No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

DRAGOMIR TASKOV — PETITIONER
(Your Name)

vs.

UNITED STATES ATTORNEY GENERAL — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

COURT OF APPEALS FOR THE NINTH CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

DRAGOMIR TASKOV
(Your Name)

14696 16A Avenue
(Address)

Surrey, BC V4A 5M7
(City, State, Zip Code)

604 341-1280
(Phone Number)

QUESTION(S) PRESENTED

A. Whether Petitioner's substantive claim of innocence and all the violations of his constitutional rights are barred simply as untimely and because of the total prosecutorial interference, miscarriage of justice, and appointed counsel's ineffectiveness.

B. Whether the Ninth Circuit Court of Appeals correctly denied Petitioner's request for Certificate of Appealability and erroneously stated that Petitioner has not shown that jurists of reason would find it debatable of his constitutional claims.

C. Whether the United States District Court of Nevada clearly prolonged and erroneously dismiss Petitioner's Section 2255 Motion on the foundation as untimely petition and without considering Petitioner's substantial claim of his innocence.

LIST OF PARTIES

[**X**] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELLOW

[X] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[ ] reported at _____ ; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

The opinion of the United States district court appears at Appendix B with Appendix C to the petition and are

[ ] reported at _____ ; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

JURISDICTION

[X] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was **February 22, 2018**

[X] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____ , and a copy of the order denying rehearing appears at Appendix _____ .

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___ A _____ .

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fourth Amendment
Fifth Amendment
Sixth Amendment
Due Process Clause
Criminal Justice Act
Speedy Trial Act

STATEMENT OF THE CASE

On May 20, 2010, Petitioner was charged along with five other individuals. He plead not guilty to all thirty-two counts of the federal indictment, which included one count of conspiracy, numerous counts of wire fraud, interstate transportation of stolen property, receipt of the same property, as well as aiding and abetting attached to all substantive 31 counts.

On June 3, 2011, he plead not guilty again to the identical thirty-two count superseding indictment. Subsequently, on June 21, 2011, the other three of five co-defendants plead guilty to one count of conspiracy. One of the three co-defendants had sentenced before Petitioner's trial and the other two received their sentences in 2012, after Petitioner's trial.

On September 13, 2011, a grand jury returned thirty-four count second superseding indictment repeating the thirty-two counts from June 2011 and included two additional counts for violation of Title 18, U.S.C. Section 1341, implicating a mail fraud. Consequently, on September 23, 2011, Petitioner plead not guilty alone to all thirty-four counts.

On March 22, 2012, Petitioner was convicted by a jury for two counts of Receipt of Stolen Vehicle in violation of 18 U.S.C. §§ 2315 and 2, one count of Transportation of Stolen Vehicle in violation of 18 U.S.C. §§ 2314 and 2, and one count of Mail Fraud in violation of 18 U.S.C. §§ 1341 and 2. He was sentenced eighty-two months in prison to each count concurrent.

The Assistant United States Attorney ("AUSA") and appointed lawyer under the Criminal Justice Act ("CJA counsel") delayed the appeal process one year, as both filed several motions to continuance. Neither the AUSA nor CJA counsel requested in their briefs for an oral hearing before the court of appeals, which implied Fed.R.App.P. 34 and extension of two extra months.

On March 18, 2014, the court of appeals affirmed Petitioner's convictions and sentence. On June 25, 2014, the Ninth Circuit denied Petitioner's motion for rehearing *en banc* by his only

appointed CJA counsel,[1] who never filed request-petition for *certiorari* to this Court. Accordingly, Petitioner filed motion for a new trial to the district court.

CJA counsel failed and refused to filed motion for new trial immediately after the trial under Fed.R.Crim.P. 33(b)(2) in March 2012. On August 15, 2014, Petitioner sent motion for a new trial based on newly discovered evidence and under Rule 33(b)(1). On September 9, the district court denied his motion and Petitioner submitted notice to appeal.

On May 20, 2015, Petitioner filed before the district court his Motion to Unseal and Access the court docket of Petitioner's case, and an additional Motion to Compel CJA counsel to release immediately to Petitioner every document and all evidence that CJA counsel received in this case during the unwilling representation of Petitioner.

On September 28, 2015, the Ninth Circuit affirmed the denial by the district court to Petitioner's motion for new trial, and on November 29, the court of appeals denied Petitioner's request for rehearing *en banc*. Consequently, on December 25, Petitioner filed request before this Court, and on March 7, 2016, the Court denied his petition for *certiorari*.

On March 23, 2016, Petitioner filed with the district court the Motion Pursuant to 28 U.S.C. § 2255 to Set Aside his federal convictions while he was still in custody of AUSA. In addition, on April 5, 2016, Petitioner sent Memorandum of Law, Motion for Evidentiary Hearing, and a following Motion for Discovery in support of his *habeas* petition.

On February 22, 2015, the U.S. Attorney's Office in Las Vegas, Nevada filed Government's

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[1] On March 28, 2014, Petitioner sent *pro se* motion to the court of appeals and requested permission to submit supplement brief pursuant to Fed.R.App.P. 10(e)(2)(C). Neither CJA counsel nor the court of appeals respond to that motion. On May 1, 2014, Petitioner sent to the court of appeals Appellant Supplement Brief under Rule 10(e)(2)(C). *See* 9th Cir. Case No. 12-10336, DktEntry #56 ("No deficiency letter sent").

Motion to Substitute and to Forfeit Property of Petitioner and he sent timely Motion for Extension of Time to respond. *See* Dkt. ##361, 364.[2] The AUSA opposed his motion and the court never adjudicate his requested time to file an adequate response.

On April 14, 2016, AUSA filed the Government's Notice to Substitute and to Forfeit Property. *See* Dkt. #371. Petitioner submitted timely Opposition to the Government's Notice to Substitute and to Forfeit his Property. *See* Dkt. #382. The AUSA filed Motion to Extended the Time to reply into Petitioner's opposed motion. *See* Dkt. #388.

The court granted AUSA's motion to extend time and set forth a new due date. On June 3, 2016, AUSA filed Government's Reply to Petitioner's opposition, and he never receive a copy of that document. Thus, Petitioner sent Motion to Receive a Copy of AUSA's reply. Although, his request has the clerk's stamp his motion is never filed.

Subsequently, on May 19, 2016, from Reno, Nevada, the AUSA filed Response in Opposition to Petitioner's motion for discovery. Petitioner's discovery "motion seeks, among other things, 'complete sets of trial transcripts' ... 'complete sets of [Petitioner]'s letters to defense counsel[.]'" *See* Dkt. #390, at 2 (emphasis, ellipsis added).

On June 6, 2016, Petitioner prepared Reply Motion to AUSA's opposition for discovery. However, the document was notarized and sent on June 15, 2016, by the detention facility and the docket number is unknown, because there is no access to this case docket. Petitioner "was precluded from filing" Rule 33 and § 2255 motions "at the same time or one after another[.]" *See* Dkt #391, at 5.

On August 25, 2016, Petitioner received two certified letters from a counsel by the Federal Bureau of Investigation ("FBI") in Las Vegas. More than six years after Petitioner's property was

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[2] All cited docket (Dkt) numbers are from the district court sealed and only docket in Petitioner's case.

seized and suppressed unlawfully, the FBI counsel sent to Petitioner only two "Waiver of ownership of property" forms regarding Petitioner's boat, the boat's trailer, and citing 41 C.F.R. § 128-48.102-1.

The named items and other property were illegally seized by agents of the FBI and the Las Vegas Metropolitan Police Department on May 19, 2010. Nevertheless, both agencies neither disclosed description of all seized items nor revealed by timely notice to Petitioner the identification of each collected item from Petitioner's residence. *See* 41 C.F.R. § 128-48.102-1(b) ("notified within 20 days").

On November 22, 2017, the district court filed an order. *See* Appendix C. The court granted "Substitution and Forfeiture Order," and the "Motion to Withdraw as Attorney" of CJA counsel. *See id.*, at 7. The "Motion to Extend Time" is denied as moot, the "Motion to Unseal and Access Judicial Documents" and the "Motion to Compel Counsel to Release Evidence" are denied as moot. *Id.*

The court ordered Petitioner's "Motion for Hearing" and "Motion for Order" are denied as moot. *Id.* The "Motion to Vacate pursuant to 28 U.S.C. § 2255" is denied, because the court "does not find that the Motion was timely, as it was filed well after the limitations period as set forth in subsection (f)(1) of the statute[,]" as "subsections (f)(2)-(4) are inapplicable." *See*. Appendix C, at 8-9.

The district court ordered Petitioner's "Motion for Evidentiary Hearing" and "Motion for Discovery" are denied, which were submitted in support of his motion to vacate pursuant to 28 U.S.C. § 2255. *Id.* In addition, the court noted, Petitioner's "Motion for New Trial pursuant to Federal Rule of Criminal 33 did not toll the limitations period for the underlying conviction." *Id.*, at n.1.

In November 2017, Petitioner timely filed three separate notices of appeal for three independently divided claims and submitted within disjoined individual timing. Petitioner specifically asked the U.S. District Court to provide him with Certificate of Appealability in the notice to appeal his Section 2255 Petition. The court of appeals asked the district court to clarify the certificate issue.

On February 22, 2018, the two judge-panel by the court of appeals issued the order and denied Petitioner's request for certificate of appealability. *See* Appendix A. The court stated that Petitioner "has not shown that 'jurists of reason would find it debatable whether the [section 2255 motion] states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.'" *See id.*, (citing *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); 28 U.S.C. § 2253(c)(2); and *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012)).

REASONS FOR GRANTING THE PETITION

This case is based fundamentally of continuing violations to Petitioner's constitutional rights, disregarding of Federal Laws and regulations, and the lack of CJA counsel effectiveness neither to raise these meritorious claims nor to raise them on time. Nevertheless, Petitioner represented these claims in his motion for new trial under Fed.R.Crim.P. 33, with timely concerns.

Petitioner's unsuccessful efforts, before trial and continuously following his trial, to secure all the suppressed documents regarding the automobiles in Counts 30, 31, 32, and 34, as well as to present these evidences at trial was intentionally blocked by his CJA counsel, who refused to provide assistance to Petitioner to obtain these documents or necessary evidence.

On June 26, 2010, CJA counsel stated that his office would not accept collect calls, as

rejected any assistance and suggested Petitioner to hire a civil lawyer for his seized property. Following CJA counsel's several jail visits Petitioner wrote his first letter to the court and stated the reasons for Petitioner's decision to withdraw from the services of CJA counsel.

On July 1, 2010, Petitioner was represented by CJA counsel at pretrial release hearing, while CJA counsel's motion to withdraw was pending within the district court. CJA counsel claimed before the court that he did not know anything about immigration law, where Petitioner demanded evidence for the accusations and the magistrate's denial for pretrial release.

On July 6, 2010, another magistrate judge denied CJA counsel's motion to withdraw from the case. *See* Dkt. #49. Even though, the judge confirmed that Petitioner's letter to the court was received, she proffered that he should be patient in the process, as well as she praised and focused on CJA counsel's length of practice and competent experience.

The magistrate judge never determined any substantial inconvenience that would be caused by possible delay, nor decided that it would be an extra cost to the court in terms of judicial resources, if CJA counsel would be substituted and terminated. CJA counsel's dispositive motions to withdraw are denied twice as non-dispositive motions by the magistrate judge. "Actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice." *See Strickland v. Washington*, 466 U.S. 668, 692 (1984).

Notwithstanding, the absurd fact that the magistrate judge who denied CJA counsel's motions to withdraw, granted a stipulation order signed by the same CJA counsel who was denied withdrawing thirty-four days earlier. *See* Dkt. #65. The judge's order authorized CJA counsel to use translation summaries provided by the prosecution, but not useful for trial. In attached affidavit, CJA counsel stated that while the prosecution was "providing transcripts or transcript summaries, refused to certify they were accurate." *See* Dkt. #80-2.

The Ninth Circuit "review steps taken to ensure the accuracy of the transcripts: whether the court reviewed the transcript for accuracy[.]" *See United States v. Armijo*, 5 F.3d 1229, 1234 (9th Cir. 1993). Here, the only step to make for the district court and to accomplish such review of accuracy for these translations was to compare the two versions of translations between the prosecution's interpretation and Petitioner's translation of his own words on the recordings.

"[A] judge may designate a magistrate [judge] to hear and determine any pretrial matter pending before the court, except a motion ... or information made by the defendant[.]" *See* 28 U.S.C. § 636(b)(1)(A) (emphasis in original, ellipsis added). "A judge of the court may reconsider any pretrial matter under this subparagraph (A) where ... the [magistrate judge's] order is clearly erroneous or contrary to law." *See id.*, (emphasis in original, ellipsis added).

The magistrate judge denied twice CJA counsel's unwilling participation without required inquiry into whether an irreconcilable conflict existed. The district judge failed to evaluate and pursue the issue twice due to Petitioner's conflict of interest with CJA counsel, and to appoint substitute counsel to represent Petitioner at trial and on appeal, where CJA counsel's own interests were at odds with Petitioner's interests, and an actual conflict of interest exists.

"On the duty of a trial court to appoint substitute counsel in the face of irreconcilable conflict or complete breakdown in communication between counsel and client, there is near-unanimity among the circuits." *See Plumlee v. Sue Del Papa*, 426 F.3d 1095, 1104 (9th Cir. 2004) (collecting cases). "[T]he adversarial process protected by the Sixth Amendment requires that the accused have 'counsel acting in the role of an advocate.'" *See United States v. Cronic*, 466 U.S. 648, 656 (1984) (quoting *Anders v. California*, 386 U.S. 738, 743 (1967)).

CJA counsel barred all meritorious challenges and did not confront the potential claim of ineffective assistance against himself. Although, as a general rule, the appellate courts do not

review claims of ineffective assistance of counsel on direct appeal, in Petitioner's case this claim was raised below, since an opportunity existed to develop the record on the merits of the issues. An exception is made if the record below allows for a fair evaluation of the claim, and Petitioner's ineffective assistance of counsel claim might be viable on Petitioner's direct appeal.

In the case at bar, Petitioner did not have access to the recordings nor the transcripts, and he was not "allowed to highlight alleged inaccuracies and to introduce alternative versions[.]" *See Armijo*, at 1234. Here, for example such inaccuracies as "in and out of jail" or "birth certificate" could and should be avoided by redaction or correct interpretation of the meaning of the phrases, if Petitioner was given a chance to review and translate his own words.

In Petitioner's case, two interpreters translated the wiretaps, and the prosecution did not provide recordings and transcripts to him, rather, allegedly agreed to disclose selected translation summaries to CJA counsel only. Petitioner's demand for evidence was brought to the attention of three judges, and he showed these events in his motion for new trial. However, the prosecution used the suppress standard and vanished the facts by misplacing one page and five exhibits from Petitioner's motion for new trial. *See* Dkt. #343, at 33 (omitted page 33 and exhibits A-E).

Fraud of this nature is the exception and confers equitable jurisdiction on a court: "Where the unsuccessful party has been prevented from exhibiting fully his case, by fraud or deception practiced on him by his opponent, as by keeping him away from court ... [] or where the attorney regularly employed corruptly sells out his client's interest to the other side, these ... are reasons for which a new suit may be sustained to set aside and annul the former judgment or decree, and open the case for a new and a fair hearing." *See United States v. Throckmorton*, 98 U.S. 61, 65-66 (1878) (ellipses added, citations omitted) ("In all these cases ... relief has been granted[.]").

Petitioner's limited untimely selection of 72 CDs were revealed and delivered on the fourth

day of trial, and the courtroom was used as a mailroom, the evidence for that event were attached to the motion for new trial but were misplaced and erased from the court record. Petitioner cannot compel neither the prosecution nor his CJA counsel to disclose any evidence, and Petitioner was deprived of his right to challenge the translation's accuracy and validity.

"It is the manifest duty of the courts to vindicate those guarantees, and to accomplish that it is essential that all relevant and admissible evidence be produced." *See United States v. Nixon*, 418 U.S. 683, 711 (1974). A neutral judicial officer shall distinguish between the constitutional rights of Petitioner, and the wrong acts of his CJA counsel, regardless of CJA counsel's ability to read or not the *provisos* of Title III, 18 U.S.C. §§ 2510-2520, in cognizable English language.

Petitioner was prohibited from using the contents of the collected audio, video, and other forms of intercepted evidence for trial. Petitioner was not furnished with a copy of the court orders accompanying their applications under which the interceptions were allegedly authorized by federal court. *See* 18 U.S.C. § 2518(9). According to Title III, and its provisions authorized by Congress, it is intending to give Petitioner an opportunity to make a pretrial motion to suppress. *See* § 2518(9), (10)(a). This necessary obligation for disclosure by the regulation is required without Petitioner's request and irrespectively for the wiretap evidence to be favorable, material, impeaching, exculpatory, pertinent, or not. Evidence derived by a court order, must be disclosed in a timely manner, in order, and without any prosecution's discretion nor its selection.

"Unlike Section 2518(8)(d) ... which gives the court discretion to deny access to the order and application, Section 2518(9) mandates that these items be made available to a party facing any [...] proceeding[.]" *See United States v. Forrester*, 592 F.3d 972, 984 (9th Cir. 2009), *withdrawn* and *superseded* by *United States v. Forrester*, 616 F.3d 929, 942 (9th Cir. 2010) (quoting *United States v. Manuszak*, 438 F.Supp. 613, 619-20 (E.D. Penn. 1977) (internal quotation marks and

citation omitted, ellipsis in original, emphasis added)). And "this is a choice which Congress has in plain language decreed the government must make when it seeks to deprive a person of his liberty on the basis of wiretap evidence." *See United States v. Manuszak*, at 625.

The information disclosed in a ten-page document by the prosecution "of the extent of the electronic surveillance used in the case," resulted in a total of 16,170 intercepted and recorded calls, and "a total number of 936 sessions of Microphone 1 and 1816 for Microphone 2." *See* Dkt. #112, at 8, n.3. The 72 calls chosen and played by the prosecution at its case-in-chief, revealed an eighteen months duration from three telephone subscribers, summed with the added calendar time by the phone calls disclosed in Petitioner's 72 CDs untimely and limited selection.

Nevertheless, the calendar dates from both co-defendants' recordings and Petitioner's wiretaps shown at trial as well as offered in Petitioner's 72 CDs, misrepresent the alleged fourteen court orders to intercept and record audio conversations from three phones and two microphones. In addition, the Jaguar-car-video was recorded 230 days after the pole camera was installed on "January 20, 2009," and according to the date July 9, 2009 on Petitioner's only video-CD. *See* 9th Cir. Case No. 12-10336, DktEntry #28-1, at 9. Accordingly, neither CJA counsel mention for a video surveillance in his suppress motion nor the magistrate judge stated any word about disclosure or production of video evidence. Petitioner never received to review any AUSA's application, or court orders for any of the various interceptions conducted by the agents or civilians in his case.

Thirty-seven days following Petitioner's arraignment, and one day after "the speedy trial clock started to run[,]" Petitioner filed his motion with the district court and claimed his Sixth Amendment speedy trial right. *See* Dkt. #48, at 2, and Dkt. #46, respectively. "The defendant's assertion of his speedy trial right, then, is entitled to strong evidentiary weight in determining [] whether the defendant is being deprived of the right." *See Barker v. Wingo*, 407 U.S. 514, 531-32

(1972) ("The amorphous quality of the [Sixth Amendment speedy trial] right also leads to the unsatisfactorily severe remedy of dismissal of the indictment when the right has been deprived").

Nevertheless, six months latter Petitioner wrote another two letters. In the first letter Petitioner stated to CJA counsel: "I personally have never waived my right to a Speedy Trial." *See* Dkt. #98. In the second letter to the district court Petitioner demanded: "I wish [to have] a speedy trial to prove my innocence at this time." *Id.*, (emphasis added). However, CJA counsel wrote that he would have to testify that his "memory of the facts was different from" Petitioner's claims. *See* Dkt. #343, Exhibit E. "You may have gotten incorrect legal advice ... that filing such a letter with Judge Pro would give you some appellate remedy." *Id.*, (ellipsis added).

Following a strong argument between CJA counsel and Petitioner, CJA counsel objected to the first prosecution's proposal for trial continuance, "particularly in light of his assent to three of the four continuances that resulted in his trial's postponement." *See* 9th Cir. Case No. 12-10336, DktEntry #46, at 2-3. CJA counsel "asserts objections to this motion and request to continue trial on behalf of [Petitioner]," only one time because Petitioner was present at that hearing and excluded from the other three hearings for continuance. *See* Dkt. #49 (emphasis added).

On January 15, 2011, Petitioner claimed in writing: "Again, I have never waived my right to a Speedy Trial by writing or verbally to anyone." *See* Dkt. #98, at 2. In addition, Petitioner sent a copy to the court of the letter to CJA counsel, "as a motion to re[s]cind this false information." *See id.*, at 3 (emphasis added). Although, Petitioner informed the district court and the prosecution to believe that Petitioner would go for trial from the very beginning, the Speedy Trial Act ("STA" or "Act") was used against him, even though, Petitioner never contribute to any delay.

Maybe it was then, when CJA counsel was planning to raise a STA-claim, as the three judge-panel stated, "for the first time on appeal[.]" *See* 9th Cir. Case No. 12-10336, DktEntry #46,

at 2. Another judge-panel "agree that a court should entertain a motion to dismiss under the STA so long as the defendant 'br[ings] to the trial court's attention his belief that the STA ha[s] been violated.'" *See United States v. Alvarez-Perez*, 629 F.3d 1053, 1061 (9th Cir. 2010) (emphases in original, citation omitted). Here, Petitioner's letters with the "informal 'statements to the district [] court prior to trial, in which he claimed a violation of the STA, satisfy the motion requirements of 18 U.S.C. § 3162(a)(2),' even though the defendant did not present his claim 'in the form of a formal, written motion.'" *See Alvarez-Perez*, at 1060-61 (quotation omitted).

"Prejudice, of course, should be asserted in the light of the interests of the defendants which the speedy trial right was designed to protect." *See Barker v. Wingo*, at 532. "This Court has identified three such interests: (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired." *See id.*, (footnote omitted). "Of these, the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system." *Id.*

Petitioner's pretrial incarceration was extra oppressive following the AUSA's Stipulation for Protective Order against Petitioner. *See* Dkt. #54 (filed on August 9, 2010). A week later the court granted the motion without CJA counsel's opposition. The judicial conduct resulted in administrative segregation to Petitioner from the jail's general population, which practically means neither phone access nor visit and twenty-four hours lockdown. This Court envisioned these circumstances forty-six years ago and specifically noted: "Moreover, if a defendant is locked up, he is hindered in his ability to gather evidence, contact witnesses, or otherwise prepare his defense." *See Barker*, at 533 (footnote omitted).

Accordingly, in more than eight months span the district court denied two motions for medical treatment while incarcerated filed by CJA counsel, as the AUSA response to both motions.

On May 4, 2011 and following Petitioner's letter to the Canadian Justice Department with their assistance, finally the medical surgery was performed in Desert Spring Hospital, Las Vegas, and it took less than one hour. Petitioner anxiety and concern of the constant delay was exhausted of the wait for a pretrial discovery which never was timely disclosed. On December 2, 2011, Petitioner addressed the discovery question directly to the magistrate judge after eighteen months of waiting, however, she redirected Petitioner's question to CJA counsel. *See* Dkt. #194.

In Petitioner's case, five witnesses died during the delay and one missed the trial because her visitor-visa expired as the witness was waiting for trial in Las Vegas, from March to August 2011. When Petitioner learned the new trial date in early January 2011, his witness obtained a visa and arrived on March 3, 2011. Due to another surprising trial date reset Petitioner's witness had departed from the United States on August 4, 2011. Her visa could not be renewed until the following calendar year. The other five named witnesses, who laid to rest before Petitioner's trail started, had knowledge of the facts surrounding the individuals in this case, their vehicles, and these witnesses have been recorded in Petitioner's phone conversations, which never been disclosed.

The STA requires that Petitioner should be brought to trial "within seventy days from the filing date ... of the information or indictment[.]" *See United States v. Medina*, 524 F.3d 974, 978 (9th Cir. 2008) (ellipsis in original, citation omitted). "We next turn to delays resulting from continuance granted by a district court under § 3161(h)(8)." *See id.*, at 979 (footnote and citation omitted). In the case at bar, the district court entered four continuances, averaging 145 days, where locking 582 days, and without including the 67 days before the first setting day for trial.

"We take this opportunity once again to emphasize that the 'ends of justice' exclusion in § 3161(h)(8) is not to be routinely applied, and that it may not be invoked in such a way as to

circumvent the time limitations set forth in the Act." *See United States v. Clymer*, 25 F.3d 824, 829 (9th Cir. 1994). This Court resolved an issue of a motion to suppress, "to exclude all time between the filing of and the hearing on a motion whether that hearing was prompt or not." *See Henderson v. United States*, 476 U.S. 321, 326 (1986).

Here, in Petitioner's case the issue is, whether the excludable time of the motion to suppress, which totaled 156 days, should be added to the extra time of 134 days, that counts for the previous motion to have more time for CJA counsel to file the motion to suppress. CJA counsel's motion to suppress was denied, despite of the fact for being filed timely or not, and without a reasonably necessary hearing. In addition, all motions filed by AUSA overlapped with CJA counsel's motions and excluded 15 days from a total of 91 non-excludable days after all timing calculation of CJA counsel's motions. Moreover, the only motion filed by the co-defendants' attorneys on the court docket was a Motion to Substitute Attorney. *See* Dkt. #73. Before the secrecy of the docked record became official on that same day, the record showed absent filing activity from the co-defendants' lawyers, which were only waiting for plea dials from the beginning of this case.

The district court never entertained Petitioner's motion under the STA, rather, instead mocked over Petitioner's constitutional right, that "only you like a 'lone wolf' went to trial." *See* Dkt. #265. In addition, at another hearing the district court said to a co-defendant, that the court could not give, and the co-defendant would not receive less than thirty months sentence, because Petitioner's trial went "bad." *See* Dkt. #245. Nevertheless, the magistrate judge "noted on an evidentiary hearing ... 'because the law has been against you ... you've been frustrated[.]" *See* 9th Cir. Case No. 12-10336, DktEntry #34, at 6 (ellipses added).

Here, it was demonstrated and prejudicially prejudged when and how Petitioner will proceed to trial, "it would ... keep the people feet to the fire.'" *See id.*, DktEntry #14, at 21.

Petitioner was kept away from "the fire" and unfortunately only for Petitioner, five pairs of his witnesses' feet would never be warmed and abled to testified at Petitioner's trial. Moreover, the AUSA sarcastically concluded: "As a result, [Petitioner] has waived a Speedy Trial Act claim in this proceeding." *Id.*, DktEntry #28-1, at 27. Accordingly, these judicial statements are contrary to the applicable law, and the abuse of the judicial discretion by the federal judiciary makes the law useless.

This Court held, that "the suppression by the prosecution of evidence favorable to an accuse upon request violates [] due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *See Brady v. Maryland*, 373 U.S. 83, 87 (1963). In the case at bar, the district court noted that "*Bready* and its progeny arise in a post-trial context. Specifically, these cases address after trial whether the failure to disclose favorable material evidence in violation of defendant's due process rights justifies a new trial." *See United States v. Acosta*, 357 F.Supp.2d 1228, 1232 (D.C. Nev. 2005) (citation omitted).

In *Acosta*, the identical U.S. Magistrate Judge as in Petitioner's case, "require[ed] government prosecutors to timely disclose before trial all evidence or information known that tends to negate the guilt of the accused or mitigate the offenses charged." *See id.*, at 1231 (emphasis added). There coincidently as in Petitioner's case, the AUSA, and the CJA counsel for one of all forty-four defendants, were prosecutor and attorney, respectively. There, the magistrate's "order further directs the government to make these disclosures no later than sixty (60) days before trial." *Id.* Here, in Petitioner's case and eighteen months following his arrest or indictment the same magistrate judge ignored Petitioner's question about disclosure and redirected her obligation to CJA counsel.

On March 2, 2012, of Petitioner's "Jury Trial (Day 4)," he saw 72 CDs on the defense table

when was escorted back to Courtroom 7C, for the afternoon court's session. *See* Dkt. #213. After CJA counsel's briefly complaint of the late disclosure and the following tense argument between the court and the AUSA, Petitioner heard the word "exculpatory" for the first time. Defense investigator wrote the word on Petitioner's notepad and explained the meaning of the phrase. The court clerk was ordered to dial the detention center, and the trial judge spoke with jailhouse personnel to ensure that Petitioner would have a place and time to review the untimely disclosed CDs.

The trial judge never checked on this issue during trial whether Petitioner was given an opportunity to review the 56 only accessible CDs. Then, at Petitioner's sentencing hearing, he brought the issue of two phone calls to judge's attention, reminding the court of Petitioner having received the 72 CDs at trial, and that a few days after the trial he had discovered their contents. Petitioner's monolog was not acknowledged by the presiding judge. More than a dozen witnesses were present at the courtroom incident who heard the phone conversation, and contrary to any of the AUSA's explanations there is no record that Petitioner received any other evidence.

The inventory list for the 72 CDs-Exhibit A; the copy of two pages of the plastic envelope-Exhibit B; the copy of the notepad page fourteen-Exhibit C; the copy of the informant's bank debit card-Exhibit D; and the copy of only video CD included in the 72 CDs-Exhibit E, were attached to the motion for a new trial. *See* Dkt. #343. On November 20, 2015, Petitioner discovered that page Thirty-Three (33) from the original motion was misplaced and omitted from the Government's Supplemental Excerpts of Record. *See* 9th Cir. Case No. 14-10437, DktEntry #15, at SER35-6. The Exhibits A-E were not included in the supplemental excerpts of record either.

CJA counsel disqualified the motion for new trial under Fed.R.Crim.P. 33(b)(2), by not filing it in its time limits and only filed a notice of appeal three months later. Under the case law,

Petitioner who made *pro se* motion more than fourteen days after the trial bears the heavy burden of showing that the evidence would probably result in an acquittal upon retrial. *See United States v. Wright*, 625 F.2d 1017, 1019 (1st Cir. 1980). Here instead, the new evidence was wrongly withheld by the prosecution in violation of its obligations under *Brady*, and it is enough Petitioner to show that the evidence undermines confidence in the verdict. *See Kyles v. Whitley*, 514 U.S. 419, 435 (1995). The district court never reached Petitioner's *Brady* claim in his *habeas* petition.

Petitioner was denied effective assistance of appellate attorney where CJA counsel failed to file timely motion for new trial. As the Ninth Circuit held in *Menefield v. Borg*, "[a]s a practical matter, the motion for new trial is the defendant's last opportunity for an unconstrained review on the merits of the evidence against him." 881 F.2d 696, 699 (9th Cir. 1989). This is so, because "[o]n appeal, both jury conclusions and the factual decisions of the trial court are either immune from review or treated under a highly deferential standard." *See id.*, (citations omitted).

Petitioner was denied competent assistance of appellate counsel where CJA counsel failed to file a proper brief under *Anders v. California*, in support of his absent motion to be relieved of his appointment to represent Petitioner on direct appeal, and therefore Petitioner demonstrated cause and prejudice for the failure to raise all issues presented in Petitioner's Section 2255 Motion, rather, timely on direct appeal. The *Anders* brief is designed to safeguard a defendant's Sixth Amendment right to direct appellate counsel. *See Anders*, at 745.

Accordingly, CJA counsel was not functioning as counsel guaranteed by the Sixth Amendment, so as he was neither knowing the law nor willing to use the available law, and to provide reasonably effective assistance. Nevertheless, CJA counsel's deficient assistance and fatal errors were so serious where he failed to protect Petitioner's basic interest and deprived him of a fair trial. Evidently, CJA counsel divested Petitioner's right to present meritorious claims on direct

appeal. "This procedure will assure penniless defendants the same right and opportunities on appeal-as nearly as is practicable-as are enjoyed by those persons who are in a similar situation but who are able to afford the retention of private counsel." *See Anders*, at 745.

The AUSA admitted that, "the investigation involves 15 court orders for the interception ... over a nine-month period in 2009 and 2010 ... and documents obtained from searches in June 2008 and May 2010, video of [] [Petitioner]'s residence from approximately December 2008 to May 2010 ... and GPS [Global Positioning System] tracking logs of cellular telephones." *See* Dkt. #48, at 2-3 (emphases and ellipses added). Petitioner's home was surveilled "from the street and by helicopter." *See* 9th Cir. Case No. 12-10336, DktEntry #28-1, at 11. "T-Mobile tracked [Petitioner]'s cellular phone to the intersection of Sahara and Durango." *Id.*, at 9 (emphasis added).

In Petitioner's case, "[t]he court had issued a complex discovery at the beginning of the case, May 24, 2010." *See* 9th Cir. Case No. 12-10336, DktEntry #14, at 30. The discovery order is not shown for public access on the criminal docket of Petitioner's case, and out of 333 docket numbers, 132 are omitted from the record and 33 are sealed for access, as CJA counsel refused assistance. In Petitioner's case, the suppressed, exculpatory, material, and impeaching evidence came to light only after trial, whereby constituting a newly discovered and undisclosed evidence, by their omission from the jury, contrary to the Nevada District Local Rule IA 10-7(a).

"I asked for a copy of my discovery ... in order to rece[i]ve a speedy and public trial[.]" *See* Dkt. #46, at 2 (emphasis and ellipsis added). In *Faretta v. California*, this Court, in implying from the Sixth Amendment another personal right of an accused, observed that, "[i]t is the accused, not counsel, who must be 'informed of the nature and cause of the accusation,' who must be 'confronted with the witnesses against him,' and who must be accorded 'compulsory process for obtaining witnesses in his favor.'" 422 U.S. 806, 819 (1975).

The first co-defendant's "telephone ... recorded a total number of 3,976 calls[.]" *See* Dkt. #112, at n.3 (ellipsis added). Petitioner received untimely 24 calls as dated from October 10, 2009, through April 8, 2010. A "total number of 1,655 calls" were recorded of the second co-defendant's telephone, as only 8 calls were disclosed late to Petitioner, dated from January 8, through March 3, 2010. *See id.* A "total number of 10,539 calls" were recorded from Petitioner's telephone as 11 calls were disclosed on March 2, 2012, and are dated from September 2, until December 31, 2009. *Id.* "However, the government did not begin the use of court-authorized electronic surveillance until July 27, 2009[.] *See* Dkt. #136, at 5. "On January 20, 2009, a pole camera installed near [Petitioner]'s home captured '[Petitioner, who is automotive technician and worked at his yard,] striping parts of the Jetta off.'" *See* 9th Cir. Case No. 12-10336, DktEntry #28-1, at 9 (emphases added).

The AUSA introduced this information at trial and noticed to the jury from an agent's testimony that the video footage was damaged. CJA counsel failed to object and the trial court erroneously admitted second agent's testimony without showing any record for Petitioner's seized personal computers. The court allowed and CJA counsel neither objected a third testimony of another ex-agent, for the use of GPS to track and recording the location of Petitioner's phone, and the whereabouts of any object attached to it. Proffering testimonies about Petitioner's phone and his computers, instead of introducing the GPS data, nor the record from all computers, therefore, it was analogous to proffering testimony describing a pole hidden camera footage of an event to provide the facts of the event instead of introducing the footage itself.

At trial, the prosecution showed a few aerial photographs taken from above Petitioner's residence, and the surveillance images were not disclosed in Petitioner's 72 CDs. A picture of a red Jaguar car was introduced and was neither enclosed in the late 72 CDs. Several still pictures

were exhibited before the jury, showing the confidential human source ("CHS") and an unidentified engine at his house with Petitioner's presence, and the photos were suppressed. The agents' testimonies absent of tangible evidence, GPS-based testimony without record, and the representations of the pictures before the jury, which were withheld from Petitioner are errors with constitutional magnitude and prejudice to Petitioner's trial defense.

The agents seized by the sweep-standard and the prosecution suppressed the Certificate of Title; Vehicle Contract and Security Agreement; Dealer's Report of Sale; Bill of Sale; co-defendant's power of attorney by the other co-defendant owner of the car; and the last Registration Certificate for both vehicles of which Petitioner was convicted. Both events were introduced to Petitioner in 2015, as shown on the fill out Form #67A under numbers 080612-1610 and 100519-0396, and the two documents are neither filed in the state court nor in the federal court.

CJA counsel was ineffective in failing to move to suppress wretchedly inadequate search warrants regardless where the motion would have been granted or not, and Petitioner would have been acquitted with the returned evidence or not. *See* Fed.R.Crim.P. 41(g). CJA counsel failed to challenge the scope and the legality of the alleged search warrants. The totality of the circumstances expressly supports the fact, that the unchallenged evidence from co-defendants' wiretaps; the filming over Petitioner's residence; the GPS intercepted data gained from Petitioner's phone and his wiretaps; the taken pictures obtained from a helicopter hovering above Petitioner's property; the search and seizure at Petitioner's property were federal in character, whereby hence governed by the requirement of Rule 41. *See* Fed.R.Crim.P. 41(a).

"This circuit has joined numerous others in holding that the Fourth Amendment imposes similar warrant requirements on the government's use of video surveillance as the wiretap statute imposes upon the use of audio surveillance." *See United States v. Nerber*, 222 F.3d 597, n.9 (9th

Cir. 2000) (citation omitted). The federal wiretapping statute goes further to protect privacy than the Fourth Amendment. "Except as expressly authorized in Title III, however, all interceptions of wire and oral communications are flatly prohibited." *See Gelbard v. United States*, 408 U.S. 41, 46 (1972).

CJA counsel failed to object before the district court that the prosecution had the burden and miscast its duty to establish that the only co-defendant who testified knew that both vehicles were fraudulently obtained. The "knowing" requirement imposes a much higher *mens rea* than that required under aiding and abetting, and no sufficient evidence existed for that required and missing element to both Sections 2314 and 2315, in Title 18, of the U.S. Code.

The indicated co-defendant entered into an agreement with the prosecution not to serve any time in prison, in exchange for his false testimony against Petitioner. *See* Dkt. #249 ("Motion for Departure under U.S.S.G. § 5K1.1 by USA"). Although, he was not charged for his ATM-scheme and crime, his sentence for the legal possession of two vehicles was suspended. At cross-examination, in response to question asked by CJA counsel, as to whether he had received any promise of consideration for leniency by the AUSA in return for his testimony, co-defendant wisely answered that he did not seek any favors, as well as of another witness who was not charged.

In *Giglio v. United States*, "the Government [] had failed to disclose an alleged promise made to its key witness that he would not be prosecuted if he testified for the Government." 405 U.S. 150- 151 (1972). In *Napue v. Illinois*, this Court noted that "[t]he same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears." 360 U.S. 264, 269 (1959) (citation omitted). In Petitioner's case these laws were ignored by AUSAs.

The prosecution suppressed the material evidence under the Jencks Act, 18 U.S.C. § 3500, and CJA counsel failed to seek disclosure under this Act, for all statements of co-defendant, an

unindicted witness, CHS, police officers, the custodians from the financial institutions and car dealerships, as well as the three grand jury's transcripts, and other AUSA's witnesses who testified at Petitioner's trial. *See* 18 U.S.C. § 3500(b) and (c).

In the case at bar, the prosecutorial misconducts throughout the pre-trial, trial, and post-trial stages, and the violations of Constitutional rights were significant to prejudice Petitioner from a fair trial and these conducts manifest great injustice. "The court observed that only in cases of outright denial of counsel, of affirmative government interference in the representation process, or of inherently prejudicial conflicts of interest had this Court said that no special showing of prejudice need be made." *See Strickland v. Washington*, at 682 (citation omitted).

The Fifth Circuit, held in *United States v. Cuevas-Sanchez*, 821 F.2d 248, 251 (5th Cir. 1987), that the videotaping activities in a suspect's backyard constitutes a "search" within the meaning of the Fourth Amendment. Petitioner's videotaping was unauthorized and used in a court of law.

Admission of evidence obtained by warrantless use of the GPS device violates the Fourth Amendment. *See United States v. Maynard*, 615 F.3d 544 (D.C. Cir. 2009). "And the Government's unrestrained power to assemble data that reveal private aspects of identity is susceptible to abuse." *See United States v. Jones*, 565 U.S. 400, 416 (2012). Here, Petitioner's phone was used as a tracking device without a court's authorization as well as used before the court of law.

This Court denied review of a California Appeals Court decision suppressing evidence gained through the aerial observations of a helicopter hovering at 400 to 500 feet above the defendant's backyard. *See People v. Sabo*, 185 Cal.App.3d 845, 230 Cal.Rptr. 170 (4 Dist. 1986), *cert. denied*, 481 U.S. 1058 (1987). The pictures used at Petitioner's trial were neither disclosed to him nor authorized by the state or federal court.

CJA counsel failed to raise any Fourth Amendment claims, demonstrating actual prejudice where the claims were meritorious. *See Kimmelman v. Morrison*, 477 U.S. 365, 382 (1986). "The principles governing ineffectiveness claims apply in federal collateral proceedings as they do on direct appeal or in motions for a new trial.: *See Strickland*, at 697.

In Petitioner's case, five of the alleged vehicles are implicated in Counts 10, 13, 14, 16, and 23, in violation of § 1343, or in other words for their credit loans. In a second prosecution, the item money was converted with a car in Counts 25, 26, 27, 28, and 29, or this time in violation of § 2314. In Count 30, the same vehicle of Count 29 or its loan money in Count 10, was lodged again this time in violation of § 2315. Petitioner was acquitted in Counts 10 and 29, for the loan and the car, and convicted in Count 30, for the same vehicle that was acquitted for its credit loan in Count 10. The double jeopardy has precluded by the Fifth Amendment whether in a former prosecution a verdict was a conviction or acquittal. *See United States v. Ball*, 163 U.S. 662, 671 (1896).

The meaning of the statutory language requires that the items of "goods" which allegedly are transported in interstate or between two states be "the same" as those "stolen, converted or taken by fraud," a physical identity between these items which are unlawfully obtained and eventually transported or received, and hence some prior physical taking of the subject goods. *See Dowling v. United States*, 473 U.S. 207, 216 (1985); *see also* 18 U.S.C. §§ 2314-2315.

Counts 30 and 31, did not inform a conduct of "sale" in the indictment, as is included in Section 2315's provisions. *See* 18 U.S.C. § 2315. The choice for the charging terms is the conjunctive phrase for "receive and conceal' in both counts, as it was presented before three grant juries. *See* Dkt. ##1, 119, and 165, at 16. This Court explained, "that a court cannot permit a defendant to be tried on charges that are not made in the indictment against him." *See Stirone v.*

United States, 361 U.S. 212, 217 (1960) (citations omitted).

Counts 30 and 31, also failed for their interstate commerce factor of Section 2315, that neither could be applied retroactively nor permits constructive jurisdiction to be exercised without limits. In addition, the "conceal" element failed in absence of sufficient evidence. Nevertheless, the concept of "stolen" property requires an interference with the property rights of its owner, and with its consent, cannot be considered "stolen" within the meaning of §§ 2312-2315. Neither a creditor's rights are ownership rights in property, nor a creditor on a simple contract is a purchaser of the property. *See United States v. Carman*, 577 F.2d 556 (9th Cir. 1978).

In the case at bar, Petitioner shows a claim of actual innocence and cause by CJA counsel's ineffectiveness that serves to lift the procedural bar, whereas the appellate court approved Petitioner's request *in forma pauperis* and extended review on the motion for new trial and behind the deadline point for timely filing of Petitioner's Section 2255 Motion. Petitioner respectfully urged the district court to grant Petitioner's "motion to vacate the convictions on Counts 30, 31, 32, and 34, of the indictment against him, or, at a minimum to grant [Petitioner] an evidentiary hearing on the instant motion." *See* Dkt. #381 (emphasis added).

Accordingly, Petitioner filed motion for discovery under Fed.R.Civ.P. 6(a), based on good cause and the discretion of the district court. *See* Dkt. #385. Good cause exists "where specific allegations before the court show reason to [] believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is ... entitled to relief[.]" *See Bracy v. Gramley*, 520 U.S. 899, 908-09 (1997) (quoting *Harris v. Nelson*, 394 U.S. 286, 300 (1969) (alteration in original)). Where good cause exists, "it is the duty of the court to provide the necessary facilities and procedures for an adequate inquiry." *See Harris*, 394 U.S. 286, at 300.

The undersigned AUSA characterized Petitioner's discovery motion as a "broad and

unsupported," whereat Petitioner "gives no explanation for how the documents he seeks are relevant to any claim he may properly raise in a § 2255 motion." *See* Dkt. #390, at 3 (citing *Calderon v. U.S. Dist. Court*, 98 F.3d 1102, 1106 (9th Cir. 1996)). The AUSA stated that even though, "a district court must give a defendant an opportunity to respond[,]" his § 2255 motion ultimate failure, once again cause by the suppressed evidence, "will render this motion for discovery moot[,]" rather, to resolve Petitioner's discovery need before his § 2255 motion's determination. *Id.*, at 3 (citation omitted).

Here, this method was a manifest miscarriage of justice, and repeatedly applied conduct by the prosecution intended to deprive Petitioner of his Constitutional right to have the evidence disclosed, and neither to introduced it before a criminal tribunal. The double purpose of this infamous prosecutorial technique was used to cover the illegally intercepted records of electronic surveillance, by an extensive fishing expeditions to investigate—a conduct of crime prohibited by federal law—; as unlawfully seized and suppressed evidence from Petitioner's residence—contrary to the United States Constitution—; and "successfully used [CJA] counsel as the arm of the prosecution[,]" who stipulated with AUSA against Petitioner's interest and consent regarding the evidence in control and possession of the prosecution. *See* Dkt. #381, at 5 (emphasis added).

Petitioner filed Section 2255 Motion with the district court two days after this Court denied his petition for a writ of *certiorari*. Although, Petitioner "has been filing motions and petitions in this Court, the court of appeals, and the Supreme Court regularly since he was convicted," AUSA claimed further that "a court *cannot* toll the one-year limitation period absent a showing of diligence and extraordinary circumstances, and observing that 'the threshold necessary to trigger equitable tolling is very high." *See* Dkt #390, at 3 (emphasis in original, citation omitted).

The Ninth Circuit held in *Roy v. Lampert*, that when the court in assessing whether to grant

equitable tolling, explains further that "even though *pro se* status alone is not enough to warrant equitable tolling, it informs and colors the lens through which we view the filings, and whether these filings made sufficient allegation or diligence." 465 F.3d 964, 970 (9th Cir. 2006), *cert. denied*, 549 U.S. 1317 (2007). Here, the district court neither "view the filings" nor determine "whether these filings made sufficient allegation or diligence." The court "does not find that the Motion was timely," and further "finds that subsection (f)(2)-(4) are not inapplicable in this case." *See* Appendix C, at 7-8.

Under Title 28 U.S.C. Section 2255(f)'s provision states: "A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of—[.]" *See id.* Accordingly, "the date on which the impediment to making a motion created by the government action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action[.]" *See* § 2255(f)(2).

Petitioner's motion for new trial was filed by the clerk on August 15, 2014. *See* Dkt. #343. The complete motion has forty-nine pages including five pages with exhibits A through E. In April 2015, AUSA filed before the court of appeals the Government's Supplemental Excerpts of Record. *See* 9th Cir. Case No. 14-10437, DktEntry #15 (page Thirty-Three[3] and Exhibits A-E omitted). "[T]he date on which the [AUSA] implement to making a motion created by the government action in violation of the Constitution or laws of the United States is removed[.]" *See* § 2255(f)(2). Thus, Petitioner "was prevented from making a motion by such governmental action[.]" *Id.*

"[T]he date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to

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[3] *See* Dkt. #383, Motion for Evidentiary Hearing in Support of § 2255 Petition (page Thirty-Three is attached as Exhibit C). Petitioner does not have access to the sealed court docket.

cases on collateral review[.]" *See* § 2255(f)(3). This Court held "[i]n all these cases, and many others which have been examined, relief has been granted, on the ground that, by some fraud practised directly upon the party seeking relief against the judgment or decree, that party has been prevented from presenting all of his case to the court." *See Throckmorton*, at 66.

"[T]he date on which the facts supporting the claim or claims could have been discovered through the exercise of due diligence." *See* § 2255(f)(4). "Until today, a district court could dismiss an untimely petition without delving into the underlying facts. From now on, each time an untimely petitioner claims innocence—and how many prisoners asking to be let out of jail do not?—the district court will be obligated to expend limited judicial resources wading into the murky merits of the petitioner's innocence claim." *See McQuiggin v. Perkins*, 569 U.S. 383, 411 (2013).

"In order to pass through [] *Schlup's* gateway, and have an otherwise barred constitutional claim heard on the merits, a petitioner must show that, in light of all the evidence, including evidence not introduced at trial, 'it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt.'" *See Majoy v. Roe*, 296 F.3d 770, 775–76 (9th Cir. 2002) (quoting *Schlup v. Delo*, 513 U.S.298, 327 (1995)). Here, Petitioner's claim of innocence is substantive, rather than procedural. His constitutional claims are based on his innocence, rather on contention of CJA counsel's ineffectiveness, *see Strickland*, and the withholding of evidence by the AUSA, *see Brady*, denied him the full panoply of protections afforded to criminal defendants by the Constitution.

In the case at bar, Petitioner is actually and legally innocent. A "lawyer who fails adequately to investigate and introduce ... [evidence] that demonstrate[s] his client's innocence, or that raise[s] sufficient doubt as to that question to undermine confidence in the verdict, renders deficient performance." *See Duncan v. Ornoski*, 528 F.3d 1222, 1234 (9th Cir. 2008) (citations omitted).

CONCLUSION

The petition for a writ of *certiorari* should be granted.

Respectfully submitted,

Date: September 14, 2018