

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

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

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,

HILARY POTASHNER
Federal Public Defender

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By /s/ Joseph A. Trigilio
JOSEPH A. TRIGILIO
SUSEL B. ORELLANA
Deputy Federal Public Defenders

Attorney for Petitioner-Appellant
HOOMAN ASHKAN PANAH