

19-7670
No. _____

IN THE
Supreme Court of the United States

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SUPREME COURT, U.S.

HOOMAN ASHKAN PANAH,

Petitioner,

v.

RON BROOMFIELD, Warden,

Respondent.

On Petition for a Writ of Certiorari to the
California Supreme Court

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

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Petitioner, by his undersigned counsel, asks leave to file the attached Petition for Writ of Certiorari to the California Supreme Court without prepayment of costs and to proceed in forma pauperis. Petitioner was represented by counsel in the California Supreme Court under the authority of the Criminal Justice Act, 18 U.S.C. § 3006A(b).

This motion is brought pursuant to Rule 39.1 of the Rules of the Supreme Court of the United States.

Respectfully submitted,

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DATED: _____

2/11/20

By: _____

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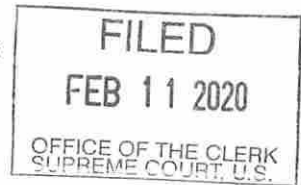
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CAPITAL CASE

QUESTION PRESENTED

What is the test to determine when due process is violated based on scientific evidence presented at trial which is later shown to be invalid?

LIST OF RELATED PROCEEDINGS

United States Supreme Court

Panah v. California, Case No. 05-7760, certiorari denied February 27, 2006.

United States Court of Appeals for the Ninth Circuit

Panah v. Chappell, No. 13-99010, judgment entered August 21, 2019 and rehearing denied on December 17, 2019

United States District Court for the Central District of California

Panah v. Ayers, No. CV-07606-RGK, judgment entered November 14, 2013.

California Supreme Court

In re Panah, No. S246758, petition denied November 13, 2019.

In re Panah, No. S155942, petition denied March 16, 2011

In re Panah, No. S123962, petition denied August 30, 2006

People v. Panah, No. S045504, judgment affirmed March 14, 2005 and rehearing denied on May 18, 2005

California Court of Appeal, Second Appellate District division two

In re Panah, No. B283818, petition denied November 27, 2017

Los Angeles County Superior Court

People v. Panah, No. BA090702, petition denied May 19, 2017

People v. Panah, No. BA090702, judgment entered March 6, 1995.

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**PETITION FOR A WRIT OF CERTIORARI
TO THE CALIFORNIA SUPREME COURT**

Hooman Ashkan Panah (“Petitioner” or “Panah”) petitions for a Writ of Certiorari to review the final order of the California Supreme Court in this case denying his petition for writ of habeas corpus.

OPINIONS BELOW

The claim at issue was raised and denied in all three levels of California’s court system. The Los Angeles Superior Court’s denial of Panah’s habeas petition was not reported. Petitioner’s Appendix (“Pet. App.”) C. The California Court of Appeal’s opinion denying relief is unreported. Pet. App. B. The California Supreme Court’s summary denial is not reported. Pet. App. A.

JURISDICTION

The California Supreme Court summarily denied habeas relief on November 13, 2019. (Pet. App. A.) This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. Amend. XIV

“[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

STATEMENT OF THE CASE

A. The State relied on scientific evidence to secure Mr. Panah's conviction and death sentence.

On November 20, 1993, Nicole Parker went missing from her father's Woodland Hills, California apartment. Panah lived in the same apartment complex with his mother. After several warrantless searches were conducted inside Panah's apartment, the police found Parker's body inside a suitcase in Panah's bedroom closet on Sunday November 21, 1993. (Pet. App. J at 57.)

The State secured Panah's conviction and death sentence under a felony-murder theory. To prove this theory the prosecution presented the expert testimony of a criminalist, William Moore, who testified that serology testing demonstrated that the stains found on a bed sheet, tissue paper, and robe contained a mixture of blood and other bodily fluids consistent with both Panah and Parker. (Pet. App. J at 57-59.)

Moore testified that a tissue found in a trash can in Panah's bathroom contained semen consistent with Panah and saliva consistent with Parker. Moore testified that this mixture of bodily fluids was consistent with oral

copulation. (Pet. App. N at 607.) Moore also testified that Panah's bedsheet contained a group of stains that showed the presence of sperm and saliva. Moore testified that the semen was consistent with Panah and the saliva consistent with Parker. (Pet. App. N at 600-01.) According to Moore, the stain pattern was consistent with semen spewing on the sheet. (Pet. App. N at 595-96.) Moore also testified that a robe found in Panah's bedroom contained two bloodstains. He only tested the larger stain and found that it was consistent with saliva belonging to Panah and blood belonging to Parker. (Pet. App. N at 603-04.) Based on Moore's testimony, the prosecutor argued that Parker had been murdered to satisfy Panah's lust. (Pet. App. N at 828.) The prosecutor never informed the jury that he had also ordered DQ-Alpha DNA testing of the bedsheet, robe, and tissue, and that this testing disproved Moore's testimony.¹ (Pet. App. N at 557-58; Pet. App. M at 496-503.) The defense also failed to present the DNA evidence disproving the serology to the

¹ The prosecutor initially represented to the trial court that it expected to introduce the DNA results into evidence. (Pet. App. N at 557.) However, he later informed the court that he would not be presenting the DNA evidence "for tactical reasons." (Pet. App. N at 562.1.) The same prosecutor later admitted to being a pathological liar and was removed from the Bench following his appointment as a Los Angeles Superior Court Judge. (See Pet. App. L at 240-421.)

jury despite being given the raw results by the prosecution.² (Pet. App. N at 560-62.)

A forensic pathologist, Eva Heuser, testified that Parker's cause of death was a combination of all her injuries which included bruising on her head, neck muscles, vagina, and anus. (Pet. App. N at 679-751.) Dr. Heuser testified that the bruising on the anus was consistent with anal penetration possibly sodomy, that sodomy could cause the heart to slow (bradycardia), and that bradycardia caused Parker to asphyxiate. (Pet. App. N at 733-50.) She found that Parker died from craniocerebral trauma, neck compression, and sexual assault with anal lacerations. (Pet. App. L at 215-37.) Based on Dr. Heuser's testimony, the prosecutor argued that Panah strangled Parker while committing the special circumstances of lewd acts, sodomy, and oral copulation. (Pet. App. N at 840-41.)

Dr. Heuser also testified as to the time of death. Although she initially stated that it was impossible to ascertain the exact time that Parker died, she gave a probable time of death. She found that rigor mortis had fully set in when Parker's body was found on Sunday, November 21, 1993 at approximately 11 p.m. and that it could have been in full rigor thirty-six

² Trial counsel never retained a DNA expert to review the prosecution's DNA testing and was unprepared for trial. (Pet. App. M at 508 ¶ 7; Pet. App. M at 515 ¶ 17; Pet. App. M. at 525 ¶ 20.)

hours after death. (Pet. App. N at 756.) She also found what she assumed to be undigested eggs that Parker had eaten the morning of November 20, 1993 in her stomach. (Pet. App. N at 755-56.) She testified that Parker probably died within four hours of eating the eggs. (Pet. App. N at 755-56.) Based on Dr. Heuser's testimony, the prosecutor argued that Panah killed Parker in the late morning or early afternoon of Saturday, November 20, 1993 before he left for work and left her body in a suitcase in his closet.³ (Pet. App. N at 832-36.)

After two days of deliberations the jury found Panah guilty of first-degree murder, sodomy by force, lewd acts upon a child under the age of fourteen, penetration of genital or anal openings by a foreign object with a person under fourteen years of age, and oral copulation of a person under fourteen years of age. (Pet. App. O at 886-92.) The jury also found true the special circumstance allegations that the murder was committed while Panah was engaged in the crime of sodomy and lewd acts upon a child under the age of fourteen. They did not find true the special circumstance that the murder was committed while Panah was engaged in the crime of oral copulation. (Pet. App. O at 886-87.)

³ Trial counsel also never retained an expert pathologist to review or challenge Dr. Heuser's testimony. (Pet. App. M at 505 ¶ 4; Pet. App. M at 509-10 ¶ 13; Pet. App. M at 525 ¶ 21.)

During the penalty phase of the trial, the prosecutor relied on the serology evidence of the oral copulation to argue that the circumstances of the crime itself were an aggravating factor weighing in favor of a death sentence. (Pet. App. N at 857-61.) The jury deliberated for four days before sentencing Panah, who was a 22-year old college student with no prior criminal history at the time of the crime, to death. (Pet. App. N at 854-55, 865-67.)

B. The State Court affirmed Panah's conviction based on the scientific evidence

The California Supreme Court affirmed Panah's conviction and death sentence on direct appeal on March 14, 2005 by relying on the scientific evidence presented against Panah. The state court relied on Dr. Heuser's testimony, including that the injuries to the rectum could have caused death, to find that there was sufficient evidence to prove lewd conduct and to find that Parker had been alive during the commission of the lewd conduct. (Pet. App. J at 162-64.) The court also found that there was sufficient evidence supporting the conviction for oral copulation based on Moore's testimony that the serology testing showed that the tissue paper stains were consistent with oral copulation and that the bed sheet stains indicated spewing. (Pet. App. J at 164-66.) ⁴

⁴ The court denied a petition for rehearing on May 18, 2005 and this Court denied the petition for writ of certiorari on February 27, 2016. (Pet.

C. Despite evidence demonstrating that the scientific evidence presented at Panah's trial was false, the State Court denied relief in post-conviction

1. Panah's post-conviction evidence

In post-conviction, Panah had experts analyze the pathology, serology, and DNA evidence obtained by the prosecution at the time of trial. Based on these expert's analysis, Panah found and presented evidence demonstrating that both Moore's and Dr. Heuser's testimony was false.

Contrary to Moore's testimony, the post-conviction expert's analysis of the DNA testing conducted at the time of trial, demonstrated that there was no mixture of bodily fluids on the tissue paper, robe, or bed sheet. The analysis found the tissue to only contain DNA consistent with Panah and not Parker. (Pet. App. L at 426-27, 434.) Similarly, the bed sheet also failed to contain any DNA consistent with Parker. (Pet. App. L at 427-29, 435.) Finally, the robe was not found to contain any DNA consistent with Panah. (Pet. App. L at 429-31, 435.) These results were consistent with the results obtained by the prosecution. Neither the original criminalist, Cyn Yamauchi, who tested the DNA for the prosecution, nor deputy district attorney Lisa Kahn, who reviewed the DNA tests in the year 2000, found that any of the

App. I.) These petitions did not concern claims related to the serology or pathology evidence.

DNA tested contained a mixture of genetic material consistent with both Parker and Panah. (Pet. App M at 496-503.)

Similarly, contrary to Dr. Heuser's testimony, post-conviction experts found that no brain and sexual assault injuries caused Parker's death. In fact, there was no evidence that Parker suffered craniocerebral injuries at all. (Pet. App. M at 466 ¶ 8; Pet. App. L at 438.) Manual strangulation was also found to be a very unlikely cause of death and any asphyxial death could have been the result of attempted resuscitation. (Pet. App. M at 466-67 ¶ 9.) Further, the theory that anal penetration caused Parker's death was found to lack any merit. (Pet. App. M at 467 ¶ 10.)

Dr. Heuser's time of death testimony was also found to be false. Rigor mortis takes six to eight hours to develop and decreases in intensity twenty-four hours after death. (Pet. App. M at 468-69 ¶ 13.) If Parker really died in the late morning or early afternoon of November 20, 1993, rigor should have been significantly decreased by the time her body was found the following evening. (*Id.*) Further, because Parker's body was found wrapped in a sheet and placed in a suitcase under a pile of objects, this insulation would have caused a retention of body heat resulting in rigor disappearing more rapidly. (*Id.*) In addition, the post-conviction evidence revealed that the use of stomach contents to determine time of death is unreliable because severe stress could have significantly delayed the stomach contents from emptying

causing the estimated time of death to be much earlier. Dr. Heuser's assumption that the contents of Parker's stomach consisted of eggs without conducting any actual testing to determine the identity and condition of the stomach contents, rendered the use of the stomach contents to determine time of death even more unreliable (*Id.*) In fact, Parker most likely died a significant number of hours *after* the early afternoon of November 20, 1993.⁵ (Pet. App. M at 469 ¶ 14.) This time of death window exonerated Panah given that the evidence clearly demonstrated that he left his apartment on November 20, 1993 at 3:00 p.m. and never returned. (Pet. App. J at 54.)

2. Previous habeas denials

In his initial state habeas petition Panah argued that, as a result of prosecutorial misconduct and ineffective assistance of counsel, the misleading serology and pathology evidence had been presented and gone unchallenged at his trial. Specifically, Panah presented a report from post-conviction DNA expert Lisa Calandro, specifying that the DNA analysis of the tissue, robe,

⁵ Even the California Supreme Court, in recounting the facts of the case, stated that Heuser "was unable to state a time of death" suggesting that the Court also found Heuser's testimony regarding time of death not to be credible. *People v. Panah*, 35 Cal. 4th 395, 415 (2005). The Attorney General adopted the California Supreme Court's characterization throughout the federal litigation of Panah's claims. (*See, e.g.*, Pet. App. M at 485, 490, 492.) Parker's death certificate is also inconsistent with Heuser's testimony. (Pet. App. L at 239.)

and sheet did not support that there was a mixture of Panah's and Parker's bodily fluids. (Pet. App. L at 422-32.) Panah also presented the report from post-conviction expert Dr. Michael Baden that "neither craniocerebral injuries nor a sexual assault caused [Parker's] death." (Pet. App. L at 438.) Despite this evidence, the state court summarily denied these claims without a hearing on August 30, 2006. (Pet. App. H.)

In his exhaustion state habeas petition in 2007, Panah again raised claims of prosecutorial misconduct and ineffective assistance of trial counsel and insufficiency of the evidence supporting oral copulation, sodomy, and lewd conduct based on the misleading serology and pathology evidence presented at his trial. To further support his claims, Panah presented a supplemental expert report from DNA expert Keith Inman analyzing typing strips without which Calandro had been unable to determine the meaning of inconclusive DNA results obtained by criminalist Yamauchi from the bedsheet and robe. (Pet. App. L at 433-35.) These strips were obtained from the prosecution through post-conviction discovery. (Pet. App. M at 527-30.) Inman confirmed that there was no DNA evidence demonstrating intimate sexual contact between Panah and Parker. (Pet. App. L at 434-45.) Panah also presented a report from Dr. Gregory Reiber agreeing with Dr. Baden's conclusion regarding cause of death and opining that time of death was much later than what Dr. Heuser testified to. (Pet. App. M at 463-71.) Despite

this additional evidence further supporting that the serology and pathology evidence was invalid, the state court denied Panah's petition in a summary denial on March 16, 2011 without granting him a hearing. (Pet. App. G.)

Panah raised these same claims in federal habeas and was denied by the district court in a reasoned opinion on November 13, 2013 again without a hearing. (Pet. App. F.) On appeal, the Ninth Circuit considered the claims of prosecutorial misconduct and ineffective assistance of counsel as to the serology evidence. For the first time, the State conceded that the evidence of a mixture of bodily fluids on the tissue was false. (Pet. App. E. at 30.) Although acknowledging the State's admission, the Ninth Circuit denied relief in a reasoned opinion on August 21, 2019 and denied rehearing on December 17, 2019.⁶ (Pet. App. E; Pet. App. D.)

3. State court habeas denials at issue herein

In 2017, while his appeal was pending before the Ninth Circuit, Panah filed a third state habeas petition in the Los Angeles Superior Court. This habeas petition was based on the Ninth Circuit case of *Gimenez v. Ochoa*, 821 F.3d 1136 (9th Cir. 2016) which found that the introduction of flawed expert testimony violated due process. The petition was also based on revisions to California Penal Code section 1473 which allowed a new habeas petition to be filed if new evidence was discovered after trial or if the prosecution presented

⁶ Mr. Panah intends to file a separate petition for writ of certiorari from the Ninth Circuit's denial.

evidence that has been undermined by scientific or technological advances and which is substantially material or probative as to guilt or punishment. Cal. Penal Code § 1473; *see also* 2016 Cal SB 1134; 2014 Cal SB 1058. The superior court denied relief on May 19, 2017, concluding that the post-conviction DNA analysis did not render Moore's expert testimony false and was not new pursuant to California Penal Code section 1473. As a result, the court found that Panah also failed to show that the admission of the scientific evidence violated due process. (Pet. App. C at 11-12.)

Panah raised the same claim with the California Court of Appeal and it also denied relief on November 27, 2017 after finding that Panah's post-conviction evidence was available at the time of trial and constituted "nothing more than impeachment of the expert testimony offered at trial." (Pet. App. B at 2.)

Panah raised the claim again in a petition for writ of habeas corpus to the California Supreme Court which summarily denied relief on November 13, 2019. (Pet. App. A.)

REASONS FOR GRANTING THE WRIT

A. This Court should grant certiorari to settle when due process is violated based on invalidated scientific evidence

This Court should grant certiorari pursuant to Rule 10(c) of the Rules of the Supreme Court of the United States. Several federal courts have weighed in on when due process is violated based on the admission of scientific evidence at trial that is later invalidated but this Court has not. However, these courts do not agree on the test, resulting in a circuit split.

Accordingly, this Court should weigh in to settle this important question of federal law.

1. This Court recognizes that the admission of certain evidence violates due process

This Court has held that the admission of certain evidence violates the Due Process Clause of the Fourteenth Amendment. *See Estelle v. McGuire*, 502 U.S. 62, 68-70 (1991); *Dowling v. United States*, 493 U.S. 342, 352-54 (1990). “As applied to a criminal trial, denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice.” *Lisenba v. California*, 314 U.S. 219, 236 (1941).

Evidence that violates fundamental fairness includes that which the State knew to be false. *See Mooney v. Holohan*, 294 U.S. 103, 112 (1935) (finding fundamental fairness is not satisfied “if a State has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured”) ; *Alcorta v. Texas*, 355 U.S. 28 (1957) (finding false impression testimony elicited knowingly by prosecutor violated due process); *Napue v. Illinois*, 360 U.S. 264 (1959) (finding due process violated even when false evidence only goes to the witnesses’ credibility rather than guilt).

This Court has also found that due process is violated where an expert's trial testimony is later demonstrated to be false through post-conviction expert testing where the prosecution was aware of the falsity. *See Miller v. Pate*, 386 U.S. 1 (1967).

However, this Court has not articulated when there is a due process violation when false or faulty scientific evidence was presented at trial that was *not* known to be false at the time by State actors.

2. Lower Courts have found that due process is violated when invalidated scientific evidence was presented at trial but there is a circuit split on what test they have applied

The Ninth Circuit in *Gimenez v. Ochoa*, 821 F.3d 1136 (9th Cir. 2016) held that scientific evidence that has since been discredited violates due process if the flawed testimony undermines fundamental fairness. It requires that the scientific evidence not merely challenge but repudiate the scientific evidence presented at trial. *Id.* at 1145. In addition, the admission of the evidence must be so unfair that it violates "fundamental conceptions of justice." *Id.* at 1145 (internal citation omitted).

The Third Circuit also allows due process claims when unreliable expert testimony was admitted when it undermines the fundamental fairness of the entire trial. *Lee v. Glunt*, 667 F.3d 397, 403 (3d Cir. 2012). However, it is a more stringent test than that of Ninth Circuit. It requires that the

scientific evidence have been undermined or shown to be invalid by subsequent scientific developments. *Lee v. Houtzdale SCI*, 798 F.3d 159, 167 (3d Cir. 2015). In addition, in order to find a due process violation, the prejudice from the scientific evidence that was admitted at trial must outweigh its probative value and there must not be other ample evidence of guilt. *Lee*, 667 F.3d at 407 n.13.

In the D.C. Circuit, courts have also found invalid scientific evidence to violate due process where the government has conceded or not disputed that it *should have known* that the testimony was false at the time of trial applying the less-stringent materiality standard of a *Napue* claim. This includes instances where the scientific evidence was not invalidated until *after* trial. For example, in *United States v. Butler*, 278 F. Supp. 3d 461, 476 (D.D.C. 2017), the government did not dispute that the microscopic hair evidence used at trial was false even though the knowledge that it was false was based on subsequent advances in science. *See also United States v. Ausby*, 916 F.3d 1089 (D.C. Cir. 2019) (noting that government conceded error in microscopic hair analysis testimony but taking no position on materiality).

Thus, depending on what Circuit a petitioner raises a due process claim in, it is possible for one Circuit to find a due process violation where another does not depending on such factors as whether the prosecution acknowledges

that the evidence was false or what prejudice test is applied. Accordingly, this Court should clarify what the proper standard is to determine when scientific evidence is considered invalid and if the invalid scientific evidence violates due process.

B. The State Court acted contrary to federal law by refusing to find that the scientific evidence used to secure Panah's conviction violated due process

The California Supreme Court denied Panah relief in a silent summary denial. (Pet. App. A.) Accordingly, this Court looks through to the reasoning of the California Court of Appeal and presumes that the California Supreme Court denied relief on the same basis. *See Ylst v. Nunnemaker*, 501 U.S. 797 (1991).

The California Court of Appeal rejected Panah's post-conviction evidence on the basis that the evidence was available at the time of trial and because it found that the evidence constituted "nothing more than impeachment of the expert testimony offered at trial." (Pet. App. B at 2.)

However, under the test articulated in *Gimenez*, Panah has made a prima facie claim that the scientific evidence against him violated due process. Even though the DNA and pathology evidence was available at the time, it was *not* presented by either the prosecution or the defense at Panah's trial. (Pet. App N at 562.1; Pet. App. M at 525 ¶ 21.)

In addition, as discussed in the statement of the case at pages 14-16, the post-conviction evidence invalidated the scientific evidence that was presented against Panah at his trial. The post-conviction DNA evidence did not just impeach but disproved Moore's scientific testimony that a mixture of Panah's and Parker's biological material was found on the tissue, sheet, and robe. *See DA's Office v. Osborne*, 557 U.S. 52, 55 (2009) (recognizing DNA testing's "unparalleled ability to exonerate the wrongly convicted and to identify the guilty"). The post-conviction pathology evidence also disproved Dr. Heuser's testimony suggesting that Parker had been killed in the course of a sodomy, that her traumatic injuries had caused her death, and that she was killed on November 20, 1993. Further, the admission of this scientific evidence to prove up key factors of the prosecution's felony murder theory including time of death, cause of death, sodomy, lewd acts, and oral copulation at Panah's trial was so unfair that it violates "fundamental conceptions of justice." *Gimenez*, 821 F.3d at 1145.

Even if the D.C. Circuit's *Napue* materiality test, rather than a fundamental fairness test, applies to Panah's due process claim, Panah can show that there is a reasonable likelihood that the introduction of Moore's and Dr. Heuser's testimony could have affected the judgment of the jury that convicted and sentenced Panah to death. *Giglio v. United States*, 405 U.S. 150, 154 (1972). Dr. Heuser's pathology evidence and Moore's serology

evidence were key to the prosecutor convincing the jury that Panah was the killer. Although Parker was found in a suitcase in Panah's bedroom closet, Panah was not the only person with access to his apartment and bedroom. One person in particular, Ahmed Seihoon, both had access to Panah's apartment and was the last person seen with Parker before she disappeared. (Pet. App. N at 838-39, 846-47.) Further, Seihoon admitted leaving Panah's apartment with a suitcase at 11 a.m. (Pet. App. N at 839; Pet. App. L at 196-97, 201.) However, the serology evidence presented by Moore inexorably tied Panah to Parker. Further, Dr. Heuser's time of death testimony assured the jury that Panah could have committed the crime. (Pet. App. N at 754-57.)

Moore's and Dr. Heuser's testimony was also central to proving the crimes of sodomy, oral copulation, and lewd acts on a child as well as the special circumstances of sodomy and lewd acts on a child. Moore's testimony supported that the injuries to Parker's anal area found by Dr. Heuser were caused by a penis and not another object and was thus a sodomy. (Pet. App. N at 577.) Dr. Heuser's testimony that anal penetration could have caused bradycardia was what supported that the murder had occurred during the commission of sodomy. (Pet. App. N 747-48.) Similarly, it was Moore's testimony that there was a mixture of semen and saliva on the tissue found in the bedroom—evidence the State now concedes is false—that supported that an oral copulation occurred. (Pet. App. N at 831.) Further, Moore's

evidence of a mixture of semen and saliva was used by the prosecution to prove up the lewd acts on a child by arguing that Panah had touched Parker with the intent to gratify his sexual desires. (Pet. App. N at 828.)

Dr. Heuser's and Moore's scientific evidence were also used to support the prosecution's call for the death penalty in the penalty phase. (Pet. App. N at 859.) Significantly, the prosecution's case at the penalty phase consisted solely of reintroducing the nature and circumstances of the crime, including victim impact evidence. See Cal. Pen. Code § 190.3(a). For example, the prosecutor used the serology and pathology evidence to argue at penalty that Panah killed Parker "intentionally by cutting off the blood supply that's coming back from her brain, by holding his hand over her mouth . . . and then [she] dies by the sheer brutality of the sexual assault itself that you found him guilty of." (Pet. App. N at 856.) Thus, the inferred sexual contact was a prominent aggravating factor.

Accordingly, taken cumulatively, had the jury known the truth about the false and faulty serology and pathology testimony, there is a reasonable likelihood that the invalid scientific evidence could have affected the judgment of the jury both at guilt and at penalty. *Giglio*, 405 U.S. at 154. This evidence gave the jury the false impression that the serology evidence irrefutably proved critical facts including 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. *See Miller v. Pate*, 386 U.S. 1 (1967); *Alcorta v. Texas*, 355 U.S. 28 (1957). Notably, the jury took four days to determine Panah's penalty (Pet. App. O at 893-97), indicating it was a close and difficult decision. Therefore, had the jury been presented the true pathology and serology evidence, it is probable that at least one juror would have found that there was insufficient evidence of Panah's guilt, let alone to sentence him to death.

Even if the more onerous Third Circuit test is applied to Panah's due process claim, Panah still warrants relief. The prejudice from the scientific evidence that was admitted at his trial outweighs its probative value given that the entirety of Moore's serology evidence was false as was Dr. Heuser's testimony as to time and mode of death.

Further, there wasn't other ample evidence of guilt. Indeed, the prosecution's case—absent the faulty forensic evidence—was entirely circumstantial, increasing the likelihood of prejudice from the prosecution's presentation of false evidence. There was little to no physical evidence placing Panah at the scene of the discovery of the body at the time of death or establishing that the special circumstance crimes making him death eligible had occurred. For example, Panah's DNA was not found anywhere on Parker's body. (Pet. App. L at 425.)

Indeed, Moore's false and faulty serology testimony was the sole scientific evidence presented at trial that linked Panah as the perpetrator. Without the false and faulty pathology evidence concerning the *cause* of death, there was no evidence that Parker's death resulted from a sexual assault or that she had been sexually assaulted to such a degree that could have caused her heart to stop. Further, without the false pathology evidence about the *time* of death, the fact Parker was found in Panah's bedroom did not incriminate Panah because he was not in the apartment at the time Parker died. However, Seihoon, who was last seen with Parker when she was alive, had access to the apartment at that time. (Pet. App. N at 848.) Indeed, at 11:00 a.m., on the day that Parker disappeared, Seihoon admitted leaving Panah's apartment with a suitcase. (Pet. App. L at 195-201.) No traces of blood, fingerprints, or other evidence of any struggle was found by police inside Panah's room. Thus, Panah's defense at trial could have argued—absent the false and faulty testimony—that Seihoon could have killed Parker and planted her body in a suitcase in Panah's bedroom. Seihoon's guilt would have explained why multiple searches of the apartment and Panah's room—including dog and suitcase searches—had come back

empty until Parker's body was discovered the night of Sunday, November 21, 1993.⁷

Further, Panah's statements to Rauni Campbell and to law enforcement while hospitalized never included an admission to having killed or assaulted Parker and were made while Panah was in the middle of an acute psychotic break and suffering from hallucinations and delusions. (Pet. App. N. at 793-94; Pet. App. J at 60.) Moreover, none of the aforementioned evidence proved the special circumstance crimes of sodomy, oral copulation and lewd acts upon a child which made Panah death-eligible.

Thus, regardless of which test this Court adopts, Panah has demonstrated his innocence, and that his due process rights were violated by the admission of the invalid scientific pathology and serology evidence at his trial. Accordingly, this court should grant review on the issue, articulate the correct standard for determining a due process violation when scientific evidence that has been invalidated was presented at a criminal trial, and

⁷ An initial search of the entire apartment, including bedrooms and closets, was conducted by 4 officers. (Pet. App. N at 555-56; Pet. App. L at 200, 203.) Another search was conducted by at least 7 officers and included a search of Panah's closet and suitcases. (Pet. App. N at 550-53.) Another search of the apartment was conducted after Panah's car was searched. (Pet. App. O at 878.) Police dogs were also used to search the premises. (Pet. App. L at 190-94.) Parker's body was found after a search conducted between 9:30 and 10:00 p.m. the night of November 21, 1993. (Pet. App. O at 869-77.)

enter judgment that Panah's due process rights were violated by the invalid serology and pathology evidence presented at his trial.

CONCLUSION

Accordingly, Panah respectfully requests that this Court grant his petition for writ of certiorari.

Respectfully submitted,

AMY M. KARLIN
Interim Federal Public Defender

DATED: February 11, 2020

By:



JOSEPH A. TRIGILIO*
Deputy Federal Public Defender

Attorneys for Petitioner
HOOMAN ASHKAN PANAH
**Counsel of Record*

No. 19-7670

IN THE
Supreme Court of the United States

HOOMAN ASHKAN PANAH,

Petitioner,

v.

RON BROOMFIELD, Warden,

Respondent.

On Petition for a Writ of Certiorari to the
California Supreme Court

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 33.2, I hereby certify that this petition is less than 40 pages, and therefore complies with the page limit set out in Rule 33. This brief was prepared in 13-point Century Schoolbook font.

Respectfully submitted,

AMY M. KARLIN
Interim Federal Public Defender

DATED: February 11, 2020

By: 

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CERTIFICATE OF SERVICE

I, JOSEPH A. TRIGILIO, a Deputy Federal Public Defender in the Office of the Federal Public Defender who was appointed as counsel for Petitioner under the Criminal Justice Act, 18 U.S.C. § 3006(A)(b), hereby certify that on February 11, 2020, a copy of **PETITION FOR WRIT OF CERTIORARI** was mailed postage prepaid to:

The names and addresses of those served are as follows:

[CONTINUED ON NEXT PAGE]

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I declare under penalty of perjury that the foregoing is true and correct.

Executed on February 11, 2020.



JOSEPH A. TRICHLIO*
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