No. 10-1548

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

PETITIONER'S REPLY MEMORANDUM

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

STATUTES

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As explained in the State's petition, this case presents two issues, worthy of certiorari, arising from the Ninth Circuit Court of Appeals' "judicial disregard" of the deference-standard limitations on habeas corpus relief imposed by the Antiterrorism and Effective Death Penalty Act's amendments to 28 U.S.C. § 2254. The Ninth Circuit recited the § 2254(d) standard and purported to apply it; but in reality it failed to accord the State-court judgment the deference required by Congress and by this Court's jurisprudence.

Despite the statutory requirement that the State judgment be measured only against the law as "clearly established" by this Court, the Ninth Circuit granted relief even though this Court has never held that perjury claim may be the basis of relief in a criminal case without proof that the prosecution knew the challenged testimony was false. Moreover, despite the historic protection for State-court factfinding, protection strengthened further by AEDPA in § 2254(d) and (e), the Ninth Circuit impermissibly relied on merely debatable inferences it chose to draw from the state court record to grant relief notwithstanding the state court's finding that the challenged testimony was in fact true.

Similarly, as to respondent's claim that the prosecution failed to disclose important exculpatory evidence, the Ninth Circuit granted relief even though this Court has never held that the prosecution has a duty to disclose information in the possession of police officers who are not working on the defendant's own case. And, in any event, the Ninth Circuit failed to consider that 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.

1. Respondent claims that the State's characterization of the circumstantial evidence proving his guilt is not accurate and that the State has failed to acknowledge that the trial prosecutor's supervisor, and another attorney who later handled the state habeas proceedings, considered the evidence against respondent to be weak. Opp. 24-31. Any such opinions, however, are besides the point: the evidence in the record speaks for itself. The State detailed, in footnote 2 and elsewhere in the certiorari petition, strong evidence of respondent's guilt – evidence "more compelling" than the challenged testimony of jailhouse informant Sidney Storch. See Pet. for Cert. 8 n.2.

Respondent contends that other pieces of evidence were subject to impeachment, and that other inferences conceivably might be drawn from the evidence. While any one piece of evidence individually might not be viewed as conclusive, when considered collectively the evidence in respondent's case painted a convincing picture of guilt. And, most important, the jury agreed – likely relying on the evidence detailed in the State's petition rather than solely on Storch's heavily-impeached testimony.

Respondent's comments about alleged misstatements by other jailhouse informants, none of whom was even mentioned by the Ninth Circuit, Opp. 28-31, are particularly inept. Each of these informants suffered from credibility problems on account of their obvious status as jail inmates. But there is no reason to believe that the jury believed only Storch's testimony concerning respondent's admission of guilt rather than the testimony on that point by any of the other informants. The fact that the jurors asked for a re-reading of Storch's

testimony does not prove that they found him more credible than the other jailhouse informants whose testimony the Ninth Circuit opinion ignored. The State did not "misstate" the record in this regard or any other.

2. Respondent also charges that the State has misstated "settled law." Opp. 31-34. The charge is demonstrably untrue. As the State explained in its petition, this Court has repeatedly indicated that relief on a perjury claim may be granted only if there is a showing of "knowing use" by the prosecution.

The cases respondent cites do not hold to the contrary. He asserts that *United States* v. *Agurs*, 427 U.S. 97, 103 (1972), "reaffirmed" the notion that, to show a due process violation, bad faith need not be shown. Opp. 33. But the cited Agurs reference to perjury in cases where the prosecution knew, or should have known, of the perjury was made in the context of discussing evidence that had been suppressed by the prosecution in violation of the rule set forth in *Brady* v. *Maryland*, 373 U.S. 83 (1959). It did not refer to the viability of a claim of perjury as itself a basis for relief. Instead, the very next statement made in Agurs belies respondent's reading: "In a series of subsequent cases, the Court has consistently held that a conviction obtained by the *knowing use* of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the testimony could have affected the judgment of the jury." Agurs, 427 U.S. at 103, emphasis added.

Respondent cites *Mesarosh* v. *United States*, 352 U.S. 1 (1952), in which the Government moved to remand the case to the trial court for further proceedings following the defendants' convictions for violating the Smith Act and the affirmance of those convictions by the Court of Appeals for the Third

Circuit. Opp. 34. But that decision, concerning the untruthful testimony given before other tribunals by a Government witness in the case before the Court, was explicitly "based entirely upon the representations of the Government in its written motion and on the statements of the Solicitor General during the argument" on the Government's motions and the defense new trial motion in which the Government admitted that it had serious reason to doubt the truthfulness of the witness's testimony in the other proceedings. *Mesarosh* v. *United States*, 352 U.S. at 3-4. Here, in sharp contrast to Mesarosh, the State has never indicated a lack of belief in the important aspects of Storch's testimony as it pertained to respondent's statement about wearing gloves so he could handle a knife without leaving fingerprints. Nor has the State ever asked that the case be remanded to a court for a determination as to the credibility of the witness in question, as occurred in *Mesarosh*. Id. at 4. Perhaps most importantly, however, *Mesarosh* did not adjudicate a federal constitutional claim, but rather was an opinion decided pursuant to the Court's supervisory jurisdiction over the proceedings of the federal courts. *Id.* at 14. Thus, this decision is irrelevant to the question of whether this Court's precedents "clearly establish" that an allegation of perjury, without proof of "knowing use," makes out a constitutional claim for relief.

Respondent also relies on *Communist Party of the United States* v. *Subversive Activities Control Board*, 351 U.S. 115 (1956). Opp. 34. But, notwithstanding respondent's references to the "convictions" at issue there, that case was not even a criminal case. Nor did the Court announce any constitutional rule. There, the Court reversed the order of an administrative board, requiring an organization to

register as a "Communist-action organization," so that new evidence regarding allegedly perjurious testimony could be considered by the Board. Although ruling that "the fair administration of justice requires it," the Court specifically stated that it was not reaching any "constitutional issues." Id. at 125. Thus, this decision, like *Mesarosh*, is irrelevant to the question of what this Court's precedents "clearly establish" with respect to perjury claims made under the Constitution.

3. Respondent similarly errs in contending that the State seeks to overturn several of this Court's precedents interpreting the Brady disclosure rule, including *Giglio* v. *United States*, 405 U.S. 150 (1972), and *Kyles* v. *Whitley*, 514 U.S. 419 (1995). Opp. 35-39. Neither *Giglio* nor *Kyles* squarely held–or even suggested–that prosecutors have a duty to disclose exculpatory evidence not known to either them or police officers working on the defendant's case. *Giglio* involved an undisclosed plea deal promised by one prosecutor who handled the grand jury proceedings against the defendant. *Giglio*, 405 U.S. at 152-153. Thus, the prosecutor who possessed the information was involved in the defendant's own case rather than only in an unrelated proceeding. And, in *Kyles*, this Court 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*, 514 U.S. at 437, emphasis added. In neither case did the Court intimate that prosecutors must contact police officers unconnected with a particular investigation in order to ascertain if they possess exculpatory information.

Here, however, the Ninth Circuit granted relief despite the lack of a showing that the alleged exculpatory evidence was possessed by a police officer

working on the Skid Row murders. Rather, the information regarding respondent's prior informant activities was in the possession of officers assigned to the LAPD's forgery division. The duty imposed by the Ninth Circuit in this case would be unworkable and unfair to prosecutors, especially in large metropolitan areas like Los Angeles. But, more important in this § 2254(d) case, such a duty has never been imposed in any square holding in a case decided by this Court.

* * *

Reasonable jurists might differ about the wisdom or propriety of extending the legal principles enunciated in *Agurs* and *Brady* to impose new obligations on the States and their prosecutors. But a legal principle cannot be "clearly established Federal law" under § 2254(d) if it has not been squarely adopted as a constitutional rule in a holding by this Court but instead reflects an extension of precedent by a lower federal court. *Yarborough* v. *Alvarado*, 541 U.S. 652, 666 (2004). Here, the State-court adjudication of respondent's perjury and suppressed-evidence claims ran afoul of no "clearly established" law as defined by § 2254(d). Habeas corpus relief therefore "shall not be granted." The Ninth Circuit again exceeded its authority, and disregarded § 2254(d)'s basic limit on federal habeas corpus, in granting relief.

Lastly, the State notes that respondent's opposition fails to discuss the reasonableness of the State-court's factfinding on the perjury question under § 2254(d)(2) and (e)(1), or the Ninth Circuit's failure under *Harrington* v. *Richter*, 131 S. Ct. 770 (2011), to engage in a valid "unreasonable application" analysis of how the *Brady* claim could

have been rejected on non-exculpatory and non-materiality grounds.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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Dated: September 6, 2011

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