ORIGINAL

No. 23-616

In the Supreme Court of the United States

FRANDER SALGUERO,
Petitioner,

v.

CALIFORNIA,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

"The Legislature finds and declares that post-conviction discovery promotes the fair administration of justice in seeking to assure that innocent persons do not remain unjustly incarcerated" (California Statutes 2018 Chapter 482, Section 1)

Justice Holmes: "For those who agree with me, no distinction can be taken between the Government as prosecutor and the Government as judge." (*Olmstead v. United States*, 277 U.S. 438, 470 (1928))

"[S]tate action within the purview of the Fourteenth Amendment... governs any action ... 'whether through its legislature, through its courts, or through its executive or administrative officers.'" (*Mooney v. Holohan*, 294 U.S. 103, 113 (1935))

The questions presented are:

1. Whether the effect on due process remains unchanged as to *Brady's* holding, "suppression by the prosecution of evidence favorable to an accused *upon request* violates due process where the evidence is material" after the prosecutor concealed the evidence at trial and suppresses it again upon request after conviction.
2. Whether a state court has discretion under the Fourteenth Amendment to assist the "suppression by the prosecution of evidence favorable to an accused *upon request*" when presented proof the existing "evidence is material".
3. Whether arbitrary state judicial procedures impairing the ability to prove one is innocent conform with due process while intending to deprive this Court of a record to review.
4. Whether a due process sanction of dismissal applies to situations like the present.

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.
- Salguero v. District Attorney et al. (VIII), 23-__ __ United States Supreme Court. Petition for certiorari, filed concurrently.
- *In re Frander Salguero* (IX), 23-_____ United States Supreme Court. Petition for mandamus, filed concurrently.

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RELEVANT DECISIONS BELOW

PETITION FOR A WRIT OF CERTIORARI

Frander Salguero respectfully petitions for the writ of certiorari directed to the California Supreme Court in *People v. Salguero* S281123, App. 43a.

JURISDICTION

On Aug. 30, 2023, the California Supreme Court issued an order denying review of a single justice's order dismissing a timely filed appeal, Cal. Pen. Code, § 1237 (b). Cal. Rules of Court, Rule 8.532 (b)(2)(A) (denial final upon entry—no rehearing possible.)[1]

Nov. 28, 2023, is 90 days from the denial order. This petition is from a separate line of review in the state courts than the false evidence matters. This pertains to suppression of proven exculpatory evidence and arbitrary denial of due process.

Jurisdiction is invoked by 28 U.S.C. § 1257(a).

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[1] Unless clearly federal, all future enactments are referencing California.

CONSTITUTIONAL PROVISIONS AND STATUTES

Constitution of the United Stated of America

Article III in petition at 36
Article VI in petition at 39
Amendment VI
In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

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.

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.

California Codes

Penal Code

Pen. Code, § 681
No person can be punished for a public offense, except upon a legal conviction in a Court having jurisdiction thereof.
Pen. Code, § 689
No person can be convicted of a public offense unless by verdict of a jury, accepted and recorded by the court, by a finding of the court in a case where a jury has been waived, or by a plea of guilty.
Pen. Code, § 1019 in petition at 11
Pen. Code, § 1020 in petition at 11

Chapter 10. Discovery

Pen. Code, § 1054
This chapter shall be interpreted to give effect to all of the following purposes:
(a) To promote the ascertainment of truth in trials by requiring timely pretrial discovery.

Pen. Code, § 1054.1
The prosecuting attorney shall disclose to the defendant or his or her attorney all of the following 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:
(e) ***Any*** exculpatory evidence.

Pen. Code, § 1054.9
(a) In a case in which a defendant is or has ever been convicted of a serious felony or a violent felony resulting in a *sentence of 15 years or more*, upon the

prosecution of a *postconviction* writ of habeas corpus or a motion to vacate a judgment, or *in preparation to file that writ* or motion, and ***on a showing*** *that good faith efforts to obtain discovery materials from trial counsel were made and were unsuccessful*, **the court shall**, except as provided in subdivision (b) or (d), *order that the defendant be provided reasonable access to any of the materials described* in subdivision (c).

(b) Notwithstanding subdivision (a), in a case in which a sentence *other than* death or life in prison without the possibility of parole is or has ever been imposed, if a court has *entered a previous order granting* discovery pursuant to this section, *a subsequent order* granting discovery pursuant to subdivision (a) may be made *in the court's discretion.* A request for discovery subject to this subdivision shall *include a statement* by the person requesting discovery as to whether that person has previously been granted an order for discovery pursuant to this section.

(c) For purposes of this section, "discovery materials" means materials in the possession of the prosecution and law enforcement authorities to which the same defendant *would have been entitled at time of trial.*

(d) [Pertains to physical evidence and not relevant here but requires showing good cause.]

Title 9. Appeals in felony cases

Pen. Code, § 1235

(a) Either party to a felony case may appeal on questions of law alone, as prescribed in this title and in rules adopted by the Judicial Council. The provisions of this title apply only to such appeals.

(b) An appeal from the judgment or appealable order in a felony case is to the court of appeal for the district in which the court from which the appeal is taken is located.

Pen. Code, § 1237
An appeal may be taken by the defendant from both of the following:
(b) From any order made after judgment, affecting the substantial rights of the party.
Pen. Code, § 1247k
The Judicial Council shall have the power to prescribe by rules for the practice and procedure on appeal, and for the time and manner in which the records on such appeals shall be made up and filed, in all criminal cases in all courts of this state.
Pen. Code, § 1248
If the appeal is irregular in any substantial particular, but not otherwise, the appellate court may order it to be dismissed.

CHAPTER 11. Errors and Mistakes in Pleadings and Other Proceedings

Pen. Code,§ 1405

(c) Upon request of the... convicted person's counsel, the court may order the prosecutor to make all reasonable efforts to obtain, and police agencies and law enforcement laboratories to make all reasonable efforts to provide, the following documents that are in their possession or control, if the documents exist:
(2) Copies of evidence logs, chain of custody logs and reports, including, but not limited to, documentation of current location of biological evidence, and evidence destruction logs and reports.
(3) If the evidence has been lost or destroyed, a custodian of record shall submit a report to the prosecutor and the convicted person or convicted person's counsel that sets forth the efforts that were made in an attempt to locate the evidence. If the last known or documented location of the evidence prior to its loss or destruction was in an area controlled by a

law enforcement agency, the report shall include the results of a physical search of this area. If there is a record of confirmation of destruction of the evidence, the report shall include a copy of the record of confirmation of destruction in lieu of the results of a physical search of the area.

California Rules of Court

Rule 3.1304
(c) Notice of nonappearance
A party may give notice that he or she will not appear at a law and motion hearing and submit the matter without an appearance unless the court orders otherwise. The court must rule on the motion as if the party had appeared.

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;[2]

[2] Advisory Committee Comment: Subdivision (b). Subdivision (b)(2)(A) recognizes the general rule that the denial of a petition for review of a Court of Appeal decision is final on filing.

STATEMENT OF THE CASE

1. Frander Salguero was sentenced to life in prison for two terms on Oct. 12, 2016, based on a "contrived a conviction through the pretense of a trial which in truth [wa]s but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured." (*Mooney v. Holohan*, 294 U.S. 103, 112 (1935)) Proven and stands unrefuted.

The state of California saddled him with a 27-time state stipulated incompetent attorney Thomas Stanley, suspended *again* five days before being assigned out to trial, without any warning to Frander of this known peril. (*Strickland v. Washington*, 466 U.S. 668, 692-93 (1984); *Cuyler v. Sullivan*, 446 U.S. 335, 343-45 (1980) state caused prejudice is presumed). Three days after being sentenced to life in prison for being the victim of a deadly assault, according to the affidavit signed before trial by the prosecutor, the actual suspension of the incompetent attorney began.

Then was appointed an appellate attorney that raised insufficiency of the evidence on appeal, without reviewing the exhibits on appeal. Whom asked Stanley if he was incompetent, and Stanley said no.

> In many cases, as defendant points out, proof of counsel's lack of diligence to discover evidence will demonstrate that counsel was constitutionally inadequate... [but] cannot reasonably be expected to argue his own ineffectiveness; his client should not pay a penalty because of the attorney's unwillingness to assert his own incompetence.
>
> *People v. Martinez*, 36 Cal.3d 816, 825-826 (1984)

Which is significant because: "Tom Stanley, Deputy State Public Defender, for Defendant and Appellant." (*Id.*, at 818) The man she asked was the attorney that created that very rule; in a former life when he was brilliant.

Disbarred by the Ninth Circuit in 2001, and suspended multiple times by both state and federal courts thereafter, *sic transit gloria.*

Frander then paired up with a person holding a bar card that direct filed a federal habeas petition without doing any investigation on insufficiency of the evidence — then after admitting to the federal magistrate "this is my first Habeas Corpus petition" he **abandoned** his client without filing a traverse, leading to a dismissal with prejudice.[3]

In August of 2021, an actual attorney showed up to represent Frander. The end of October obtained the initial discovery from the post-conviction handling prosecutor, Mr. Lara. By December of 2021 a massive volume of known false evidence and concealed *Brady* evidence was proven and ascertained.

Investigation continued, then on May 16, 2022, upon obtaining said affidavit declaring Frander the victim of a deadly assault signed by the trial prosecutor, (R.520, 524-25) a 101-page postconviction discovery motion was filed per Pen. Code, § 1054.9, supported by 322 pages of exhibits (R.62-485), that proved 46 items specially recognized under *Brady v. Maryland*, 373 U.S. 83 (1963) and *Kyles v. Whitley*, 514 U.S. 419 (1995) of which nine had been obtained in part from Lara and part independently, before filing.

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[3] 2:19-cv-07414-CJC-AS Document 16,p.2:6-11

The motion proved the existence of 36 *Brady* items or classes of items and two more items relevant to *Strickland.*

Just like this Court felt, counsel believed "this case merits 'favored treatment,' ... cases in which the record reveals so many instances of the state's failure to disclose exculpatory evidence are extremely rare." (*Kyles at* 455, Stevens, J., concur-ring.) Thus, a significant volume of proof was submitted to the trial court, because when one is dealing with the innocent, it is no time to hold back. Appended to this petition is the listed 38 items only, with their legal and factual support as presented to the lower court, it spans 56 pages in the appendix.

To summarize rapidly the procedural history before getting into specifics: Lara explained a family emergency required leaving the country; then provided item #3; in that process it showed he acted in good faith, but police had not; the trial court was updated as to both with a request for Pen. Code, §1405(c) (evidence logs) (R.486-93); devoid of opposition the trial court denied all (App.56a R.494); upon receiving a motion to reconsider the denial based on outdated law (R.497-530), solicitation for opposition was made (App.54a R.531); mandamus sought; at the hearing solicitating opposition the court reluctantly agreed to grant reconsideration, denied the contested item and continued the matter to hear from the concealer as to all the rest (App.95a); the court of appeal was notified, the *Napue* line was born; not desiring to bore the Court with specifics but gamesmanship was afoot and as permitted by law on this uncontested matter being continued to be contested, a motion for nonappearance was submitted along with an objection to hearsay. "The court is in

receipt of a notice of nonappearance pursuant to Rules of Court, rule 3.1304(c) for Arturo Gutierrez who is the attorney for this appellate issue." The actual motion as well as other critical items were not in the record on appeal, addressed more in depth later. That was said to start the hearing held on Nov. 18, 2022.

2. Under Pen. Code, § 1054.9, to be entitled to this postconviction discovery there is one triggering act.

> It simply says that "on a showing that good faith efforts to obtain discovery materials from trial counsel were made and were unsuccessful, the court shall ... order" discovery. The language could not be plainer: If that showing is made, the defendant is entitled to discovery.
> *Catlin v. Superior Court* 51 Cal.4th 300, 305 (2011)

After highlighting prior failed efforts evinced by returned letters and returned email. A showing was made of additional effort, on page 5 of the motion (R.66-67):

[U]tilizing a commercial real estate website, counsel was able to verify an address listing the title owner as "Stanley, Thomas A & A M Trust" as the grantee to a quitclaim deed from grantors "Thomas & Anita Stanley" on January 18, 2016, for a residential property at 4461 Sherman Oaks Cir. Sherman Oaks, CA ([R.183]). Searching State Bar Court records, an additional email address was located (Tom_alan_stanley@yahoo.com) ([R.181]). Thereafter, on September 23, 2021, a formal demand .... letter addressed to the home was acknowledged by the United States Postal Service as "Delivered, Left with Individual" at that location on Sept. 27, 2021 ([R.188-190] tracking codes per address). ... the second email address used

was not returned ([R.191]). Stanley has never made an attempt to contact, or effort to assist or even an acknowledgement of habeas counsel or the requests. (See App.102a for the significant more detail and effort.)

"The language could not be plainer: If that showing is made, the defendant is entitled to discovery." (*Catlin, supra*)

The trial court, who repeatedly stated it had "read and considered" the motions, as to the above and the 100 times the name "Stanley" appeared in the motion and exhibits, found:

"And I would note that **none** of the motions to compel had **anything to did** [sic] **with Mr. Stanley**." (RT.1210-25-26)

If that were true, then the court was statutorily prohibited from proceeding, for lack of subject matter jurisdiction. Especially on an issue that was claimed as privileged, despite the motion proving conclusively the privileged had been waived by the holder (R.92-94), but unlawfully set in place by Mac.

"I do agree with you that the connection between the eSCAR [suspected child abuse report[4]] reporting party and the case at hand with the discovery is very tenuous. Mr. Gutierrez has made a lot of assertions in this over 400-page motion and lays out a lot of discovery that I'm not entirely sure -- no. I am sure -- is not relevant to this motion. That he has laid out a potential defense does not change the discovery requirements on the D.A.

[Pen. Code, §1019 ("The plea of not guilty puts in issue every material allegation of the accusatory

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[4] It is unclear why that region refers to it with an "e", possibly electronic but unsure.

pleading...") *Id.*, §1020 ("All matters of fact tending to establish a defense ... may be given in evidence under the plea of not guilty.") *Id.*, §1054.1(e) ("***Any*** exculpatory evidence.") *Id.*, §1054.9(c) ("defendant *would have been entitled at time of trial.*"]

But to accommodate Mr. Gutierrez, the court is going to order the district attorney to turn over the reporting party name on the eSCAR. I know that to do so on a general basis would have a chilling effect. But given that we're post conviction, this is a habeas matter, and there are 1054.9 obligations, and I am going to allow Mr. Gutierrez to have that last name. I do find that that is the last of the discovery that needs to be turned over to Mr. Gutierrez given this motion." (RT.1211:4-20)

Graciously, the defense was allowed one item of *Brady* material; not knowing the court granted two, as two reports were discussed R.80-94, one previously fully concealed and one heavily redacted.

The Legislature decreed entitlement with the command shall. And explained to all the California courts involved, that only on a second request does the legislature grant the courts discretion Pen. Code, § 1054.9(b).

All these California courts seem to believe they hold discretion to allow the defense to have *Brady* materials or withhold them. Thus, it seemed prudent to ask this Court.

3. Some of the aspects proven therein, from the clues left by the trial prosecutor Steven Mac.

"/2207* 10/97 (600077) 265A/P <000>
/2238* URN REQUEST (600077)
X,2607,419,CR,V,SALGUERO,KENIA,,,F,H,371,,
<000>
/2238 • URN () 015-10552-2607-419" (R.284)

Everything that needs to be said, was just said. The Court can GVR this cause.

This Court made clear that state games with due process are prohibited, "'the prosecution can lie and conceal and the prisoner still has the burden to... discover the evidence,'... A rule thus declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process." (*Banks v. Dretke* 540 U.S. 668, 696 (2004)) The prosecutor hid, Frander sought, and found, then moved as afforded by the California Legislature, to seek speedy release for being innocent. Seeking compulsory process under a state statutory right to compel production of 36 exculpatory items or classes of items and two items specific to prior trial counsel. The California judiciary have actively participated in denial of due process rights, *Brady*.

Incidentally, those random letters and numbers pertained to item #3, received after the motion was filed from Lara. While the above may not read clearly, it actually says, *I am an exonerating police report that was concealed for seven years. My name is 419, and my concealment is why you were convicted.* R.516-518

All counsel had to do was sift through every fragment of discovery, locate Los Angeles County Sheriff's Department radio codes & manuals and learn to read radio and then it was clear as day.

But that was not the reason that task began. Rather it pertained to hunting down the concealed major exculpatory witnesses, identified here:
"'INCIDENT,5392 BLUE SAGE DR,PLM X 50TH ST E/AV R-8,P ,911B,,,, , 11 DMH, JOSEY,,661 4920620,DMH RESPONDED TO A CALL WHER,E FATHER'" (R 283)

The above communicates, *I am Frander's therapist who was on scene to assist him. But I will be used as argument to prove his falsely claimed guilt related to 419 in Mac's closing*:

> ... and brings that one doctor in to court as a defense. Not the wife. Not the daughter. Right? Not anyone else that saw him that day. Not anyone else that saw him those four or five days afterwards to say he is crazy. No. He brings in that doctor. (RT.83:2-6; R.408-409)

"There is also talk about meth. Sure, George and Mr. Salguero used meth before in the past. ... And then, you know, who is an expert on that? George, because he uses it. He's been convicted of it." (RT.97:27-28; 98:7-8)

The prosecutor turned the probation violating trafficker into the victim and expert for giving Frander so much methamphetamine that it caused psychosis with auditory hallucinations. While Mac was busy calling Frander crazy, repeatedly, he was also concealing that George was an unmedicated schizophrenic.

Item #13 (R.128, App. 119a) pertained to the Sheriff's drug regimen given to George while in custody recently to treat the severely disabling mental disease. Plus, item #11 "true and correct name of the psychiatric hospital(s)" (App. 116a) that the other purported victim stayed at, whom is an actual sociopath. At sentencing, Mac's communication was recalled. "George was advised by the D.A. that he part ways with Mark because the incident had affected Mark's mental state to where he was admitted to a mental institute. George was not made aware of the location of the mental institute only that Mark was in one." ([R.370]) R.126, App. 116a

Mac conveyed he complied with his duties to provide discovery at trial (RT.1202:26-28). And the trial court found the D.A.'s office had provided everything required, (RT.1212:20-22). Which both must have included in their statements item #26:
"'George had a lot of meetings. I actually only went to the court – or to meetings with he and the DA twice, I think. And all the rest of them, he would tell me about them, but he would go on his own. Or he and Mark would go.' ([R.416]) That was Elston Freeman speaking with the habeas investigator, he was a central background figure in the case" "when asked about the DA, George advised, 'No. I talked to them actually when – Before the court case we were talking on a regular basis for a good month and a half,' ([R.371]) and later, 'Every time that I spoke to them, it was in regards to the actual stabbing itself, only' ([R.372])" (R.139, App. 137a-138a)

Eyewitness statements to witness coaching, was admitted to by the prosecutor by stating he complied, and the trial court found this was provided.

That was only a discussion of six items, three were provided. In total 35 items remain outstanding. Including two that expressly had to do with Stanley, which the trial court found were provided and simultaneously found none of the motions had anything to do with Stanley.

While acknowledging entitlement "1054.9, which is what this motion is being filed under, entitles Mr. Gutierrez to any discovery that would have been available to him at the time of trial." (RT1202:14-16) Then the trial court noted Lara "had turned over *essentially* everything that was in the D.A.'s possession. Do you have anything else to add about

that?" (*Id.*:18-22) Asking the concealer if he concealed. His concealing answer was no.

CONSTITUTIONAL ISSUES RAISED

4. Again a rapid summary, after the Nov. 18, 2022, denial a mandamus was sought a second time, denied declaring no abuse of discretion (App.51a) for a court to deprive *Brady* materials; review sought and an Answer and reply filed, then denied Apr. 12, 2023. Prior a timely notice of appeal was filed as a back-up, thus precluding earlier review before this Court. The intermediate court dismissed without briefing or legal cause, claiming only mandamus was permitted. Under California law, that made the prior denial in excess of jurisdiction.

Trial court level.

The motion was titled, "Motion to Compel Discovery Pursuant to Penal Code § 1054.9". Without any opposition having been filed, the trial court denied:

"The court has read and considered the defendant's request to compel discovery in this post-conviction matter pursuant to Penal Code section 1054 and *Brady v. Maryland*, received on March 26, 2010. The only provision in Penal Code section 1054 allowing for post-conviction discovery to a defendant in a criminal case is section 1054.9..." App.56a.

Brady was "definitely brought to the court's attention." (*Live Oak Assn. v. R.R. Comm*, 269 U.S. 354, 357 (1926)) At least the trial court resolved the federal invocation. See also R.70, 76, or any of the other 50 times "*Brady*" appears in the motion; *Kyles* only 14, *Banks* 17, *Mooney* 18, *Miller* 27, *Napue* 29, *Ritchie* 17 and Fourteenth Amendment 10, but Sixth Amendment 17.

The greater number reflects the degree of belief that witnesses in one's favor directly correlates to the ability to effectively assist.

Intermediate court.

A notice of appeal is to be interpreted broadly. The intermediate court dismissed the appeal without legal authority, its reason was: "The order entered by the superior court on November 18, 2022 is not an appealable order. (*In re Steele* (2004) 32 Cal.4th 682, 692.)" (App.45a)

The cited case addressed capital cases:

> Thus, we conclude that when no execution is imminent, a person seeking specific discovery under section 1054.9 should first file the motion in the trial court that rendered the judgment... But if necessary, after the trial court has ruled, either party may challenge that ruling by a petition for writ of mandate in the Court of Appeal.

In re Steele, 32 Cal.4th 682, 692 (2004)

"It merely reflects the reality that successive habeas corpus petitions in capital cases present problems distinct from those in noncapital cases." (*Briggs v. Brown*, 3 Cal.5th 808, 845 (2017))

State highest court.

Under state law, it is beyond resolved that what occurred here is impermissible. R.28:

"There is no constitutional right to an appeal; the appellate procedure is entirely statutory and subject to complete legislative control." (*Trede v. Superior Court* 21 Cal.2d 630, 634 (1943))

Pen. Code, § 1237(b) ("From *any* order made after judgment, affecting the substantial rights of the party.") "The Legislature has not found that a convicted defendant has a substantial right to seek

post-judgment discovery, **except** when section 1054.9 applies." (*People v. Davis* 226 Cal.App.4th 1353, 1368, (2014) emphasis added.)

And at R.29:

Since 1872, except for subdivision enumeration, the text is identical: "3. From any order made after judgment, affecting the substantial rights of the party."

> The present appeal is not from the judgment, but is an appeal from an order after judgment, from which, if it affects any substantial right of the petitioner, he has an undoubted right to appeal. (Pen. Code, sec. 1237, subd. 3.) That the order does affect the substantial rights of the petitioner is clear;
>
> *Ward v. Dunne* 136 Cal. 19, 20-21 (1902)

Exactly on point is *People v. McNulty* 95 Cal. 594 (1892). Without equivocation, soundly resolved the issue in Petitioner's favor, relying on [Pen. Code,] §§ 1237(3) and 1248. Two noteworthy aspects: "To dismiss an appeal is to refuse to consider its merits..." "By this provision the supreme court is forbidden to dismiss an appeal in a criminal case unless the appeal itself is irregular in some substantial particular," (*id.* at 595-96), explaining the instant Petitioner's appeal was not irregular.

Per [Pen. Code,] § 1247k there is no Rule of Court granting authority to dismiss an appeal that is timely filed, unless there was consent or some fault in the process by the party, consistent with [Pen. Code,] § 1248.

The final conclusive proof of appealability is found in [Pen. Code,] §1054.9 (d) "The procedures for... DNA testing are provided in Section 1405, and

this section does not provide an alternative means of access to physical evidence for those purposes."

[Pen. Code,] § 1405(k) ("An order granting or denying a motion for DNA testing under this section shall not be appealable, and shall be subject to review only through petition for writ of mandate or prohibition...") Reference to a statute that precludes appealability and announces procedural distinctness yet does not itself renounce appealability, renders [Pen. Code,] § 1237(b) expressly viable.

Then on R.30:

"[I]t is now fundamental that, once established, ... avenues [of appellate review] must be kept free of unreasoned distinctions that can only impede open and equal access to the courts." (*Rinaldi v. Yeager*, 384 U.S. 305, 310 (1966)) The Fourteenth "Amendment governs any action of a State, 'whether through its legislature, through its courts, or through its executive or administrative officers.' [Citations.]" (*Mooney v. Holohan*, 294 U.S. 103, 113 (1935))

Of course, the Court may still be hesitant based on comity. But the intentions are revealed by another issue.

The *Napue* certiorari was attempted to be blocked by referring to a claimed afforded habeas route, while concealing from this Court that with its other hand, it was denying access to massive amounts of exculpatory evidence while shoving Frander down that path.

In this case, the prejudice was intended for this Court. Counsel for the innocent Frander has been at this game for 50 years and can read a room. A motion for request for judicial notice was filed in this matter as the record was inadequate, (e.g., forgot the trial

RT.1 starts with defense case). That notice exposed the intentions claimed all along.

The breakdown in comity, equal justice under law, and preservation of individual liberty eroded to dust, from the petition for review before the state high court.

"THE RECORD ON REVIEW

Currently the record is incomplete, no opportunity to augment or perfect was afforded. The standard of review is de novo, post at 27, requiring original appraisal of all the evidence, a motion requesting judicial notice of papers within this Court was filed with the initial petition. This is permissible under long standing rules preventing judicial frustration from reaching the issue, *Blair v. Hamilton* 32 Cal. 49, 52-53 (1867); applied in *Schwarz v. Superior Cour*t 111 Cal. 106, 112-13 (1896). R.14

As to the end result of lower courts and a prosecutor acting contrary to several United States Supreme Court decisions, "suppression by the prosecution of evidence favorable to an accused *upon request* violates due process where the evidence is material" (*Brady, supra*, emphasis added) given that a "rule thus declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process." (*Banks* at 696))

> Certainly, if Kennedy is able to identify materials to which he would have been entitled at time of trial under *Brady*, and he has requested discovery of those materials in the present motion, then he is entitled to an order for discovery of those materials under section 1054.9 (assuming he has satisfied all other requirements for obtaining such an order).

> *Kennedy v. Superior Court* 145 Cal.App.4th 359, 369 (2006)
> "[A]ll branches of government are required to comply with constitutional directives or prohibitions". As we observed more than a century ago, "[e]very constitutional provision is self-executing to this extent, that everything done in violation of it is void."[Citations omitted.] *Katzberg v. Regents of the University of California* 29 Cal.4th 300, 306-07 (2002)

The merits of the appeal, in the above three paragraphs in just 202 words and four case citations, established the result was void. "When, as here, there is an appeal from a void judgment, the reviewing court's jurisdiction is limited to reversing the trial court's void acts. [Witkin cites.]" (*Griset v. Fair Political Practices Com.* 25 Cal.4th 688, 701 (2001)) R.15-16

The state highest court declared itself divested of power to do what it condoned by the lower court. Resultantly, we are petitioning this Court because the state high court disregards its own rules repeatedly. And in that process tried to preclude the truth from reaching this court. Per its denial order:

> "The request for judicial notice of the court documents in case numbers B323872, B325061, and B325333, the briefs and objection in case number S278394, and the court documents in case number MA066642 is granted. The remainder of the request for judicial notice is denied.
> The petition for review is denied." App.43a

This was a statutory right of appeal. Yet per se reversal, denied? But notice the language "remainder" denied. Set out for the Court at App.98a is what was

intended to be denied, i.e., the entire record set up in the *Napue* line. The present one is bountiful but not complete like the *Napue* record. Then beyond that, the request for notice included every major exculpatory item, that was part of the "remainder" that was denied. If the state high court granted it in part, why would it deny itself the very thorough and complete record?

Along with denying the major *Brady* items on an appeal pertaining to *Brady* denial?

If this was truly state grounds, why deny any part of it?

That court had all the records anyway. Why deny what they possessed? Unless the denial was not for them, but for this Court.

See the express items denied to this Court at App.91a When the issue on appeal was the *Brady* items, and those and the *Napue* record are excluded from the order granting judicial notice, that is by negative implication a direct acknowledgment. "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))

Counsel does have a habit of asking the tough questions...

1. Which remedial vehicle should be pursued to obtain relief seeking a substantial right involving a ministerial obligatory task, yet refused, given one appellate court declares discretion afforded despite divested by statute and another appellate court declaring not appealable despite afforded by statute,

to avoid arbitrary adjudicative procedures that violate due process?
2. To ensure due process is enjoyed and avoid any future arbitrary adjudicative procedures that declare discretion vested when divested by statute, what is the correct standard of review or is there even a standard of review for non-compliance with statutory obligations resulting in acts in excess of jurisdiction for ministerial duties?
3. What is the remedy for willful noncompliance, when both the People and courts expressly violate the unequivocal holding of *Brady v. Maryland*, (1963) 373 U.S. 83, 87 "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material", and all defy the commands of § 1054.9?

While those questions could work before this Court, it was believed that the Court would enjoy questions with national applications.

The arbitrary aspects pertained to no standard of review having been established on this issue in over 20 years. All intermediate courts have been borrowing from a statute that affords discretion as opposed to Pen. Code, § 1054.9 that expressly divested discretion. See R.32-34 and R.36-38.

Ending with, "How much longer will an error of law reign over litigants and block the legislative intent to afford the innocent speedy resolution?
That answer does lay within the sound discretion of this Court." R.38

But given the gravity and the refusal, while clearly this Court cannot determine the state standard of review, the sound discretion in this Court is found in the state's inability to preclude review of

their arbitrary treatment of rights. As stated in R.45-46:

"The touchstone of due process is protection of the individual against arbitrary action of government," (*Wolff v. McDonnell* 418 U.S. 539, 558 (1974)) "it serves to prevent governmental power from being 'used for purposes of oppression,'" (*Daniels v. Williams* 474 U.S. 327, 331 (1986)) "due process protections are necessary 'to insure that the state-created right is not arbitrarily abrogated.'" (*Vitek v. Jones* 445 U.S. 480, 488-89, (1980) and 491 fn.6.) "Prosecutors' dishonest conduct or unwarranted concealment should attract no judicial approbation." (*Banks* at 696) Will Mac's felony and dishonesty directed at this Court attract approbation or probation?

REASONS FOR GRANTING REVIEW

The *Napue* petition demonstrates that the circuits are in open rebellion on false evidence. While California is trying to block this Court's access to the injustice of this case, the focus here is on how we have strayed so far of course. And why such flagrant injustice and dereliction of constitutional duty begs of protection for the small individual, as our Constitution was intended as a means of escaping oppression —the very purpose behind most amendments. Including process for papers in favor.

I. Because California ensured that this Court should be blocked from accessing the facts, recognizing the intended protection and power will prevent significant future litigation.

While the instant lower courts claim discretion to defy *Brady*, this country's great jurist believed quite the opposite.

> [W]ith respect to his right to apply for papers deemed by himself to be material. In the one case the accused is made the absolute judge of the testimony to be summoned; if, in the other, he is not a judge, absolutely for himself, his judgment ought to be controlled only so far as it is apparent that he means, to exercise his privileges not really in his own defence, but for purposes which the court ought to discountenance. The court would not lend its aid to motions obviously designed to manifest disrespect to the government; but *the court has no right to refuse its aid to motions for papers* to which the accused may be entitled, and which may be material in his defence. These observations are made to

> show *the nature of the discretion which may be exercised.*
> *United States v. Burr*, 25 F. Cas. 30, 35 (1807)

If *Brady* is evidence favorable to an accused, then the Chief's words were either prophetic or apropos for the amendment's meaning, "his means of defence ... designed by the fundamental law of our country, ... his right to apply for papers" "the testimony to be summoned" "the papers" "may be material in his defence" "process to obtain testimony" "deemed by himself to be material" (*id.*).

"Two hundred years ago, a great jurist of our Court established that no citizen, not even the President, is categorically above the common duty to produce evidence when called upon in a criminal proceeding. ... *Burr*, 25 F.Cas. at 34." (*Trump v. Vance* 140 S. Ct. 2412, 2431 (2020))

As Justice Thomas explained *Burr* rejected the construction of witnesses as only meaning humans, "holding that the right to compulsory process includes the right to secure papers — in addition to testimony — material to the defense. *Id.*, at 34-35. This Court has subsequently expressed agreement with this view of the Sixth Amendment. See *United States* v. *Nixon*, 418 U.S. 683, 711 (1974)." (*United States v. Hubbell* 530 U.S. 27, 54-55 (2000), Thomas, J., concurring, joined by Scalia, J.)

II. Only this Court can bring us back to the intended freedom from oppression that we have gradually sunk into.

> [T]he trial by jury... regarded as a right of inestimable value, and the best and only security for life, liberty, and property. [¶] But as the law formerly stood, the value of this right was much

> impaired by the mode of proceeding in criminal cases.... denied compulsory process for his witnesses;... nor to have the aid of counsel in his defence, except only as regarded the questions of law. [¶] ... Lord Coke... declares... the rule which prohibited the witnesses for the accused... was not founded in law...[¶] ...as they became States, placed... safeguards against the restoration of proceedings which were so oppressive and odious while they remained in force... and ingrafted on it the provision which secures the trial by jury, and abolishes the old common-law proceeding which had so often been used for the purposes of oppression.... [¶] It was for this purpose that the 5th and 6th amendments were added to the Constitution.
>
> *U.S. v. Reid* 53 U.S. 361, 363-64 (1851)

Despite that history, old habits die hard, and was overruled as to "the dead hand of the common-law rule of 1789 should no longer be applied to such cases" (*Rosen v. United States*, 245 U.S. 467, 471 (1918)) because "the truth is more likely to be arrived at by hearing the testimony of all persons of competent understanding who may seem to have knowledge of the facts involved in a case, leaving the credit and weight of such testimony to be determined by the jury or by the court" (*id.*) as "the disposition of courts to hear witnesses rather than to exclude them" (*id.*, at 470)

We started as a nation adamant that the defendant was master of his defense. And it was unthinkable to the Chief that one would be denied the evidence of his choosing. "It ought not to be believed that the department which superintends prosecutions in criminal cases, would be inclined to

withhold it. What ought to be done under such circumstances presents a delicate question, the discussion of which, it is hoped, will never be rendered necessary in this country." (*Burr* at 37)

The above, impeaches the below.

> There is no general constitutional right to discovery in a criminal case, and *Brady* did not create one; as the Court wrote recently, "the Due Process Clause has little to say regarding the amount of discovery which the parties must be afforded..." *Wardius* v. *Oregon*, 412 U.S. 470, 474 (1973).
>
> *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977)

The lower courts simply read no right to discovery and ignore "general" and "amount".

The burden of breadth of law placed on this Court is immense, law schools cannot contain the amount of law required to review by this Court. But it is most certainly universal, those in the criminal law do not contemplate the word discovery as those in civil law do. The broad exchange of information, not the right to solicit it to narrow triable issues, is the focus of criminal legal minds.

One court in California, does frame it neutrally. "However, the duty to disclose under *Brady* is not a discovery rule, but a due process requirement" "whether *Brady* applies is a legal matter, reviewed de novo." (*IAR Sys. Software, Inc. v. Superior Court* 12 Cal.App.5th 503, 513 (2017) pretrial discovery) R.41

We started with the defendant is the master of his defense and the government had no right to refuse absent a clear abuse. Which flipped into no general right, or do not require open files. Why not?

If the government claims witness privilege will the Court not command dismissal under Jencks?

(Discussed post at 39) And if a President claiming the most powerful privilege, will he or she still not be caused to surrender his or her evidence?

If Lord Coke declared the rule prohibiting witnesses for the accused was not founded in law, then that rule still living today through permissible non-disclosure to ascertain where a defense may be found and still unfounded in law, begs a question.

Quo warranto the common prosecutor to defy the accused the right to his defense, upon his assistant's counsel?

According to The Bluebook 1.2 Introductory Signals (a) Signals that indicate support. This Court has already made that leap, and in the most unlikely case.

> [T]he right to receive from prosecutors exculpatory impeachment material—a right that the Constitution provides as part of its basic "fair trial" guarantee. See U.S. Const., Amdts. 5, 6. See also *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (Due process requires prosecutors to "avoi[d]... an unfair trial" by making available "upon request" evidence "favorable to an accused ... where the evidence is material either to guilt or to punishment"); *United States v. Agurs*, 427 U.S. 97, 112-113 (1976) (defense request unnecessary); *Kyles v. Whitley*, 514 U.S. 419, 435 (1995) (exculpatory evidence is evidence the suppression of which would "undermine confidence in the verdict"); *Giglio v. United States*, 405 U.S. 150, 154 (1972) (exculpatory evidence includes "evidence affecting" witness "credibility," where the witness' "reliability" is likely "determinative of guilt or innocence").
>
> *United States v. Ruiz*, 536 U.S. 622, 628 (2002)

III. A *Brady* violation is a core Sixth Amendment violation, requiring per se reversal for denial of the community's constitutional rights to adjudge.

The Court's constitutional analysis through the incorporation clause has sagaciously matured to honor the obvious intention of the founders when writing the Constitution. The power that *Chapman* granted the every-judge significantly curtailed the rights of the jury to safeguard; that divestment bestowed it on the entity intended to be deprived.

> Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge. If the defendant preferred the common-sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it.
>
> Beyond this, the jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power—a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges.
>
> Fear of unchecked power, so typical of our State and Federal Governments in other respects, found expression in the criminal law in this **insistence upon community participation in the determination** of guilt or innocence. The deep commitment of the Nation to the right of jury trial in serious criminal cases **as a defense**

> **against arbitrary** law enforcement qualifies for protection under the Due Process Clause of the Fourteenth Amendment, and must therefore be respected by the States.[5]
> *Duncan v. Louisiana,* 391 U.S. 145, 156 (1968)

A vital point can be taken in two ways, adjusting the wording shows the intended reading in context: as a defense against arbitrary enforcement of the law.

Given that arbitrary government was a major concern expressed throughout the federalist papers, that rewording more clearly expresses the jury's role as part of the guaranteed social compact: *we the people* shall determine when liberty is to be surrendered; and no other.

"In *all* criminal prosecutions" the jury decides guilt or innocence, not the prosecutor or the judge. Deprivation of the Sixth Amendment incorporated through the due process and equal protection guarantees of the Fourteenth Amendment render the judgment and sentence void.

That is the only use of the word "all" in the Bill of Rights. It appears twice more in the full text of the Fourteenth and once in the Eighteenth Amendments.[6]

"The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury" (Art. III §2, cl.3)

The inquiry must be isolated to whether the issue was a question of fact or one of law. Only the

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[5] Emphasis added, paragraph intentionally broken up to highlight points in it.

[6] "All persons born" "but all such debts"; "and all territory subject to"; also 14 times in Article I; 7 in Article II; 6 in Article III; 2 in Article IV; Article V "shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified"; 3 in Article VI; 0 in Article VII.

latter may possibly be within judicial purview. See *United States v. Gaudin*, 515 U.S. 506, 510 (1995) ("We have held that these provisions require criminal convictions to rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt."... "'must unanimously *concur in the guilt of the accused before a legal conviction can be had.*'")

> This right was designed "to guard against a spirit of oppression and tyranny on the part of rulers," and "was from very early times insisted on by our ancestors in the parent country, as the great bulwark of their civil and political liberties." *Id.*, at 540-541. See also *Duncan* v. *Louisiana,* 391 U.S. 145, 151-154 (1968) (tracing the history of trial by jury).
>
> *Gaudin* at 510-511
>
> Thus far, the resolution of the question before us seems simple. The Constitution gives a criminal defendant the right to demand that a jury find him guilty of all the elements of the crime with which he is charged;
>
> *Id.*, at 511

There is one exception to this, that is limited to if a retrial or acquittal is appropriate. There are two tests currently in play.

Under the current *Brady-Strickland* prejudice test, undermining confidence requires finding a sole juror would have voted differently, resulting in a mistrial. A different result includes the outcome of a hung jury, all that is required is to convince "the factfinder... need[ing] to reach a subjective state of near certitude of the guilt of the accused" (*Jackson v. Virginia*, 443 U.S. 307, 315 (1979)) that the government failed and thus "undermine confidence in

the outcome" (*Strickland* at 694) meaning "there is a reasonable probability that at least one juror would have struck a different balance." (*Wiggins v. Smith*, 539 U.S. 510, 538 (2003)). Justice O'Connor wrote both opinions *Strickland* and *Wiggins*. "When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." (*Strickland* at 695) Factfinder was not plural in either usage. "A jury must reach a unanimous verdict in order to convict." (*Ramos v. Louisiana*, 140 S. Ct. 1390, 1395 (2020))

If a reviewing court finds an issue of fact, then the above dictates retrial is permissible. Yet the other test is the only time the courts should be allowed to supplant the outcome.

A finding of innocence entails, "no reasonable juror would find him guilty beyond a reasonable doubt — or, to remove the double negative, that more likely than not any reasonable juror would have reasonable doubt." (*House v. Warden* 547 U.S. 518, 538 (2006)) "The meaning of actual innocence as formulated... It must be presumed that a reasonable juror would consider fairly all of the evidence presented. It must also be presumed that such a juror would conscientiously obey the instructions of the trial court requiring proof beyond a reasonable doubt." (*Schlup v. Delo* 513 U.S. 298, 329-330 (1995))

No reasonable juror finds perjury established "the **truth** of the charge." (Pen. Code, § 1096, our reasonable doubt instruction)

Likewise, any reasonable jury upon learning the prosecutor is concealing evidence of innocence as part of "the entire comparison and consideration of all the evidence," casts a reasonable doubt on the govern-

ment's "burden of proving him or her *guilty beyond a reasonable doubt*" and thus still "innocent [because] the contrary [wa]s [not] proved" (*id.*).

This Court would not tolerate any attorney lying to it in oral argument, it casts reasonable doubt on everything said. The standard should not be presumed to be less for a jury. If they choose to weigh and disregard, then they performed their difficult task. If that constitutional obligation is stolen, then the prosecutor resolved the test.

The fortitude of the premise advanced was best noted recently, again by *Ramos* at 1395:

> Still, the promise of a jury trial surely meant *something* —otherwise, there would have been no reason to write it down. Nor would it have made any sense to spell out the places from which jurors should be drawn if their powers as jurors could be freely abridged by statute. Imagine a constitution that allowed a "jury trial" to mean nothing but a single person rubber-stamping convictions without hearing any evidence.... And if that's not enough, imagine a constitution that included the same hollow guarantee *twice* —not only in the Sixth Amendment, but also in Article III.

Four Justices expressed the danger of the single-judge-jury on appeal, that occurred in the instant case, without hearing any evidence or causes advanced.

> On what ground would anyone have us leave Mr. Ramos in prison for the rest of his life? Not a single Member of this Court is prepared to say Louisiana secured his conviction constitutionally under the Sixth Amendment. No one before us suggests that the error was harmless. Louisiana

> does not claim precedent commands an affirmance. In the end, the best anyone can seem to muster against Mr. Ramos is that, if we dared to admit in his case what we all know to be true about the Sixth Amendment, we might have to say the same in some others. But where is the justice in that? Every judge must learn to live with the fact he or she will make some mistakes; it comes with the territory. But it is something else entirely to perpetuate something we all know to be wrong only because we fear the consequences of being right. The judgment of the Court of Appeals is *Reversed.*

Ramos at 1408, opinion of Gorsuch, J., joined by Ginsburg, J., Breyer, J., and Sotomayor, J. But was the judgment of the Court.

Observing "but says nothing else about what a 'trial by an impartial jury' entails." (*Id.*, at 1395) The answer to that aspect is presented in the mandamus petition, for the objection to false evidence was listed in the Declaration of Independence and is the purpose of the Sixth Amendment.

"For *depriving* us in many cases, of the *benefits* of Trial by Jury:

For transporting us beyond Seas to be tried for *pretended offences*

For abolishing the free System of English Laws in a neighbouring Province, establishing therein an Arbitrary government..."

–Declaration of Independence

And before that aspect of the objections, noted the other side of the justice coin:

"For protecting them, by a mock Trial, from punishment for any Murders which they should commit on the Inhabitants of these States"

While not a source of law itself, it surely is the most powerful legislative intent in our history.

The full depth of the meaning was explained in the record, but because of the judicial usurpation by the California Supreme Court of this Court's Article III obligations, i.e., "The judicial Power of the United States, shall be vested in one supreme Court," "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution," "In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact," when deprived of facts through the partial denial of request for judicial notice that pertained to the *Brady* materials, on a *Brady* appeal.

IV. Sanctions have always shown to be the only teacher. Is not that the very purpose of the criminal law?

> The State here nevertheless urges, in effect, that "the prosecution can lie and conceal and the prisoner still has the burden to . . . discover the evidence," ... A rule thus declaring "prosecutor may hide, defendant must seek," is not tenable in a system constitutionally bound to accord defendants due process.
>
> *Banks, supra,* 540 U.S. 668, 696
>
> We find sanctity in another unlikely case. [T]he State has denied a defendant the benefit of a specific provision of the Bill of Rights, such as the right to counsel, *Argersinger* v. *Hamlin,* 407 U.S. 25 (1972), ... When specific guarantees of the Bill of Rights are involved, this Court has taken special care to assure that prosecutorial conduct in no way impermissibly infringes them. *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974)

Sanctions teach those humans believing they are cloaked with power to play fair. In reality the intention was to perform as civil servants. Nothing less has inspired them.

California, through its executive and judicial branches, denied access through compulsory process, to evidence proven to exist.

That specific right, being historically born of the Sixth Amendment, a heavy sanction awaits its defiance, "the constitutional infringement identified has had or threatens some adverse effect upon the effectiveness of counsel's representation or has produced some other prejudice to the defense." (*United States v. Morrison* 449 U.S. 361, 365 (1981)). "upon a showing that the State participated in the denial of a fundamental right protected by the Fourteenth Amendment. The right to counsel guaranteed by the Sixth Amendment is a fundamental right." (*Cuyler, supra,* 446 U.S. 335, 343)

For as solid as *Agurs* was on the *Mooney-Napue* and even *Brady* understandings, the logic of this next part defies all Sixth Amendment cases:

> "The problem arises in two principal contexts. First, in advance of trial, and perhaps during the course of a trial as well, *the prosecutor must decide* what, if anything, he should voluntarily submit to defense counsel. Second, *after trial a judge may* be required to decide whether a nondisclosure deprived the defendant of his right to due process. Logically the same standard must apply at both times.
>
> *Agurs* at 107-08

The Sixth Amendment right to assistance did not include the prosecutor and judge in that role. They may not deprive him, but certainly are not there as

his omnipotent aid. The accused and the attorney constitutionally assigned to him decide what defense to make. If "one cannot invoke the Sixth Amendment as a justification for presenting what might have been a half-truth." (*United States v. Nobles*, 422 U.S. 225, 241 (1975)) Then it surely can invoke it to be protected from the employ of a half-truth.

> The dual aim of our criminal justice system is "that guilt shall not escape or innocence suffer," *Berger* v. *United States*, 295 U.S. 78, 88 (1935). To this end, we have placed our confidence in the adversary system, entrusting to it the primary responsibility for developing relevant facts on which a determination of guilt or innocence can be made.
>
> *Id.*, at 230

It is incongruent for the Sixth Amendment's witnesses in favor—by testimony or by paper— to be a personal right of the accused, yet a prosecutor may unilaterally withhold parts of its file from the One whose defense is deprived and the Twelve whose constitutional role may turn "upon such subtle factors" (*Napue* at 269). "A prosecution that withholds evidence on demand of an accused which, if made available, would tend to exculpate him" "casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice" (*Brady* at 87-88) Assistance of Counsel for his defense, includes "the right to receive from prosecutors exculpatory impeachment material—a right that the Constitution provides as part of its basic 'fair trial' guarantee. See U. S. Const., Amdts. 5, 6." (*Ruiz, supra.*) "In certain Sixth Amendment contexts, prejudice is presumed... state interference with counsel's assistance... such circumstances involve

impairments of the Sixth Amendment right that are easy to identify and... because the prosecution is directly responsible, easy for the government to prevent." (*Strickland* at 692)

Article VI cl.2 "This Constitution, and the Laws... shall be the supreme Law of the Land; and the Judges in every State shall be bound" which this Court interprets the listing of constitution before laws to mean the former is superior.

The cost of actual justification to withhold is clear:

> [I]n criminal causes "... the Government can invoke its evidentiary privileges only at the price of letting the defendant go free. The rationale of the criminal cases is that, since the Government which prosecutes an accused also has the duty to see that justice is done, it is unconscionable to allow it to undertake prosecution and then invoke its governmental privileges to deprive the accused of anything which might be material to his defense...." 345 U.S., at 12.
>
> *Jencks v. United States*, 353 U.S. 657, 671 (1957)

Yet, absent such good cause, "the price of letting the defendant go free"[7] is to be paid by the defendant?

The good prosecutors are out there doing justice. It is the bad ones that require tests such as these. But they do not deserve tests, "it is this very lack of predictability which ultimately defeats the State's argument." (*Wardius* v. *Oregon*, 412 U.S. 470, 477 (1973))

"Prosecutors' dishonest conduct or unwarranted concealment should attract no judicial

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[7] Quoted and invoked at R.94, 94, 155, 156, 157, 162.

approbation." (*Banks* at 696.) "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* at 449)

Mac deceived the jury, concealed innocence and stole liberty through employ of felonies. And has only received judicial approbation from California.

Dismissal is the verdict. For he chose to steal the acquittal from the jury.

The lower courts have proven irresponsible. The power to decide for the jury was wrongly bestowed and only this Court can take back what it gave.

SUMMATION

Hamilton's "faithful guardians of the constitution" are the only ones that are constitutionally empowered to protect the sanctity of the jury's role as arbiters of permitting the state to deprive liberty. Full open disclosure was the intention, the Court should give the power back to where the founders intended it to be, with the master of his own defense and the constitutionally empowered jury.

It is prayed to restore this protection for all.

CONCLUSION

The Court should grant this petition.

Respectfully submitted,
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Petitioner pro se