

No: \_\_\_\_\_

\_\_\_\_\_

IN THE  
SUPREME COURT OF THE UNITED STATES

\_\_\_\_\_  
DAVID SOUZA – Petitioner

VS.

THE STATE OF CALIFORNIA – Respondent

On Petition for Writ of Certiorari  
to the  
Supreme Court of California

PETITION FOR WRIT OF CERTIORARI

Roger T. Nuttall (Cal. SBN 42500)  
Counsel of Record  
Nuttall Coleman & Drandell  
2333 Merced Street  
Fresno, California 93721  
Tel: (559) 233-2900  
Fax (559) 485-3852

Edgar E. Page (Cal. SBN 231147)  
Page Law Firm  
Post Office Box 994314  
Redding, California 96099-4314  
Tel: (916) 449-3970

## QUESTIONS PRESENTED FOR REVIEW

### QUESTION 1

Does it violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution, the holding in *Berger v. United States*, 295 U.S. 78 (1935) [“”] and the mandate of *Napue v. Illinois*, 360 U.S. 264 (1959) [“Napue”], when a state prosecutor does not acknowledge and correct false and/or misleading testimony at a preliminary hearing and/or at any pretrial hearing where the testimony was introduced, and where instead of immediately correcting the testimony, the state prosecutor continues to rely upon it even after being made aware that the testimony was not truthful?

### QUESTION 2

When a state prosecutor consolidates two separate and distinct cases into one case, and then proceeds to preliminary hearing, and thereafter files an Information thereon, is the Due Process Clause of the Fourteenth Amendment to the United States Constitution and the holding in *Berger* implicated when that same state prosecutor thereafter, several years later, files a new Complaint (without seeking the permission required by statute) alleging new offenses based upon the same nexus of operative facts as in the initial case?

## LIST OF PARTIES

### DAVID SOUZA:

- Petitioner here;
- Petitioner in Court of Appeal and California Supreme Court. and
- Defendant in trial court.

### THE STATE OF CALIFORNIA:

- Respondent here, and
- Respondent in Court of Appeal and California Supreme Court.

### THE PEOPLE OF THE STATE OF CALIFORNIA:

- Real Party in Interest here,
- Real Party in Interest in Court of Appeal and California Supreme Court, and
- Plaintiff in trial court.

Sup. Ct. R. 14(1)(b).

## TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW . . . . .	i
LIST OF PARTIES . . . . .	ii
TABLE OF AUTHORITIES . . . . .	viii
PETITION FOR WRIT OF CERTIORARI . . . . .	1
DECISION BELOW . . . . .	2
JURISDICTION . . . . .	2
CONSTITUTIONAL AND STATUTORY	
PROVISIONS INVOLVED . . . . .	3
A.    UNITED STATES CONSTITUTION . . . . .	3
B.    STATUTORY PROVISIONS . . . . .	4
STATEMENT OF THE CASE . . . . .	5
A.    COURT OF APPEAL FOR THE STATE OF CALIFORNIA, FIFTH APPELLATE DISTRICT . . . . .	5
B.    CALIFORNIA SUPREME COURT . . . . .	7
REASONS FOR GRANTING THE WRIT OF CERTIORARI . . . . .	8
I.    THE USE OF FALSE TESTIMONY WITHOUT IT HAVING BEEN PROMPTLY CORRECTED AS MANDATED BY THIS COURT IS RIPE FOR REVIEW WHEN THE FALSE TESTIMONY OCCURS DURING PRETRIAL PROCEEDINGS . . . . .	8

A.	PETITIONER NOTIFIED THE HIGHEST STATE COURT THAT THE STATE PROSECUTOR WAS NOT ABIDING BY THIS COURT’S MANDATES REGARDING A DEFENDANT’S FUNDAMENTAL RIGHTS AS PROTECTED BY THE UNITED STATES CONSTITUTION . . . . .	9
1.	<u>Citations To Federal Authority In The State Petition Claims . . . .</u>	9
2.	<u>Citations To Federal Authority Within The Arguments Of The State Petition . . . . .</u>	9
3.	<u>State Court Was Notified In Filings Submitted With Petition That State Prosecutor’s Witness Had Testified Falsely As To The Application Of A Treaty To Support The Delay In The Investigation . . . . .</u>	10
B.	REVIEW IS APPROPRIATE TO REVISIT THE MANDATE OF NAPUE SO AS TO EXTEND IT TO PRETRIAL MATTERS . . . . .	11
1.	<u>The Decision Of The State Court Of Last Resort Conflicts With This Court’s Unanimous Decision In Napue . . . . .</u>	11
2.	<u>The Decision Of The State Court Of Last Resort Conflicts With This Court’s Holding In Berger . . . . .</u>	13
3.	<u>The Decision Of The State Court Of Last Resort Conflicts With A Decision Of A United States Court Of Appeals Decision As To The Application Of Napue . . .</u>	15

II.	DUE PROCESS FORBIDS THE PROSECUTION OF A SECOND CASE BASED UPON THE SAME NUCLEUS OF OPERATIVE FACTS . . . . .	16
A.	PETITIONER NOTIFIED THE HIGHEST STATE COURT THAT THE STATE PROSECUTOR HAD FILED A SECOND CASE WHILE MAINTAINING THE FIRST CASE, AND THAT BOTH CASES ARE BASED UPON THE SAME NUCLEUS OF OPERATIVE FACTS THEREBY DEPRIVING PETITIONER OF HIS FUNDAMENTAL RIGHTS PROTECTED BY THE UNITED STATES CONSTITUTION . . . . .	16
B.	THIS COURT HAS REPEATEDLY HELD THAT STATE STATUTES MAY BE PROTECTED BY THE DUE PROCESS CLAUSE . . . . .	16
C.	THE STATE COURT OF LAST RESORT WAS INFORMED THAT THE STATE PROSECUTOR HAD FILED AND MAINTAINED TWO CASES BASED UPON THE SAME NUCLEUS OF OPERATIVE FACTS . . . . .	18
1.	<u>First Case Filed In September 2014 . . . . .</u>	18
2.	<u>In First Case, The Prosecuting Attorney Opposed Severance On January 15, 2015, Arguing Judicial Economy As One Reason To Keep The Tulare Incidents Consolidated With The Out of Tulare County Cellphone Incidents . . . . .</u>	19
3.	<u>Second Case Allegations Based Upon Same Or Similar Cellphone</u>	

	<u>Incidents As First Case</u> . . . . .	19
D.	THE STATE PROSECUTORS THROUGHOUT THE LITIGATION IN THE STATE COURTS INSISTED THAT THE PROSECUTION HAD THE RIGHT TO FILE AND MAINTAIN TWO CASES . . . . .	20
E.	THE STATE COURT OF LAST RESORT HAS MADE A DECISION AS TO THE APPLICATION OF THE DUE PROCESS CLAUSE THAT CONFLICTS WITH THIS COURT’S HOLDINGS . . . . .	21
	CONCLUSION . . . . .	23
	INDEX TO APPENDICES . . . . .	24
	APPENDIX A	
	Order, Supreme Court of California, July 18, 2018, denying Petition for Review in case number S248793 . . . .	25
	APPENDIX B	
	Petition for Review filed in case number S249793 . . . . .	27
	APPENDIX C	
	Order, Petition for Mandate, Prohibition and/or Any Other Appropriate Relief in the Court of Appeal of the State of California for the Fifth Appellate District, denied on May 3, 2018 . . . .	69
	APPENDIX D	
	Excerpt of Petitioner's Motion to Dismiss Which Was Referred To In The Filing In The California Supreme Court As Pet.Ex. 121-122 . . . . .	71
	APPENDIX E	
	Excerpt of Detective Ford’s Testimony During The Preliminary Hearing On	

February 23, 2017, Page 7 . . . . .	76
APPENDIX F	
Reference To MLAT Excerpt from Petitioner's Supplemental Opposition to Consolidate Which Was Referred To In The Filing In The California Supreme Court As Pet.Ex. pp. 137-140. See also <a href="https://www.congress.gov/treaty-document/100th-congress/14/all-info">https://www.congress.gov/treaty-</a> <a href="https://www.congress.gov/treaty-document/100th-congress/14/all-info">document/100th-congress/14/all-info</a> . . . . .	79
APPENDIX G	
2014 Kik Guide For Law Enforcement Which Petitioner Requested And Was Granted Judicial Notice Of By Court Of Appeal And Was Part Of Record Considered By State Court Of Last Resort . . . . .	85
APPENDIX H	
Excerpt of California Attorney General's December 5, 2017, Response Filed In Court Of Appeal In Which Attorney General Continues To Rely Upon False Testimony . . . . .	97
APPENDIX I	
Excerpt of California Attorney General's February 6, 2018, Response Filed In Court Of Appeal In Which Attorney General Continues To Rely Upon False Testimony . . . . .	100
APPENDIX J	
Except Of Trial Court Record In Which Prosecutor Asserted Due Diligence And The Right To File The Cases As Two Separate And Independent Cases . .	102



## TABLE OF AUTHORITIES

### UNITED STATES CONSTITUTION

Amendment VI . . . . .	16, 17, 22
Amendment XIV . . . . .	i, ix, 3, 6-9, 11, 14-17, 22

### UNITED STATES CODES AND RULES

#### TITLE 28

1257(a) . . . . .	2, 4, 8
-------------------	---------

#### RULES OF THE SUPREME COURT OF THE UNITED STATES

10(b) . . . . .	15
10(c) . . . . .	1, 8, 22
13.1 . . . . .	2
14(1)(b) . . . . .	ii
14(1)(e)(i) . . . . .	2
14(1)(e)(iv) . . . . .	2

### FEDERAL CASES

Berger v. United States, 295 U.S. 78 (1935) . . . . .	i, 8, 9, 13-15
Colorado v. Connelly, 479 U.S. 157 (1986) . . . . .	9
Dye v. Hofbauer, 546 U.S. 1, 4 (2005) . . . . .	9
Giglio v. United States, 405 U.S. 150 (1972) . . . . .	9, 14
Hayes v. Brown, 399 F.3d 972 (9th Cir. 2005) . . . . .	15
Hebert v. Louisiana, 272 U.S. 312 (1926) . . . . .	22
Kyles v. Whitley, 514 U.S. 419 (1995) . . . . .	9
Lisenba v. California, 314 U.S. 219 (1941) . . . . .	9
Mooney v. Holohan, 294 U.S. 103 (1935) . . . . .	10, 22
Napue v. Illinois, 360 U.S. 264 (1959) . . . . .	i, 5-8,

	10-13, 21
Pyle v. Kansas, 317 U.S. 213 (1942) . . . . .	10
United States v. Agurs, 427 U.S. 97 (1976) .	13
Vitek v. Jones, 445 U.S. 480 (1980) .	6, 16, 17,
	22
Wolff v. McDonnell, 418 U.S. 539 (1974) . .	17,
	22

CALIFORNIA CODES AND RULES

PENAL CODE	
654 . . . . .	17
954 . . . . .	17
1009 . . . . .	17
1382 . . . . .	6, 17
1382(b) . . . . .	17
1385 . . . . .	17
1387 . . . . .	17
1387(a)(1) . . . . .	6, 17, 21

STATE OF CALIFORNIA CASES

Dunn v. Superior Court, 159 Cal.App.3d 1110 (Ct.App. 1984) . . . . .	6, 17
---	-------

IN THE  
SUPREME COURT OF THE UNITED STATES

---

DAVID SOUZA – Petitioner

VS.

THE STATE OF CALIFORNIA – Respondent

PETITION FOR WRIT OF CERTIORARI

David Souza, Petitioner, by and through his counsel, Roger T. Nuttall, of Nuttall Coleman & Drandell, and Edgar E. Page, of the Page Law Firm, prays that this Court shall issue a writ of certiorari to review the California Supreme Court’s decision which “has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.” Sup.Crt. R. 10(c ).

The petition for a writ of certiorari does not only seek review just because the “error consists of erroneous factual findings or the misapplication of a properly stated rule of law.” Id.

## DECISION BELOW

The order of the California Supreme Court denying Petitioner any relief was filed on July 18, 2018, and is attached as Appendix A. Sup.Crt. R. 14(1)(e)(i).

## JURISDICTION

Petitioner invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1257(a). Sup. Crt. R. 14(1)(e)(iv).

## PETITION IS TIMELY FILED

Petitioner must file the instant petition within 90 days after the California Supreme Court issued its order denying the petition for review on July 18, 2018. Sup. Crt. Rule 13.1

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

### A UNITED STATES CONSTITUTION

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial ..., and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. Const., amend. VI.

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor 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. XIV, Cl. 2.

B. STATUTORY PROVISIONS

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty ... of the United States is drawn in question ... where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties ... held or authority exercised under, the United States.

28 U.S.C. § 1257(a).

## STATEMENT OF THE CASE

### A. COURT OF APPEAL FOR THE STATE OF CALIFORNIA, FIFTH APPELLATE DISTRICT

On August 2, 2017, Petitioner filed a petition for writ of mandate in the Court of Appeal for the State of California, Fifth Appellate District. Petitioner raised the federal issues addressed in the instant filing in the Court of Appeal. These claims were reiterated, Appendix B, in the state court of last resort, the California Supreme Court, and denied, Appendix A.

The first question was raised in all of the filings as related to the false and/or misleading testimony of a state prosecution witness in violation of this court's holding in *Napue*, and the Due Process Clause. The subject testimony asserted that a Canadian company, in 2015, was "finally accepting U.S. search warrants for investigations" when, in fact, the Treaty with Canada on Mutual Legal Assistance in Criminal Matters (referred to in all of the State filings and herein as "treaty" and "MLAT") had been ratified and applicable for over 30 years. Appendices E, F.

In addition, the guide produced by the Canadian company, the Kik Law Enforcement Guide, specifically directed law enforcement to the MLAT as the means to serve a United States search warrant. Appendices B, F, G (see Page 6 of Kik Guide).

The second question sought procedural protections based upon the Prosecution having filed and seeking thereafter to maintain two separate cases based upon the same nucleus of operative facts. Petitioner asserted in this regard that the State

prosecutor failed, pursuant to statute, to properly attempt to demonstrate due diligence and the existence of substantial new evidence.. See Cal. Pen. Code, §1387(a)(1). In filing a second and separate case, the Prosecution did not comply with the state statutes enacted to keep the Prosecution from “harassing defendants with successive prosecutions [citation] and, in part, to pressure the prosecution to bring the case to trial within the time limits of section 1382 [citation].” *Dunn v. Superior Court*, 159 Cal.App.3d 1110, 1119 (1984). Appendix D.

The Prosecution’s actions violated the protections of the Due Process Clause as discussed in *Vitek v. Jones*, 445 U.S. 480 (1980).

Further, even after the Prosecution had been informed that the testimony which was relied upon (to justify the filing of the second case) was not supported by the MLAT and the Kik Law Enforcement Guide, the Prosecution, in the trial court and in the Court of Appeal as well, never corrected this violation of *Napue*. Appendices B, F, G.

Instead, the prosecution continued to rely upon the testimony of the prosecution witness that the Canadian company had not accepted United States search warrants until 2015, which is not the truth, in order to support the mandatory requirement that the Prosecution had acted with "due diligence" in pursuing the new allegations. Cal. Pen. Code, §1387(a)(1). Appendix B.

Indeed, the Prosecution failed to comply with the state statutes and proceeded to file and maintain a second case while still maintaining the first case. When Petitioner raised the violation of his due process rights, the Prosecution throughout the entire process maintained that it had the right to file and



maintain both cases and, as well, that they would have gone to trial on both cases if the trial court had not consolidated the cases.

In the Court of Appeal, Petitioner submitted several guides, and obtained judicial notice of these guides, produced by the Canadian company establishing that the company was accepting search warrants well before 2015.

The California Attorney General, hereafter Attorney General, filed several responses and never acknowledged that the prosecution witness had testified in a false and/or misleading manner.

Ultimately, the Court of Appeal took no action to correct the violation of this Court's holding in Napue and/or the requirements of the Due Process Clause.

On May 3, 2018, the Court of Appeal denied the petition for writ of mandate, and granted the deferred motion for judicial notice. Appendix C.

#### B. CALIFORNIA SUPREME COURT

Petitioner timely filed a petition for review of the California Court of Appeal decision in the highest state court.

On July 18, 2018, the California Supreme Court denied the petition for review. Appendix A.

## REASONS FOR GRANTING THE WRIT OF CERTIORARI

### I. THE USE OF FALSE TESTIMONY WITHOUT IT HAVING BEEN PROMPTLY CORRECTED AS MANDATED BY THIS COURT IS RIPE FOR REVIEW WHEN THE FALSE TESTIMONY OCCURS DURING PRETRIAL PROCEEDINGS

Petitioner prays that this Court will exercise “judicial discretion” and grant “[r]eview on a writ of certiorari” to review the decision of the state court which “conflicts” with this Court’s holdings in *Napue*, *Berger*, and the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Sup.Crt. R. 10(c ).

Petitioner prays that this Court shall grant review to address the false and/or misleading testimony of the state prosecution witness as to the application of the MLAT. 28 U.S.C. § 1257(a). Petitioner specifically notified the state court of last resort that the testimony relative thereto was false inasmuch as the MLAT had been ratified and applicable for over three decades. Appendices B, D. However, the prosecution witness had testified that the Canadian company had just started accepting United States search warrants in 2015, which is not true. Appendices B, E, F.

A. PETITIONER NOTIFIED THE HIGHEST STATE COURT THAT THE STATE PROSECUTOR WAS NOT ABIDING BY THIS COURT’S MANDATES REGARDING A DEFENDANT’S FUNDAMENTAL RIGHTS AS PROTECTED BY THE UNITED STATES CONSTITUTION

1. Citations To Federal Authority In The State Petition Claims

The State of California was made aware that claims made within the state petition involved “specific allegations of prosecutorial misconduct,” as the petition included references to the “Due Process Clause” in the titles of several claims, and in the text of the petition, and Petitioner also cited to the “Fourteenth Amendments to the Constitution of the United States.” Appendix B.

2. Citations To Federal Authority Within The Arguments Of The State Petition

Petitioner further alerted the State, as the holding in *Dye v. Hofbauer*, 546 U.S. 1, 4 (2005), suggests, by citing to “the following federal cases, all of which concern alleged violations of federal due process rights in the context of prosecutorial misconduct”

- *Berger v. United States*, 295 U.S. 78 (1935),
- *Colorado v. Connelly*, 479 U.S. 157 (1986)
- *Giglio v. United States*, 405 U.S. 150 (1972)
- *Kyles v. Whitley*, 514 U.S. 419 (1995)
- *Lisenba v. California*, 314 U.S. 219

(1941)

- Mooney v. Holohan, 294 U.S. 103 (1935)
- Napue v. Illinois, 360 U.S. 264 (1959)
- Pyle v. Kansas, 317 U.S. 213 (1942).

## Appendix B.

### 3. State Court Was Notified In Filings Submitted With Petition That State Prosecutor's Witness Had Testified Falsely As To The Application Of A Treaty To Support The Delay In The Investigation

The Treaty with Canada on Mutual Legal Assistance in Criminal Matters (referred to in the State Petition and herein as “treaty” and “MLAT”) was ratified by the United States Senate on October 24, 1989, after being received from the President on February 22, 1988. Appendices B, F.

Thus, the United States and Canada have had MLAT protocols in place for nearly 30 years – well before 2015.

The state prosecutor in the trial court relied upon the officer's false and/or misleading testimony, and the Attorney General, as well, in its Second Response arguing that the officer was diligent when he testified that the Canadian company, in 2015 was “finally accepting U.S. search warrants for investigations” Appendices B, E, H.

The testimony of the officer at the preliminary hearing that the Canadian company did not accept search warrants until 2015 was not truthful.

This evidence was utilized by the state prosecutor and the Attorney General to argue that the officer had acted with due diligence and that there was substantial new evidence based upon the

false assertion that before 2015, the Canadian Company was not accepting United States Search Warrants for investigation.

In addition to citing to the MLAT as being available for decades, Petitioner also provided several renditions of the Canadian company's guide to law enforcement explaining that it complied with the MLAT.

Further, the officer had testified that he had worked with federal agencies previous to starting the investigation in this case; as such, it can be concluded that he also had access, during his investigation, to these agencies in order to assist him with obtaining information from the Canadian company and to understand the MLAT.

Indeed, the highest state court, as well, was made aware of the fact that the evidence utilized by the state prosecutor to support a showing of due diligence was not truthful.

B. REVIEW IS APPROPRIATE TO REVISIT THE  
MANDATE OF NAPUE SO AS TO EXTEND IT TO  
PRETRIAL MATTERS

This case brings to light that this Court's holding in *Napue* needs to be extended to the pretrial matters regarding a prosecutor's mandatory duty to immediately inform the trial court and the defendant of the knowing use of false testimony as this conduct violates the Due Process Clause.

1. The Decision Of The State Court Of Last  
Resort Conflicts With This Court's  
Unanimous Decision In *Napue*

The State court's denial of the petition is in

conflict with this Court's unanimous holding in Napue.

The State was alerted to the fact that the state prosecutor allowed a police officer's false testimony at the preliminary hearing to be used to satisfy a showing of due diligence in order to obtain additional allegations.

Thereafter, the state prosecutor in the trial court compounded the failure to comply with this Court's mandate in Napue by relying upon the officer's false testimony when Petitioner moved to dismiss the charges which had been obtained pursuant to the false testimony.

In the Court of Appeal, the Office of the Attorney General continued to rely upon the said false testimony. As such, this also represented an ongoing violation of Petitioner's due process rights. The utilization of emphasis so as to draw the Court of Appeal's attention to that false testimony compounded the on-going abuse of process and violation of Petitioner's due process rights under the Fourteenth Amendment. Appendices H, I.

In addition, the Attorney General was provided a copy of the 2014 Kik Guide for Law Enforcement which specifically indicates that the Canadian Company abided by the MLAT well before the officer testified that the Canadian company supposedly not accepting U.S. search warrants until 2015. Appendices E, F, G, H, I.

We disclose account records in accordance with our terms of service and applicable law. That means that agencies outside of Canada will need to submit an Mutual Legal Assistance Treaty (MLAT) request through the proper legal authorities to allow us to disclose details

about a Kik user's account.

Appendix G, 2014 Kik User Guide, p. 6

The state prosecutor and Attorney General's knowing use of false testimony violates this Court's mandate in *Napue* which is "implicit in any concept of ordered liberty." *Napue*, 360 U.S. at 269.

This Court has never tolerated the use of false testimony and reaffirmed that mandate "[i]n a series of ... cases, the Court has consistently held that a conviction obtained by the knowing use of perjured testimony is fundamentally unfair." *United States v. Agurs*, 427 U.S. 97, 103 (1976).

Therefore, Petitioner contends that this Court should reaffirm mandate in *Napue* and extend it to pretrial matters involving testimony by prosecution witnesses. Sup.Crt. R. 10(c ).

2.     The Decision Of The State Court Of Last Resort Conflicts With This Court's Holding In *Berger*

The *Berger* holding is well-established:  
The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed,

he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Berger, 295 U.S. at 88.

The Attorney General, having taken the position that the officer's testimony as to when the Canadian company was beginning to accept search warrants was true, compounded the abuse of process and the violation of due process when its Response filed in the Court of Appeal actually emphasized the false statement and argued that the officer was diligent by citing the testimony as to when the Canadian company was "finally accepting U.S. search warrants for investigations" Appendices B, E, H, I.

The Attorney General's reliance and emphasis upon this false testimony represents an on-going misrepresentation as to officer's due diligence in his investigation, thereby violating Petitioner's substantial procedural due process rights. Berger, 295 U.S. at 88; Giglio, 405 U.S. 150.

The state's highest court was made aware that the prosecution in the trial court relied upon the officer's false testimony during and after the preliminary hearing, and that the Attorney General relied upon the same false testimony to argue against Petitioner being granted any relief.

The California Supreme Court was made aware of this Court's mandates.

The California Supreme Court's failure to take any steps to correct the use of false testimony in this



case conflicts with this Court's mandate that a prosecutor "may strike hard blows, he is not at liberty to strike foul ones" and that the prosecutor has a "duty to refrain from improper methods." Berger, 295 U.S. at 88. The use of false testimony represents a prosecutor striking "foul ones" and using "improper methods." Id.

Therefore, Petitioner contends that review would be appropriate in this case. Sup.Crt. R. 10(c ).

3.     The Decision Of The State Court Of Last Resort Conflicts With A Decision Of A United States Court Of Appeals Decision As To The Application Of Napue

The Ninth Circuit Court of Appeals has held that the presentation of false evidence or testimony during preliminary proceedings violates a defendant's due process rights. Hayes v. Brown, 399 F.3d 972, 979-80 (9th Cir. 2005).

Here, during the preliminary hearing, the officer testified falsely as to when the Canadian company was accepting United States search warrants.

The "state court of last resort has decided an important federal question in a way that conflicts with the decision [] of a United States court of appeals." Sup. Crt. R. 10(b).

Therefore, Petitioner submits that review is appropriate in this case.

II. DUE PROCESS FORBIDS THE  
PROSECUTION OF A SECOND CASE  
BASED UPON THE SAME NUCLEUS OF  
OPERATIVE FACTS

A. PETITIONER NOTIFIED THE HIGHEST STATE  
COURT THAT THE STATE PROSECUTOR HAD  
FILED A SECOND CASE WHILE MAINTAINING  
THE FIRST CASE, AND THAT BOTH CASES ARE  
BASED UPON THE SAME NUCLEUS OF  
OPERATIVE FACTS THEREBY DEPRIVING  
PETITIONER OF HIS FUNDAMENTAL RIGHTS  
PROTECTED BY THE UNITED STATES  
CONSTITUTION

The state court of last resort was made aware that claims made within the state petition assert that the state prosecutor had filed two cases in violation of his federal due process rights as indicated with references to the Due Process Clause in the titles of several claims, in the text of the petition, and with citations to the Sixth and Fourteenth Amendments to the United States Constitution. Appendix B.

B. THIS COURT HAS REPEATEDLY HELD THAT  
STATE STATUTES MAY BE PROTECTED BY THE  
DUE PROCESS CLAUSE

"We have repeatedly held state statutes may create liberty interests that are entitled to the procedural protections of the Due Process Clause of the Fourteenth Amendment." Vitek, at 488.

"Once a State has granted ... a liberty interest, we held that due process protections are necessary 'to

insure that the state-created right is not arbitrarily abrogated." Vitek, at 488-489 quoting Wolff v. McDonnell (1974) 418 U.S. 539, 557.

Here, the state Legislature has duly enacted Penal Code sections 654, 954, 1009, 1382, 1385, and 1387 so as to protect a defendant's fundamental federal and state constitutional rights to due process of law, to a speedy trial, and to be free of harassment. U.S. Const., Amendments 6th & 14th; Dunn v. Superior Court, 159 Cal.App.3d 1110, 1119 (Ct.App.1984).

The state legislature has determined that a felony must go to trial within "60 days of the defendant's arraignment on an [] information" unless there has been a waiver of the speedy trial right by the defendant. Cal. Pen. Code, §1382(b).

Once a case has been filed, the state legislature has imposed requirements upon the prosecution to file an application and demonstrate that "substantial new evidence" has been discovered to support any new allegations and that the Prosecution had acted with "due diligence" in pursuing the new allegations after the first case has been filed before the first case will be dismissed to allow a second action to be filed. See Cal. Pen. Code, §1387(a)(1).

"The purpose of section 1387 is to prevent the prosecution from harassing defendants with successive prosecutions [citation] and, in part, to pressure the prosecution to bring the case to trial within the time limits of section 1382 [citation]." Dunn v. Superior Court, at 1119.

C. THE STATE COURT OF LAST RESORT WAS INFORMED THAT THE STATE PROSECUTOR HAD FILED AND MAINTAINED TWO CASES BASED UPON THE SAME NUCLEUS OF OPERATIVE FACTS

The state court of last resort was informed that the two cases had been filed utilizing the same nucleus of operative facts and that, in this regard, the state prosecutor failed to comply with applicable statutes.

Petitioner asserted in his state filings that his federal due process rights along with his right to a speedy trial had been violated by the state prosecutor's conduct.

1. First Case Filed In September 2014

In case number VCF285006 (hereafter "first case"), the case involved two separate and distinct events with different facts.

The first set of operative facts involved allegations of conduct with two children who resided in Tulare County (hereinafter "Tulare incidents") but where the allegations did not involve pornographic images.

The second set of operative facts related to communications using a cellphone with children in other locations outside of California including Canada that involved texting and sending pornographic images (hereafter "cellphone incidents"). The cellphone was discovered and seized by the police during the search of Petitioner's home in Tulare County which related to the allegations

associated with the first set of operative facts.

A holding order was issued at the end of the preliminary hearing held on September 15, 2014.

Appendix B. The state prosecutor filed its Information regarding these allegations on September 25, 2014. Appendix B.

2. In First Case, The Prosecuting Attorney Opposed Severance On January 15, 2015, Arguing Judicial Economy As One Reason To Keep The Tulare Incidents Consolidated With The Out of Tulare County Cellphone Incidents

Petitioner's initial defense counsel, on January 15, 2015, sought to sever all the counts involving the cellphone incidents from the other counts which involving the Tulare incidents; the state prosecutor opposed the motion. Appendix B. One reason for opposing the severance was that "a single proceeding would be efficient use of the Court's time." Id. The trial court denied the severance motion brought by the defense. Appendix B.

3. Second Case Allegations Based Upon Same Or Similar Cellphone Incidents As First Case

Roughly a year later, on October 21, 2015, the state prosecutor filed a new felony complaint in case number VCF325933 (hereafter "second case") making additional allegations which related to the same nucleus of operative facts found in Counts 5, 6 and 7 of the first case involving the cellphone incidents.

The state prosecutor failed to file an application with the trial court pursuant to California Penal Code §1387(a).

A preliminary hearing in the second case was held on February 23, 2017. Appendix B. An Information was filed on March 22, 2017. Appendix B.

D. THE STATE PROSECUTORS THROUGHOUT THE LITIGATION IN THE STATE COURTS INSISTED THAT THE PROSECUTION HAD THE RIGHT TO FILE AND MAINTAIN TWO CASES

The state prosecutor's position throughout the litigation in state courts was that the second case (VCF325933) and the first case (VCF285006) were two separate and distinct cases such that the requirements of California Penal Code 1387 did not apply. Appendices B, J.

The state prosecutor in the trial court argued there is "no requirement under 1387 for the People to have, you know, dismissed the previous case. They're two separate and distinct cases."

Appendix J.

The Prosecution further argued that if the Court had disagreed with the motion to consolidate, it would have then proceeded with two separate cases. Appendix J.

The Attorney General adopted the state prosecutor's position in the Court of Appeal.

The Court of Appeal denied Petitioner any relief. Appendix C.

Petitioner contested these issues in the state court of last resort. Appendix B. This petition was denied. Appendix A.

The state court of last resort was made aware of the fact that the state statutes require that the state prosecutor file an application in order to demonstrate that “substantial new evidence” has been discovered so as to support the new allegations and that the Prosecution had acted with “due diligence” in pursuing the new allegations after the first case has been filed before the first case will be dismissed so as to allow a second action to be filed. See Cal. Pen. Code, §1387(a)(1).

It is respectfully submitted here that the State prosecutor simply “skirted” the relevant statutory requirement since, in truth and in fact, there was no “due diligence” or purported “substantial new evidence”, and as such, neither could have been established by the prosecution by proceeding pursuant to said statutory mandate.

E. THE STATE COURT OF LAST RESORT HAS MADE A DECISION AS TO THE APPLICATION OF THE DUE PROCESS CLAUSE THAT CONFLICTS WITH THIS COURT’S HOLDINGS

No state prosecutor even complied with the statutory requirements and/or this Court’s mandates. And then, when ultimately challenged, the state prosecutor cited to the officer’s false testimony referred to in the Napue argument above to justify the delay in the investigation. However, as heretofore noted, this testimony was false; yet again, and ultimately, no prosecutor has ever acknowledged that the testimony was false and/or that steps were taken to correct it. See Appendices E, F, G, H, I, J.

The decision of the court of last resort in the state deprived Petitioner of his fundamental due process rights.

[Due Process] "safeguard[s] the liberty of the citizen against deprivation through the action of the State, embodies the fundamental conceptions of justice which lie at the base of our civil and political institutions . . . [and prohibits] deception of court and jury by the presentation of testimony known to be perjured. . . [and] is as inconsistent with the rudimentary demands of justice. . ."

Mooney v. Holohan, 294 U.S. at 112 citing Hebert v. Louisiana, 272 U.S. 312, 316, 317 (1926).

The state prosecutor knew or should have known the prosecution witness' testimony was the "presentation of testimony known to be perjured." Id.

Therefore, the state's action was "inconsistent with the rudimentary demands of justice" which "lie at the base of our civil and political institutions." Id.

This conduct, it is submitted, was in direct violation of Petitioner's due process rights and this Court's decisions.

The state court of last resort took no action to protect Petitioner's fundamental federal constitutional rights to due process of law, to a speedy trial, and to be free of harassment. U.S. Const., Amends. 6th & 14th.

The state court's decision to deny the petition deprived Petitioner of "the due process protections are necessary 'to insure that the state-created right is not arbitrarily abrogated.'" Vitek, at 488-489 quoting Wolff, at 557.

Petitioner submits that this issue is ripe for review. Sup.Crt. R. 10(c).



## CONCLUSION

It is respectfully submitted that the instant petition should be granted for the above noted reasons.

Petitioner prays that this Court will grant his petition for writ of certiorari.

Dated:           October 11, 2018

Respectfully submitted,

s/ Roger T. Nuttall

---

Roger T. Nuttall  
Counsel of Record