No. 23-5905

ORIGINAL

In the Supreme Court of the United States

DANIEL KRISTOF LAK,

Petitioner,

v.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondents.

On Petition for Writ of Certiorari to the Appellate Division, Orange County Superior Court, State of California.

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QUESTION PRESENTED

When a law enforcement witness in a criminal trial, themselves, becomes the subject of an unrelated criminal investigation, the prosecution is faced with the dilemma of how to preserve the officer's reputation as a witness in one criminal trial, while being tasked with the duty to investigate the same law enforcement witness, now turned potential defendant, in another criminal trial.

Wherefore, the Question Presented is:

(i) Whether a prosecutor's duty to disclose exculpatory and impeachment information under *Brady* should be extended to include mandating the disclosure of conflicts of interest and material impeachment information when a law enforcement witness, themselves, becomes the subject of an unrelated criminal investigation, thereby ensuring that no member of law enforcement is "above the law" and that all members of a prosecution team are to be "above reproach."

LIST OF PARTIES AND RELATED PROCEEDINGS

All parties to the proceeding in the court whose judgment is sought to be reviewed are listed the caption above.

There are no other proceedings related to this case.

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PETITION FOR WRIT OF CERTIORARI

The time from when a defendant is charged with a crime, to when a jury returns its verdict, may span several years.

Meanwhile, the prosecution's star witness - the arresting officer - might also become a defendant in an unrelated criminal matter, within the same jurisdiction, by means of committing illegal actions of their own.

In such cases, the prosecution is faced with the dilemma of how to preserve the officer's reputation as a witness in one criminal trial, while being tasked with the duty to prosecute the same star witness, now turned defendant, in another criminal trial.

Currently, there are no sufficient remedies to obviate this conflict as (i) *Brady*'s materiality requirement is not met by crimes investigated, but not yet charged, (ii) state statutory laws typically protect ongoing law enforcement investigations from discovery, (iii) local law enforcement agencies are not likely to begin disciplinary proceedings before a prosecutor has made a determination on whether to formally charge the officer, (iv) state bar disciplinary investigations for conflicts of interest are not only protected from discovery, but are typically known only to the offending attorney(s) and may extend beyond the conclusion of the first trial wherein the officer appeared as a witness, and (v) the shrewd prosecutor knows that once the statute of limitations has run for the law enforcement witness' alleged crime, any information regarding their potentially nefarious and/or illegal acts will be forever entombed in the catacombs of the prosecution's "work product."

To be sure, the convergence of such a conflict of interest, together with the absence of meaningful judicial protections to prevent abuse, ignites the supernova that creates the

"black hole" wherein the shrewd prosecutor is able to hide all manner of exculpatory and impeachment information in contravention of *Brady*, thereby decimating the due process protections of the 14th Amendment.

This Petition for Writ of Certiorari asks this Court to review the judgement of the Appellate Division of the Orange County (California) Superior Court which prevented information regarding the Orange County Human Trafficking Task Force's referral for criminal charges of solicitation of prostitution for ***former*** Huntington Beach (California) Police Officer Grant Hasselbach to be disclosed to the defense, pursuant to *Brady*, while Petitioner was heading to trial and Hasselbach, a prosecution witness, was under investigation - in the same jurisdiction, by the same District Attorney (Orange County).

OPINIONS BELOW AND PROCEDURAL SETTING

Defendant was convicted of suspicion of driving under the influence (DUI) on August 2, 2021, following a jury trial in Orange County Superior Court for the State of California, the Honorable Judge John Zitny, Presiding (Trial Court Case No. 18WM13405).

Defendant timely filed an appeal in the Appellate Division of the Orange County Superior Court, which denied Defendant's appeal on March 9, 2023 (See Appendix A, Appellate Division Opinion Case No. 30-2021-01221480).

Defendant timely filed an Application for Transfer to the Court of Appeal and Motion for Rehearing in the Appellate Division pursuant to California Rules of Court Rule(s) 8.1005 and 8.268, respectively, which denied both the Application and Motion on March 30, 2023. (See Appellate Division Court Docket Case No. 30-2021-01221480).

Defendant timely filed a Petition for Transfer in the Court of Appeal, Fourth District, Division Three, for the State of California pursuant to California Rules of Court, Rule 8.1006, to secure uniformity of decision and to settle an important question of law.

The Court of Appeal denied Defendant's Petition for Transfer on May 4, 2023. (See Appendix B, Court of Appeal Decision).

The decision of the Court of Appeal was final upon filing (*California Rules of Court, Rule 8.1018(a)*) and, therefore, a petition for rehearing could not have been filed in that court. *California Rules of Court, Rule 8.268(a).*

The Defendant now timely filed a Petition for Review before the Supreme Court of California pursuant to California Rules of Court, Rule 8.500(b)(1) which was denied on July 12, 2023 (See Appendix C, California Supreme Court denial of Petition for Review).

JURISDICTION

A PETITION FOR REVIEW TO THE SUPREME COURT OF CALIFORNIA IS PERMITTED WHEN A COURT OF APPEAL DENIES TRANSFER OF A CASE WITHIN THE APPELLATE JURISDICTION OF THE SUPERIOR COURT UPON A SHOWING THAT THE APPELLATE DIVISION EXCEEDED ITS JURISDICTION.

The right to file a Petition for Review with the Supreme Court of California lies for review of any decision of the Court of Appeal with the exception of the denial of the transfer of a case within the appellate jurisdiction of the superior court. *California Rules of Court, Rule 8.500 (a)(1).*

Here, Defendant petitioned the California Supreme Court for review of the Court of Appeal's decision to deny transfer of a case within the jurisdiction of the Appellate Division of the Orange County Superior Court.

As first glance, it appears that Defendant is thereby prevented from bringing this Petition for Review before the Supreme Court.

However, the California Supreme Court has ruled that while writ of certiorari does not lie to review error of a lower court, ***certiorari is available when the [lower] court exceeds its jurisdiction***. Additionally, the appellate department of the superior court is found to have exceeded its jurisdiction when it ***refuses to follow precedent***. *Dvorin v. Appellate Dept.*, (1975) 15 Cal.3d 648, 650 citing *Auto Equity Sales, Inc. v. Superior Court*, (1962) 57 Cal. 2d 450, 454-456 [20 Cal. Rptr. 321, 369 P.2d 937].

As shown below, the decision of the Appellate Division in the instant case completely ignores well established authority of the United States Supreme Court, the California Supreme Court, and the Court of Appeal, Fourth Appellate District, Division Three.

Additionally, the Appellate Division creates its own, completely new and entirely unsupported by any precedent whatsoever, *Brady*-type analysis.

In refusing to follow well-established precedent, the Appellate Division far exceeded its jurisdiction and review by the California Supreme Court was appropriate and necessary pursuant to that court's holding in *Dvorin*.

TIMELINESS OF PETITION

According to California Rules of Court Rule 8.500(e)(1), a petition for review must be served and filed within ten (10) days after the Court of Appeal decision is final in that court.

California Rules of Court, Rule 8.1018(a) states that if a Court of Appeal denies transfer of case from the appellate division of the superior court after a party files a petition for transfer, the denial is final immediately.

The Court of Appeal of the State of California, Fourth Appellate District, Division Three, denied Petitioner's petition for transfer on May 4, 2023. (See Appendix B, Court of Appeal Decision).

Therefore, the decision was final in the Court of Appeal on May 4, 2023.

Petitioner filed a Petition for Review in the California Supreme Court on May 14, 2023, ten days after the Court of Appeal became final, which was denied on July 12, 2023.

Therefore, Petitioner's Petition for Writ of Certiorari is timely filed pursuant to the Rule 13 of the Rules of the Supreme Court of the United States.

CONSTITUTIONAL AND STATUTUTORY PROVISIONS INVOLVED

Jurisdiction in this Court is invoked under 28 U.S.C. Section 1254 (1) and the Federal Question claimed herein, violation of due process under Brady _____ implicates the Due Process Clause of the 14th Amendment, which prevents States from depriving any person of life, liberty, of property, without due process of law. U.S. Constitutional Amendment XIV, Section 1.

STATEMENT OF THE CASE

The subject of this appeal is the jury verdict returned against Defendant for suspicion of Driving Under the Influence ("DUI") in Case Number 18WM13405 and the bad faith trial tactics of the Orange County District Attorney ("OCDA" or the "People") used to obtain such a verdict.

As part of the sentence, Defendant was sentenced to sixty (60) days in the Orange County jail and placed on informal probation.

Appellant completed his jail sentence on April 7, 2022 and is currently in full compliance with all terms and conditions of the informal probation.

Specifically, the trial court committed reversible error in arbitrarily and capriciously denying Defendant's motions on July 6, 2021 to (i) disqualify certain deputy OCDA's, as well as, the entire OCDA office itself from prosecuting the case pursuant to California Penal Code Section §1424.5 for various *Brady* violations, (ii) for discovery sanctions pursuant to California Penal Code §1054.5, (iii) to continue the trials pursuant to California Rules of Court, Rule 4.113, and (iv) to set a hearing on these motions for

September 8, 2021. (C.T. Vol. II, pages 212-389).

Additionally, the trial court committed reversible error when it arbitrarily and capriciously allowed witnesses to testify at trial when Defendant had repeatedly and strenuously objected, and demonstrated, via documentary evidence, that (i) he had never been given witness names and addresses until the day of trial, (ii) that he had never been given any statement by any witness, whatsoever, prior to trial, nor (iii) did he ever receive from the OCDA the name or the qualifications of the criminologist it planned to call as a witness – ever – but (iv) was only given the name of the criminologist witness the day trial began.

Such arbitrary and capricious actions by the trial court materially prevented Defendant from receiving a fair trial in that he was completely and totally blinded sided, the day of trial, regarding who was about to testify and what their testimony was going to be.

FACTS

Defendant was arrested in August of 2018 by ***former*** Huntington Beach Police Officer, Grant Hasselbach ("Hasselbach"), for suspicion of driving under the influence ("DUI"). Hasselbach was the only law enforcement officer/witness called by the OCDA to testify at trial.

At the time, Hasselbach was a celebrated police officer within the Huntington Beach Police Department ("HBPD"), amassing an astonishing 913 DUI arrests between January 2018 and May of 2020, receiving numerous awards as a result.

However, and also in May of 2020, Hasselbach himself became the subject of a criminal investigation for solicitation of prostitution pursuant to California Penal Code §647(b).

Specifically, the Orange County Human Trafficking Task Force made a formal referral to the OCDA for prosecution of Hasselbach under California Penal Code §647(b) following an investigation of a joint human trafficking task force which included the (i) Anaheim Police Department, (ii) California Highway Patrol, (iii) Irvine Police Department, (iv) Santa Ana Police Department, (v) Orange County District Attorney's Office, (v) Orange County Probation Department, (vi) United States Department of Justice, and (v) United States Department of Homeland Security.

Shortly thereafter, in the fall of 2020, Hasselbach voluntarily retired from the Huntington Beach Police Department ("HBPD").

Prior to trial, the only *Brady* material the OCDA gave the Defendant regarding Hasselbach's solicitation investigation and resulting referral for criminal charges was a single report drafted by an Irvine Police Department detective, addressed to the Anaheim Police Department, which details ***only*** that one detective's percipient observations during the investigation.

However, during trial and on the record, the OCDA ***admitted*** that an actual, formal, referral for prosecution of criminal charges against Hasselbach (i.e. an additional document) was drafted by members of the Orange County Human Trafficking Task Force and delivered to the office of the Orange County District Attorney who ultimately declined to prosecute Hasselbach's case as being "weak."

Prior to trial, Defendant formally requested, on numerous occasions, that the OCDA provide "all *Brady* material" relating to Hasselbach's solicitation investigation.

Each time, the OCDA repeatedly declined to provide anything more than the single report mentioned above stating that "defendant had been given everything they were obligated to provide."

Not believing that the only *Brady* material in existence produced by a joint task force of no less than seven (7) law enforcement agencies, which ultimately resulted in a formal referral to the OCDA for prosecution of criminal charges against Hasselbach, was the single report from one detective from the Irvine Police Department, Defendant brought motions on July 6, 2021 to (i) disqualify certain deputy OCDA's, as well as, the entire OCDA office itself from prosecuting the case pursuant to California Penal Code §1424.5 for various *Brady* violations, (ii) for discovery sanctions pursuant to California Penal Code §1054.5, (iii) to continue the trials pursuant to California Rules of Court, Rule 4.113, and (iv) to set a hearing on these motions for September 8, 2021. (C.T. Vol. II, pages 212-389).

The trial court did not deny Defendant's motions on the merits, but rather, did not even allow the motions to be calendared at all, merely relying on the OCDA's verbal assertion to the court that Defendant had been given all the *Brady* material he was entitled to receive, again, without any evidentiary hearing on the matter, whatsoever.

On July 28, 2021, at the beginning of trial, Defendant brought a Motion in Limine to disqualify Hasselbach as a witness because (i) Defendant was never notified that Hasselbach was going to be called as a witness until ***the day of trial*** and that (ii) the OCDA again be ordered to produce any and all required *Brady* material.

Discussions ensued during which time Deputy District Attorney, Miles Robinson

("Robinson"), stated ***in open court and on the record*** that (i) he knew the ***Anaheim Police Department had made a formal referral to the Orange County District Attorney for solicitation of prostitution charges to be brought against Hasselbach,*** (ii) that Robinson knew the OCDA made the subjective determination to reject the Hasselbach solicitation charge referral as being weak, and that (iii) Robinson knew that Hasselbach was previously made unavailable as a witness in Defendant's case because the statute of limitations had not yet run in Hasselbach's solicitation case. (C.T. Vol. 2, pages 446-459., R.T. Vol I, page 117, Lines 16 through 18).

THE ANALYSIS APPLIED BY THE APPELLATE DIVISION IN DETERMINING THAT NO *BRADY* VIOLATIONS WERE COMMITTED BY THE ORANGE COUNTY DISTRICT ATTORNEY OMITTED ESSENTIAL ELEMENTS REQUIRED FOR A PROPER *BRADY* ANALYSIS AS ESTABLISHED IN *BRADY* AND *DEKRAAI.*

Specifically, the Appellate Division's *Brady* analysis ***completely omits*** any discussion regarding the OCDA's duty to disclose conflicts of interest and divided loyalties to the Defendant prior to trial as required under *Brady* and further detailed in *Dekraai.*

The leading case in the Fourth Appellate District, Division Three, regarding the inseparable relationship between *Brady* violations, statutory discovery obligations, and a California Penal Code §1424 motion to recuse the prosecution, is found in the *Dekraai* case. *People v. Dekraai,* (2016) 5 Cal.App.5th 1110.

In *Dekraai*, the Court of Appeal held that Penal Code §1424 grants a trial court the authority to recuse a district attorney if the evidence establishes the district attorney ***has a conflict of interest*** that is so severe it is unlikely a defendant would receive a fair trial. *Dekraai*, supra, citing *Haraguchi v. Superior Court* (2008) 43 Cal.4th 706, 711-712.

Under *Dekraai*, the Court of Appeal held that because the OCDA had a ***divided***

loyalty between its duty to fairly prosecute cases and protecting the Orange County Sheriff, recusal of the OCDA was necessary to ensure the defendant would receive a fair penalty phase. *People v. Dekraii,* 5 Cal.App.5th 1110, 1151.

Ultimately, the Court of Appeal affirmed the trial court's ruling that the OCDA intentionally hid, withheld, and lied about the existence of, prison informants over the span of approximately ten (10) years.

As a result of the OCDA's nefarious practices regarding prison informants, the OCDA prevented Dekraai and other defendants from obtaining a fair trial.[1]

Dekraai also established that the OCDA, both former and current administrations, have a pattern of systemic behavior in intentionally lying to, and withholding conflict of interest information and required discovery from defendants, opposing counsel, and the Judges of the Orange County Superior Court.

Ultimately, the court, in *Dekraai,* affirmed the trial court's decision to recuse the entire office of the OCDA from prosecuting the penalty phase of the case.

This resulted in the death penalty being removed as a possible consequence of Dekraai's reprehensible conduct - the largest mass shooting of innocent victims in the history of the State of California.

The *Dekraai* case also stands for the rule that *Brady* requires District Attorneys to produce this ***conflict of interest*** information to defense counsel to investigate possible *Massiah* violations ***prior to trial***. *Dekraai, Supra.*

The *Dekraai* Appellate Court continued its discussion stating:

As we explain below, we conclude the trial court did not abuse its discretion when it recused the entire OCDA's office from prosecuting the penalty phase. There was

substantial evidence to support the court's conclusion the OCDA's institutional relationship with the [Orange County Sheriff's Department] OCSD constituted a conflict of interest that prevented the OCDA from fairly prosecuting the penalty phase. The court's conclusion that the OCDA's institutional relationship with the OCSD prevented it from supervising its law enforcement team and, was therefore, a conflict of interest well established in law. Further, the court's exercise of its discretion, that based on the entire factual record before it, the OCDA's conflict of interest was so grave that it was unlikely Dekraai would receive a fair penalty phase, was within the permissible range of options provided by section 1424.

[W]e must rely on our prosecutors to carry out their fiduciary obligation to exercise their discretionary duties fairly and justly—to afford every defendant, whether suspected of crimes high or petty, equal treatment under the law." (Hollywood v. Superior Court (2008) 43 Cal.4th 721, 734 (Hollywood).) "The first, best, and most effective shield against injustice for an individual accused, or society in general, ***must be found not in the persons of defense counsel, trial judge, or appellate jurist, but in the integrity of the prosecutor.***" (Corrigan, On Prosecutorial Ethics (1986) 13 Hastings Const. L.Q. 537, italics added.).

In the instant case, the OCDA had a conflict of interest and divided loyalty between ensuring Defendant obtained a fair trial and protecting the reputation of ***former*** Officer Grant Hasselbach - its star witness in almost 1,000 other DUI cases – as well as the reputation of the Huntington Beach Police Department.

As such, a conflict of interest was clearly established under *Brady* and *Dekraai* and the OCDA had an affirmative duty to disclose this conflict to defendant ***prior to trial.***

This it did not do and, therefore, the OCDA committed a *Brady* violation, as firmly established and defined by the Court of Appeal in *Dekraai.*

Again, the Court in *Dekraai,* held that the duty to disclose the conflict of interest "***must be found not in the persons of defense counsel, trial judge, or appellate jurist, but in the integrity of the prosecutor.***" *Dekraai,* Supra.

Ultimately, the *Dekraai* Court held that substantial evidence supported the conclusion that there were a number of *Brady* and discovery violations committed by the OCDA which additionally supported a §1425 recusal motion.

Here, there is voluminous evidence that Defendant had, on numerous occasions, requested various discovery materials to be produced and the OCDA failed to do so. In fact, there is voluminous evidence showing that the OCDA provided certain discovery only ***on the day of trial.***

As detailed in Defendant's motion for discovery sanctions filed on July 6, 2021, numerous requests for *Brady* and other discovery materials had been propounded to the OCDA on several occasions who never supplied the required information and intentionally mislead the trial court by stating that it had.

From Robinson's statements made to the trial court in the instant case as shown above, it is clear that the OCDA made both the decisions to call Hasselbach as a witness in Defendant's case and the decision not to prosecute Hasselbach for the solicitation of prostitution charge.

Furthermore, the OCDA also made the decision on "when" to bring

Hasselbach as a witness to testify, making sure that it was not until the statute of limitations had run on Hasselbach's solicitation charge.

Clearly, a more concrete basis for concluding that a conflict of interest and divided loyalty existed cannot be found.

As such, the OCDA, under *Brady* and *Dekraai,* had an affirmative duty to disclose this conflict of interest to Defendant ***prior to trial and not the day of trial.*** It did not do so. Therefore, the OCDA has clearly committed a *Brady* violation, and recusal of the OCDA under California Penal Code §1425 would have been the only remedy available to ensure Defendant obtained a fair trial. (R.T., Vol I, page 117, Lines 5-7., R.T., Vol I, page 123, Lines 18-24).

Because the Appellate Division completely omits, and fails to discuss in anyway, whatsoever, the foregoing *Brady* analysis as required by the Court of Appeals in *Dekraai*, the conclusion of the Appellate Division that the OCDA did not commit any *Brady* violations in the instant case is reached in error.

If allowed to stand unaddressed by this Court, the Orange County District Attorney, as well as other courts within the entire State of California itself, will be sent the clear message that the *Dekraai* case is no longer "good law" and that *Brady*, in fact, ***does not*** require disclosure by the prosecution of conflicts of interests and divided loyalties to the defense prior to trial.

Again, review by the Supreme Court in the instant case is necessary at this time to secure uniformity of decision, thereby preventing the risk of multifarious pronouncements throughout the State of California and the entire Nation.

THE APPELLATE DIVISION'S UNDERSTANDING OF THE *BRADY* "MATERIALITY" REQUIREMENT IS INCOMPLETE, THEREBY LEADING IT TO ERRONEOUSLY CONCLUDE THAT NO *BRADY* VIOLATIONS WERE COMMITTED BY THE ORANGE COUNTY DISTRICT ATTORNEY.

In its opinion, the Appellate Division outlined the elements required to determine whether a Brady violation has been committed as follows:

> There are three elements to a *Brady* violation: (1) the state withholds evidence, either willfully or inadvertently; (2) the evidence at issue is favorable to the defendant, either because it is exculpatory or impeaching; and (3) the evidence is material. *People v. Lewis* (2015) 240 Cal.App.4th 257, 263.

The Appellate Division went on to state that:

> With respect to materiality, "[e]vidence is material if there is a reasonable probability its disclosure would ***have altered the trial result.***" (*People v. Zambrano* (2007) 41 Cal.4th 1082, 1132 (*Zambrano*), overruled on another ground as stated in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22; *Brady, supra*, 373 U.S. at p. 87). (Emphasis added).

Based on this analysis, the Appellate Division concluded that there was no reasonable probability that disclosure of the alleged *Brady* information "would have altered the trial result." Therefore, Defendant's requested information was therefore not "material" for purposes of *Brady* disclosure" and no *Brady* violations were committed by the OCDA (See Appendix A, Appellate Division Opinion, page 5, first full paragraph).

However, the Appellate Division's understanding of *Lewis* and *Zambrano* is incomplete, thereby leading it to erroneously conclude that no *Brady* violations were committed in the instant case.

The exact quote from *Zambrano* upon which the Appellate Division bases its "materiality" analysis is as follows: (*Zambrano*, supra, at 1132):

> Evidence is material if there is a reasonable probability its disclosure would have altered the trial result. (E.g., *Banks v. Dretke* (2004) 540 U.S. 668, 699 [157 L.Ed.2d 1166, 124 S.Ct. 1256].)
>
> ***Materiality includes consideration of the effect of the nondisclosure on defense investigations and trial strategies***. (*Bagley, supra*, at pp. 682-683; see *In re Brown* (1998) 17 Cal.4th 873, 887 [72 Cal.Rptr.2d 698, 952 P.2d 715] (*Brown*).) (***Emphasis*** added).

Additionally, when citing *Lewis* regarding the materiality requirement, the Appellate Division's cite is not complete, likewise resulting in an erroneous conclusion. The precise quote from *Lewis* is as follows (*Lewis*, Supra, at 263):

> As to the last element, "[e]vidence is material if there is a reasonable probability its disclosure would have altered the trial result." (*People v. Zambrano* (2007) 41 Cal.4th 1082, 1132, 63 Cal.Rptr.3d 297, 163 P.3d 4.) Put another way, the defendant must show that "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." (*Kyles v. Whitley* (1995) 514 U.S. 419, 435, 115 S.Ct. 1555, 131 L.Ed.2d 490.)
>
> ***Materiality includes consideration of the effect of the nondisclosure***

on defense investigations and trial strategies. [Citations.] (***Emphasis*** added).

Furthermore, the Appellate Division neglects to cite the cases that *Zombrano* and *Lewis* rely upon as the basis for its formulation of a "materiality" analysis. These are *United States v. Bagley*, 473 U.S. 667 (1985) and *Kyles v. Whitely,* 514 U.S. 419 (1995).

In *Bagley* and *Kyles*, the United States Supreme Court has held that a proper *Brady* "materiality" analysis includes four additional considerations:

First, "[a]lthough the constitutional duty is triggered by the potential impact of favorable but undisclosed evidence, ***a showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal*** (whether based on the presence of reasonable doubt or acceptance of an explanation for the crime that does not inculpate the defendant). [Citations.] ***Bagley's touchstone of materiality is a `reasonable probability' of a different result, and the adjective is important. The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial***, understood as a trial resulting in a verdict worthy of confidence." *Kyles*, Supra at p. 434 (***emphasis*** added).

Second, one does not show a *Brady* violation by demonstrating that some of the inculpatory evidence ***should have been excluded, but by showing that the favorable evidence could reasonably be taken to put the whole case in such a different light*** as to undermine confidence in the verdict. *Kyles*, Supra at pp.

434-435. (***emphasis*** added).

Third, once a reviewing court applying *Bagley* has found constitutional error ***there is no need for further harmless-error review***. *Kyles*, supra at p. 435. ***The one subsumes the other***. Id. at pp. 435-436. (***emphasis*** added).

Fourth, while the tendency and force of undisclosed evidence is evaluated item by item, ***its cumulative effect for purposes of materiality must be considered collectively***. *Kyles*, supra at pp. 436- 437. (***emphasis*** added).

As shown above, the Appellate Division held that there was no reasonable probability that disclosure of the alleged information would have altered the trial result and therefore, the requested information was not "material" under *Brady*.

However, as seen from *Kyles* above, a showing of materiality under *Brady* ***does not require*** demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal - but rather - ***whether in its absence the Defendant received a fair trial***.

Applying the correct *Brady* analysis under *Bagley* and *Kyles,* the Appellate Division should have concluded that (i) the Orange County District Attorney's failure to disclose ***all*** of the material held by the ***entire prosecution team*** relating to the referral made by the Anaheim Police Department to the OCDA for the prosecution of Officer Hasselbach under California Penal Code Section 647(b) (solicitation of prostitution) which was (ii) based upon undercover operations of The Orange County Human Trafficking Task Force and (iii) detailed in a ten (10) page written report drafted by an undercover officer of the Irvine Police Department who was also a member of the task force would have (v) prevented Defendant from receiving a fair trial in that Defendant was not given ***all*** the information

regarding the incident he was entitled to receive and Defendant's ability to potentially use such information to impeach Hasselbach's testimony at trial or conduct further investigations and pre-trial discovery accordingly, was summarily denied by the trial court.

Here, the record clearly shows that, Defendant requested ***all*** *Brady* material "***to include, but not be limited to***" (i) the OCDA's decision not to prosecute Officer Hasselbach, (ii) the OCDA's decision to make Hasslebach "unavailable" as a witness until the statute of limitations had expired on Hasselbach's solicitation charge(s), and any cases where the OCDA had made the determination not prosecute other Hasselbach DUI cases due to Hasselbach's malfeasance.

As also shown above, at trial and on the record, the OCDA ***admitted*** to the existence of a formal referral (i.e., another document that was not given to Defendant prior to trial) made by a member of the Orange County Human Trafficking Task Force to the Orange County District Attorney recommending prosecution of Hasselbach for solicitation of prostitution charges.

Under a complete *Brady* materiality analysis, as detailed in *Bagely* and *Kyles*, failure by the OCDA to provide a copy of this referral to the Defendant prior to trial ***could reasonably be taken to put the whole case in such a different light*** as to undermine confidence in the verdict (*Kyles*, Supra at pp. 434-435) and that in its absence, ***the Defendant did not receive a fair trial*** in the instant case.

THE APPELLATE DIVISION CREATES TWO NEW ELEMENTS IN ITS *BRADY* ANALYSIS NOT SUPPORTED BY STATUTE OR PRECEDENT.

The Appellate Division also inserts two additional elements into its *Brady* analysis that are not supported by statute or judicial precedent, whatsoever, in the following

language:

> Moreover, ***it appears there was no material responsive to defendant's requests***, and pursuant to Penal Code section 1054.6, any internal charging decision by the OCDA ***would likely be exempt*** from its discovery obligations. (See Appendix A, Appellate Division Opinion, page five, middle of first full paragraph).

Firstly, an analysis under *Brady* ***does not require*** a showing of whether or not there "appears" to be any material responsive to Defendant's request as shown above.

The logical reality of a prosecutor withholding evidence is that there would be no appearance or existence of any material responsive to Defendant's discovery requests because (i) if no material was provided by the prosecution, then (ii) no material would have been entered into evidence, and, therefore, (iii) the record would be completely silent on the appearance or existence of any other material, located elsewhere, responsive to Defendant's discovery requests.

If the Appellate Division is allowed to insert this new, unprecedented element to a *Brady* analysis, the result will be that Prosecutors throughout this appellate district will most certainly withhold evidence going forward knowing that courts will ultimately conclude that "it doesn't look like anything else was out there anyway, so there must not have been a *Brady* violation."

Additionally, the Appellate Division's insertion of this condition is "putting the cart before horse." Defendant claims that the OCDA did not provide all the *Brady* material he was entitled to receive. Therefore, the record would obviously be silent as to "anything else that might be out there" because, again, the claim is that not all was provided.

This begs the question, "how can someone create for the record a showing that there "appears to be" something else out there that the OCDA should have provided, when that is exactly what the Defendant is claiming – that he didn't receive all he was to receive. Again, *Brady* does not require this showing.

If this Court allows the Appellate Division to insert this condition into its *Brady* analysis, then all the OCDA will have to do going forward is to never supply any ***Brady*** material, ***whatsoever***.

The result will be, "it doesn't appear, from the record, that there is anything responsive to Defendant's request" and every *Brady* claim from henceforth and forevermore will necessarily fail because the record will obviously lack any evidence that "there was nothing else out there anyway."

The second element the Appellate Division inserts into the *Brady* analysis is an assumption that if "there were any material responsive to Defendant's request," that it probably "wouldn't be admissible anyway" for various reasons, statutory or otherwise.

In other words, the Appellate Division is saying that in order for a *Brady* duty to arise, the requested material must be deemed admissible under a separate analysis made by the court. Again, *Brady* does not require this.

The United States Supreme Court has made in abundantly clear "that once a reviewing court, applying *Bagley*, has found constitutional error ***there is no need for further harmless-error review*** [and] ***its cumulative effect for purposes of materiality must be considered collectively***. *Kyles*, supra at pp. 436-437.

Conditioning the OCDA's duty to produce material under *Brady* with a conclusion that "it probably wouldn't be admissible at trial anyway," puts the OCDA in the position of

being the sole arbiter of what it is required to produce under *Brady*.

Such an outcome is unthinkable and the potential for abuse is enormous and certain.

Lastly, Defendant's Requests for Judicial Notice filed in this appeal, clearly show that there ***was*** *Brady* material "responsive to Defendant's request" that the OCDA failed to provide.

For example, the federal case filed against Officer Hasselbach for evidence tampering that was later settled out of court at the same time the charges against the Defendant in that DUI case were dropped should have been provided to Defendant here, prior to trial.

Whether or not that information would have been admissible as evidence at trial is another analysis altogether but, in any event, does not absolve the OCDA of its duty to provide such material to the Defendant prior to trial.

In other words, *Brady* does not allow the OCDA to make, on its own, an independent analysis of whether it thinks certain *Brady* material would ultimately be admissible as evidence.

To do so would make the OCDA the sole arbiter of what it thinks it should provide under *Brady*. Such an outcome is unthinkable.

REASONS FOR GRANTING THE PETITION

PRIOR TO APPEAL, A BRADY MATERIALITY ANALYSIS LIES EXCLUSIVELY IN THE HANDS OF THE PROSECUTION AND THE TEMPTATION TOWARDS A "NON-MATERIALITY" DETERMINATION BECOMES IRRESISTABLE IN CASES OF THE CONFLICTS OF INTERESTS DESCRBIED HEREIN.

This Court provided an excellent summary of a prosecutor's duty to disclose material exculpatory and impeachment information, under *Brady* and it's progeny, in the following passage from *Strickler v. Greene, Warden*, 527 U.S. 263 (1999):

> We begin our analysis by identifying the essential components of a *Brady* violation. In *Brady,* this 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." 373 U. S., at 87. We have since held that the duty to disclose such evidence is applicable even though there has been no request by the accused, *United States* v. *Agurs,* 427 U. S. 97, 107 (1976), and that the duty encompasses impeachment evidence as well as exculpatory evidence, *United States* v. *Bagley,* 473 U. S. 667, 676 (1985). Such evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Id.,* at 682; see also *Kyles* v. *Whitley,* 514 U. S. 419, 433-434 (1995). Moreover, the rule encompasses evidence "known only to police investigators and not to the prosecutor." *Id.,* at 438. In order to comply with *Brady,* therefore, "the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in this case, including the police." *Kyles,* 514 U. S., at 437. *Strickler v. Greene, Warden*, 527 U.S. 263 (1999).

The above duties have been levied upon on the prosecution to fulfill. As such, their role as the "discloser" implies that the "disclose" knows little to nothing about the existence of the relevant information prior to the prosecution's disclosure.

Therefore, in making a Brady materiality determination, the prosecution acts as judge and jury in a kind of quasi, pre-trial, evidentiary hearing to decide whether or not to provide certain information to the defense.

As such, the prosecution is making this determination, solely and exclusively, on its own subjective analysis and resulting determination.

As the prosecutor's Brady analysis is entirely "pre-trial" in nature, meaningful remedies for violations are largely relegated to the appeal.

Additionally, an appeal based upon a Brady violation will be successful ***only*** if the Defendant/Appellant is fortunate, or "lucky," enough to find the existence of material exculpatory and impeachment evidence following the actual trial.

Therefore, all of the aforementioned, Constitutionally sacrosanct, duties of the prosecutor are performed solely, and exclusively, by the prosecution prior to appeal, with little to no oversight, and therefore, are entirely subjective and inherently subject to bias.

Historically, the Court has recognized and established various safeguards to hold the "rogue" prosecutor accountable in such situations, thereby helping to protect against abuse.

However, the existence of a conflict of interest, where a prosecutor is tempted to "hide" the evidence of one bad actor to obtain the successful prosecution of another, more likely than not, is too much temptation for the average prosecutor to bare and a new safeguard is needed to remedy the situation.

It is said that Justice is blind, yet, when the subjective determination of *Brady* materiality lies solely in the discretion of the prosecution, and the successful outcome of another trial also rests in the balance, the hand of bias will most certainly always "tip the scales" in favor of "non-materiality," thereby, resulting in non-disclosure to the defense unless there is a new safeguard established by this Court.

As the Court also stated in *Strickler*, "the special role played by the American prosecutor [is]" the search for truth in criminal trials" and " the United States Attorney is "the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and

whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Berger* v. *United States*, 295 U. S. 78, 88 (1935). Strickler v. Greene, Warden,527 U.S. 263 (1999).

When a conflict of interest exists such that a sovereignty (i.e., the prosecutor) cannot govern impartially, this Court must act accordingly to ensure that "justice shall be done."

CURRENTLY DISCOVERY STATUTES CONFLICT WITH BRADY DISCLOSURE OBLIGARTIONS FURTHER TIPPING THE SCALES IN FAVOR OF NON-DISCLOSURE.

In California, Penal Code § 1054.1 requires the prosecuting attorney to disclose to the defendant, or his or her attorney, an exhaustive list of materials and information, "if it is in the possession of the prosecuting attorney, or if the prosecuting attorney knows it to be in the possession of the investigating agencies, that range from the names and addresses of persons the prosecutor intends to call as witnesses at trial, to all relevant real evidence seized or obtained as a part of the investigation of the offenses charged, to "*any exculpatory evidence.*"

Additionally, California Courts have consistently held that Penal Code § 1054.1 is intended to impose a broader statutory duty to disclose to the defendant any exculpatory evidence, *not just material exculpatory evidence.*

However, this Section of the California Penal Code conflicts with California Government Code §7923.615 (Public Records/Information Requests) which prohibits the disclosure of police reports and ongoing investigations as follows:

> Notwithstanding any other provision of this article, a state or local law enforcement agency shall make public the information described in paragraph (2), except to the extent that disclosure of a particular item of information would endanger the safety of a person involved in an

> investigation or would endanger the successful completion of the investigation or a related investigation.

As can be seen, although the California legislature and, subsequently, the courts, have attempted to "go beyond" *Brady* with Penal Code §1054.1, any information regarding the disclosure of police reports and ongoing investigations is prohibited.

Therefore, the prosecutor may be faced with the situation where exculpatory or impeachment information has become available, and is also likely to be deemed "material" by an appellate court at some point in the future, however, they are prevented from disclosing such information to the defense as the information pertains to an "ongoing investigation."

Therefore, it is entirely possible that a law enforcement officer, who is the key witness in a prosecutor's case against a defendant, is also the subject of an ongoing criminal investigation and, as a result, the information regarding the officer's own criminal investigation is prohibited from being disclosed to the defense as required under *Brady* because the prosecution believes they are prevented from doing so by California statutory law – further "tipping the scales" towards non-disclosure and preventing the Defendant in the first case from receiving a fair trial.

STATE BAR ETHICS RULES ARE AN INEFFECTIVE REMEDY.

Current American Bar and State Bar Ethics Rules are inefficient vehicles for addressing such conflicts of interest leading up to trial.

For example, the California State Bar's Rule 5.20 on court proceedings states that "a State Bar Court proceeding begins when a party files an initial pleading" and that the statute of limitations period for filing is between "the later of (1) five years from the date

the violation occurred or (2) two years from the date the first complaint regarding the violation is submitted to the State Bar."

Therefore, it is entirely possible that a prosecutor, who finds themselves with a conflict of interest between their duties towards their star witness and another defendant in a criminal case, will not actually be subject to discipline by the state bar for up to five years after the violation has occurred.

After five years, most likely, the law enforcement witness, turned potential criminal defendant, will have already testified, the jury will have already returned a verdict, and the period for filing an appeal will long since have passed, before anyone, including the California State Bar, has even filed charges against the offending prosecutor for the conflict of interest violation.

Meanwhile, the defendant in the first case, potentially incarcerated, sits and hopes "to get lucky" and have someone, somewhere, find something that can be used as a basis for a post-trial motion to over-turn the guilty verdict, the fairness of which would have been called into question if the prosecutor had disclosed the evidence of the conflict of interest and information regarding the law enforcement witnesses' ongoing criminal investigation in the first place.

As can be seen, existing state bar ethics rules are an ineffectual remedy to handle such conflicts of interest, in a *Brady* scenario, prior to trial.

AN ADEQUATE REMEDY EXISTS FOR THIS COURT TO FASHION BY COMBINING AMERICAN BAR ASSOCIATION MODEL RULE 3.8(d) WITH AN ALREADY EXISTING SUPREME COURT CONSTRUCT.

The American Bar Association Rule 3.8 (d) requires the prosecutor in a criminal case to make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal ***all unprivileged*** mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility ***by a protective order of the tribunal***. *American Bar Association Model Rule* 3.8(d).

At first glance, this Rule seems to embody a *Brady* type disclosure obligation and duty. However, the duty is limited to "all unprivileged" material.

However, the Rule also states that a protective order of the tribunal may alleviate the prohibition against disclosure of privileged information.

This Court, in *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987), ruled that just such a "protective order" was available in the form of an *in camera* case file inspection and served the dual purposes of complying with *Brady* while, at the same time, protecting the subject of the privileged information's privacy, in this case a minor child. *Ibid.*

Ultimately, the Court held that "although courts have used different terminologies to define "materiality," a majority of this Court has agreed, "[e]vidence is material only if 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." *United States* v. *Bagley,* 473 U. S., at 682.) See *id.,* at 685.

Additionally, the Court held that although the eye of an advocate may be helpful to a defendant in ferreting out information - *Dennis* v. *United States,* 384 U. S. 855, 875 (1966), this Court has never held — even in the absence of a statute restricting disclosure — that a defendant alone may make the determination as to the materiality of the information and that [the defendant's] interest in ensuring a fair trial can be protected fully by requiring that the [privileged] files be submitted only to the trial court for *in camera* review. *Pennsylvania v. Ritchie*, 480 U.S. 39, 53, 59 (1987).

CONCLUSION

As shown above, the decision of the Appellate Division in the instant case completely ignores well established authority of the United States Supreme Court, the California Supreme Court, and the Court of Appeal, Fourth Appellate District, Division Three.

In so doing, the Appellate Division created a completely new and unsupported by any precedent, whatsoever, *Brady*-type analysis of its own.

In refusing to follow well-established precedent, the Appellate Division far exceeded its jurisdiction and review by the Supreme Court is appropriate and necessary at this time pursuant to this Court's holding in *Dvorin*.

In the instant case, former HBPD Officer Hasselbach was solely responsible for 913 DUI arrests in the City of Huntington Beach between January 2018 and May 2020. As such, there are 912 cases, in addition to the instant case, which either have been tried or will be tried, which likely all have the same facts pertaining to Hasselbach's solicitation charge and the OCDA's refusal to comply with its obligations under *Brady* to supply all the material relating to the Hasselbach's investigation by the Orange County Human

Trafficking Task Force.

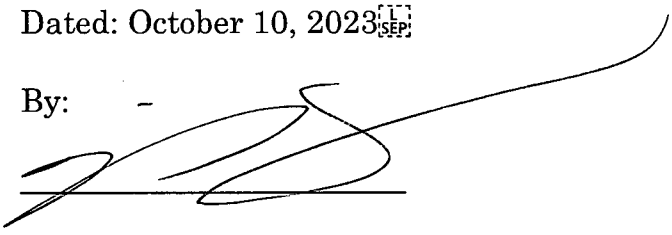
Consequently, the potential for multifarious pronouncements from an endless stream of appeals in cases with identical facts to the instant case is enormous.

Therefore, review by the Supreme Court at this time is necessary to secure uniformity of decision within the Orange County Superior Court, the Fourth Appellate District, Division Three, the State of California and throughout all of the courts throughout the nation who are confronted with concealment by prosecution of a law enforcement witness, turned potential defendant.

Wherefore, the petition for a writ of certiorari should be granted.

RESPECTFULLY SUBMITTED:

Dated: October 10, 2023

By: 

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