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21-7499

IN THE SUPREME COURT OF THE UNITED STATES

David Lopez Gonzales	NO:
Petitioner	NINTH CIRCUIT NO: 20-17173
-vs-	ON PETITION FOR A WRIT OF CERTIORARI
David Shinn et al,	TO THE NINTH CIRCUIT COURT OF APPEALS
Respondent	

PETITION FOR A WRIT OF CERTIORARI

ORIGINAL

Respectfully submitted this 10 day of March 2022

David Lopez Gonzales
David Lopez Gonzales

QUESTIONS PRESENTED

1. Does Cullen v Pinholster 563 U.S. 170, 181 (2011) bar consideration of new evidence in federal habeas proceedings, when in a case like mine, the prosecutor presented false testimony to rebut the defense theory of the case and the truthful testimony I gave on the stand, and refused to disclose the exculpatory and impeachment evidence that would prove that testimony was false?

2. Does Cullen v Pinholster relieve the State of its affirmative duty to disclose exculpatory or impeachment evidence?

3. Is Brady, after Pinholster, still clearly established law for the purpose of Federal Habeas proceedings?

4. Is Napue v. Illinois part of the Brady line of cases where the knowledge of the investigating agency (including the police) acting on the government's behalf imputed to the prosecution? Is the knowledge of the detective imputed to the prosecutor for the purpose of a Napue Claim?

5. If the State refuses to meet its affirmative duty to disclose exculpatory and impeachment evidence can a petitioner rely on the Fed. R. Civ. P. governing Request for Admissions to establish his Brady and Napue Claim?

6. Under the due process clause of the fifth and fourteenth amendment, as well as, the sixth amendment clear notice and compulsory clause does an alibi, if proven, prove a defendant's innocence of the crime charged.

LIST OF PARTIES

David Shinn

The State of Arizona

The Arizona Attorney General

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a Writ of Certiorai issue to review the judgment below.

The opinion of the United States District Court appears at Appendix A to the petition and is unpublished

The opinion of the Ninth Circuit Court of Appeals appears at Appendix B to this petition and is unpublished

The opinion of the highest state court to review the merits appear at Appendix C to this petition and is unpublished

The opinion of the Arizona Superior Court appears at Appendix D to the petition and is unpublished

JURISDICTION

The date on which the United States Court of Appeals denied my case was

A timely petition for rehearing was denied by the United States Court of Appeals on the following date: November 19 2021, and a copy of the order denying rehearing appears at Appendix E

The jurisdiction of this court is invoked under 28 U.S.C. § 1254 (1) and 28 U.S.C. § 1257(a), the Supremacy Clause and Madison v Malbury

Constitutional and Statutory Provisions Involved

Article VI of the United States Constitution Supremacy Clause

This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme law of the Land; and the Judges in every State shall be bound thereby, anything in the Constitution or Laws of any State to the contrary notwithstanding .... [A]ll executive and judicial officers, both of the United States and of several states, shall be bound by Oath or Affirmation, to support this Constitution.'

The federal judicial power extends to all cases "arising under this Constitution." As part of their inherent duty to determine the law, the federal courts have a duty to interpret and apply the Constitution. Malbury v. Madison, 5 U.S. at 175-78 (1803)

Fifth amendment Due Process Clause

Sixth amendment Clear Notice and Compulsory Clause

Eighth amendment equal protection clause

Fourteenth amendment Due Process Clause

AEDPA

28 U.S.C § 2254

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Ariz. R. Crim. P.

13.5

15.1

32.6

ER42 3.8

STATEMENT OF THE CASE

This is a Case where I claimed actual innocence and I went to trial to prove my innocence. However, the prosecutor obtained my conviction by unethical improper means. He elicited false testimony to dispute the defense theory of the case and the credible evidence in record. Then he relied upon that false testimony in his closing argument to meet his burden of proof. Now he refuses to disclose the exculpatory and impeachment evidence which would prove that testimony was false.

The prosecutions action of elisiting false testimony was not isolated to a single witness. The Court found that the prosecutor elicited the false testimony Antoinette gave just minutes after she testified truthfully because of a jurors question.

Thereby, the questions of Laws and Facts are presented so this Court may resolve the conflict in the circuit courts decision on these issues and answer questions left open in Supreme Court rulings.

Reason why these questions should be addressed by this Court

1. It's an open question whether Cullen v Pinholster, 131 S.Ct. 1388, 1389 (2011), applies to evidence that is suppressed by the prosecutor in state proceedings yet introduced on federal habeas in support of a Brady claim already adjudicated by the state courts.

2. It is not clearly established whether Cullen v Pinholster relieves the state of its affirmative duty to disclose exculpatory or impeachment evidence during the federal appeal process, when as here the defendant used due diligence to try to obtain the exculpatory and impeachment evidence during state court proceedings and the state remained unconstitutionally silent.

3. Brady v Maryland has always been clearly established federal law for the purpose of federal habeas proceedings. However, the State argued and the District court agreed that Cullen v Pinholster would bar the court from reviewing the new evidence my discovery request would produce. If Pinholster actually bar's the introduction of evidence disclosed by the state in federal habeas proceedings then the well established line of cases under Brady will no longer have any meaning. It is important to a defendant's right to a fair trial that this Court answers the questions and explain the differences between Pinholster which deals with a Strickland violation and Brady which deals with the prosecutors suppression of exculpatory and impeachment evidence.

Does Cullen v Pinholster 563 U.S. 170, 181 (2011) bar consideration of new evidence in federal habeas proceedings, when in a case like mine, the prosecutor [deliberately] presented false testimony to rebut the defense theory of the case and the truthful testimony I gave on the stand, and refused to disclose the exculpatory and impeachment evidence that would prove that testimony was false?

This Courts decision in Pinholster dealt with a Strickland violation of ineffective assistance of counsel. It is unclear whether that decision transfers over to a Brady violation of suppressed exculpatory and impeachment evidence.

In 2013 in the case of Milke v Ryan NO: 07-99001 the Ninth Circuit Court of Appeal noted in footnote 3:

> It's an open question whether Cullen v Pinholster, 131 S.Ct. 1388, 1398 (2011), applies to evidence that is suppressed by the prosecution in state proceedings yet introduced on federal habeas in support of a Brady Claim already adjudicated by the state courts. see Gonzales v Wong, 667 F.3d 965, 999-1001, 1013-17 (9th Cir. 2011) (W. Fletcher, J., concurring); Pinholster, 1388 S.Ct. at 1417 n.5. (Sotomayor J., dissenting) ("I assume that the Majority does not intend to suggest that review is limited to state Courts records when a petitioner's inability to develop the facts supporting his claim was the fault of the State Court itself.") id at 1417-18 ("Consider for example, a petitioner who diligently attempted in state Court to develop the factual basis of a claim that the prosecutor withheld exculpatory witness statements in

violation of Brady v maryland....") Because we concluded that the withholding of the report distorted the fact finding process so as to render the state Court finding defective, we need not consider whether the report could be considered on federal habeas under this alternative theory.

In Pinholster the warden contended that the prisoner's evidence of mitigation which counsel failed to provide during the death penalty phase was improperly considered on federal habeas review, and that in any event, the prisoner failed to show ineffective assistance of counsel.

The U.S. supreme Court held that habeas corpus review under 28 U.S.C.S. § 2254 (d)(1) was limited to the records that was before the state court which adjudicated the prisoner's claim on the merit, and on the record before the state court, the prisoner was not entitled to habeas relief.

The Honorable Justices Sotomayor, Ginsburg and Kagan voiced their concern and recognized that some habeas petitioners are unable to develop the factual basis of their claims in state court through no fault of their own.

We have long recognized that some diligent habeas petitioners are unable to develop all the facts supporting their claims in state Court. See e.g., Michael williams, 529 U.S. 420, 432, 120 S.Ct. 1479, 146 L.Ed.2d 435 (2000) (noting that diligent efforts to develop the facts might be "twarted, for example, by the conduct of another or by happenstance"); Id., at 434, 120 S.Ct. 1479, 146 L.Ed.2d 435 (noting that the prosecutor might have "concealed the facts" [***72] supporting a claim which was pursued with diligence");...

The Honorable Justices seem to point out that this Courts decision in Pinholster over looked the Brady line of cases, where the Prosecutor used false testimony to obtain the conviction, then throughout the state appeal process refused to disclose the exculpatory and impeachment evidence that would prove that testimony was false.

In addition, this Courts decision in Pinholster acknowledged that state prisoners may sometimes present new evidence in federal Court. Id at HN8

> Although state prisoners may sometime submit new evidence in federal Court, AEDPA's statutory scheme is designed to strongly discourage them from doing so. Provisions like §2254 (d)(1) and (e)(2) ensure that [f]ederal Courts sitting in habeas are not an alternative forum for trying facts and issues which a prisoner made insufficient effort [****573] to pursue in state proceedings.

However, this Court left the question open on whether the Honorable Justice Sotomayor's hypothesis of undisclosed Brady material meets that criteria.

In my case I went to trial to prove my innocense. I utilized the protection guaranteed to me by the Constitution. which include but is not limited to the right to clear notice so I may prepare a defense, compel witnesses to establish that defense and testify on my behalf

The prosecutor violated my constitutional right to a fair trial by doing the unthinkable. He elicited false testimony to rebut the defense theory of the case, the credible testimony I gave on the stand, as well as the jurors determination of facts, he relied upon that false testimony in his closing argument, and refused to disclose the exculpatory and impeachment evidence that would prove that testimony was false.

Now a decade later I am still trying to obtain the evidence I need to prove my innocence. while I was in state court I put in numerous request for disclosure, request to compel disclosure, special actions and request for admissions. (exhibit G)

However, the state remained unconstitutionally silent and I never received the exculpatory and impeachment evidence to present it in state court.

In the Federal Court system I once again tried to obtain the exculpatory and impeachment evidence the state suppressed. (exhibit H) Now the State is arguing that I have no constitutional right to disclosure in federal habeas proceedings, and that Pinholster would bar any new evidence my discovery request would produce. In essence saying since they did not meet their affirmative duty to disclose in State Court, in violation of Brady and its progeny, Pinholster bars the federal Court from reviewing it now.

The state is relying upon its misinterpretation of this Courts ruling in Pinholster to excuse its violation of the Brady doctrine. Thereby, once again denying me my constitutional right to have my claims fairly adjudicated in federal court. Inaddition, the state is still denying me my right to the exculpatory evidence that would prove my innocence and the impeachment evidence that would prove that my constitutional right to a fair trial was violated.

In Pinholster the court dealt with an ineffective assistance of counsel claim where the counsel either had or had access to mitigating evidence which Pinholster claimed that his counsel should have presented to the court during sentencing. However, even though he had access to the mitigating evidence he never presented it to the state Court.

In my case I claimed actual innocense. I provided testimony to prove this fact. I testified on the stand and explained that I could not have committed most of these crimes because I did not move in with Antoinette until the last part of 1995. I explained that Carmen did not live with Antoinette and I until about 1996 and she only lived with Antoinette for about a year.

The prosecutor brought Carmen back on the stand to rebut my testimony, deceive the jury and meet his burden of proof. In other words the prosecutor brought Carmen back on the stand to commit fraud upon the Court. The whole story she told and the reason why she did not live with Antoinette in 1996 was a lie. The CPS records will prove this. However, I cannot obtain the exculpatory and impeachment evidence unless the state discloses it.

The main differences between Pinholsters claim and a Brady claim, Is that Pinholster had access to the new evidence and he could and should have presented it to the state court and preserved it for federal reveiw. In a Brady claim like mine a petitioner does not have access to the information or evidence. In addition, he can only obtain the exculpatory or impeachment evidence if the state chooses to disclose it. If the state does not meet its affirmative duty to disclose then a Petitioner cannot present the exculpatory or impeachment evidence in State Court.

(?)

Since this courts decision in Pinholster the state of California has found that the prosecutors practice of withholding exculpatory evidence is criminal and has made it a crime punishable as a felony if a prosecutor withholds exculpatory evidence.

In 2013 in the case of Milke v Ryan the Ninth Circuit Court of Appeals held that the prosecutor withholding of the report distorted the fact-finding process so as to render the state-court finding defective.

In 2015 in the case of Comstock v Humphries the Ninth Circuit Court of Appeals over turned the conviction because the state suppressed the ring owners statement and it was Brady material because it supported the defense theory of the case.

On or about 2020 the Arizona Supreme Court changed the rules governing Post-Conviction Relief. And added a provision (Rule 32.6 (b) (1) (2)) for pre-petition discovery.

3

Comstock v Humphries also held that "there is no dispute that Brady constitutes clearly established federal law for the purposes of the Antiterrorism and Effective Death Penalty Act of 1996.

In my case the prosecutor brought Carmen back on the stand with the specific purpose of disputing the defense's theory of the case, the testimony I gave on the stand and to meet his burden of proof. (see exhibit J)

My Testimony pages 85 line 23 through page 86 line 14

23 Q. ..., how long did you live with Antoinette at that address at 79th Avenue and Indian School?

1 A. To 1996 --

2 Q. And why are you so sure of the date?

3 A. -- December, because the fire was in November, that's when my grandfather died, and we all agreed on that. Even Antoinette agreed on that. That's how I know, just because of that. If it wasn't for that fire, I would not even know when it was.

9. Q. What was that, sir?

10 A. If it wasn't for the fire, I wouldn't even know when it was. Yeah.

12 Q. Okay. Fair enough. The event is the fire that you recall?

14 A. The fire is when I recall

pages 87 line 1 – 17

1 Q. And who is Carmen? Tell me about Carmen.

2 A. Carmen is Antoinette's niece.

3 Q. And did she live with Antoinette?

4 A. Yes, she lived with us in 1996, because -- we know that for a fact because the same thing with the fire, she was drying some clothes and the dryer caught on fire.

7 It wasn't her fault, you know, it was just something that happens. That's what the detective told us, the inspector.

10 Q. And that was Carmen?

11. A. That was Carmen.

12. Q And how long had she been living there? When did she come to live at the address at 79th Avenue and Indian School?

15 A. I don't remember. She hadn't been living there that long, though. I don't remember. I know she was living there less than a year, so.

pages 121 line 25 - page 122 line 8 and 20 - 23

25 Q. By Mr. Cohen: It's your testimony that Carmen lived with you when she was 13?

2 A. Yes, my testimony, Antoinette's testimony and my sister Lisa's testimony--

4 Mr. Cohen: objection, not responsive. Will the Court please direct the witness to answer the question

7 The witness: Yes, I will do it. I'm sorry.

20 Q. So you never lived-- is it your testimony that you never lived in the same house with the children before 1995?

23 A. Yes, before 1995, never.

Carmen's testimony Rebbutal page 150 line 13 page 151 line 25

13 Q. Now you've had the opportunity to watch the defendant's testimony?

15. A. Correct.

16. Q. And in your previous testimony you indicated that you were

living Antoinette and the defendant when you were 11 years old?
A. Right
Q. And to be clear, when is your birthday?
A. 2/6 of '83.
Q. So you would have been 11 beginning February 6 1994?
A. Correct.
Q. Through February of 1995?
A. correct
Q. Now, you heard the defendant's -- well what address were you living at when you first moved in?
A. Fairmount, the one on Indian School and 79th, 77th, around that area.
Q. Now, you heard the defendant testify that you didn't come to live with them until you were 13 years old?
A. Correct
Q Is that true?
A. No, that's not true
Q. And how are you so sure that it couldn't have been when you were 13?
A. At 13 years old I was pregnant with my son, and I was out of the home at that time -- or out of Antoinette's home. I ran away, and I was placed in juvenile. From juvenile, I went to Black Canyon and from Black Canyon, I went to a home in Tucson. It was so I could care for my son there, and I gave birth to my son August

21. 10, 1997

Then the Prosecutor relied upon this false testimony in his closing argument. page 34 20-24

34. Carmilita told you that she was positive that these events happened when she was 11 because by the time she was 13, she was in juvenile, she was pregnant, and no longer living at the home.

The reason we knew Carmen's testimony was a lie is because she was there the night the house caught on fire. The house fire was in November of 1996 and the only reason we know this is because that was the night my grandfather died. Before the house caught of fire Carmen was spending alot of time with her mother (nights, weekends, summer). After the house caught on fire Carmen moved in with her mother. If she had her son on August 10 1997 that would mean she got pregnant around December. That was after we moved out of the house on fairmount.

So after my trial I started filing request for disclosure, request to compel disclosure, request for admissions and special actions to prove that testimony was false. However, the State of Arizona refused to disclose Carmen's CPS records during state court proceedings and argued in my federal habeas that Pinholster would bar the district court from considering any new evidence my discovery request would produce.

The harsh reality is the prosecutor should have known Carmen's testimony was false. Not only because he had the CPS records in his direct possession, but also because I informed him at my settlement conference that I did not move in with Antoinette until 1995. And this was the evidence I would be relying on to prove my innocence. (exhibit F) (page 23 lines 13-15)

13. The Defendant: what is it we have to prove - we actually have to prove to you that I didn't do these things to you in court?

Page 24 lines 17-21

17. The Defendant: Let's say I try to prove my innocence. ...

20. The Defendant: How would I do that? what would I need to prove my innocence?

Page 33 line 14 through Page 34 line 7

14. The Defendant: The whole thing that's scary about it is this: I can prove most of it. I can't prove all of it, and that is sorry. I can only prove some of it.

18. The Court: And that is the risk that Mr. Cohen is talking about--

20. The Defendant: I can prove it

21. Mr. Simpson: Well, when you say "it"—when you say "prove it" you're talking about them making an inconsistent statement?

24. The Defendant: No, I'm talking about me not being at the time

1. they said this happened. I didn't get what they said till 95. They said this happened in 89. I wasn't there. There were other people living at the house at this time, her uncles, her dad, everybody else living at this one place at this time. On this one place they said it happened, one place I wasn't even living there. I never lived there with her,

Page 34 line 8 through Page 35 line

8. The Court. This is how I would think about it, Mr. Gonzales, if I were you. I'd sit down and look at the 18 counts. And if you were, as you just said, convinced that, "As to this count there's no way they can prove this count against me because I did not live there at this time"--

14. The Defendant: Yes

15. The Court: Okay, cross that off in your head. But then look at what remains. How many of those 18 counts would you not be able to prove?

18. The Defendant Four. ...

19. The Court: And so if you think about those four, then take into account if they convict me on those four, say the trial goes as well as you can hope and on 14 of the counts there convinced he didn't do it and they come back "not guilty" on 14 counts, but they convict on those four, then where does that leave you in terms of going to prison for what period of time?

1. The Defendant: A lot.

2. The Court: Yeah, That's -- so maybe thats the way to focus, instead of focusing on the ones that you think you didn't do and I'm not--

6. The Defendant: I didn't do none of them. I didn't do none of them. There's only four I can't prove because-- I cant prove them because the statements aren't made.

The state is relying upon its misinterpretation of this Courts ruling in Pinholster to excuse its violation of its affirmative duty to disclose the exculpatory evidence that would prove my innocence and the impeachment evidence that would prove my Constitutional right to a fair trial was violated.

Inaddition, the state is showing its total disrespect to the Brady Doctrine, ABA guidelines, the law and Constitution.

Furthermore, the state is bringing the very integrity of the judicial system into question.

Under the Supremacy Clause of the United States Constitution this Court has an obligation to protect the integrity of the Judiciary and follow the Constitution. This Court may not allow the state to continue violating a defendant's constitutional Right to a fair trial. The Constitution itself forbids it.

moreover, this Court must not allow the state Prosecutor to violate the very integrity of the justice system by presenting false testimony to obtain a conviction, then hide the evidence that would prove that testimony was false. Especially, when the evidence it's hiding will prove a defendant's actual innocence.

Since its inception the Constitution and this Court have forbidden that Practice.

For those reasons, in the interest of justice, I pray this Court will answer the Constitutional question of Law and Facts.

Reason why this question should be answered by this Court 4

4 To protect every person's constitutional right to a fair trial and equal protection of law it is important for this court to establish whether Napue is part of the Brady, Giglio and Kyles line of cases. where the knowledge of the investigating agency acting on the government behalf imputed to the prosecutor

In Reis-Campos v Biter, 832 F.3d 968 (2016) at 977 and footnote 8 the Ninth Circuit Court of Appeals did not clarify this issue.

While the supreme court has clearly established that the prosecutor's Brady duty encompasses evidence "known only to police investigators and not to the prosecutor." Kyles, 514 U.S. at 437-38, 115 S.Ct. 1555, it is not clearly established that a police officer's knowledge of false testimony may be attributed to the prosecutor under Napue. See Briscoe v. La Hue, 460 U.S. 325, 326 n.1, 103 S.Ct. 1108, 751 L.Ed.2d 96 (1983)(noting that while the supreme Court had "held that the prosecutor's knowing use of perjured testimony violates due process," the Court had "not held that the false testimony of a police officer in itself violates constitutional rights") Several of our sister circuits have recognized this lack of clarity[8]. Further, the federal courts are split on the substantive issue. The Fourth and Second circuits have held that "knowingly false or misleading testimony by a law enforcement officer is imputed to the prosecutor for purposes of determining whether there was a Napue violation. Boyd v French, 147 F.3d 319, 329 (4th Cir. 1998); Wedra v. Thomas, 671 F.2d 713, 717 n.1 (2nd Cir. 1982) The Tenth and Fifth circuits have declined to impute the knowledge of a law enforcement officer to the prosecution where there has been an alleged Napue violation. See Smith v Sec'y of N.M. Dep't of Corr., 50 F.3d 801, 830-31 (10th Cir. 1995); Koch v Puckett, 907 F.2d 524, 531 (5th Cir. 1990) our Court has not yet addressed the question.

Is Napue part of the Brady line of cases where the knowledge of the investigating agency (including the police) acting on the governments behalf imputed to the prosecution?

Is the knowledge of the detective imputed to the prosecutor for the purpose of a Napue claim?

In the Brady line of cases it is well established that the knowledge of the investigating agency, including the police, acting on the government's behalf is imputed to the prosecutor. See Kyles v Whitley 514 U.S. 419 (1995)

The prosecutor who alone can know what is disclosed, must be assigned the responsibility to gauge the likely net effect of all such evidence and make disclosure when the point of reasonabe probability is reached. Moreover, that responsibility remains regardless of any failure by the police to bring favorable evidence to the prosecutors attention. To bring otherwise would amount to a serious change of course from the Brady line of cases.

Brady itself was just an extention of Mooney v Holohan, 294 U.S. 103, 112, 79 L.Ed 791, 794, 55 S.Ct. 340, 98 ALR 406 (1935) where the court ruled on what nondisclosure by a prosecutor violated due process. Brady 373 U.S. 86

It is a requirement that cannot be deemed to be satisfied by mere notice and hearing if a State has contrived a conviction through the pretense of a trial which in truth is but a means of depriving a defendant of liberty through a deliberate deception of the court and jury by the presentation of testimony known to be perjured. Such a contrivance by a State to procure the conviction and imprisonment of a defendant is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation.

In fact this Court relied upon the decision in Mooney v Holohan and its progeny Pyle v Kansas and Napue v Illinois when it announced its decision in Brady

In Pyle v Kansas, 317 U.S. 213, 215, 216, 87 L.Ed. 214, 216, 63 S.ct. 177, this court phrased the rule of mooney in broader terms. Id at Brady 373 U.S. 86

Petitioner's papers are inexpertly drawn, but they do set forth allegations that his imprisonment resulted from perjured testimony, knowingly used by the state authorities to obtain his conviction, and from the deliberate suppression by those same authorities of evidence favorable to him. These allegations sufficiently charge a deprivation of rights guaranteed by the federal constitution, and, if proven, would entitle petitioner to release from his present custody. Mooney v Holohan, 294 U.S. 103

In Napue v Illinois, 360 U.S. 264 this court extended the test formulated in mooney v Holohan. Id at Brady 373 U.S. 87

The same result obtains when the state, although not soliciting false evidence, allows it to go by uncorrected when it appears.

It is well established that Brady is an extention of the Mooney line of cases which Napue is apart. Each decision after Mooney clarified the prosecutors responsibility during criminal trials. See Giglio v United States 405 U.S. 150, 153-154

As long as Mooney v Holohan, 294 U.S. 103, 112, 79 L.Ed. 791, 794, 55 S.ct. 340, 98 ALR 406 (1935) this court made clear that deliberate deception of a court and jurors by the presentation of known false evidence is incompatable with "rudimentary demands of justice." This was reaffirmed in Pyle v Kansas, 317 U.S 213 87 L.Ed 214, 63 S.Ct. 177 (1942). In Napue v Illinois, 360 U.S. 264, 3 L.Ed 2d 1217, 79 S.ct. 1173 (1959) we said, "the same result obtains when the state, although not soliciting false evidence, allows it to go by uncorrected when it appears."

Id, at 296, 3 L.Ed 2d at 1221. Thereafter, Brady v Maryland, 373 U.S. at 87, 10 L.Ed.2d at 218, 83 S.Ct. 1194 [1963], held that suppression of material evidence justifies a new trial "irrespective of the good faith or bad faith of the prosecution." see American Bar Association, Project on Standards for Criminal Justice, Prosecutors function and the Defense function 3.11 (a) when the "reliability of a given witness may well be determative of guilt or innocence", disclosure of evidence affecting credibility falls within this general rule...

In Kyles v Whitley, 514 U.S. 419 (1995) this court established that the knowledge of the investigating agency, including the police, assigned to a case is imputed to the prosecutor for the Brady line of cases.

Thus, the prosecutor, who alone can know what is undisclosed must be assigned the responsibility to gauge the likely net effect of all such evidence and make disclosure when the point of "reasonable probability" is reached. moreover, that responsibility remains regardless of any failure by the police to bring favorable evidence to the prosecutor's attention. To hold otherwise would amount to a serious change of course from the Brady line of cases.

Even in Kyles v. Whitley this court recognized that a Brady claim could arise when the prosecutor introduced trial testimony that it knew or should have known was false. Id at 514 U.S. 433.

In United States v Argurs, 427 U.S. 97, 49 L.Ed.2d 342, 96 S.Ct. 2392 (1976) it became clear that a defendant's failure to request favorable evidence did not leave the Government free of all obligation. There, the court distinguished three situations in which a Brady claim might arise: First, where previously undisclosed evidence revealed that the prosecutor introduced trial testimony that it knew or should have known was perjured. 427 U.S. at 103-104, 49 L.Ed 2d 342, 96 ...

Regardless as to whether it was this courts decision in Mooney, Napue, Giglio, Kyles or any of the Brady line of cases, this court came to the same conclusion, The state may not use false testimony to obtain a conviction. The Constitution strickly forbids it, because, the use of false testimony violates a defendants fifth, sixth and fourteenth amendment right to a fair trial.

See Napue v Illinois Id at 360 U.S. 269-270

> "It is of no consequence that the falsehood bore upon the witness' credibility rather than directly upon defendant's guilt. A lie is a lie no matter what its subject, and, if it is any way relevant to the case, the district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth, ...
>
> That the district attorney's silence was not the result of guile or a desire to prejudice matters little, for its impact was the same, preventing, as it did, a trial that could in any real sence be termed fair."

For those reasons I contend that Napue v Illinois is part of the Brady line of cases. So the knowledge of the investigating agency, including the police, assigned to a case must be imputed to the prosecutor for a Napue claim.

I pray this court will resolve this mixed question of law and facts and provide me with a fair trial.

In my case I put up a defense that these were false allegation brought against me by Antoinette because we were going through a disputed Child custody / Divorce Proceeding and I was seeing another woman.

Because of a questien asked by the jury and answered by the State's expert witness Dr. Dutton, the jury had a factual base to consider my Defense. Jurors Question to Dr. Dutton p.91, 21 - p92, 9

14. All right, what does research tell us about false accusation of abuse.

21. The witness: The research on false allegations are what I call malicious false allegations. These are allegations that are made for some ulterior motive or secondary gain.

25. what the reasearch shows, that when they occur they typically occur most often in one of two situations. The first is generally involving younger children whose parents are involved in high-conflict divorce or custody disputes. Most often the false allegation arises from one of the parents or the adult in an effect to gain advantage in the custody dispute and the child might be coached or encouraged to make a false allegation. There are some children who do initiate false allegations themselves. (exhibit K)

The fact that Antoinette and I were going through a child Custody and Divorce proceeding, when Antoinette brought these allegations against me, was undisputed until a juror asked Antoinette a question, the last day of trial, on rebuttal. (See exhibit E Magistrates R and R p. 33, 9 - p.)

9. Petitioner argues that A.A. provided inconsistent testimony with regard to the timing of her divorce from Petitioner and when she notified authorities about her concerns of Petitioner's sexual abuse of the girls. (Doc. 34 at 11-14) On rebuttal testimony during the last day of trial, the court posed a juror question to A.A., initiating the following questioning and testimony:

14. The Court: You never called the police ever until 2011 about [Petitioner]. Is it fair to say that you started calling the police on [Petitioner] when divorce proceedings started and [Petitioner] was seeing other women?

16 [A.A] That's a negative. I called the police because my daughter [K.G.] went to go stay with [Petitioner], and I had suspicion that he did something to her. I talked to my daughters and I told them they needed to tell me the truth, if he actually did something to them, because I was worried that he did something to my daughter, and thats when I called the police.

20 (Doc. 56-5 at 187) Subsequently, defense counsel questioned A.A. further:

21. Q. And one of the jury questions was asked about the timing of it all. You have a different reason for it, but you don't dispute that in 2011, according to your prior testimony, you were going through a heated divorce and child custody proceeding: is that true?

24. [AA] After I had suspicion that he had did something to my daughter, yes.

26 Q. And most of these answers call for a yes or no [answer], so if I'm not being clear, please let me know. Yes or

27. no, is it at this time you were going through a child custody and divorce proceeding, yes or no?
28. [A.A.] Yes.
1. Q. And you were aware he was seeing another woman at this time as well?
3. [A.A.] Yes
4. Q. So its just a coincidence that these allegations remained untouched for 20 years and now you call law enforcement when your going through a child custody, divorce, and you were aware that he was dating another woman, that's just a pure coincidence, yes or no
7. [A.A] Yes, it is a pure coincidence.

8. (Id. at 191-92) Immediately thereafter, the prosecutor questioned A.A. as follows:
9. Q. You were already divorced from [Petitioner] in July of 2011?
11 [A.A] Yes.
12. Q. And custody by that time had been resolved?
13. [A.A.] Yes
14. Q. So were there any pending court proceedings at that point in time?
15. [A.A] NO.
16. Q Did you care at that point in time if [Petitioner] was seeing another woman?
18 [A.A.] No, I didn't.
19 Q You were divorced

[A.A.] Yes
Q. And 2011 isn't the first time that you heard [A.Y. and T.Y.] come forward about things that [Petitioner] had done to them?
[A.A.] No its not the first time
(Id. at 192-193)

The state PCR record includes a copy of the decree of dissolution of A.A.'s and Petitioner's marriage dated March 7, 2012, in the Maricopa County Superior Court. (Doc. 45-4 at 37-42) The Decree indicates that A.A. filed a petition for dissolution on February 4 2011. (Id at 37) Accordingly, it Appears that A.A.'s first statement that she was involved in a divorce action in 2011 was accurate, and that custody of the children had been resolved in 2011 was not accurate. Petitioner, however, does not establish that the prosecutor knew or should have known that A.A.'s second statement was false. Petitioner's argument that the prosecutor knew or should have known that A.A.'s second statement was false is that: (1) A.A. made the first statement, that is, "clearly" answering "yes" to the question about whether she was in the mist of divorce proceedings when she made the allegations leading to Petitioner's prosecution; and (2) "the detective knew at the time [A.A.] brought these charges ... that [Petitioner and A.A.] were going through a child custody/Divorce proceeding and that [Petitioner and A.A.] had a court apperance the next morning." (Doc 47 at 10) Petitioner provides no support for the statement that Detective Scheffer knew about the timing of divorce proceeding. Further, Because Petitioner alleges a police office, not the prosecutor, knew about the timing of the divorce proceeding this does not "adequately allege a violation of clearly established federal law with respect to [Petitioner's] Napue claim." Reis-Campos v. Biter, 832 F.3d 968, 977 (9th Cir. 2016) The Arizona Court of Appeals rightly concluded that A.A's conflicting testimony was for the jury to decide.

The support I provided that the detective knew Antoinette lied I presented in my Reply to States Response page 8 through page 13 (exhibit L)

page 11 line 3 to 5

3 This claim depends fully on the evidence that was presented to this Court by the state in its exhibits, which include trial transcripts, police report and my divorce decree, all of which I presented to the state Courts, at the proper time and in the proper manner.

See also Antoinette's interview with police (exhibit M)

page 7 3rd AG: well my soon to be ex molesting them...

page 10 4th AG: my soon to be ex's aunt

page 13 line 1-17 we go to court tomorro because he is fighting the order of protection.

And order of protection that the Detective had obtained that clearly states Antoinette and I are still married at that time (exhibit N)

The only evidence I have to prove the prosecutor knew or should have known Antoinette lied is:

- The theme at trial was already set, that the defense theory of the case was that Antoinette brought these false allegations against me because we were going through a divorce child custody proceeding and I was seeing Leticia, and the jurors had a factual bases to consider that defense.
- Both Antoinette and I testified "under oath" that at the time

she brought these charges against me we were going through a child custody and divorce proceeding.

- Just minutes after Antoinette testified truthfully the prosecutor elicited the false testimony Antoinette gave.
- The police reports and order of protection was in the direct control of the prosecutor because the prosecutor was the one who disclosed it to the defense

With it being fully establish that the prosecutor elicited the false testimony Antoinette gave about a material issue, the District Judge over looked those important facts and held: page 12 line 17 - page 13 line 7

17 Based on the Divorce decree, Gonzales has established that A.A presented false testimony. But Gonzales has failed to establish the second element, that the prosecutor who elicited A.A's false testimony (that in July 2011, she was "already divorced" from Gonzales and had resolved custody) knew or should have known it was false. Gonzales objects it is "undisputed" that "the police reports prove that [testimony] was a lie and the detective knew it was a lie." (Doc. 60 at 14) But the R&R directly addressed this argument, stating first Gonzales failed to establish the detective knew about the timing of the divorce proceedings, and second Gonzales failed adequately to alleged the prosecutor knew about the timing of the divorce proceeding (Doc. 59 at 35) Gonzales' objection to this latter conclusion is "This is a complete contradiction with line 5." Line 5 of that page contains the R&R conclusion that Gonzales did not establish the prosecutor knew or should have known A.A's second statement was false. The Arizona Court of Appeals concluded Gonzales' contentions were "unsupported," "nothing in the record suggest

that the prosecutor engaged in misconduct, much less intentional misconduct, with respect to the evidence presented to the jury" and "the credibility for the witness was for the jury to decide." (Doc 45-3 at 80)

4* Crucially it is not clearly established that the knowledge of a detective should be imputed to a prosecutor for purposes of a Napue claim, Ruis-Compos v. Bitter, 832 F.3d 968, 977 (9th Cir. 2016) Thus, even if the detective knew A.Ai testimony was false, that is not enough.

The investigation by the investigating agency assigned to a case, including the police, is the most important part of the prosecutors case. The information they produce is how the prosecutor determines what charges to bring against a defendant.

Inaddition, the information and or evidence they uncover could be the only means a defendant (like myself) could prove his actual innocence or establish their defense.

The Constitution guarantees a defendant a right to a fair trial. It would go against the concept of justice and truth seeking function of the trial by jury process, violate a defendants fifth, sixth and fourteenth amendment right to Due Process of law, prepair and present a defense, obtain witnesses to establish that defense to allow a State prosecutor to elict false testimony that he should have known was false to obtain a conviction. Furthermore, it would go against the very fabric of Supreme court precedence, including but not limited to Brady, Giglio, Argues and Kyles not to impute the knowledge of the investigating agency including the police to the prosecution for a Napue claim.

For those reasons I pray this Court will answer this disputed question of law.

Reason why these questions should be addressed by this Court 5

It is fully establish that the prosecutor has an affirmative duty to disclose exculpatory and impeachment evidence. However, the prosecutor does not always meet its affirmative duty to disclose.

In my case the prosecutor is actually concealing the exculpatory and impeachment evidence he is required to disclose. While I was in state court I put in numerous request for disclosure, motions to compel disclosure, special actions and request for admissions (exhibit B) But the state just remained unconstitutionally silent.

When I entered the Federal Habeas proceedings I sent the State a request to disclose the exculpatory evidence that would prove my innocence and the impeachment evidence that would prove that my trial was fundamentally unfair. As well as petitions to compel disclosure and request for admissions. However, the state argued that even if the federal court ordered them to disclose the new evidence my discovey request would produce, it would be futile because Pinholster would bar them from considering it (exhibit I)

Then to ad insult to injury the state argues that the court could not consider my Brady claim because I could not speculate what the undisclosed evidence would produce. (The Court agreed with this argument)

In my case, while I was in state court, the State clearly hid the exculpatory evidence that would prove my innocence and the impeachment evidence that would prove my constitutional right to a fair trial was violated. Then the state benefitted from its misconduct when I got to federal court.

If the State were allowed to continue this pactice the integrity of the Judiciary would be in question. The only provision I know of that would allow a defendant to obtain the evidence the State is hiding is a request for admission.

Request for admissions, although not introduced for this specific purpose, maybe the only means a Petitioner has to establish his Brady or Napue Claim and his innocence.

Thereby if, as here, a Petitioner request the State to admit or deny that the CPS reports (now DCS) prove the alleged victim (CS) did not live at the residence in question on or between February 6 1994 through February 5 1995, the State would merely answer yes they prove this fact or no they do not prove this fact. In the alternative, make an admission by remaining silent. It is that simple.

Due diligence is relatively part of every criminal procedure. A Due Diligence requirement could easily be incorporated into a request for admission to insure this procedure is not abused or used for questionable purposes.

In these particular instances, where in cases like mine the prosecutor refused to meet its affirmative duty to disclose, the interest of justice and search for the truth suggests that a petitioner should be able to rely upon the Fed. R. Civ. P. Rule 36 the rule governing request for admissions, to establish his Brady or Napue claim and his actual innocence.

For those reasons I pray this Court will answer this question of fact and law and permit a Petitioner to rely upon the Fed. R. Civ. P. Rule 36 the rule governing a request for admission to establish his Brady or Napue Claim and his innocence.

Under the Due Process clause of the fifth and fourteenth amendment, as well as, the sixth amendment clear notice and compulsory clause, does an alibi, if proven, prove a defendant's innocence of the crime charged?

It is well established that the due process clause of the fifth and fourteenth amendment is put in place to insure a criminal defendant receives a fair trial. Furthermore, the sixth amendment's clear notice and compulsory clause are put in place to insure he has actual and constructive knowledge of the crime charge so he can prepare to meet those charges.

The fifth amendment to the United States Constitution places a high burden on the State to prove the charges they place on a defendant. In criminal trials this burden is proof beyond a reasonable doubt of every element necessary that constitutes the crime charged. This high burden is put in place to insure an innocent man will not suffer punishment for a crime he did not commit.

In every type of criminal case the state is limited to the charging terms set on the indictment or information. See Ariz. R. Crim. P. 13.5 (b)

> A preliminary hearing or grand jury indictment limits the trial to the specific charge or charges stated in the magistrate's order or the grand jury indictment. . . .

This includes the actual timelimit set by the indictment. When an alibi defense is asserted time of crime is extremely material since any variance in the time proved and time jury is allowed to find deprives defendant of an alibi defense. Thereby, if the indictment or information charged that a defendant committed the crime on or between February 6 1994 through February 5 1995, but if the defendant proves he and/or the alledged victim were somewhere other than the scene of the crime on that specific date he has proven his innocence of the crime charged. See Black's Law Abrige. Seventh Edition.

A defense based on the physical impossibility of a defendant's guilt by placing the defendant in a location other than the scene of the crime at the relevant time. Fed. R. Crim. P 12.1

However, the state may rebut an alibi defense with witnesses and evidence to prove the defendant and alledged victim were at the scene of the crime at the relevant time. Then it would be up to the jury to decide if the defendant presented a valid alibi defense or if the prosecutor met his burden of proof.

Nevertheless, the prosecutor may not introduce false testimony that he knew or should have known was false to rebut an alibi defense to meet his burden of proof. This is strickly forbidden by the United States Supreme Court. See the Brady line of cases which Napue is apart.

This Court's reasoning was based upon the fundamental principle that the constitution guarantees a defendant a fair trial. Inaddition, for the government to present testimony known to be false would violate the very integrity of the judiciary and public confidence in the judicial process. Furthermore, it would be inconceivable to allow a jury to base its decision on testimony known to be false, because it would violate the Truth seeking function of the Trial by jury.

Reason why these questions should be addressed by this Court

6

It is clearly established that the sixth amendment's clear notice clause is put in place so a defendant may know the charges and their grounds so he may prepair a defense. And the compulsory clause was put in place to give a defendant a fair opportunity to establish that defense.

However, it is an open question whether a alibi if proven proves a defendant's innocence of the crime charged.

The state and federal government are in dispute of this issue. The Ninth Circuit Court of Appeals has held in Comstock v Humphries 786 F.3d 701 (2005) that I did not have to prove my innocence of an uncharged crime. see HN16

> We evaluate the materiality of Brady evidence based on the crime charged not based on the crimes that might have been charged.

However, the Arizona court of Appeals suggest that I not only have to have an alibi for a crime charged but my alibi must be sufficient to establish that the alleged victim or I were not present for a crime that could have been charged. (exhibit c) (¶ 19)

> First, Defendant contends that the prosecutor engaged in prosecutorial misconduct by knowingly violating Brady v Maryland 373 U.S. 83 (1963) According to Defendant the state failed to disclose documents - in particular, C.S.'s Child Protective Service ("CPS") records[3] - that would have shown that C.S. wrongly identified the years during which she lived and

interacted with him. Defendant asks that we conduct an in camera review of the records and enter an order compelling their disclosure. We deny this request and find no error. Under Ariz. R. Crim. P. 15.1 and Brady, 373 U.S. at 87, the State is required to timely disclose evidence material to guilt or punishment. When a witness's reliability may be determinative of guilt or innocence, material evidence affecting the witness's credibility must be disclosed. Giglio v. United States, 405 U.S. 150, 154 (1972). Defendant made no showing of materiality - though he argues that C.S. did not live with him during the years she claimed, he does not dispute that she lived with him at some point when she was less than fifteen years old, the age required to support the conviction for sexual abuse as a class 3 felony. See A.R.S. § 13-1404.

The indictment gave me clear notice that the crime I had to defend against was that on or between February 6 1994 through February 5 1995 I committed the crimes against (CS).

I informed the prosecutor, court and my Counsel that I would be presenting an alibi defense to prove my innocence. (see exhibit F settlement Conference page 33 14 through page 34 7)

14 The Defendant: The whole thing that's scary about it is this: I could prove most of it. I can't prove all of it, and that is sorry. I can only prove some of it.

18. The Court: And that is the risk that Mr. Cohen was talking about--

20 The Defendant: I can prove it.

21 Mr. Simpson: well, when you say "it" -- when you say "prove it".

you're talking about them making an inconsistent statement.

The Defendant: No, I'm talking about me not being at the time they said this happened. I didn't get what they said till '95. They said this happened in '89. I wasn't there. There were other people living at the house at this time, her uncles, her dad, everybody else living at this one place at this time.

On this one place they said it happened, one place I wasn't even living there. I never lived there with her.

If the Arizona Court of Appeals reasoning is taken as true, that I not only had to prove my innocence for the crime charged, that on or between February 6 1994 though February 5 1995 I committed the crimes against (cs), I also had to provide an alibi for the crimes that were not charged, anytime before she turned 15, then my sixth amendment right under the clear notice and compulsory clause to prepare and present a defense is meaningless.

The question itself is important to society for this reason; if a defendant bases his decision on whether to go to trial or take a plea on the assumption that he is actually innocent based upon an alibi. Then he must know that he not only has to provide an alibi for the crime charged he must also provide an alibi for a crime not charged.

This information, regardless whether he is guilty or innocent is vital for a defendant to make an informed decision whether to go to trial and risk spending the rest of his life in prison, or taking a plea and getting out in a few years.

The Constitution is the foundation of this great nation. The Constitution itself was written to insure our rights and freedom were protected. Our families and friends have fought and died to protect the freedoms and guarantees the Constitution provides. I once, as I am sure you have, swore an oath to protect the Constitution from all enemies foreign and domestic. Now I find myself in need of the protection's guaranteed to me by the Constitution.

The question itself seems to be simple but the answer seems to be in dispute.

The Ninth circuits decision in Comstock states that a defendant does "not" have to prove his innocence of an uncharged crime. Thereby, I take that to mean an alibi, if proven, proves a defendant's innocence of the crime charged.

In contrast the Arizona Court of Appeals places an impossible task on me when they suggest that I must also prove my innocence of an uncharged crime. Thereby, my alibi did not prove my innocence of the crime charged.

The Sixth amendment clear notice and compulsory clause are vital rights guaranteed so a defendant may prepare a defense. When the state gives a defendant clear notice that on or between February 6 1994 through February 5 1995 he committed the crime, then the facts he must prepare to meet are set in stone. The State cannot be allowed to say that the time frame specified in the indictment or information does not matter. Because this would be committing violence against the Constitution itself.

For these reasons I pray this Court answers this question.

CONCLUSION

Before AEDPA Federal Habeas Proceedings were about protecting a defendant's constitutional right to a fair trial. The court would consider an indigent prisoner's brief in the best possible manner for both exhaustion purposes and contents. The Courts came to this understanding because they were aware that prisoners did not have access to the information or case law that was vital to prepare a proper brief or argument. Nevertheless, for some odd reason the District Court no longer takes that into consideration.

I cannot understand the District Court's ruling because I presented my claims the best I could, with limited resources and little to no knowledge of the law, in State and Federal court.

My main argument has always been that I did not receive a fair trial because the prosecutor elicited false testimony to obtain my conviction and I was innocence. (see exhibit G)

From my understanding, of all the case law I have read, is the prosecutors may not use false testimony to obtain a conviction it is strickly forbidden by the constitution itself and ABA guidelines because it violates the truth seeking function of the trial by jury process and a Defendant's Constitutional rights to a fair trial. Inaddition, a prosecutor must disclose exculpatory and impeachment evidence.

The questions I presented are not clearly established Supreme Court rulings for the purposes of AEDPA, 28 U.S.C §2254 Habeas proceedings. But they should be because they have to do with a defendant right to a fair trial and what he actually has to prove to prove he is innocent. Inaddition, the prosecutors obligation to disclose in Federal habeas proceedings. The questions themselves are in dispute.

In Kyles v Whitley, 514 U.S. 419 (1995) all the Justices agreed that the Courts principle task in a case was to resolve mixed questions of law and fact.

If this Court were to resolve the mixed questions of Law and Fact left open in Pinholster, it would not amount to a new rule because it will not modify Brady or Pinholster in any substantial way. Under Brady the state will still have an affirmative duty to disclose exculpatory and impeachment evidence. And under Pinholster the petitioner would still have to show he used due diligence to try to obtain the undisclosed evidence in state court. The main reason this court should answer these questions is to protect individual rights. (see article 6 of the U.S. Constitution) The state cannot be allowed to hide the exculpatory evidence that would prove a Petitioner's actual innocence or the impeachment evidence that would prove his trial was unfair. Neither Brady or Pinholster permit this. The states reliance on Pinholster to hide the exculpatory and impeachment evidence I need to prove my innocence is reprehensible.

For those reasons I pray this Court will answer these mixed questions of Law and Fact.

Relief Requested

A Fair Trial or any other relief this Court finds is appropriate.

David Lopez Gonzales

This Petition was handwritten and contains no more than 40 pages not including preliminary pages, proof of service and exibits. David Lopez Gonzales

I David Lopez Gonzales swear under oath and penalty of perjury that everything written in this Petition is true to the best of my knowledge or belief.

David Lopez Gonzales