

No. 23-680

In the Supreme Court of the United States

IN RE FRANDER SALGUERO, PETITIONER

*On Petition for an Extraordinary Writ to the District
Attorney of Los Angeles County, George Gascón and
deputy District Attorney Steven Mac; Through the
Fifth Division of the Second District Court of Appeal
of California*

PETITION FOR REHEARING

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ADVISEMENT:

ORDER LIST: 601 U.S. FEBRUARY 20, 2024

Regarding cases:

*Frander Salguero v. Court of Appeal of California,
Second Appellate District, et al.* 23-609

Frander Salguero v. California 23-610

In re Frander Salguero 23-680

The petitions for rehearing as to each case above are identical except for the cover. If one has been read, the others need not be.

A March 8, 2024, inquiry to the Clerk of the Court revealed that a separate petition for rehearing is required for each submitted case number, even if intended to cover all three cases simultaneously. The additional two duplicative petitions serve solely for preservation purposes, and their identical uniformity was maintained out of respect for the Court's time.

March 16, 2024 was last day.

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PETITION FOR REHEARING

In accordance with Supreme Court Rule 44.2, Petitioner Frander Salguero (“Petitioner” or “Mr. Salguero”) respectfully seeks rehearing of the Court’s orders denying certiorari and mandamus for the most compelling of “intervening circumstances of a substantial or controlling effect” (Rule 44.2) rendering this case as unquestionably “cert. worthy.” Because this Court just declared so.

Petitioner urges this Court to consider on rehearing:

Whether, in light of the grant of review in *Glossip v. Oklahoma* 22-7466 (1/22/24), this Court should consolidate the instant cases with *Glossip* for the reasons expressed herein, thereby fostering a comprehensive and universally applicable resolution of the issues stemming from *Brady* and *Napue*, impacting both capital and noncapital cases alike.

Glossip presented the same issues, compare:

- ***Glossip* Question 1.a**

“failure to correct that witness’s false testimony” citing *Napue*.

- ***In re Salguero* 23-680:**

“Whether mandamus should compel the prosecutor to fulfill his constitutional duty and correct the known false record.” (*Napue* cited 42 times)

- ***Salguero v. Court of Appeal* 23-609:**

“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.” (*Napue* cited 74 times)

“2. Whether false evidence is structural error or some prejudice test must be employed to ascertain an acceptable amount of perjury.”

- ***Glossip* Question 2:**

“Whether due process of law requires reversal, where a capital conviction is so infected with errors”

- **This Court’s Question in *Glossip*:**

“Whether the Oklahoma Court of Criminal Appeals’ holding that the Oklahoma Post-Conviction Procedure Act precluded post-conviction relief is an adequate and independent state-law ground for the judgment.”

- ***Salguero v. California* 23-610 Question 4:**

“Whether a due process sanction of dismissal applies to situations like the present.”

- ***Id.* Question 3:**

“Whether arbitrary state judicial procedures impairing the ability to prove one is innocent conform with due process”

GROUNDS FOR REHEARING

1. Parallel avenues under Court precedent.

This Court’s precedent provides two avenues for consideration. In addition to the main contention raised below, the “other substantial grounds not previously presented” (Rule 44.2): if Mr. Salguero is not to be heard, the secondary request made is to hold Mr. Salguero’s cases pending the outcome of *Glossip*. Precedent finds Mr. Salguero as a similarly situated person justifying such relief as the proper recourse, (see *Gonzalez-Longoria v. United States* 138 S. Ct. 1975, 138 S. Ct. 2668 (2018), Pet. Rehearing brief at pp. 3-4 *id.*, 16-6259).

- **In furtherance of consistent treatment:**

[S]o that this case might be disposed of consistently with the companion cases of *United States v. Allen-Bradley Co.*, 352 U.S. 306, and *National Lead Co. v. Commissioner*, 352 U.S. 313, in which we had granted certiorari the same day, *viz.* June 11, 1956. 351 U.S. 981. If there is to be uniformity in the application of the principles announced in those two companion cases, the judgment below in the instant case cannot stand. Accordingly we now grant the petition for rehearing, vacate the order denying certiorari, grant the petition for certiorari, and reverse the judgment of the Court of Claims *United States v. Ohio Power Co.*, 353 U.S. 98 (1957)

- **Instances of certiorari denial followed by grant on rehearing when similar issue was granted review:**

Melson v. Allen, 558 U.S. 900 (2009), 561 U.S. 940 (2010);

Simmons v. Sea-Land Services Inc. 459 U.S. 931 (1982), 462 U.S. 1114 (1983);

Florida v. Rodrigues, 451 U.S. 1022 (1981), 461 U.S. 940 (1983);

Forgett v. United States 383 U.S. 926 (1966), 390 U.S. 203 (1968);

Pickett v. Union Terminal Co., 313 U.S. 591, 314 U.S. 704 (1941), *sub nom Williams v. Terminal Co.*, 315 U.S. 386, 394 (1942) ("Because of the importance of the issues presented, on petition for rehearing certiorari was granted. 314 U.S. 701.")

- **Parallel Significance of *Salguero* and *Glossip***

Glossip was unknown to petitioner at the time of preparing the petitions.

Importantly, because this Court granted review after the instant petitions were filed, there was no opportunity to request holding the matter till review was complete in *Glossip*. This limitation hindered the articulation of the necessity of consolidating the two cases.

Frander Salguero's cause is just as cert. worthy as Richard Glossip's cause. Both are innocent individuals fighting for Liberty and the very security of due process itself. The false appearance of evidence led to the theft of their lives, and both have been addressing courts relying on the false appearance of due process ever since.

The close relation between these cases is what makes Mr. Salguero's cause just as cert. worthy. However, it is the additional points that distinguish his case, making it also an appropriate vehicle to establish the remedy for the nation, including for Mr. Glossip if necessary.

This petition will address the similarities followed by the complementary differences.

2. Cert. worthy cases with disparate outcomes.

Two cases, both with issues deemed cert. worthy, were presented to this Court, resulting in disparate outcomes. Review was granted in *Glossip* on Jan. 22, 2024, yet on the same issues re *Brady* and *Napue*, review was denied on Feb. 20, 2024, as to

Salguero in 23-609 (cert. *Napue*); 23-610 (cert. *Brady*); and 23-680 (mandamus *Napue*).

Both gentlemen presented uncontested facts; both have crucial State witnesses with concealed mental illnesses (23-610 petition p.14); both States are in conflict with their Circuit; the State's attorney in *Glossip* confessed to the error; the District Attorney in *Salguero* concedes and commands the duty to correct false evidence; central to both: the State judiciary is disregarding this Court's rulings.

Notably, proof of the known perjury has never been refuted by the State in *Salguero*, despite multiple opportunities. Even before this Court, the State declined to comment, presumably aware that their own evidence substantiates massive perjury leading to the wrongful life imprisonment of the known innocent. Instead of confessing error, the State remained silent. "Prosecutors' dishonest conduct or unwarranted concealment should attract no judicial approbation." (*Banks v. Dretke* 540 U.S. 668, 696 (2004))

Mr. Glossip's adversaries confessed error after trial, while Mr. Salguero's adversary, in a pretrial affidavit under penalty of perjury acknowledged the error *to be* committed. One of the 46 newly discovered *Brady* materials (of which 35 remain outstanding), was the trial prosecutor's affidavit declaring Mr. Salguero the victim of a deadly assault in this self-defense case, invoking "individual self-defense is 'the *central component*' of the Second Amendment right." (*McDonald v. City of Chicago* 561 U.S. 742, 767 (2010).) (Detailed in the 23-609 petition pp. 14-15)

Due to the improvidently denied petitions, the result stands: leaving the known innocent imprisoned for life, merely for exercising a constitutional right to live.

It would work a manifest injustice to Mr. Salguero and compound the fundamental unfairness of false evidence not to hear Mr. Salguero's cause when it was recently deemed cert. worthy by this Court, but then as to Mr. Salguero "allowed their false statements to stand uncorrected." (*Banks* at 675)

See *Jones v. Opelika*, 316 U.S. 584, 589 (1942) ("This Court denied certiorari, 314 U.S. 651, but later, because of the similarity of the issues presented to those in the *Jobin* case, No. 966, vacated the denial of certiorari and issued a writ. 315 U.S. 793.")

3. Case disparities and the critical need for resolution.

The manifest difference between the cases underscores the potential deleterious disunity awaiting the nation. Highlighting this, both cases reference Mr. Escobar (see *Glossip* Question 2), yet Mr. Salguero noted that, post-facto, the intermediate state court in *Escobar* disregarded this Court's command and the state's confession of error (see 23-609 petition pp. 5-6), exposing a brazen disregard for *Napue*.

There is legitimate concern arising from this Court soliciting briefs in *Glossip* re independent and adequate state remedies, presumably regarding the 2022 Oklahoma Statutes Title 22 OK Stat. §1089(D)(8) (*Glossip v. State* 529 P.3d 218, 222, Okla. Crim. App. 2023). A potential outcome might be persuading this Court that this state statute is

sufficient to deny Mr. Glossip's federal constitutional rights, thereby missing the opportunity to address the critical *Brady* and *Napue* issues.

However, Mr. Salguero's petitions highlight a pressing issue: a current 6 to 5 split in the Circuits on the matter of false evidence. The former, plus the District of Columbia Circuit, are denying the unanimous holdings of this Court. The divide is discussed extensively in *Juniper v. Davis*, 74 F.4th 196, 211-12 and fns. 13 & 14 (4th Cir. 2023). (See petitions 23-609 pp. 5, 39, 123a-129a; 23-680 pp. 26-27) A case deemed cert. worthy and capable of carrying Liberty's torch, like Mr. Salguero's, provides an opportunity for this Court to resolve the deeply entrenched conflict, preventing a great disservice to the nation.

This is especially crucial when over 205,818,528 Americans¹ are at risk of having their Liberty stolen, with no remedy available for false evidence, merely because they live in a jurisdiction that disregards *Napue's* command.

For every 10 Americans, 6 are denied what was once "important in our free society that every individual going about [their] ordinary affairs have confidence that [their] government cannot adjudge [them] guilty of a criminal offense without convincing a proper factfinder of [their] guilt with utmost certainty." (*In re Winship*, 397 U.S. 358, 364 (1970))

¹ The populations according to the 2020 Census of all states within the six circuits, District of Columbia, Oklahoma and California.

As Chief Justice Fred M. Vinson emphasized:

The debates in the Constitutional Convention make clear that the purpose of the establishment of one supreme national tribunal was, in the words of John Rutledge of South Carolina, "to secure the national rights & uniformity of Judgmts." The function of the Supreme Court is, therefore, to resolve conflicts of opinion on federal questions that have arisen among lower courts, to pass upon questions of wide import under the Constitution... of the United states, and to exercise supervisory power over the lower federal courts. ... To remain effective, the Supreme Court must continue to decide only those cases which present questions whose resolution will have immediate importance far beyond the particular facts and parties involved.²

The second question in *Glossip* addresses a remarkably narrow class of persons, whereas *In re Salguero* demonstrates that over 2,183 persons were exonerated for false evidence since 1989, with 93 in 2023 alone — 50 of those 93 were for murder charges. Of the 93: 59 were black — false evidence is the preferred weapon of modern racism. (See petition 23-680 pp. 27-29)

Denying equal protection and due process, especially to the black community, at a grossly disproportionate level, contradicts the very principles enacted to protect them.

² Fred M. Vincent, Work of the Federal Courts, address before the American Bar Association (Sept. 7, 1949). Shapiro, M., Geller K., et al., *Supreme Court Practice*, 4-4, 11th ed., 2019.

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 [citations.] The same result [now] obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears.”” (*Napue v. Illinois*, 360 U.S. 264, 269 (1959)) As a result, no longer does “the Due Process Clause protect[] the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.” (*Winship, supra.*)

Despite the last majority word on the subject as “the Court has applied a strict standard of materiality” (*United States v. Agurs*, 427 U.S. 97, 104 (1976)) the lower courts are simply making up what the standard of materiality is, misinterpreting as intended — modernly called 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)

Salguero’s Questions compliment and complete the *Napue* resolution, inquiring on vehicle and prejudicial standard.

By consolidating and adjudicating *Salguero* and *Glossip*, the Court has the opportunity to deliver

a thorough and universally applicable opinion, ensuring a more comprehensive remedial application for cases stemming from these issues. Such a decision would provide invaluable guidance for litigants and courts involved in both capital and non-capital proceedings, thereby upholding the principles of justice and fairness.

4. Liberty and justice: the Court's established remedy.

In adherence to the principles of liberty and justice for all, “there is a clearly established constitutional due process right not to be subjected to criminal charges on the basis of false evidence that was deliberately fabricated by the government.” (*Spencer v. Peters*, 857 F. 3d 789, 800 (9th Cir. 2017) quoting *Devereaux v. Abbey*, 263 F.3d 1070, 1074-75 (9th Cir. 2001) (en banc))

“The right to have a jury make the ultimate determination of guilt” is deeply engrained. “Blackstone described ‘trial by jury’ as requiring... ‘the truth of every accusation, ...’” (*United States v. Gaudin*, 515 U.S. 506, 510 (1995)) Perjury cannot prove a “fact [a]s an element of an offense” (*Jones v. United States* 526 U.S. 227, 232 (1999).)

“The ideas of right and remedy are inseparable. ‘Want of right and want of remedy are the same thing.’” (*Edwards v. Kearzey* 96 U.S. 595, 600 (1877))

Because “a remedy is the means employed to enforce a right or redress an injury” (*Lewis v. Lewis Clark Marine, Inc.*, 531 U.S. 438, 445 (2001)) Mr. Salguero presented this Court with its own precedential remedy in the exact vehicle previously decided “because only this Court or a constitutional

amendment can alter our holdings” (*Knick v. Township of Scott* 139 S.Ct. 2162, 2177-78 (2019).)

Habeas is an incompetent remedy to compel compliance with *Napue*’s duty to correct. The reason why *Napue* would announce such a right was because that Court had 21 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))

“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.” (*Napue* at 269-270)

“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))

The duty to correct must be enforceable post-conviction, otherwise *Napue*’s holding rewards those that violate it.

5. Summation: seeking justice in accordance with the Court’s command.

Mr. Salguero diligently followed this Court’s commanded. Utilizing the vehicle established by this Court’s precedent, California law, and the common law, deemed as the correct means to compel official action. However, the State intermediate court, in defiance of penal laws, constitutions, and this Court, deemed the suborning prosecutor’s disregard as within his discretion.

Allowing one of two equally cert. worthy cases to stand without a remedy for adhering to this Court's precedent is fundamentally unfair and works a manifest injustice. Simultaneously approbating the prosecutor and courts that disregarded established precedent compounds the injustice.

An earlier mandamus case once observed:

"But where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured has a right to resort to the laws of his country for a remedy." (*Marbury v. Madison*, 5 U.S. 137 (1803))

"Our sole concern with it is to see that no conviction contrary to a valid objection raised under the Fourteenth Amendment is upheld." (*Musser v. Utah*, 333 U.S. 95, 98 (1948))

We have consistently ruled that the interest in finality of litigation must yield where the interests of justice would make unfair the strict application of our rules. This policy finds expression in the manner in which we have exercised our power over our own judgments, both in civil and criminal cases.

Ohio Power Co., *supra*, 353 U.S. at 99

See *Gondeck v. Pan American Airways*, 382 U.S. 25 (1965) (same).

Mr. Salguero's voice has spent two years studying this Court's false evidence precedent, the petitions are treatises on the subject. Losing such a beneficial voice and viable alternative, especially if *Glossip* falls to a state grounds argument, would be

regrettable when Mr. Salguero stands ready to serve this Court's opinion securing the nation from tyranny.

The deeply entrenched division in the country calls for resolution and guidance, with Mr. Salguero serving as insurance for this Court to fulfill its promise to the nation: "It is emphatically the province and duty of the Judicial Department to say what the law is." (*Marbury v. Madison*, 5 U.S. at 177)

PRAYED FOR RELIEF

There is no limitation on what the Court may do with this case lawfully before it.

28 U.S.C. § 2106 Determination (“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.”)

WHEREFORE, in accordance with Rule 44.2, petitioner Frander Salguero respectfully petitions and prays to this Court for an order:

(1) Granting rehearing.

(2) Vacating the Court’s Feb. 20, 2024, order(s) denying certiorari and/or mandamus, and either:

(3) Holding this case, then redispensing of it by granting the petition(s) for a writ of certiorari and/or mandamus, vacating the judgment, and remanding to the Fifth Division of the Second Circuit Court of Appeals of California for further consideration in light of *Glossip v. Oklahoma* 22-7466, as the judgment of conviction “must fall under the Fourteenth Amendment” (*Napue* at 269) as “a conviction obtained through use of false evidence”; or

(4) Granting the petition(s) for a writ of certiorari and/or mandamus and consolidating the instant case with *Glossip v. Oklahoma* 22-7466 for the reasons stated herein; or

(5) Any other order the Court deems just and proper.

CONCLUSION

The Court should grant the petition for rehearing and provide the prayed-for relief.

Respectfully submitted,

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Petitioner pro se