No. 20-1709

ORIGINAL

In the Supreme Court of the United States

DAVID MING PON, PETITIONER,

v.

UNITED STATES, RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR REHEARING

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INTRODUCTION

Rehearing is requested for substantial grounds not previously presented which include: holding on docket, possible GVR, awaiting *Brown v. Davenport* 596 U.S.(2022) final opinion on "harmless" error, for "it is not the appellate court's function to determine guilt or innocence. Nor is it to speculate . . ." *Kotteakos v. United States*, 328 U.S. 750,763 (1946), all-non-Asian jury with anti-Asian discrimination (title VI of the Civil Rights Act 1964), defense attorney/ appellate judge/ expert witness conflicts of interest (biases), prosecutorial witness tampering, ever-growing scientific advances and medical practice trends vindicating Pon.

Jury was all-non-Asian. In *Vasquez v. Hillery*, 474 U.S. 254 (1986), racial discrimination in jury selection can be structural error and not harmless. It follows an all-non-Asian jury would not be harmless. The jury was comprised of no Asians (nor physician peers) on the voir dire jury pool nor on the final jury and alternates nor likely on the grand jury, despite Asians constituting 7.2 % of the U.S. population. This all-non-Asian jury does not fairly represent an "impartial jury" of true peers and not equal protection of law (Sixth, Fourteenth Amendments).

Being Chinese-American, Pon is subjected to anti-Asian racial discrimination that has existed through U.S. history, highlighted by pending anti-discrimination case (20-1199): *SFFA v. Harvard.* America fought three horrific mass casualty wars against Far-Eastern countries. History recalls railroad coolies, Chinese Exclusion Act 1882-1943, Japanese-American internment camps-WWII (1,862

deaths), thousands of anti-Asian incidents (e.g., Vincent Chin's killing), and an increasingly adversarial nuclear-armed China.

This biased jury only heard silence from the vindicating laser expert testimony and from barred surrebuttal (exonerating textbook explanation) against false unrelated fraud allegations which compelled "essentially a confession," App. 77a. violating Fifth and Sixth Amendments. Government cannot trample the U.S. Constitution.

More bias from conflicts of interest were recently discovered. Lead defense attorney (implying ineffective assistance of counsel) Richard Kiefer's son works as "Senior Director and Senior Principal Scientist" for Genentech, manufacturer of two main anti-VEGF injectables (Avastin, Lucentis). Appellate Judge Ed Carnes (majority) holds stock interest in drug companies for Eylea and Lucentis. All these drugs compete directly with the laser Pon was developing for wet (neovascular) age-related macular degeneration (wAMD or nvAMD) and other diseases.

DEBUNKED "OVERWHELMING" EVIDENCE: INTERVENING SCIENCE VINDICATES PON

Against the above prejudicial background factors, the whole body of peer-reviewed PubMed publications ("LLLT" [low level laser therapy] aka "PBM" [photobiomodulation] therapy, >7,500 and >7,700 publications respectively) was not previously presented. The sheer volume could not fit. This ever-expanding scholarship scientifically disproves the very basis underlying the "overwhelming" evidence. Even the small recent sample in appendices App. 188a-205a. of this huge volume of

publications is vindicating. "Essentially" compelled "confession" by denial of surrebuttal was constitutional error. This demonstrates real harm from unbalanced "harmless" error analysis when unfairly only weighing error's effect on prosecution's evidence, even when untrue, while ignoring the effect on the defense evidence, otherwise sufficient for acquittal.

"[H]armless error rules can work very unfair and mischievous results . . ." *Chapman v. California*, 386 U.S. 18,22 (1967). *Brown v. Davenport's* slip opinion that both *Brecht* and Anti-Terrorism and Effective Death Penalty Act/*Chapman* apply before granting court relief. For in *Pon* (now scientifically vindicated), it satisfies both the spirit of *Brecht* and *Chapman*/AEDPA. For withholding relief based on any holding that "very damning" but false evidence was "harmless" error under *Chapman* or that it not have "substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson,* 507 U.S. 619 (1993), is an "unreasonable application of" law when some circuits use "overwhelming" evidence to justify "harmless" error when other circuits use the spirit of *Brecht* by not ignoring also its effect on defense evidence for the total influence on *that* jury's determination. Whether for direct appeal or habeas, *Pon* would still have satisfied *Brecht* and AEDPA under *Chapman* "a reasonable possibility that the evidence complained of might have contributed to the conviction." *Chapman,* supra at 23, with "unreasonable application of" law (constitutional rights denied) or "unreasonable determination of the facts" (defense evidence ignored) 28 U.S.C. §2254(d); for this Court can apply "harmless error" interpretation equally

nationwide to resolve "circuit conflict" in *Pon v. U.S.* as in *Brown v. Davenport.*

The overwhelming amount of absolving medical research published after trial and intervening, vindicates Pon and substantiates non-criminal intent. His diagnoses and methodologies have been validated scientifically. Importantly, virtually every patient improved with no serious side effects nor harm. Pon diligently performed every billed laser (many pro bono, earlier for better outcomes) to help patients whose testimonies all verified receiving laser and visual improvement almost immediately after "every" laser.

Intervening current medical practice trends were not previously presented. Doctors are being taught (2021) by at least 5 retinal physicians via exonerating global webinars (and publications) on how to use subthreshold (i.e., non-scarring) micropulse laser to treat eye diseases including wAMD. Dr. Brian Horsman praised laser expert Giorgio Dorin in his August 2021 webinar [1] (post-filing certiorari petition). LLLT is being used for both wet and dry AMD [2] and multiple patents have been granted. Subthreshold micropulse laser (LLLT/PBM) is becoming more mainstream years after Pon's pioneering efforts.

OCT-A (optical-coherence-tomography-angiography] (FDA cleared 2016) new technology is

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[1] Calzada J, Horsman B, Yiu G. "The Management of AMD, CSR, and DME with MicroPulse Laser Therapy." https://www.youtube.com/watch?v=kdwidKmB2GM 8/18/2021. Accessed 11/21/2021.

[2] Horsman, B. Laser therapy for retinal pathologies. *Ophthalmology Management,* 2018;22:34-35,54-55.

identifying a "new category" of "subclinical" unsuspected neovascular(nv) AMD (histopathologically confirmed), previously undetectable by conventional means except by ICG-A (indocyanine green-angiography) before trial (2015). Only Pon (no government doctors) used ICG-A enabling identifying otherwise undetectable nvAMD early, when vision is relatively good, reducing visual loss as early treatment is critical for better outcomes.[3] "The average patient may have nvAMD for 6 to 12 months before diagnosis and treatment initiation."[3] Importantly, LLLT/PBM improves visual acuity, metamorphopsia, scotomata in wet and dry AMD without side effects,[4] and reduces inflammation, neovascularization, and "edema and bleeding of wet AMD patients were alleviated."[5]

LLLT/PBM has extended to earlier stages of the AMD spectrum to "dry" AMD (all wAMD arises from dry AMD) making alleged misdiagnosis of wAMD instead of dry AMD irrelevant as LLLT/PBM can treat both. Clinical studies have demonstrated safety and efficacy, visual improvements, "no

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[3] Ho AC, Albini TA, Brown DM et al. The Potential Importance of Detection of Neovascular Age-Related Macular Degeneration When Visual Acuity Is Relatively Good. *JAMA Ophthalmol.* 2017;135(3):268-273.

[4] Koev K, Avramov L, Borissova E. Five-year follow-up of low-level laser therapy (LLLT) in patients with age-related macular degeneration (AMD). *J. Phys.:Conf.Ser.*2018;992(1):012061.

[5] Wu Y, Chen P, Tong J. Development of Photobiological Regulation and its Application in Retinal Diseases. *Proceedings of Anticancer Research* 2021;5(2).

adverse events,"[4] improved anatomical and clinical outcomes; repeated treatments may be necessary.[6]

"Several studies in the past 5 years have shown encouraging results using PBM . . .[which] does not worsen the disease, has no side effects and is completely non-invasive." [7] Safe, cost-effective LLLT/PBM effectively improves visual function and retinal pathology,[4] and "stimulat[es] retinal stem cells to regenerate."[7]

"[S]everal mitochondrial-targeted therapies have been approved in a limited number of countries, including photobiomodulation [PBM] for AMD . . ."[8] "[C]linical experiments have verified the efficacy of PBM for AMD . . ."[4]

Use of subthreshold micropulse laser is becoming mainstream for several eye conditions. Horsman explains by webinar[1] his wAMD treatment (like Pon's) routinely includes 810nm non-scarring subthreshold micropulse laser (LLLT/PBM), usually repeated "quarterly," demonstrating "dramatic decrease in progression" and "dramatic drop" in the number of injections required. After 1-2 doses, "many cases cease injections with laser alone," but

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[6] Markowitz SN, Devenyi RG, Munk MR et al. A Double-Masked, Randomized, Sham-Controlled, Single-Center Study with Photobiomodulation for the Treatment of Dry Age-Related Macular Degeneration. Retina 2020;40(8):1471-1482.

[7] Pinelli R, Bertelli M, Scaffidi E. Harnessing the power of light in dry age-related macular degeneration *Ophthalmology Times Europe Journal* October 2020;16 (80):24-25.

[8] Ji MH, Kreymerman A, Belle K et al. The Present and Future of Mitochondrial-Based Therapeutics for Eye Disease. *Transl Vis Sci Technol.* 2021;10(8):4.

as with any given treatment, each doctor may have methodologic variations in exercising discretionary medical judgment.

For wAMD, Horsman (2018) published using the same fundamental LLLT principles (as Pon) with methodologies of FA, ICG-A, and contact lens. He also performs periodic post-laser FA, ICG-A and OCT initially and at follow-ups and repeats micropulse laser periodically between every 2 to 6 months "to prevent CNVM recurrence." In 70%, anti-VEGF injections beyond 1-2 are not required.[2] Horsman published post-LLLT, the macula becomes "dry," and vision loss is prevented.[2]

The government alleged this was impossible. It was not only possible but was already reality, as Pon was essentially performing this before trial and Horsman's and other publications. Defense patients all uniformly testified to good post-laser results: e.g., "Every time . . . my vision improved . . . without exception." App. 101a.

Horsman writes: "The FA and ICG-angiograms and OCT imaging are essential for this to work . . . Angiograms are vital for the success of this treatment to assess essential information about activity . . . I use MicroPulse laser therapy to treat both wet and dry AMD . . ."[2]

What Horsman does today is strikingly similar and fundamentally the same as Pon's methods years ago for wAMD, falsely alleged "fake," but Medicare has been continuing to reimburse Horsman and many others for subthreshold non-scarring lasers. In Horsman's retrospective review of 200 wAMD patients, those receiving injections only had worse vision than those that also received micropulse laser quarterly. These highly effective

subthreshold pulsed laser nonscarring methods with individualized adaptations including wAMD (for which Pon was imprisoned) are *currently* used in clinical practice.

New peer-reviewed scientific publications, public presentations/webinars, and current practice trends are vitally important. As exonerating scientific DNA evidence would not be ignored, new relevant scientific evidence and Dorin's barred testimony of LLLT non-scarring effectiveness vindicating Pon's methodologies should not be ignored. All these factors debunk the flawed "overwhelming" evidence analysis used to justify the biased majority's judgement of "harmless" error ignoring contrary defense evidence so sufficient that "a rational jury could acquit." J. Martin, App.76a. Rehearing and Certiorari should be granted.

CONSTITUTIONAL RIGHTS DENIED

Dorin's independent expert testimony would confirm absolving scientific evidence (instead of the defendant being his own expert), corroborate Pon, and address directly genuine intent. Pon was correct all along.

Dorin's exclusion was erroneous, a mortal blow to Pon's defense. Pon's sole expert testimony was denied, but government's expert testimony was permitted. It violates the Sixth Amendment guarantee for defense "witnesses in his favor," which would permit complete surrebuttal and defense expert testimony. The result: prosecution evidence was "overwhelming," when untrue; constitutional errors were "harmless," when harmful.

EVIDENCE /PROCESS FLAWED

Prosecution alleged laser must scar and nvAMD patients must get worse without treatment. Both are untrue. Early LLLT/PBM achieves better outcomes without any scarring. Independent research, experience, and defense patients' corroborating testimony (App.80a-124a) proves the prosecution wrong. Well-documented nvAMD verified histopathologically post-mortem, can stabilize with good vision (9 years) without treatment.[9]

Clinically diagnosed dry AMD can be "subclinical" nvAMD proven by post-mortem histopathology.[10] AMD is one disease with two main phenotypes of dry and nvAMD that "share a common threshold stage" histopathologically. Only Pon could diagnose "subclinical" unsuspected nvAMD pretrial using "more sophisticated clinical tests" [11] no government doctors used.

Due process is violated when the prosecution cannot know if vision had improved or had become worse if no doctor reviews medical records charts (for

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[9] Chen L, Messinger JD, Sloan KR, et al. Nonexudative Macular Neovascularization Supporting Outer Retina in AMD: A Clinicopathologic Correlation. *Ophthalmology.* 2020;127(7):931-947.

[10] Heiferman J, Fawzi AA. Progression of subclinical choroidal neovascularization in age-related macular degeneration. *PLoS ONE* 2019:14(6):e0217805.

[11] Sarks S, et al. Relationship of Basal Laminar Deposit and Membranous Debris to the Clinical Presentation of Early AMD. *IOVS* 2007;48(3);968-977.

vision before and after treatment), nor examines nor takes any history. Nor could the government know what critical subtle clinical clues Pon saw when it was not present during his exam. Images do not show everything. It ignores published peer-reviewed LLLT/PBM's non-scarring effectiveness and regenerative properties restoring the retina to pre-wAMD "dry" stage. Pon's LLLT/PBM experience is like Horsman's with most cases stabilizing, even reversing by regeneration. The desired outcome was achieved: virtually all Pon's patients improved/stabilized without scarring.

Pon demonstrated good faith, genuinely believing in the laser's effectiveness, by again purchasing two costly ICG-A units not once, but twice, for very expensive upgraded technology despite fully functional ICG-A units. For perspective, Pon's revenue (Medicare website 2012) was *less* than at least 4 retina doctors (including Berger and Mavrofrides) and likely many more. Pon was not excessive.

Pon genuinely believed he was helping patients and had no criminal intent. With 93.8% success, Pon's patients came primarily via word of mouth from other effectively treated gratified patients who traveled repeatedly over years, thousands of miles, from 39 states and 6 foreign countries to get treatments. The prosecution absurdly implied all hundreds of these patients (many college-educated) had "no common sense." Not true. Patients improved and returned as a result. Diagnoses were proper and earlier LLLT/PBM treatments (more effective, safer, cheaper, less burdensome than alternative injections)

were medically necessary to prevent vision loss and to improve outcomes.

Each government doctor only examined one or two of those 11 patients *after* successful treatments providing rejuvenation/regeneration optimally at specific "low" laser settings used (patent EP1906874A2/WO2007014323A2). They utilized no advanced diagnostics for early diagnosis nor performed history nor examination on 98% of patients and completely ignored improved vision.

Friberg was not so "expert" as no ICG-A nor laser was billed by him nor even other doctors (recent Medicare records). Neither Friberg nor any testifying/treating doctor was given past medical records charts (with vision measurements) by the investigator as required before any determination of "medical necessity." Friberg, paid consultant for Genentech, manufacturer of directly competing drugs to laser, was unfairly biased. Research shows even negligible financial amounts can cause strong biases, and for fairness, Friberg, Kiefer and Carnes should have recused themselves.

Harvard professor Alan Dershowitz criticized all doctors who without examination were diagnosing Donald Trump: "Do not make diagnoses without seeing the patient."[12] Yet prosecution did exactly this with paid "expert" Friberg who diagnosed without examination, history, medical records charts of even one patient violating due process.

Government ophthalmologist Dr. Gills admitted: "you can't quite be sure . . .whether they've had previous treatment" nor have "clear-cut" active

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[12] Partland, Dan, "Unfit: The Psychology of Donald Trump." Documentary film, Dark Star Pictures, 2020;8:43.

wAMD, "you can't rule out that he has [wAMD] in the past." Dkt. 226 at 132,136,137.

TAINTED OUTCOME

Relevant behavior cannot meet even preponderance of evidence proof for "diagnosis" is defined as identifying a disease "from its signs and symptoms" (NIH, Merriam-Webster) which are obtained by examination and history, respectively, as neither were performed in 98%. Due process (Fifth Amendment) is violated when rationalizing an unprecedented 280-fold increase in restitution, then doubled for forfeiture to a mind-boggling 560-fold total increase with 7-fold increased incarceration (violating Eight Amendment against "excessive fines" and "cruel and unusual punishment," being "grossly disproportional" by "orders of magnitude" exponentially beyond the 23.8-fold deemed excessive in *U.S. v. Bajakajian*, 524 U.S. 321 (1998). Eleven indictment patients totaled ~$25,000 in alleged illegitimate billings (not $7 million) despite uniform testimony from all defense patients that post-laser vision improved including Doris Showers (on indictment).

Prosecution called, tampering with Showers' testimony on its eve, frightening Showers enough to leave home fearing her safety (intervening discovery). Defense witness tampering implicates prosecutorial misconduct, along with purposefully misleading the jury, further exposes flawed "overwhelming" evidence. Prosecution admitted, *"Let's say you mess up 10 or 20 times. That's not criminal intent,"* Dkt. 234 at 88-89. There were 20 counts on 11 patients.

The jury's verdict was tainted by its all-non-Asian discriminatory composition, not hearing vindicating evidence from barred defense expert and relevant exonerating surrebuttal. Allegedly "overwhelming" evidence falsely asserted laser scarring was necessary and intentional misdiagnosis, ignoring contrary scientific evidence for justifying harmful "harmless error." These errors prejudicially swayed the jury's determination. Ever-growing independent scientific evidence and current medical practice trends disprove the very basis for prosecution's evidence.

Prosecutorial witness tampering and conflicts of interest (bias) further tainted the process. Fifth, Sixth, Eighth, and Fourteenth Amendment constitutional rights were crushed: due process, presenting a complete defense with vindicating evidence, being tried fairly by nondiscriminatory impartial jury of true peers, impartial tribunals, "nor cruel and unusual punishment," equal protection. Prosecutors poisoned Pon's credibility (case is all about intent) by "highly prejudicial" App. 77a. and totally misleading rebuttal climaxing in unconstitutional denial of complete exculpatory surrebuttal to false "very damning" allegations to unrelated untrue fraud just before jury deliberations.

Myriad defendants (like Pon) have had guaranteed constitutional and substantial (28 U.S.C. §2111) rights trampled upon by "harmless error" analysis. Equal justice under law does not exist if government uses crafty legal machinations with "harmless error" analysis to deny constitutional rights and due process.

Reviewing circuits and state courts are hopelessly split when error is harmless. Three amici

curiae briefs, including 10 law professors from 7 law schools, represent nationwide support; whether it's effect of error on the government's evidence while completely ignoring effect on defense evidence, (sufficient for acquittal absent error). A 2-1 biased opinion hinging on "harmless" error with a different outcome whether appealed in another circuit is not "Equal Justice." "A rational jury...[with] Pon's explanation could render a different verdict..."App. 77a.

> "[D]enial of constitutional rights, designed and calculated to make petitioners' version of the evidence worthless, can no more be considered harmless than the introduction against a defendant of a coerced confession" (*Chapman*, *supra* at 25-26)

which denial of complete surrebuttal in effect did both.

CONCLUSION

Intractable division on "harmless" error between federal circuits and state high courts affecting multitudes is not "Equal Justice under Law." This is an excellent case to settle entrenched splits among the lower-courts, left undecided in *Vasquez* v. *United States* (No. 11-199), dismissed as improvidently granted, 566 U.S. 376 (2012)).

Rehearing and Certiorari should be granted, or hold on docket (perhaps next term), considering GVR, awaiting *Brown v. Davenport* or other cases.

Respectfully submitted,

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CERTIFICATE OF PRO SE PETITIONER

Pursuant to Rule 44, Petitioner David Pon requests rehearing and reconsideration of the Court's November 15, 2021 order denying the Petition for a Writ of Certiorari, on the grounds of intervening circumstances of a substantial or controlling effect or to other substantial grounds not previously presented (which are elucidated in the main text).

I hereby certify this petition for rehearing is presented in good faith and not for delay.

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