No. 19-8009

IN THE

Supreme Court of the United States

HOOMAN ASHKAN PANAH,

Petitioner,

v.

RON BROOMFIELD, ACTING WARDEN,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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I. QUESTION 1: THE STATE COURT'S FAILURE TO HOLD A HEARING ON PANAH'S JUROR MISCONDUCT CLAIM

The Ninth Circuit declined to issue a certificate of appealability (COA) on Panah's claim that his juror improperly contacted her preacher, who gave her an eye-for-an-eye Biblical passage that gave her "peace" to vote for a death sentence. The failure to hold a hearing after the discovery of this extrinsic contact conflicts with this Court's authority in *Remmer v. United States*, 347 U.S. 227 (1954) and Fourth Circuit authority in *Barnes v. Joyner*, 751 F.3d 229 (4th Cir. 2014) and *Hurst v. Joyner*, 757 F.3d 389 (4th Cir. 2014). Respondent attempts to distinguish these cases based on a hyper-technical, non-literal, and unreasonable interpretation of the allegations presented to the state court.

Respondent argues that the declaration describing Juror E.C.'s contact with her preacher does not explicitly say that her preacher "directed" her to the Biblical passage. Opp. at 11. Instead, it says that he "gave her some selected materials, which she read." Pet. App. 20-424. Respondent posits that this means Juror E.C. only "*later* 'found'" the problematic eye-for-an-eye passage on her own, not as a result of her contact with her preacher. *Id.*

(emphasis added).[1] If the state court or the Ninth Circuit interpreted Panah's evidence as Respondent suggests, their summary denials absent any evidentiary hearing was unreasonable.

First, nowhere in the declaration is there an indication that Juror E.C. "later" stumbled on the Biblical passage on her own. *See* Pet. App. 20-423-26. That was a characterization by Respondent. Rather, the declaration establishes that Juror E.C. obtained the passage from her preacher, who "gave" it to her. Pet. App. 20-424. As a matter of semantics, "giving" a Juror material to read is the functional equivalent of "directing" a juror to those materials. Respondent contends that the former conforms with this Court's authority but acknowledges that the latter required a hearing prior to denying the claim. Opp. at 10. In fact, there is no meaningful distinction between the two phrases.

Second, to the extent the declaration was unclear as to whether the preacher *directed* her to the passage or she found it on her own, Panah's allegations show, at least, improper contact that had a "tendency" to be "injurious" to Panah, requiring an evidentiary hearing. *Remmer*, 347 U.S. at 229. This is especially true in California, where the state court—at the stage

[1] Respondent makes no attempt to justify Juror E.C.'s contact with her husband and preacher and does not suggest it was appropriate for her to do so.

it summarily denied Panah's claim—was required to resolve all inferences in Panah's favor and accept his allegations as true. *See Aguilar v. Atlantic Richfield Co.,* 25 Cal. 4th 826, 851 (2001)*; Quinn v. City of Los Angeles,* 984 Cal. App. 4th 472, 279-80 (2000).

Third, if Respondent suggests that the "selected" materials given by the Preacher to Juror E.C. did not include the passage the juror relied on, this is a factual dispute that the state court should have resolved at an evidentiary hearing. At the stage Panah's claims were denied, where his allegations were to be considered true, the declaration—stating that the preacher "gave" her "selected" materials—provides reasonable support for Panah's allegation that the preacher gave her the eye-for-an-eye passage she relied on. Pet. App. 20-424

Fourth, Respondent argues that the aggravating evidence and nature of the crimes obviated any bias or prejudice from Juror E.C.'s extrinsic contact with her Preacher. Opp. at 14. Respondent's argument is misplaced and premature. As Respondent acknowledges, "the government may overcome" the presumption of prejudice from Panah's initial showing of potentially harmful contact "after notice to *and hearing of* the defendant[.]" Opp. at 10, citing *Remmer*, 347 U.S. at 229 (emphasis added). Panah's allegations satisfy the *Remmer* presumption. Juror E.C. admitted that during deliberations, but prior to talking with the preacher, she was struggling with

the penalty-phase decision. Pet. App. 20-423-24. So she went to her preacher and told him she "was having a hard time making a decision" and asked the preacher for "biblical references or other spiritual writings regarding the legal system." Pet. App. 424. The selected passages the preacher gave her helped her settle on voting for death. Pet. App. 20-424. Accordingly, Juror E.C.'s contact with her preacher was, in fact, injurious to Panah—it caused one of his jurors to vote for his death.

Finally, Respondent argues that "the record reflects that Juror E.C. did not discuss or share the contents of the extrinsic information she had found[.]" Opp. at 14. This assertion is belied by the state-court record, which includes declarations from other jurors stating that Juror E.C. was "extremely religious" and "talked a lot about the God and the Bible" during deliberations. *See Panah v. Chappell*, 9th Cir. Case No. 13-99010, Dkt. No. 16, Opening Brief and Excerpts of Record, at 477.1 and 477.2.

Accordingly, by failing to issue a COA, the Ninth Circuit has contravened this Court's authority under *Remmer* and its progeny, thus creating a circuit split with the Fourth Circuit Court of Appeals.

II. QUESTION 2: THE NINTH CIRCUIT'S FAILURE TO ADDRESS THE IMPACT OF CONSTITUTIONAL VIOLATIONS ON PANAH'S PENALTY PHASE

Respondent points to one clause in the Ninth Circuit's opinion to argue that the opinion did not conflict with *Cone v. Bell*, 556 U.S. 449 (2009) by

failing to address the impact of constitutional violations on the penalty phase. Opp. at 15-16. Specifically, Respondent points to the phrase where the Ninth Circuit stated that "a different outcome on the felony of oral copulation would not affect Panah's guilty verdict and death sentence." Pet. App. 1-25.

Reading the clause relied upon by Respondent in context with the other sentences in the paragraph exposes the court's failure to consider penalty. In that same paragraph, the Ninth Circuit concludes, "Therefore, whatever rebuttal of the State's expert witnesses that Panah believes he was deprived and thus prejudiced by would not have overcome the other significant evidence *of guilt*." Pet. App. 1-25 (emphasis added). This demonstrates that any passing reference to penalty in the preceding sentence is a conflation of a guilt-phase materiality analysis. This conflicts with *Cone v. Bell*, which instructs a reviewing court to "distinguish between the materiality of the evidence with respect to guilt and the materiality of the evidence with respect to punishment." 556 U.S. at 24.

Moreover, on its face, the clause is only discussing one of the multiple felonies charged by the prosecution, and it is the only felony for which the jury did not find a corollary special-circumstance. Thus, the question of whether that one felony mattered is missing the point. The question the Ninth Circuit failed to ask is whether exposing Moore's false testimony and

rebutting the state's pathologist at the guilt phase would have altered at least one juror's assessment of the appropriate penalty. *Id*.

Under the correct analysis, no fair-minded jurist could conclude that Moore's false testimony and counsel's failure to rebut the pathology evidence had no impact on Panah's death sentence. The only aggravating factor against Panah at the penalty phase was the nature and circumstances of the crime. *See* Cal. Pen. Code § 190.3(a). Under this factor, Moore's false testimony permitted the prosecutor to narrate a graphic, inflammatory, but false story of how the victim died—describing in closing argument that Parker was "spewing" Panah's ejaculate onto a tissue paper and then a bed sheet, and shocking the jury with an explicit account of sodomy that involved Panah's saliva dripping onto a bloody kimono. RT 2847, 2877. There was no "spewing." Someone else—not Parker and not Panah—contributed to the stains on the tissue paper. Absent Moore's false testimony these arguments were unavailable.

Respondent misstates the import of the pathology evidence at penalty. During that phase, the jury considered the state's unrebutted pathology testimony that Parker suffered additional trauma, including purported head injuries that resulted in "some degree" of non-fatal concussion in the brain. RT 2332-36; 9th Cir. Case No. 13-99010, Dkt. No. 16, Excerpts of Record, 1369 (autopsy report listing as "traumatic injuries" "craniocerebral trauma").

Had counsel reasonably investigated the case, an independent pathologist—like Dr. Baden who provided a post-conviction declaration—could have testified that "there was no injury to the brain - no trauma to the brain - and that [the victim's] brain was entirely normal." Pet. App. 24-435. It is at least reasonably likely that this one aggravator would have been outweighed by the mitigation already presented at trial in favor of a life sentence.[2] Accordingly, this Court should grant certiorari, vacate the Ninth Circuit's decision and remand for it to consider the impact of the constitutional violations it identified on Panah's penalty phase.

III. QUESTION 3: THE NINTH CIRCUIT CONTRAVENTION OF THE *NAPUE* AND *STRICKLAND* MATERIALITY STANDARDS

The Ninth Circuit failed to conduct a materiality analysis consistent with this Court's authority in *Napue v. Illinois*, 360 U.S. 264 (1959) and *Strickland v. Washington*, 466 U.S. 668 (1984). Respondent disagrees, based on the Ninth Circuit's citations to the standards in those cases. But the mere citations to the correct law does not cure the Ninth Circuit's failure to appropriately assess materiality.

[2] Indeed, the jury's penalty verdict was already a close call; it took the jury four days to decide on the punishment.

Kyles v. Whitley, 514 U.S. 419, 434-35 (1995) rejects a materiality analysis that merely "discount[s]" the unconstitutional evidence put before the jury. Respondent argues that *Kyles* is inapplicable because it is limited to claims involving the failure to disclose evidence under *Brady v. Maryland*, 373 U.S. 83 (1963). (Opp. at 23). But *Strickland* got its materiality analysis from *Brady*'s holding, *i.e.* "the test for materiality of exculpatory information not disclosed to the defense by the prosecution." 466 U.S. at 694.

Respondent then argues that the Ninth Circuit actually did apply *Kyles*. Not so. As explained in the Petition, the Ninth Circuit's materiality analysis merely "set[ ] aside," *i.e*, "discount[ed]," Moore's false testimony and found that there was enough evidence left to convict. *Compare* Pet. App. 1-17 *with Kyles*, 514 U.S. at 434-35. Moreover, the Ninth Circuit failed to consider the cumulative impact of the post-conviction DNA analysis and pathology evidence, as *Kyles* requires, instead ignoring the latter to dismiss the materiality of the former.

To appropriately address materiality, the Ninth Circuit should have resolved whether the "favorable evidence," which exposed Moore's testimony as false and rebutted the state's false pathology evidence, "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Kyles*, 514 U.S. at 435. Respondent does not address this distinction. Instead, Respondent argues that under any standard

the false evidence and deficient performance of counsel could not be material given the prosecution's case. Respondent's argument, however, omits critical evidence from the record.

Contrary to Respondent's argument that the DNA "showed nothing" regarding the bedsheet stain and "did not impugn Moore's serology testimony," Opp. at 21, in fact, it shows that a third-party could have been a contributor to the stains. The prosecution relied on Moore's testimony to argue that the A and B antigens found on a tissue paper and bedsheet came from the same source: a mixture of Panah's (who has B antigens) and Parker's (who has A antigens) biological fluid. But DNA reveals that Parker did *not* contribute to the tissue paper stain or multiple stains on the bedsheet. Pet. App. 27-464. This means *someone else* other than Panah or Parker—who was either an A or AB antigen contributor—contributed those A antigens. The same person, again—who DNA reveals could not have been Panah or Parker, who provided the A antigens on the tissue paper also contributed A antigens on the bedsheet. There no definitive evidence matching any of those stains to Parker. Indeed, neither Respondent nor the courts below have acknowledged that two independent experts examining the DNA and serology confirm that "there is no evidence to suggest intimate sexual contact between Mr. Panah and the victim." Pet. App. 27-464.

Respondent also dismisses the postconviction pathology evidence about the time of Parker's death, arguing that "[u]nder this theory, Parker would have been killed and her body placed in Panah's closet while the police were stationed outside Panah's apartment—an in between the series of searches of Panah's apartment." Opp. at 22. But there is at least a reasonable likelihood that this theory is true. Respondent and the courts below ignore critical facts demonstrating a third party had access to Panah's bedroom even with a police presence outside the complex:

- Ahmad Seihoon had access to Panah's apartment and was the last person seen talking to Parker. RT 1795;
- Seihoon was seen leaving Panah's apartment with a suitcase on the day Parker disappeared. 9th Cir. Case No. 13-99010, Dkt. No. 16, Excerpts of Record at 1335;
- An adjacent apartment next to Panah's apartment had just become vacant a week before Parker's disappearance. RT 1763;
- A person could access Panah's bedroom through the balcony of that vacant apartment and there is no evidence that this vacant apartment was searched for analyzed for forensic evidence of a crime. RT 1799-1800;

- Police had conducted multiple searches[3] of Panah's apartment, yet found no evidence of Parker's body, despite lifting up a suitcase in Panah's closet where the body was ultimately found;
- Police observed a television inside Panah's apartment turned on and then off, during the time in which Panah was at his job at Mervyns Department Store. RT 1728, 1746; and
- Seihoon was in Panah's apartment the night before the body was located and in the hours *after* the police conducted their searches of Panah's apartment. RT 2180.

These facts would lead any fair-minded jurist to conclude that there is at least a reasonable probability that confidence in the prosecution's theory of Panah's guilt is undermined by the post-conviction DNA analysis and Dr. Reiber and Dr. Baden's post-conviction pathology analysis. Indeed, other than the tissue paper, bedsheet, and robe—all of which lack a mixture of Panah and Parker's fluids according to Panah's postconviction allegations—Panah's bedroom showed no evidence of a crime scene. No blood, vomit, or signs of struggle were found in his bedroom. Nor was there any biological

[3] Panah's jury never learned that police dogs were used to search the premises, but found no evidence of Parker's body. Pet. App. 35-752-55. Moreover, at least seven officers searched Panah's apartment, and even picked up a suitcase in his closet. RT 264-65; 289-90.

evidence found on Parker, despite police examining her body and fingernails for signs of Panah's DNA. And, importantly, while Parker had no clothes at the time of her discovery, those clothes were not found anywhere in Panah's bedroom.[4]

Nor do Panah's statements refute the materiality of the pathology and DNA evidence the jury did not hear. Panah never confessed to anyone that he committed the offense. The testimony of his former girlfriend Rauni Campbell is not—when considered in the appropriate context—inculpatory. While Campbell testified that Panah said "I have done something very bad," in fact, she admitted to police that Panah actually said "*they* did something bad." RT 2179 (emphasis added). Moreover, her interview with police reveals that she initially said that Panah answered "no" to the question of whether Parker was dead, and then "yes" to whether she was alive. She also admits that Panah "said he could be assuming that she's alive." *Panah v. Chappell*, USDC Case No. 05-07606, Dkt. No. 104, Ex. No. 158. Finally, her claim at trial that Panah said he had something to do with Parker's disappearance

[4] Respondent points to marks on Parker that it argues are consistent with Panah's ring, Opp. at 3, but the scratching pattern does not match the ring and there is no evidence that her DNA was on that ring. RT 3101 (Panah wanted counsel to hire an expert to refute the prosecution's attempt to connect the ring to the offense.)

was absent in both her police interview and grand jury testimony. RT 2190-91.

Panah's statements and distress upon learning police were looking for him are not inculpatory when viewed in the context of his belief that he was setup. Campbell acknowledged that Panah told her that his mother needed "to get out of the house." RT 2147. Campbell said that Panah thought "they" were going to hurt his mother. RT 2180. Indeed, he believed he was being threatened. This is why Campbell's first statement to police acknowledges that Panah told her "they set me up so it looks like I did [something bad]," and he also told her "I wouldn't hurt anybody." *Panah v. Chappell*, USDC Case No. 05-07606, Dkt. No. 104, Ex. No. 158.

Panah's fear of being set up was well founded. The night before Parker went missing, someone left a message on Panah's answering machine warning, "I'm going to get you," "I'm going to make life miserable," and "You're going to regret this." RT 2605. At that time, Panah told his friend, Sean Hosseini, that he was scared for his mother's safety based on threats he was receiving. RT 2586, 2623. The next day—after Parker went missing and Panah was at work—Panah received a call at his job from a police officer who told him a ruse: that Parker was missing and that Panah was the last person seen with her. RT 1716. This was not true (Ahmad Seihoon was last seen with the victim), but it convinced Panah that he was being setup.

Accordingly, given the evidence presented to the jury combined with the suppressed post-conviction DNA analysis and pathology evidence, any fair-minded jurist must conclude that there is at least a reasonable probability of a different result at the guilt or penalty phases of trial.

IV. QUESTION 4: THE NINTH CIRCUIT'S FAILURE TO FOLLOW ITS OWN RULES FOR RESOLVING PANAH'S CONFLICT MOTION

Panah requests certiorari be granted because the Ninth Circuit violated its own rules by the Ninth Circuit's Commissioner referring Panah's reconsideration motion—where Panah asked to replace his lawyers due to a conflict—to the merits panel instead of the motions panel. Respondent relies on Ninth Circuit General Order 6.3e to argue that the appellate commissioner "has discretion to refer any motion to the merits panel in the first instance, regardless of the relief granted." Opp. at 23. But the relevant subsection of this same order limits the commissioner's discretion to "motions enumerated in Appendix A[.]" *See* Ninth Circuit General Order 6.3(a). Notably, the motions enumerated in Appendix A excludes a motion to substitute counsel in habeas cases. *See* Appendix A (motions include "withdrawal or substitution of counsel in civil cases, excluding habeas cases").

Appendix A of the Ninth Circuit's General Order undermines Respondent's argument in another way. It sets forth the types of motions in which "[t]he Clerk is authorized to enter orders referring to the merits

panel[.]" These motions—there are eight of them listed—do not include motions to substitute counsel or motions to reconsider a prior order denying substitution of counsel." *Id*. Rather, Ninth Circuit Rule 27-7(b)(3) controls, and it explicitly states that "the motion [for reconsideration] is referred to a motions panel." The merits panel should not hear that motion unless there is a motion challenging the motion's panel denial. *See* Ninth Circuit Rule 27-10(b).

Finally, Respondent does not address the Ninth Circuit's failure to "stay the schedule for . . . briefing pending the Court's disposition" of Panah's motion. Ninth Circuit Rule 27-11(a). Rather, the parties continued their briefing unabated while Panah's motion—premised on a conflict with counsel in violation of *Christenson v. Roper*, 574 U.S. 373 (2015) and *Martel v. Clair*, 565 U.S. 648 (2012) was pending.[5] A remand to ensure the Ninth Circuit uniformly applies its rules and that Panel's rights are protected is, therefore, necessary.

[5] Panah's *pro se* motion to substitute counsel raised issues involving a conflict with present counsel and his motion to reconsider the appellate commissioner's denial of the motion raised allegations implicating bias on the part of the commissioner and other allegations of "financial crimes" by Panah's prior counsel. *See* 9th Cir. Dkt. Nos. 48, 49.

Respectfully submitted,

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DATED: July 13, 2020

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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 reply is 15 pages, and therefore complies with the page limit set out in Rule 33. This reply was prepared in 13-point Century Schoolbook font.

Respectfully submitted,

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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 July 13, 2020, a copy of **REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI** was mailed postage prepaid to:

//

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

Executed on July 13, 2020.

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