ORIGINAL

23-609

No. _____

In the Supreme Court of the United States

FRANDER SALGUERO,
Petitioner,

v.

THE DISTRICT ATTORNEY OF LOS ANGELES COUNTY, GEORGE GASCÓN AND DEPUTY DISTRICT ATTORNEY STEVEN MAC; THE FIFTH DIVISION OF THE SECOND DISTRICT COURT OF APPEAL OF CALIFORNIA,
Respondents.

On Petition for a Writ of Certiorari to the California Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Habeas is an incompetent remedy to compel official action since "the only remedy that can be granted on habeas is some form of discharge from custody." (*Fay v. Noia*, 372 U.S. 391, 428, fn.38 (1963)) The sole remedial vehicle to compel compliance with an official duty has consistently been mandamus.

Given that the false appearance of evidence—false evidence—completely undermines the American criminal justice system, this Court contemptuously rejects it, holding such convictions "must fall under the Fourteenth Amendment" and obliging a "'responsibility and duty to correct what [the prosecutor] knows to be false and elicit the truth'" (*Napue v. Illinois*, 360 U.S. 264, 269-70 (1959)). However, certain critical details still require attention.

Especially as the circuits are split 5 to 6, the majority are allowing convictions on proven government known perjury to stand—over 30 cases from all circuits prove this split, 20 are within the past 5 years.

The questions presented are:

1. Whether habeas is the sole remedy or remedy by mandamus is a permissible means to effectuate the constitutional duty to correct false evidence when a prosecutor refuses to perform.
2. Whether false evidence is structural error or some prejudice test must be employed to ascertain an acceptable amount of perjury.

PARTIES TO THE PROCEEDING

Petitioner in this Court and in the lower courts, —except as defendant at the trial court— is Frander Salguero, a human being, currently confined in a California state prison after jury trial.

Respondents in this Court are: the current District Attorney of Los Angeles County, California, the Honorable, George Gascón, in his official capacity; and the prosecutor from said jury trial, deputy District Attorney Steven Mac, in his official capacity; and the California Court of Appeal, Second District, Fifth Division, as an entity, not as individual justices, *Ex Parte Fahey*, 332 U.S. 258, 259-60 (1947); *Mallard v. United States District Court*, 490 U.S. 296, 309-10 (1989).

STATEMENT OF RELATED PROCEEDINGS

The following proceedings are directly related to the case in this Court within the meaning of Rule 14.1(b)(iii), all in California:

- *People v. Salguero*, No. MA066642, Superior Court of Los Angeles County. Judgment entered Oct. 12, 2016.
- *People v. Salguero*, No. B278249, Second District Court of Appeal, Division Five. Judgment entered May 31, 2018.
- *People v. Salguero*, No. S249843, California Supreme Court. Review denied Aug. 29, 2018.
- *Salguero v. Sullivan*, No. CV 19-07414-CJC (AS) U.S. District Court for the Central District of California. Judgment entered June 10, 2020.
- *People v. Salguero*, No. MA066642, Superior Court of Los Angeles County. Order of denial entered Sept. 15, 2022.

- *Salguero v. Superior Court* (I), No. B323872, Second District Court of Appeal, Division Five. Order denying as moot entered Nov. 4, 2022.
- *People v. Salguero*, No. MA066642, Superior Court of Los Angeles County. Order granting in part and denying in part entered Nov. 18, 2022.
- *Salguero v. Superior Court* (II), No. B325061, Second District Court of Appeal, Division Five. Order denying mandamus entered Jan. 20, 2023.
- *Salguero v. District Attorney* (III), No. B325333, Second District Court of Appeal, Division Five. Order denying mandamus entered Feb. 24, 2023.
- *Salguero v. Superior Court* (IV), No. S278394, California Supreme Court. Order denying review entered Apr. 12, 2023)
- *People v. Salguero* (V), No. B328253 Second District Court of Appeal, Division a. Order dismissing appeal entered Jun. 14, 2023.
- *Salguero v. District Court of Appeal* (VI), No. S278944, California Supreme Court. Order denying mandamus entered Jul. 19, 2023.
- *People v. Salguero* (VII), No. S281123 California Supreme Court. Order denying review entered Aug. 30, 2023.
- *In re Frander Salguero* (IX), 23-_____ United States Supreme Court. Petition for mandamus, filed concurrently.

Please note from 2022 on, all above filings have been by the author, are not vexatious nor fee driven, rather "in a time when the need for legal services among the poor is growing and public funding for such services has not kept pace, lawyers' ethical obligation to volunteer their time and skills *pro bono publico* is manifest." (*Mallard v. United States District Court*, 490 U.S. 296, 310 (1989))

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Relevant Opinions Below

No decisions in this case are published. The first three are orders denying relief in original proceedings and the last on direct review:

PETITION FOR A WRIT OF CERTIORARI

Frander Salguero respectfully petitions for a writ of certiorari to the California Supreme Court (*Salguero v. District Court of Appeal* VI S278944), seeking review of the order by respondent court (*Salguero v. District Attorney* III B325333). In a symbiotic relationship, this certiorari petition fortifies appellate jurisdiction and aligns with the concurrently filed mandamus petition, *In re Frander Salguero* 23-_____, (28 U.S.C. §1651(a)) serving as the remedial means to correct the false record mandated by the Fourteenth Amendment. The certiorari foundation requires the mandamus to effectuate its decision, each petition mutually supporting the other for a comprehensive and just result.

JURISDICTION

The California Supreme Court order denying the petition for extraordinary writ was entered July 19, 2023. California Rules of Court, rule 8.532(b)(2)(C) (no rehearing possible, final upon denial.)

Though timely received for filing on Oct. 17, 2023, the Clerk returned this petition for corrections on Oct. 24, 2023, (Rule 14.5); last day became Dec. 23, 2023. Because the mandamus petition required like correcting, recalling it before delivery expedited the joint submission to aid appellate jurisdiction.

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a); or if necessary, as common-law certiorari, 28 U.S.C. §1651(a), *Hartranft v. Mullowny*, 247 U.S. 295, 299-300 (1918).

The case is final as "far as these respondents are concerned, there is nothing more to be decided" (*Clark v. Williard*, 292 U.S. 112, 118 (1934)) "state law would not permit him again to present his federal claims for review." (*Cox Broadcasting Corp. v. Cohn*,

420 U.S. 469, 481 (1975)) Nor does possible habeas prevent finality. (*Largent v. Texas*, 318 U.S. 418, 421-22 (1943)). "It is the right to a trial on the issue of guilt 'that presents a serious and unsettled question' [citation] that 'is fundamental to the further conduct of the case' [citation]" (*Brady v. Maryland*, 373 U.S. 83, 85 n.1 (1963)).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Constitution of the United Stated of America

Amendment II

...being necessary to... security... the right of the people to... bear Arms, shall not be infringed.

Amendment XIV

SECTION. 1. ... nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

California Constitution

Article I

SECTION 1. All people are by nature free and independent and have *inalienable rights*. Among these are enjoying and *defending life* and *liberty*... and pursuing and *obtaining safety*, happiness, and privacy.

Article VI

SECTION 10. in petition at 16

United States Code

28 U.S.C. § 1257

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari ... where any... right, privilege, or

immunity is specially set up or claimed under the Constitution... [of] the United States.

28 U.S.C. § 1651

(a) The Supreme Court...may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

28 U.S.C. § 2106

The Supreme Court... may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

Statutes at Large

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California Codes

Civil

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Every person who has actual notice of circumstances sufficient to put a prudent person upon inquiry as to a particular fact has constructive notice of the fact itself in all cases in which, by prosecuting such inquiry, he or she might have learned that fact.

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Pen. Code § 1477 in petition at 20 and App. at 91a

California Rules of Court

Rule 8.385(d) in petition at 18 and subsections (c-f) in App. at 91a-92a

Rule 8.487(a)(1) in App. at 97a

Rule 8.532
(b) Finality of decision
(2) The following Supreme Court decisions are final on filing:
(A) The denial of a petition for review of a Court of Appeal decision;
(C) The denial of a petition for a writ within the court's original jurisdiction without issuance of an alternative writ or order to show cause;[1]

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[1] Advisory Committee Comment: "Subdivision (b)(2)(C) recognizes that an order denying a petition for a writ within the court's original jurisdiction without issuance of an alternative writ or order to show cause is final on filing. The provision reflects the settled Supreme Court practice, since at least 1989, of declining to file petitions for rehearing in such matters."

INTRODUCTION

There is a well-recognized and entrenched conflict in the application of the law on an issue that this Court deems more important than all "'fundamental'" "'bedrock' constitutional rights" (*Whorton v. Bockting* 549 U.S. 406, 421 (2007)). The circuits have split, some are intractably divided from this Court's unanimous holdings. Five circuits are beholden to the Constitution and this Court; six are not. Various states have joined the rebellion. The divide is discussed extensively in *Juniper v. Davis*, 74 F.4th 196, 211-12 and fns. 13 & 14 (4th Cir. 2023).

A significant volume of lower courts are accepting the government's use of felonious non-facts to supplant facts. Then allowing these convictions to stand after presenting the courts proof. No longer is it "established that a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment," (*Napue v. Illinois*, 360 U.S. 264, 269 (1959)) Disregarding the established "strict standard of materiality" (*United States* v. *Agurs*, 427 U.S. 97, 103-104 (1976)) in favor of creating their own tests in defiance of this Court.

The Union is supported by the Second, Fourth, Ninth, Tenth and Eleventh Circuits.

They are outnumbered by the rebel First, Third, Fifth, Sixth, Seventh, and Eighth Circuits. California is among them.

Ex parte Escobar, WR-81,574-02, at *1-2 (Tex. Crim. App. **Sep. 27, 2023**):

> The United States Supreme Court remanded this case to us to reconsider Applicant's false-testimony claim in light of the State's confession of error.

> Nothing presented in the *certiorari* proceedings or to us afterwards changes our conclusion that Applicant has not shown a due process violation; because he has not shown certain evidence to be false, and other evidence that has been shown to be false is not material because there is no reasonable likelihood that the outcome would have changed if the false evidence had been replaced with accurate evidence. Accordingly, we reaffirm our denial of relief.

A humble teacher once advised, "forgive them; for they know not what they do" *Luke* 23:34

Yet *can* easily be instructed. Definitively, in modern parlance, false evidence is structural error:

This "Court has consistently held that a conviction obtained by the knowing use of perjured testimony is fundamentally unfair" (*Agurs* at 103) and "an error has been deemed structural if the error always results in fundamental unfairness." (*Weaver v. Massachusetts*, 137 S.Ct. 1899, 1908 (2017)) Which "means only that the government is not entitled to deprive the defendant of a new trial by showing that the error was 'harmless beyond a reasonable doubt.'" (*Id.*, at 1910)

False evidence eradication ranks more fundamental to ordered liberty than all bedrock due process principles, as an express exemption to the former bar in *Teague v. Lane*, 489 U.S. 288, 313 (1989), overruled re "retroactively on federal collateral review," "no new rules of criminal procedure can satisfy the watershed exception." (*Edwards v. Vannoy*, 141 S. Ct. 1547, 1559 (2021))

Aside from being a *Teague* exemption, this case is not about collateral *review*, but rather direct remedial *relief*—the very aspect to be addressed is to

recognize that it cannot only apply to habeas. Because over 60 years ago, when this Court commanded the prosecutor to correct the known false record, remedy by habeas was replaced by mandamus, (*Napue* at 269-70) as only 11 days prior held, "under the All Writs Act, 28 U.S.C. § 1651... we think the right to grant mandamus to require jury trial where it has been improperly denied is settled." (*Beacon Theatres v. Westover*, 359 U.S. 500, 511 (1959)) Unanimous on that point. "There can be no doubt that a litigant is entitled to a writ of mandamus to protect a clear constitutional or statutory right to a jury trial." (*Id.*, concurring and dissenting).

The command to clean-up one's own mess, was not delegable. The prosecutor, or if not available the office, remains responsible, (*Giglio v. United States*, 405 U.S. 150, 154 (1972)). "It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." (*Berger v. United States*, 295 U.S. 78, 88 (1935))

A totalitarian form of government believing in perjury—is usurping this Court's authority and denying "the fundamental conceptions of justice which lie at the base of our civil and political institutions." (*Mooney v. Holohan,* 294 U.S. 103, 112 (1935)) There is a civil war occurring over the Bill of Rights.

"All perjured relevant testimony is at war with justice" (*In re Michael* 326 U.S. 224, 227 (1945)). "Those who wrote our constitutions knew from history and experience that it was necessary to protect against unfounded criminal charges brought to eliminate enemies", yet when they form an axis with "the corrupt or overzealous prosecutor" the "inestimable safeguard" provided "an accused with the right to

be tried by a jury of his peers" (*Duncan v. Louisiana,* 391 U.S. 145, 156 (1968))—the "jury being the constitutional tribunal provided for trying facts in courts of law" (*Berry v. United States*, 312 U.S. 450, 453 (1941))—becomes a casualty of war.

"[T]he Fourteenth Amendment cannot tolerate a state criminal conviction obtained by the knowing use of false evidence.... There can be no retreat from that principle here." (*Miller* v. *Pate* 365 U.S. 1, 7 (1967))

Such an attack on the American system of jurisprudence requires mandamus. "As the writ is one of 'the most potent weapons in the judicial arsenal'" (*Cheney v. U.S. Dist. Court for D.C.* 542 U.S. 367, 380-81 (2004), citation omitted) to compel the apostate prosecutor to present himself in open court and correct the false record. For he must "use every legitimate means to bring about a just" result (*Berger, supra*).

Confessing in front of his peers, exposing the practice of shifting the burden of proof and favoring the presumption of guilt by requiring one to prove innocence by disproving the false appearance of guilt —when there never was subject matter jurisdiction— will serve to deter the need to feed his own ego with innocent souls. "And it will tend to preserve the criminal trial, as distinct from the prosecutor's private deliberations, as the chosen forum for ascertaining the truth about criminal accusations." (*Kyles v. Whitley*, 514 U.S. 419, 440 (1995))

The mandamus petition presents with significantly more facts and cause; this petition secures the theatre with a stand-alone factual basis and sufficient reasons to grant review. Both joining together to win this civil war against tyranny.

STATEMENT OF THE CASE

1. California—without so much as a warning—allowed Thomas Stanley, a 27-time state-stipulated-incompetent attorney, suspended *again* five days before being assigned out on this trial, to safeguard Frander's rights.[2] By calendar dates the trial appeared lengthy, Sept. 20 to Oct. 3, 2016, but total time in front of the jury—*voir dire* to *retire*—8 hours and 5 minutes.

Three days after Frander was sentenced to two life-terms, Stanley's actual suspension began.

A month later, upon receiving notice, Frander immediately notified respondent court, complete in all respects to constitute a habeas petition, but for being verified.[3]

It was set to the side.

Now for the bad parts of the case.

2. The record proves that one element of each charged offense was established by known false evidence,[4] rendering the matter void for lack of subject matter jurisdiction, *United States v. Gaudin*, 515 U.S. 506, 509-10 (1995); *Forbes v. Hyde* 31 Cal. 342, 348 (1866), ("there is a total absence of any legal evidence tending to prove an essential jurisdictional fact" *id.*, at 355) "no evidence whatever in the record to support these convictions... [is a] 'sheer denial of due process,'...(fn.13)" (*Thompson v. Louisville*, 362 U.S. 199, 206 (1960)), fn.13: "*Mooney* v. *Holohan*"

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[2] R.183
[3] R.1474-1476
[4] R.50-76

With a significant volume more known false evidence proven, including *eight* known false evidence questions in-a-row.[5]

The lower courts were also provided proof of the prosecutor's: document tampering, pretrial coaching sessions (eyewitnesses' statements), and concealment of 45 exculpatory items. This petition is not presented because we won.

Some quick known perjuries:

Respondent prosecutor Steven Mac did not ask George[6]—the best person to know—instead he asked Mark, the other purported victim:

Q- On that day do you know whether or not he was still using narcotics, *or no*?

A- As far as I know, he hadn't been.[7]

L.A. County firemen hand wrote at the time of event: "*7/21/2015*" "*Ayala, George*" "Transfer Care *2127*"

"Suspected: ☒ ETOH ☒ Drugs" followed by "*+METH USE x 1HR PRIOR*." [ETOH= Alcohol][8]

George's "Admission History Assessment" form: "Information Given by" "Mark Thomas" on "Drugs used methamphetamine" "Drugs last used 1 hour PTA" (prior to arrival) "07/22/2015-11:22"[9] provided when George was "sedated",[10] "The patient... did not want to talk to me" "uses methamphetamines frequently" "He is accompanied by his partner."[11]

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[5] R.65-67, R.105-146

[6] The prosecutor created a record using first names, necessitating matching the record.

[7] Tr.1216:3-5

[8] R.1847

[9] R.2253-2255

[10] R.2195

[11] R.1855-57.

All from People's 11 introduced at trial and proves Mac knew Mark was lying.

Since "'[t]he individual prosecutor is presumed to have knowledge of all information gathered in connection with the government's investigation'" (*In re Brown*, 17 Cal.4th 873, 879 (1998), citation omitted) then he has knowledge of the exhibits introduced at trial to prove his claim to the jury, Cal. Civ. Code, §19.[12]

It is a rare event indeed, to observe exculpatory evidence transformed into inculpatory evidence.

Detective Saylor's Report: "I searched the vehicle for the knife and any other possible evidence of the crime. **No knife or blood evidence was found**." Accompanied by a "Senior Criminalist" and a "Forensic Identification Specialist"[13] from a very dirty vehicle. Observe how the incompetent handled the deliberate deceiver:

Q- Was a knife ever recovered during the course of your investigation?
Det. Conn- No.
Q- Was a knife ever recovered – was a knife ever recovered from the Toyota Prius?
A- No.
Mr. Mac: Nothing further, Your Honor.
The Court: Cross.

Mr. Stanley: No.[14]

The jury was released for the weekend "at 9:40 a.m."[15]

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[12] All future references to enactments are from California, except when clearly federal.
[13] App. 109a
[14] Tr.1266:9-20
[15] Tr.1267-68

Mac's opening statement:
"You will hear the description of the injuries and the cut that George suffered. And you will learn that the knife was taken by Mr. Salguero away from the scene and never recovered."[16]

Instead of exposing government deception—the falsely instilled belief in the jury that the knife was concealed *by* Frander was left lingering for 71 hours and 20 minutes.

Only to return on Monday to witness first-hand the most prejudicial false evidence imaginable *ever*. But that is addressed in the mandamus petition. Because the three biggest cannons had to be split up to cover each petition.

This one contains the Holy Grail of *Brady* evidence.

The altered printout of the knife presented as evidence,[17] or the fact that counsel was able to locate the knife seven years later— it was in the jury box the entire time—[18] are not even close to the cannons.

Nor is this preview of some element-based perjury in this self-defense case:

As observed by the surgeon —according to People's 11— "Abdominal examination revealed an about **2 to 2.5 cm laceration** over the left upper quadrant with eviscerated omentum. **No evidence of eviscerated small bowel** or colon."[19]

According to the Oxford Dictionary, eviscerated means disembowel. The simplest way to describe omentum is basically glorified belly fat. And according

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[16] Tr.1152:27-1153:2
[17] R.564-572
[18] R.815-824
[19] App. 111a

to science, 2.5cm is approximately 0.984 inches, not the 17.78cm claimed to the jury.

By Mr. Mac: Is this six-to seven-inch wound the stab wound that you received?

A- Yes.

From that *not* six to seven-inch wound, out poured intestines all over the jury.

Opening statement, "His intestines are protruding out of his stomach."

Proved up as: "Did you see your intestines? Yeah. What did it look like to you? [Objection overruled] It was white roman noodles, I will say, but thick." "My intestines came out. I had them in my hands". They "had to remove intestines" (stricken). "He just held his – he was holding his intestines."

Mac's closing argument:

"You will have the medical records and you will *see*... bowels coming out, intestines coming out. **That's a move to kill somebody**."[20]

Either firemen, nurses, and doctors are liars; or Mark, George, and Mac are. Both cannot be true. Either way, known false evidence was introduced.

[20] Location in order as quoted:
Tr.1152:9;1183:8-14;1181:24;1186:10-15;1127:14;1344:17-19

LIFE IMPRISONMENT—FOR EXERCISING A CONSTITUTIONAL RIGHT—BY THE SWORN INNOCENT

Mac declared his argument re self-defense false under penalty of perjury:

"If you want to argue self-defense, then you have to argue that the person there was fighting and then reacted in a reasonable way. That's why both of those arguments doesn't hold water..."[21]

Mac's argument was the known sieve:

"Accordingly, the Office of the Los Angeles District Attorney is submitting the attached Subpoena Duces Tecum for any and all medical records of **the victim in this matter**".

"Any and all medical records for Patient **Frander Salguero**" "07/21/2015, Frander Salguero was treated at Olive View" "for injuries resulting from a violation of PC 245(A)(1), PC 422"[22] "injuries inflicted upon Frander" "the identity of the persons who inflicted injury" "declare under penalty of perjury" "*Steven Mac*" "April 28, 2016"[23]

Concealed by Mac and independently discovered by habeas investigation six years to the day on 5/16/22 that the records were provided to Mac on 5/16/16.

That concealed affidavit swore Frander was the victim of a deadly assault and was relevant to the "self-defense" appearing 17 times in the unpublished opinion affirming the conviction (App. 49a-81a) and rejecting "Self-defense [that] is a basic right, recognized by many legal systems from ancient times

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[21] Tr.1365:16-22

[22] "ASSAULT WITH A DEADLY WEAPON AND GREAT BODILY HARM & CRIMINAL THREAT"

[23] App. 113a & 116a-118a

to the present day, and in *Heller,* we held that individual self-defense is 'the *central component*' of the Second Amendment right. ... the 'inherent right of self-defense has been central to the Second Amendment right'" (*McDonald v. City of Chicago* 561 U.S. 742, 767 (2010).) Sent to prison for life on known lies, for exercising his constitutional rights[24] to choose to live.

Would that concealed affidavit swearing to innocence be material under *Brady*?

A whole new light under *Kyles*?

Because it certainly was a first *Agurs* category violation,[25] yet California refuses to act.

Self-defense was quite necessary because when the unmedicated schizophrenic in a blackout rage event from the chronic methamphetamine use by the convicted trafficker—the "third largest drug dealer" "in West Hollywood"[26]—was beating Frander in the skull with a metal pan, with such immense force that it dented the metal around Frander's skull,[27] and caused George to break his own arm.[28]

Mac swore *send me to prison if I lie, Frander Salguero was the victim of a deadly assault.*

Then suborned perjury to send "**the victim in this matter**" to prison for life. Because evil has an insatiable thirst, a year after trial, Mac sent a recom-

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[24] See Cal. Const. art. I, §1, ante at 2.

[25] "The plea of not guilty puts in issue every material allegation of the accusatory pleading," (Pen. Code, § 1020) "All matters of fact tending to establish a defense... may be given in evidence under the plea of not guilty." (*Id.*, § 1020)

[26] R.402:23-25

[27] Photos at App. 137a-138a

[28] R.136-137 identifying location in record for this paragraph.

menddation to the parole board, "Defendant should not be paroled."[29]

FEDERAL CONSTITUTIONAL ISSUES RAISED

3. California Const. art. VI §10: "The Supreme Court, courts of appeal, superior courts, and their judges have original jurisdiction in habeas corpus proceedings. Those courts also have original jurisdiction in proceedings for extraordinary relief in the nature of mandamus, certiorari, and prohibition."

The grounds raised were of such a "nature" Pen. Code, §1265(a)[30] that "the application for the writ shall be made to" respondent court. Addressed below, but each was an original action.

A. The highest state court.

The *Napue* duty was "definitely brought to the court's attention." (*Live Oak Assn. v. R.R. Comm*, 269 U.S. 354, 357 (1926)) The California Supreme Court's approbating denial, stated: the writ "is denied. To the extent the petition raises habeas corpus claims (see Pen. Code, §1473, subd.(b)(1)), the denial is without prejudice to filing..." (App. 45a). It is not independent when the state law cited is the federal issue raised. Pen. Code §1473(b)(1) ("False evidence") (App. 89a) "There can be no question as to the proper presentation of a federal claim when the highest state court passes on it" (*Raley v. Ohio*, 360 U.S. 423, 436 (1959)), and "not necessary that the ruling shall have been put in direct terms. If the necessary effect of the judgment has been to deny the claim, that is enough." (*Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928)) False evidence is a due process violation, not its presentation vehicle.

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[29] App. 121a

[30] App. 88a

There was no "fail[ure] to meet a state procedural requirement" (*Coleman v. Thompson* 501 U.S. 722, 730 (1991)) because the California Legislature dictated habeas was not a required procedural vehicle. "This section **does not** limit the grounds for which a writ of habeas corpus may be prosecuted **or preclude the use of any other remedies.**" (Pen. Code, §1473 (d))

"[H]abeas corpus" is merely "the preferred method", not the *only*, because if "out-of-custody" "the appropriate vehicle... [is] writ of mandate" (*People v. Picklesimer*, 48 Cal.4th 330, 339 (2010)). Quoting respondent court, "'[A] right but no expeditious and adequate remedy.... is an unconscionable situation which a court of justice cannot tolerate.'" (*Id.*, at 339)

The unexplained denial of the "expeditious and adequate remedy" of *Napue* relief, requires a "look through" adoption of the lower court's reasoning. (*Wilson v. Sellers*, 138 S.Ct. 1188, 1192 (2018))

B. The intermediate state court.

Salguero III on *Napue* duty to correct was denied finding: "The petition does not seek performance of a ministerial act", regarding compliance with this Court, deemed merely discretionary, by citing a case to clarify: "Discretion... is the power conferred on public functionaries to act officially according to the dictates of their own judgment".[31]

Ignoring the Supremacy Clause "obligation is imperative upon the state judges in their official... capacities....They were not to decide merely according to the laws... of the state, but according to the constitution... of the United States — 'the supreme

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[31] App. 46a; *AIDS Healthcare Foundation v. Los Angeles County* 197 Cal.App.4th 693, 700 (2011)

law of the land.'" (*Martin v. Hunter's Lessee*, 14 U.S. 304, 340-41 (1816))

The California Supreme Court could not agree with that faulted order's reasoning, because "we hold that a court acts in excess of its jurisdiction when it permits a district attorney to disregard the statutory confines of his authority" (*Safer v. Superior Court* 15 Cal.3d 230, 232 (1975)) "the prosecutor's own discretion is not subject to judicial control at the behest of persons **other than the accused**. [Citations]" (*Dix v. Superior Court*, 53 Cal.3d 442, 451 (1991) emphasis added) (R.55 & 58).

The "extent... raise[d]" pertained to the prejudice intended resulting from a backup conditional prayer before respondent court. "*If* the Court disagrees with Mandate... yet *believes* a prima facie case establishing entitlement to...habeas corpus on false evidence grounds... such that *relief* from unlawful confinement maybe [sic] afforded now"[32], acknowledging the conditions precedent: "To the extent petitioner seeks habeas *relief*, the petition is denied" (App. 46a) with its stated reason defying the Cal. Rules of Court, Rule 8.385(c-f) (App. 91a-92a). Noting it had discretion to deny *without* prejudice—which it did not declare. Thus acknowledged the prima facie case was established, while trying to silence it.

> Rules of Court, Rule 8.385
> (d) Order to show cause
> If the petitioner has made the required prima facie showing that he or she is entitled to relief, the court *must issue an order to show cause.* An

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[32] R.79

order to show cause does not grant the relief sought in the petition.

The author of the affirming opinion (App. 47a, 81a) skipped over the prayer to re-decide the opinion that was based on known false evidence. The very aspect requiring the petition be filed there, Pen. Code, §1265.

C. The portions of the record.

Not wanting to endorse the ambiguity intended by the lower courts, the "pertinent quotations of specific portions of the record or summary thereof, with specific reference to the places in the record where the matter appears... so as to show that the federal question was timely and properly raised and that this Court has jurisdiction to review the judgment on a writ of certiorari. [Because] th[ose] portions of the record relied on under this subparagraph are voluminous, they shall be included in the appendix referred to in subparagraph 1(i)." (Rule 14.1(g)(i)) Please see for overview App. 100a, trial court 102a, respondent court 102a-105a and state highest court 106a-107a.

D. The state procedure was correctly followed, the proffered alternative was not adequate, because habeas is not a remedy in California.

California can advise why denying an equitable remedy to pursue equitable habeas was not adequate, *Robertson v. Library Trustees*, 136 Cal. 403, 405 (1902):

"It has been held in this state that to supersede the remedy by *mandamus* the party must not only have a specific adequate legal remedy, but one competent to afford relief upon the very subject-matter of his application, and one which

> is equally convenient, beneficial, and effective as the proceeding by *mandamus*." [Citation.]

The petition pertained to the duty to correct the false record. "The purpose of the writ of mandate is 'to compel the performance of an act which the law specially enjoins, as a duty resulting from an office,...; or to compel... enjoyment of a right... unlawfully precluded by such ... person.' (Code Civ. Proc., § 1085)" (*People v. Romero*, 8 Cal.4th 728, 742 (1994)) Continuing at 743:

> Habeas corpus and mandate proceedings are merely analogous, not identical.... in mandate proceedings relief is granted by issuance of a peremptory writ of mandate; in habeas corpus proceedings, relief is granted not by issuance of ... the writ of habeas corpus[, which] serves only the limited function of requiring the filing of a return.

"It 'does not decide the issues and cannot itself require the final release of the petitioner.'" (*Id.* at 738)

A habeas writ cannot "supersede that by mandamus, since it cannot compel a specific act to be done" (*Fremont v. Crippen*, 10 Cal. 211, 215 (1858)) upon which Code Civ. Proc., §1086 is based (App. 93a-94a).

> Pen. Code §1477 The writ must be directed to the person having custody of or restraining the person on whose behalf the application is made, and must command him to have the body of such person before the Court or Judge before whom the writ is returnable, at a time and place therein specified.

Another statute commanded, "'[a]ny court or judge authorized to grant the writ... must, if it appears

that the writ ought to issue, grant the same without delay....'" (Pen. Code, § 1476.)" (*Romero* at 737-38)

"When this Court has fulfilled its duty to interpret federal law, a state court may not contradict or fail to implement the rule so established. See U.S. Const., Art. VI, cl. 2." (*Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530, 531 (2012)) Thus "contrary to the law of California" this was merely a "pretence that the Court adopted its view in order to evade a constitutional issue" having "decided upon grounds" with direct "relation to [the] federal question." (*Nickel v. Cole*, 256 U.S. 222, 225 (1921)) It is "'important that ambiguous or obscure adjudications by state courts do not stand as barriers to a determination by this Court of the validity under the federal constitution of state action.'[Citation.]" (*Michigan v. Long*, 463 U.S. 1032, 1041 (1983))

Jurisdiction was not divested.

REASONS FOR GRANTING REVIEW

"Prosecutors' dishonest conduct or unwarranted concealment should attract no judicial approbation." (*Banks v. Dretke* 540 U.S. 668, 696 (2004))

"It is a fundamental principle of our constitutional scheme that government, like the individual, is bound by the law." (*Alderman v. United States*, 394 U.S. 165, 202 (1968), Fortas, J., concurring and dissenting.) "Its duty and its office is to do the law, and nothing but the law." (*Mitchell v. Harmony*, 54 U.S. 115, 146 (1851))

I. The issue in Question One is why this case presents a clean vehicle for proper resolution of an acknowledged and entrenched conflict.

Forty-eight states have statutory mandamus, Massachusetts and New York abolished but provide in the nature of; all state statutes at App. 130a-133a.

A. Because *Napue* so commanded, petitioner proceeded by way of mandamus.

"The distinction between rights and remedies is fundamental. A right is a well founded or acknowledged claim; a remedy is the means employed to enforce a right or redress an injury. Bouvier's Law Dictionary."(*Chelentis v. Luckenbach S.S. Co.* 247 U.S. 372, 384 (1918))

The means of the specific relief prayed for is why this case is the correct example to set for the nation.

Mac "contrived a conviction through the pretense of a trial" (*Mooney* at 112) but declined to correct when requested on Dec. 16, 2022,[33] and "allowed their false statements to stand uncorrected" (*Banks* at 675) necessitating remedy by mandamus "to compel the performance of an act which the law specially enjoins, as a duty resulting from an office" (Code Civ. Proc. §1085 (a)).

Proceeding by mandamus, praying for an order compelling "the prosecutor to correct the testimony of the witness[es] which he knew to be false" (*Napue* at 265) and because such conviction "must fall under the Fourteenth Amendment," (*id.* at 269) as it was "incumbent on the State to set the record straight" (*Banks* at 676), Frander Salguero has abided this

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[33] R.540

Court's precedent and pursued the only remedy that honored this unanimous Court in *Napue*, "the right to grant mandamus to require jury trial where it has been improperly denied is settled." (*Beacon Theatres, supra,* 359 U.S. 500, 511)

This Court did not hold that a suborning prosecutor is relieved *because* his disregard of the constitution worked. Rather this Court **"impose[d]** upon the prosecution **a constitutional obligation** to report to the defendant and to the trial court whenever government witnesses lie under oath. [Citing *Napue* and *Mooney*]" (*California v. Trombetta*, 467 U.S. 479, 485 (1984), emphasis added.) "Through direct appeal and state collateral review proceedings, the State continued to... allow[] their false statements to stand uncorrected" and therefore "incumbent on the State to set the record straight." (*Banks* at 675-76)

B. Additional reasons why this case is a clean vehicle:

- Opportunity to refute the proven voluminous perjury was afforded three times, yet was never contested (Rules of Court, Rule 8.487(a)(1) at App. 97a)
- Respondent, the Honorable George Gascón, District Attorney, agrees that a duty to correct is mandatory during and after trial (App. 104a).
- Respondent court found a prima facie case had been established.
- No lower court has made any finding of fact as to that which established false evidence. That factual presentation is irrefutable before this Court.
- The California Legislature and the Supremacy Clause resolved the lower courts' orders.

C. The case presents a keen opportunity to establish an important remedy before any more division takes hold.

The remedial vehicle aspect of this case presents an opportunity for the Court to rule on an issue of great importance, before there is a chance for division. As far as known, this is the third case to employ mandamus to compel correction, *Campbell v. Superior Court* 159 Cal.App.4th 635, 652 (2008) (precedential pretrial mandamus issued). *Mote v. Sempa* (3d Cir., May 12, 2020, No. 19-3931, p. 2) (not precedential, denied; rebellion side of circuits).

II. Question Two addresses the entrenched conflict of fundamental importance and will continue recurring because only this Court can resolve it.

Napue is valid law, commanding "the conviction... must fall under the Fourteenth Amendment," (*id.*, at 269) therefore over half of the lower circuits developing prejudice tests that permit false evidence convictions to stand, defy the Supremacy Clause, "because only this Court or a constitutional amendment can alter our holdings" (*Knick v. Township of Scott* 139 S.Ct. 2162, 2177-78 (2019).)

A. The issue is fundamental to a free society with a paramount legal significance, because false evidence establishes federal innocence.

The fundamental national importance was established, *In re Winship*, 397 U.S. 358, 354 (1970):

> It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned. It is also important in

> our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper factfinder of his guilt with utmost certainty.
>
> ... [W]e explicitly hold that the Due Process Clause ***protects the accused against conviction*** except upon proof beyond a reason-able doubt of ***every fact*** necessary to constitute the crime with which he is charged. [Emphasis added.]

Perjury, by definition, cannot be a fact. If it were a fact, it would not be perjury.

> Evid. Code, §190
>
> "Proof" is the establishment by evidence of a *requisite degree of belief* concerning a fact in the mind of the trier of fact or the court.

California juries are instructed (Pen. Code, §1096a) with:

> Pen. Code, §1096
>
> A defendant in a criminal action is presumed to be **innocent until the contrary is proved**, and in case of a reasonable doubt whether his or her guilt is satisfactorily shown, he or she **is entitled to an acquittal**, but the effect of this presumption is only **to place upon the state the burden of proving** him or her *guilty beyond a reasonable doubt*. Reasonable doubt is *defined as follows*: 'It is not a mere possible doubt; because everything relating to human affairs is open to some possible or imaginary doubt. It is that state of the case, which, after the entire comparison and consideration of all the evidence, leaves the minds of jurors in that

> condition that they **cannot say they feel an abiding conviction of the truth** of the charge.'

Here "more likely than not any reasonable juror would have reasonable doubt" (*House v. Warden* 547 U.S. 518, 538 (2006)) because no reasonable juror finds perjury establishes "the truth of the charge" and therefore "entitled to an acquittal", federal innocence is established when false evidence is proven.

If a prosecutor really thought she would not destroy the jury's view of her case, then she would admit to them, *I am lying to you, but I need a record to look good, and I really think this guy is guilty but just cannot prove it.* The prosecutor does not, because no reasonable juror would vote in her favor. See *Napue* at 267 fn.1.

Likewise, no reasonable jurist would uphold a record that contained such a confession, yet a perjury pandemic has infected the courts.

> Pen. Code, §1165
> Where a general verdict is rendered ... in favor of the defendant ... a judgment of acquittal must be forthwith given. If such judgment is given ... he must be discharged, if in custody, as soon as the judgment is given...

False evidence stole the relief due on Oct. 3, 2016. And despite being legislatively authorized independent of habeas, a court may "in furtherance of justice, order an action to be dismissed" (Pen. Code §1385(a)) and "if in custody, be discharged therefrom" (*id.*, §1384), the lower courts chose to destroy "the moral force of the criminal law... diluted by a [felonious] standard of proof that leaves... innocent men... condemned" (*Winship, supra*).

B. The several Circuits and States are hopelessly and intractably divided from this Court's actual precedent making it necessary to lay out the actual law first.

Throughout the history of the common law, the judicial process directly called upon God to protect the integrity of justice. A perjurer was known to suffer an eternity of damnation. See legal definition of Oath (1883) App. 140a (last page).

Structural error was proven at the outset, but it started in 1935 with *Mooney*, ("a State has contrived a conviction through the pretense of a trial... through a deliberate deception of court and jury by... testimony known to be perjured." *Id.,* at 112) The falsely appearing trial, once revealed by proof of false evidence—"inconsistent with the rudimentary demands of justice"—establishes automatic reversal.

Next, unknown-false evidence was included by *Pyle v. Kansas*, 317 U.S. 213, 215 (1942) involving the police framing[34] Mr. Pyle for a murder that another man was later convicted for. (Explained below.)

The duty to correct after conviction was born in *Alcorta v. Texas*, 355 U.S. 28, 31 (1957) "the prosecutor had told him he should not volunteer any information about such intercourse but if specifically asked about it to answer truthfully. The prosecutor took the stand and admitted that these statements were true." Noteworthy also because it only involved lying by omission.

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[34] *Briscoe v. LaHue* 460 U.S. 325, 336 fn.15 (1983) declared "no distinction between public officials and private citizens".

Next, was the only grant of certiorari in this Court's history on: "The question presented is whether on these facts the failure of the prosecutor to correct the testimony of the witness which he knew to be false denied petitioner due process of law in violation of the Fourteenth Amendment", *Napue* at 265 and at 269:

> *First,* it is established that a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment, [*Mooney*, *Pyle*, *Curran, infra*, citations.] The *same result* obtains when the State, although *not* soliciting false evidence, allows it *to go* uncorrected *when* it appears. *Alcorta*... [latter italics added.]

Napue cited *Curran v. Delaware*, 259 F. 2d 707, (3rd Cir. 1958) directly after *Pyle*. The *Curran* court, explained that in *Pyle*, "the prosecuting officer was in no wise a party to or cognizant of the perjured testimony given by certain witnesses of the State of Kansas or of the fact that the law enforcement officers had taken steps to procure false testimony favorable to the prosecution." (*Curran* at 713)

The two cases cited after *Curran* addressed suppressed evidence; the third case cited contained an immensely powerful legal discussion, *United States v. Ragen*, 86 F. Supp. 382, (N.D. Ill. 1949) regarding "no signs pointing to rape" and "remained a virgin" (*id.*, at 385) "threaten[ing]... prompt action by the Klan if he took the stand" "his trial lasted twenty minutes" "convicted of a crime never committed and sentenced to life imprisonment" (*id.*, at 386) through "means of lawlessness of the prosecution." "There was no trial here, but a sham, one of false pretenses and fraud." (*Id.*, at 387)

"Even in a case where the perjury was unknown, as claimed by the prosecuting officers... a federal court has determined [a] violation of the 14th Amendment and released" (*id.*, at 387), discussion continued post at 32.

Why "*when* it appears" was also significant, stemmed from an event three years before *Napue*. To understand that we must look forward four years.

The final citation before the famous *Brady* holding: "In *Napue*... we extended the test formulated in *Mooney*... when we said: 'The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears.' And see *Alcorta*... [citation]. Cf. *Durley v. Mayo*, 351 U.S. 277, 285 (dissenting opinion).[¶] We hold..." (*Brady* at 87)

Justice Douglas authored *Brady* and the *Durley* dissent, joined by Justices Black and Clark and the Chief Justice, all favoring relief once made known. Co-defendants implicated Mr. Durley, one later expressly recanted and the other confessed falsity to another (*Durley* at 287), "the State now knows that the testimony of the only witnesses against petitioner was false. No competent evidence remains to support the conviction." (*Id.*, at 291) Three years and 11 days later, a unanimous court penned by the Chief Justice required correction "when it appears".

If the prosecutor cannot obtain, then should not be allowed to sustain.

Why not simply cite *Durley*? Maybe for the same reasons that *Alcorta* (the first true *Brady* case), was cited in *Brady* just once—before *Durley*. Yet *Alcorta* was the primary cite after "when it appears", which was *after* trial. Everyone is susceptible at times

to the human condition and capable of making mistakes, that is inclusive of Supreme Court Justices' law clerks.[35]

The gravest of false evidence cases, was the last time certiorari was granted on known false evidence, in 1967. That case definitively resolves the rebel circuits' claim that a *Chapman* like standard applies.

Would the Court find harmful error in a fact pattern that had a confession, a witness to a second confession, hair from defendant in the 8-year-old rape-murder victim's vagina, with her blood on his clothes found outside of his house? Of course not, and no court did either.

Two days from execution, the confession witness recanted, after seven years the defense finally gained access to test the shorts—covered in paint not blood, the confession signed by the defendant obtained when he demanded to take a lie detector test and was locked in a room for three days while his attorney was denied access and thought he was signing something else. The hair did not match him. The prosecutor lied to the jury in argument, and lied to the courts in habeas, and talked the defense exculpatory alibi eyewitness out of testifying for the defense. That is the *Miller* fact pattern.

Proof is found in the timing *and a few pages.*

386 U.S. 18 Arg. Dec. 7-8, 1966. Dec: Feb. 20, 1967.
386 U.S. 1-7 Arg. Jan. 11-12, 1967. Dec: Feb. 13, 1967.

The former *Chapman v. California,* the latter *Miller v. Pate.* No opinion separates them, only per curiam orders.

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[35] Except for those on the 2023-24 terms, obviously.

It is not possible to conclude that this holding was intended to have a duration of one week, when the *Miller-Chapman* court held:

> The prosecution deliberately misrepresented the truth. [¶] More than 30 years ago this Court held that the Fourteenth Amendment **cannot tolerate** a state criminal conviction obtained by the knowing use of false evidence. *Mooney*.... There has been **no deviation** from that established principle. *Napue*...; *Pyle*...; cf. *Alcorta*... There can be **no retreat** from that principle here.

Miller at 6-7, emphasis added.

A week later, sitting under the name *Chapman v. California* "requiring the beneficiary of a constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained" could not, and did not, begin to "tolerate" "the knowing use of false evidence." Because when the *Miller-Chapman* court began this paragraph: "In argument at the close of the habeas corpus hearing, counsel for the State contended that '[e]verybody' at the trial had known that the shorts were stained with paint. That contention is totally belied by the record." It ended with, "The prosecution deliberately misrepresented the truth." (*Miller* at 6, fn. omitted.) That was the extent of the test.

The beneficiary of the error proved to continue with dishonesty. Just like in the instant case, the prosecutor continued making untrue statements to the discovery motion court. Just like the one in *Miller*, the prosecutor denied wrongdoing and claimed everything was above board.

C. The Court recognized a preexisting conflict but declined to resolve the issue, resolving on other grounds, allowing the conflict to expand.

Despite the *Banks* Court repeatedly referencing the duty to correct, it was left unresolved.

> [T]he Court of Appeals said...[as presented was] not a claim under *Napue*... and *Giglio*... that the prosecution had failed to correct Farr's false testimony. App. to Pet. for Cert... the Court of Appeals explained, a *Brady* claim is distinct from a *Giglio* claim... But cf. *United States v. Bagley*, [at] 679-680, n. 8 (1985); *United States* v. *Agurs*, [at] 103-104 (1976).... Because we conclude that Banks qualifies for relief under *Brady*, we need not decide whether a *Giglio* claim, to warrant adjudication, must be separately pleaded.
>
> *Banks* at 690 n.11

That reveals the national confusion that must be resolved by the only entity in the nation that can.

That lower court was correct, they are separate. This Court was correct to compare to *Agurs*, because *Agurs* at 104 separated the *Brady* and *Mooney-Napue* lines. The references to *Giglio* and *Bagley* is where the fault can be found, resulting from *Agurs*.

As will be shown below, the void prejudice standards being applied, flipped *Agurs* upside down.

The unknown-false evidence case cited by *Ragen* was *Jones v. Commonwealth of Kentucky*, 97 F.2d 335, 338 (6th Cir. 1938) relying on *Mooney*, "'the fundamental conceptions of justice...' must with equal abhorrence condemn as a travesty a conviction upon perjured testimony if later... falseness is discovered...

[equally must] afford a corrective judicial process to remedy the alleged wrong".

That Circuit now holds "under *Brecht v. Abrahamson*(fn.2), courts may excuse *Brady/Giglio* violations involving known and materially false statements as harmless error." (*Rosencrantz v. Lafler*, 568 F.3d 577, 584 (6th Cir. 2009) at fn.2 ("because — as Justice Blackmun tells us in a portion of his *Bagley* opinion not joined by the majority".)

Citing itself with approval, *McNeill v. Bagley*, 10 F.4th 588, 604 (6th Cir. 2021)

The Sixth Circuit openly defies this Court's unanimous *Mooney, Pyle, Napue, Miller* and *Giglio* holdings, based on a plurality holding that excluded itself from this issue. See *Brecht v. Abrahamson*, 507 U.S. 619, 638 fn.9 (1993) attached to the holding re trial error, and note Justice Stevens concurred on more narrow grounds, citing his dissent in *Rose v. Lundy*, 455 U.S. 509, 543 (1982)—the basis for exempting false evidence under *Teague*. Plus, *Kotteakos v. United States*, 328 U.S. 750 (1946) predated *Napue*, and Justice Blackmun joined in the *Brecht* dissent.

In fairness, *McNeill* made no mention of *Brecht,* yet the dissent chastised their disregard of the teachings in *Wearry v. Cain*, 577 U.S. 385, 392 (2016)

D. The Conflict is caused from dicta in a minority opinion of this Court and is dragging the Nation in a different direction and causing a split from this Court's actual holdings.

"JUSTICE BLACKMUN announced the judgment of the Court and delivered an opinion of the Court except as to Part III." (*United States v. Bagley*, 473 U.S. 667, 669 (1985)) Justice Blackmun's Part III

—joined only by Justice O'Connor—has become half the national standard for prejudice under footnotes 8 & 9 in Part III—the source of modern confusion.

To start, fn. 8 stated regarding *Pyle*, "the prosecutor had deliberately suppressed evidence favorable to the accused and had knowingly used perjured testimony" and "reaffirmed this principle in *Napue*". *Napue* citing to *Curran* recognized, "the prosecuting officer was in no wise a party to or cognizant of the perjured testimony", thus this majority opinion cannot be accurate either:

"The Court has held that the prosecutor's knowing use of perjured testimony violates due process, but has not held that the false testimony of a police officer in itself violates constitutional rights. See *United States* v. *Agurs*, [at] 103, and nn. 8, 9" (*Briscoe* at 327 fn. 1)

The first cite in *Agurs* fn. 8 is *Pyle*, which held police coercing false testimony from witnesses is unconstitutional; reason dictates police are forbidden from doing directly what they cannot do indirectly.

The harm started innocently when *Giglio* errantly quoted *Napue*. That error was pointed out by more four Justices, including the author of the *Bagley* fn. 9 lore, clarifying:

"The Court rejected the claim that it was 'bound by [the state court's] determination that the false testimony could not *in any reasonable likelihood* have affected the judgment of the jury.' *Id.*, at 271 (emphasis added)." [Brackets in original.] (*Boyde v. California*, 494 U.S. 370, 392-93 (1990) Marshall, J., dissenting, joined by Brennan, J., Blackmun, J., and Stevens, J.)

Then moved onto agreeing with fn. 9:

"'The rule that a conviction be obtained by the knowing use of perjured testimony must be set aside if there is any reasonable likelihood that the false testimony could have affected the jury's verdict derives from *Napue*'" (*id.*, at 393).

The true harm is not from the use of an expression that predated the prejudice test born in *Agurs*, but from not understanding that *Giglio* addressed unknown-false evidence.

A close reading of *Giglio* reveals it was more accurately a *Pyle* issue, not *Mooney*, and arose under a duty to correct when made known under *Napue*. "We granted certiorari to determine whether the evidence not disclosed was such as to require a new trial under the due process criteria of *Napue*... and *Brady*" (*Giglio* at 151) The intent was to lay out materiality under due process.

On a case of unknown-false evidence introduced at trial, the remedial vehicle and relief was a "motion for new trial based on newly discovered evidence." (*Id.*, at 152) The trial prosecutor was advised by the concealing grand jury prosecutor that no promises were made to witness. A third prosecutor, "shortly before trial", emphasized to witness he "would definitely be prosecuted if he did not testify" (*id.*, at 153) the District Court concluded, "its disclosure to the jury would not have affected its verdict." (*Id.*)

Neither of the pretrial prosecutors knew false evidence was later introduced, and the trial prosecutor was fooled into believing none had.

Giglio protection goes to the whole truth, and nothing but the truth, "deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with 'rudimentary demands of justice.'

This was reaffirmed in *Pyle*... In *Napue*... we said, '[t]he same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears.' *Id.*, at 269." (*Id.*, at 153) "[N]ondisclosure of evidence affecting credibility falls within this general rule. *Napue, supra*, at 269.... A finding of materiality of the evidence is required under *Brady, supra*, at 87. A new trial is required if 'the false testimony could... in any reasonable likelihood have affected the judgment of the jury...' *Napue, supra*, at 271." (*Id.*, at 154)

Finding it "would be **relevant** to his credibility and the jury was entitled to know of it. [¶] For these reasons, the due process requirements enunciated in *Napue* and the other cases cited earlier require a new trial, and the judgment of conviction is therefore reversed" (*id.*, at 155, emphasis added.)

The materiality standard set in *Giglio* was relevance. Accord *Napue*, "'A lie is a lie, no matter what its subject, and, if it is ***in any way relevant*** to the case, the district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth.'" (*Id.*, at 269-70, emphasis added.)

Why *Agurs* announced "should have known" was the other major holding, "[t]he prosecutor's office is an entity and as such it is the spokesman for the Government." (*Giglio* at 154)

E. The entrenched conflict at issue has proven that it will not stop recurring until this Court resolves the deepening preexisting conflict.

California, for example, has really made a mess of things. "We conclude that... testimony, although apparently false and certainly material, does not

require reversal." (*People v. Marshall*, 13 Cal.4th 799, 830 (1996))

Napue has been cited 15 times by the California Supreme Court, only 2 out of the 15 over-turned. Once for not affording a free trial transcript, *People v. Hosner*, 15 Cal.3d 60, 69-70 (1975) and once for *Brady*, concluding *Chapman* applies, *People v. Ruthford*, 14 Cal.3d 399, 408-09 (1975) overruled in *In re Sassounian*, 9 Cal.4th 535, 546 n.7 (1995) relying on *Bagley*.

Bagley Part III begins on page 678.

"As pointed out by the lead opinion in *United States* v. *Bagley*, [at] 679-680, footnote 9," "The lead opinion in *Bagley* then stated: '...this Court's precedents indicate that the standard of review applicable to the knowing use of perjured testimony is equivalent to the *Chapman* harmless-error standard.' (...680, fn. 9)" (*In re Jackson*, 3 Cal.4th 578, 598 n.10 (1992)) Again declared more liberal than federal law, thus "erroneous and are hereby disapproved" (*Sassounian*, at 545, fn.6)

Adopting in its place, California's almost 30-year prejudice test for false evidence: "In other words, false evidence passes the indicated threshold if there is a 'reasonable probability' that, had it not been introduced, the result would have been different." (*Id.*, at 546 citing to *Bagley* at 678, but could only be Part III of that page.)

California's false evidence remedy is to delete it and see if still guilty. Which is not "must fall under the Fourteenth Amendment," (*Napue* at 269)

The role reversal is also easy to prove as errant. *Giglio* predated *Agurs*. And *Agurs* was the start of our modern prejudice tests.

False evidence was the first *Agurs* category applying a "strict standard of materiality" (*id.*, at 104), separated from the second category— *Brady* specific request, more liberal than third no request category, "if the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed." (*Agurs* at 112). False evidence was *twice* as liberal as raising a reasonable doubt.

The reason *Brady* was more liberal than reasonable doubt, is found after, "now hold... evidence is material" explained as "withholds evidence on demand of an accused which, if made available, would *tend to exculpate* him" (*id.* 87-88, italics added).

The third *Agurs* category is where the "test for prejudice finds its roots" (*Strickland v. Washington*, 466 U.S. 668, 694 (1984)) (see *Weaver,* at 1914-1916, Alito, J., concurring) because "reasonable doubt marks the legal boundary between guilt and innocence." (*Schlup v. Delo* 513 U.S. 298, 328 (1995))

The twice as liberal standard and strict materiality—in modern parlance—is structural error.

A cluster of confusion due to lack of guidance is amply demonstrated in our nation's capital, *infra* at pp. 478-480 after a lengthy discussion ensued at 479 fn. 10 about *Bagley* fn. 9:

> This fact-specific materiality inquiry requires evaluation of the false evidence "in the context of the entire record." *Turner* , 137 S.Ct. at 1893 (quoting *Agurs*, 427 U.S. at 112); see also *Vega*, 826 F.3d at 531 (finding false testimony to be not material after "looking at the evidence in the record as a whole")
>
> *United States v. Butler*, 278 F. Supp. 3d 461, 480 (D.D.C. 2017)

"Given the government's concession that it knowingly used false evidence at trial, the only dispute between the parties is whether there is 'any reasonable likelihood' that the hair testimony could have had an impact on the outcome of the defendant's trial." (*Id.*, at 481) After conceding known use, affirmed the conviction, and was overturned by a split court. The majority that overturned noted:

> Yet not every knowing use of false evidence by the government against a defendant necessarily rises to the level of constitutional error. Rather, the introduction of false evidence unconstitutionally denies a defendant a fair trial if the evidence counts as material. *E.g., United States v. Agurs*, [at] 104–108 (1976).
>
> *United States v. Butler*, 955 F.3d 1052, 1057-58 (D.C. Cir. 2020)

"Our dissenting colleague... sees... our conclusion in applying that standard here is out of step with other decisions. To the contrary, our conclusion is fully in step with precedent, as best illustrated by our most germane and recent decision, *Ausby*" (*id.*, at 1062).

The above examples are inconsistent with a jury's "determinati[on] ...upon ***such subtle factors***" (*Napue* at 269, emphasis added.)

A sample of 30 or so recent cases from all circuits is provided in App. 123a-129a.

F. California and its Ninth Circuit are intractably divided on false evidence prejudice.

California directly allows false evidence without sanction. "A conviction premised on false evidence is reversible only when the defendant shows that if such evidence were *not* introduced, it is reasonably probable that the jury would have reached

a different result." (*People v. Wilson*, 56 Cal.App.5th 128, 158 (2020)) That opinion cited *Campbell, supra,* 159 Cal.App.4th 635—the only known successful employ of mandamus to compel correction—then defied it. Authored by California's new Chief Justice.

The Ninth Circuit is less tolerant.

"Such false testimony and false evidence corrupts the criminal justice system and makes a mockery out of its constitutional goals and objectives." (*Northern Mariana Islands v. Bowie*, 243 F.3d 1109, 1124 (9th Cir. 2001)) "The ends in our system do *not* justify the means. Our Constitution does not promise every criminal will go to jail, it promises due process of law." (*Id.*)

G. The most compelling reason to grant is also the most obvious.

See the first proven known lie, that no court would overturn on, at App. 139a.
Our major premise is:

> Not proving a known lie does not make it true;
> it only makes it continue to be concealed.
>
> *Falsus in uno, falsus in omnibus.*
>
> Those who suborn, do not stop at one.

If counsel had failed, and not proven that approximately 90% of the evidence was false, that would not have made it true.

SUMMATION

This modern practice of exclude and retest, then decide guilt, overlooks "when it does that, 'the wrong entity judge[s] the defendant guilty.'" (*Sullivan v. Louisiana*, 508 U.S. 275, 281 (1993)) Excising that perjury does not "turn[] what was otherwise a tainted

trial into a fair one." (*Napue* at 270) Nor guarantee a completely purged record.

Recognizing that structural error is present under *Weaver* and *Agurs* is objective and easy. Fed. R. Evid. 402 ("Irrelevant evidence is not admissible.") Evid. Code, §350 ("No evidence is admissible except relevant evidence.") If it was admitted into evidence, it was relevant to the government because "the Assistant State's Attorney himself thought it important to establish before the jury" (*Napue* at 270). Perjury is only evidence in one type of trial, and Frander's was not it.

The suborning prosecutor usurped the jury's role as constitutional arbiters. "District attorneys are not the arbiters of guilt or innocence." (*People v. Talle*, 111 Cal.App.2d 650, 678 (1952)) The founders expressly advised, better 100 guilty go free than one innocent should suffer (see App. 134a for Adams' compelling reason why). The relief due belongs to those that had due process stolen. Relieving a prosecutor of his duty under *Napue* rewards him, forcing the slow habeas route double punishes the victim that "comes before the habeas court with a strong — and in the vast majority of the cases conclusive — presumption of guilt." (*Schlup* at 326 n.42)

This issue was important enough to be listed as an objection in the Declaration of Independence, (*Duncan* at 152) and should be clarified by this Court given the entrenched rebellion by six circuits and many states.

To close, the most poetic of passages on the subject:

> The authentic majesty in our Constitution derives in large measure from the rule of law — principle and process instead of person.

> Conceived in the shadow of an abusive and unanswerable tyrant who rejected all authority save his own, our ancestors wisely birthed a government not of leaders, but of servants of the law. Nowhere in the Constitution or in the Declaration of Independence, nor for that matter in the Federalist or in any other writing of the Founding Fathers, can one find a single utterance that could justify a decision by any oath-beholden servant of the law to look the other way when confronted by the real possibility of being complicit in the wrongful use of false evidence to secure a conviction in court. When the Preamble of the Constitution consecrates the mission of our Republic in part to the pursuit of Justice, it does not contemplate that the power of the state thereby created could be used improperly to abuse its citizens...
> *Bowie, supra.*

"The solitary individual who suffers a deprivation of his constitutional rights is no less deserving of redress than one who suffers together with others." (*Steffel v. Thompson* 415 U.S. 452, 474 (1974))

We pray for the Court to resolve these issues and protect the Nation from tyranny by review or per curiam; and or "vacate, set aside or reverse" (28 U.S.C. §2106) this void injustice; grant any other relief the Court deems just.

CONCLUSION

The petition should be granted.

Respectfully submitted,
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PETITIONER PRO SE