No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

_____

Ricky Lee Earp,
Petitioner,

v.

Ronald Davis, Warden,
Respondent.

_____

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

_____

PETITION FOR WRIT OF CERTIORARI

_____

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CAPITAL CASE

QUESTIONS PRESENTED

1. When, if ever, can a petitioner be denied the discovery necessary to learn the circumstances of counsel for respondent's spoliation of potentially exculpatory evidence which the petitioner was seeking to have DNA tested, in the course of proceedings on a federal habeas corpus claim for prosecutorial suppression of evidence?

2. Does spoliation of potentially exculpatory evidence by one part of a prosecution team impact the credibility of others on the team?

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

OPINIONS BELOW

On February 6, 2018, the Ninth Circuit issued its opinion affirming the district court's dismissal of Earp's remaining habeas claim; it is reported at 881 F.3d 1135. (App. 2-20). The Ninth Circuit denied Earp's petition for rehearing and rehearing in banc on March 15, 2018. (App. 1).

In 2005, the Ninth Circuit remanded for an evidentiary hearing on two habeas claims, including the one petitioned here. *Earp v. Ornoski*, 431 F.3d 1158 (9th Cir. 2005) (hereinafter *Earp I*) (App. 84-107). In 2010, it again remanded for an evidentiary hearing on the present habeas claim. *Earp v. Cullen*, 623 F.3d 1065 (9th Cir. 2010) (*Earp II*) (App. 64-83).

The California Supreme Court's opinion affirming the judgments on direct appeal is reported at *People v. Earp*, 20 Cal.4th 826 (1999); it is not relevant to this petition. The California Supreme Court's summary denial on habeas is relevant only because Earp raised the present claim there as claim II.; that court did not order an evidentiary hearing. (App. 108).

JURISDICTION

The Ninth Circuit's order affirming the denial of habeas relief was filed on March 15, 2018. Earp was granted one 30-day extension of time to file his petition. Supreme Court Rule 13.5. This Court's jurisdiction is timely invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Amend. V:

> No person shall . . . be deprived of life, liberty or property without due process of law.

United States Constitution, Amend. XIV:

> No State shall . . . deprive any person of life, liberty or property, without due process of law . . . .

Title 28, United States Code, section 2254(d):

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

STATEMENT OF THE CASE AND OF THE FACTS

A. State Court Proceedings

1. The Trial

On February 9, 1989, Earp was charged by information with the murder of Amanda Doshier. The information alleged three special circumstances: that the murder was committed while Earp was engaged in (1) rape, (2) sodomy and (3) a lewd and lascivious act on a child under the age of 14. (Clerk's Transcript ("CT") 153 (Respondent-Warden's counsel lodged a copy of the CT and Reporters' Transcript ("RT") in the district court on June 22, 2001; *see* Clerk's Record (CR) 25).

a. Evidence presented at Earp's trial regarding his guilt

On August 25, 1988, Earp was in the two-story house he had lived in for two years with his girlfriend Virginia MacNair (RT 841). While Virginia was at work, Earp was painting a room in the house for the baby he and Virginia were expecting, and taking care of 18-month-old Amanda Doshier, whose mother, Cindy, had left in the couple's care earlier that week (RT 737, 743, 880, 2758).

That afternoon, Earp called 911 saying that Amanda was in distress (RT 3226), then waited with Amanda until paramedics came and took her to a hospital; she died the next day (RT 705-06, 1202, 1231).

Earp did not go to the hospital (RT 3037, 3096). He went that night to friends' houses (RT 1834, 2838-39), and the next day to his mother's home in northern California (RT 634-35, 2117, 2847-48).

Earp learned of Amanda's death after arriving in northern California (RT 2193, 2125), and surrendered to police there (RT 2133, 2185). An attorney who assisted him in surrendering advised him to speak about the case only to his attorney. He was advised of and invoked his *Miranda* rights while being transported to jail in police custody (RT 2875). He has always maintained his innocence of the injuries that caused Amanda's death.

b. Evidence regarding the actual perpetrator

At his trial, Earp testified that another man, Dennis Morgan, came to the house that August afternoon (RT 2784). The two met when they were in state prison together (RT 2706), and after Earp was released Morgan gave him a job (RT 2714). Morgan, an admitted heroin and cocaine addict (RT 3307), was looking for drugs (RT 2789). Earp told Morgan he had no drugs to give him. When Morgan began injecting himself with heroin he had brought with him, Earp went into the backyard to clean his paint brushes (RT 2795, 3151).

When Earp came back into the house, he found Amanda lying at the bottom of the stairs, not moving (RT 2803). He first shook her, possibly hard, and ran

upstairs with her in his arms where he ran water on her head (RT 2807, 3045). He then called Virginia, who gave him CPR instructions. When Amanda did not respond to CPR, he called 911 (RT 2806-11). While he was dialing 911, Morgan ran out of the house (RT 2812).

Two neighbors, Patricia Lathrop and Theresa Thompson, testified to seeing a young man run out of Earp's house before the paramedic-fire truck arrived (RT 2426-27, 2462). Given the timing, that man could not have been Earp.

Bruising on Amanda's body was consistent with her having been sexually abused on the day she suffered her fatal injuries, but no seminal fluid, sperm, or other glandular fluids, which would indicate sexual contact with a male, was found on her body (RT 1633-34). Blood stains were found on a pillow, on a sheet, and on a paper napkin, but serological blood-typing produced nothing which eliminated or implicated either Earp or Morgan as their source (RT 1637-38). No DNA testing was done on the stained evidence.

Morgan, called by the defense in the hope that he could be brought to admit his guilt, testified that he had never been to Earp's home (RT 3463).

c. The verdict

Following a jury trial, Earp was convicted of murder and the three death-qualifying special circumstances were found true. (CT 789-99).

2. The Penalty Phase

The penalty phase of Earp's trial commenced on December 9, 1991. After hearing evidence and instructions, the jury deliberated thirteen hours before returning a verdict of death on December 16.

3. The New Trial Motion

Between the conclusion of the penalty phase and sentencing, defense counsel learned of Michael Taylor, a Los Angeles County jail inmate at the time, who said he had overheard Morgan, also then a County inmate, tell another inmate that he (Morgan) had lied in his testimony at Earp's trial, and that he had in fact been to the Earp/MacNair house on the day Amanda was fatally injured. (ER 87). A defense investigator interviewed Taylor, who signed a declaration to that effect. (ER 91, 432, 446-47).

It is undisputed that once the prosecutor, Robert Foltz, learned about Taylor's declaration for the defense, he and the investigating officer in the case, Deputy Sheriff Edwin Milkey, had Taylor brought in for an interview. According to Taylor, Foltz told him, "'You're not going to fuck up my case.'" (ER 93; *see also* ER 433). After speaking with Taylor for a time, Foltz and Milkey then audiotaped Taylor recanting his declaration. (ER 452-75; *see also* ER 92-95, 433-34).

When interviewed by Earp's counsel about the recantation, Taylor explained that Foltz and Milkey had intimidated him into recanting. He reiterated that his original declaration was truthful. He signed another declaration explaining why he had recanted, and reaffirming what he heard Morgan say about being in the house when Amanda was fatally injured (ER 90-96, 433-34).

The court denied the motion for a new trial without hearing testimony from Taylor, and sentenced Earp to death.

4. The Appeal and Habeas Petition

Earp's appeal to the California Supreme Court (*People v. Earp*, Cal. Supr. Ct. Case No. S025423) was automatic. Concurrent with his appeal, Earp filed a petition for writ of habeas corpus with that court (*In re Earp*, Cal. Supr. Case No. S060715). (*See* CR 25). The petition alleged prosecutorial misconduct in intimidating Taylor into recanting his first declaration to trial counsel. It included another declaration from Taylor describing how Foltz and Milkey intimidated him into recanting his declaration that was to accompany the motion for a new trial.

The petition also alleged that Foltz met with Amanda's mother, Cindy Doshier, before trial, and learned that Doshier believed Earp to be innocent.

> In an effort to change her mind, Foltz told Ms. Doshier about other cases involving molestations by persons under the influence of methamphetamine, and . . . that Petitioner had been using that drug when he assaulted Amanda . . . . He also told her that Petitioner's blood had been found on [Amanda's] body . . ., and that his sperm had been found inside the vagina of her child. [citation omitted] Foltz knew these statements were false when he made them. (CR 18 (p. 36)).

Foltz's false representations convinced Doshier that Earp was guilty of the crime, and she testified for the prosecution. On cross-examination, however, she testified to the lie Foltz had told her about Earp's blood and semen being found on her daughter's body. (ER 540-41).

After Doshier testified, Foltz took her into a room and told her he knew that she was pregnant and using drugs. Foltz threatened that if she did not return to the stand and take back her testimony about his lie to her, "he would make sure that Cindy's 10-month-old baby and her unborn child would be taken from her . . . ." (CR 18, 36-37). Later, Foltz called Doshier to testify again. She recanted her prior testimony—that Foltz told her about finding Earp's semen in Amanda's body—and said that it was her ex-husband who had talked about semen. (ER 557-58).

On June 24, 1999, the California Supreme Court affirmed the judgment on appeal. *People v. Earp*, 20 Cal.4th 826 (1999). On June 2, 2000, the California

Supreme Court summarily denied Earp's petition for writ of habeas corpus, without briefing, discovery, a hearing, or a reasoned opinion. (App. 6).

B. Federal Court Proceedings

1. The first evidentiary hearing

On May 23, 2001, Earp filed his petition for writ of habeas corpus in the District Court pursuant to 28 U.S.C. § 2254, raising nineteen Constitutional claims (designated III through XXII), many of which included sub-claims. (CR 17). The case is governed by the AEDPA (Anti-Terrorism and Effective Death Penalty Act). Among the claims were one for factual innocence, and one for prosecutorial misconduct alleging that Taylor and Doshier were both intimidated into recanting testimony that had been favorable to Earp's guilt defense. (ER 507-09).

In May 2002, during the preparation of a joint discovery stipulation, Earp asked counsel for the Appellee-Warden, the Attorney General's Office in the California Department of Justice ("CDOJ"), whether the pillow and napkin seized from the Earp/MacNair's home "contain[ed] sufficient sample size such that [Earp] may conduct DNA testing" to support his claim of actual innocence. (ER 428).

On May 30, 2002, CDOJ responded that Los Angeles County Sheriff's Office forensic biologist Ken Sewell reported that swatches from these two items

did "contain sufficient sample size for DNA testing." (ER 330-31). A little more than a month later, however, the DNA-testing issue was mooted when the district court granted CDOJ's motion for summary judgment on almost all the claims, including those for actual innocence and prosecutorial misconduct. (ER 412-13). On September 3, 2002, after an evidentiary hearing, the district court announced from the bench that it was denying the last two claims as well. On February 27, 2003, the district court entered judgment denying the petition with prejudice and dismissing the action. (CR 201).

2. Earp's first appeal to the Ninth Circuit

On September 8, 2005, the Ninth Circuit filed (1) a published opinion reversing the District Court's grant of summary judgment and remanding for an evidentiary hearing on Earp's claims of (a) prosecutorial misconduct in intimidating Michael Taylor, and (b) ineffective assistance of trial counsel at the penalty phase in the investigation and presentation of mitigating evidence, *Earp I* (App 84), and (2) an unpublished memorandum affirming the District Court's denial of all other claims.

The published opinion held that the state court's summary denial of the Taylor prosecutorial misconduct claim was based on an unreasonable determination of the facts, and that the district court's denial of the claim without a

hearing, following the state court's summary denial of the issue, denied Earp "a full and fair opportunity to develop the facts to support his claim."[1] (App. 92-93).

On February 22, 2006, this Court denied the Warden's petition for writ of certiorari. No. 05-1201.

3. The second evidentiary hearing

The second evidentiary hearing was held in 2007. Taylor, Foltz and Milkey testified. Earp called Doshier to testify, "[i]n an effort to bolster the credibility of Taylor . . . . [She] was prepared to testify that she too was intimidated by Foltz" into changing her trial testimony. (App. 68). However, before she could testify, CDOJ requested the district court appoint counsel for her because she might admit she perjured herself at trial in the course of now testifying about the change in her trial testimony. The district court appointed counsel for her, and sustained her invocation of the Fifth Amendment right as to testimony she had yet to give. The district court made credibility findings regarding the testimony given by Taylor, Milkey, and Foltz, and again denied relief. (ER 361-88). On March 11, 2008, the district court entered its order denying the claims (CR 278).

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1 That finding under 28 U.S.C § 2254(d)(2) established that the writ might be granted on the prosecutorial misconduct claim though the California courts did not adjudicate it on the merits.

4. Earp's second appeal to the Ninth Circuit

On October 19, 2010, the Ninth Circuit filed its opinion affirming the district court's order denying the ineffectiveness of counsel claim, but reversing the denial of the prosecutorial misconduct claim, which it once again remanded for an evidentiary hearing. (*See* App. 64-83). The Ninth Circuit found that the district court had once more thwarted Earp's opportunity to develop facts in support of that claim by allowing Doshier to *pre-emptively* invoke her Fifth Amendment rights. (App. 69-70). The opinion also noted that the statute of limitations for perjury prosecutions based on Doshier's prior testimony had "long since expired." (App. 71).

In June 2011, this Court denied Earp's certiorari petition from the denial of his IAC claim. No. 10-9852.

C. Earp's State Litigation to Have Evidence Seized from the Home DNA Tested.

Meanwhile, in 2011, Earp moved in Los Angeles County Superior Court, pursuant to California Penal Code § 1405, for DNA testing of the napkin and pillow swatches which had been the subject of district court discovery in 2002.

After the Superior Court granted Earp's § 1405 motion, Earp's counsel arranged for the evidence to be taken from the Los Angeles County Sheriff's

Department laboratory ("the Sheriff's laboratory"), to the agreed-upon private laboratory for analysis. The evidence envelopes were sealed, and remained sealed, during their transport from the Sheriff's laboratory to the private laboratory by counsel's investigator. (ER 351-55). When the serologist at the private laboratory opened the evidence envelopes, the napkin swatch was not in the envelope where, according to documentation from the Sheriff's laboratory, it should have been. (ER 356-60).

Kenneth Sewell, the supervising criminalist at the Sheriff's laboratory who had confirmed to the CDOJ that the swatches from the napkin and pillow were of sufficient size for DNA testing in May 2002, investigated the disappearance of the evidence. (*See* ER 330-31).

Sewell confirmed that the laboratory's evidence technician had released the correct evidence envelopes to Earp's investigator, including one "described as containing 'stain cuttings from napkin & pillow.'" (ER 348). He confirmed that the laboratory had no documentation showing that the trial criminalist's analysis had consumed the napkin swatch. (ER 349; *see also People v. Earp*, 20 Cal. 4th 826, 850 (1999) (criminalist describing results of serological analysis)). Further, Sewell found laboratory documentation showing that,

> [O]n May 2, 2002, [the Sheriff's laboratory] released the envelope containing the stain cuttings from the napkin and pillow at issue here (#H838087) from its custody to California Department of Justice special agent Eddie Shore, at the request of Los Angeles County Sheriff's Department homicide detective Gerry Biehn.

(ER 348). The laboratory's documentation shows that the evidence envelope was returned to the Sheriff's laboratory the same day. (*Id*.)

Sewell described the removal of the evidence from the laboratory by CDOJ as unprecedented:

> In my 25 years with the Science Services Bureau, the May 2, 2002 event is the only occasion I know of that [the Sheriff's laboratory] released homicide evidence to the California Department of Justice.

(ER 349). Sewell had no explanation for what happened to the napkin swatch, why the CDOJ took custody of the evidence and removed it from the laboratory, or why, as the private serologist discovered, there were swatches from the pillowcase and other items apparently collected from the Earp house in the evidence envelope. (*Id*.)

Sewell tried to speak to Los Angeles County Sheriff's Department homicide detective Gerry Biehn, whose name was shown on the laboratory's documentation, but never received a response. (ER 348-49). Counsel for Earp attempted to speak

to CDOJ's investigator Eddie Shore, who took custody of the evidence and apparently removed it from the laboratory, but was also unsuccessful. (ER 360).

Counsel for Earp then moved in the Superior Court for further proceedings regarding the missing evidence, but the motion was denied, as was Earp's petition for relief to the California Supreme Court. (*See* Motion for Judicial Notice, doc. 12, filed in the appeal at issue here, No. 15-56989.)

D. Earp's motion under Rule 7 of the Rules Governing Section 2254 Cases, and the evidentiary hearing and adjudication of the prosecutorial misconduct claim.

In *Earp II*, the Ninth Circuit had remanded the cause for another evidentiary hearing on the prosecutorial misconduct claim, because the district court had deprived Earp of Doshier's testimony — which would have impeached the state's witnesses — by allowing her to *pre-emptively* invoke her Fifth Amendment rights. (App. 69-70). Before this third evidentiary hearing, Earp moved to expand the record under Rule 7 of the Rules Governing Section 2254 Cases in District Court (ER 289-318). The Rule 7 motion described CDOJ's unprecedented taking custody of the evidence, its disappearance, and the apparent involvement of the Los Angeles County Sheriff's Office.

Earp sought discovery to determine whether CDOJ, as counsel for the Appellee-Warden, "engaged in spoliation of evidence that could provide strong support for Earp's position in this hearing, justifying an adverse inference against [the Warden] on the issue raised by the pending claim." (ER 294). In the alternative, if the Court were persuaded by the Motion and its supporting documentation, Earp asked the Court to "draw 'a rebuttable presumption against the responsible party that the evidence, if it had not been despoiled, would have been detrimental to the despoiler,'" the CDOJ. (ER 61).

At the evidentiary hearing, the district court heard testimony from Taylor, prosecutor Foltz, Sheriff's deputy Milkey, and Doshier, the victim's mother.

Taylor testified, in substance, to what he had testified to in his post-trial declarations and in the first evidentiary hearing: that he overheard Morgan talk about being at Earp's house when Amanda was injured, and that Foltz and Milkey had intimidated him into recanting that testimony as it appeared in his first declaration. (ER 84-107, 433).

Foltz and Milkey testified that, when they interviewed Taylor after he had given his first declaration, he had admitted that the declaration was not true, and had told the truth in the recorded portion of the interview, without any threats or intimidation by them. (ER 208-18; *see also*, ER 452-74).

Doshier testified, in accordance with her state habeas declaration that: Foltz lied to her in saying that Earp's blood and semen were found on Amanda's body, she testified to that effect at trial, but that Foltz' threats intimidated her into recanting that testimony the next day. (ER 243-63; *see also* ER 439). Foltz denied both that he told Doshier that Earp's "blood and semen was" found, and that he had intimidated her (though admitting he "scolded" her). (ER 218-41).

In denying relief, the district court denied Earp's request for discovery. It did, however, grant the Rule 7 motion and deemed the evidence Earp presented "sufficient to permit the court to draw the adverse inference he seeks," that is, *the court inferred that Morgan's DNA would have been found on the napkin but for the CDOJ's spoliation of it, and therefore that Morgan was in the house on the day of Amanda suffered her fatal injuries.* (ER 20). Nevertheless, despite the support given it by that adverse inference, the court found Taylor's testimony incredible, Foltz's and Milkey's credible, and that Doshier's testimony was "not particularly credible." (ER 42).

REASONS FOR GRANTING THE WRIT

I. This Court should grant certiorari to decide when, if ever, a petitioner can be denied the discovery necessary to learn the circumstances of the Government's spoliation of evidence in the course of federal habeas proceedings.

Earp appealed from the district court's decision to grant his Rule 7 motion to expand the record regarding the disappearance of the potential DNA evidence, find CDOJ guilty of spoliation (*see Akiona v. United States*, 938 F.2d 158, 161 (9th Cir. 1991)), draw the adverse inference that Morgan was at the Earp house, but notwithstanding to deny discovery of the circumstances of the disappearance. (ER 21).

The Ninth Circuit panel affirmed, rejecting the discovery request as a "fishing expedition." Earp, according to the panel, was seeking discovery regarding the spoliation based only on the "meager conjecture" that Earp "*might possibly* discover a connection that *might possibly* exist, which *might possibly change* the credibility of the witnesses . . . ." (App. 16 (emph. in orig.)).

The question for this Court is whether such a cavalier ruling can be acceptable where, as here, the integrity of the federal habeas process, and the execution of a potentially innocent person, is at stake.

Twice, the Ninth Circuit remanded Earp's case for a full and fair evidentiary hearing as to whether Foltz and Milkey, the prosecutor and investigating officer at trial (ER 42-43), suppressed testimony which might have shown to the jury that Morgan, not Earp, was guilty of the crime for which Earp stands condemned to death. The district court found the CDOJ, which has represented the state throughout these federal habeas corpus proceedings, guilty of spoliation by losing or destroying physical evidence which may have supported Earp's contention through and since his trial that Morgan was present at the house, and guilty of afflicting Amanda's fatal injuries.

Further, the district court found that the spoliation took place during federal discovery proceedings in preparation for an evidentiary hearing at which Foltz and Milkey were expected to testify in response to the witness intimidation charge against them (C.D. Cal. Dkt. 82, motion for evidentiary hearing; ER 330-31, 348). And, it is undisputed that the entire prosecution team, including the CDOJ, Foltz and Milkey, knew of that physical evidence's potential relevance at the time. (ER 19-20).

Yet, the Ninth Circuit panel has affirmed the district court's denial to Earp of the means to determine whether or not those accused in these habeas proceedings of witness intimidation were involved in the spoliation.

The reasons discovery could be fruitful are especially strong here. CDOJ investigator Shore's took custody of this evidence in cooperation with Gerry Biehn, who was a fellow Los Angeles County Sheriff's detective of Milkey. (ER 348). Further, Shore's obtaining custody of the evidence was unprecedented. Sheriff's laboratory Supervising Criminalist Ken Sewell declared that, "[I]n my 25 years with the Science Services Bureau, the May 2, 2002 event is the only occasion I know of that Sheriff's Laboratory released homicide evidence to the California Department of Justice." (ER 349).

The broader issue, however, is whether, whenever a state prosecutorial agency is found guilty of spoliating potentially exculpatory DNA evidence in its sole possession in the course of a federal habeas proceeding, there needs to be full discovery of the circumstances of that spoliation in order to determine whether, and to what extent, and how, those involved in the proceedings were involved in the spoliation. This Court should grant certiorari in order to determine whether full discovery of the circumstances of prosecutorial spoliation in the course of federal habeas corpus proceedings is essential to protect the integrity of those proceedings.

II. This Court should decide whether spoliation by one part of a prosecution team impacts the credibility of all on the team.

The district court held that the CDOJ's spoliation could not damage the credibility of Foltz and Milkey, the two government witnesses Earp accuses of prosecutorial misconduct in this habeas proceeding, because they were not "affiliated" with the CDOJ (ER 42-43), and the Ninth Circuit panel affirmed virtually without comment (App. 17-20).

The ruling that Foltz and Milkey were not affiliated with the CDOJ is erroneous because it is contrary to the California Constitution. That Constitution provides that the California Attorney General, as head of CDOJ, has "direct supervision over every district attorney and sheriff . . . , in all matters pertaining to the duties of their respective offices. . . ." Cal. Const., Art. V, § 13. Foltz and Milkey, as Deputy Los Angeles District Attorney and Los Angeles County Deputy Sheriff, respectively, are legally affiliated with the spoliator here, CDOJ, because the head of the CDOJ, the California Attorney General, is their direct supervisor. *Id*.

But more broadly, that decision raises for this Court the question whether, when one member of a state prosecutorial team commits spoliation of potentially exculpatory evidence in the course of federal habeas proceedings, other members

of that team can *ever* be held "unaffiliated," and free of its taint (*see* Respondent-Warden's appellate Response Brief, No. 15-56989, Doc. 30, pp. 42-43).

The district court explicitly recognized that its finding of spoliation would not only justify the negative inference it drew as to the specific evidence spoliated, but could also "significantly undermine" the general credibility of the spoliator and those affiliated with the spoliator. (ER 42-43).

That is implicit in the legal maxim"omnia praesumuntur contra spoliatorem (all things are presumed against a despoiler)," cited in other circuits for the proposition that "spoliation . . . impacts . . . overall credibility." In re Heinz, 501 B.R. 746, 759 (N.D. Ala. 2013); Appleton Elec. Co. v. Advance-United Expressways, 494 F.2d. 126, 139 n.24 (7th Cir. 1974); Roberts v. Sears, 2000 U.S. Dist. LEXIS 21294, 23 (W.D.N.C 2000); White v. Tunica Cty., 2017 U.S. Dist. Lexis 84565 (N.D. Miss. 2017).

This Court held in *Arizona v. Youngblood,* 488 U.S. 51 at 57 (1988), following *Brady v. Maryland*, 373 U.S. 83 (1963), that it is not the particular law enforcement agency which was in possession of evidence, but "the State" as a whole which bears the responsibility for preserving potentially exculpatory evidence. *See Kyles v. Whitley*, 514 U.S. 419, 438 (1994); *United States v. Auten*, 632 F.2d 478, 481 (5th Cir. 1980) (no basis for concluding that "different arms of

the government are insulated one from the other."). *See also Reis-Campos v. Biter*, 832 F.3d 968, 975, fn. 6 (9th Cir. 2016) (question is whether the lead investigator is "a member of the prosecution team for *Brady* purposes"); *United States v. Sherlock*, 962 F.2d 1349, 1355 (9th Cir. 1992).

Foltz and Milkey were, along with the CDOJ and its investigator Shore, all members of "the prosecution team" which first prosecuted Earp, and now works to preserve his conviction and sentence. There is no reason why the reasoning which led this Court to conclude that prosecution team members cannot be insulated from breaches of *Brady* and *Youngblood* obligations by other team members should not also apply to spoliation by team members. If so, then the CDOJ's spoliation must be taken to impact the overall credibility, not only of the CDOJ and its agents, but also Foltz and Milkey, compelling a remand to reconsider the credibility of their testimony in light of that impact.

Earp asks this Court to grant certiorari in order to consider whether the "team" approach to *Brady* and *Youngblood* obligations should not be extended to spoliation by prosecution agencies.

III. Conclusion

For the reasons stated above, Earp respectfully requests that the petition be granted.

Respectfully submitted,

DATED: July 13, 2018

By: _____

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*Counsel of Record

CERTIFICATE OF WORD COUNT

As required by Supreme Court Rule 33. l(h), I certify that the document contains 4,771 words, excluding the parts of the document that are exempted by Supreme Court Rule 33.l(d).

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

Respectfully submitted,

Executed on July 13, 2018.

By: Robert S. Gerstein

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