

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