

No. 10-1548

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IN THE  
SUPREME COURT OF THE UNITED STATES

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BRENDA CASH, ACTING WARDEN,

Petitioner,

vs.

BOBBY JOE MAXWELL,

Respondent

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

**RESPONDENT'S BRIEF IN OPPOSITION TO  
PETITION FOR WRIT OF CERTIORARI**

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## QUESTIONS PRESENTED

1. In a case where the prosecutor post-conviction conceded the evidence was weak and that he won it with the help of a “confession” to a jailhouse informant, did the Court of Appeals properly find the state court’s ruling objectively unreasonable in light of the evidence presented at the state court hearing, when the prosecutor failed to correct, *inter alia*, the informant’s lies about his prior record, his pending cases, and his denial that he was motivated by leniency. See, e.g. Napue v. Illinois, 360 U.S. 264, 269 (1959) and United States v. Agurs, 427 U.S. 97, 103 (1976).

2. Did the Court of Appeals properly find the state court’s rejection of Respondent’s Brady claims objectively unreasonable, when the prosecutor failed to disclose, *inter alia*, the true nature of the informant’s deal making, his reputation for being an habitual liar, and that he was a veteran (and unreliable) police informant?

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Respondent Bobby Joe Maxwell respectfully opposes the petition for writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit filed on December 7, 2010. The opinion is reported as Maxwell v. Roe, 628 F.3d 486 (9<sup>th</sup> Cir. 2010) and reproduced in Petitioner’s Appendix (“App.”).

## OPINION BELOW

On December 7, 2010, the Court of Appeals entered its decision reversing the district court's denial of habeas relief. Maxwell v. Roe, 628 F.3d 486 (9<sup>th</sup> Cir. 2010) App.

2. On March 23, 2011, the Court of Appeals denied the petition for rehearing and rehearing en banc. No judge voted to rehear the matter en banc. App. 1.

## JURISDICTION

On December 7, 2010, the judgment of the Court of Appeals was entered. On March 23, 2011, the petition for rehearing and suggestion for rehearing en banc was denied. App. 1. The petition for writ of certiorari was filed on June 21, 2011. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

## **STATEMENT OF THE CASE**

### **A. Introduction**

Relying on clearly established Supreme Court authority, e.g. Napue v. Illinois, 360 U.S. 264, 269 (1959) (prosecutor who fails to correct false testimony violates due process) and United States v. Agurs, 427 U.S. 97, 103 (1976) (prosecutor who knew or should have known of perjured testimony violates due process) the Court of Appeals granted habeas relief after finding, inter alia, that the prosecution allowed jailhouse informant Sidney Storch to falsely deny he had been motivated by a deal when he testified Respondent had confessed and that the prosecution failed to correct his lie. App. 40. Storch told numerous other lies



at Respondent's trial and became famous for teaching other informants how to fabricate confessions. App. 21-26.

Relying on Brady v. Maryland, 363 U.S. 83 (1963) the Court of Appeals also found the prosecution failed to disclose that by agreeing to testify Storch was able to independently negotiate a better deal for himself than his public defender had. The prosecution also failed to disclose Storch's prior informant history. App. 36-43.

Storch's testimony was material and the prosecution itself admitted that the evidence against Respondent was weak. App. 34-35. The Court of Appeals found that the state court's rejection of Respondent's claims was objectively unreasonable in light of the evidence presented in the state court proceedings, App. 21. The state court's rulings were also contrary to a reasonable application of Brady. App. 43.

Petitioner asks this Court to grant certiorari to find that the good or bad faith of the prosecutor is the critical issue in determining whether due process has been violated when a conviction is obtained by a lying jailhouse informant. Petitioner asks this Court to make such a finding because Los Angeles is a large metropolitan area. Pet. 19. Such a finding would, of course, overturn the clearly established law of this Court. Furthermore, that the prosecutor in this case acted in bad faith is not subject to rational debate; and his misconduct had nothing whatsoever to do with Los Angeles being a large metropolitan area.

As Deputy District Attorney (DDA) Sterling Norris conceded, the evidence against Respondent was weak. (4 Excerpts of Record "ER" 510, 10ER 844.) App. 34. By

contrast, the evidence of misconduct by Norris and Sidney Storch, his “make or break witness,” App. 34, is overwhelming.

In addition to Respondent’s case, other convictions have been overturned for prosecutorial misconduct involving Norris. In People v. Ruthford, 14 Cal.3d 399, 403, 121 Cal.Rptr. 261 (1975), the California Supreme Court reversed a conviction for misconduct, naming Norris as the prosecutor who negotiated a deal with a cooperating witness that was not disclosed. At the hearing on Ruthford’s motion for new trial, after Norris said a promise of leniency to the witness’s wife in exchange for testimony was not a “deal,” the court told him there had been a “complete lack of candor by the District Attorney’s Office” which had employed a “sort of gamesmanship.” (Ruthford RT 58-59, 1 Appellant’s Supplemental ER “ASER” 225.)

In Gantt v. Roe, 389 F.3d 908, 910-911 (9<sup>th</sup> Cir. 2004) the Court of Appeals ordered an evidentiary hearing into whether Norris failed to disclose exculpatory evidence. On remand, Norris testified at the evidentiary hearing. The district court found that Norris had indeed failed to disclose material exculpatory evidence and granted habeas relief. Gantt v. Roe, CV-98-1487-DSF(E). (CR 88 [Report and Recommendation].) The state appealed, but the Court of Appeals affirmed in an unpublished memorandum decision. Gantt v. Scribner, 2007 U.S. App. LEXIS 17863 (9<sup>th</sup> Cir. 2007) (No. 06-55678).

“Storch was one of the most infamous jailhouse informants in Los Angeles history.” App. 43. He had a “propensity to go after high profile cases” such as Respondent’s,

whose trial was a “textbook example of the ‘booking’ method that Storch helped make famous” Id. At the time of Respondent’s trial, Storch was, among other things, an undisclosed longtime heroin addict, veteran police informant, and habitual liar. App. 16. “The withheld evidence revealed that Storch ... was completely unreliable, a liar for hire, and ready to perjure himself for whatever advantage he could squeeze out of the system.” App.42.

Prior to Respondent’s trial, unbeknownst to Respondent, Norris not only wrote that the evidence against Respondent was “weak” but he cautioned his fellow deputies not to use jailhouse informants unless there was the risk of an “acquittal.” (4/9/99 RT 8-9; 10 ER 1846-1847.)

Over the years, Norris and Storch had an “ongoing relationship.” App. 29, n.10. Just one year after Respondent was convicted, Norris told the court and defense counsel in the case of *People v. Horace Burns*, that he benefitted from Storch’s testimony in Respondent’s case and planned to use him to testify against Burns. (4 ER 604-605.) In 1988, Storch wrote to another prosecutor asking for money, stating he had been “spoiled” by Norris and other prosecutors. App. 29, n.10.

Storch testified for the District Attorney at least seven times between 1984 and 1988, and offered to testify in countless more cases. After a recommendation by the grand jury that investigated the Los Angeles jailhouse informant scandal, the California Attorney

General indicted Storch for perjury. Storch was arrested but died in custody, awaiting extradition from New York.

As will be shown below, Petitioner repeatedly misstates the record, the settled law of this Court, and the decision of the Court of Appeals. Further review is unwarranted. The petition for writ of certiorari should be denied.

### **B. Respondent's Trial**

In April 1979, after numerous men were stabbed to death in the skid row area of downtown Los Angeles, Respondent was arrested and charged with ten counts of capital murder. Respondent has maintained his innocence since the day he was arrested. The press dubbed Respondent the "Skid Row Stabber" and said that the killings had stopped when he was arrested. After obtaining law enforcement records, Respondent's trial attorneys proved this was not true and successfully prevented the prosecution from making any such argument at trial. People continued to be stabbed in skid row well after Respondent was arrested and stabbings were (and are) commonplace in skid row.

Respondent's defense was that another one-time police suspect, Gary Leon Stinson, was the true culprit who had stabbed David Martin Jones and Frank Garcia, the two murders Respondent was convicted of. Respondent was not, however, allowed to present all the police evidence about Stinson. App. 162-164. In particular, Norris convinced the court that the jury should not be allowed to hear Stinson had been arrested at the Garcia crime scene only moments after police discovered the body. Norris then falsely argued to

the jury that Respondent's Stinson defense was a "smokescreen" because there was no evidence Stinson had been at any of the crime scenes. (RT 12,616.) See United States v. Kojayan, 8 F.3d 1315 (9<sup>th</sup> Cir. 1993) (prosecutor who lies to jury that evidence which he has suppressed does not exist commits misconduct); People v. Varona, 143 Cal.App.3d 566, 570 (1983) (conviction reversed when evidence suppressed at prosecutor's request. When prosecutor told jury there was no such evidence he "knew he was arguing a falsehood. The whole argument went beyond the bounds of any acceptable conduct.")

The only physical evidence linking Respondent to the crimes was his palmprint on the backrest of the park bench where Garcia's body was found. Prosecution experts conceded it was impossible to date this palmprint. The crime scene was the City Hall Mall, an area Respondent was known to frequent.

During the middle of the trial, over the protest of his attorneys, Respondent was moved from a single man cell into a multi-man cell. (4 ER 563.) One of the cellmates was Sidney Storch. Storch then testified he and Respondent became close during the three weeks they were housed together; that one day a newspaper article about Respondent's case, which said his palmprint was on a park bench, was passed into the cell; and that Respondent angrily pointed to the reference in the article about his palmprint, saying it reminded him he had mistakenly forgotten to wear gloves. App. 6-7.

Storch was a forger who was given a deal whereby he would plead guilty to his pending cases for an 18 month sentence. Despite this deal, Storch insisted he was not

seeking leniency. A deal “did not even enter into the picture” until he met Norris. (RT 6683, 4 ER 561.) Storch said Respondent’s statements “disturbed” and “upset” him and he came forward only after seeking “guidance” from the prison Rabbi. (RT 6690, 4 ER 568.).

During closing argument, Norris argued at length that Respondent was guilty because he made an “admission” to Sidney Storch. (RT 11,456-11,462, 2 ASER 547-556.) Norris: “People contend its really an admission by the inference what he’s saying is he made a mistake when he left his palmprint, and the police say he left a palmprint, didn’t want to be reminded of it, he is admitting in essence to the Garcia murder.” (RT 11,461, 2 ASER 554.). The jury asked to rehear Storch’s testimony during deliberations. (RT 12,897-12,898, 2 ASER 544-546.) App. 7-8.

Despite the exclusion of considerable exculpatory evidence and the testimony of 4 jailhouse informants, see discussion *infra*, the jury deliberated a record 25 days before convicting on only two counts. The jury acquitted Respondent of 3 counts and hung on the remaining 5. After 3 hours, the jury returned a life verdict. App. 8.

### **C. The Jailhouse Informant Scandal**

At the time of Respondent’s trial in 1983-1984, the Los Angeles County District Attorney routinely relied on jailhouse informants in homicide cases. In 1988, before Respondent’s direct appeal was concluded, the jailhouse informant scandal erupted when Leslie White demonstrated on the nationwide television program “60 Minutes,” how easy it

was to obtain confidential information with which to fabricate a confession in exchange for favors from the District Attorney. App. 17-18.

Numerous newspaper articles were written about the unfolding scandal. Sidney Storch was identified in the press as one of the most prolific jailhouse informants whose nicknames were “the Snitch Professor” and “Informant Extraordinaire.” (2 ASER 416.)

A watchdog grand jury was convened to investigate both the Sheriff and the District Attorney in regard to jailhouse informants. The grand jury concluded that the District Attorney had “failed to fulfill the ethical responsibilities required of a public prosecutor by the deliberate and informed declination to take the action necessary to curtail the misuse of informant testimony.” (Grand Jury Report at 6, 1 ASER 216) The Sheriff was also singled out for failing to “control improper placement of inmates” with the “foreseeable result that false claims of confessions or admissions would be made.” Id.

The grand jury recommended, inter alia, that Sidney Storch be prosecuted for perjury in the case of *People v. Sheldon Sanders*. The Attorney General indicted Storch for lying in the Sanders’ case about whether he had been given a deal in Respondent’s case. App. 25-26. As noted above, Storch died not long after he was arrested for perjury.

As a result of the scandal, the District Attorney and the Sheriff provided discovery about Sidney Storch and the other jailhouse informants pursuant to a California Public Records Act request. After obtaining discovery and conducting independent investigation, in 1991, Respondent filed a petition for writ of habeas corpus in the Los

Angeles County Superior Court, raising numerous claims regarding prosecutorial misconduct vis-a-vis all four jailhouse informants. That petition was denied with a hearing in November 1993.

**D. The State Habeas Evidentiary Hearing**

Respondent subsequently filed a habeas petition in the California Supreme Court raising the same claims. (1 ASER 181-274, 2 ASER 275-371.) On May 26, 1996, the California Supreme Court issued an order to show cause on the single issue of whether Respondent was entitled to relief “based on his allegation that Sidney Storch gave false testimony at his trial.” ( 1 ER 303.)

On remand to the superior court, an evidentiary hearing was conducted over the course of two years. More than 30 witnesses testified and some 50 exhibits were entered into evidence.

**1. The District Attorney’s Office Conceded the Evidence  
Against Respondent Was Weak**

Prior to trial, supervising prosecutor Dino Fulgoni (later a superior court judge) believed the evidence against Respondent was weak. (RT 2576-77; 10 ER 1623-1624.) Norris wrote: “**Palm print** on park bench immediately next to body of Garcia” was the “**Best evidence in case.**” (4/9/99 RT 5; Pet. exh. 32; 4 ER 509, emphasis added.) Norris had two jailhouse snitches, Hall and Whittaker (4 ER 508), but:

I evaluate the case as being **weak from an evidential standpoint .... the uselessness of jailhouse snitches. Palm print** is, of course, subject also to the



**inability to date it with absolute certainty. The defendant has consistently denied the murders.** (4/9/99 RT 6; Pet. exh 32; 4 ER 510; 10 ER 1844, emphasis added.)

Norris confirmed at the habeas evidentiary hearing that “the evidence in this case was not the strongest.” (4/9/99 RT 37, 10 ER 1875.) The prosecutor who handled the state habeas proceedings, DDA Eleanor Barrett, also conceded this was not an “overwhelming case.” (11/12/99 RT 82, 1 ASER 1-3.) App. 42.

## **2. Norris Conceded He Benefitted from Storch’s Testimony Against Respondent**

As noted above, one year after Respondent was convicted, Norris gave notice that he was again going to use Sidney Storch as a witness at the penalty phase trial of Horace Burns. (Pet. Exh. 44; 4 ER 600.)

Norris: Also, in relation to Sidney Storch, Sid Storch testified for me in the Bobby Joe Maxwell case.

The Court: Okay.

Norris: Gave testimony in that case.

Defense Counsel Miller: Is he a professional witness?

The Court: What does that mean?

Miller: Professional snitch.

Norris: I would not classify him as that, other than giving testimony for me in that trial.

Miller: What?

Defense Counsel Lenoir: **Did you get any benefit out of that?**

Norris. **Yes.**” (4 ER 604-605, emphasis added.)

Norris ultimately did not call Storch in the Burns’ case after Larry Stroup testified in Burns’ defense that Storch had newspaper articles and “that’s where a lot of information was coming from, was through those.” (Burns RT 2668, 2677-78; 10 ER 1715, 1724-1725.) Another inmate, Eugene McDaniel, also testified for Burns that Sidney Storch had threatened him:

Yesterday when I made it back to the Hall of Justice, Sidney Storch told me that Mr. Sterling Norris was a good friend of his; and told me that it would be in my best interests not to take part in this case because I was messin’ with the tribunal and I could end up being moved to 1750 .... basically the worst place to be for a K-9.

(Pet. Exh. 50; Burns RT 3717-18; 4 ER 614-615)

**3. Norris’ Investigation into Storch’s Background and Credibility was only to Confirm that Storch and Respondent had Shared a Cell**

When Norris was approached by a private lawyer for Storch offering to testify against Respondent, Norris instructed his investigator Robert Hauskin to interview Storch about where he overheard Respondent’s “confession” and who else was present. Norris did not ask Hausken to check out Storch’s background. (4/9/99 RT 11-56; 10 ER 1849-1894.)

Hausken interviewed Storch but did not interview any of the police officers who had arrested Storch on any of his five pending cases. (4/9/99 RT 55, ER 1893.) In fact,

Hausken was only aware of one pending case. One of the cellmates who Storch said heard the confession was dead. The other cellmate said, “if anyone was a killer, it was Storch.” (4/9/99 RT 58-59, 10 ER 1896-1897; Pet. Exh. 42; 4 ER 524.)<sup>1</sup>

Hausken did no background investigation on Sidney Storch. Had he done so, he would have learned: App. 22-26.

- Several police officers from LAPD’s Bunco-Forgery Division (Gene Dear, Gary Ingemunson, Patrick Riley, and Gregory Schwien), who had arrested Storch on the cases for which Norris gave him a deal, all knew him to be a sophisticated con man, a longtime heroin addict, a police informant, and a liar. Schwien stopped using Storch as an informant after he suggested framing someone so the police could arrest him. (RT 2076, 2084; 7 ER 1118, 1126.)

- Storch’s older brother Fred knew Sidney to be a heroin addict, police informant, and liar since he was a teenager. By the time Storch testified against Respondent he was in his late 30s. (Pet. Exh 30; 4 ER 505.)

- Sidney Storch was kicked out of the United States Army in 1965, for being an “habitual liar.” (Pet. Exh. 51; 4 ER 644-645.)

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<sup>1</sup> Hausken did not check the jail housing records which are vital to keeping track of inmates. The jail housing records show that Storch and Respondent shared a jail cell for only 4 ½ hours and not for 3 weeks. (3 ER 425-434.) Due to computer software problems in 1984, the superior court found they were ambiguous. App. 109-110. The Court of Appeals therefore did not rely on the housing records in granting habeas relief. App. 6-7.

At the time Respondent and Storch were housed together it was a routine practice for the Sheriff's Department to move informants into cells with defendants in order to gather information: App. 24.

- Phil Sowers worked for LAPD for 21 years, from 1971 to 1972. In 1986, he filled out a card at the jail requesting that a defendant be moved from Wayside to the men's central jail. This was done. Sowers later got calls from several jailhouse informants offering information. (8 ER 1224-1234.)

- William Patterson worked for Sheriff's Homicide for 12 years. In 1982, Patterson asked jail deputies to move a particular informant into the cell of a particular defendant. This was done and the informant became a witness against the defendant. (10 ER 1636-1643.)

#### **4. Storch Would Not Have Gotten an 18 Month**

##### **Deal Without Testifying**

Storch's lawyer, Deputy Public Defender Arnold Lester, had worked out a guilty plea deal to consolidate Storch's 5 pending cases (involving more than 20 counts of forgery, theft, credit card fraud, and drugs) for three years in prison. This was "reasonable" given the number of counts and his prior record. It was Storch himself who obtained a private lawyer to work out an even better deal with DDA Norris for only 16 months, a deal he would not have gotten without testifying. (9 ER 424-1427.) App. 37-38.

**5. Storch Became Known as The Snitch Professor Who Taught Other Inmates How to Fabricate Confessions for Favors**

After Respondent's conviction, DDAs John Krayniak and Joseph Markus, two prosecutors who did check out Storch's background, decided not to use him in their cases because they determined he was a liar. (10 ER 1822-1827.) Krayniak discovered Storch had a checked history as an informant and was not telling the truth about when he had been placed in the defendant's cell. Markus determined that Storch's proposed testimony was similar to newspaper accounts of the case. App. 24-25.

Storch became known as the Snitch Professor" and "Informant Extraordinaire," for teaching other inmates how to fabricate confessions to trade for favors from the District Attorney. App. 23-24.

- Sheriff Sergeant Samuel Porter knew Storch could get himself placed in close proximity to high profile defendants and then use newspapers in the jail to make up confessions. (7 ER 1132-1146.)

- A tape recording was made of Sidney Storch (who was out on bond) instructing Robert Ormsbee (who was in the jail) how to make up confessions to trade for prosecution favors. Storch: "All it would really take to book this guy is ... like this .. well, yeah, I was involved with the arts. My partners and I got so deep off into this that somebody needed some killing and we did." Ormsbee: "All right." Storch: "Okay, now. I'll have a car

in about a week and once I get the car I can go down to the library.” (Pet. exh. 14B; 3 ER 444.)

- In 1987, Sheriff deputies confiscated an instruction manual written by Sidney Storch about how to fabricate confessions. The legible portion reads:

“You asked him what he told me and he told you ... (put in what you want, as long as it’s not in my words – use your own style!). You can add stuff like ... #5 said, “I can go to the gas chamber for this if my wife and her brothers rat on me.” YOU KNOW WHAT TO DO!! S 86. (Pet. exh. 22; 3 ER 460-461.)

- In the late 80's, Sheriff Deputy Edward Brosel, wrote a memo about how Storch and other jailhouse informants were easily able to fabricate confessions. Brosel specifically asked how an informant got placed next to a defendant for whom an informant wants to fabricate a confession. Storch told Brosel that:

to be placed next to an inmate, they would generally make a phone call or have somebody make a phone call for them, generally themselves, pass themselves off as an investigator for the D.A.’s office or whatever police department was handling the case. ¶ So they would get placed next to them or in the same proximity. They would usually call the court line over at the men’s central jail, said that they needed a specific inmate, which would be themselves, in a particular courtroom, which would be the same as the person they were trying to make the case on. ¶“And that way they would wind up being on the same court transmittal for that day being in that same court so, therefore, they’re going to be on the bus and they’re going to be in the court together somewhere near each other in the holding cells.” (RT 54; 10 ER 1817.)

**6. The District Attorney Conceded that Storch Was an  
Habitual Liar but Asserted He Did Not Lie in  
Respondent's Case**

Throughout all the state habeas proceedings, the District Attorney conceded that Storch was "basically a con artist" who "presented himself as other than who he really was;" "played fast and loose with the facts at times;" and, lied to "victims, an arresting officer and probation officers for his own purposes." (Original Return at 75.) (1 ASER 198.)

The District Attorney also conceded that Storch lied numerous times under oath and did indeed commit perjury in the case of People v. Sheldon Sanders, A039120. (Original Return at 92, 93, 95, 96.) (1 ASER 198.)

Storch, for example, lied repeatedly to probation and parole officers when he said he went to Viet Nam. (Peo. Exh. 51; 5/14/99 RT 30; 10 ER 1793.) He never went to Vietnam and was kicked out the army for being an habitual liar. He also lied when he said he had been honorably discharged from the Army; and when he said his wife and father died in an automobile accident. (RT 2200-03; 8 ER 1244-1246-1247.) In truth, Storch was married and divorced twice. He was never a widower. His father passed away from a heart attack and he was forced out of the Army without an honorable discharge. (Pet. Exhs. 30, 50; 4 ER 501-502, 644-645.)

Storch was thought to be a liar by law enforcement officers who knew him well:

- Sheriff Sergeant Porter knew Storch “very well” for 5-6 years at the jail. Initially Porter thought that Storch was a credible informant. Soon, however, he had “extreme distrust” for Storch who manipulated the system to his own advantage. (RT 2100, 2103-06, 2111; 7 ER 1148-1153.)

- Sheriff Deputy Thomas Halstead who worked in the custody liaison division from 1984 to 1990, also knew Storch well. “If it was convenient for him to tell the truth, he would tell the truth. If it was convenient to lie, he would probably lie. It would depend upon his circumstance and what he wanted.” Halstead would never rely on Storch’s word to make an important decision. (RT 2249; 8 ER 1293.)

- Alvin Henley was a deputy sheriff who worked in custody liaison from 1982 to 1986. He had numerous dealings with jailhouse informants, including Sidney Storch. He believed they all lie, including Storch. (5/14/99 RT 29; 10 ER 1792.)

- Wanda Burton, Storch’s parole officer in 1984, issued a warrant for his arrest on June 30, 1984, only one month after he had been released. He had absconded from parole and violated conditions by working as an informant for the Secret Service without permission. Burton accused Storch of deceit, fraud, and manipulation, necessitating psychiatric treatment. (5/14/99 RT 31; 10 ER 1794.)



**7. The Superior Court Agreed that Storch Was a Liar  
but Not in Respondent's Case**

On February 10, 2000, in a written decision, on the superior court denied the habeas petition:

The court finds no credible or persuasive evidence Sidney Storch lied at petitioner's trial in 1984. Furthermore the court finds the evidence of subsequent misconduct to be insufficient to convince the court that he was engaged in like misconduct in 1984. The court agrees with respondent that, whatever sophistication Storch possessed at these latter times, he developed after his testimony against petitioner. At the time of petitioner's trial, Storch was nothing more than a neophyte jailhouse informant who had never before received any favor or remuneration from law enforcement or the prosecution.

App. 137.

**E. Subsequent Proceedings**

Respondent returned to the California Supreme Court raising numerous claims of prosecutorial misconduct, including the failure to disclose the true nature of Storch's deal. On December 19, 2001, the California Supreme Court denied Respondent's habeas corpus petition on the merits. Justice Kennard, however, believed an OSC should be issued. App. at 105.

On May 11, 2006, the district court entered judgment dismissing Respondent's 2254 petition with prejudice. App. 45.

**F. The Court of Appeals**

Respondent argued, inter alia, to the Ninth Circuit Court of Appeals that his due process rights were violated when he was convicted on the false material testimony of

Sidney Storch, which the prosecutor knew was false by his fraudulent failure to investigate Storch's background and credibility; and by the failure to disclose material exculpatory impeachment information about Storch.

On December 7, 2010, the Court of Appeals reversed the district court in a published decision. The court thoroughly reviewed the extensive record and acknowledged the "daunting deference" it was required to give the state court decisions. App. 20. The Court of Appeals found that under § 2254 (d)(2) the state court's rejection of Respondent's claims was an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. App. 35.

First, it is undisputed that Storch told numerous lies at Maxwell's trial. At a minimum, Storch lied about his motivation for coming forward, his prior record, the amount of money he had stolen, the level of education he attained, and the fact that he had previously worked out a 36-month prison term in exchange for his guilty plea before the sixteen-month deal he ultimately received in exchange for his cooperation and testimony in Maxwell's trial. Specifically, Storch testified at Maxwell's trial that he was not seeking leniency in exchange for his testimony. Rather, Storch stated, he had sought guidance from the prison rabbi about whether to testify and had concluded thereafter that he should. This was a lie. The prison rabbi testified that Storch had never discussed Maxwell's case with him nor sought his guidance. Storch testified that there were no deals between him and the prosecution prior to the sixteen-month deal he received. This was a lie. Storch's public defender had previously worked out a 36-month deal. Storch testified that he had only two prior felony convictions when in fact he had more. Storch stated that his five pending cases involved "almost \$13,000" of forged funds, but the amount was closer to \$44,000. Finally, Storch said he had completed two and a half years of college in business administration when, in truth, he had never gone to college.

App. 21-22.

Based on our review of the state court records, and in particular the evidence at the Superior Court's evidentiary hearing, we conclude that the state court's conclusion that Storch testified truthfully was an unreasonable determination of the facts. There is simply too much evidence of Storch's pattern of perjury to conclude otherwise. At the time of Maxwell's trial, Storch was already employing the "booking" formula that he would later teach others and for which he would become famous; the housing records show that Storch had physical proximity to Maxwell; Storch openly admitted that he was in possession of a newspaper article about the murders; the newspaper article itself mentioned all of the specific facts to which Storch testified--namely, that the police had found Maxwell's palm print on a nearby park bench; and, finally, Storch contacted Deputy District Attorney Sterling Norris with the news of his cellmate's spontaneous confession and negotiated his own deal in exchange for his testimony.

App. 28-29.º

The Superior Court arbitrarily cabined Storch's perjury methods to a time period starting after 1984, and, in spite of the numerous known lies told at Maxwell's trial, unreasonably found his testimony truthful. In 1984, Storch was 37 years old and already a career criminal. He had committed crimes of deceit, and has been arrested at least 13 times and convicted of at least 3 felonies. Storch told numerous lies at Maxwell's trial, was known as dishonest at the time of trial, was an experienced informant according to the testimony of three LAPD officials, and used his signature method to "book" Maxwell. **If Storch was a neophyte informant at the time of Maxwell's trial, his inexperience showed not in his forthrightness, but rather, in the lack of creativity in the lies he told.** Storch simply repeated facts about the Skid Row Stabber killings contained in the newspaper article he admitted to possessing, and he offered no details about any of the crimes that were not already public and in widespread print. Storch testified at Maxwell's trial because he wanted to obtain a benefit – a reduction in his sentence – and because he was dishonest, he was willing to say or do anything to obtain that goal.

App. 29-30 (emphasis added).

The Court of Appeals held that Respondent's due process rights were violated because Storch's lies were material as to both counts. The District Attorney itself conceded

the evidence against Respondent was weak, Norris emphasized Storch's testimony in urging the jury to convict, and the Attorney General itself argued that Storch's testimony was offered to show Respondent had admitted responsibility for all of the murders. App. 35.

Here, the prosecution itself admitted that the evidence against Maxwell was weak, that Maxwell had consistently maintained his innocence, and that the police testimony about the date of the palmprint was speculative. For these reasons, and those explained previously, Storch's testimony was crucial to the prosecution's case.

App. 42.

As to the Brady claim, the Court of Appeals found that the failure to disclose the true nature of Storch's deal and the failure to disclose the true nature of his informant background were material. The fact that Storch "had negotiated himself a better deal coupled with the evidence of Storch's undisclosed informant past" and the number of lies he told on the stand "would have created substantial doubt as to Storch's credibility ...." App. 42. Further, "the prosecution's failure to correct Storch's false testimony about his prior deals was prejudicial." App. 40.

Storch was one of the most infamous jailhouse informants in Los Angeles history. In particular, as confirmed by Kr[a]jniak's and Marcus's testimony, Storch had a propensity to go after high profile cases. The 'Skid Row Stabber' case would have been just such a case, and Storch's testimony at Maxwell's trial is a textbook example of the 'booking' method that Storch helped make famous. Based on the evidence brought to light during the lengthy evidentiary hearing, we conclude that the state court's finding that Storch did not give false testimony was an unreasonable determination of the facts in light of the evidence. We further conclude that there is a reasonable probability that this false testimony affected the jury's verdict. Because the State convicted Maxwell on the basis of false and material evidence in violation of his due process rights, we direct the district court to grant Maxwell habeas relief on

this claim. We further conclude that the prosecution withheld material evidence in violation of Brady.

App. 43.

### **REASONS FOR DENYING THE WRIT**

Petitioner contends that federal habeas relief is not available unless a state court conviction was obtained by perjured testimony that the prosecution knew was false; and the evidence that Storch lied was merely circumstantial. (Question 1.) Respondent also contends that a federal court may not grant habeas relief unless the suppressed evidence “had been known to the prosecutors or police working on” the defendant’s case; and the suppressed evidence was not material. (Question 2.)

Petitioner’s claims are premised on repeated misstatements of the record and the settled law of this Court. For that reason, the issues posed by the petition for writ of certiorari are not present in this case. Respondent in fact seeks to overturn the long settled law of this Court and relieve prosecutors in large offices from any responsibility to investigate whether their witnesses are credible.

The Court of Appeals carefully evaluated the state court record and gave due deference to the state court decisions. Further review is unwarranted. “[T]he state court’s ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.” Harrington v. Richter, \_\_\_ U.S. \_\_\_, 131 S.Ct. 770, 787, 178 L.Ed.2d 624 (2011).

**A. PETITIONER REPEATEDLY MISSTATES THE RECORD**

Petitioner asserts that the evidence against Respondent was “compelling,” Pet. 8; that there were three other jailhouse informants who testified Respondent confessed Pet. 5; that Storch did not testify to a confession but merely to a statement about forgetting to wear gloves, Pet. 9-10; and Storch was not the make or break witness for the prosecution. Pet. 10 and n.3. Petitioner misstates the record. Supreme Court Rule 15.2.

First, as detailed above, Petitioner refuses to acknowledge that DDA Sterling Norris characterized the evidence against Respondent as “weak” and not compelling. Respondent refuses to acknowledge that Norris’ supervisor found the evidence to be “weak” and the prosecutor who handled all the state habeas proceedings concurred with that assessment. App. 42.

**1. The Weak Circumstantial Evidence**

Second, Petitioner’s characterization of the circumstantial evidence is not accurate. Respondent will address the evidence seriatim.

(1) An “eyewitness” identified Respondent at the preliminary hearing and all three eyewitnesses described certain characteristics that were similar to Respondent, e.g. unusual gait and Spanish accent. Pet. 8 and n.2.

Petitioner neglects to mention that the witness Tom Jones identified Respondent only by his *voice*.<sup>2</sup> (RT 5074.) Respondent did not fit the description of the killer who was said to be over 6 feet tall, more than 200 pounds, and clean shaven. Respondent was 5'9", 150 lbs, and wore a beard. At the lineup, eyewitness William Stumpner said, "You've got everyone up there that doesn't look like him." App. 5.

By contrast, Gary Stinson did fit the description of the killer and three people identified him as having tried to stab them in the same vicinity and time period. No other witness identified Respondent at any time. (Appellnat's Opening Brief "AOB" at 8-9, record citations.)

(2) Respondent's palm print on the park bench. Pet. 5, 10, and n.3.

Petitioner neglects to mention that Norris conceded the palm print could not be dated. (4 ER 510, 10 ER 1844.) Norris' experts, "Leo and Keir both testified, without equivocating, that they were unable to determine the age of the palmprint." (1 ER 326 [state appellate opinion at 22].)

(3) Respondent possessed a cigarette lighter resembling the victim's. (Pet. 5, 10, n.3.

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<sup>2</sup> Petitioner neglects to mention Tom Jones also identified a voice on a tape recorded radio call as that of the killer. Police voice print analysis determined that this voice and Respondent's voice were not the same person. The test results were known before the preliminary hearing ended but not disclosed to the defense for four years. This testing was subsequently confirmed by the world's leading scientist in voice print identification, Dr. Oscar Tosci. The jury was not allowed to hear this evidence. (AOB at 11-12.)

Petitioner fails to acknowledge that the lighter was a common Bic lighter. The victim's widow said Respondent's lighter looked like her husband's but she had not been shown the lighter in a line-up. The victim's stepson was unable to pick it out of a line-up of similar lighters shown to him in court. Two police detectives said there was nothing unusual about Respondent's lighter to distinguish it from any other used Bic lighter. (AOB at 13.)

(4) Two knives recovered from Respondent and his living area were “consistent” with victim's wounds. Pet. 5, 10, n.3.

Petitioner fails to acknowledge that the knife evidence was *inconclusive*. With respect to Garcia's knife wounds, Respondent's knives were consistent *only if* there were both stabbing and cutting motions. It was impossible to determine this. With respect to the Jones' knife wound, Respondent's knives were consistent *only if* they had *not* been inserted all the way. It was impossible to determine this. (AOB at 12.)

(6) Shoe prints at the murder scene were “generally matched” to shoes worn by Respondent. Pet. 5, 8, n.3.

Petitioner fails to acknowledge that these foot prints were found 100 feet from Garcia's body and there was no evidence whatsoever that they were the foot prints of the killer. Moreover, the outline of the print was one size *smaller* than the exemplars taken from Respondent's shoes. (AOB at 13-14.)

(7) Respondent's gait was similar to the person who killed Garcia. Pet. 8, n.2.



Again, there was no evidence that the “gait” of the footprints belonged to the killer. The police criminalist who took measurements of Respondent's run, walk, and jog exemplars and compared them with photographs conceded his measurements might not be accurate. He also conceded he was *not* an expert in gait comparison and had never even done a gait comparison. (AOB at 13-14.)

The defense witness, Dr. Peter Cavanaugh, who *was* an expert in gait comparison, said this evidence was meaningless. It was unknown if the killer made those prints and they were too indistinct to show anything. Also, it was impossible to make a comparison without knowing the *speed* of the person who left the prints. The footprint trail and gait comparison were useless for identification. If the police measurements were accurate it was extremely unlikely Respondent made them. (AOB at 14.)

(8) Respondent had clothes similar to those worn by the killer. Pet. 8, n.2.

Petitioner neglects to mention these clothes were just a sweatshirt and a watch cap. (AOB at 10.)

(9) Restroom graffiti identified as Respondent’s handwriting “proclaiming his intent to ‘kill win-os.’” Pet. 5.

Petitioner neglects to mention that there was a date of “11/16/78” in the graffiti and the expert’s opinion was based on a scribbly type numeral “one” *in that date*. William Stumpner, who discovered the writing, testified that *he was the one who wrote the date*. (AOB at 6, 12-13.)

Petitioner also fails to mention that the handwriting analyst told Respondent what and how to write the exemplars and selected but a few out of dozens to make his comparison. (RT 7168, 7173.) He cut up the words of the wall writing from an inexact photograph and altered the slant of the original to match Respondent's exemplar. (AOB at 13.)

## **2. The Other Jailhouse Informants**

Petitioner faults the Court of Appeals for not mentioning the other jailhouse informants who, in contrast to Storch, actually said Respondent confessed. Pet. 5. Petitioner leaves out the names of these informants and fails to tell the truth about them.

(10) George Mark Hall testified that Respondent bragged about being the Skid Row Stabber. Pet. 5.

Petitioner neglects to mention that Hall was a dangerous child molester awaiting trial on charges of kidnapping, raping, and sodomizing a little girl. He had similar prior convictions. Hall offered to testify against Respondent at the preliminary hearing in exchange for release on his own recognizance. The preliminary hearing prosecutor Michael Genelin refused to release Hall because he was too dangerous. Thereafter, Hall wrote a letter to Genelin completely *recanting* his proposed testimony. Norris did not disclose this letter. The defense attorneys discovered it by accident when reviewing other material at the District Attorney's Office. (AOB at 15-16.)

Petitioner also neglects to mention that in preparation for trial, Norris wrote that he could not make these satanic killings without Hall's testimony. Norris also wrote that Hall would refuse to testify without release. Norris wrote this in the same document where he admitted the evidence was weak. (4 ER 509-510.)

By the time of trial Hall was confined to the Patton State Mental Hospital as a mentally disordered sex offender ("MDSO"). Hall said he wrote the recantation letter because he was afraid of Respondent. He also said that the only thing he had been promised was a letter from Norris recommending good time credits. (AOB at 16.) This, however, turned out to be a lie, knowingly used by Norris.

After Respondent was convicted Norris did write the letter. Norris and other deputies also made numerous appearances in the MDSO department asking for Hall's release. The judge refused because Hall was not legally entitled to good time credits and because the hospital said he was still dangerous. Hall complained that he testified only because he thought he was getting out. Norris said Hall was correct, adding that he could not have prosecuted Respondent without Hall. The judge still refused to release Hall saying he was too dangerous. (Hall RT 27-31.)

Thereafter, the District Attorney brought Hall before a different judge. In a hearing lasting a minute or two, this judge ordered Hall released to the streets. (4 ER 202-204.)

At the same time of Respondent's habeas evidentiary hearing, Hall was in custody again, awaiting trial on charges of kidnapping, raping, and sodomizing another little girl. Hall's child victim at the time of Respondent's trial, was now a grown woman. The District Attorney called her as a witness against Hall. (4ER 143-160.) Hall is now in prison for life.

(11) Jimmy Carl Whittaker testified that Respondent raped him at the jail and while doing so admitted he killed ten people Pet. 5.

Petitioner neglects to mention that Whittaker's girlfriend testified that he was dishonest and a liar. (RT 9550.)

Petitioner also neglects to mention that Whittaker had asked to be released on bail in exchange for testifying against Respondent. The judge refused to grant bail saying he did not believe Whittaker was telling the truth about Respondent. (2 ASER 456-458.)

(12) Bobby Toombs shared a cell with Respondent in a Tennessee prison. He testified Respondent said he was from Puerto Rico, as did the suspect. Pet. 5.

Petitioner fails to acknowledge that Toombs later declared his testimony against Respondent was false. He also declared he had been a long time police informant prior to testifying against Respondent. Toombs' informant status was not disclosed. The District Attorney's habeas investigator verified that Toombs was indeed an informant prior to testifying against Maxwell. (4 ASER 300-304, 453-455.)

As for Storch, Petitioner complains that the Court of Appeals treated the comment about making a mistake and not wearing gloves “as if it were confession to the charged crimes.” Pet. 9-10. Petitioner contends Storch’s testimony was merely a comment about gloves. Pet. 2, 3, 5, 6, 16. Petitioner neglects to mention that Norris himself characterized Storch’s testimony about the palmprint in the newspaper article and not wearing gloves as an “admission” to the “Garcia murder.” (RT 11,461, 2 ASER 554.)

After incorrectly asserting that Storch’s testimony was not a confession, Petitioner argues it was not material, as it only consumed 61 pages of transcript. Pet. 10, n.3. Petitioner neglects to mention that the jury asked to rehear Storch’s testimony. (RT 12,897, 2 ASER 544.) App. Most important, Petitioner also neglects to mention that in the Horace Burns’ case Norris said he benefitted from Storch’s testimony against Respondent and planned to use him as a witness against Burns as well. (4 ER 605.)

**B. RESPONDENT MISSTATES THE SETTLED LAW**

Petitioner asserts that “this Court’s precedents clearly require that relief may be granted only if the prosecution knowingly presents perjured testimony.” Pet. at 13. If the prosecutor did not knowingly use perjured testimony then there is no clearly established constitutional claim. Pet. 13. Petitioner contends that while the Court of Appeals cited Napue v. Illinois, it relied on its own precedent to grant relief and “eliminated the ‘knowing use’ requirement.” Pet. at 14. Petitioner contends that the Court of Appeals is in conflict

with other circuits that have “conscientiously adhered” to Napue’s knowing use requirement. Pet. at 15.

First, as to the facts, Norris certainly knew that Storch was lying when he denied being motivated by a deal. Norris also had good reason to suspect that Storch was lying about the confession based on a newspaper article. Norris knew the evidence against Respondent was weak; he personally did not trust jailhouse informants and told his colleagues to use them only if they risked an acquittal; he knew that Respondent’s attorneys had objected when Respondent was moved from a single man cell to a multi-man cell and Storch turned out to be one of the cellmates; he instructed his investigator to verify only whether Storch and Respondent had been in the same cell and to find out who else was in the cell; and he used Storch as a witness even though the other cellmate did not corroborate Storch’s tale of a confession, saying that “if anyone was a killer it was Storch.” Napue, 360 U.S. 264, 269 (1959) (due process is violated when the state, “although not soliciting false evidence, allows it to go uncorrected when it appears.”)

Second, as to the law, Petitioner essentially argues that this Court’s precedents have nothing to do with the truth seeking function of a trial, Arizona v. Fulminante, 449 U.S. 279, 293 (1991), and everything to do with the good or bad faith of a prosecutor. But this Court has repeatedly and consistently rejected such a position.

In Mooney v. Holohan, 294 U.S. 103 (1953) this Court held that when a prosecutor knew testimony was perjured, due process is violated.

In Napue v. Illinois, 360 U.S. 264 (1959), this Court reaffirmed that when a conviction is obtained by false evidence, “known to be such by representatives of the State,” due process is violated. Id. at 269, citing Mooney, 294 U.S. 103. “The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears.” Id. “It is of no consequence that the falsehood bore upon the witness’ credibility rather than directly upon defendant’s guilt. A lie is a lie, no matter what its subject.” Id. at 270. Allowing a witness to falsely state he had received no promises for his testimony violated due process and required reversal. Id. at 272.

This Court subsequently held that “[th]e principle of Mooney v. Holohan is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused.” Brady v. Maryland, 373 U.S. at 87.

Then, in United States v. Agurs, 427 U.S. 97 (1976), this Court reaffirmed that to show due process violations for failures to disclose, the prosecutor’s bad faith need not be shown. 427 U.S. at 110. Agurs also held the rule of Brady applies to situations, “typified by Mooney v. Holohan, 294 U.S. 103,” where “the undisclosed evidence demonstrates that the prosecution’s case includes perjured testimony and that the prosecution knew, *or should have known of the perjury.*” 427 U.S. 103 (emphasis added). Agurs, did not hold that the *only* time due process is violated is when the prosecutor is aware of perjured testimony when it is given. Id. at 110. Nor is there any Supreme Court case that holds due process can be violated *only* when perjured testimony is knowingly used.

Further, this Court has long held that a conviction based on lying informants must be overturned even if the prosecutor was unaware of the lying at the time of trial.

In Mesarosh v. United States, 352 U.S. 1 (1952), several convictions were reversed when a key informant testified falsely about his background and deal making in subsequent trials. Prosecutors said this did not mean the informant had lied in the Mesarosh trial. This Court held “It is not within the realm of reason to expect” the informant “testified truthfully” in this case and at the same time “testified falsely” in another case . Id. at 13. “The dignity of the United States government will not permit the conviction of any person on tainted testimony.” Id. at 9. “The untainted administration of justice is certainly one of the most cherished aspects of our institutions ... the government of a strong and free nation does not need convictions based upon such testimony.” Id. at 14.

In Napue, this Court cited Mesarosh as analogous to the Mooney v. Holohan due process violation. Napue, 360 U.S. at 269.

In Communist Party of U.S.A. v. Subversive Activity Control Board, 351 U.S. 115 (1956), this Court reversed several convictions when it was discovered post-conviction that government informants had lied in other proceedings. “If these witnesses in fact committed perjury in testifying in other cases on subject matter substantially like that of their testimony in the present proceedings, their testimony in this proceeding is inevitably discredited .... the fair administration of justice requires reversal.” Id. at 125.



**C. PETITIONER SEEKS TO OVERTURN *GIGLIO AND KYLES V. WHITLEY*, AMONG OTHERS**

Petitioner acknowledges that this Court “has also held that ‘the individual prosecutor has a duty to learn of favorable evidence known to others acting on the government’s behalf *in the case* including the police.’” Pet. 18, citing Kyles v. Whitley, 514 U.S. 419, 437 (1995) (emphasis added). Petitioner asserts, however, that 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.” Pet. 18.

Petitioner complains that it would be “impossible for conscientious prosecutors in large metropolitan areas like Los Angeles to comply” with a rule requiring them to uncover exculpatory information from “any local law enforcement officer unconnected with an investigation regarding the defendant.” Pet. 18. Petitioner asserts the Court of Appeals granted Brady relief without finding that the trial prosecutor or the police officers on the Skid Row murders were aware of the fact that Storch had previously provided assistance to LAPD’s forgery division. Pet. 18.

Petitioner states that LAPD has 9,914 sworn officers and 2,862 civilian employees and that the Los Angeles County Sheriff is the largest sheriff’s department in the world. Pet. 19, n.4. Petitioner essentially likens the prosecutor’s obligation to investigate

Storch's background and credibility to looking for a needle in a haystack. Petitioner is wrong on both the facts and the law.

- First, Petitioner does not explain how Sidney Storch, who was a critical witness against Respondent, was not part of the Skid Row Stabber case.

- Second, Petitioner fails to explain why Norris, who took over Storch's prosecution, and sweetened his deal from 3 years to 16 months, had no obligation to contact a single police officer who had arrested Storch on any of his cases. The officers who testified at the habeas evidentiary hearing about Storch's informant activities for LAPD's bunco forgery division – and his lack of credibility -- Patrick Riley, Gary Ingemunson, and Gene Dear, were the very officers who had arrested Storch on the cases for which Norris gave him such a sweetheart deal.

- Third, Petitioner fails to explain why Norris instructed his investigator to gather information solely on when Storch shared a cell with Respondent and who else was in the cell. The answer very likely is that Storch had already told Norris he was a longtime police informant and could be of help to him if he got a good deal. The answer most certainly is that Norris, if he did not already know about Storch's informant background, did not want to know the truth about him.

- Fourth, Petitioner overlooks the fact that two other prosecutors in the Los Angeles District Attorney's Office, John Krayniak and Joseph Markus, did investigate

Storch's background and credibility and determined he was not truthful. App. 24. Petitioner fails to explain why Norris could not have done likewise.

In Giglio v. United States, 405 U.S. 150 (1972), this Court overturned a conviction when the government failed to disclose that Taliento (an alleged coconspirator and only witness linking Giglio to the crime) had been promised a deal by prosecutor DiPaola that had not been disclosed. DiPaola handled the case at the grand jury stage but did not try the case. Post-conviction, the assistant who did try the case filed an affidavit stating that DiPaola assured him there had been no promises made to Taliento. DiPaola later averred that he had in fact offered Taliento a deal. Id. at 152-153. This Court held that it was not necessary to resolve competing affidavits because the "heart of the matter" was that the prosecutor who first dealt with Taliento now states that he promised him he would not be prosecuted if he testified. Id. at 153.

This Court reiterated that the suppression of "evidence affecting credibility" warrants a new trial irrespective of the good or bad faith of the prosecution. Here:

neither DiPaola's authority nor his failure to inform his superiors or his associates is controlling. Moreover, whether the nondisclosure was a result of negligence or design, it is the responsibility of the prosecutor. The prosecutor's office is an entity and as such it is the spokesman for the Government. A promises made by one attorney must be attributed, for these purposes, to the Government. (Citation.)

Giglio, 405 U.S. at 154.

This Court specifically instructed that prosecutors should institute procedures and regulations to ensure that large offices comply with the Constitution.

**To the extent this places a burden on the large prosecution offices, procedures and regulations can be established to carry that burden and to insure communication of all relevant information on each case to every lawyer who deals with it.**

Giglio, 405 U.S. at 154 (emphasis added).

In Kyles v. Whitley, 514 U.S. 419, 438 (1995), this Court reiterated that prosecutors are charged with the knowledge of information in the hands of the police.

Since, then, the prosecutor has the means to discharge the government's Brady responsibility if he will, any argument about excusing a prosecutor from disclosing what he does not happen to know about boils down to a plea to substitute the police for the prosecutor, and even for the courts themselves, as the final arbiters of the government's obligation to ensure fair trials.

This Court also noted that attacking the "sloppiness" and reliability of the prosecution's investigation is a common defense tactic; to discredit the caliber of the investigation or the decision to charge the defendant may be considered in assessing a possible Brady violation. Kyles v. Whitley, 514 U.S. at 446 and n.15. "When ... the probative force of evidence depends on the circumstances in which it was obtained and those circumstances raise a possibility of fraud, indications of conscientious police work will enhance probative force and slovenly work will diminish it." Id. at 446 n.15.

In seeking to excuse Norris for failing to disclose Storch's prior informant activities, Petitioner asks this Court to overturn Giglio and Kyles v. Whitley because Los Angeles is a large metropolitan area. Petitioner asks this Court to permit prosecutors in Los Angeles and other large jurisdictions to forgo the establishment of procedures and regulations to insure communication between and among the police and the prosecutors.

Petitioner fails to acknowledge that Los Angeles long ago took it upon itself to ignore Giglio by its “deliberate and informed declination to take the action necessary to curtail the curtail the misuse of informant testimony.” (Grand Jury Report at 6, 1 ASER 216.) The District Attorney’s deliberate flaunting of the Constitution earned it the condemnation of the grand jury. A number of other convictions have been overturned due to the jailhouse informant scandal, see e.g. App. 28, and several others are still being litigated.

Undaunted by the widespread misconduct regarding jailhouse informants, Petitioner now asks this Court to throw out a generation of authority that consistently and forcefully holds the good or bad faith of the prosecutor has no relevance to assessing whether due process was violated. But of course, the prosecutor did act in bad faith, and did so repeatedly in order to secure a conviction in an admittedly weak case.

### **CONCLUSION**

The petition for writ of certiorari should be denied.

Date: August 23, 2011      Respectfully submitted,

VERNA WEFALD

Counsel of Record