No. 18-5252

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

**PETITIONER'S REPLY TO THE BRIEF IN OPPOSITION**

ROBERT S. GERSTEIN (35941)*
Attorney at Law
171 Pier Ave., # 322
Santa Monica, CA 90405-5311
Telephone: (310) 820-1939
E-Mail: Robert.Gersteinl@verizon.net

HILARY POTASHNER (167060)
Federal Public Defender
EMILY JM GROENDYKE (264102)
Deputy Federal Public Defender
321 East 2nd Street
Los Angeles, California 90012

STATIA PEAKHEART (200363)
Attorney-at-Law
P.O. Box 531967
Los Angeles, CA 90053
Telephone: (310) 692-5500
E-mail: Statia.Peakheart@gmail.com

Attorneys for Petitioner Ricky Lee Earp
*Counsel of Record

## Table of Contents

**Page**

## Table of Authorities

**Cases** **Page**



**Constitutions**

## INTRODUCTION

Petitioner presents two question to this Court:

First, when, if ever, can a habeas petitioner alleging prosecutorial misconduct be denied the right to discovery about a prosecutorial's agency's spoliation?

To put the question in terms of the relevant law, it is whether a habeas petitioner can ever have "a fair, rounded, development of the material facts" (Pet. App. 13 (citing *Jones v. Wood*, 114 F.3d 1002, 1009 (9th Cir. 1997) (quoting *Toney v. Gammon*, 79 F.3d 693, 700 (8th Cir. 1996))), regarding prosecutorial misconduct without full knowledge of a prosecutorial's agency's spoliation of evidence relevant to the misconduct?

Second, does spoliation by one member of the prosecutorial team taint the credibility of all members?

This Court held in *Arizona v. Youngblood,* 488 U.S. 51, 57 (1988), that it is not only the particular law enforcement agency which possesses potentially exculpatory evidence, but "the State" as a whole which bears the responsibility for preserving it. Petitioner now asks this Court to consider whether it is not implicit in the *Youngblood* holding that where one member

of a prosecutorial team is guilty of spoliating potentially exculpatory evidence, the taint of that spoliation should also extend to every member of that team.

Both questions arise here from the district court's finding that the California Department of Justice (CDOJ) engaged in spoliation of potentially exculpatory evidence. As shown below, rather than take on either question directly, Respondent's opposition is an exercise in evading and/or ignoring both of them.

## I. Contrary to Respondent's assertions, the trial court did find the CDOJ guilty of spoliation, and there was a sound basis for that finding.

Respondent seeks to evade both of the questions Petitioner raises to this Court by asserting (quoting the Ninth Circuit's opinion) that the district court did not find the CDOJ guilty of spoliation, but only "assumed without deciding" that it was. Respondent supports that assertion by reference to (1) what it characterizes as the district court's comment that additional discovery would only provide evidence which could rebut the allegation of spoliation, and (2) a narrative drawn from an earlier pleading in which

Respondent's counsel (CDOJ), purports (without the support of sworn testimony) to exonerate itself of that guilt. (Opp. 12-13.)

Neither argument stands up to scrutiny. Petitioner's demonstration that the district court found the CDOJ guilty of spoliation, therefore, remains unchallenged, as does Petitioner's demonstration that the district court's refusal to allow Petitioner discovery regarding the spoliation violated Petitioner's Fifth and Fourteenth Amendment rights. This Court should grant the writ and decide when, if ever, a habeas court can act as the district court did here, and deny a petitioner discovery regarding prosecutorial spoliation where necessary to prove his prosecutorial misconduct claim.

### A. The District Court order is clear about finding spoliation, and nowhere suggests that the finding could be rebutted.

The district court's finding of spoliation was a step in the process of drawing the inference that Morgan was in Petitioner's house on the day Amanda was fatally injured. (Pet. App. 39-41.)

The court first cited authority for the proposition that parties "engage in spoliation" as a matter of law "only if they had notice" that the spoliated materials were "potentially relevant to the litigation before they were

destroyed." *United States v. Kitsap Physicians Srv.*, 314 F.3d 995, 1001 (9th Cir. 2002) (internal quotation marks omitted). (Pet. App. 39-40.) It then went on to hold that this prerequisite to finding spoliation had been met, because "there can be no dispute" that Respondent knew the napkin swatch was potentially relevant the Petitioner's habeas claims. (Pet. App. 40.)

The court then went on to state the rest of the facts establishing spoliation "as a matter of law," and thereby laying the groundwork for the adverse inference:

> [B]ecause the napkin and pillow swatch were checked out [of the laboratory where they were stored] . . . by the Department of Justice – which is defending the conviction – and later found to have disappeared . . ., it is proper to draw an adverse inference against respondent.

(Pet. App. 40.)

Thus, the district court made a finding that the State committed misconduct in the form of spoliation *and* drew from that finding the rebuttable presumption that Morgan was in the house on the day Amanda was fatally injured.

There is nothing in the district court's order to suggest that, as Respondent claims, the finding of spoliation was a mere "assumption" which

could have been rebutted by additional evidence. Respondent gives a contrary impression only by taking language from the order out of context.

The district court justified its decision not to allow Petitioner discovery on the spoliation by asserting that

> . . . additional discovery would serve only to develop evidence that could be used to *rebut* the inference drawn, e.g. by permitting respondent to adduce facts suggesting an innocent explanation of the disappearance of the napkin and/or pillowcase.

(Pet. App. 41.)

In context, the "inference drawn" the district court is referring to as subject to rebuttal is the adverse inference about Morgan's presence it drew *from* the fact of spoliation, *not* the finding of spoliation itself. That is confirmed by the court's description of the evidence which could serve the purpose of rebuttal: evidence supporting an "innocent explanation" of the swatch's disappearance. (Pet. App. 41.)

Such an "innocent explanation" would not rebut the finding of spoliation, because no showing of bad faith is required to prove it. Rather, a party has spoliated whenever it allows evidence it knows to be potentially relevant to the opposing party's case to disappear in its custody. *Glover v. BIC*, 6 F.3d 1318, 1329 (9th Cir. 1993).

On the other hand, as the district court noted immediately after making the point discussed above, an adverse inference drawn *from* spoliation "may be rejected" if the loss or destruction of the evidence was accidental or otherwise innocent. See *Med. Lab. Mgmt. Consultants v. Am. Broad. Companies, Inc.*, 306 F.3d 806, 824 (9th Cir. 2002). (Pet. App. 41.)

But Respondent quotes part of a sentence from the order out of context and adds its own conclusion to make it appear that, on the contrary, the district court was describing, not the inference from spoliation, but the spoliation as rebuttable. Respondent's version has the district court say that

> '. . . additional discovery would serve only to develop evidence that could be used to *rebut*' the allegation of spoliation. (Opp. 12.)

As shown below, Respondent's argument is unsupported and contradicted by the district court's order.

### B. Respondent's counter-narrative indicating there was no spoliation is unsupported by any sworn testimony, and contradicts the sworn testimony of the head of the Los Angeles County Sheriff Department's laboratory.

In addition, Respondent (Opp. 12-13) presents a narrative of the 2002 events which make it appear, not just that there is an innocent explanation of the spoliation, but that there was no spoliation at all.

Respondent asserts that the release homicide evidence to a CDOJ investigator (described by Supervising Criminalist Kenneth Sewell of the Sheriff's laboratory, the Scientific Services Bureau, as unprecedented) "can be explained." The explanation, according to Respondent, is that the CDOJ agreed (as Respondent's federal habeas counsel), to find out — "as a courtesy to Earp's counsel" — whether the pillow and napkin swatches still existed and were sufficient to be DNA tested. (Opp. 13.)

The Opposition cites to the brief CDOJ filed in opposition to Petitioner's 2016 Superior Court motion seeking information about the disappearance of the napkin swatch. (That state court opposition is attached to Petitioner's Motion for Judicial Notice [Ninth Cir. Dkt. Entry 12] as Ex. C).)

That opposing brief provides a narrative of Respondent's reactions to Petitioner's discovery requests about the napkin and pillow in connection with the 2002 district court evidentiary hearing in this matter. CDOJ recounts how, after responding that it had no information on the subject, it sought further information by dispatching its Special Investigator Shore to the Sheriff's Scientific Services Bureau to personally inspect the evidence. According to CDOJ, while at the lab, Shore met with Sewell, who produced the material to him. (RJN 100.)

Respondent then filed a response to Petitioner's discovery request stating that the pillow and napkin swatches were in the possession of the Sheriff's Department, and that Sewell had confirmed that there was sufficient material to DNA test. (RJN 100-01.)

The CDOJ brief then draws the conclusion that, because there is a receipt showing that "KLS" checked the swatches out to Shore, and that Shore returned them to "KLS" on the same day, the swatch went missing, not while in CDOJ custody, but in the custody of Petitioner's investigator nearly 10 years later, in 2012. In 2012, the lab released the envelope in which the swatch *should* have been to Petitioner's investigator, who took

court-authorized custody of it for DNA testing under a California statute. (RJN 76, 100, 101.) Petitioner's investigator (unlike Shore) has provided a sworn declaration that she placed the sealed envelope into a container where it remained, never leaving her sight, until she delivered it to the laboratory where it was unsealed by the analyst and the swatch was found to missing (RJN 78-79.)

The problem with Respondent's novel narrative is that (1) there is no sworn declaration or other testimony from Shore or anyone else supporting it, and (2) it contradicts Sewell's sworn declaration about what happened.

On one point there is agreement, supported by documentary evidence. The lab receipt (RJN 76) states that CDOJ investigator Shore checked out the pillow and napkin swatches on May 2, 2002, and returned them the same day. But there the agreement ends.

First, CDOJ took the receipt to be documentary evidence that the napkin swatch *itself* was both checked out from, and returned to the lab, on May 2, 2002. But Sewell, who dealt with such receipts every day, did not understand it in that way. Rather, his declaration (MJN 76) states his

understanding that what the lab released to Shore, and received from him, was the *envelope* which was supposed to contain the swatches.

Second, while the opposing state court brief describes a meeting between Shore and Sewell at the lab on May 2, 2002, there is no evidence of any such meeting (beyond the ambiguous fact that the initials KLS appear on the receipt). The initials could belong to someone else, or could have been written by Sewell without his having had a face-to-face meeting with Shore.

Further, Sewell's declaration has no indication of any such meeting. On the contrary, Sewell commented (as Supervising Criminalist of the Sheriff's Scientific Services Bureau) that the Bureau had no information to explain why the CDOJ wanted the material involved, or what had happened to the napkin swatch. Rather it expresses his surprise at learning of the unprecedented release of the evidence to the CDOJ investigator. (MJN 70.)

Respondent's new and unsubstantiated version of the events surrounding the disappearance of the swatch does not provide any reason to reject Petitioner's showing that it was spoliated by the CDOJ either.

## II. Respondent ignores the substance of Petitioner's question as to whether spoliation by one member of a prosecution team impacts the credibility of others.

Respondent brushes aside the second question the Petition presents to this Court — whether spoliation by one member of a prosecution team impacts the credibility of the other members — rather than making a serious effort to answer it. (Opp. 11.)

In doing so, Respondent fails to come to grips with the substance of the issue as presented here by the district court's decision that the credibility of the two witnesses (the trial prosecutor and investigating officer) was not impacted by the CDOJ's spoliation because they were not "affiliated" with the CDOJ. (Pet. App. 63.)

Respondent purports to respond by arguing that the district court agreed that the spoliation of one member of the prosecution team could impact the credibility of other members in "appropriate circumstances," but that, given the facts before it, the district court found that spoliation did not "significantly undermine" the credibility if the witnesses here. (Opp. 11.)

But that response evades the issue. Specifically, the district court found that the witness's credibility was not "significantly undermined" because they were not "*affiliated*" with the spoliator. (Pet. App. 63.)

As shown in the Petition, that is, first of all, not the case. The California Constitution (Cal. Const., Art. V, § 13) places both local prosecutors and sheriff's departments throughout California under the direct supervision of the Attorney General, who heads the Justice Department.

More to the point, however, the district court's assumption that a person must be directly "affiliated" with the organization that engaged in spoliation to be affected by it implicitly rejects the rule, implicit in this Court's reasoning in *Arizona v. Youngblood,* 488 U.S. 51, 57, that all of the members of the prosecution team, whether "affiliated" with the spoliating "organization" or not, is tainted by the spoliation.

As noted above, this Court held in *Youngblood* that it is not only the particular law enforcement agency which possesses potentially exculpatory evidence, but "the State" as a whole, which bears the responsibility for preserving it. So here, Petitioner contends that, because it is "the State," in

the form of the entire prosecutorial team, which bears the responsibility of ensuring that the object of a prosecution is treated at in accordance with the Fourteenth Amendment's due process clause, then the taint of spoliation should extend to every member of that team.

Respondent's opposition provides this Court with no good reason for failing to take up the issue raised by the district court's decision that the credibility of the prosecutor and investigating officer at trial, who continue to be part of the team defending Petitioner's conviction and death sentence, is unaffected by spoliation carried out by the agency which represents the State in this habeas proceeding.

///

## III. The Court should grant the writ.

For the reasons stated above and in the Petition, Petitioner respectfully requests that the writ of certiorari be granted.

Respectfully submitted,

DATED: October 29, 2018

By: 

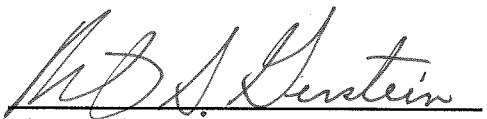
**ROBERT S. GERSTEIN***
Attorney for Petitioner
*Counsel of Record

## CERTIFICATE OF WORD COUNT

As required by Supreme Court Rule 33. 1(h), I certify that the document contains 2,317 words, excluding the parts of the document that are exempted by Supreme Court Rule 33.1(d).

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

Executed on October 29, 2018

By: 

**ROBERT S. GERSTEIN***
Attorney for Petitioner
*Counsel of Record

No. 18-5252

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

**CERTIFICATE OF SERVICE TO PETITIONER'S REPLY TO THE BRIEF IN OPPOSITION**

I, Robert S. Gerstein, counsel for Petitioner under the Criminal Justice Act, 18 U.S.C. § 3006(A)(b), hereby certify that on October 30, 2018, a copy of Petitioner's Reply to the Brief in Opposition was mailed postage prepaid to counsel of record for Respondent:

James William Bilderback II
300 South Spring Street, Suite 1702,
Los Angeles, CA 90013
(213) 269-6160 Bill.Bilderback@doj.ca.

All parties required to be served have been served. I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed on October 30, 2018.

By: Robert S. Gerstein
**ROBERT S. GERSTEIN***
Attorney for Petitioner
*Counsel of Record