**No.**

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In the
Supreme Court of the United States

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GEORGE A. PILOLA,
Petitioner -Appellant

v.

CRAIG KOENIG, Acting Warden
Respondent-Appellee

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit 20-55756

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# PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

Should CERTIORARI be granted to review the following issues:

1) The failure of the prosecution to turn over the fingerprint showing no MAKE to Pilola was a violation of *Brady v. Maryland;*

`2) The untruthfulness of both the detective and the prosecutor about the recovery of the fingerprint was a violation of Due Process and *Napue v. Illinois*;

3) This petition additionally should be granted on the basis that the Ninth Circuit panel deciding this case refused to stay the appeal long enough to have the beer bottle examined and the expert retained by the defense, explain the meaning of NO MAKE referring to a print on the bottle. The petition was denied but with NO PREJUDICE to the filing of a motion in the Ninth Circuit to have that examination done by the defense expert. Then, when the motion was made by counsel for such an examination, it was denied by the Ninth Circuit panel. That was unreasonable. It deprived petitioner a chance of exculpation.

## PARTIES TO THE PROCEEDINGS

There are no parties to the proceeding other than those named in the caption of the case.

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Petitioner George Pilola, respectfully petitions the Court for a writ of certiorari to review the Memorandum Opinion of the United States Court of Appeals for the Ninth Circuit affirming the district court's denial of the section 2254 petition for a writ of habeas corpus. That court in turn upheld as reasonable the denial by the California Supreme Court of a petition for writ of habeas corpus raising as a prosecutorial and law-enforcement falsehood that there were no prints on the beer bottle used in the assault.

## WHY THIS PETITION SHOULD BE GRANTED

1) Because the failure of the prosecution to turn over the fingerprint showing no MAKE to Pilola was a violation of *Brady v. Maryland;*

2) Because the untruthfulness of both the detective and the prosecutor about the recovery of the fingerprint was a violation of Due Process and *Napue v. Illinois*;

3) This petition additionally should be granted on the basis that the Ninth Circuit panel deciding this case refused to stay the appeal long enough to have the beer bottle examined and the expert retained by the defense, explain the meaning of NO MAKE referring to a print on the bottle. The petition was denied but with NO PREJUDICE to the filing of a motion in the Ninth Circuit to have that examination done by the defense expert. Then, when the motion was made by counsel for such an examination, it was denied by the Ninth Circuit panel. That was unreasonable.

It is argued here that when the prosecutor and his law enforcement witness both lie that there were no fingerprints on a beer bottle used to commit a sex offense against a victim it cannot be harmless error. This is especially so because of the fact that the victim recanted her testimony after testifying.

## OPINIONS BELOW

On January 26, 2022, the Ninth Circuit Court of Appeals, (Ninth Circuit) in a five page Memorandum Opinion, affirmed the district court denial of petitioner's habeas corpus petition filed under 28 U.S.C. 2254. (Dkt 62-1.) Appendix A, 9th Ckt. Memorandum Opinion .

On April 11, 2022, the Ninth Circuit denied petitioner's petition for rehearing and rehearing en banc. Appendix B; Dkt. 70.

Preceding that denial was the Order of the United States District Court for the Central District of California denying the petition but granting a Certificate of Appealability. Appendix C, Dkts 66-67.

The Magistrate's Report and Recommendation is attached hereto along with the California Court of Appeal Opinion as Appendix D for both.

The Civil Dockets of both District Court and Ninth Circuit are in Appendix E.

## JURISDICTION

The Ninth Circuit affirmed the denial of the habeas corpus petition an on January 26, 2022 and on April 11, 2022, denied a petition for rehearing. See above

The jurisdiction of this Court is, thus timely invoked under 28 USC Section 1254 (1). *Hohn v. United States,* 524 U.S. 236 (1998).

## STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

A defendant in a criminal case must have the right to Due Process of Law, and the Fifth and Fourteenth Amendment to the U.S. Constitution.

28 U.S.C. section 2254(d) provides:

> (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.

This certiorari petition responds to the denial of petitioner's appeal to the 9th Circuit Court of Appeal.

## INTRODUCTION

"A rule . . . declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process." *Banks v. Dretke* 540 U.S. 668, 696 (2004).

Citations below are to the California Court of Appeal (CCA) appellate record, CT being Clerk's Transcript and RT the Reporter's Transcript. Additionally there are parallel citations to the Ninth Circuit Except of Record (ER).

## SUMMARY OF RELEVANT FACTS

George Pilola was charged with the August 9, 2001 forcible sexual penetration and aggravated mayhem of his wife, L.P., and residential burglary of the home in which she resided.

At trial, the facts that crimes had been committed against Pilola's wife were never in dispute.

What *was* contested was the identity of the criminal. Mr. Pilola testified it was not him.

Mr. Pilola was convicted of all charges except the residential burglary.

The detective assigned to the case, during the trial, in December 2001, testified that no fingerprints were recovered from the items taken from the crime scene. (A beer bottle, tape and knife.)( 3-ER-4110, 2-RT-425, Exhibit D attached to First Amended Petition.)

During summation by the prosecutor, he told the jury that Mr. Pilola had not shown there were any fingerprints of the person who committed the crime against petitioner's wife. (4-ER-595; 3-RT-774, Exhibit E attached to FAP.)

The problem with these statements by the detective and the prosecutor was that they were not true.

There *was* a fingerprint on the beer bottle which had been used by the intruder to penetrate petitioner's wife. (1-ER-97-99, Exhibit C, attached to FAP, declaration identifying print as taken from beer bottle.)

That fingerprint was examined and did not match petitioner's prints on August 24, 2001. (1-ER-92-93, Exhibit A attached to the FAP, Request for Print Comparison by Detective Inskeep attached hereto.)

Yet, on September 5, 2001 the prosecutor responded to the defense pre-prelim discovery request that "Fingerprint results from beer bottle and packing tape used to tie up the victim was not yet available." (1-ER-94-96, Exhibit B, attached to FAP, item 26 of response to defense discovery request.)

The failure to turn over the results of the analysis to Mr. Pilola's attorney pre-trial was a violation of *Brady v. Maryland* 373 U.S. 83 (1963).

What is worse is that both the detective and prosecutor were not truthful in their testimony and the prosecution was able, in summation, to use that falsehood to destroy Mr. Pilola's defense of third party culpability.

"Mr. Silva's, [defense counsel who has since deceased] the defense theory is, it wasn't the defendant. Okay. If it wasn't the defendant, then show us something. Give us something concrete to prove it wasn't." (4-ER-589, 3-RT-768.)

In rebuttal, the prosecutor went further: "You haven't heard one shred of evidence that indicates that somebody did this crime other than the defendant. And if she's lying, why is that? *There were no prints*. The person was wearing gloves. She just keeps lucking out. Sometimes the truth just stares us in the face, in spite of someone wanting us not to believe it." (1-ER-102-103,3-ER-595; 3-

RT-774 emphasis added.)

The *Brady* violation is clear as is the violation of *Napue v. Illinois,* 360 U.S. 264 (1959). There is a reasonable chance that *one* juror could have found that non-matching fingerprint supportive of petitioner's defense of third party culpability.

The facts of this case are set forth in greater detail at pages 3-14 in the CCA opinion which itself is attached to the Report and Recommendation, Appendix D.

## ARGUMENT

I

**AS STATED IN THE DECLARATION FROM THE LAB, THE FINGERPRINT WAS TAKEN OFF THE BEER BOTTLE WHICH WAS THE SUBJECT OF THIS CASE AND IF IT WAS SUCH A POOR PRINT, LOGIC DEMANDS THAT WOULD HAVE MADE IT LABELED AS "UNUSABLE" AND THERE WOULD HAVE BEEN NO ATTEMPT TO SEE IF THERE COULD BE A "MAKE" OF THAT PRINT**

The declaration of this counsel, making clear the "print" was taken from the side of the beer bottle taken from the scene of the attack against L.P. was attached to the petition filed in the District Court. (1-ER-43, 97-ER-95, Dkt 26-1.) That same declaration was earlier filed in the CCA petition which was denied and then sent to the Supreme Court of California with the petition for review which was also denied..

There can be no doubt there was a "print" since that is the wording used to describe the evidence taken from the beer bottle.

The prosecutor told the jury "there were no prints. The person was wearing gloves." (4-ER-595; 3-RT-774.) But L.P. testified the intruder was washing his hands in the bathroom, certainly he was not washing his "gloves"! At some point those gloves came off and the print came "on" the beer bottle.

Why would there be a request for print comparison submitted by Deputy Inskeep to the Sheriff's Lab if there were no print to compare? (See Exhibit A attached to both the FAP 1-ER-92-93 and the CCA habeas petition, at lodged Doc #8) Of course there was a print.

Exhibit B of those same two petitions illustrates even more that there was a fingerprint on the beer bottle because that is how the prosecutor described it in his September 5, 2001 statement that the comparison was still not available. (1-ER-94-96.) That statement of the prosecutor is belied by Exhibit A, written in August 26, 2001, saying that the result of the comparison was NO MAKE.

All the petitioner had to accomplish in his habeas pleading is set forth in *People v. Duvall,* 9 Cal. 4th 464, 474-75 (1995). At page 474 of that case appears the requirement of the petitioner to *plead* sufficient grounds for relief, and later to *prove* them. The later *prove them* obviously refers to an evidentiary hearing at an OSC which is the result of the *pleading*.

If there was no useable print, the lab would have said NO USEABLE PRINT. But the lab did not state that, it reported back NO MAKE which meant the useable print did not match any fingerprint of petitioner Pilola.

The prosecutor and the detective hid that fact from the jury. It is a clear example of *Brady* and *Napue* error.

The unreasonable denial of the OSC by the CCA removes this case from the AEDPA restriction.

### A. The Conclusion of the District Court That There Was a Merits Decision of No Prima Facie Case Is Belied By the CSC's Own Statement of the Meaning of a Bare Denial of a Petition for Review

The conclusion of the District Court that there was a merits decision by the California Supreme Court's bare denial of the petition for review is equally

unreasonable since it contradicts the Chief Justice of that Court's explanation of such a denial in the Motion for Judicial Notice filed in this case.

Accordingly, the assumptions in the R& R at fn.5, ER-15 are just that, assumptions. And the statement of the Chief Justice of the CSC in the judicial notice request, negate even the assumption of the footnote. As stated by the Chief Justice, nothing can be concluded from that denial of the petition for review.

## II

## THE *BRADY /NAPUE* VIOLATION WHICH OCCURRED HERE WAS PREJUDICIAL REQUIRING THE GRANTING OF THIS WRIT

### A. Preliminary Statement

In an investigation conducted by this counsel, twelve years after petitioner signed his notice of appeal, counsel discovered that indeed there was a fingerprint taken off the beer bottle in this case. Proof of that finger print was attached to the FAP as Exhibit A, 1-ER-90-91.

Counsel's declaration, Exhibit C, 1-ER-97-99, attached to the FAP shows that the finger print came from the beer bottle that was used in this case.

That same declaration was attached to the petition for writ of habeas corpus filed in the CCA from which the petition for review was taken to the California Supreme Court. (Lodged Doc. 8) and shows that beer bottle was and still is in the possession of the Los Angeles County Sheriff.

### B. Applicable Law re A *Brady/Napue* Violation

**1. *Brady Law***

In *Brady, supra*, 373 U.S. 83, the United States Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." (*Id.* at p. 87.) Under *Brady* and its progeny, the state is required to disclose to the defense any material, favorable evidence, even in the absence of a discovery request by the defense. *Ibid*.; *United States v. Bagley,* 473 U.S. 667, 678 (1985); *United States v. Agurs*, 427 U.S. 97, 107 (1976); *In re Sassounian,* 9 Cal.4th 535, 543 (1995).

"The scope of this disclosure obligation extends beyond the contents of the prosecutor's case file and encompasses the duty to ascertain as well as divulge 'any favorable evidence known to the others acting on the government's behalf . . . .' [Citation.] Courts have thus consistently 'decline[d] "to draw a distinction between different agencies under the same government, focusing instead upon the 'prosecution team' which includes both investigative and prosecutorial personnel.'" [Citation.]" *In re Brown* 17 Cal.4th 873, 879, fn. omitted (1998). Thus, the prosecution must disclose evidence that is actually or constructively in its possession or accessible to it from other agencies, including the police department. *People v. Kasim,* 56 Cal.App.4th 1360, 1380 (1997). "[A]ny favorable evidence known to the others acting on the government's behalf is imputed to the prosecution. 'The individual prosecutor is presumed to have knowledge of all information gathered in connection with the government's

investigation.' [Citations.]" *Brown, supra*, 17 Cal.4th at p. 879; see also *Youngblood v. West Virginia,* 547 U.S. 867 (2006) [nondisclosure of note from prosecution witnesses read by state trooper but not shared with prosecutor constituted suppression for purposes of asserted *Brady* error].

"Evidence is 'favorable' if it hurts the prosecution or helps the defense." *People v. Earp,* 20 Cal.4th 826, 866 (1999); *In re Sassounian, supra*, 9 Cal.4th at p. 544, that is, if it is exculpatory or has impeachment value. *Strickler v. Greene*, 527 U.S. 263, 282 (1999). Moreover, "the prosecution's duty of disclosure extends to all evidence that reasonably appears favorable to the accused . . . ." *People v. Morris,* 46 Cal.3d 1, 30 (1988) fn. 14, italics omitted, disapproved on other grounds in *In re Sassounian, supra*, 9 Cal.4th at pp. 543-545, fns. 5 & 6.

Evidence is material, where there is "a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." (*Bagley, supra*, 473 U.S. at p. 682.) The defendant need not show that disclosure of the evidence would have resulted in acquittal; rather, "[t]he question is . . . whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Kyles v. Whitley,* 514 U.S. 419, 434 (1995). A *Brady* violation thus occurs where the nondisclosed favorable evidence "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Id*. at p. 435, fn. omitted.

In the more recent case of *Browning v. Baker,* 875 F.3d 444 (9th Cir. 2017) is on point about "prints", except this was an officer's *shoeprint* observation at the scene of a robbery and murder. The observation, not disclosed to the petitioner established the print was of a shoe bigger than the defendant's feet. The fact the shoe print did not match Browning's shoes (p. 461) was material because if fit with the defense that another person was the killer. (p 463.)

This is exactly what petitioner Pilola's jury or at least *one juror* could have concluded from the fingerprint on the beer bottle evidence as that was petitioner's defense.

**2. Napue Law**

The clearly established Supreme Court precedent, at the time of petitioner's state court decision, was that a *Napue* violation—a presentation to a fact-finder of false testimony knowing it to be false—results in the reversal of a conviction if "the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury . . . ." *Giglio v. United States*, 405 U.S. 150, 153, 154 (1972) (quoting *Napue v. Illinois*, *supra,* at p. 271 (1959).

In *Napue*, the prosecutor elicited and did not correct what he knew to be false testimony—that the state's principal witness had not been promised any consideration by the State in exchange for his testimony. *Supra*, 360 U.S. at 265, 267. The Court explained that the principle that a prosecutor, working on behalf of the state, may not knowingly use false testimony to obtain a conviction is "implicit in any concept of ordered liberty." *Id*. at 269. The Court held that "a

conviction obtained through use of false evidence, known to be such by representatives of the State" violates the Fourteenth Amendment. *Id*. at 269.

The Court reversed Napue's conviction on the ground that the false testimony "may have had an effect on the outcome of the trial." *Id.* at 272.

### C. Petitioner Established the Elements of Both a *Brady* and *Napue* Violation and Those Violations Were Material Ones

#### 1. The *Brady* Violation Was Material

On appeal, the defendant has the burden to establish the elements of a *Brady* violation. *Strickler v. Greene, supra*, 527 U.S. at pp. 289, 291.

Concerning whether the print on the beer bottle tape was favorable to the defense, petitioner notes that the false statement by the detective that no such print existed was utilized to great success by the prosecutor in summation and rebuttal as pointed out above. The prosecutor in essence “called out” defense counsel by name in eviscerating the defense of third party culpability due to the lack of any proof that the intruder was *not* the petitioner. One can picture the prosecutor turning to defense counsel and saying directly to him: “Mr. Silvas, [defense counsel] the defense theory is, it wasn’t the defendant. Okay. If it wasn’t the defendant, then show us something. Give us something concrete to prove it wasn’t.” (4-ER-589; 3-RT-768.) All the time the prosecutor had to know, because his case detective knew, there was a print on the bottle which was *not* petitioner’s print. The case detective knew because Exhibit A has the case detective *requesting* the print analysis which came back as a “No Make” when compared

with the prints of petitioner in late August 2001, four months before the trial.

In rebuttal, the prosecutor went further: "You haven't heard one shred of evidence that indicates that somebody did this crime other than the defendant. And if she's lying, why is that? There were no prints. The person was wearing gloves. She just keeps lucking out. Sometimes the truth just stares us in the face, in spite of someone wanting us not to believe it." (4-ER-595; 3-RT-775 emphasis added.)

The prosecution's duty to disclose favorable evidence is not dependent upon a request from the accused, and even an inadvertent failure to disclose may constitute a violation. *See United States v. Agurs*, *supra* 427 U.S. at 107, 110. Accordingly, the evidence that the detective and prosecutor actively *suppressed* the truth in this case illustrates that the "no make" print was favorable to the defense. There can be no doubt that the print on the beer bottle was favorable evidence that the prosecution had a duty to disclose. And this was no inadvertent failure to disclose, its failed disclosure was exploited to the maximum by the prosecution.

The print would have totally prevented the powerful prosecution argument that there was no evidence of a third party invader of the home other than petitioner.

Last, when viewed in light of all the evidence, the evidence that petitioner was the perpetrator came from only one source, L.P., who recanted her testimony at the motion for new trial. That recantation was filed in the trial court and also

was attached to the habeas filed in the CCA and appears again as Exhibit A to the Traverse, Dkt 58-1.

This no-match fingerprint was scientific evidence that cast doubt on the prosecution theory that petitioner was the perpetrator.

Not only its exclusion but the manner in which it was excluded, by outright falsehood to the jury by the primary detective in the case, with the prosecutor both eliciting and then emphasizing it in summation to the jury, that its exclusion has to undermine a court's confidence in the jury's verdicts. *See Kyles v. Whitley, supra*, 514 U.S. at p. 435; *Strickler v. Greene, supra*, 527 U.S. at p. 290.

Accordingly it was reasonably probable the result would have been different had the jury heard about the no-match fingerprint on the beer bottle. The term "reasonable probability" means "'*merely a reasonable chance*, more than an abstract possibility.' [Citation.]" *People v. Racy,* 148 Cal.App.4th 1327, 1335 (2007) emphasis added.

As stated in *People v. Soojian,* 190 Cal.App. 4th 491, 520 (2010) a hung jury with simply *one* holdout juror is considered a more favorable verdict than a guilty verdict. It is this reasonable chance of a hung jury if not an outright acquittal which allows this petitioner to show that there is a reasonable probability that, but for the *Brady* violation, the result of the proceeding would have been different. A reasonable probability is "a probability sufficient to undermine confidence in the outcome." *Strickland v. Washington,* 466 U.S. 668, 694 (1984). The suppressed evidence was material.

Petitioner has satisfied his burden to show a *Brady* violation: the prosecution withheld favorable and material evidence.

**2. The *Napue* Violation Was Material**

The Supreme Court reversed *Napue's* conviction on the ground that the false testimony "may have had an effect on the outcome of the trial." *Id*. at 272. As stated above, and explained in subsequent opinions applying the *Napue* standard, "a new trial is required if 'the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury . . . ." *Giglio v. United States*, 405 U.S. 150, 153, 154 (1972) (quoting *Napue*, 360 U.S. at 271); see also *Sivak v. Hardison*, 658 F.3d 898, 912 (9th Cir. 2011); *Libberton v. Ryan*, 583 F.3d 1147, 1164 (9th Cir. 2009); *Jackson v. Brown*, 513 F.3d 1057, 1076 (9th Cir. 2008).

Although the government's knowing use of false testimony does not automatically require reversal, courts apply a less demanding materiality standard to *Napue* errors: whether "there is any reasonable likelihood that the false testimony ***could have*** affected the judgment of the jury." *United States v. Agurs*, 427 U.S. 97, 103 (1976) (emphasis added). This materiality standard is, in effect, a form of harmless error review, but a far lesser showing of harm is required under *Napue's* materiality standard than under ordinary harmless error review. *See Smith v. Phillips*, 455 U.S. 209, 220 n.10, 102 S. Ct. 940 (1982) (describing the "materiality requirement" that applies to *Napue* and *Giglio* claims); see also *Hayes v. Brown*, 399 F.3d 972, 984 (9th Cir. 2005) (en banc).)

*Napue* requires a reviewing court to determine only whether the error ***could have*** affected the judgment of the jury, whereas ordinary harmless error review requires us to determine whether the error ***would have*** done so.

In short, prosecutorial misconduct of the kind that occurred here violates the constitutional rights of the defendant and requires a reversal of the conviction if (1) the testimony was actually false, (2) the prosecutor knew it was false, and (3) the false testimony was material (i.e., there is a reasonable likelihood that the false testimony could have affected the judgment). *See Napue*, 360 U.S. at 271-72.

Therefore the writ must issue, the jury's verdicts cannot stand and the judgment must be reversed. *See Kyles v. Whitley, supra*, 514 U.S. at pp. 435-436 [*Brady* violation encompasses determination that nondisclosure was prejudicial]; *In re Brown, supra*, 17 Cal.4th 873, 887.

### 3. Fair Minded Judges Could Not Disagree that An Order to Show Cause Had to be Issued by the State Courts

Both the CCA habeas corpus petition and then the petition for review to the Supreme Court of California were summarily denied. But that summary denial by the Supreme Court of the petition for review from the denial of the petition for writ of habeas corpus does not mean that AEDPA sections 2254(d)(1) and (d)(2) cannot apply. As stated above, the Supreme Court requires federal habeas courts to "focus[] on what a state court knew and did." *Cullen v. Pinholster,* 563 U.S. 170, 182 (2011).

In the face of a state court summary denial, the Ninth Circuit Court of

Appeals has long taken the same approach, looking to see what evidence was before the state court and "what the state court did." *Nunes v. Mueller,* 350 F.3d 1045, 1053 (9th Cir. 2003).

In understanding"what the state court did," it is important to understand that under long-established California law, a court presented with a state habeas petition must perform an initial screening function by taking two steps: (1) assume the truth of the factual allegations contained in the petition and (2) based on those facts, determine whether the habeas petitioner has pled a prima facie case for relief. *See, e.g.*, *People v. Duvall,* 9 Cal. 4th 464, 474-75 (1995).

If a prima facie case for relief has been pled, the state court must issue an Order to Show Cause, requiring full briefing from both sides and–if there are factual disputes-an evidentiary hearing. *Duvall,* 9 Cal.4th at 475. If a prima facie case has not been pled, the court may summarily deny the petition. *Duvall*, 9 Cal.4th at 475.

Here, the California Supreme Court did not issue an Order to Show Cause or return the case to the court of appeal for that purpose. Instead, they summarily denied the petition for review. Under state law, this meant they found that petitioner had not pled a prima facie case. Thus, in applying section 2254(d) here — and in following *Pinholster's* admonition to "focus on what the state court knew and did" — it is important to note that this federal Court is *not* reviewing a state-court decision that petitioner failed to prove his *Brady/Napue* claim.

Instead, this Court is reviewing the state court finding that assuming the

truth of all allegations in the state habeas petition, petitioner did not plead a prima facie case and that summary denial was therefore proper.

The Ninth Circuit Court of Appeals has repeatedly taken this precise approach.

Thus, where a state habeas petitioner pleads facts which state law requires be accepted as true, and those facts establish a prima facie case which is denied unreasonably, sections 2254(d)(1) and (d)(2) will *not* bar relief where the state court issues a summary denial of a habeas corpus petition or petition for review from that CCA summary denial.

To the contrary, where a California state court summarily denies relief in the face of a prima facie case, its decision constitutes both an unreasonable application of federal law within section 2254(d)(1), and an unreasonable determination of the facts within section 2254(d)(2). (*See, e.g. Nunes v. Mueller*, 350 F.3d 1045 at 1053-54; *see also Earp v. Ornoski*, 431 F.3d 1158, 1169-70 (9th Cir. 2005); *Burt v. Yarborough,* 313 Fed.Appx. 23, 24 (9th Cir. 2008); *Taylor v. Maddox,* 366 F.3d 992, 1000 (9th Cir. 2004).

*Nunes* controls this case. There, defendant was convicted in state court of second degree murder. In a petition for writ of habeas corpus filed in state court, defendant argued that he had received ineffective assistance of counsel during the plea bargaining process. Defendant alleged in his state petition that his trial lawyer gave him incorrect information about a plea offer which had been made by the prosecution. Specifically, defendant alleged that his lawyer told him the offer was

for 22 years when, in fact, it was really for only 11 years. The defendant also specifically alleged that had he been given the correct advice, he would have accepted the plea. After the state courts denied the petition without an evidentiary hearing, defendant sought habeas relief in federal court. The state contended that section 2254(d) barred relief.

The Ninth Circuit Court of Appeals rejected the argument. The Court first noted that under state law, the state court was required to accept the truth of petitioner's factual allegations. *Nunes v. Mueller,* 350 F.3d at 1054.

Had the state court accepted the truth of these allegations, it would have had to assume that (1) trial counsel gave petitioner incorrect advice and (2) petitioner would have accepted the plea offer if he had received correct advice. *Nunes,* 350 F.3d at 1054.

In holding that AEDPA did not bar relief under these circumstances, the Court noted that "[t]hose assertions certainly suffice to support an ineffective assistance of counsel claim and there was ample evidence in the record before the state court to support those assertions." *Nunes,* 350 F.3d at 1054.

Given that the state court's role under long-standing state law was to accept the truth of the factual allegations and "to evaluate Nunes' claim for sufficiency alone," the state court acted unreasonably in denying the claim "without affording him an evidentiary hearing . . ." *Nunes,* 350 F.3d at 1054-55; *see also Earp*, 431 F.3d at 1159-116 (state habeas petitioner alleges that the prosecutor committed misconduct in intimidating a jail inmate with favorable

defense testimony into refusing to testify; held, where state petitioner properly alleged prima facie case in state court, and supported it with signed declarations, "the state court decision summarily denying him habeas relief was based on an unreasonable determination of the facts" within section 2254(d)(2).)

*Nunes* and *Earp* control here. This case, like both *Nunes* and *Earp,* involves a California state habeas petition supported by declarations and exhibits clearly setting forth *Brady/Napue* violations in this case and the state courts never made any ruling other than to deny the habeas petitions without granting an Order to Show Cause.

As noted above, and just as in *Nunes* and *Earp,* the factual allegations in the state habeas petition and petition for review to the California Supreme Court certainly established a prima facie case for relief.

Just as in *Nunes* and *Earp*, "there was ample evidence in the record before the state court to support [petitioner's factual] assertions." *Nunes*, 350 F.3d at 1054; *accord Earp*, 431 F.3d at 1169 ("through these [six declarations] to the state court, Earp proffered the factual foundation for his alleged prosecutorial misconduct claim."

Here too, in his state court habeas petition, petitioner presented declarations, sworn under penalty of perjury, and exhibits which were never controverted by any court.

In sum, just as in *Nunes* and *Earp*, petitioner did indeed plead a prima facie case in state court.

As *Nunes* correctly noted, the state court's role was to accept the truth of petitioner's factual allegations and "to evaluate [petitioner's] claim for sufficiency alone." As *Pinholster* shows, this federal court's role in applying section 2254(d) is to "focus on what [the] state court knew and did." Here the state court knew facts which plainly constituted a prima facie case but it denied the state petition without issuing an Order to Show Cause or holding a hearing. As in both *Nunes* and *Earp,* the state court acted unreasonably in denying petitioner's claim.

## III

## CERTIORARI SHOULD BE GRANTED BECAUSE ONCE THE FEDERAL DISTRICT COURT CONCLUDED THAT "NO MAKE" WAS TOO AMBIGUOUS TO GIVE RELIEF, THEN THIS COUNSEL WAS OBLIGATED TO RETURN TO STATE COURT WITH EXPERT OPINION AS TO THE MEANING OF NO MAKE. THE NINTH CIRCUIT FRUSTRATED THAT PATH BY REFUSING SIGN THE ORDER ALLOWING THE EXPERT ACCESS TO THE FINGERPRINT AND REFUSING TO STAY THE APPEAL IN THE NINTH CIRCUIT

Respondent's Brief in the Ninth Circuit states at p. 24 that the "District Court's decision should be affirmed because the fingerprint testimony was not false given the ambiguity in the meaning of the term "NO MAKE."

Ambiguity is the key word and petitioner has been attempting to get the bottle examined by an expert since 03-22-2021, see Dkt 19.

Dkt 19 was filed on March 22, 2021 and it was titled APPLICATION FOR AUTHORIZATION AND PAYMENT FOR INVESTIGATIVE SERVICES. The purpose of the motion was stated on page 2, "counsel respectfully requests authorization to hire an experienced fingerprint

examiner to examine the print which was called a NO MAKE in the exhibits attached to this motion" The amount in question $750.00 was set forth in the motion and then the reasons for the examination, to see if in fact there was a useable print on the bottle which could not have been made by petitioner.

I was advised by Ninth Circuit staff that the amount requested by my expert was already covered in my appointment and I need not ask for $750 so I withdrew the motion asking for money in Dkt 24 on 5-3-2021 and on the same date filed another motion simply asking for an Order to the Sheriff to allow the expert to examine the bottle. Dkt 25.

On 06-07-2021, the appellate commissioner responded in Dkt 27 that "Appellant's motion (Dkt. 25) for an order requiring the Los Angeles County Sheriff's Department to produce evidence [allow the expert to examine the bottle] is referred to the panel deems appropriate."

Hearing nothing more from the panel and in view of the importance of the expert's examination of the bottle, appellant/petitioner, in Dkt 33 on 07-31-2021 asked again for an order "allowing expert to examine evidence [the bottle on which the NO MAKE print appears] in the LA County Sheriff's custody."

On 08-10-2021 appellant filed a motion to stay appellate proceedings. Dkt 36.

The heading and text of that motion is as follows:

> **A proposed Order to the Sheriff of Los Angeles County allowing appellant's expert to examine the beer bottle in issue in this case has been submitted to the panel on June 7, 2021.**

**(See Dkt 33).**

> Without the Order, the expert will not be able to perform his examination. Authorities and argument supporting this request have been previously submitted to this Court in Dkt 25.
> Mr. Kuhn, appellant's expert, has told me that he knows where the bottle is maintained and that he estimates it will take approximately 6 hours, for a total of $760.00, once he receives a court order allowing examination of the bottle and its print to determine the status of that print and the meaning of "NO MAKE" which was the result of the state's fingerprint examination.
>
> Appellant hereby respectfully moves, pursuant to Rule 27 of the Federal Rules of Appellate Procedure and Ninth Circuit Rule 312.2(b), to stay this appeal for a period of 90 DAYS because, without that stay, petitioner's expert will not be able to examine the BEER BOTTLE as described in DKT 33 .
> Appellant seeks this stay under the authorities set forth in the points and authorities submitted in Dkt nr. 25,
> .
>
> Respectfully submitted,
> /s/Charles R. Khoury Jr.
> Attorney for appellant

At Dkt 38, it was acknowledged that appellant's motion had been received and the stay was denied as "Principal Briefing is Complete" and the motion was referred to the panel"for whatever consideration the panel deems appropriate".

And just that same week, the panel was considering this case for oral argument. Dkt. 41, 44 and 45.

## IV

**THE NINTH CIRCUIT COULD NOT PROPERLY DECIDE THIS CASE WITHOUT CLEARING UP WHAT RESPONDENT HAS CONCEDED IS AN AMBIGUITY WHICH GOES TO THE MAJOR ISSUE IN THE APPEAL, NAMELY WHAT IS THE MEANING OF "NO MAKE" DESCRIBING THE FINGERPRINT ON THE BOTTLE. THAT AMBIGUITY CAN BE SETTLED BY APPELLANT'S EXPERT EXAMINING THE BOTTLE IF THE COURT HAD GRANTED THE REQUESTED ORDER TO THE LA SHERIFF TO ALLOW THE EXAMINATION TO OCCUR BUT THEY DID NOT**

If NO MAKE in reference to the print on that bottle means it was a print which was NOT appellant's print then the issue of a violation of *Brady v. Maryland* 373 U.S. 83 (1963) and *Napue v. Illinois,* 360 U.S. 264 (1959) has more than just "legs" it means the writ must be granted. This writer got this appeal when no appeal at all had been filed in the state court, ineffective assistance of appellate counsel resulted in erroneous advice to Mr. Piola to dismiss his appeal before it even began.

This attorney began poring over the pages of the trial and clerk transcripts and tried to contact defense counsel (passed away) and prosecutor (passed away) and found that the complaining witness had totally recanted her testimony after the trial and it was then that this issue was discovered by this counsel.

This counsel had made an assumption that NO MAKE meant there was a fingerprint which could not be attributed to Mr. Pilola and that had never been divulged to the defense and in fact the jury was told there were no prints at all on the bottle and the prosecution and his investigator were in possession of the NO MAKE report.

If that assumption was ineffective assistance of this attorney, then Mr. Pilola should not be imprisoned because of it. But no one can say that this attorney did not try hard over the last months to get that bottle examined.

The Memorandum Opinion of the Ninth Circuit stated at p. 4 there could not have been any fingerprints because the assailant wore gloves but it was very clear in the trial testimony that gloves were removed by the assailant to wash perspiration off his face in a sink and that was set forth in the briefing and at oral argument.

## CONCLUSION

The problem with the testimony by the case detective to the jury that there were no finger prints was that it was not true and he knew it was not true as shown by Exhibit A, ER-90-91. That falsehood by the case agent has to be imputed to the prosecutor who argued to the jury there were no fingerprints. There *was* a fingerprint on the beer bottle which had been used by the intruder to penetrate Mrs. P. That fingerprint was examined and did not match petitioner's prints. NO MAKE meant there was no match.

In view of the prosecution argument to the jury that there were no fingerprints whatsoever consequently the defense theory of third party culpability was bogus, it is harder to imagine a clearer case of a *Brady/Napue* violation. Certiorari should be granted and the writ should issue. Alternatively the appeal should be stayed as requested and then remanded to the District Court to have the

bottle examined by petitioner's expert.

Respectfully submitted,

/s/Charles R. Khoury Jr.
Attorney for George Pilola

CERTIFICATE OF COMPLIANCE PURSUANT TO SUPREME COURT RULE 33

This brief complies with the length limits permitted by Rule 33-1. The brief is under 40 pages excluding exempted portions. The brief's type size and type face comply with Rule 33.2(a)(b).

/s/ Charles R. Khoury Jr. June 24. 2022

IN THE
SUPREME COURT OF THE UNITED STATES

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PILOLA v. KOENIG

**PROOF OF SERVICE**

I hereby certify that I am a member of the Bar of the Supreme Court of the United States and not a party to this action and that on this 24h Day of June, 2022 a petition for In Forma Pauperis Status and petition for Certiorari with volume of exhibits, were e- mailed to the email of counsel for the Respondent justain.riley@doj.ca.gov
I declare under penalty of perjury that the foregoing is true and correct.

Executed on June 24th 2024

Respectfully submitted,
/s/CHARLES R. KHOURY JR.