No. 19-7670

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 Supreme Court Of California

MOTION FOR LEAVE TO FILE BRIEF OUT OF TIME AS AMICUS CURIAE AND BRIEF FOR THE EMBASSY OF PAKISTAN, IRANIAN INTERESTS SECTION IN SUPPORT OF PETITIONER HOOMAN ASHKAN PANAH

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MOTION FOR LEAVE TO FILE BRIEF OUT OF TIME AS AMICUS CURIAE

Pursuant to Supreme Court Rule 37.2(b), The Embassy of Pakistan, Iranian Interests Section (IIS), respectfully moves for leave to file the accompanying brief as amicus curiae. The counsels of record for the Petitioner and Respondent have been informed by e-mails dated March 30, and April 2, 2020, and there were no specific objections.

The Amicus submits that it was unaware of the Petitioner's petition to the California Supreme Court until the last week of February 2020 and by that it was too late to prepare and file this amicus brief on time in part because of complications ensued due to COVID-19. This Amicus further submits that the docket shows that on or about February 26, 2020, the respondent, has sought and grated a 30-day extension to file its brief. Considering this one-month extension to the Respondent, there would be no prejudice from amicus' late filing. Accordingly, the Amicus request that the brief of Amicus filed concurrently with this motion in support of the petition for a writ of certiorari be accepted as it was timely.

The accompanying amicus brief, provides important perspective on why this Court should grant certiorari and hear this case.

Respectfully submitted,

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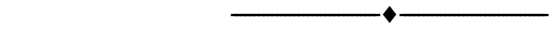
INTEREST OF AMICUS CURIAE[1]

Pursuant to Supreme Court Rule 37.3, Amicus Curiae, The Embassy of Pakistan, the Interests Section of Iran in Washington, D.C. ("IIS" or "Amicus") submits this brief on behalf of the petitioner, Hooman Ashkan Panah, an Iranian national, who has been convicted of a capital crime in a state court in California and in has been on death row since 1995. IIS was established in 1981 after the formal diplomatic ties between the two countries were severed. As a consular office, it provides all essential consular services to over 1.5 million Iranian nationals/ex-patriates living in the United States and issues visas to foreigners. It has an active website which was/is available to the public at all the times relevant to this matter.[2] IIS operated under the diplomatic auspices of the Pakistan Embassy in Washington, DC. IIS submits this brief to inform this Honorable Court that the petitioner was deprived of his benefits from the services that could have been available to him under the Vienna Convention on Consular Relations treaty and has been a victim of unfair and prejudicial treatment by the legal system in the State of California.



[1] Pursuant to Rule 37.6, amicus curiae certifies that no counsel for a party authored this brief in whole or in part and that no person or entity, other than amicus, has made a monetary contribution to the preparation or submission of this brief. The parties have filed letters consenting to the filing of this brief with the Clerk of the Court. All parties were timely notified of the submission of this brief.

[2] http://www.daftar.org/Eng/default.asp?lang=eng (last accessed on April 4, 2020).

SUMMARY OF ARGUMENT

By signing and ratifying the Vienna Convention on Consular Relations ("VCCR"), opened for signature Apr. 24, 1963, 21 U.S.T. 77, the Governments of Iran and the United States made commitments to each other, to their other treaty partners, and to the rule of law. Specifically, the United States promised that detained Iranian nationals would be promptly notified of their right to seek consular assistance. This obligation remained unchanged even after the formal diplomatic ties between the two countries were severed in 1981, and they established Interests Section offices at their respective capitals. The IIS was established in Washington, DC, and at the same time, the United States established its Interests Section in Tehran.[3] Presently and during all the times relevant to this case, both the U.S. government and State of California were aware of the existence of IIS as it has been operating under the diplomatic auspices of the Pakistan Embassy in Washington, DC.

The United States Government has vigorously used this treaty all over the world when its nationals have been arrested in other counties. It is generally understood that for foreign nationals this notice is fundamental and has the same effect as the Miranda Right in regards to right to counsel. Any effort to marginalize this very important treaty could have chilling effects on the consular relationship between the nations and

[3] The U.S. Interests Section in Tehran has been operating under the Swiss Embassy since 1981.

meaningful access to legal representation by a terrified defendant in an unfamiliar and possibly hostile environment when a consular office is the only support that he may have. In order to maintain international peace and security, and to promote friendly relations among the nations, full compliance by all the nations, including the United States, that itself is the leader in demanding full compliance from other nations, is required.

Furthermore, it has been well established that the terms of The Vienna Convention on Consular Relations is applied even in the absence of a full diplomatic relationship between two signatory countries or even during apparent hostility. As pointed out by the petitioner's prior appeals, this important and vital right has been violated for this petitioner. It is well documented that no notice was given to the petitioner or IIS.

In addition to the clear violations of VCCR, the record shows egregious violations of petitioner's fundamental rights under the U.S. and State of California constitutions as well as the violations of criminal legal proceedings. Here, a young and helpless Iranian national was prosecuted and sentenced to death by a prosecutor, Mr. Patrick Couwenberg, who admitted himself as being a "Pathological Liar," who shortly, thereafter, was removed from the bench and disbarred for life by the California Supreme Court. There were many fundamental and serious defects, deficiencies, bias and prosecutorial conducts that State of California was made aware of but failed to investigate or take

proper actions. On these specific issues, IIS incorporates the arguments made by the petitioner in his previous appeals and the brief filed with this court. IIS submits that withholding exonerating serological and DNA evidence in a capital case, from the court, jury and defense by the prosecutor, Mr. Couwenberg, by itself, is enough evidence warranting a second trial. In all likelihood, this would NOT have happened if the U.S. Government had informed IIS in a timely manner, as was required under VCCR. As with the other 167 death penalty cases that have been freed for false conviction, Mr. Ashkan Panah, deserves a second trial during which all the evidence can be presented.

ARGUMENT

I. The State of California failed to inform Mr. Ashkan Panah, of his rights under VCCR for several years after his arrest and conviction; and failed to inform the consular office of the Iranian Interests Section in Washington, DC about the arrest of Mr. Hooman Ashkan Panah, an Iranian national until 2002.[4]

By ratifying the Vienna Convention, the United States committed itself to the consular notification and

[4] Petitioner's right under the Vienna Convention was raised as early as 1999. It was part of the court's record in the case of Hooman Ashkan Panah v. Robert L. Ayers, Jr., U.S. District Court for the Central District of California, Western Division, Case No. CV 05-07606-RGK, Dkt# 103-2, Exhibits 48-59.

access provisions of Article 36. This Article on Consular Relations provides that individuals detained in a foreign country must be notified of their "right" to seek assistance of consul from their country of origin.[5] Article 36(1) of the VCCR sets forth three "rights" aimed at ensuring consular assistance:

> 1) detained foreign nationals are entitled to "freedom with respect to communication with and access to consular officers of the sending State;"[6]
>
> 2) "[a]ny communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay;"[7] and
>
> 3) "[c]onsular officers shall have the right to visit a national of a sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation."[8]

In addition, Article 36(1) provides that detaining authorities must notify foreign nationals "without delay of [their Article 36(1)] rights. . . ."[9]

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[5] 1. Vienna Convention on Consular Relations art. 36, Apr. 24, 1963, 21 U.S.T. 77, 596.

2. U.N.T.S. 261 [hereinafter VCCR].

[6] VCCR, *supra* note 1, art. 36(1)(a).

[7] *Id.* art. 36(1)(b).

[8] *Id.* art. 36(1)(c).

[9] *Id.* art. 36(1)(b).

If notified in a timely manner consular assistance can drastically change the playing field for an accused that has been charged for a crime in an unfamiliar and often a hostile environment. The difficulties can range from a simple language barrier to cultural differences to outright hostility. As a result, a notice to a consular office about the identity and place of its detained foreign nationals immediately after the incarceration as provided in VCCR can be a "cultural bridge," which allows foreign nationals to "navigate the waters of the criminal justice system and . . . help[s] them secure their rights within that system."[10] Consular officials can be instrumental from explaining the substantive and procedural rights of defendant to helping in finding interpreter translators to locating evidence and witnesses in the home country.

It should be noted that the rights under consular notification and access provisions of Article 36 remain effective even during the hostility between two signatory nations. In fact it would be more critical for an accused to have access to his/her consul office when there are diplomatic problems between the nations. In the present case, Mr. Ashkan Panah was arrested in November of 1993, he was not informed of his rights under VCCR nor was the consul office notified about his incarceration until 2002 (Exhibit "A").

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[10] Brief for Amici Curiae Republic of Honduras and Other Foreign Sovereigns in Support of Petitioners at 8, *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669 (No. 04-10566, 05–51), 2005 WL 3597807.

The commitment under VCCR is binding federal law which, under the Supremacy Clause of the United States Constitution, takes precedence over any contrary state law. U.S. CONST. art. VI, cl. 2 ("all Treaties made . . . under the Authority of the United States, shall be the supreme Law of the Land; and judges in every State shall be bound thereby."); *United States v. Belmont*, 301 U.S. 324, 331 (1937). International treaties constitute federal law, and, as such, are binding on the United States as a whole, and preempt any conflicting state laws through the Constitution's Supremacy Clause. The Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77 ("Vienna Convention" or "VCCR") is a treaty, duly ratified by the United States Senate. Article 36 of the Vienna Convention guarantees to the citizens of all signatory nations' effective notice and access to consular services if they are arrested in another signatory nation.

Here the facts are clear. No notifications to Mr. Ashkan Panah or IIS were given for many years after Mr. Ashkan Panah was convicted and sentenced to death. In fact, IIS first became aware of the petitioner's conviction from his family members in Iran long after his conviction. This prompted IIS to seek information from the U.S. State Department. The U.S. State Department responded in 2020, more than 7 years after the petitioner's conviction (Exhibit "A"). Subsequently, and in compliance with its obligations, during 2002-2004, IIS spent over $45,000 in re-testing the evidence that were still available. The results included

various exonerating serology and DNA evidence that were not presented to jury at trial or sentencing. If IIS was informed about this case in 1993, when Mr. Ashkan Panah was arrested, at the very least IIS had the means and obligation to help Mr. Ashkan Panah and in all likelihood, the final outcome could have been very different for Mr. Ashkan Panah. Specifically, if IIS had been made aware of the serious charges against the petitioner, in a timely manner, among other things IIS would have made sure that Mr. Ashkan Panah had competent defense counsels with proper certifications to handle the capital cases. The record on this is very clear. One of petitioner's two attorneys resigned as the jury selection began and the court permitted the jury selection to proceed by one court-appointed attorney. Subsequently, the court appointed a second attorney who was not familiar with the facts of the case, and had no prior experience with capital cases. He learned about the case as the case proceeded with trial. Also the record is very clear that Mr. Ashkan Panah, who has little understanding of English, was not provided with certified interpreter as required in capital cases. Clearly IIS could have helped Mr. Ashkan Panah's defense on the selection of his legal team and for testing of the evidence.

Unfortunately right from the get go, all the circumstances beyond Mr. Ashkan Panah's control were stacked up against him and affected his defense and ultimately the outcome of his trial. Mr. Ashkan Panah deserves another opportunity to present all his evidence and witnesses in order to defend himself.

II. The State of California failed to re-open or review the capital cases prosecuted by admittedly a "Pathological Liar," Mr. Patrick Couwenberg, who was removed from the bench in 2001 and permanently disbarred for misconduct and falsification.[11]

In 1994-1995, Mr. Patrick Couwenberg was the prosecutor in the case of *People v. Panah* (case No. BA090702) in Los Angeles County. Shortly thereafter, Mr. Patrick Couwenberg was appointed by then-Gov. Pete Wilson to serve as a Superior Court judge at the Norwalk courthouse (Los Angeles County). Mr. Couwenberg became a judge on or about April 24, 1997. After the news about his dishonesty was surfaced, the State of California Commission on Judicial Performance, investigated Mr. Couwenberg. After completion of their investigation, on or about August 15, 2001, Judge Patrick Couwenberg, was removed from the bench for willful and prejudicial misconduct, noting that he admitted perjuring himself during the state investigation.[12] During the investigation, Mr. Couwenberg admitted that he was a "pathological liar" (Exhibit "B"). He becomes

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[11] This matter was appealed by the petitioner in lower courts included but not limited to *Hooman Ashkan Panah v. Vincent Cullen*, United States District Court Central District of California Western Division, Case number CV05-07606-RGK (*See, e.g.*, Exhibit for second Amended petition for writ of Habeas Corpus Dkt# 103-2, Exhibit 63 and pages 100-124).

[12] These links are last visited on March 21, 2020:

https://cjp.ca.gov/public-decisions/couwenberg/;
file:///C:/Users/sbajd/Downloads/Couwenberg_208_15_01.pdf.
https://www.latimes.com/archives/la-xpm-2001-aug-16-me-34920-story.html.

the seventh Los Angeles Superior Court judge—and the 16th statewide—to be removed in the commission's 40-year history.[13] He was disbarred permanently on or about January 16, 2002.[14]

Despite the fact that Mr. Couwenberg admitted that he was a pathological liar and intentionally withheld exonerating serological and DNA evidence from the court, the jury and the defendant, the State of California failed to re-open the case after it became aware of these serious irregularities and defects. At the very least a new fact finder should have been appointed to review the all evidence, including the new serological DNA evidence that was withheld from Mr. Ashkan Panah's jury in 1994-1995. After over 26 years of imprisonment in San Quentin, Mr. Ashkan Panah deserves a fresh look/review of the incomplete and one-sided evidence presented by the prosecutor in petitioner's trial and sentencing during 1994-1995.

III. The State of California failed to re-open or review Mr. Ashkan Panah's case after it became aware of exonerating serological and DNA evidence that were deliberately withheld from the jury by the prosecutor, Mr. Patrick Couwenberg.

Becoming a judge after serving as prosecuting attorney is a common occurrence in the United States

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[13] http://www.metnews.com/articles/couw0816.htm; (last visited on March 21, 2020).

[14] http://members.calbar.ca.gov/fal/Licensee/Detail/70507 (last visited on March 21, 2020).

legal systems. In the State legal system, often, prosecutors are appointed to the bench shortly after the successful prosecution of notable cases. Here the fact, the lead prosecutor of the Petitioner's case, Mr. Couwenberg, was appointed to the bench within two years of prosecuting this matter and he knowingly and intentionally lied to the *Judicial Selection Advisory Committees* (JSACs) about his education and service.[15] Also, as more fully provided in the Petitioner's brief, Mr. Couwenberg withheld exonerating evidence from the jury. Reviewing the facts of this in light of the large number of releases from the death row inmate population, and in the pursuit of justice, the Petitioner deserves a chance of second trial.

It is not uncommon to hear a death row defendant was released after decades of imprisonment due to a lack of evidence. As of March 21, 2020, the Innocence Database from Death Penalty Information Center shows 167 exonerations of prisoners on death row in the United States since 1973.[16] In 2019 alone, three death row inmates were released.[17] Behind most of these false convictions stood a dishonest or racist law enforcement agency and prosecuting attorneys who are willing to bend the rules for personal gains (getting appointed to bench) or satisfaction. Going over the

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[15] See, e.g. Exhibit "B".

[16] https://deathpenaltyinfo.org/policy-issues/innocence-database (last accessed on March 21, 2020).

[17]
- Paul Browning, Nevada. Convicted 1986.
- Clifford Williams, Florida. Convicted 1976.[73][74]
- Charles Finch, North Carolina. Convicted 1976.[75]

three released death row inmates in 2019, we note that,

1. Mr. Paul Browning. Mr. Browning (63) was convicted in 1986 in the State of Nevada. He was released after 33 years on Nevada's death row for a 1985 killing of a Las Vegas jeweler that he has consistently maintained he did not commit.[18] The U.S. Court of Appeals for the Ninth Circuit overturned Mr. Browning's conviction in 2017 after finding that "a mixture of disturbing prosecutorial misconduct and woefully inadequate assistance of counsel" led to "extreme malfunctions" at his trial. *Browning v. Baker* (9th Cir. 2017) 875 F.3d 444 (emphasis added)

2. Clifford Williams. Mr. Williams (73) was convicted in 1976 in the State of Florida. Mr. Williams was released after 43 years on Florida's death row for the May 2, 1976, killing of Jeanette Williams in her apartment in the New Town neighborhood of Jacksonville, Florida.[19] While the first jury trial ended in mistrial, the State of Florida re-tried and convicted of Mr. Williams after a quick two-day trial during which none of the 5 alibi witnesses were called to testify. The innocence of

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[18] https://eji.org/news/nevada-court-orders-mans-release-death-row-due-prosecutorial-misconduct-and-inadequate-defense/ (last accessed on March 21, 2020).

[19] https://edition.cnn.com/2019/03/29/us/florida-wrongful-imprisonment-42-years-murder/index.html (last accessed on March 21, 2020); See, also https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5533 (last accessed on March 21, 2020).

Mr. Williams was only uncovered by Conviction Integrity Unit in the State Attorney's Office for the Fourth Judicial Circuit which cited racial bias by police, prosecutor failure evaluate the case, and for ineffective assistant of counsel for the false conviction.

3. Charles Ray Finch. Mr. Finch (81) was convicted in 1973 in the State of North Carolina. Mr. Finch was released after 46 years in prison for killing of a gas station owner who was killed in his store during a robbery attempt; Mr. Finch has always maintained his innocence.[20] Over the years, Mr. Finch had filed motions for relief, both pro se and through counsel, and been denied. In December 2015, a habeas petition filed by the Legal Clinic at Duke University with the U.S. District Court for the Eastern District of North Carolina (case No. 5:15-hc-02302, *Finch v. McKoy*). The petition was again denied. Id. The Fourth Circuit Court of Appeals reversed the district court's decision in January. Considering evidence and testimony from the 1976 trial, the three-judge panel found issues including an "impermissibly suggestive" police line-up, ballistic evidence that failed to connect a shotgun shell from Finch's car with the crime scene, and significant credibility problems with the state's only eyewitness,

[20] https://eji.org/news/charles-ray-finch-exonerated-43-years-after-being-sentenced-to-death/ (last accessed on March 21, 2020); See, also, https://law.duke.edu/news/wrongful-convictions-clinic-secures-release-charles-ray-finch-after-43-years-prison/ (last accessed on March 21, 2020).

> according to the opinion. In addition, the opinion noted that new evidence also undermined the credibility of the Wilson County chief deputy, Tony Owens. Writing for the panel, Fourth Circuit Chief Judge Roger L. Gregory said, "Finch has overcome the exacting standard for actual innocence through sufficiently alleging and providing new evidence of a constitutional violation and through demonstrating that the totality of the evidence, both old and new, would likely fail to convince any reasonable juror of his guilt beyond a reasonable doubt." *Finch v. McKoy*, 914 F.3d 292 (4th Cir. 2019)

In the present case, the petitioner has always maintained his innocence. At the time of his arrest he was a 20-year-old new immigrant with difficulty speaking and understanding English. The heinous crime involved the rape and murder of an 8-year-old innocent girl that shook the city and neighborhood. Perhaps the law enforcement agency wanted to get quick closure to the crime. Perhaps the petitioner, a young Iranian National, speaking little English, was in the wrong place at the wrong time, and ended up being a sacrificial lamb. While we may not know this for sure, what we know for sure is that the petitioner was not informed of his rights under the international law, and at the same time, the Consulate post was not independently informed by the state and federal government authorities about petitioner's arrest. Furthermore, the petitioner suffered from an ineffective assistant of

counsel,[21] the case was prosecuted by someone who admitted for being a "pathological liar," and the prosecution failed to disclose the exonerating materials facts including the DNA evidence. The fact is, after knowing all these serious defects and issues, the State of California failed to take a single step to investigate the matter or allowed an independent fact finder such as "the Conviction Integrity Unit," in the State of Florida, to review the facts in this case that are more fully pointed out in the petitioner's brief. Just like other 167 wrongfully convicted and death row inmates in the United States, Mr. Ashkan Panah deserves a second chance which this Honorable Court can grant in order to prevent the execution of an innocent person.

IV. The State of California failed to re-open or review Mr. Ashkan Panah's case after it became aware of inadequacy of interpreter provided by court, serious issues with legal representations as the trial started and ineffective assistance of counsel

This case has been laced with serious flaws and defects throughout its 27-year history. As pointed out *Supra*, Petitioner's rights under VCCR was violated, his right for competent defense counsel has been was

[21] According to the record, as Petitioner's trial began on December 5, 1994, the lead defense counsel, Mr. Sheahen notified that, the second attorney, ShafiNia, was unable to serve as second counsel; but he did not seek a continuance. So, the jury selection was started by one counsel. While, the court appointed new second counsel to replace ShafiNia, but second counsel was required to familiarize himself with the case during trial.

ignored by the state of California. The case was investigated by a racist Los Angeles police department, prosecuted by a pathological liar, the jury was not informed of the exonerating evidence, and the court failed to provide certified interpreter to Mr. Ashkan Panah during the court proceedings.

While the Petitioner maintained his innocence for 27 years, unfortunately, all his appeals and habeas corpus petitions were denied. In its recent decision from which this appeal has been taken, the Supreme Court of California denied the petition summarily by ignoring detailed colorable claims of factual innocence presented by the petitioner. Unfortunately the court below failed to review these documents before denying the appeal. The refusal to entertain the overwhelming evidence of innocence by the lower court resulted in a fundamental miscarriage of justice. *Sawyer v. Whitley*, 505 U.S. 333 (1992). This Court established an exception for fundamental miscarriages of justice in *Murray v. Carrier*, 477 U.S., at 495 (1986); *Kuhlmann v. Wilson*, 477 U.S. 436 (1986); *Smith v. Murray*, 477 U.S. 527 (1986). Under these cases, a petitioner must show that the constitutional error "probably" resulted in the conviction of one who was actually innocent. While this exception is rare and applied in the "extraordinary case," as more fully discussed above and in the Petitioner's brief, this is one of those extraordinary cases. The State of California failed to provide this petitioner a fair chance of defending himself against the admitted pathological liar prosecutor. A

second review has helped in release of 167 death row inmates already.

CONCLUSION

It is unfortunate that Mr. Ashkan Panah, himself became a victim of circumstances that he did not cause nor have control over. First he was not informed about his VCCR rights, then the consular office was not notified about his arrest, he was tried for capital murder during the lowest point of diplomatic relationship between two great nations, a subsequently a disgraced, dishonest and disbarred attorney prosecuted the case and the State of California failed to review the evidence against the petitioner after the scandal about prosecutor was surfaced and new serological and DNA results contracted the evidence presented by the prosecution.

Clearly the violation of Mr. Ashkan Panah's VCCR rights and his inability to use the service of consul office and compel appearance by all his witnesses and his inability to present all the evidence have seriously prejudiced his trial. If Mr. Ashkan Panah had been told of his VCCR rights at the very beginning, while there was a good cooperation between the two counties, in all likelihood today we would have had a different outcome.

Therefore, and for the reasons set forth above, and consistent with the spirit of VCCR, IIS respectively

submits that the Court should reverse the decision of the California Supreme Court.

Respectfully submitted,

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