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

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

AMY M. KARLIN
Interim Federal Public Defender
JOSEPH A. TRIGILIO*
Joseph_Trigilio@fd.org
SUSEL CARRILLO-ORELLANA
Susel_Carrillo-Orellana@fd.org
Deputy Federal Public Defenders
321 East 2nd Street
Los Angeles, California 90012
Telephone: (213) 894-2854
Facsimile: (213) 894-0081

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

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Hooman Ashkan Panah petitioned this Court to decide an important and unresolved federal issue: 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? Respondent's brief in opposition raises three main arguments, none of which should dissuade this Court from granting review.

First, Respondent argues that there is no circuit split concerning the presentation of false scientific evidence. (Opp at. 8.) This is incorrect. While the Ninth Circuit has joined the Third Circuit in recognizing that the introduction of flawed expert testimony undermines fundamental fairness, it has not embraced the Third Circuit's test requiring that the scientific evidence have been invalidated or undermined by subsequent developments, that its prejudice outweigh its probative value, and that there not be other ample evidence of guilt. *Compare Lee v. Houtzdale SCI*, 798 F.3d 159, 167 (3d Cir. 2015) *and Lee v. Glunt*, 667 F.3d 397, 403 (3d Cir. 2012) *with Gimenez v. Ochoa*, 821 F.3d 1136, 1145 (9th Cir. 2016). These differences mean that a petitioner who could show that the scientific evidence presented against him at trial was invalid could get relief in the Ninth Circuit if that violated fundamental conceptions of justice. However, he would have to also show: 1) that the evidence was invalidated due to subsequent advances in science and

2) that "ample" other evidence of his guilt did not exist before he could get relief in the Third Circuit.

Respondent's attempt to distinguish the D.C. Circuit cases also fails. Like the Third and Ninth Circuit, the D.C. Circuit cases concern scientific developments that post-date and were not known at the time of trial. For example, *United States v. Butler*, 955 F.3d 1052 (D.C. Cir. 2020) concerned microscopic hair matching analysis used in 1970, scientific analysis which was debunked in 2009. The difference is that, in D.C. the prosecution has been conceding falsity even though these petitioners could not make the *Napue v. Illinois*, 360 U.S. 264 (1950) and *Giglio v. United States*, 405 U.S. 150 (1972) showing that the prosecution knew or should have known that the evidence was false at the time of trial, allowing the D.C. circuit to extend the *Napue/Giglio* materiality test to these claims. *See United States v. Ausby*, 916 F.3d 1089 (D.C. Cir. 2019); *Butler*, 955 F.3d at 1052. This extension of *Napue/Giglio* to these claims, thus, does amount to a circuit split in how these claims are being treated.

Second, Respondent argues this case is a poor vehicle to decide what the proper federal standard should be because the California courts did not distinguish between the federal and state standard and the California standard is at least as favorable as any federal standard. (Opp. at 8-10.) Respondent wrongly claims that Petitioner argued in state court that the

California and federal standards were the same. Petitioner only argued that the prejudice showing for his federal due process claim was the same as the materiality requirement laid out in *In re Cox*, 30 Cal. 4th 974, 1008-09 (2003), i.e. "a reasonable probability that, had the evidence not been introduced, the result of the trial would have been different." (Opp. App. at 132-133.) However, the state court used a different materiality standard from that in *Cox* to deny Panah relief. It required showing that the "scientifically advanced or new evidence would probably have resulted in a different outcome at trial given the totality of the evidence" as recited in the state court's appellate opinion. (Pet. App. B at 3.)

In addition, as explained in the Petition (pet. at 16-23), the California standard differs significantly from the federal standards of the Third, Ninth, and D.C. Circuits. Specifically, the California court required that the evidence refuting the scientific testimony presented be "new" or "scientifically advanced" and found that because Panah's DNA evidence was available at the time of trial, it did not meet that criteria. (Pet. App. B. at 2; Cal. Penal Code § 1473(e)(1).) As discussed above, the California court also imposed a prejudice test requiring that the evidence "would probably have resulted in a different outcome at trial given the totality of the evidence." (Pet. App. B. at 3.) This test is different from that of the Third and Ninth Circuits and tougher than the D.C. Circuit's materiality test which requires

finding that the false testimony "may have had an effect on the outcome of the trial." *Napue,* 360 U.S. at 272. Accordingly, the difference between the California test and that of the federal courts warrants a grant of certiorari. Sup. Ct. R. 10(b).

Even if, as Respondent argues, the California standard is at least as favorable as any of these federal standards, a grant of certiorari is still warranted so that this Court can settle this important federal question. Sup. Ct. R. 10(c).

Third, Respondent argues that the post-conviction evidence presented by Panah does not undermine the validity of the scientific evidence presented by Moore and Dr. Heuser at his trial. (Opp. at 10-14.) Contrary to Respondent's arguments, the post-conviction DNA evidence disproves Moore's serology evidence that Panah and Parker were both present at the time of the crime. Parker's body was found in a suitcase in Panah's bedroom closet so that it was unsurprising that Panah's DNA would be found on items in the room. (Pet. App. J at 57.). Further, Parker's body was found wrapped in the bedsheet so that it would also be unsurprising that she was not excluded as a contributor to saliva found therein. (Pet. App. O at 872; Pet. App. L at 427.) Most importantly, a number of other people, including Ahmed Seihoon who was the last person seen with Parker alive, also had access to Panah's

apartment and the opportunity to commit the crime. (Pet. App N at 838-39, 846-47.)

The prosecution thus relied exclusively on Moore's mixture theory—*i.e.*, that Panah's and Parker's biological fluids were mixed together–to provide the only forensic and direct evidence of Panah as the perpetrator.[1,2] It is this mixture theory that has clearly been invalidated and shown false. (*See* Pet. App L at 432, 435.) Respondent erroneously suggests only the tissue paper stain has been undermined by the DNA testing, stating that Parker was "*not* excluded as a contributor to the saliva on the bed sheet." (Opp. at 11.) But this ignores the DNA analysis, which conclusively rules out a mixture of fluids on two of the five stains in one grouping on the bedsheet. (Pet. App. L at 435.) This means someone else—an A or AB contributor who is not Parker nor Panah—contributed to the stains on the tissue paper *and* the bedsheet.

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[1] Although Respondent points out that the Ninth Circuit opined that the state court could have reasonably found Moore's testimony to be immaterial due to the other evidence of guilt (opp. at 4-5), the claim considered by the Ninth Circuit and the state decision cited therein was a *Napue/Giglio* claim separate and distinct from the due process claim at issue here. Further, that claim is currently separately pending before this Court. *See Panah v. Broomfield*, No. 19-8009.

[2] Although Respondent cites Panah's statements to Rauni Campbell as pointing to his guilt (opp at 1), Campbell testified that Panah never admitted killing, kidnapping, sodomizing, orally copulating, or committing lewd acts on a child. (RT 2178.)

Indeed, neither the state court nor Respondent grapple with the fact that Panah's DNA analysis found that there was "no biological evidence" on the stains linking Panah to Parker. (Pet. App. L at 435.)

As to the robe, Moore testified that he only tested the larger stain so that neither he nor the prosecution relied on the second stain on the robe that Respondent refers to to convince the jury of Panah's guilt. (Opp. at 31; Pet. App. N. at 604.) Accordingly, the post-conviction evidence renders Moore's serology testimony invalid and unreliable.

Respondent's argument that Dr. Heuser's testimony that traumatic injuries to the neck and genital area caused Parker's death has not been disproved (opp. at 12-14) is also incorrect and misleading. Respondent leaves out that Dr. Heuser's autopsy report, which was presented to the grand jury to support probable cause to charge Panah (CT 218, 470), specified that the traumatic injuries that caused Parker's death consisted of "craniocerebral trauma, neck compression, and sexual assault with anal lacerations." (Pet. App. L at 216, 228.) The genital injuries Respondent refers to are thus the very same anal lacerations that Dr. Baden found did not cause death. (Pet. App L at 438.) Respondent also ignores that Dr. Reiber found both neck compression and sexual assault with anal lacerations to be causes of death unsupported by the evidence. (Pet. App. M at 466-67.) Instead, Dr. Reiber opined that the cause of death was most likely asphyxiation either from

aspiration of gastric contents or due to an attempted resuscitation. (Pet. App. M at 470.)

Respondent also attempts to bolster Dr. Heuser's testimony citing the California Supreme Court's direct appeal opinion as to Moore's findings that the anal swab was inconclusive for semen. (Opp. at 13.) However, Respondent conveniently ignores that the post-conviction DNA testing, conducted years *after* the direct appeal, invalidated Moore's testimony, finding that the anal swabs tested negative for P30, the protein indicative of semen. (Pet. App. L at 425.) Further, no semen was found anywhere else on Parker's body. (*Id*.) Thus, there was no DNA evidence to "support the hypothesis that intimate sexual contact occurred" (Pet. App. L at 432), further invalidating Moore's testimony.[3] Accordingly, the post-conviction evidence invalidates the trial evidence that Panah strangled Parker while committing lewd acts, sodomy, and oral copulation. (Pet. App. N at 840-41.)

Respondent further argues that Dr. Reiber did not contest that air temperature could delay onset of rigor mortis or that full rigor after 48 hours was within textbook parameters. (Opp. at 13.) However, Dr. Reiber

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[3] Respondent wrongly refers to Dr. Heuser finding that scratches on Parker's thigh were consistent with Panah's ring. (Opp.at 3.) In fact, Dr. Heuser only testified that the scratches could have been caused by a ring. (Pet. App N. at 688-89: Pet App. J at 145.)

contradicted Dr. Heuser's ultimate conclusion that Parker died a few hours after breakfast the morning of November 20, 1993. (Pet App. N at 755-56, 783.) Dr. Reiber observed that rigor mortis usually fully develops within 6 to 8 hours and decreases in intensity after 24 hours so that it should have been significantly decreased 36 hours after Parker's death when her body was found. (Pet. App. M at 468.) Accordingly, Dr. Reiber found that the fact that the coroner's investigation case report noted that rigor was fully set when the body was found, sometime between the late night of November 21, 1993 and early hours of November 22, 1993, supported that the time of death was significantly later than Dr. Heuser opined. (Pet. App. M at 468-69) Further, Dr. Reiber noted that the fact that the body was found "in a suitcase, wrapped in a sheet, under a pile of other objects in a closet" would have insulated the body and caused it to retain body heat causing rigor to decrease even more rapidly, further invalidating that Parker died the day of November 20, 1993. (Pet. App. M at 468.) As such, Dr. Reiber's report demonstrates that Dr. Heuser's testimony that Parker died in the late morning or early afternoon of November 20, 1993, a time range used to point to Panah's guilt (RT 2889), was false.

Thus, the post-conviction expert evidence does not amount to a battle of the experts but provides clear scientific evidence demonstrating that both the

serologist's and pathologist's evidence that was used to secure Panah's conviction and death sentence was false.

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: May 26 2020

By: */s/ Joseph A. Trigilio*
JOSEPH A. TRIGILIO*
Deputy Federal Public Defender

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

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 33.2(b), I hereby certify that this reply is less than 15 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: May 26, 2020

By: */s/ Joseph A. Trigilio*
JOSEPH A. TRIGILIO*
Deputy Federal Public Defender

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

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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 May 26, 2020, a copy of **REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI** was served electronically via electronic mail to:

The names and addresses of those served are as follows:

[CONTINUED ON NEXT PAGE]

Ana R. Duarte
Deputy Attorney General
Office of the CA Attorney General
300 South Spring St., Ste 1702
Los Angeles, CA 90013
Ana.Duarte@doj.ca.gov
VIA E-MAIL

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

Executed on May 26, 2020.

/s/ Joseph A. Trigilio
JOSEPH A. TRIGILIO*
Attorney for Petitioner
**Counsel of Record*