No. _____

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

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED

Question 1:

During deliberations, a juror contacted her preacher, who gave her an eye-for-an-eye Biblical passage, which made her "at peace" with voting for a death sentence. The state court dismissed these allegations without holding a hearing to allow the state to explain how that contact was not harmful. The question presented is this:

> Does the Ninth Circuit's conclusion—that the state court's dismissal of this claim without a hearing was reasonable—conflict with this Court's decision in *Remmer,* 347 U.S. 227, 229 (1954) and its progeny, and with factually-indistinguishable opinions of the Fourth Circuit Court of Appeals which require a hearing once there has been inappropriate third-party contact?

Question 2:

This is a death penalty case. Panah alleged in state and federal court that violations that occurred during the guilt phase—including the presentation of false testimony and trial counsel's deficient performance—prejudiced him at both the guilt and penalty phases of his trial. The Ninth Circuit assumed there were constitutional errors, but denied relief by finding the state court could have reasonably

concluded the errors did not prejudice Panah at the guilt phase. The question presented is this:

> Does the Ninth Circuit's complete failure to consider, the impact of any constitutional violation on the jury's penalty verdict in a capital case conflict with this Court's decision in *Cone v. Bell*, 556 U.S. 449 (2009)?

Question 3:

Prosecution serologist William Moore testified that antigens found on evidence in Petitioner Hooman Panah's bedroom were consistent with a mixture of biological fluids from the victim and Panah. The Ninth Circuit assumed that this testimony was false and that the prosecution knew it was false, based on the prosecution's unpresented DNA testing indicating no such mixture. The Court was also troubled by defense counsel's failure to investigate and expose that false testimony. However, the Ninth Circuit found the state court reasonably denied relief because "setting aside" Moore's testimony the prosecution's case was strong. The question presented is this:

> Does the Ninth Circuit's materiality analysis, which addressed the strength of the prosecution's case absent the prosecution's false or misleading testimony, conflict with *Napue v. Illinois*, 360 U.S. 264 (1959) and *Strickland v. Washington*, 466 U.S. 668 (1984) by failing to assess whether the Panah's post-conviction evidence could have impacted the verdict?

Question 4:

Did the Ninth Circuit depart from its accepted and usual course of judicial proceedings when it violated its own circuit rule by transferring to the merits panel—rather than a motions panel—Petitioner's *pro se* motion for reconsideration of the appellate commissioner's denial to replace counsel?

LIST OF RELATED PROCEEDINGS

United States Supreme Court

Panah v. Broomfield, Case No. 19-7670, petition for writ of certiorari filed February 11, 2020[1]

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

[1] This petition is from the California Supreme Court's dismissal of Panah's claim that the prosecution presented faulty evidence in violation of federal due process rights as well as other California-statutory violations, which constituted new legal bases for relief after the instant case was initiated.

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 UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner Hooman Ahskan Panah (Panah or Petitioner) respectfully petitions this Court for a Writ of Certiorari to review the judgment of the Court of Appeals for the Ninth Circuit in *Panah v. Chappell*, Case No. 13-99010.

OPINIONS BELOW

The Ninth Circuit's order denying panel rehearing and rehearing en banc was not reported. Petitioner's Appendix ("Pet. App.") 10. The Ninth - Circuit's opinion denying relief is reported, *Panah v. Chappell*, 935 F.3d 657 (9th Cir. 2019). Pet. App. 1. The district court's orders denying relief without granting discovery or an evidentiary hearing and entering judgment are unreported. Pet. App. 9.

The California Supreme Court's summary denials on habeas are not reported. Pet. App. 7, 11. The California Supreme Court's appellate opinion affirming Panah's convictions and sentences is reported, *People v. Panah*, 35 Cal.4th 395 (2006). Pet. App. 12.

JURISDICTION

The Ninth Circuit's opinion affirming the denial of habeas relief was filed on August 21, 2019. The Ninth Circuit's order denying Panah's petition

for rehearing was filed on December 17, 2019. The Court's jurisdiction is timely invoked under 28 U.S.C. § 1254(1).

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."

U.S. Const., Amend. VI

"In all criminal prosecutions, the accused shall enjoy the right … an impartial jury . . . [and] to have the Assistance of Counsel for his defence."

Title 28 U.S.C. § 2254(d)

"An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."

STATEMENT OF THE CASE

A. The crime and lead counsel's appointment to the case

On Saturday, November 20, 1993, eight-year old Nicole Parker went missing from her father's Woodland Hills, California apartment. Pet. App 13-394; 15-398. The following morning, after several warrantless searches of Panah's apartment found no evidence of wrongdoing, police found Parker's dead body in a suitcase in Panah's bedroom closet in the apartment he shared with his mother in the same complex. Pet. App 13-396.

Panah was indicted on charges of first-degree murder and special circumstance allegations that the murder occurred in the commission of kidnaping, sodomy, lewd acts on a child under 14, and oral copulation of a person under 14 and more than 10 years younger than the defendant (Panah was 22 at the time of the offenses). Pet. App. 12-259-60.

Defense lawyer Robert Sheahen solicited his appointment to the case in a February 24, 1994 letter to the court, promising a quick, low-cost settlement: "Given the defendant's . . . complete faith in Mr. Sheahen, it is probable that he would follow [his] advice to enter a plea at an early stage of the proceedings." Pet. App. 30-736-37. Sheahen warned that if a public defender were appointed, "the result might be an extremely costly trial." *Id*. The court appointed Sheahen as Panah's lead counsel.

B. Pre-trial forensic experts

Around five months before trial began, prosecutor Peter Berman advised that he had ordered DNA testing on various items of evidence. RT 192.[2] Sheahen asked that the testing be expedited and complained that "we have set a trial date for a little over six weeks from now, and we still don't have what may be the single most critical piece of evidence in this case." RT 235. Judge Kriegler advised defense counsel to "find a DNA expert to assist you" and to retain an expert "confidentially for for purposes of consultation[.]" RT 237-38. Sheahen replied that he'd "draft an appropriate order along those lines," but he never did. *Id*. The defense did not retain a DNA or serology expert.

The prosecution's case—relying on a felony-murder theory—relied heavily on pathology evidence describing the injuries and what conduct could have caused them. And Sheahen acknowledged during pre-trial proceedings that the prosecution's pathologist, Eva Heuser, was "the most important witness for the people" and that "the question of whether Mr. Panah lives or dies will rise and fall on her testimony." RT 2221. He further acknowledged that consulting with an independent pathologist was necessary to

[2] "RT" refers to the Reporter's Transcript of the trial, and "CT" refers to the Clerk's Transcript of the trial.

"intelligently cross-examine Dr. Heuser." RT 2227. Sheahen went so far as to mislead the trial court, telling the court he had "on board" a pathologist, Dr. Griffith Thomas. RT 2221, 2324. But Sheahen neither retained nor consulted with Thomas or any other pathologist before or during trial. Pet. App. 23-433.

C. Trial

As trial neared, the court told Sheahen: "I think you have spent a lot of time, probably too much time, trying to dispose of this case." RT 1372. Sheahen agreed, and admitted that he had not "gotten through all these questionnaires" for voir dire. RT 1374. Then, on December 5, 1994, the day that the prosecution began its case-in-chief, Sheahen, for the first time, requested funds to retain an investigator. RT 1462, 1547; 3 CT 600.

1. The prosecution's guilt-phase presentation

The prosecution relied solely on a felony-murder theory of first degree murder. RT 2046-47. It presented evidence that on the morning of Saturday, November 20, 1993, Nicole Parker visited her father, Edward Parker, in his Woodland Hills apartment. Pet. App. 12-261. Panah and his mother, Mehri Monfared, lived in the apartment across the courtyard from Parker's apartment. Ahmad Seihoon was in Panah's apartment that morning for a business meeting with Monfared. Monfared left the apartment before 11:00 a.m., as did Seihoon, but he returned for his keys and wallet. When he left again, he spoke briefly with Nicole outside the apartment. Pet. App. 12-261;

RT 1698. Seihoon testified that from time to time, he and his 12 and 17-year-old boys had stayed overnight at Monfared's apartment. RT 1701-02.

At about 12:30 p.m., Parker noticed that Nicole was missing and called the police, who arrived by 1:15 p.m. to set up a command post. Pet. App. 12-262. Meanwhile, Panah arrived at Mervyns department store for his work shift at 3:00 p.m.

After the police learned that Nicole had been seen talking with a man (Seihoon) outside Panah's apartment, they searched the apartment for about 15 minutes but did not find her. Pet. App. 12-263. Later in the afternoon a police officer called Panah at work and asked if he knew Nicole. He said he knew her vaguely. The officer asked if he knew where Nicole was, and he said "no." The officer said that someone had reported seeing him with Nicole earlier in the day; Panah said that he had not seen her that day. Pet. App. 12-263-64

The next morning, Rauni Campbell, Panah's ex-girlfriend, called 911 reporting that Panah had taken sleeping pills and had tried to kill himself. Pet. App. 12-264. Police detained Panah near Campbell's apartment complex; his wrists were slashed, he was incoherent, and he appeared to be under the influence of drugs or alcohol. The police took him to a hospital for medical treatment. Pet. App. 12-266. After more warrantless searches, the police found Nicole's body in a suitcase in Panah's bedroom closet. *Id*. Notably, the

body was placed directly on Panah's bedroom without protective covering, and evidence—including Panah's robe—was bundled with other items by criminalist Monsoon. RT 1995-96.

The prosecution presented William Moore as their serology expert. Pet. App. 29-474. Moore testified that Parker had blood type A and Panah had blood type B, and that a bed sheet, blue robe and tissue paper found in Panah's apartment contained mixtures of blood and other bodily fluids that could have come from Panah and Parker. Pet. App. 12-267-68. According to Moore, "the tissue paper found in the wastebasket in defendant's bathroom revealed that the paper contained semen stains consistent with the defendant and high amylase [saliva and other fluids] activity consistent with Nicole," and "consistent with the product of oral copulation." Pet. App. 12-268. Confirmatory tests for the presence of semen on oral and anal swabs taken from the victim were negative, with Moore confirming he could not find semen based on the lack of P30 protein. Pet. App. 12-267; RT 2099.

The prosecution's pathologist Eva Heuser testified that "there was an injury to the larynx indicative of manual strangulation"; that Parker "aspirated on her own vomit"; and that Parker's injuries "were consistent with the insertion of a male penis, or similar object into the rectum" and suggested her vagina had been penetrated by a finger. Pet. App. 12-269, 272. Heuser opined that death could have been caused by the injuries to the neck

or the rectum. Pet. App. 12-268-69. While the California Supreme Court noted that Heuser "was unable to state a time of death," Pet. App. 12-269, in fact, Heuser agreed with the prosecutor that the victim "probably" died within four hours of her morning breakfast, based on the contents of her stomach. Pet. App. 29-667-68.

2. The defense case

Sheahen presented an emergency room physician who treated Panah on Sunday, November 21, and who described Panah as "'acutely psychotic,' suicidal and hearing 'command hallucinations,' meaning that black robed and hooded figures were telling him to kill himself." Pet. App. 12-269. Sheahen also presented character witnesses who testified to Panah's "peaceful disposition, sensitive nature and lack of any unnatural interest in children," and two former girlfriends testified that he "was never violent during sex." Pet. App. 12-269-70. Finally, Sheahen presented witness, Michael Mier, who lived about five miles from Panah and testified that he called 911 on the evening of November 20 after hearing a young girl and a man screaming for help near his home. Pet. App. 12-270.

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The jury convicted Panah of first degree murder and the four underlying charged felonies (including oral copulation), and found the sodomy

and lewd acts special circumstances true but the oral copulation special circumstance not true. Pet. App. 12-259-60.

3. The penalty phase

The prosecution's case in aggravation consisted entirely of the nature and circumstances of the crime, and of the victim impact testimony of Nicole Parker's parents and siblings. Pet. App. 12-270. Panah, twenty-two at the time of the offense, had no prior criminal record. RT 3960. The defense in mitigation presented eleven witnesses, some of whom addressed Panah's positive character and others who addressed his background and upbringing. Pet. App. 12-270-73.

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At penalty, after deliberating for four days, the jury returned a death verdict on January 23, 1995. RT 4234.

D. Post-conviction evidence

1. Evidence of trial counsel's refusal to prepare.

In state habeas and below, Panah presented declarations from all three of his trial lawyers and his belatedly-hired investigator attesting to counsels' deficient performance. Sheahen acknowledged in a post-conviction declaration that "[a]ll of our efforts had gone into the aborted settlement and full factual investigation had simply not been done" by the time testimony had commenced. Pet. App. 25-452. Second counsel Syamak Shafi-Nia also

declared that "[n]o pre-trial investigation was conducted" because Sheahen was certain that the case would settle. Pet. App. 26-460. William Chais, who replaced Shaf-Nia, similarly declared that when he was appointed to represent Panah on the second day of the prosecution's case-in-chief he "was surprised to learn that no defenses had been prepared for the guilt or the penalty phase." Pet. App. 21-428. Finally, Charles Evans, who was the *only* defense investigator and was appointed on the first day of trial testimony, confirmed that "no prior investigator work[ed] on the case" prior to his appointment. Pet. App. 22-431.

Panah's trial lawyers acknowledged that the defense never retained experts because Sheahen had banked on a settlement and purportedly believed that "there were limited funds for any investigation," Pet. App. 26-460, a proposition belied by the fact that the court had encouraged him to retain a DNA/serology expert and immediately granted his request for an investigator.

2. DNA analysis refuting the prosecution's trial presentation

In state and federal post-conviction proceedings, Panah presented declarations from independent DNA analysists, Lisa Calandro and Keith Inman, showing that the state's DNA evidence, given to the defense but not presented at trial, undermines the "mixture" theory presented through

Moore's testimony at trial by (1) excluding Parker as a contributor to the tissue stain sample; (2) showing that the claim of a mixture of Panah's semen and Parker's saliva on the bed sheet is unsupported; and (3) eliminating Panah as a contributor to the stain on the robe. Pet. App. 19-413-22, 27-463-64. Both experts confirm that "there is no evidence to suggest intimate sexual contact between Mr. Panah and the victim." Pet. App. 27-464.

Panah also presented evidence that the prosecutor who examined Moore, Patrick Couwenberg, was removed as a superior court judge in 2001 for repeated instances of lying about his background, including on a judicial application completed the year before Panah's trial, and defended himself by claiming he was a longstanding pathological liar. Pet. App. 31-738-48.

3. Independent pathologist refuting the prosecution's trial presentation

In state and federal post-conviction proceedings, Panah presented the declaration of pathologist Gregory Reiber showing that the time of death was a significant number of hours later than asserted at trial by pathologist Heuser and the prosecution. Pet. App. 28-469. This more accurate time of death exonerated Panah showing his innocence because the victim died at a time Panah was demonstrably not in his apartment. Pet. App. 28-469; RT 1594 (Panah seen at work at 3-5pm).

Reiber also opined that, contrary to the prosecution presentation, manual strangulation was a very unlikely cause of death and any asphyxial death may have resulted from an attempted resuscitation. Pet. App. 28-471. Finally, Reiber explained that there is no scientific support for Heuser's trial testimony that the victim could have died due to anal penetration. Pet. App. 28-468.

4. Evidence of third-party contact about the matter pending before the jury and other juror bias.

Panah presented evidence to the state and federal habeas courts that during the four-day penalty-phase deliberations, Juror E.C.[3] consulted with her husband and a pastor. A declaration filed in state and federal court describes the Juror's conversation with her husband, wherein she asked him, "what am I going to do [about the penalty decision]?" to which he advised that "she should consult the Bible to see what it has to say" and ask herself "What would God Want?" Pet. App. 20-423.

Juror E.C. then "went to a minister in her Church, told him she was serving as a juror on a murder case, and that she needed biblical references or other spiritual writings regarding the legal system." Pet. App. 20-424. The minister "gave her some selected materials, which she read." Pet. App. 20-

[3] For privacy interests, the juror's name is abbreviated as "E.C." in this petition.

424. The juror decided on a death-verdict after reading one of those passages that read: "He who sheds innocent blood, his blood too shall be shed." Pet. App. 20-424. This passage helped the juror "get [her] peace with God" regarding a decision to vote for death. Juror E.C. brought her religious views into the deliberation room. Other jurors recalled that Juror E.C. was "extremely religious" and "talked a lot about God and the Bible" during deliberations. Pet. App. 32-749, 33-750.

Additional evidence of demonstrable juror bias was also discovered and presented to the state court. This included evidence that one juror was seen nodding and having eye contact with a priest who sat next to the victim's mother. This juror attended the same church as the victim's family and his daughter attended school with the victim. Pet. App. 34-751, 18-411-12.

Finally, post-conviction declarations exposed that Panah's jurors were subject to racial and ethnic bias against Panah, who is Persian. This includes declarations by or regarding jurors who felt threatened by Iranian spectators, or who otherwise harbored negative stereotypes or fears against Persians. Pet. App. 20-423-26, 32-749, 17-410-11.

E. The state court affirmed Panah's conviction and summarily denied his habeas petitions without holding an evidentiary hearing.

The California Supreme Court denied Panah's automatic appeal on March 14, 2005. Pet. App. 12-259-393. Panah's initial state habeas petition

was summarily denied without an evidentiary hearing. Pet. App. 11-258. Panah also filed a second petition in the California Supreme Court, which was summarily denied on March 16, 2011. Pet. App. 7-34

F. The federal courts below denied relief without affording Panah a hearing and despite the state's concession that it used false testimony at trial.

Panah filed a timely federal habeas petition in district court on February 26, 2007, and—after exhausted claims in state court—he filed an amended petition on June 24, 2011. The district court denied each of Panah's claims without affording him discovery or an evidentiary hearing, and it issued a Certificate of Appealability ("COA") on one claim: that the prosecution's serologist William Moore testified falsely. Pet. App. 9-256; 1-12-13.

On appeal, Panah raised the certified claim and additional uncertified claims, including ineffective assistance of counsel and that Juror E.C. committed misconduct by contacting her preacher who helped her reach her death verdict. Throughout state and federal district court proceedings, the state—represented by the California Attorney General—disputed Panah's allegations that serologist Moore testified falsely. But in its Answering brief to the Ninth Circuit and at oral argument, Respondent acknowledged that Moore's testimony was false, at least as to the tissue paper evidence. *See* Ninth Cir. Dkt. No. 62-1, Answering Brief, at 49 ("it appears that Petitioner

is correct that the DNA results showed Nicole was not a contributor to the stain on the tissue").

At the time it issued its decision affirming the dismissal of Panah's petition, the Ninth Circuit expanded the COA to include the ineffective-assistance-of-counsel claim. Pet. App. 1-2-3. It denied a COA on all other claims—including the juror misconduct claim—without explanation. *Id*. The court applied § 2254(d) to each element of the certified claims.

Regarding the false-evidence claim, it assumed "there was no reasonable basis for the state court to deny Panah's claim as to the first two *Napue* [360 U.S. 264 (1959)] requirements" but found it could not "say that it would be unreasonable to conclude that Moore's testimony was immaterial." Pet. App. 1-16.[4] Regarding the ineffective-assistance claim, the opinion noted that it was "concerned with defense counsel's lack of pre-trial investigation." but denied relief by concluding there would be no reasonable likelihood of a that Panah would have been found not guilty had counsel performed competently. Pet. App. 1-23. The opinion ignored the impact of both the false testimony and counsel's performance on the penalty phase of Panah's trial.

[4] The first two *Napue* factors applied here are that Moore's testimony was false and the prosecutor knew or should have known it was false.

On December 17, 2019, the Ninth Circuit denied panel rehearing and rehearing *en banc*.

REASONS FOR GRANTING THE WRIT

I. QUESTION 1

Panah presented allegations and evidence to the state and federal courts below indicating that a juror based her decision to vote for death based on an extrinsic conversation with her preacher—during deliberations—wherein the preacher pointed her to Biblical passages that suggested a convicted killer should, himself, be killed. No court has ever held a hearing to determine the extent and harmfulness of this third-party contact, and the Ninth Circuit refused to grant a COA to review the denial on appeal.

To obtain a COA under 23 § 2253(c)(2), a petitioner need only "demonstrate that the issues are debatable among jurists of reason" and that the questions are "adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003); *see also Buck v. Davis*, 137 S. Ct. 759, 773 (2017). Here, the Ninth Circuit's denial of a COA on Panah's juror misconduct claim—under the modest COA standard— conflicts with decisions of this Court and of other Circuit Courts. Accordingly, this Court should grant certiorari pursuant to Supreme Court Rules 10(a) and (c), vacate the decision below, and remand to the Ninth Circuit to decide Panah's claim in the first instance.

A. The denial of a COA on Panah's juror-misconduct claim conflicts with *Remmer* and its progeny.

Mattox v. United States, 146 U.S. 140, 150 (1892) and *Remmer v. United States*, 347 U.S. 227, 229 (1954) clearly establish that improper contact between a juror and an outside party that has a "tendency" to be "injurious to the defendant" is presumptively prejudicial, meaning that the state has a heavy burden to establish the contact was harmless. When prejudicial effect of the contact is unclear, a hearing is required to "determine the circumstances [of the contact], the impact thereof upon the juror, and whether or not it was prejudicial." *Remmer*, 347 U.S. at 229-30.

Here, Panah alleged in his state habeas petitions that Juror E.C. improperly contacted both her husband and her preacher during penalty-phase deliberations. Her preacher gave her a Biblical passage indicating that someone guilty of murder should be killed. Pet. App. 20-424. This passage "made up her mind" to give Panah a death sentence. *Id*. And she spoke with other jurors about the Bible during deliberations. Pet. App. 32-749. The state court assumed these allegations were true, *see People v. Romero*, 8 Cal. 4t 728, 737 (1994) (explaining California courts' procedure for evaluating a petitioner's allegations), but summarily denied Panah's claim anyway.

The Ninth Circuit, by denying Panah even a COA on this claim, concluded that his allegations surrounding Juror E.C.'s third-party contact

did not even debatably raise a prima facie claim that the state court's summary denial either contradicted or unreasonably applied *Remmer*. This conclusion conflicts with that case.

This Court issued two opinions addressing the juror contact at Elmer Remmer's trial. In *Remmer I*, this Court explained that a juror was contacted by someone who offered that juror money in exchange for a verdict favorable to the defendant. 347 U.S. at 450-51. The juror reported the contact, and the FBI investigated and concluded that "the statement to the juror was made in jest, and nothing further was done or said about the matter." *Id.* at 451. This Court noted that a jury trial "must not be jeopardized by unauthorized invasions," and it remanded the case for a hearing because the record provided no information about "what actually transpired, or whether the incidents that may have occurred were harmful or harmless." *Id.*

On remand, the district court held a hearing but concluded the third-party contact with the jury was harmless, which the Ninth Circuit affirmed. *Remmer v. United States (Remmer II)*, 350 U.S. 377, 378 (1956). This Court reversed the Ninth Circuit. It found that the juror—interviewed by the FBI during its investigation—"had been subjected to extraneous influences to which no juror should be subjected, for it is the law's objective to guard jealously the sanctity of the jury's right to operate as freely as possible from outside unauthorized intrusions purposefully made." *Id.* at 382.

Here, Juror E.C.'s contact with her husband and preacher are even more troublesome and potentially prejudicial than the juror in *Remmer I* and *II*. Unlike the juror in *Remmer*, who did not seek out unauthorized contact, Juror E.C. violated the trial court's admonishments and actively sought out third-party assistance in reaching her verdict. This calls into question her bias as a juror both at guilt and penalty. Moreover, Juror E.C.'s contact was directly tied to the matter pending before the jury—whether Panah should live or die. This is in contrast to the less-obviously prejudicial contact of the juror in *Remmer*, who was contacted by the FBI about matters unrelated to the defendant's guilt. At the very least, Juror E.C.'s contact with her preacher was *debatably* harmful to Panah, making the state court's summary denial *debatably* unreasonable such that the Ninth Circuit should have granted a COA.

B. The COA denial of the juror-misconduct claim creates a circuit split on whether a hearing is required when a petitioner presents a credible allegation of juror contact with a third party about a matter pending before the jury.

Beyond conflicting with this Court's decisions, the Ninth Circuit's denial of a COA evidences a circuit split about a fundamental issue: the standard for when a hearing is required (and when the denial of a hearing is unreasonable) on the harmfulness of a juror's third-party contact.

By denying a COA without explanation, the Ninth Circuit does not consider the state court's failure to hold a hearing concerning Juror E.C.'s third-party contact as contradicting this Court's decision in *Remmer*. This conclusion creates a split of authority with the Fourth Circuit Court of Appeals.

In two cases, the Fourth Circuit found that 28 U.S.C. § 2254(d) was satisfied when jurors contacted a preacher and a family member—who each gave the jurors the same Biblical passage at issue here—during deliberations. *Barnes v. Joyner*, 751 F.3d 229, 243 (4th Cir. 2014) (juror contact with her preacher); *Hurst v. Joyner*, 757 F.3d 389 (4th Cir. 2014) (juror contact with her father).

In *Barnes*, the court found an unreasonable application of *Remmer* where a state court failed to grant a hearing on a similar habeas claim that a juror consulted with a pastor. There, the juror called a pastor and discussed the death penalty with him while the juror was considering the appropriate punishment. 751 F.3d at 248. The Fourth Circuit held that "[t]o the extent that a juror had a conversation with a third party about the spiritual or moral implications of making this decision, the communication was of such a character as to reasonably draw into question the integrity of the verdict and further inquiry in a *Remmer* hearing was required." *Id.* at 249 (internal citations omitted).

Similarly, in *Hurst v. Joyner*, a juror asked her father where to look in the Bible for guidance in making her penalty decision. 757 F.3d 389, 392 (4th Cir. 2014). Her father gave her a section in the bible where she "could find 'an eye for an eye.'" *Id*. Reading that section "helped [her] sleep better" and she voted for the death penalty. *Id*. The Fourth Circuit held that the foregoing allegations warranted a "presumption of prejudice and an evidentiary hearing." *Id*. at 398. Thus, the Court held, "as [it] did in *Barnes*, that the state court's failure to apply the *Remmer* presumption and to conduct an evidentiary hearing ... was contrary to or an unreasonable application of the Supreme Court precedents applicable to juror-influence claims." *Id*.

Here, like in *Hurst* and *Barnes*, Juror E.C. consulted with her husband and minister about a matter pending before the jury, i.e. whether the defendant should receive the death penalty. *See Barnes*, 751 F.3d at 249; *Caldwell v. Mississippi*, 472 U.S. 320, 329 (1985) (describing the duty of "capital sentencers" as "the serious one of determining whether a specific human being should die at the hands of the State"). Moreover, both the husband and the minister directed Juror E.C. to consult the bible; indeed her minister - like the father in Hurst - provided Juror E.C. with biblical passages to read. *Compare* ER 448-49 *with Hurst*, 757 F.3d at 398.

Finally, like the jurors in *Barnes* and *Hurst*, Juror E.C. relied on a biblical passage implying an "eye for an eye" to reach a decision to vote for

death. Indeed, just as the passage in *Hurst* helped the juror "sleep better" about voting for death, here too Juror E.C. recalled the passage helping her "get peace with my God" about her decision to vote for death. Pet. App. 20-424.

There are no material distinctions between Panah's allegations of Juror E.C.'s contact with her husband and preacher and the jurors' contact with their father and preacher in *Barnes* and *Hurst*. Yet, the Fourth Circuit in those cases found § 2254(d) satisfied and remanded for an evidentiary hearing, while the Ninth Circuit concluded Panah's claim was not even worthy of a COA. This "conflict with the decision of another United States court of appeals on the same important matter" warrants a writ of certiorari, vacating the decision below, and remanding it to the Ninth Circuit.[5] Sup. Ct. R. 10(a).

[5] The COA denial here conflicts even with the Ninth Circuit's own precedent. For example in two recent cases—*Godoy v. Spearman*, 861 F.3d 956 (9th Cir. 2017) and *Clark v. Chappell*, 936 F.3d 944 (9th Cir. 2019)—the Court granted a COA and ordered a hearing under materially-indistinguishable facts. In *Clark*, just like the juror here, a juror contacted a preacher who gave her an "eye for an eye" passage. 936 F.3d at 971-73. And in *Godoy*, a juror text-messaged her friend, who was a judge, about procedural matters in the case. 861 F.3d at 959. The Ninth Circuit in both cases found the contact "possibly prejudicial" and remanded. *Id*.

II. QUESTION 2

In his opening brief to the Ninth Circuit, Panah argued that each of his certified claims—serologist's Moore's false testimony and counsel's failure to investigate and expose that false testimony and misleading pathology testimony—prejudiced Panah at the guilt *and* penalty phases of his trial. The Ninth Circuit accepted that the prosecution presented false evidence and that trial counsel performed deficiently. Yet, other than a brief mention in its restatement of the case, the Ninth Circuit's opinion entirely failed to address the impact of those constitutional violations on Panah's sentence.

A writ of certiorari to vacate the Ninth Circuit's decision and remand is appropriate because the Ninth Circuit's blatant failure to address—at all—the impact of Moore's false testimony or trial counsel's deficient performance on the penalty phase conflicts with this Court's decision in *Cone v. Bell*, 556 U.S. 449 (2009).

A. The Ninth Circuit's failure to consider the materiality of the false evidence and deficient performance on Panah's punishment conflicts with *Cone v. Bell*.

In *Cone v. Bell*, the Sixth Circuit—denying a *Brady*[6] claim—concluded that the "suppressed evidence would not undermine confidence in the verdict 'because of the overwhelming evidence of Cone's guilt.'" *Id.* at 462. This Court

[6] *Brady v. Maryland*, 373 U.S. 83 (1963).

vacated the denial because the Sixth Circuit "did not distinguish between the materiality of the evidence with respect to guilt and the materiality of the evidence with respect to punishment—an omission we find significant." *Id*. at 472. This Court explained that there is a "critical difference" between what evidence would have been impactful at the guilt-phase and the "far lesser standard that a defendant must satisfy to qualify as mitigating in a penalty hearing in a capital case." *Id*. at 474. Thus, this Court remanded for the lower court "to determine in the first instance whether there is a reasonable probability that the withheld evidence would have altered at least one juror's assessment of the appropriate penalty for Cone's crimes." *Id*. at 452.

Here, the district court and the Ninth Circuit—by entirely failing to consider whether the withheld DNA and pathology evidence impacted the jury's verdict about punishment—repeated the Sixth Circuit's error in *Cone*, thus conflicting with this Court's decision in that case. And the omission mattered. The prosecution relied exclusively on the nature and circumstances of the crime as aggravation; Panah had no prior felony convictions or acts of violence. With the post-conviction DNA and pathology evidence, the prosecutor could not have argued graphic details of the crime, such as the now-debunked theory that the victim orally copulated Panah, or that she spit out ejaculate first onto a tissue-paper and then onto a bed sheet. This creates a reasonable likelihood that but for the false impression of the

stains that were the subject of Moore's testimony, Panah would not have been sentenced to death. Indeed, even with the false evidence suggesting intimate sexual contact, the jury took four days to determine Panah's penalty. *C.f. Parker v. Gladden*, 385 U.S. 363, 365 (1966) (26 hour deliberation).

III. QUESTION 3

The Ninth Circuit "assume[d]" the state court acted unreasonably by determining that Panah failed to establish that the prosecution knowingly presented false serology testimony in violation of *Napue*. Pet. App. 1-16 (opinion at 16). The Court also assumed counsel performed deficiently by failing to investigate and uncover the prosecution's false and misleading serology and pathology evidence. Pet. App.1-24 (Opinion at 24). But for both claims, the Court found the state court's summary denial reasonable based on a lack of prejudice. *Id*.

This Court should grant certiorari because the Ninth Circuit's materiality analysis exposes that it assessed the state court's application of this Court's precedent in a way that conflicts with *Napue, Strickland v. Washington*, 466 U.S. 668 (1984), and *Kyles v. Whitley*, 514 U.S. 419 (1995). Sup. Ct. R. 10(c).

A. The Ninth Circuit's materiality analysis conflicts with this Court's decisions in *Napue, Kyles*, and *Strickland*.

In *Strickland*, this Court—determining whether trial counsel's

deficient performance is prejudicial enough to warrant habeas relief—adopted "the test for materiality of exculpatory information not disclosed to the defense by the prosecution[,]" which asks whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding *would* have been different." 466 U.S. at 694 (emphasis added). A claim that the prosecutor knowingly presented false testimony has a similar—and easier-to-meet—test for materiality: whether there is "any reasonable likelihood" that the false testimony "may have had an effect" on the outcome of trial. *Napue*, 691 U.S. at 271-72.

This Court has explained that these materiality analyses are "not a sufficiency of the evidence test." *Kyles v. Whitley*, 514 U.S. at 434-35. "A defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict." *Id*. Rather, the question is whether "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Id*. at 435. Simply "eliminat[ing]" the tainted testimony and seeing what evidence was left was "diametrically different" from this Court's materiality analyses for *Napue* and *Strickland* claims. *Goudy v. Basinger*, 604 F.3d 394, 44 (7th Cir. 2010) (quoting *Williams (Terry)*, 529 U.S. 362, 406 (2000)). Moreover, prejudice is assessed *cumulatively*, not item-by-item. *Kyles*, 514 U.S. at 420.

Here, the Ninth Circuit's materiality assessment conflicts with *Napue*, *Strickland*, and *Kyles* in two ways. First, it found the state court's application of this Court's materiality tests reasonable by doing exactly what this Court said not to do— "discounting," i.e., "setting aside," Moore's testimony and concluding there was enough evidence left to sustain Panah's conviction. *Compare Kyles*, 514 U.S. at 434-35 *with* Pet. App. 1-17("Even setting aside Moore's testimony, the case against Panah was devastating").

Second, the Ninth Circuit asked the wrong fundamental question: what the verdict would have been absent the false testimony or counsel's failure to retain forensic experts. The appropriate question is whether the "favorable evidence," *i.e.*, the DNA analysis disproving serologist Moore's false testimony and the testimony of an independent pathologist, "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. This Court should grant certiorari to answer this question, which the state and lower courts failed to reasonably posit.

B. Panah has demonstrated prejudice under the appropriate analysis.

1. The post-conviction evidence exposing the prosecution's false and misleading testimony case the case in a new light.

Rather than merely omit Moore's false serology testimony entirely, the Ninth Circuit should have considered whether the omitted favorable DNA testimony—in any likelihood—may have impacted the verdict. The Ninth Circuit failed to address the number of ways it did impact the verdict by stopping its analysis short with it conclusion that the prosecution's evidence was too overwhelming for any violation to matter. As shown below, it was not.

In the absence of any direct evidence linking Panah to the victim, the prosecution relied on serologist Moore's testimony about a "mixture" of fluids of Panah and the victim to prove his guilt. But that evidence was false, and had Panah known of its falsity at trial—either through competent representation or the prosecution complying with its duty to correct false testimony—the jury would have had a dramatically different impression. Panah is a Type B antigen contributor and the victim contributes Type A antigens. Pet. App. 1-10. Moore testified that a mixture of A and B antigens on tissue paper stain, and on a grouping of five stains on Panah's bedsheet, show that the victim's saliva mixed with Panah's semen. Pet. App. 29-505.

As to the tissue paper, the State now concedes Moore testified falsely, *i.e.*, the victim did not contribute to that stain. Similarly, DNA evidence conclusively shows no evidence of a mixture on the bedsheet, with two of those five stains *conclusively* excluding the victim as a contributor. Pet. App. 27-464.[7] This means that someone else—an A or AB contributor who is not the victim and cannot be Panah—contributed to the stains in the bedroom. This removes any reasonable inference that Panah had any contact with the victim.

The courts below relied heavily on the fact that the victim's body was discovered in a suitcase in Panah's bedroom. But the state court and Ninth Circuit failed to consider the fact that Panah was not the only person with access to his apartment and bedroom. Ahmed Seihoon, who was staying with Panah and his mother before the victim's death, both had access to Panah's apartment and was the last person seen with the victim before she disappeared. RT 2861-62; 2915-16. And Seihoon was seen with a suitcase at

[7] The Ninth Circuit erroneously stated in its opinion that "[n]either post-conviction [DNA] report conclusively refuted [Moore's] findings as to the bedsheet or robe stains." Pet. App. 1-21. That is wrong. Absent an evidentiary hearing the state and federal courts below were required to accept as true Panah's evidence and allegations that there was "no biological evidence" on the stains linking Panah to the victim. Pet. App. 27-464.

the time he made contact with the victim, and was seen leaving Panah's apartment with a suitcase on the day she disappeared. Pet. App. 16-401.

Because the police failed to take any fingerprints of the suitcase in which the victim was found, RT 2945, the prosecution was left arguing circumstantially that the victim died during a small window of time during which Panah had the opportunity to commit the crime. This window fell between approximately 11:45 a.m. on November 20, 1993—the time the father reported last seeing the victim—and around 1:00 p.m. on the same day—the time the police arrived at the scene. RT 1630, 1637. Panah had left by the time the police arrived and was seen at work by 3:00 p.m. that day. RT 1594. Dr. Heuser testified that—based on undigested eggs found in the victim's stomach—she "probably" died within this small window. Pet. App. 29-667-68.

Neither the state nor federal court considered Panah's post-conviction evidence showing that Dr. Heuseur's use of stomach contents as a basis for time of death is not scientifically reliable. Pet. App. 28-469-70. Panah demonstrated to the state and federal courts below that it is more likely—based on the body's rigor mortis and placement in wrapped sheets–that the victim died "a significant number of hours later than Dr. Heuser testified to[.]" Pet. App. 28-469.

Thus, without the false pathology evidence—or the false serology evidence linking the victim and Panah—the victim's presence in Panah's bedroom is no longer inculpatory. Rather, the more accurate estimation of the victim's time of death, and the *absence* of any biological evidence linking Panah to the victim, demonstrates his innocence. With no traces of blood, fingerprints, or other evidence of any struggle inside Panah's room, Panah's defense at trial could have argued—absent the false and faulty testimony—that Seihoon killed Parker and planted her body in a suitcase in Panah's bedroom. A third-party'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.[8]

Short of complete guilt-phase exoneration, the false serology and pathology evidence could have at least impacted the verdicts as to the special circumstance crimes of sodomy, oral copulation and lewd acts upon a child

[8] An initial search of the entire apartment, including bedrooms and closets, was conducted by 4 officers. PRT 457-58, Pet. App. 13-395, 15-398. Another search was conducted by at least 7 officers—with negative results—and included a search of Panah's closet and suitcases. RT 264-65; 289-90. Another search of the apartment was conducted after Panah's car was searched. CT 488. Police dogs were also used to search the premises. Pet. App. 35-752-55 Parker's body was found after a search conducted between 9:30 and 10:00 p.m. the night of November 21, 1993. CT 430, 438-45.

which made Panah death-eligible. Moore's false serology link permitted an inference that injuries to the victim's anal area found by Dr. Heuser were caused by a penis and not another object and was thus a sodomy. Pet. App 29-487. Dr. Heuser then testified that anal penetration could have caused bradycardia (a slowing of the heart resulting in death) to prove that the murder occurred during the commission of sodomy. Pet. App. 29-659-60. Similarly, it was Moore's testimony about a mixture of semen and saliva that supported an oral copulation conviction. RT 2847. And finally, Moore's evidence of a mixture of semen and saliva was used by the prosecution to prove up the intent for a lewd-acts special circumstance by showing sexual gratification. RT 2844.

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. The prosecution's aggravating evidence consisted only of reintroducing the nature and circumstances of the crime. *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." RT 4088. But the post-conviction evidence concerning the *cause* of death, demonstrates that 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.

2. The new evidence is even more impactful because it comprised the prosecution's only scientific evidence in an otherwise circumstantial case.

Contrary to the Ninth Circuit's characterization of the evidence against Panah, the prosecution's case was circumstantial absent the prosecution's false and misleading serology and pathology 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, a complete sexual assault kit was administered on the victim and police pulled pubic hair and nail clippings from Panah. RT 1969, 2212, 472. Yet, Panah's DNA was not found anywhere on the victim's body and vice versa. Pet. App. 19-415. Moreover, even Moore testified that he did *not* find semen anywhere on the victim, despite the police obtaining anal and vaginal swabs. Pet. App. 29-538.

Moreover, as explained above, the circumstantial fact that the victim's body was found in Panah's bedroom closet in a suitcase because less inculpatory when considering (1) the evidence in the record that Seihoon had access to a suitcase and Panah's bedroom and was last seen with the victim, (2) DNA evidence demonstrates there is no biological evidence of contact between the victim and Panah, and (3) an independent pathologist could have

testified that the victim died at a time when Panah was not present at the scene and could not have committed the crime.

Indeed, Panah's statements to Rauni Campbell and to law enforcement while hospitalized never included an admission to having killed or assaulted the victim and were made while Panah was in the middle of an acute psychotic break and suffering from hallucinations and delusions. Pet. App. 29-705-06, 12-269. To the extent they were inculpatory, Panah's words were taken out of context, *i.e.*, statements he made about a "girl" were in reference to Rauni Campbell, not the victim. RT 2947.

Thus, given the circumstantial nature of the prosecution's case, applying the correct materiality test under *Napue* and *Strickland*, the post-conviction evidence demonstrating serologist Moore's and pathologist Heuser's false and misleading testimony could have impacted the jury's verdict. This Court should, accordingly, grant certiorari to ensure that the Ninth Circuit's materiality analysis is in conformity with this Court's precedent.

IV. QUESTION 4

"Certiorari is appropriate when 'a United States court of appeals … has so far departed from the accepted and usual course of judicial proceedings … as to call for an exercise of this Court's supervisory power.'" *Kalamazzo County Road Com'n v. Deleon*, 135 S. Ct. 783, 783 (2015) (Alito, J. dissenting

from the denial of certiorari) (quoting Supreme Court Rule 10(a)). Here, the Ninth Circuit's failure to resolve Panah's conflict allegations pursuant to its own rules and procedures warrants a writ of certiorari, vacating the opinion, and a remand to ensure Panah's rights are protected and that circuit courts consistently apply rules to its judicial proceedings.

A. Background

After Panah's Opening Brief was filed in the Ninth Circuit, Panah filed a *pro se* motion to substitute the Office of the Federal Public Defender ("FPD") with "non-conflicted counsel" based on a conflict arising from the contents of the Opening Brief. (9th Circuit Docket No. 19-2.) The Court—Appellate Commissioner Peter Shaw presiding—initially declined to consider Panah's *pro se* motion, but ultimately required counsel to respond to his allegations. Pet. App. 2-28. On February 23, 2015, Counsel responded, stating that the relationship between Panah and counsel "has irreparably broken down and that the substitution of counsel would be in the interests of justice." (9th Circuit Docket No. 34.) Panah then responded to Counsel's response with a detailed, twenty-seven page, brief outlining various issues he had with his counsel that was supported by over two-hundred pages of exhibits. (*See* 9th Cir. Docket No. 38.)

On April 6, 2015, the Ninth Circuit—again before Appellate Commissioner Shaw—denied Panah's motion to remove counsel, stating that

the "opening brief addressed many of the factual and legal issues about which the Petitioner has expressed concern" and that to justify removing counsel, "more must be shown that the client's apparent disagreement with which issues counsel raised in the opening brief." Pet. App. 3-29. The Court subsequently appointed Firdaus Dordi to serve as co-counsel with the FPD. (9th Cir. Dkt. No. 4-31.)

On May 28, 2015, Panah filed a motion to reconsider the Ninth Circuit's (Appellate Commissioner Shaw's) denial of his request to remove the FPD as counsel. (9th Cir. Dkt. No. 49.) Commissioner Shaw issued an order referring Panah's motion for reconsideration "to the merits panel for whatever consideration it deems appropriate." Pet. App. 5.1-32.1 On June 22, 2015, Panah filed a "letter brief motion" directed to the "Honorable Members of the Merits Panel" alerting the merits panel that Commissioner Shaw mishandled his *pro se* filings. (9th Cir. Dkt. No. 79.)

On August 21, 2019, the same day that the merits panel issued its opinion confirming the denial of Panah' s petition, the panel denied Panah's *pro se* motions for reconsideration. Pet. App. 6-33.

B. The Ninth Circuit failed to follow its own rules of adjudicating Panah's motion.

Federal Rule of Appellate Procedure 27 govern motions filed in federal circuit courts. The Ninth Circuit has its own local rules building on the

national appellate rules, including rules governing motions and the reconsideration of motions.

Ninth Circuit Rule 27-7 delegates to "the Clerk or designated deputy clerks, staff attorneys, appellate commissioners or circuit mediators authority to decide motions filed with the Court." Here, Panah's motion to replace counsel was delegated to, and decided by, Appellate Commissioner Shaw pursuant to this rule.

Ninth Circuit Rule 27-10 governs motion to reconsider orders issued by a delegated authority, including Appellate Commissioner Shaw. If—as was the case for Panah—the appellate commissioner issued the order for which a reconsideration motion is filed, "the motion [for reconsideration] is referred to a *motions* panel." 9th Cir. R. 27-7(b)(3) (emphasis added). The *merits* panel—the panel deciding the ultimate appeal—does not get involved a party seeks reconsideration of a motion panel's denial. 9th Cir. R. 27-10(b). And even then, the rules do not contemplate the merits panel deciding any issues; rather, the motions panel is merely tasked with "contact[ing] the merits panel before disposing of the motion [for reconsideration]." *Id.*

Here, Panah filed a motion to reconsider Commissioner Shaw's order denying Panah' s *pro se* motion to replace counsel. (9th Cir. Dkt. No. 49.) Circuit Rule 27-7 therefore required that Panah's motion be referred to a *motions* panel. Instead, however, Commissioner Shaw referred the motion to

Panah's *merits* Panel, the same panel addressing the substance of Panah's appeal and COA request. The difference matters. Motions panels comprise of judges who serve on a rotating basis, and the membership of the panel changes monthly. *See* 9th Cir. Court Structure and Procedures E.5 (discussing selection of panels). A single motions panel is appointed for the entire circuit. *See* 9th Cir. R. 27-1, Advisory Comm. Note (3)(b). In contrast, the merits panel are the three judges assigned to a particular case and tasked with resolving an appellant's ultimate appeal.

Commissioner Shaw's violation of Ninth Circuit Rule 27-7—by omitting the motions panel entirely from the process—put Panah's motion to remove counsel directly before the merits panel for decision, when the rules do not contemplate that panel ever deciding such a motion. The appropriate procedure required a motions panel—not Panah's merits panel—to review Commissioner Shaw's order and resolving any motion to reconsider. Moreover, Ninth Circuit Rule 27-11(a) requires that motions to appoint or withdraw counsel "shall stay the schedule for . . . briefing pending the Court's disposition of the motion." Such a stay did not happen in this case, and counsel continued briefing to the merits panel. The failure to follow the procedure set forth in the local rules raises a risk that the panel was (or had the appearance of being) improperly informed and influenced by the arguments and briefing supporting or opposing Panah's *pro se* motion. To

ensure uniformity in judicial proceedings, this Court should grant certiorari, vacate the merits-panel opinion, and remand with instructions for a motions panel to determine Panah's reconsideration motion in the first instance. This should include examining—after a hearing—the factors set forth in *Christeson v. Roper*, 574 U.S. 373 (2015) and *Martel v. Clair*, 565 U.S. 648 (2012) for when the interests of justice require appointing new counsel.

CONCLUSION

Accordingly, Panah respectfully requests that this Court grant certiorari, vacate the decision below, and remand to the lower court for a COA to decide the case on the merits based on Questions 1; grant certiorari, vacate the decision below, and remand to the lower court to decide penalty-phase prejudice based on Question 2; grant certiorari based on Questions 3; and grant certiorari, vacate the decision below, and remand to the lower court based on Question 4.

Respectfully submitted,

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DATED: March 13, 2020

By:_____
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No. _____

IN THE

Supreme Court of the United States

HOOMAN ASHKAN PANAH,

Petitioner,

v.

KEVIN CHAPPELL, WARDEN,

Respondent.

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

CERTIFICATE PURSUANT TO RULE 33

Pursuant to Rule 33.2(b), 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: 3/13/20

By: _____
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