No. 19-8009

In the Supreme Court of the United States

HOOMAN ASHKAN PANAH,

Petitioner,

v.

RON BROOMFIELD, ACTING WARDEN,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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CAPITAL CASE
QUESTIONS PRESENTED

1. Whether the federal courts below erred by denying a certificate of appealability on petitioner's claim that prejudicial third-party juror contact occurred when a juror spoke with the juror's husband and minister.

2. Whether the court of appeals adjudicated petitioner's false-evidence claim only as to the verdict of guilt and not also as to the verdict of death.

3. Whether the California Supreme Court unreasonably applied clearly established federal law by denying relief on petitioner's false-evidence and ineffective-assistance claims.

4. Whether the court of appeals' appellate commissioner violated circuit rules by referring a motion for reconsideration to the merits panel instead of the motions panel.

DIRECTLY RELATED PROCEEDINGS

United States Court of Appeals for the Ninth Circuit:

Panah v. Chappell, No. 13-99010, judgment entered August 21, 2019, petition for rehearing and rehearing en banc denied December 17, 2019 (this case below).

United States District Court for the Central District of California:

Panah v. Chappell, No. CV 05-7606-RGK, judgment entered November 14, 2013 (this case below).

California Supreme Court:

In re Hooman Ashkan Panah, No. S155942, petition denied March 16, 2011 (state collateral review).

In re Hooman Ashkan Panah, No. S123962, petition denied August 30, 2006 (state collateral review).

People v. Panah, No. S045504, affirmed March 14, 2005 (state direct appeal).

California Superior Court, Los Angeles County:

People v. Panah, No. BA080702, judgment entered March 6, 1995.

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STATEMENT

1. In 1993, eight-year-old Nicole Parker disappeared while playing near some apartments, one of which petitioner Hooman Ashkan Panah shared with his mother. Pet. App. 261-262. Police arrived at the apartment complex shortly thereafter and began searching for Parker. *Id.* at 262-263. Later that day, Panah told a co-worker, Rauni Campbell, that "I have done something very bad," and asked her to tell his mother and friends goodbye because he would not be seeing them again. *Id.* at 264. The next morning, Campbell was awakened by Panah knocking at her window; his wrists were slashed, and he asked her to buy sleeping pills for him. *Id.* Panah admitted to Campbell that he had something to do with Parker's disappearance and told Campbell that Parker was not alive. *Id*. at 265. Campbell called 911 to report that Panah was attempting suicide. *Id*. Panah fled when a police officer arrived, but was later apprehended. *Id*. at 265-266. The police obtained a warrant and searched Panah's bedroom late that night, about 36 hours after Parker had disappeared. *Id*. at 266. They found Parker's naked, lifeless body wrapped in a bed sheet and hidden inside a suitcase on the floor of Panah's closet. *Id*.

2. The State charged Panah with capital murder (and some other, related crimes) on the theory that he had killed Parker while engaged in the commission of a sex offense. Pet. App. 259-260. The specified sex offenses were sodomy, oral copulation, and lewd or lascivious acts on a child. *Id*.

To prove the oral copulation, the State relied on testimony from forensic serologist William Moore. Pet. App. 10, 373-374. He testified that there were stains containing a mixture of semen and large quantities of amylase indicative of saliva on the bed sheet and on some discarded tissue paper. *Id*. at 477-478, 482, 515-518. He also testified that there were stains containing blood and saliva on a silk robe or kimono. *Id*. at 479, 481. He testified that all the stains contained type A and B antigens, which could have come from a mixture of type A antigens from Parker and type B antigens from Panah. *Id*. at 476-482, 485-486, 489-491.[1] Moore also cautioned that "I cannot establish any certainty based on conventional serology. I can only demonstrate consistency." *Id*. at 525-526.

To prove the sodomy and lewd acts, the prosecution relied on testimony from Dr. Eva Heuser, a forensic pathologist. Dr. Heuser testified that Parker's vaginal opening was "outlined by a band of dark purple bruising" consistent with digital penetration. Pet. App. 642-645. Parker's anus and rectum also had a "bruised appearance." *Id*. at 646, 650. And there were "two tears of the

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[1] DQ Alpha typing (a type of DNA test) conducted before the trial and provided to the defense showed that Parker could not have contributed the saliva on the tissue paper. But this evidence was not introduced at trial. Pet. App. 6. Post-conviction analysis confirmed that Parker was excluded as a source of the saliva on the tissue paper (*id*. at 417, 463), and also confirmed that Panah was excluded as a source of the saliva on the robe stain about which Moore testified (*id*. at 464), but that Panah was not excluded as a source of a different stain on the robe (*id*.).

skin running from the anus frontwards." *Id*. at 648. The injuries were consistent with penile penetration of the rectum. *Id*. at 651-652.

Dr. Heuser also testified about several injuries to Parker's neck, which were indicative of manual strangulation. Pet. App. 601, 611-613, 663-664. An examination of Parker's lungs indicated she had inhaled her own vomit, which trapped air in her lungs. *Id*. at 662-663. Dr. Heuser also saw other bruises and abrasions to Parker's face. *Id*. at 595, 606-607, 609-610, 618. A bruise on her forehead was consistent with impact with a wall or the floor or being struck by a fist. *Id.* at 590-593, 601. Other bruises were caused by finger pressure. *Id*. at 607. Scratches on the inside of her thighs were consistent with having been made by Panah's ring. *Id*. at 600-601; *see id*. at 354. Dr. Heuser opined that Parker had died as a result of the cumulative effect of her injuries. *Id*. at 663. But the "genital trauma" and the injuries to her neck were the "most lethal." *Id*. at 664.

Although Dr. Heuser was unable to establish a precise time of death, she opined that Parker had still been alive at the time she suffered the injuries. Pet. App. 660, 666. Dr. Heuser also opined that the appearance of certain food in Parker's stomach was consistent with normal digestion for four hours or less. *Id*. at 666-668. Because stress slows digestion, however, there was "quite a range" of time within which Parker could have died. *Id*. at 667-668. Dr. Heuser testified that the discovery of Parker's body in full rigor mortis 36 hours after her disappearance was "a little surprising," but was "certainly within the

parameters given in the textbooks," especially because there was no evidence regarding the surrounding air temperature. *Id*. at 668-669.

The jury convicted Panah of first degree murder (among other crimes) and found that he had committed the murder while engaged in sodomy and lewd acts on a child, but not while engaged in oral copulation with a child. Pet. App. 260. The jury returned a verdict of death. *Id*. at 261.

3. Following Panah's trial, jurors R.A. and A.S. made sworn declarations stating that fellow juror E.C. talked about "God and the Bible." Pet. App. 749, 750. According to a defense investigator who spoke to her, juror E.C. had confided in her husband and in a minister that she was having difficulty returning a verdict as to penalty. *Id*. at 423-424. Her husband responded that "she had to do what was right and that she should consult the Bible to see what it has to say." *Id*. at 423. The minister responded similarly by giving her "some selected materials." *Id*. at 424. She eventually "found a biblical passage, which read: 'He who sheds innocent blood, his blood too shall be shed.'" *Id*. *see* Genesis 6:9. She told the investigator that this passage "helped 'get [her] peace with God' regarding her decision to vote for death." Pet. App. 424.

Panah filed two petitions for habeas relief in the California Supreme Court. *See* Pet. App. 12, 34, 258. In addition to raising a juror misconduct claim based on the juror declarations (D. Ct. Dkt. 45, Lodged Doc. Q at 381-391; D. Ct. Dkt. 199, Lodged Doc. Z at 891-900), Panah raised a claim that the prosecution had knowingly introduced false or misleading evidence from Moore

regarding the possibilities that (i) Parker had been a source of a stain on the bed sheet and a stain on the tissue paper and (ii) Panah had been a source of a stain on the silk robe (C.A. Dkt. 62-4 at 3-67). Panah also claimed that trial counsel had provided ineffective assistance by failing to retain an independent serologist and DNA expert, and by not investigating the cause or time of death. Lodged Doc. Q at 104-119, 170-187; Lodged Doc. Z at 149-175, 339-383. He further claimed that the State had violated the Vienna Convention on Consular Relations. Lodged Doc. Q at 27-46; Lodged Doc. Z at 1102-1127. The California Supreme Court summarily denied both petitions. Pet. App 34, 258.

4. Following the denial of his second state habeas petition, Panah filed a second amended petition for a writ of habeas corpus in the district court. D. Ct. Dkt. 102. The district court denied the petition in its entirety. Pet. App. 256.

The district court began by addressing Panah's claim alleging that the prosecution presented false serology evidence, and his related ineffective-assistance claim regarding his attorney's decision not to retain independent forensic experts. The district court concluded that the state court could have reasonably determined that: Moore's testimony regarding the bedsheet was not false (Pet. App. 45); Moore's testimony regarding a stain on the robe was immaterial because Panah could have been a contributor to a different stain on the robe (Pet. App. 47); and Moore's testimony regarding the tissue paper was immaterial because "compelling evidence of the same mixture of fluids, consistent with oral copulation, was presented through the stains on the bed

sheet" (Pet. App. 49). Next, the district court addressed Panah's claim alleging that the prosecution presented false evidence concerning the time and cause of Parker's death and his related ineffective-assistance claim. The district court concluded that the state court could have reasonably determined that Dr. Heuser's testimony was not false and that Panah was not prejudiced because his expert offered a cause of death that "would have been no more palatable to the jury" and would not have refuted the basis for Dr. Heuser's imprecise estimate of Parker's time of death. *Id*. at 71-79.

As to the juror misconduct claim concerning E.C., the district court noted that Panah presented no evidence that biblical references were discussed or brought into the jury room. Pet. App. 190. Thus, E.C.'s consultations did not "add appreciably to any extraneous influence." *Id*. The court also concluded that, as in *Crittendon v. Ayers,* 624 F.3d 943 (9th Cir. 2010), and *Fields v. Brown*, 503 F.3d 755 (9th Cir. 2007), the alleged introduction of extrinsic evidence into the jury room did not have a substantial and injurious effect on the jury's verdict. *Id*. at 188-190.

And, as to the supposed violation of the Vienna Convention on Consular Relations, the district court agreed with Panah's own concession that controlling precedents "'appear to suggest that Panah is not entitled to relief on this claim until Congress enacts legislation implementing the rights contained in the Vienna Convention.'" Pet. App. 240; *see Medellin v. Texas*,

552 U.S. 491, 498-499 (2008) (*Medellin I*); *Medellin v. Texas*, 554 U.S. 759, 759-760 (2009) (per curiam) (*Medellin II*).[2]

The district court granted a certificate of appealability on Panah's claim that the prosecutor knowingly presented, or failed to correct, false serology evidence from Moore. Pet. App. 14, 256. The court of appeals expanded the certificate to encompass Panah's related claim of ineffective assistance, but only as to the guilt phase. *Id*. at 14.

5. After Panah's appointed counsel filed his opening brief in the Ninth Circuit Court of Appeals, Panah filed a letter requesting the appointment of new counsel. *See* Pet. App. 28; *see also id*. at 29-30. The appellate commissioner appointed another attorney as co-counsel, but concluded that Panah did not have an irreconcilable conflict with the original attorney. *Id*. at 31; *see id*. at 29. Panah filed a motion to reconsider the appellate commissioner's order, which the commissioner referred to the merits panel. *Id*. at 32, 32.1. The merits panel denied reconsideration. *Id.* at 33.

The court of appeals affirmed the district court's denial of habeas relief in a published opinion. Pet. App. 1-27. Applying the deferential standard of review required by the Antiterrorism and Effective Death Penalty Act of 1996

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[2] The Embassy of Pakistan, Iranian Interests Section, submitted an amicus brief regarding this issue, but the brief does not acknowledge or address the controlling precedents upon which the district court had relied. *See* Amicus Br. 5-11.

(AEDPA), the court held that the California Supreme Court's summary adjudication was not based on an unreasonable application of the law or determination of the facts under 28 U.S.C. § 2254(d). *Id.* at 22-23, 26.

As to Panah's false evidence claim, the court held that it was not unreasonable for the state court to deny the claim on the ground that Moore's serology testimony was immaterial. Pet. App. 16. The court of appeals explained that even without Moore's testimony, the State presented a compelling case of Panah's guilt. The court focused on evidence of the discovery of Parker's dead body in Panah's closet, Panah's statements and conduct following Parker's disappearance, and Dr. Heuser's "impactful" testimony regarding Parker's extensive injuries, which it compared to the minimal value of Moore's "hypotheticals and wavering findings." *Id*. at 17-19. Based on the state of the evidence, the court concluded that, "at most, although we think unlikely, the State's case may have become marginally weaker" had Moore's testimony been corrected. *Id*. at 21-22.

As to Panah's ineffective-assistance claim, the court of appeals held that the state court reasonably concluded that Panah was not prejudiced by his counsel's failure to independently investigate the serology and pathology evidence. Pet. App. 24. The court of appeals noted that Panah could have refuted Moore's testimony about the tissue paper but could not refute his testimony about the bedsheet and robe. *Id*. at 25. The court further observed that the presence of Parker's dead body in Panah's closet—and not Moore's

testimony—connected Panah to the crime. *Id*. 25. Finally, the court concluded that "further challenging Dr. Heuser's testimony on the cause of death" would not have changed the outcome, because Panah's expert offered comparable testimony on the cause of death. *Id*. at 26-27.

ARGUMENT

1. Panah argues that the courts below erred by not issuing a certificate of appealability on his claim of juror misconduct. Pet. 16-22. He contends that he made a substantial showing that the California Supreme Court violated federal law when it summarily adjudicated his claim on the merits without an evidentiary hearing. But the state court's rejection of this claim was consistent with this Court's precedent—and certainly did not amount to an unreasonable application of clearly established federal law. 28 U.S.C. § 2254(d). What is more, Panah has never made a colorable showing of actual prejudice as required to obtain federal habeas relief. Under these circumstances, there was no basis for the courts below to grant a certificate of appealability.

a. A habeas petitioner does not have an automatic right to appeal. Rather, the petitioner must obtain a certificate of appealability by demonstrating "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 481 (2000). To do this, the petitioner must show that "jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further."

Slack, 529 U.S. at 484. Where AEDPA's deferential standard of review applies, as here, the question is "whether the District Court's application of AEDPA deference . . . was debatable among jurists of reason." *Miller-el v. Cockrell*, 537 U.S. 322, 341 (2003).

Extraneous influences on a jury are deemed presumptively prejudicial. *Remmer v. United States*, 347 U.S. 227 (1954) (*Remmer I*); *see Warger v. Shauers*, 574 U.S. 40, 51, (2014) (information derived from a source external to the jury is deemed extraneous). But "due process does not require a new trial every time a juror has been placed in a potentially compromising situation." *Smith v. Phillips*, 455 U.S. 209, 217 (1982). "The presumption is not conclusive," and the government may overcome it by establishing, "after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant." *Remmer I*, 347 U.S. at 229.

Here, Panah claims that juror E.C. committed misconduct by conducting "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." Pet. 16. Panah learned about this contact and retained a private investigator to look into it. Pet. App. 423. According to the declaration submitted by that investigator—the only declaration Panah has proffered on the issue—the minister merely "gave [E.C.] some selected materials" in response to her request for "biblical references or other spiritual writings regarding the legal system." *Id.* at 424. The declaration also states

that E.C. later "found" the passage from Genesis 6:9 at issue here. *Id*. The use of the word "found" indicates that, even if the passage had been included in the materials provided by the minister, the minister had not specifically directed her attention to it. The case is, accordingly, analogous to those involving a juror's own independent study of the Bible or other religious text. And "the bare showing that a juror read a religious text outside the jury room does not establish prejudice." *Crittenden v. Ayers*, 624 F.3d 943, 972-974 (9th Cir. 2010).

b. Those circumstances make this case materially different from others in which courts have held that a hearing was required. In *Barnes v. Joyner*, 751 F.3d 229 (4th Cir. 2014), for example, a juror allegedly asked her pastor about defense counsel's argument that any juror who voted for death would one day face judgment for their actions. *Id.* at 236. The pastor replied by quoting another biblical passage that contradicted defense counsel, which the juror then read to the other jurors when back in the deliberation room. *Id*. In holding that the state court had unreasonably applied *Remmer I* and its progeny by not conducting an evidentiary hearing, the Fourth Circuit emphasized that the juror "was actually directed to a specific biblical passage by her pastor in response to an argument about the death penalty . . . ." *Barnes*, 751 F.3d at 251. In other words, the pastor "did not simply provide [the juror] with a Bible." *Id*. Likewise, in *Hurst v. Joyner*, 757 F.3d 389 (4th Cir. 2014), a juror's father specifically "directed her to an (as yet) undetermined

'eye for an eye' verse . . . ." *Id.* at 398. There was no similar evidence of "direction" in the present case.

Panah also alleges an intra-circuit conflict (Pet. 22 n.5), but the decision below is not inconsistent with other Ninth Circuit decisions. In *Clark v. Chappell*, 936 F.3d 944 (9th Cir. 2019), for example, a minister allegedly counseled a juror "'that in these circumstances the death sentence would be appropriate because the Bible says, "an eye for an eye."'" *Id.* at 971. And in *Godoy v. Spearman*, 861 F.3d 956 (9th Cir. 2017), a juror was alleged to have shared information from an outside judge at times when "'the jury was not sure what was going on or what procedurally would happen next.'" *Id.* at 966 n.5. The Ninth Circuit noted that the quoted language in *Godoy* militated toward an evidentiary hearing, because it "could refer to substantive legal or factual questions as easily as procedural questions . . . ." *Id*. Here, in contrast, Panah has proffered only a declaration asserting that a minister gave a juror "some selected materials" in response to her request for "biblical references or other spiritual writings regarding the legal system," and that the juror herself "found" the passage in Genesis 6:9 at issue. Pet. App. 424.

c. In any event, Panah has never made the substantial showing of actual prejudice required to obtain federal habeas relief. *See Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993). In particular, Panah has never established that the alleged contact had a substantial and injurious effect or influence in

determining the jury's verdict. *See Crittenden,* 624 F.3d at 973-974; *Fields*, 503 F.3d at 781-783. Pet. App. 188-190.

Indeed, the record reflects that E.C. did not discuss or share the contents of the extrinsic information she had found, and the information had simply put her at peace with her verdict. Pet. App. 424, 749, 750, *cf. Remmer v. United States* (*Remmer II*), 350 U.S. 377, 381 (1956).[3] As previously mentioned, "the bare showing that a juror read a religious text outside the jury room does not establish prejudice." *Crittenden*, 624 F.3d at 973. And, as the district court noted, the biblical passage in the present case was relatively "innocuous," because it did not appear "to call specifically for 'man' to exact justice . . . ." Pet. App. 190. Rather, it "seems only to forecast that the outcome 'shall' happen." *Id*. Finally, the aggravating evidence in this case was overwhelming. The nature of the crimes of which Panah was convicted were particularly egregious. Panah sexually brutalized eight-year-old Parker in a prolonged attack that caused catastrophic injuries and her ultimate death. *Id*. at 7-8. Panah thus failed to carry his burden under *Brecht*, and the court of appeals did not err by denying a certificate of appealability.

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[3] In *Remmer II*, which followed the hearing this Court ordered in *Remmer I*, this Court held that a third party's offer of money to a juror in exchange for his vote, FBI investigation into the contact, and the juror's candid admission that he was "under a terrific pressure" showed that the juror's contact with a third party so affected the juror that he was unable exercise "his freedom of action as a juror." *Remmer II*, 350 U.S. at 381.

2. Panah next asks this Court to vacate the court of appeals' judgment and remand for that court to consider his claims that (i) the prosecution knowingly introduced false serology evidence in violation of *Napue v. Illinois*, 360 U.S. 264 (1959) and (ii) defense counsel provided ineffective assistance under *Strickland v. Washington*, 466 U.S. 668 (1984) by not investigating that evidence despite having reason to know it was false. Pet. 23-25. He faults the court of appeals for "fail[ing] to address the import of those constitutional violations on his capital sentence." *Id.* at 25. But a closer review of the procedural history and the decision below shows that the court of appeals effectively concluded that the serology evidence did not influence the jury's verdict of death. That conclusion is correct and does not warrant reconsideration by the court of appeals or plenary review by this Court.

Panah argued in the district court that his *Napue* claim warranted relief from his sentence because the jury, "at the very least, would not have sentenced him to death" but for the supposedly false evidence that he had "sexually assaulted" Parker. D. Ct. Dkt. 144 at 113, 115, 120. He similarly argued that his *Strickland* claim warranted relief because his jury would have found him not guilty, and his trial "would have at least resulted in Panah not being eligible for or receiving the death penalty" had counsel retained a DNA expert and forensic pathologist. *Id*. at 71, 75. The district court denied relief on both claims, explaining that the state court "may have reasonably held that any assertions called into question by the DNA testing had no reasonable

likelihood of impacting Petitioner's outcomes at trial." Pet. App. 48. For example, "any false evidence presented regarding the stain on the kimono did not have any reasonable likelihood of affecting the jury's guilt *or penalty* determinations." *Id.* at 47 (emphasis added). The district court issued a certificate of appealability on the *Napue* claim, but not on the *Strickland* claim. The court of appeals subsequently expanded the certificate to include the guilt-phase *Strickland* claim. *Id.* at 14.

On appeal, Panah reiterated his claim that the serology evidence from Moore had affected the verdict of death, because it "provided a graphic, horrific narrative of the crime to exploit the jury's emotions during the penalty phase." Pet. C.A. Br. 58, 61-62. He specifically argued that "[w]ithout Moore's testimony, the prosecutor could not have argued that the victim orally copulated Panah, or that she spit out ejaculate first onto a tissue-paper and then onto a bed sheet," or that the sodomy "involved Panah's saliva dripping onto a bloody kimono." *Id*. at 61.

The court of appeals rejected those arguments, explaining that testimony from Dr. Heuser made it unlikely that the serology evidence from Moore affected the jury's verdict. Specifically, "while Panah contends that Moore's testimony was prejudicial because of its at-times graphic descriptions, particularly of oral copulation, Dr. Heuser's testimony offered an even more graphic and detailed description of the entire sexual assault and murder." Pet. App. 18. The court also observed that, even to the extent Moore's testimony

was material on the issue of oral copulation, "a different outcome on the felony of oral copulation would not affect Panah's guilty verdict *and death sentence*." *Id*. at 25 (emphasis added).[4]

It is thus inaccurate for Panah to assert that the decision below "entirely failed to address the impact" of the serology evidence on the verdict of death. Pet. 23. Read in context, the court of appeals expressed its determination that the serology evidence from Moore was not prejudicial in light of the testimony from Dr. Heuser. Pet. App. 18; *see id*. at 25. That determination was correct and does not warrant further consideration or review. Unlike in *Cone v. Bell*, 556 U.S. 449, 470 (2009), where the petitioner's substance abuse was relevant to statutory punishment criteria regarding whether his appreciation of the wrongfulness of his act was impaired, the precise manner in which Panah committed one of many sex acts against an eight-year old girl was not at issue at the penalty phase. Indeed, while Panah was charged with the special circumstance that he killed Parker during the commission of the offense of oral copulation—one of the criteria for a defendant to become death-penalty eligible—the jury found this special circumstance to be *not true*. Pet. App. 260. "A reasonable interpretation of the jury's rejection of this special circumstance is that the jury was not entirely persuaded by Moore's mixture theory." *Id.* at

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[4] Panah petitioned for rehearing, arguing among other things that the opinion had omitted "*any* discussion of the impact of the constitutional errors on the penalty phase." C.A. Dkt. 128 at 4. The court denied rehearing without elaboration. Pet. App. 257.

19. Thus, "it is reasonable to conclude that [Moore's] testimony had essentially no effect on the jury's decision making." *Id*. at 22.

3. Panah also contends that the court of appeals applied the wrong standards for determining materiality under *Napue* and prejudice under *Strickland*. Pet. 25-34. He suggests that the court improperly limited its inquiry to whether there would have been sufficient evidence to support the jury's verdicts absent the false evidence and deficient performance. *Cf. Kyles*, 514 U.S. at 434-435 (discussing materiality in the context of withheld evidence). That is not correct.

a. The court of appeals began its analysis with the established standard of materiality under *Napue*:

> Materiality under *Napue* requires a "lesser showing of harm . . . than under ordinary harmless error review." But, after weighing the effect of alleged *Napue* violations collectively, there still needs to be a "reasonable likelihood that the false testimony could have affected the judgment of the jury." Thus, a *Napue* claim fails if, absent the false testimony or evidence the petitioner still "received a fair trial, understood as a trial resulting in a verdict worthy of confidence."

Pet. App. 16 (citations omitted). Later, the court recognized the established standard of prejudice under *Strickland*:

> To prevail, Panah must show . . . "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." "The likelihood of a different result," however, "must be substantial, not just conceivable."

Id. at 22 (citations omitted). The court concluded that Panah was not entitled to relief under either standard because "the State had a uniquely strong case"

and it was "inconceivable, even had defense counsel independently investigated the serology and pathology evidence, that the jury would have reached a different verdict." *Id*.

As to the *Napue* standard, the court engaged in a comprehensive analysis of the effect of Moore's testimony on Panah's trial. *See* Pet. App. 16-22. It evaluated the strength of the prosecution's case showing Panah's guilt, which included the fact that Parker's body was found in Panah's bedroom closet, and Panah's statements and conduct following Parker's disappearance. *Id.* at 17. It considered Dr. Heuser's "impactful testimony" about the extensive injuries suffered by Parker, which reflected a violent sexual assault. *Id.* at 17-18. It then assessed the relative impact that Moore's testimony had on the prosecution's case. *Id.* at 18-19. Moore testified that there were stains on the tissue paper, bedsheet, and robe containing AB blood type that could have been contributed by a person with A blood type, like Parker, and a person with B blood type, like Panah. *Id*. at 18. Even so, Moore candidly admitted that his serology evidence could not "establish any certainty," but "can only demonstrate consistency." *Id*. Further, the prosecution acknowledged the limitations of Moore's testimony during closing argument:

> Now the question is, did a person with AB blood leave . . . body fluids such as blood, semen[,] and saliva, on the sheets, on the toilet paper, on the robe. That is one interpretation. The other interpretation, of course, is that you have two separate people, one of whom has type A, and one has type B.

Id. at 19.

Moreover, the court of appeals observed that Moore's testimony regarding the possibility of a mixture of body fluids on the tissue and bedsheet involved (at most) the charge that Panah committed the offense of oral copulation. Pet. App. 19. And the jury's split verdict finding that Panah committed oral copulation but that Parker's murder was not committed during oral copulation reflected that the jury "was not entirely persuaded by Moore's mixture theory" to begin with and was more persuaded by Dr. Heuser's testimony, which resulted in the jury finding Panah guilty of sodomy and lewd acts. Pet. App. 19.

The court also noted that Moore's testimony was not critical to the prosecution's case, and that its exclusion would have made the prosecution case only "marginal weaker." Pet. App. 21-22. Given the overwhelming evidence of Panah's guilt and the jury's rejection of the oral copulation special circumstance, Moore's testimony likely had little effect on the jury's decision making. *Id*. at 22. The court's analysis illustrates that it weighed Moore's testimony along with the other evidence of Panah's guilt, consistent with *Napue*.

As to the prejudice standard under *Strickland*, the court of appeals concluded that the state court could have reasonably determined that there was "no 'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" Pet. App. 24. The court of appeals explained that even if counsel had investigated the serology

and pathology evidence, it was not plausible that it would have led to a different outcome. Such an investigation would have at most exposed some weaknesses in Moore's and Dr. Heuser's testimony, which defense counsel already brought out at Panah's trial. *Id*. at 25-26. It would not have produced any exculpatory evidence nor any evidence that refuted the State's strong case against Panah. *Id*. at 24-25; *see id*. at 26-27 (noting that this Court's reasoning in *Richter*, 562 U.S. at 102, "is almost entirely applicable" to Panah's ineffective-assistance claim because the post-conviction evidence did not exonerate Panah and defense counsel already raised concerns about the State's experts before the jury).

To be sure, the court acknowledged that Panah's post-conviction evidence could have established that Parker was not a contributor to the tissue paper and could have been used to challenge Dr. Heuser's testimony on the time and cause of Parker's death. Pet. App. 25-26. But the court also noted that Panah's post-conviction evidence would not have refuted Moore's testimony regarding the bedsheet and robe; would not have rebutted Dr. Heuser's testimony regarding Parker's horrific and extensive injuries; and would have *confirmed* that Parker was killed during the sexual assault. *Id.*

b. Panah argues that, in addition to the DNA results on the tissue paper excluding Parker, the DNA evidence "conclusively shows no evidence of a mixture on the bedsheet, with two of those five stains *conclusively* excluding the victim as contributor." Pet. 29. That is not entirely accurate. According

to Panah's post-conviction evidence, Parker was eliminated as a contributor to two of five stains on the bedsheet, and Panah was included as a possible contributor to the same two stains. Pet. App. 464. But the post-conviction DNA evidence showed nothing regarding the other three bedsheet stains and thus did not impugn Moore's serology testimony about the bedsheet, which did not discuss the serology results on a stain-by-stain basis.

With respect to the significance of challenging Parker's time of death, Panah argues (Pet. 30) that forensic pathologist Dr. Gregory Reiber, one of the post-conviction experts, would have placed Parker's time of death "a significant number of hours later" than noon to 1:00 p.m. (as Dr. Heuser opined, *see* Pet. App. 470), and at a time when Panah was not at the apartment. Under this theory, Parker would have been killed and her body placed in Panah's closet while the police were stationed outside of Panah's apartment—and in between the series of searches of Panah's apartment.[5] Further, to accept this theory, the jury would have also had to ignore Panah's inculpatory statements to his co-worker, Rauni Campbell, in which he admitted doing something bad involving Parker and stating that Parker was dead, all while police and others searched for Parker. Pet. App. 5. Panah also would have had to ask the jury

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[5] Contrary to Panah's assertion, the police did not search all the suitcases in Panah's closet during earlier searches. The police had not previously searched the suitcase where Nicole's body was found. As the police explained, earlier searches were focused on finding a missing child, not a dead child, and they believed that the suitcase where Nicole's body was found was too small to contain a body. D. Ct. Dkt. 45, Lodged Doc. B at 1672, 1923-1924.

to draw no adverse inference from his failure to produce evidence of the alleged third-party killer's blood type and DQ Alpha markers to compare to the serology and DNA results on the tissue, bedsheet, and robe, despite its availability. *See id.* at 6.

Panah asserts that his post-conviction evidence demonstrates that Parker did not die as a result of a sexual assault. Pet. 32-33. As the court of appeals noted, however, Panah's post-conviction expert did not dispute that Parker died during the sexual assault and did not offer a "cause of death [that] 'would have been no more palatable to the jury.'" Pet. App. 26. Indeed, Dr. Reiber acknowledged that Parker died during the sexual assault, opining that "the specific cause of death is less clear (than the manner of death: homicide), but in the setting of a sexual assault, some type of asphyxia death is likely." Pet. App. 471. He further explained that "other types of asphyxia death, such as suffocation and/or 'Burking'—pressure of a large person's body on a smaller person's chest causing restrictions in breathing—remain possible, and the facial bruising and areas of contusion on the torso support either or both in combination." *Id*. Under these circumstances, the court of appeals correctly concluded that further challenging the cause of Parker's death would not have been fruitful. *Id*. at 26.

Panah also suggests that the courts below erred by assessing the cumulative effect of the false evidence and deficient performance under the prejudice standard in *Strickland* rather than the materiality standard in

Napue. Pet. 27-34. He argues that applying the *Strickland* standard in this context is contrary to *Kyles v. Whitley*, 514 U.S. 419 (1995). But this Court did not address the cumulative effect of false evidence and deficient performance in *Kyles*. Rather, the Court addressed only a prosecutor's duty to disclose evidence favorable to the defense under *Brady v. Maryland*, 373 U.S. 83 (1963). *See Kyles*, 541 U.S. at 421, 436. This Court ordered a new trial "[b]ecause the net effect of the evidence withheld by the State in this case raises a *reasonable probability that its disclosure would have produced a different result*." *Id*. at 421-422 (emphasis added); *see id*. at 441. Because that standard is identical to the one applied below and in *Strickland*, there is no conflict with *Kyles*.

4. Finally, Panah contends that the Ninth Circuit's appellate commissioner violated circuit rules by referring Panah's request for reconsideration of the order denying substitute counsel to the merits panel rather than to the motions panel under Ninth Circuit Rule 27-10. There was no such violation. Circuit Rule 27-7 provides that the court may delegate authority to an appellate commissioner to decide motions, among other things. Circuit Rule 27-10 further provides that a motion to reconsider an order issued by an appellate commissioner under Rule 27-7 should be "referred to a motions panel." But an appellate commissioner also has discretion to refer any motion to the merits panel in the first instance, regardless of the relief requested. *See* Ninth Circuit General Order 6.3.e. If a case has been internally assigned to a merits panel, circuit procedure requires that the motions panel contact the

merits panel, because the merits panel possesses "responsibility for all further proceedings in the case." Ninth Circuit General Order 3.3.e. That procedure is not unusual. *See, e.g.,* Third Circuit, I.O.P. 10; Fourth Circuit, Local Rule 27(e); Fifth Circuit, Rule 27, I.O.P; *United States v. Kelly*, 749 F.2d 1541, 1552 (11th Cir. 1985) (considering a motion to substitute appellate counsel in opinion addressing the merits of defendant's appeal).

CONCLUSION

The petition for a writ of certiorari should be denied.

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