Supreme Court, U.S.
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No.

In the Supreme Court of the United States

BRENDA CASH, ACTING WARDEN OF THE CALIFORNIA STATE PRISON, LOS ANGELES COUNTY, *Petitioner*,

v.

BOBBY JOE MAXWELL, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

KAMALA D. HARRIS
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
PAMELA C. HAMANAKA
Senior Assistant Attorney General
DONALD E. DE NICOLA
Deputy Solicitor General
KENNETH C. BYRNE
Supervising Deputy Attorney General
*LAWRENCE M. DANIELS
Supervising Deputy Attorney General
**Counsel of Record*
300 South Spring Street, Suite 1702
Los Angeles, California 90013
Telephone: (213) 897-2288
E-mail: Larry.Daniels@doj.ca.gov
Counsel for Petitioner

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QUESTIONS PRESENTED

1. May a federal court governed by the deferential-review rules of 28 U.S.C. § 2254 grant habeas corpus relief on a claim that the petitioner's state-court conviction rested on perjured testimony (a) without regard to whether "clearly established law" requires proof that that the prosecution knew the challenged testimony was false and (b) by relying only on inferences it chose to draw from mere circumstantial evidence in rejecting the state-court's finding that the challenged testimony in fact was true?

2. May a federal court grant relief, despite the §2254 deference rule, on a claim that the state had suppressed exculpatory evidence at the petitioner's trial (a) without regard to whether "clearly established" law requires proof that the evidence had been known to the prosecutors or police working on the petitioner's case and (b) without considering whether the state court in any event reasonably could have rejected the claim on the grounds that the evidence was not exculpatory or would not likely have affected the verdict?

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PETITION FOR WRIT OF CERTIORARI

Brenda Cash, Acting Warden of the California State Prison, Los Angeles County [1] (the State), petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS AND JUDGMENTS BELOW

The Ninth Circuit's opinion, reversing the district court and granting habeas corpus relief, is reported as *Maxwell* v. *Roe*, 628 F.3d 486 (9th Cir. 2010). The Ninth Circuit's order denying rehearing en banc is unreported. The district court's decision and judgment, denying habeas corpus relief, are unreported. The California Court of Appeal's decision affirming the state-court judgment on direct review, the California Supreme Court's orders denying direct review and habeas corpus relief but ordering an evidentiary hearing, and the state trial court's order denying habeas corpus relief are unreported. Each of these reproduced in the Appendix to this Petition (App.).

JURISDICTION

The Ninth Circuit denied rehearing en banc on March 23, 2011. This Court's jurisdiction is timely invoked under 28 U.S.C. § 1254(1).

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[1] Acting Warden Brenda Cash has succeeded Warden Ernie Roe as respondent Bobby Joe Maxwell's custodian at the California State Prison in Los Angeles County. See Sup. Ct. R. 35.

RELEVANT STATUTORY PROVISIONS

As amended by the Antiterrorism and Effective Death Penalty Act (AEDPA), section 2254 of title 28 of the United States Code reads, in relevant part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim – [¶] resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States, or [¶] resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.
>
> (e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

STATEMENT OF THE CASE

A. Introduction

At respondent Maxwell's 1983-84 trial for multiple stabbing murders, "jailhouse informant" Sidney Storch testified that respondent had made a remark about wearing gloves so that he could handle a knife without leaving fingerprints. The Ninth

Circuit granted respondent habeas corpus relief on two grounds related to the Storch's testimony. The first was that—despite the state post-conviction court's factual finding that Storch had not lied and despite the lack of any finding that the prosecution had known of the alleged falsity—circumstantial evidence of Storch's lies about other matters at respondent's trial and his general background and reputation as an unreliable informant combined to prove that his testimony recounting respondent's statement about the gloves was false. The second ground was that the prosecution had suppressed "exculpatory" evidence: that Storch at one time had been offered a plea bargain less favorable to him than the one he acknowledged receiving at trial; and that, while averring he had never before testified for the prosecution, Storch nonetheless had worked as an informant in other criminal investigations for the police.

The Ninth Circuit's decision violated the deferential-review standard of 28 U.S.C. § 2254(d) and (e) in many ways. On the perjury claim, the Ninth Circuit strayed beyond the "clearly established Federal law" standard of § 2254(d), ignoring the "knowing use" requirement imposed by this Court in *Napue* v. *Illinois*, 360 U.S. 264 (1959), and impermissibly relying on its own circuit precedents instead. Further, transgressing § 2254(d) and (e)'s strict rules against second-guessing state-court factual findings, the Ninth Circuit improperly supplanted the state judge's reasonable evidentiary-hearing finding that Storch in fact had not lied in recounting respondent's statement about the gloves; and it did so not on the basis of any direct evidence disproving Storch's testimony but only on the basis of merely debatable inferences it chose to draw from competing circumstantial evidence.

The Ninth Circuit's ruling on the withheld-evidence claim is vitiated by the same fundamental flaws. Its opinion ignored that this Court's "clearly

established" law under *Brady* v. *Maryland*, 373 U.S. 264 (1959), has not extended to imputing to the prosecutor knowledge of alleged exculpatory information known only to officials unconnected with the investigation of the defendant's case. And, here, there was no proof that the prosecution or the police involved in respondent's case knew of the allegedly exculpatory evidence cited by the panel below. In addition, the opinion below nowhere considered whether the California Supreme Court's rejection of respondent's *Brady* claim on its merits was at least "reasonable" in any event because the cited evidence—that Storch had testified only after obtaining a new and more-favorable plea-bargain, disclosed to the jury, and that he had served as a police informant in other cases—was either not clearly exculpatory or likely to have affected the verdict.

Indeed, as the district court recognized, the jury probably gave little if any weight to Storch's testimony. After all, it had been offered to prove that respondent had admitted responsibility for all ten of the murders charged, but the jury convicted him of only two. And, as the district court also noted, there was "more compelling evidence" of respondent's guilt on those two counts. The state court's objectively reasonable rejection of respondent's *Napue* and *Brady* claims, on both legal and factual grounds, should have precluded relief under § 2254.

B. The State Criminal Proceedings

1. Respondent Maxwell—dubbed "The Skid Row Stabber"—was charged with the murders of ten homeless men in Los Angeles. At respondent's nine-month trial in 1983-1984, the main parts of the prosecution's circumstantial case comprised: (1) statements from three homeless men, who had spoken to a man from "San Juan" moments before the stabbing of victim Jones, one of whom had

identified respondent at the preliminary hearing as that man, and all three of whom had described certain characteristics (unusual gait and Spanish accent) of the suspicious man that were similar to respondent's; (2) respondent's palm print, found at the scene of the death of victim Garcia; (3) respondent's possession, at his arrest, of a common kind of cigarette lighter similar to one belonging to victim Garcia and of a knife that could have inflicted the wounds to both Garcia and Jones; (4) shoe prints, found near Garcia's body, that generally matched the kind of shoes respondent wore; and (5) restroom graffiti, identified as respondent's handwriting, proclaiming his intent to "kill win-os."

In addition, four jailhouse informants testified for the prosecution. One testified that respondent had admitted to being the "Skid Row Stabber"; a second testified that respondent had raped him and jail and had intimidated him by claiming that he already had killed ten people; and a third testified that Maxwell had made statements to him about being from Puerto Rico (as the suspicious man had claimed to the homeless men before the Garcia killing). The fourth, Sidney Storch, testified that, while he and respondent were in the Los Angeles County Jail, respondent had remarked to him about a newspaper report that a palm print had been found at one of the crime scenes. Respondent told Storch that he "wasn't prone to that kind of mistake because he wore gloves with the fingers cut off so as to keep his hands warm and leave his fingers free. . ."

The jury convicted respondent for the Garcia and Jones murders. It acquitted respondent on three murder counts and failed to reach a verdict on the remaining five. Following a penalty trial before the same jury, respondent was sentenced to state prison for life without parole rather than to death.

2. A Los Angeles County grand jury in 1988 investigated the use of jailhouse informants. Afterward, the California Attorney General obtained

an indictment charging Storch with committing perjury in the 1988 case of *People* v. *Sheldon Sanders*. But Storch died in a New York jail before he could be extradited to California.

3. The California Court of Appeal affirmed respondent's conviction on direct review in 1991. The California Supreme Court denied further appellate review.

C. State Habeas Corpus Proceedings

In 1995, respondent filed a habeas corpus petition in the California Supreme Court. It alleged that Storch had lied at respondent's trial in claiming that he and respondent had been housed together in jail, and therefore that he also must have lied about respondent's statement about wearing gloves; in denying that he had sought leniency for his cooperation; and in describing the extent of his activities as an informant.

The California Supreme Court ordered the trial court to hold an evidentiary hearing to determine whether Storch had given false testimony at respondent's trial. More than thirty witnesses testified at that hearing, which concluded in 1999. In a 34-page opinion filed in 2000, the superior court denied habeas corpus relief. Presumably focusing on the critical allegation set forth in the petition regarding respondent's statement about wearing gloves, the court found "no credible or persuasive evidence Sidney Storch lied at petitioner's trial in 1984." More specifically, the court found that Storch had not lied about his criminal record or about his history as an informant, and that he had not lied when testifying about relying on any plea-bargain benefit in return for his cooperation. The court further concluded that, although Storch had been deemed untrustworthy by some law enforcement officials by 1988, he had been just a "neophyte jailhouse informant" at the time of Maxwell's trial

and did not develop "sophistication" as a jailhouse informant until afterwards.

In 2001, respondent filed a second habeas corpus petition in the California Supreme Court. That petition reasserted the perjury claim. It also asserted a *Brady* v. *Maryland* claim: that the prosecution had withheld exculpatory evidence, including evidence that the 16-month deal that Storch received in exchange for his testimony was one that he had negotiated on his own behalf, following his attorney's prior agreement for a 36-month deal, and evidence of Storch's informant activities on behalf of the police. The state supreme court summarily denied the petition on its merits.

D. Federal Habeas Corpus Proceedings

1. Respondent next filed a habeas corpus petition, again raising the perjury and withheld-evidence claims, in the United States District Court for the Central District of California in 2002. The magistrate filed a report recommending that relief be denied. On respondent's *Napue* perjury claim, the magistrate ruled, under circuit precedent applying § 2254(e)(1), that respondent had failed to present "clear and convincing evidence to rebut the finding of the superior court that Storch did not lie when he testified he had shared a cell with petitioner for approximately three and a half weeks." Similarly, the magistrate ruled that respondent had failed to produce any evidence to rebut the state court's factual finding that Storch had not lied at trial about any of his prior experiences as an informant. Further, the magistrate ruled that, even if Storch had lied at trial about whether his testimony was motivated by his plea bargain, any falsehood "was not material in the context of his other statements refusing to relinquish the deal promised by the District Attorney"—and that, in any event,

respondent "has not established that the state court's decision rejecting this claim was contrary to or objectively unreasonable under clearly established law."

On the *Brady* withheld-evidence claim, the magistrate ruled that the cited evidence that Storch earlier had agreed to a less favorable plea bargain was not "exculpatory." And, the magistrate further concluded, the cited evidence about Storch's prior informant history or reputation for being a liar was not "material," so that any failure to disclose it would not have prejudiced respondent's defense.

As the magistrate also noted in light of the jury's refusal to convict on the other murder counts, "the jury apparently gave little, if any, weight to Storch's testimony" anyway. In addition, the magistrate judge explained, that there was "more compelling evidence" adduced as to the two murder counts on which respondent was convicted. The magistrate cited, among other things, eyewitness identification of respondent and the discovery of his palm print at one of the murder scenes.[2] The district court adopted

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[2] More specifically, the magistrate cited: (1) the eyewitness identification of respondent by an eyewitness who died before trial but whose preliminary hearing testimony was adduced at trial; (2) the presence of respondent's palmprint on a bench where the body of victim Garcia was found; (3) respondent's possession of a cigarette lighter resembling one that belonged to Mr. Garcia and was missing; (4) testimony that respondent wore two knives, one strapped to his upper arm and another suspended from his neck down his back; (5) the recovery, from respondent and his living area, of two knives that were consistent with the wounds inflicted on the victims; (6) testimony that respondent spoke Spanish and, like the killer, claimed he was from Puerto Rico; (7) the presence of shoe prints at the Garcia murder scene that were consistent with shoes owned by respondent; (8) evidence that respondent's gait was similar to that of Mr. Garcia's killer; and (9) the recovery of clothes from respondent that were similar to those worn by the killer.

the magistrate's report and recommendation.

2. In a published opinion authored by Judge Paez (joined by Judge Pregerson and district judge Mahan), a Ninth Circuit panel reversed. On respondent's perjury claim, the panel rejected as objectively "unreasonable," under § 2254(d)(2), the state trial court's finding that "no credible or persuasive evidence" showed that Storch had lied at respondent's trial. (The panel never applied the § 2254(e)(1) presumption of correctness for state fact finding or the "clear and convincing evidence" standard it imposes on petitioners.) In support of its own fact finding, the appellate panel cited its view that Storch otherwise had lied about his motivation for coming forward, his prior record, the amount of money he had stolen, his education level, and the fact that he had previously worked out a 36-month prison term in exchange for his guilty plea before the 16-month deal he ultimately received in exchange for his cooperation and testimony in respondent's trial. The panel acknowledged that this evidence did not alone establish that Storch had lied about his confession itself. But, the panel went on to say, such evidence indicated that Storch had a "willingness to lie under oath" and thus "lent credence" to respondent's arguments that Storch had lied about the jail-cell statement and that the prosecution "knew or should have known" that Storch had given false testimony. The panel also relied on its view that, in light of Storch's prior performance as an informant in forgery investigations for the police department, he had "misrepresented" himself as a novice informant when he averred, simply, that he had never previously "testified . . . as an informant for the district attorney's office." And it cited Storch's performances as an unreliable trial witness in cases—leading to his indictment for perjury in 1988—in the years after respondent's trial.

Treating respondent's alleged statement about not making the kind of fingerprint mistake recounted

in the newspaper as if it were a confession to the charged crimes and deeming Storch to be the prosecution's "make-or-break" and "centerpiece" witness,[3] the panel concluded—as a mater of de novo review rather than deferential review under § 2254(d)—that Storch's perjury had violated respondent's right to a fair trial. The panel quoted this Court's statement from *Napue* that a constitutional violation occurs when the false evidence is "known to be such by the State"; but the panel also invoked circuit-law precedents indicating that the constitutional violation occurs whenever false evidence brings about a conviction. And, in the end, the panel opinion found the constitutional violation and used it as a basis for granting habeas corpus relief, without ever finding that the prosecution had known at the time that Storch's testimony about respondent's jail-cell statement was false.

On respondent's withheld-evidence claim, the panel concluded, purportedly under the § 2254(d) deference standard, that the state court had acted "unreasonably" under *Brady* in denying relief because the prosecution had not disclosed to the defense two pieces of information. One was that Storch had engineered a new plea bargain more favorable than an earlier one in exchange for his cooperation; the second was Storch's "prior cooperation with law enforcement as an informant." The fact that Storch had worked out a new and better deal, the panel said, would have undermined Storch's

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[3] In fact, Storch was not the prosecution's "make-or-break" witness. Storch's testimony took less than half a day; the trial took nine months. Storch's testimony comprised only approximately 61 pages of the reporter's transcript. The transcript of the guilt phase of the trial was 14,000 pages in length. And, he was only one of the four jailhouse informants who testified at respondent's trial, a fact the Ninth Circuit ignored.

testimonial claim that he had not been motivated by a desire to lighten his sentence and would have shown that Storch was a sophisticate. The fact that Storch had worked as a police informant, the panel further asserted, would have undermined his testimony that he had not previously testified as an informant for the district attorney.

In rejecting the state court's adjudication of the *Napue* and *Brady* claims, the Ninth Circuit panel never discussed why it would have been "unreasonable" under constitutional rules "clearly established" only by this Court's decisions for the state court to interpret federal law as requiring, as a predicate for relief, proof that the prosecution knew of the alleged perjury and the alleged exculpatory information. Nor did the panel discuss whether the alleged acts of misconduct might reasonably be deemed non-prejudicial in light of the "more compelling" evidence of guilt, not related to Storch, identified by the district court—or in light of two other informants' far more damaging testimony that respondent had told them, "I am the Skid Row Stabber . . . responsible for all the killings" and "I have already killed ten people and would not mind killing you too.

REASONS FOR GRANTING CERTIORARI

THE NINTH CIRCUIT DECISION UNDERMINES CORNERSTONE AEDPA REFORMS OF HABEAS CORPUS, REPRESENTS ANOTHER FAILURE TO CONFORM TO THIS COURT'S § 2254 JURISPRUDENCE, AND CONFLICTS WITH THE VIEWS OF OTHER CIRCUITS

The Ninth Circuit decision violated 28 U.S.C. § 2254(d), as interpreted by this Court, in many fundamental ways.

First, the panel judged the state court's decision against its own expansive view of the law rather than

against only the law "clearly established" by this Court's precedents. That approach transgressed *Carey* v. *Musladin*, 549 U.S. 70, 74 (2006), *Knowles* v. *Mirzayance*, 129 S. Ct. 1411, 1419 (2009), and *Wright* v. *Van Patten*, 552 U.S. 120, 126 (2008) (per curiam). "[I]t is not an unreasonable application of clearly established Federal law for a state court to decline to apply a specific legal rule that has not been squarely established by this Court." *Mirzayance*, at 1419. Thus, the panel below erroneously found a *Napue* perjury violation without any compelling proof that the prosecution had known of the alleged perjury, even though this Court has never approved relief in the absence of it. And it found a *Brady* violation without any compelling proof that the prosecutors and police working on the petitioner's trial were aware of the alleged exculpatory evidence, even though this Court has never approved relief in the absence of such proof.

Second, the panel overruled the state-court's reasonable evidentiary-hearing factual finding that Storch had not lied about respondent's statement, rejecting direct evidence in favor of debatable inferences it chose to draw from circumstantial evidence. And it did so even though state-court fact findings have traditionally been accorded the highest degree of deference, and even though this Court has repeatedly condemned such intrusive second-guessing of state-court findings of historical fact. See *Rice* v. *Collins*, 546 U.S. 333, 342 (2006); *Felkner* v. *Jackson*, 131 S. Ct. 1305 (2011) (per curiam).

Third, the panel unjustifiably condemned, and did so only in a conclusory way, the state court's application of clearly-established law to the facts of this case as "objectively unreasonable." And it did so even though this Court this very Term again has explained that, instead, "a habeas court must determine what arguments or theories . . . could have supported . . . the state court's decision; and then it must ask whether it is possible that any fairminded

jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court." *Harrington* v. *Richter*, 131 S. Ct. 770, 786 (2011). The panel below never came to grips with the determinative § 2254 question: whether, in all events, the state-court reasonably might have determined that the alleged misconduct by Storch or by the prosecution was not likely to have prejudiced respondent's defense. See *Lockyer* v. *Andrade*, 538 U.S. 63, 71 (2003).

The importance of guaranteeing proper adherence to strict deference rules laid down by the AEDPA in 28 U.S.C. § 2254(d) and (e) is manifest in this Court's many grants of certiorari over the past few Terms to correct "judicial disregard" for § 2254(d) and (e). Similarly, the importance of correcting the panel's failures to abide by this Court's § 2254(d) jurisprudence can hardly be denied. Finally, in eliminating inquiry into the prosecution's knowledge, the panel's view of *Napue* and *Brady* conflicts with the views of other circuit courts of appeals. For those reasons, this case—a case where the Ninth Circuit erroneously nullified a 27-year-old state court judgment of a multiple murderer—warrants review by certiorari and reversal too.

A. The Ninth Circuit violated § 2254(d) by granting relief on the *Napue* perjury claim without regard to the "knowing use" requirement consistently recognized by this Court.

First, as to the *Napue* claim, this Court's precedents clearly require that relief may be granted only if the prosecution knowingly presents perjured testimony. Conversely, it is hardly "clearly established" that a constitutional claim of perjury is valid in the absence of such a showing. See, e.g., *Napue* v. *Illinois*, 360 U.S. at 269 ("[A] conviction

obtained through the use of false evidence, *known to be such by representatives of the State*, must fall under the Fourteenth Amendment"), emphasis added; see also *United States* v. *Bagley*, 473 U.S. 667, 678-679 (1985) (referring to the "*knowing*" use of perjured testimony), emphasis added; *United States* v. *Agurs*, 427 U.S. 97, 103 (1972) (stating that "the Court has consistently held that a conviction obtained by the *knowing* use of perjured testimony is fundamentally unfair"), emphasis added; *Giglio* v. *United States*, 405 U.S. 150, 153 (1972) ("deliberate deception of a court and jurors by the presentation of *known* false evidence is incompatible with 'rudimentary demands of justice'"), emphasis added; *Mooney* v. *Holohan*, 294 U.S. 103 (1935).

But the Ninth Circuit eliminated the "knowing use" requirement in this case, impermissibly relying on its own precedents in this regard. App. 31-33, citing *Hall* v. *Dir. Of Corrs.*, 343 F.3d 976, 981 (9th Cir. 2003) (per curiam) (court agreed with defendant's argument that whether or not the prosecution knew that incriminating handwritten notes supplied by a jailhouse informant were false at the time of trial, "to allow his conviction to stand, based on the present knowledge that the evidence was falsified, is a violation of his right to due process under the Fourteenth Amendment"), and *Killian* v. *Poole*, 282 F.3d 1204, 1208 (9th Cir. 2002) (irrespective of whether the prosecution knew that the informant had given false testimony, "one [could not] reasonably deny that [the jailhouse informant] gave perjured testimony"); see also *United States* v. *Wallach*, 935 F.2d 445, 473 (2d Cir. 1991) (holding that perjury by a key government witness, irrespective of whether the government knew of the perjury at the time of trial, "infected the trial proceedings" and required reversal).

Under § 2254(d), however, this Court's holdings are the only ones that may form the basis for habeas relief; lower federal court decisions cannot attain the

status of clearly established federal law under AEDPA. See *Lockyer* v. *Andrade*, 538 U.S. at 71; *Early* v. *Packer*, 537 U.S. 3, 8 (2002) (per curiam). Thus, the Ninth Circuit exceeded the scope of its authority when it granted relief in this case without proof and a finding of knowing use of perjury on the prosecution's part.

The Ninth Circuit's opinion conflicts, further, with decisions from other circuits. In contrast to the Ninth Circuit, they have conscientiously adhered to *Napue*'s requirement of "knowing" use of perjury. See, e.g., *Tayborn* v. *Scott*, 251 F.3d 1125, 1130-1131 (7th Cir. 2001); *Coe* v. *Bell*, 161 F.3d 320, 343 (6th Cir. 1998); *United States* v. *Griley*, 814 F.2d 967, 970-971 (4th Cir. 1987); *United States* v. *Brown*, 634 F.2d 819, 827 (5th Cir. 1981) ("due process is not implicated by the prosecution's introduction or allowance of false or perjured testimony unless the prosecution actually knows or believes the testimony to be false or perjured even if a prosecution witness lied, defendant did not show that the prosecutor knew the testimony was perjurious).

B. The Ninth Circuit impermissibly second-guessed rational state-court fact findings.

In any event, the state court's crucial factual finding—that Storch had not lied—was not unreasonable and must be presumed correct under § 2254(d)(2) and (e)(1). It thus was binding on the Ninth Circuit.

After conducting a lengthy evidentiary hearing at which more than thirty witnesses testified, the superior court found as follows: "The court finds no credible or persuasive evidence Sidney Storch lied at [respondent's] trial in 1984." Storch had died by the time of the evidentiary hearing, and so he obviously did not testify at the hearing. Nor did any other credible witness testify that, at any point after

respondent's trial, Storch had admitted lying at trial concerning the testimony the Ninth Circuit deemed crucial—i.e., the statement respondent made about wearing gloves in response to reading a newspaper report that a palm print had been found on a bench at the scene of one of the murders. The most salient evidence respondent adduced at the evidentiary hearing in this regard consisted of his own self-serving testimony in which he denied the critical admissions to which Storch testified at trial, and the testimony of jail inmate David Gerhardt, who said that Storch admitted "booking" (that is, assisting law enforcement or the prosecution) respondent while Gerhardt and Storch were in jail together. The superior court found that Gerhardt's testimony "lacks any credibility." App. 117. The Ninth Circuit panel did not rely on either respondent's or Gerhardt's evidentiary hearing testimony.

The Ninth Circuit panel conceded that there was no direct evidence that Storch had lied about his opportunity to speak with respondent in his jail cell—the focus of the attack launched against Storch's testimony by respondent in his federal and state habeas corpus petitions—but condemned the state court's finding as "unreasonable" anyway. The panel opined that Storch's lies about other facts "indicates a willingness to lie under oath and lends credence" to respondent's arguments that Storch lied when he testified about the alleged confession. App. 22. Indeed, the panel was forced to rest its holding on its speculative assertion, representing at most a permissive rather than compelled view of the evidence, that there was "simply too much evidence of Storch's pattern of perjury to conclude otherwise." App. 28-29. However, to premise a finding of perjury as to the confession simply because Storch testified inaccurately regarding, for example, his admission that he had two prior convictions when in fact he had more, or that his five pending cases involved almost $13,000 of forged funds whereas the true amount was

closer to $44,000, involves mere speculation rather than a mandatory inference from the evidence. Solid proof is not established by evidence that merely "lend[s] credence" to a defendant's arguments.

In re-determining on its own the fact question of whether Storch had lied about respondent's statement, the Ninth Circuit relied merely on inferences it chose to draw from the fact that Storch appears to have lied about other matters that arguably might have affected his general credibility but that did not involve his account of respondent's statement itself. As in *Rice* v. *Collins*, 546 U.S. at 342, the Ninth Circuit impermissibly relied on merely "a set of debatable inferences to set aside the conclusion reached by the state court."

The Ninth Circuit also erred in failing to apply § 2254(e)(1) in its review of the superior court's factual findings, due to its erroneous observation that the statute "applies to challenges based on extrinsic evidence or 'evidence presented for the first time in federal court.'" App. 20 n.7. The Ninth Circuit relied on its decision in *Taylor* v. *Maddox*, 366 F.3d 992, 999-1000 (9th Cir. 2004), and ignored the fact that this Court has applied *both* §§ 2254(d)(2) and (e)(1). See *Miller-El* v. *Cockrell*, 537 U.S. 322, 341 (2003) (referring to the two requirements as "independent"); see also *Wiggins* v. *Smith*, 549 U.S. 510, 528-530 (2003); cf. *Rice* v. *Collins*, 546 U.S. at 338-339.

C. The Ninth Circuit opinion erroneously extends, beyond "clearly established law," the scope of a prosecutor's obligations under *Brady* v. *Maryland*.

1. Relevant to respondent's *Brady* claim, this Court has clearly established that the suppression by the prosecution of evidence favorable to the accused violates due process where the evidence is "material"

to guilt or punishment. *Brady* v. *Maryland*, 373 U.S. at 87. After *Brady*, this Court clarified that this duty exists even in the absence of a request from the defense, *United States* v. *Agurs*, 427 U.S. at 108; and it disavowed any difference between exculpatory and impeachment evidence for *Brady* purposes, *United States* v. *Bagley*, 473 U.S. at 682. This Court has also held that "the individual prosecutor has a duty to learn of any favorable evidence known to others acting on the government's behalf *in the case*, including the police." *Kyles* v. *Whitley*, 514 U.S. 419, 437 (1995) emphasis added; see also *Banks* v. *Dretke*, 540 U.S. 668, 693 (2004).

But this Court has never extended a prosecutor's *Brady* obligations to require a prosecutor to uncover exculpatory evidence in the possession of police officers unconnected with the investigation of a particular defendant. And, if a federal habeas court must extend a clearly established legal principle before it can apply to the facts at hand, then the legal principle cannot be clearly established at the time of the state court decision. See *Yarborough* v. *Alvarado*, 541 U.S. 652, 666 (2004) ("Section 2254(d)(1) would be undermined if habeas courts introduced rules not clearly established under the guise of extensions to existing law").

That, however, is what the Ninth Circuit did here. It upheld respondent's *Brady* claim without proof or a finding that either the trial prosecutor or the police officers who investigated the Skid Row murders were aware of the fact that Storch had previously provided assistance to the LAPD's forgery division. Absent a holding by this Court clearly establishing that a prosecutor must affirmatively take steps to uncover exculpatory information that might be in the possession of any local law enforcement officer unconnected with an investigation regarding the defendant being prosecuted in that case, the Ninth Circuit acted in excess of its authority under 28 U.S.C. § 2254(d).

Moreover, especially in large law enforcement agencies such as the Los Angeles Police Department (LAPD) [4] in major metropolitan areas like Los Angeles, a rule such as that in effect applied by the Ninth Circuit here would be unworkable and unfair to prosecutors. Simply put, it would be impossible for conscientious prosecutors in large metropolitan areas like Los Angeles to comply with it.

2. The Ninth Circuit also erred in granting relief under *Brady* on account of the prosecution's alleged failure to disclose that the deal for a reduced sentence Storch testified about in front of the jury was actually the second deal that he had negotiated with the prosecution. The first deal, negotiated by Storch's attorney, was for 36 months, whereas a later deal that Storch privately worked out with the prosecution was for 16 months. See App. 37-40. As to this aspect of the claim, there is no clearly established Supreme Court law deeming "exculpatory" the fact that an informant previously had worked out a worse deal than the one he acknowledged in his testimony in front of the jury is

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[4] According to the LAPD's website (http://www.lapdonline.org/), the LAPD currently employs 9,914 sworn officers and 2,862 civilian employees. The Los Angeles County Sheriff's Department also conceivably could have had in its possession exculpatory evidence pertaining to Storch at the time of respondent's trial. According to Wikipedia, that department is the largest sheriff's department in the United States, with 16,000 employees, 8,400 of whom are sworn officers. Even though these two law enforcement agencies presumably had fewer employees at the time of respondent's trial than they do today, it is patent that requiring the prosecutor in this case to consult every employee of just these two law enforcement agencies would have obligated him to contact thousands of officers and civilian employees. In addition, there are numerous smaller police departments in Los Angeles County in addition to the LAPD.

exculpatory. Cf. *Benn* v. *Lambert*, 283 F.3d 1040, 1057-1058 (9th Cir. 2002) (*Brady* violation found where prosecution failed to disclose benefits and leniency greater than that testified to at trial).

3. In any event, the Ninth Circuit ruling never confronted the fact that a fairminded jurist reasonably may have denied relief on respondent's *Brady* claim because the allegedly withheld evidence lacked "materiality"—i.e., it was not reasonably probable that any failure to disclose the evidence affected the result of the trial. See *Strickler* v. *Greene*, 527 U.S. 263, 291 (1999) (defendant must show a "reasonable probability" of a different result, not a "reasonable possibility"). Here, neither of the two *Brady* items were material. First, as to Storch's informant history, respondent had and utilized other opportunities to impeach Storch. During Storch's cross-examination, he admitted to having multiple felony convictions for forgery and theft. Respondent's counsel also demonstrated that Storch's testimony was obtained in exchange for a substantial reduction in his prison sentence. See *United States* v. *Zuno-Arce*, 339 F.3d 886, 891-893 (9th Cir. 2003) (where defense presented evidence of past crimes, government favors, and inconsistencies, additional impeaching evidence was not material and failure to disclose it did not affect outcome of trial). Second, as to the deal, the fact that a worse bargain had previously been worked out was, in addition to not being exculpatory, as noted above, simply not material either. It is the favorable deal that rewards a witness for their testimony that casts doubt on his or her credibility.

* * *

The Ninth Circuit again has disregarded the limitations on federal collateral relief codified in 28

U.S.C. § 2254(d) and (e). Its decision warrants either summary or plenary review and reversal by this Court.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

KAMALA D. HARRIS
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
PAMELA C. HAMANAKA
Senior Assistant Attorney General
DONALD E. DE NICOLA
Deputy Solicitor General
KENNETH C. BYRNE
Supervising Deputy Attorney General

*LAWRENCE M. DANIELS
Supervising Deputy Attorney General
**Counsel of Record*

Counsel for Petitioner

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