differently, there is at least a likelihood that whoever left the A or AB antigens on the tissue paper (which could not have been the victim according to the DNA results) also left A antigens on the bedsheet.

Accordingly, considering the DNA results of the tissue and bedsheet together, no fair-minded jurist could deny Panah's claim without affording him factual development and an evidentiary hearing.

4. The DNA evidence excluded Panah as a contributor to the large stain on the robe unequivocally contradicting Moore's testimony about the stain.

Moore identified two stains on a blue robe found in Panah's bedroom; one on the lower left hem and another larger stain on the upper left front. ER 1284. Moore's testimony discussed only the larger stain. He testified that it contained blood and amylase that he said indicated the presence of saliva, ER 1282, as well as A and B antigenic activity. ER 1248.22. According to Moore's testimony, the B antigens could be traced to Panah while the A antigens in the blood were consistent with the victim. ER 1248.23. The resulting impression was that that stain on the robe contained a mixture of Panah's saliva and the victim's blood. *Id*. The prosecution did not disclose to the jury, however, that its DNA results showed that Panah was not a contributor to the stain on the front of the robe. ER 464. Moreover, as Panah's DNA expert Calandro explained to the state court, the

amylase found in the stain was "less than the quantity detected for a 1:100 dilution of saliva" and "may be the result of perspiration." ER 463.

The Warden, like the district court below, defends the state court's denial of Panah's claim about the stain on the front of the robe by relying on inconclusive results found on an entirely separate stain that Moore never analyzed or testified about at trial. Panah has already explained in his Opening Brief that if the state court similarly relied on a separate stain—that Moore never analyzed—to conclude that Panah failed to allege even a prima facie claim, the decision is an unreasonable determination of facts that ignores Panah's evidence. AOB at 64. The Warden has not offered a contrary explanation.

Similarly, the inconclusive finding on an unanalyzed stain cannot reasonably refute the "allegation that the prosecution knew or should have known that it presented false evidence." ER 13. The prosecution had possession of DNA results that showed Panah was not a contributor to the large blood stain on the front of the robe and yet, it presented Moore's testimony to the contrary. Accordingly, no fair-minded jurist could accept Panah's evidence and allegations as true and conclude he has not raised, at the very least, a prima facie claim worthy of an evidentiary hearing.

D. Moore's testimony was material

Although "*Napue* does not create a per se rule of reversal," if the prosecution "knowingly permitted the introduction of false testimony[,] reversal is virtually automatic." *Jackson v. Brown,* 513 F.3d 1057, 1076 (9th Cir. 2008) (internal citation omitted). Accordingly, the materiality standard for a *Napue* claim is purposefully low "to reflect a sentiment that the prosecution's knowing use of perjured testimony will be more likely to affect our confidence in the jury's decision, and hence more likely to violate due process . . ." *Id.* at 1076 n.12. To find that false testimony was material a court must determine whether "'the false testimony could …in any reasonable likelihood have affected the judgment of the

jury ....'" *Giglio v. United States*, 405 U.S. 150, 154 (1972) (quoting *Napue v. Illinois*, 360 U.S. 264, 271 (1959)). "The question is not 'whether the defendant would more likely than not have received a different verdict' if the false testimony had not been presented, but whether the defendant 'received a fair trial, understood as a trial resulting in a verdict worthy of confidence.'" *Jones v. Ryan*, 691 F.3d 1093, 1102 (9th Cir 2012) (quoting *United States v. Bagley*, 473 U.S. 667, 678 (1985).).

Here, Panah made a prima facie case that Moore's false testimony could have affected the outcome of his trial given that Moore's mixture theory was central to identifying Panah as the killer and as the perpetrator of the special circumstance crimes of sodomy, oral copulation and lewd acts and securing his conviction and death sentence. Moreover, because, as discussed *supra*, the prosecutor knowingly permitted and relied on Moore's false testimony, Panah should have, at minimum, been given an evidentiary hearing to prove he was entitled to relief. However, the state court and federal district court wrongly denied Panah relief.

1. The state court applied a contrary and higher materiality standard than required by clearly established federal law

Contrary to clearly established federal law under 28 U.S.C. § 2254(d)(1), the state court applied a higher materiality standard to Panah's claim than that established by *Napue*. A state court's "consistent articulation and application" of an unconstitutional test rebuts the presumption that a state court knew and followed federal law. *McKinney v. Ryan*, 2015 U.S. App. LEXIS 22767 (9th Cir. 2015). The state's articulation and application of a higher materiality standard, as evidenced by the state court cases of *In re Richards*, 55 Cal. 4th 948, 961 (2012) and *Dow v. Virga*, 729 F.3d 1041, 1048-49 (2013), rebuts the presumption that the state court followed federal law.

The Warden argues that *Richards* does not stand for the proposition that the state court applied a higher materiality standard but only constitutes a discussion of law related to California Penal Code § 1473(b). Ans. at 52. To the contrary, *Richards* demonstrates that the state treated the prejudice standard for § 1473 and *Napue* as one and the same. Importantly, *Richards* stressed that "the law [on false evidence] remained unchanged after the 1975 amendment" of Penal Code §1473. The *Richards* decision cited with approval the case of *In re Wright*, 78 Cal. App. 3d 788, 814 (1978), which, in discussing § 1473 and *Napue*, held that the state court "perceive[d] no substantive difference between the formulations reasonably probable that it could have obtained a different verdict and may have affected the outcome of the trial." *Id.* at 869 (internal citations omitted). The *Richards* court concluded that the materiality test was a "reasonable probability that, had [the evidence] not been introduced, the result would have been different." *Richards,* 55 Cal. 4th. at 961 (internal citations omitted). *Napue,* however, only requires a reasonable likelihood that the false testimony *could* have affected the verdict. *Napue*, 360 U.S. at 271. In fact, the materiality test articulated in *Richards*, is the same as the *Brady* test, which this Court has already recognized is higher than the *Napue* materiality test.

> The materiality analysis proceeds differently for *Brady* and *Napue* claims. Whereas a *Brady* violation is material when "there is a reasonable probability that . . . the rest of the proceedings *would* have been different," *Bagley*, 473 U.S. at 682 (emphasis added), a *Napue* violation requires that the conviction be set aside whenever there is *any* reasonable likelihood that the false testimony *could* have affected the judgment of the jury." *Hayes v. Brown*, 399 F.3d 972, 985 (9th Cir. 2005) (en banc) (emphasis added) (internal quotation marks omitted).

Jackson v. Brown, 513 F.3d 1057, 1076 (9th Cir. 2008). Thus, the court did apply a more onerous materiality standard.

The Warden also attempts to distinguish *Dow v. Virga*, 729 F.3d 1041, (2013). *Dow* found that the state court applied a more difficult materiality standard to a *Napue* claim by requiring that petitioner show that he "would" have obtained a favorable result. *Id*. at 1048-49. The Warden argues that *Dow* involved a reasoned state appellate court opinion, while this case involves a state court silent denial to which *Richter* applies. Ans. at 52-53. However, as Petitioner articulated in his Opening Brief (AOB at 56-57), it is proper under *Richter* to presume that in Petitioner's case the state court applied a test in accord with its own precedent. *See Johnson v. Williams*, 133 S.Ct. 1088 (2013) (finding that it was unreasonable for the state court to have deviated from state precedent in adjudicating petitioner's claim where the denial was silent); *see also McKinney*, 2015 U.S. App. LEXIS 22767 (finding consistent with stare decisis that the state court applied an unconstitutional test consistently throughout the relevant period). Importantly, the Warden points to no cases where the California Supreme Court applied the correct materiality standard to *Napue* claims between 2004 and 2012.

Therefore, the state court's decision is contrary to Supreme Court precedent under 28 U.S.C. § 2254(d)(1) and should be reviewed *de novo*. *Panetti v. Quarterman*, 551 US. 930, 948 (2007).

2. The district court applied a contrary materiality standard

Contrary to the Warden's argument (Ans. at 53-55), the district court also misapplied the materiality standard when it considered the materiality of the *Napue* claim item-by-item instead of cumulatively as required by *Kyles v. Whitley,* 514 U.S. 419, 434 (1995). Like the lower court opinion in *Kyles*, the district court opinion "contains repeated references dismissing particular items of evidence as immaterial and so suggesting that cumulative materiality was not the touchstone." *Id*. at 440. For example, the district court discussed separately the materiality of

the false evidence regarding the stain on the robe versus the false evidence of the stain on the tissue. *Compare* ER 13 ("The court may have reasonably concluded, therefore, that any false evidence presented regarding the stain on the kimono did not have any reasonable likelihood of affecting the jury's guilt or penalty determinations.") *with* ER 15 ("The California Supreme Court may have reasonably determined that any false evidence about the tissue stain, like that about the kimono stain, was not material."). The district court also discussed the materiality of the bedsheet separately from the materiality of the tissue and robe. *See* ER 10-11. Moreover, unlike the lower court in *Kyles*, the district court did not make any statement evidencing that it did conduct a cumulative prejudice analysis. *Kyles,* 514 U.S. at 440.

The failure to conduct a cumulative materiality analysis was particularly egregious in this case, given that the prosecutor argued that it was the combination of the serology evidence that proved that the sexual offenses had occurred:

> That part of the argument that the oral copulation count is not there is not correct. Because it's not the swabs alone upon which the evidence of the count of oral copulation is based. It's also based on the fact that there is semen and there is saliva on the tissue in the waste basket in Mr. Panah's bathroom, and that the blood typing on that matched as well, the victim and defendant.
>
> There is also semen and saliva mixture on the bed sheet, the bed sheet that she was wrapped in. That, too, matches with Nicole Parker and Mr. Panah.
>
> It's on that basis that we believe that you can infer circumstantially that there were acts of oral copulation.

ER 926-27; *see also* 24 RT 2847.

Thus, the district court failed to apply the correct cumulative prejudice analysis when justifying the state court's summary denial. To the extent that the state court engaged in a similar item-by-item materiality analysis, its reasoning was contrary to Supreme Court precedent under 28 U.S.C. § 2254(d)(1).

3. Even if 2254(d) applies, no fair-minded jurist could conclude that Moore's testimony was immaterial

The Warden repeatedly argues that the remaining evidence against Panah was sufficient to convict him of the crimes. *See* Ans. at 75 ("with or without Moore's testimony, the evidence showed a graphic and horrific sexual assault"); Ans. at 77 ("details of the crimes were also admitted through Dr. Heuser's testimony and including overwhelming evidence that Petitioner sodomized Nicole."). However, the materiality test "is not a sufficiency of the evidence test." *Kyles*, 514 U.S. at 435.

Analyzing Moore's testimony under the correct materiality standard reveals that there is a reasonable likelihood that his false testimony could have affected the judgment of the jury. *See Napue*, 360 U.S. at 271-72. "Under this materiality standard, the question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Hayes v. Brown*, 399 F.3d 972, 984 (9th Cir. 2005) (internal citations omitted). No additional harmless-error analysis is necessary once materiality is found. *Id.* at 985 ("The materiality analysis is complete in itself; there is no need for a separate harmless error review.").

This Court has found the necessary materiality under *Napue* when the witness was central to the case, the prosecution relied on the witness testimony, and the remaining evidence was circumstantial. In *Hayes*, the Court found material that the false evidence concerned a witness whose testimony was essential to the burglary case, first-degree murder conviction, and sentence and that the

prosecution relied on the testimony in closing argument. *Hayes*, 399 F.3d at 986. "Without [the false evidence], there was only circumstantial evidence of the burglary, and only inference as to whether Hayes killed [the victim] as a result of the commission of a burglary . . . the false evidence presented was material to both the murder conviction and the imposition of the death penalty . . . " *Id.* In *Maxwell v. Roe*, this Court also found materiality where the witness testimony "was the centerpiece of the prosecution's case" and the remaining evidence was circumstantial. *Maxwell v. Roe*, 628 F. 3d 486, 507 (9th Cir. 2010).

Although the Warden attempts to downplay the significance of Moore's testimony, it is undeniable that "scientific evidence has a uniquely persuasive impact on juries." Vincent P. Iannece, "*Breaking Bad Science: Due Process as a Vehicle for Postconviction Relief When Convictions are Based on Unreliable Scientific Evidence*," 89 St. John's L. Rev. 195, 198 (2015). In fact:

> A 1987 survey of recently discharged jurors serving on criminal cases exposed that forensic experts are the most persuasive trial witnesses. Moreover, approximately one-quarter of these jurors indicated that they would have instead come to a not guilty verdict had no scientific evidence been presented. The research resulted in a finding that "the [mere] presence of forensic science evidence, regardless of the certainty with which it connects the defendant with the crime, is predicted to result in higher rates of conviction."

Id. at 199 (footnotes omitted, alteration in original). "By proffering scientific evidence, the State makes a special claim on a jury's trust because the scientific evidence offers a truth that lay jurors cannot themselves draw from a set of facts." *Id.* at 200. In cases "where the original conviction rested largely on the basis of conventional serology test results indicate that juries presented with such evidence

did, in fact, view it as highly indicative of guilt." Hilary S. Ritter, *Note: It's The Prosecution's Story, But They're Not Sticking to It: Applying Harmless Error and Judicial Estoppel to Exculpatory Post-Conviction DNA Testing Cases*, 74 Fordham L. Rev. 825, 868 (2005). The Supreme Court itself has recognized that serology evidence "play[s] a vital part in the case for the prosecution." *Miller v. Pate*, 386 U.S. 1, 4 (1967). Here, as in *Miller*, the serology evidence is "an important link in the chain of circumstantial evidence against the petitioner, and in the context of the revolting crime with which he was charged, [its] gruesomely emotional impact upon the jury [is] incalculable." *Id.*

Moore's expert testimony regarding the serology evidence was critical to the prosecution's case against Panah. Moore's mixture theory was key to identifying Panah as the perpetrator of Parker's murder, to proving that Panah committed the special-circumstance crimes of sodomy, oral copulation, and lewd acts that made him death-eligible, and as aggravating evidence supporting a death sentence. Thus, Moore's false testimony had a greater impact upon the jury than any other evidence presented.

Moore's testimony was central to identifying Panah as the killer because the remaining evidence was circumstantial. Although the Warden argues that "there was no direct or circumstantial evidence linking anyone other than Petitioner to the crimes" (Ans. at 58), the issue of identity was not as open and shut as the Warden would have this Court believe. There was no eyewitness to the crimes. Numerous people other than Panah had access to the apartment where Parker's body was found, including Ahmed Seihoon who was present at the apartment the day Parker went missing and was the last person seen with Parker while she was alive. ER 962-63, 1011-12. In fact, law enforcement witnessed that someone turned a television off when they knocked on Panah's apartment door during a search for Parker *after* Panah was already at work, demonstrating that someone else, possibly Seihoon, was present in the apartment and had refused to open the door for police.

8 RT 356-57. Law enforcement searched Panah's closet several times before the body was discovered (with negative results), suggesting that the body was planted. ER 228-29, 255-57. Panah's statements to law enforcement and his girlfriend Rauni Campbell, while suffering from acute psychosis, never included any admissions to killing or sexually assaulting Parker. (*See* AOB at 90; SER 72-73) Moreover, Panah has evidence that the time of death was actually later than represented at trial by Dr. Heuser, proving that Panah could not have been the killer. ER 373; *see also* AOB at 84-85. Moore's testimony linking Panah and Parker through the mixture of their biological fluids was, thus, necessary to identifying Panah as the killer.

Moore's testimony was also key to proving that the sexual offenses and related special circumstances of sodomy, oral copulation, and lewd acts on a child had occurred.[6] Contrary to the Warden's argument (Ans. at 77), while Dr. Heuser's testimony discussed injuries to Parker's anal area, she could not determine what had caused the anal injuries. ER 1213-1217. Instead, it was Moore's testimony that was used to prove that the injuries were caused by a penis, rendering it sodomy. Moore testified that, although his examination of the anal swabs and slides revealed no evidence of the presence of semen, the presence of semen was indicated by the presence of acid phosphate on an anal swab. ER 1288.

To find the sodomy special circumstance true, the jury had to find that the murder was committed the perpetrator was engaged in the commission of sodomy. Cal. Pen. Code § 190.2. That showing was premised on Dr. Heuser's arguments that the anal penetration could have caused Parker to die from bradycardia, a slowing of the heart. ER 1226-27. Heuser did not opine, however, that the anal penetration was caused by a penis, it was only Moore's testimony that supported

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[6] The jury found Panah guilty of oral copulation but acquitted him of the oral copulation special circumstance. 4 CT 860, 865.

that the anal penetration was by a penis and thus, a sodomy.[7] *Id.* Moreover, as discussed in more detail in uncertified claim one, Dr. Heuser's opinion that the anal penetration was the cause of death was unreliable. A post-conviction expert critiqued Dr. Heuser's conclusions that Parker's sexual assault was the cause of death. ER 415. Another expert opined that contrary to Heuser's testimony, the extent and depth of anal penetration cannot be determined. ER 372. He also opined that Heuser's theory of sodomy constituted "a novel theory of causation not found in the published literature, and as such forms an improper basis for offering expert opinion."[8] ER 372. Thus, without Moore's testimony there was no evidence to support that sodomy occurred, let alone that the murder occurred during the commission or attempted commission of a sodomy.

It was Moore's mixture evidence alone that the prosecutor used to argue that Parker had been forced to orally copulate Panah. The prosecutor argued:

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

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[7] At the time of trial, sodomy with a foreign object was not a special circumstance.

[8] Heuser's testimony with respect to time of death was also rebutted by the post-conviction expert as Parker's body was in full rigor mortis when found, requiring a substantially different time of death than testified to by Heuser, one that was long after Panah had left the premises where the body was found. ER 373.

> the high amylase indicating saliva—of his type B and her type A.

ER 948. The Warden has now acknowledged, however, that DNA testing conclusively contradicted that Parker's saliva was on the tissue paper, refuting the prosecution's theory that Parker had spit out Panah's semen. Ans. at 54. In fact, A and B antigens found on the tissue paper pointed to someone else having used it, including the real perpetrator or Panah's ex-girlfriend Victoria Eckstone, an A-secretor who testified to having sex with Panah in his bedroom. (22 RT 2597-98.)

Moreover, although the acid phosphatase could have been caused by semen, more definitive testing proved that there was no semen, disproving the Warden's contention that it is inconclusive. Ans. at 76. "[N]o semen or foreign DNA was found in the swab samples from the child's body cavities." ER 372. No p-30 protein, a semen-specific protein, was found in the anal or oral swabs either. ER 1248.51, 1248.53. The presence of acid phosphatase could be accounted for by other explanations, including decomposition. ER 458. Thus, the entire theory that Panah forced Parker to orally copulate him as proven by the mixture of her saliva and his semen is debunked.

Finally, the Warden's arguments (Ans. at 65) overlook that it was Moore's testimony that was relied on by the prosecution to argue that Panah had touched Parker with the specific intent to arouse, appeal to, or gratify his own sexual desires under Penal Code § 288. The prosecution argued in closing argument, "it was done to satisfy his own lust based upon the kind of evidence that you have of ejaculation, semen which is found, semen and saliva, a mixture of which is found on the sheets in the bed." ER 945.

Thus, Moore's testimony was key to the jury finding Panah guilty of murder, sodomy, lewd acts, and oral copulation and finding true the special circumstances of sodomy and lewd acts. "[O]nce an expert has indicated that a crime has occurred, the jury likely focuses on whether it was the defendant who committed

the crime instead of on whether a crime was committed at all." Iannece, 89 St. John's. L. Rev. at 226.

In the guilt phase, the defense had argued to the jury that the case against Panah was completely circumstantial and that none of the special circumstances had been proved beyond a reasonable doubt. ER 1000, 1025. The defense further argued that Moore's mixture testimony was questionable and consisted of unacceptable scientific procedure. ER 1011, 1047. Had the jury been presented with the more exacting DNA evidence contradicting Moore's mixture testimony, it could have undermined Moore's credibility and supported the defense argument that the prosecution had not proven its case against Panah beyond a reasonable doubt. ER 1025, 1030. There is, thus, a reasonable likelihood that the false evidence could have affected the judgment of the jury, undermining confidence in the outcome of the guilt phase of Panah's trial. *Hayes,* 399 F.3d at 985.

In the penalty phase, the prosecutor continued to rely on Moore's mixture-theory evidence that the sexual crimes of oral copulation, sodomy, and lewd acts on a child had been committed to secure a death sentence. The prosecutor argued to the jury "[t]his was a murder that occurred because an individual saw an opportunity and decided he was going to sexually abuse an eight-year-old child and he did so." ER 541. He went on to state that "[t]here is no justification for what occurred. Other than the fact that Mr. Panah did what he wanted to do to this little girl for sexual reasons…" The prosecutor then argued that none of the mitigation evidence presented by the defense "excuses what he did, and none of it mitigates what he did." ER 546.

A death sentence was not a foregone conclusion in Panah's case. Panah's jury began penalty-phase deliberations on January 13, 1995 at 3:10 p.m. and did not reach a verdict until ten days later on January 23, 1995 at 10:08 a.m. after deliberating more than three full days. (CT 908-10, 914-15, 961.) The jury's inability to reach a verdict is indicative of the weakness of the prosecution's case.

Kyles, 514 U.S. at 454. Thus, there is a reasonable likelihood that Moore's mixture theory testimony *could* have affected the judgment of the jury. It, thus, cannot be said that Panah's death sentence is worthy of confidence. *Id.* at 434.

Contrary to the Warden's argument (Ans. at 66-70), taken cumulatively, there is a reasonable likelihood that Moore's mixture theory could have affected the judgment of the jury. *Napue*, 360 U.S. at 271. Moore's testimony gave the jury a false impression of a critical fact like in *Miller v. Pate*, 386 U.S. 1 (1967) and *Alcorta v. Texas*, 355 U.S. 28 (1957). While in *Miller*, the false impression was that a pair of shorts were stained with blood rather than paint and in *Alcorta*, the false impression was that the only eyewitness had a casual, rather than an intimate relationship with the victim, here the false impression was that the serology evidence irrefutably proved that Panah was the perpetrator of the murder and that he had committed the additional crimes of oral copulation, sodomy, and lewd acts, which made him death eligible and which were used as aggravators to obtain his death sentence.

Moore's testimony was crucial to the State's case. Without it there was only circumstantial evidence that Panah had committed the murder or that an oral copulation, sodomy, or lewd acts had been committed. Thus, no fair-minded jurist would conclude that the false evidence presented was not material to both the murder conviction and the imposition of the death penalty. Panah is, therefore, entitled to relief on this claim.

III. CONCLUSION

Panah was convicted and sentenced to death based on the serologist's testimony that stains found in Panah's bedroom demonstrated a mixture of Panah and Parker's bodily fluids. In reports submitted to the state court, post-conviction DNA experts stated unequivocally that DNA results of these same stains do not show evidence of a mixture of DNA belonging to Panah and the victim. One expert concluded that after his review of the DNA results, "there is no evidence to

suggest intimate sexual contact between Mr. Panah and the victim." ER 382. This disclosure renders the prosecution's serology presentation false and creates a reasonable likelihood that the false evidence could have affected the jury's verdict at guilt and at sentencing. The Warden's attempt to diminish the import of the post-conviction evidence by relying on inconclusive results ignores the Report's conclusions and is an unreasonable determination of the facts. Until an evidentiary hearing is granted and the Warden cross-examines the post-conviction experts, the reliance on one sentence of their report, taken out of context, is premature and unreasonable. Accordingly, the district court's dismissal of Panah's petition should be vacated and this Court should either grant Panah guilt and penalty relief on the basis of the record or this Court should remand the case to district court for a hearing on Panah's claim.

Respectfully submitted,

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DATED: March 9, 2016

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. 32(a)(7)(C) and Circuit Rule 32-1, I certify that this reply brief is proportionally spaced, has a typeface of 14 points or more, and contains approximately 9,664words.

DATED: March 9, 2016

/s/ Joseph A. Trigilio
JOSEPH A. TRIGILIO

CERTIFICATE OF SERVICE

I hereby certify that on **March 9, 2016**, I electronically filed the foregoing **Appellant's Reply Brief** with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

DATED: March 9, 2016

/s/ De Anna Dove
DE ANNA DOVE