

No. 18-7571

ORIGINAL

Supreme Court, U.S.
FILED

OCT 22 2018

OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

Gabriel C. Valencia — PETITIONER
(Your Name)

VS.

Davey Warden - California — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United States Court of Appeals for the Ninth Circuit/Central Dist.
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Gabriel C. Valencia
(Your Name)

S.V.S.P. C-2-A #106 P.O. Box 1050
(Address)

Solidad Ca. 93960
(City, State, Zip Code)

☎
(Phone Number)

QUESTION(S) PRESENTED

1. Whether the Circuit, District and State courts denials and dismissals of Petitioners BRADY VIOLATION claim violate petitioners Due Process Rights Guaranteed him by the United States Constitution 5th 6th and 14th Amendments.
- A. Whether Petitioners above rights were violated due to the destruction of the initial recorded statement of the Victim Danielle Martinez by the investigating agency. Prejudicing Petitioners defence.
- B. Whether Petitioners above rights were violated when the initial recorded interview in question could not be provided for the jury to weight out the evidence, Prejudicing Petitioners defence.

LIST OF PARTIES

[] 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:

1. The United States District Court
U.S. Courthouse Room G-8
Los Angeles Ca. 90012.

2. Solicitor General of the United States
Room 5614, Department of Justice
950 Pennsylvania Ave.
N.W. Washington D.C.
20530-0001.

TABLE OF CONTENTS

OPINIONS BELOW.....	1
JURISDICTION.....	
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	
STATEMENT OF THE CASE	
REASONS FOR GRANTING THE WRIT	
CONCLUSION.....	

INDEX TO APPENDICES

APPENDIX A- Jurisdiction, United States Court of Appeals for the Ninth Circuit, Orders, Supreme Court of the United States, Clerk instructions.

APPENDIX B- United States Central District Court Recommendations, Proceedings and Decisions.

APPENDIX C- State Courts Procedural History.

APPENDIX D- Transcripts of the case (Evidence). In support of BRADY VIOLATION. Sub-claims 1-15.

APPENDIX E

APPENDIX F

TABLE OF AUTHORITIES CITED

CASES

PAGE NUMBER

<u>Brady V. Maryland</u> , 373 U.S. 83. (1963)	Sub-claim 1-15.
<u>Dudley V. Duckworth</u> , (7th Cir 1988) 854 F. 2nd 967.	
<u>People V. Garcia</u> , (1993) 17 CA 4th 1169, 22 CR2d 545.	
<u>People V. Ainsworth</u> , (1990) 217 CA 3d 247, 251, 266 CR175.	
<u>People V. Sanders</u> , (1990) 51 C3d, 471, 508, 273, CR537.	
<u>People V. Hernandez</u> , (1988) 204 CA 3d 639, 251 CR393.	
<u>In re Sodersten</u> , (2007) 146 CA 4th 1163, 1224.	
<u>People V. Evans</u> , (1952) 39 C 2d, 242, 252.	
<u>Stanley V. Schiro</u> , 589 F. 3d 612, 624 (9th Cir 2012)	
<u>In Williams V. Taylor</u> , (2000) 529 U.S. 362, 431, 146, LEA 2d 389, 448, 1205 CT 1495.	
<u>Insyxlongmay V. Morgan</u> , 403 F. 3d 657 (9th Cir 2005) —	

STATUTES AND RULES

<u>United States Constitution Due Process Rights Amendments 5th, 6th and 14th.</u>
<u>Constitutional Law § 525- Safeguarding Liberty of Citizen.</u>
<u>Constitutional Law § 520- Due Process Conduct of Prosecuting officers.</u>
<u>Constitutional Law § 840- Due Process Prosecution Suppression of Evidence.</u>
<u>Evidence § 275- Presumption, Jurisdiction over State courts to Protect</u>
<u>Constitutional Rights.</u>

OTHER

<u>11.31 VII Post Judgement Discovery</u>
<u>Jones V. Wood</u> , 114 F. 3d 1002 (9th Cir 1997)
<u>Merril V. Superior Court</u> , (1994) 27 CA 4th 1586, 33 CR2d 515

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 BELOW

☒ 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,

☒ is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

☐ reported at _____; or,

☐ has been designated for publication but is not yet reported; or,

☒ is unpublished.

☐ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix C to the petition and is

☐ reported at _____; or,

☐ has been designated for publication but is not yet reported; or,

☒ is unpublished.

The opinion of the Appeals Court court appears at Appendix C to the petition and is

☐ reported at _____; or,

☐ has been designated for publication but is not yet reported; or,

☒ is unpublished.

JURISDICTION

☒ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was 12/12/17.

☐ 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: August 29th 2018, and a copy of the order denying rehearing appears at Appendix A.

☒ An extension of time to file the petition for a writ of certiorari was granted to and including 11/5/18 (60 days) (date) on _____ (date) in Application No. A.

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

☒ For cases from **state courts**:

The date on which the highest state court decided my case was June 8 2016. A copy of that decision appears at Appendix C.

☐ A timely petition for rehearing was thereafter denied 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. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Violation of Petitioners Due Process Rights Guaranteed by Amendments 5th, 6th and 14th to the United States Constitution.

Brady V. Maryland, 373 U.S. 83 (1963) Analysis: BRADY

Elements, There are three elements to a BRADY claim. First there must be evidence that is favorable to the defence either because it is exculpatory or impeaching. Second the government must have willfully or inadvertently failed to produce the evidence. Third the suppression must have prejudiced the defendant. Mike V. Ryan, 711 F.3d (1998) 1012 (9th Cir 2013) (Citing STRICKLER, 527 U.S. at 281-82) The court addressed each element separately (A, B and C). In Brady V. Maryland, 373 U.S. 83 (1963) This court held that irrespective of good or bad faith of the prosecution where evidence is material either to guilt or to punishment the suppression of such evidence violates Due Process. In the United States V. Augurs, 427 U.S. 97 (1976) This court held that the duty to provide material evidence to the defence is so basic that it exists even in the absence of a specific defence request.

UNITED STATES CONSTITUTIONAL LAW

Constitutional Law § 525 - Safeguarding Liberty of Citizen.

The Constitutional requirement of Due Process in Safeguarding the liberty of the citizen against deprivation through the action of the state, embodies the fundamental concept of justice which lie at the base of civil and political institutions of the United States.

Constitutional Law § 520 - Due Process Conduct of Prosecuting Officers.

The action of prosecution officers on the behalf of the state may constitute state action within the purview of the Due Process Clause

of the Fourteenth Amendment.

Constitutional Law § 840 - Due Process Prosecution Suppression of Evidence. The suppression by the prosecution of evidence favorable to and requested by an accused violates Due Process where the evidence is material either to guilt or to punishment irrespective of the good or bad faith of the prosecution.

Evidence § 275 - Presumption, Jurisdiction over state courts to protect Constitutional Rights. It may not be assumed that a state has denied to its courts jurisdiction to protect and enforce a right secured by federal Constitution upon a proper showing and in an appropriate proceeding for that purpose.

Stanley V. Schniro, 589 F.3d 612, 624 (9th Cir 2010) Petitioner entitled to evidentiary hearing because petitioner developed factual basis for that claim that if proven would entitle him to relief.

In Williams V. Taylor, (2000) 529 U.S. 362, 431, 146, LE d 2d 389, 448, 120 S.Ct. 1495,

The Supreme Court rejected the argument that under the 'A.E.D.P.A.' forbids an evidentiary hearing in every case in which the factual basis for the claim has not been developed in state court, holding that the phrase 'failed to develop' implies lack of diligence or some other fault of petitioner or the petitioners attorney - thus when a petitioner has done every thing in his or her power to develop the claim, but further factual development is necessary, the district court may hold an evidentiary hearing, see also: Insyxlengmay V. Morgan, 403 F.3d 657 (9th Cir 2005); and Jones V. Wood, 114 F.3d 1002 (9th Cir 1997)

Dudley V. Duckworth (7th Cir 1988) 854 F.2nd 967, Admission of evidence that witness for state recieved threats that were not connected to the defendant, sanctioned by the state court on the theory that it was relevant to explain witness nervousness, Violated Due Process under the circumstances of this case.

BRADY: Brady duty to disclose encompasses impeachment evidence. The United States Supreme Court has never drawn a distinction for Brady purposes between impeachment evidence, i.e., evidence that reflects on the credibility of a witness and evidence that is directly exculpatory. see U.S. v. Bagley, Supra. The prosecutors duty to disclose material evidence that is favorable to the accused includes the duty to disclose evidence that would impeach the testimony of material witnesses. U.S. v. Bagley, Supra see also Giglio v. U.S. (1972) 405 U.S. 150, 153, 31 LEd 2d 104, 108, 92 S Ct 763. In addition, the Brady obligation may well require disclosure of reports and statements of experts and witnesses the prosecutor does not intend to call at trial. Brady also places a duty on prosecutors to learn of any favorable evidence known to others acting on the governments behalf, including the police and crime labs. Kyles v. Whitley (1995) 514 U.S. 419, 131 LEd 2d 490, 115 S Ct 1555; In re Brown (1998) 17 C 4th 873, 72 CR2d 698; see People v. Little (1997) 59 CA 4th 426, 68 CR2d, 907.

Prosecutors failure to disclose Brady materials even when negligent, can result in reversal see Merrille v. Superior Court, (1994) 27 CA 4th 1586, 33, CR2d 515; People v. Robinson, supra. A prosecutors intentional failure to disclose Brady materials may be misconduct. see People v. Garcia (1993) 17 CA 4th 1169, 1183, 22 CR2d 545. On appeal evidence is considered material "only if there is a reasonable probability that had it been disclosed to the defence the result would have been different". Reasonable Probability is defined as a probability sufficient to undermine the confidence in the outcome. In re Sassounian, (1995) 9th C 4th 535, 544, n6, 37 CR2d 446 (citing U.S. v. Bagley, Supra.) see also Kyles v. Whitley (1995) 514 U.S. 419, 131 LEd 2d 490, 115 S Ct 1555; discussion in § 1128. The materiality of omitted evidence is assessed in light of other evidence, not merely in terms of its probative value standing alone. 514 U.S. at 436. —

§ 11.31 VII Post Judgement Discovery. A prosecutors duty to disclose substantial material evidence favorable to the accused even without a request does not end when the trial is over. People V. Garcia (1993) 17 CA 4th 1169, 22 CR2d 545.

(failure to disclose, during pendency of Appeal, exculpatory evidence going to credibility of key prosecuting witness resulted on defence success on habeas.)

After a petition for post conviction relief has been filed, the petitioner may seek permission from the court in which the case is pending to conduct discovery.

see People V. Ainsworth, (1990) 217 CA 3d 247, 251, 266 CR 175.

Photo Id: A procedure that is unfair suggests the identity of the person in advance of identification by witness. People V. Sanders, (1990) 51 C3d 471, 508 273, CR537: People V. Hernandez (1988) 204 CA 3d 639, 251 CR 393.

In re Sodersten (2007) 146 CA 4th 1163, 1224 (Failure to disclose tape-recording statements (recorded) of the two key trial witnesses that contained inconsistent statements, as well as admission of lying and coercive interrogation of one of the witnesses, violated Brady.)

In challenging the fairness of a photo line-up, the burden is on the defendant to show that the line-up was so impermissibly "suggestive" as to give rise to a very substantial likelihood of "irreparable misidentification", That deprives him or her of Due Process. Simmons V. U.S. (1968) 390 U.S. 377, 384 88 S Ct. 967. see also People V. Avila, (2009) 46 C 4th 680, 700. The unfairness must be demonstrable reality not merely speculation. People V. Desantis (1992) 2 C 4th 1198, 1222.

Single photo identifications are less reliable than those involving multiple photos compare. People V. Evans (1952) 39 C 2d 242, 252.

The California Supreme Court; Has clearly and plainly explained what must be disclosed: Evidence is favorable and must be disclosed if it will either help the defendant or hurt the prosecution.

People V. Coddington, (2000) 23 Cal 4th 529, 589.

Attention: All in support of BRADY VIOLATION Sub-claims 1-15.

Statement of the Case

the same incident. Three prior felony convictions were alleged in support of this count. (Pen. Code, § 12021, subd. (a)(1).) (1 CT 94.) In count III, it was charged that appellant dissuaded a witness, Danielle Martinez. It was further alleged that such act was accompanied by force and an express and implied threat of force and violence upon her. (Pen. Code, § 136.1, subds. (a) & (b)(1).) (1 CT 95.)

It was also alleged as to all counts, pursuant to Penal Code section 186.22, subdivision (b)(1)(C), that the offenses were committed for the benefit of, at the direction of, and in association with a criminal street gang. (1 CT 95.)

It was also alleged, pursuant to Penal Code sections 667, subdivision (a)(1), 667, subdivisions (b) through (i), and 1170.12, subdivisions (a) through (d), that appellant had suffered a prior felony conviction in 2002. (1 CT 96.)

Trial of the prior convictions was bifurcated. (1 CT 130.) Trial was by jury. (1 CT 130-139, 171-172, 206-207.) The jury found appellant guilty of second degree robbery, as charged in count I. The jury found the allegation the a principal personally used a handgun, pursuant to Penal Code section 12022.53, subdivisions (b) and (e), to be true. It found the allegation that he personally used a handgun within the meaning of Penal Code section 12022.53, subdivision (b), to be not true. The allegation pursuant to Penal Code section 186.22, subdivision (b)(1)(C), was also found to be true. (1 CT 200.)

Appellant was found guilty of possession of a firearm by a felon, as charged in count II. The allegation pursuant to Penal Code section 186.22, subdivision (b)(1)(C), was found to be true. (1 CT 201.) He was also found guilty of dissuading a witness, as charged in count III. The allegation pursuant to Penal Code section 186.22, subdivision (b)(1)(C), was found to

STATEMENT OF THE CASE

In an information filed in the Los Angeles Superior Court on October 5, 2011, appellant was charged, in count I, with the robbery of Danielle Martinez on August 25, 2011. (Pen. Code, § 211.) (1 CT 94.) It was alleged that a principal personally used a firearm – a handgun. (1 CT 94; Pen. Code, § 12022.53, subds. (b) and (e)(1).) In count II, appellant was charged with being a felon in possession of a firearm, in connection with

minute and a half, they returned, got into their van, and left. (2 RT 365.) The thieves took her money, her blowdryer, her driver's license, and her credit cards. (3 RT 611-612.) Later, she told police officers that one of the men wrote down her license plate number (2 RT 369.) At trial, she was positive that neither man told her that they had her personal information, and knew where to find her if she told anyone what happened. (2 RT 371.)

The police came within a few minutes. Just before the police arrived, Contreras returned. She asked him what was going on, and who those men were. Contreras told her he did not know them, and had no idea what was going on. She told the police she had been robbed. (3 RT 616-617.) They took her to the station and interviewed her there. (3 RT 618.)

When she was interviewed by the police an hour or so after the incident, she told the officer she did not recognize anyone in the photographic arrays he showed her. (2 RT 375-376.) During the first interview, the officer told her to go ahead and circle the picture, even if she was not sure of the identification. (3 RT 644-646.)

In Martinez's first police interview on the night of the robbery, she told the officer that the driver was the one with the handgun, and also the one who hit her. Later, when she was less upset, she realized she had not been hit with a gun. The blow to her head was not hard enough. (3 RT 633.) She pointed to one of the pictures in the second lineup and told the officer it resembled one of the men. He told her to circle the picture. When she spoke with Detective Avila four days later, she told Avila that the person she circled might not be the robber. (3 RT 636-637, 648.) At the first interview, she described the van as a light-colored Toyota. (3 RT 674.) Prior to the robbery, Contreras and she had been friends for a few years. (3 RT 659.) After the robbery, she heard there were people trying to reach Contreras. She thought she might have been set up. (3 RT 664.) She

jumped back in the van and left. The police came within a few minutes. (3 RT 780-781.) The people in the van never chased him. (3 RT 782.) He thought “maybe” one of them had a shaved head. When he approached Martinez, she said they robbed her. He asked her if she was all right. (3 RT 783-784.)

When the police arrived, they separated Contreras and Martinez. They interviewed Contreras about what had happened. (3 RT 786.) Later that night, they showed him some photographic lineups. (3 RT 787-788.) He could not recall the conversation with the officers. He admitted that he recognized one picture as that of a person he had seen at a friend’s house. (3 RT 790-791.) When they showed him the second lineup, they told him to point out anyone who looked familiar. He recognized the photograph of appellant. (3 RT 792-793.) He picked appellant’s photograph because he thought the vehicle used in the robbery looked like appellant’s. (3 RT 794.)

Contreras stated that, if one sells drugs for a gang, one must pay a “tax” to the gang on the profits. He knew Azusa 13 fairly well from having lived in the city for eleven years. To his knowledge, appellant belonged to the gang. He called appellant “G” for gangster. (3 RT 801-802.) Contreras knew that appellant had a tattoo on the back of his head that read, “Azusa.” (3 RT 803.)

He “could have” told Avila that appellant was after him because his lost appellant’s money a month before in Chino Hills. At trial, Contreras said that the money confiscated in Chino Hills belonged to him. He affirmed that the Chino Hills case did not involve appellant. (3 RT 804-805.) A recording of a telephone conversation with Avila (People’s Exhibit No. 3) was played for the jury. (4 RT 912-913.)

Avila told Contreras that his only interest was in the robbery, so he should be honest. Contreras said that he knew who robbed Martinez. (1 CT

Officer Jason Kimes of the Azusa Police Department responded to 1107 Calle de las Estrellas in Azusa at about 11:51 p.m., on the night of the robbery. He interviewed Contreras, who told him three people came out of a car and chased him, and he fled. The pursuers were driving a black and gray Mazda van. Contreras told him that one of them was appellant. (4 RT 1014-1015.) Appellant was the driver of the van. Contreras said that appellant and three friends approached him, and then he ran. The then drove the van to where Martinez was sitting in her parked car. Appellant removed a black handgun from underneath the hood of the vehicle. Appellant and his friends grabbed Martinez as she sat inside the car. (4 RT 1016.)

Contreras told Kimes appellant was an Azusa13 gang member who went by the moniker "Gangster." (4 RT 1016-1017.) He and Officer Chivas returned about an hour later to talk to Contreras. For the first time, he said he sold drugs, and might be targeted because of money issues. (4 RT 1021-1022.)

Officer Robert Chivas interviewed Martinez, who explained that she was there to see her friend, and had just parked her vehicle when another vehicle came up to her. The occupants of the other vehicle got out, and robbed her at gun point. (4 RT 1024-1025.) She described two male Hispanics with shaved heads. She said that the vehicle they used was a van, possibly a Toyota. The gun they used was similar to his service weapon, but smaller. She said it had a silver handle. One of the men lifted his shirt to show her he was armed. Later, he pulled out the gun and hit her. (4 RT 1026-1027.) One of them wrote down her license plate number on his hand, and said they knew how to find her if she told anyone. She could not say who had the gun. (4 RT 1028.)

When he took her to the police station she identified appellant in the

analyzing certain cell phone records. (3 RT 702-705.) Using a list of cell towers, with their longitude and latitude, it is possible to determine where the cell phone was located when the call was made. (3 RT 731, 75-736.) Antoinette Nunez was the senior lead analyst for the Department of Justice Task who analyzed call records provided by Azusa Police Department. (4 RT 993.) She used the data to create cell tower maps. The result was People's Exhibit No. 27, a map of all the cell phone towers hit by this phone from August 1st to August 29th of 2011. (4 RT 997-998.) The map contained a red circle that mapped a mile radius around the Calle de las Estrellas address where the robbery occurred. A second, purple, circle mapped a three-mile radius centered on the same address. At 11:34 p.m., on the night of the robbery, there was a call made to a 626 number using tower MCA 6048R. It was a regular call in the vicinity of the address. (4 RT 1003-1004.)

Avila also testified as a gang expert. (5 RT 1222.) Azusa 13 originated after World War II as a Hispanic turf gang. At present, it has about 375 people, only twenty or thirty of whom are active members. It's symbol is anything containing the letter "A." It's name is Barrio Azusa 13, Azusa 13, or A-13. The hand sign for the gang is formed by forming the letter "A" with the fingers. (5 RT 1227-1229.) The primary activities of the gang are graffiti, assaults, battery, vandalism, illegal drug sales, robbery, possession of firearms, attempted murder, and murder. The prosecution introduced certified copies of two minute orders that showed that two members of Azusa 13 were convicted of robbery in 2011, and attempted murder in 2010. (5 RT 1229-1235.) Avila performed a background check on appellant, and concluded that appellant was an Azusa 13 member. (5 RT 1236.)

Avila was given a hypothetical in which a gang associate owed a

STATEMENT OF THE CASE

Facts:

- 1) September 21st 2011 Officer Robert Chivas of the Azusa Police station, department stated in Pre-liminary court under Cross-examination that he did record the initial interview of the victim Danielle Martinez but was not able to review the tape recording. (Prelim pg. 42 sec. 18-22.)
- 2) Officer Chivas stated that he was not able to review the (Tape) recording, his intention was to review the (tape) recording and was not able to remember the victim (Martinez) exact words. He was also unable to make a copy of the (Tape) recording. (Prelim pg. 43 sec 16-18)
- 3) Pre-liminary courts Judge (Honorable Harold J. Mulville) stated that any recordings be preserved and not be destroyed, also that counsel is to make copies for defence counsel. (Prelim pg 65 sec 4-5 and sec 8-9.)
- 4) On August 27th 2012 During trial and under Cross examination the victim (Martinez) was not aware that the recorded interview that was done by Officer Chivas was destroyed. The district attorney Chau at trial never informed the victim (Martinez) of the initial (tape) recording being destroyed (3RT 654 sec 11-22).
- 5) The victim Martinez testified of not being aware of the (tape) recording being destroyed untill testimony being given at trial under oath, cross examination. (4RT pg. 1032 sec 21-28 and pg. 1033 sec 1-5).
- 6) At trial the Judge (Martinez) and both Counsels confirmed that the initial (tape) recording of the victim (Martinez) was missing at trial. (2RT pg 39 sec 22-28) and (2RT pg. 40 sec 1-28 and pg. 41 sec 1-28.)
- 7) The Detective Tommy Avila testified at trial that the (taped) recorded interview of the victim Martinez could not be played he also stated that all the lines at the police station are -

- recorded. (SRT pg 1258 sec 25-28 and pg. 1259 sec 1-16.)
- 8) On September 21st 2011 During Pre-liminary hearing while petitioner was present with counsel at the defence table, The victim Martinez on the stand testified that she did not see the person in court who robbed her. (Prelim pg 11. sec 10-17)
- 9) The victim Martinez stated that she could not identify the suspects. (Prelim pg. 15 sec 19-28)
- 10) Under Cross examination at the preliminary hearing the victim Martinez testified that petitioner Valencia was not the one who robbed her. (Prelim pg. 29 sec 21-28.)
- 11) The victim Martinez testified that she told officer Chivas over "20" times that she was not sure about the photo that was circled, and was not sure if he resembled the suspect who carried the gun. (Prelim pg. 32, sec 21-28 and pg 33 sec 1-3.)
- 12) On redirect examination the victim Martinez testified that she "was sure" that the person she circled was not one of the suspects only that he was what she thought he would look like. (Prelim pg. 33 sec 10-28 and pg 34 sec 1-10.)
- 13) At the Pre-liminary hearing Officer Chivas stated that he had to rely on his memory and notes in order to write his report because he could not review the recording. (Prelim pg. 42 sec 5-28).
- 14) Officer Chivas testified that the victim Martinez possatively identified petitioner Valencia. (Prelim pg. 43 sec 1-10)
- 15) Defence Counsel for petitioner Valencia stated to the court that he was not able to file a TROMBETTA motion upon finding out that the (tape) recording was missing. (ZRT pg. 39 sec 22-28 and pg 40 sec 1-28 and pg 41 sec 1-26.)
- 16) The Victim Martinez testified that she barely read what she signed

and that all she wanted to do was get out of there in a hurry, she also trusted the officer. (3RT pg. 634 sec 8-17)

17) The victim Martinez stated that she pointed at one of the in the six-pack line up as someone that resembled 'one of the suspects and she was told to circle, the victim asked officer Chivas... why? (3RT pg. 635 sec 26-28)

18) The victim Martinez stated in trial that she did not know if the person she picked was him or not and that she had made it clear to officer Chivas the night of the robbery. That officer Chivas informed the victim Martinez to circle and initial that they (officer Chivas) just wanted to have kind of an idea. (3RT pg. 638 sec 2-22).

19) The victim Martinez stated that it is possible that the individual in the photo six-pack line up, that she may have seen him before. (3RT pg 634 sec 2-5)

20) The time of the interview of the victim Martinez was at 1:13 AM on August 26th 2011. (3RT pg 636 sec 22-26)

21) Four days later, the victim Martinez was interviewed by Detective Avila where the victim stated that she was concerned about the identification being wrong and that the person that she circled might not have been the person that was there that night. (3RT pg 637 sec 4-26)

22) The victim Martinez stated that there was a few conversations with Detective Avila and that when petitioner was arrested she was upset because she thought that they had did the arrest over her circling. (3RT pg. 640 sec 4-20).

23) The victim Martinez testified that the officer had rearranged her words, that she did not identify the person that was there that night. (3RT pg 641 sec 28. and pg. 642 sec 1-28.)

- 24) The victim Martinez testified that the last thing that she wanted to do was to put someone in jail or custody that she was not sure was there that night. The officer told the victim Martinez that if she was not sure that it was okay to circle the picture of petitioner. (3RT pg. 644 sec 6-28)
- 25) Officer Chivas told the victim Martinez to go ahead and circle even if not sure. (3RT 645 sec 1-2)
- 26) The victim Martinez was told to circle anyone that looked like the person that was there. (3RT pg 648 sec 5-7)
- 27) The victim Martinez spoke with Detective Avila and informed him that there might be something wrong with the identification. (3RT pg 648 sec 11-28 and 3RT pg 649 sec 1-22.)
- 28) The victim Martinez testified that she had made it very clear that she was unsure about the identification and that officers still arrested petitioner Valencia. (3RT pg 650 sec 5-22)
- 29) The victim Martinez testified that she was under the assumption that the (tape) recording of the initial interview with officer Chivas was 'still in existence' and that she did not know that the recording had been 'destroyed'. (3RT pg 651 sec 11-22)
- 30) The victim Martinez testified that the six-pack photo of petitioner looked bigger than the rest of the photos, as well as if the camera was closer to petitioner when the photo was taken. (3RT pg. 655 sec 1-28)
- 31) The victim Martinez testified that she was vulnerable the night of the incident. (3RT pg. 656 sec 11-17.)
- 32) The victim Martinez testified that even in the second interview she never 'told detective Avila that she was possative about the identification or that the identification made was correct. (3RT pg. 658 sec 1-28.)
- 33) At trial the victim Martinez testified that she told the officer that she was not sure, she said it 100 times. (3RT pg 659 sec 3-10.) and (pg 690-691.)

34) Witness Contreras testified that he was under the influence of Methamphetamine (an illegal mind altering drug) the night of the robbery and that he had a problem with meth and would sometimes overdo it. (4RT pg. 934 sec 1-12)

35) The witness Contreras testified that the victim Martinez and petitioner Valencia have met once or twice before at his hotel in Chino hills Ca. (4RT pg. 949 sec 8-12.)

36) The victim Martinez stated that she spoke with Det Avila four to five times (3RT pg 649 sec 10-16.)

37) Witness Contreras 'admits' that victim Martinez accused him of setting her up. (RT pg. 943 sec 2-27).

REASONS FOR GRANTING THE PETITION

Prejudice that occurred by the Destruction of the initial recorded interview of the Victim Danielle Martinez by investigative agency raising Sub-claims totaling to a BRADY Violation. (Sub-claims 1-15.)

Sub-claim #1. There were numerous contradictions between the victim Martinez and officer Chivas during testimonys given at pre-liminary hearing and at trial where the 'problem solver' between the two was that initial recording. It had the contents to prove one side was lying over the other. Petitioner knows that the victim was the one telling more truth than the officer due to the fact that the victim testified with the 'knowing' that she was recorded in the initial interview. Where the officer Chivas knew that the recording had been destroyed because 'they destroyed it' and therefore he was more inclined to lie in order to secure a conviction. The victim Martinez was not made aware of the recording being destroyed untill late in her testimony at trial.

Sub-claim #2. The victim Martinez testified that she never said that she was in fear of her life or retaliation, due to the assailants having her information or the alledged writing down of a licence-plate. It was a tactic by officers in an attempt to cover up the fact that petitioner was not picked out as a suspect but it is how they wanted the case to be settled. Investigating officers theorised that the victim testified the way she did because of the fear factor which they could not corroborate. The fact is that petitioner was not picked out by the victim as a suspect and the only way to rewrite the theory was for Investigating officers Chivas and Det Avila was to withhold and destroy the initial interview.

Sub-claim #3. Its important to know why the investigating officers did not take the victim Martinez serious and failed to do a full investigation on her allegations of a possible 'set-up'. It is the investigating officers errors that caused the lack of investigation. The Central District court also stated that petitioner was not offering up any suspects in the case. But how is petitioner suppose to offer up something he knows nothing about. Only the investigating officers have the statements in evidence. Petitioner Valencia is not an investigator. Petitioner does not know who committed this "alleged" robbery. But the fact that these investigative officers did not do a full investigation based on the victims statement prejudiced petitioners freedom rights. Its also possible that petitioner was used as a 'scape goat' in this case based on the evidence. Also witness Contreras testified that he would take full responsibility in his open Chino Hills case, that all of the contents found were his. It has been brought to petitioners attention that the opposite has occurred in that case. Petitioner has motioned and has been denied Postdiscovery in that matter, and in regards to this issue (Sub-claim). Which with that evidence petitioner can show with proof that this witness Contreras did in fact perjure himself on the stand in petitioners case. He only testified that he would take full responsibility in his open case so that he would portray himself to appear authentic, credible and reliable as a witness against petitioner in front of the jury, for the prosecution. Where even after trial the prosecution has the duty to disclose discovery evidences even without petitioners request. Due Process has not been satisfied at this point. Due Process demands the prosecution not withhold the evidence (BRADY VIOLATION). Due to this weak case in evidence the prosecution desperately put on and appraised this witness who admitted to being in an altered state of mind of "Methamphetamine".

at the time of the robbery alledged. For a clear example the witness told the nine one one operator that while the robbery was in progress that he seen 'blood flowing' and saw four Gangsters with guns.' which were not credible to the circumstances of the case and of the evidence. This clearly contradicted the victim Martinez testimony of 'two suspects, and no blood' involved what so ever. Petitioner went outside the scope of the 'destruction of the recording' in order to show this court that there was no other credible witness that could place petitioner at the scene as a suspect. The fact that this witness was not credible or reliable in the first place is a relevant factor to show the desperate attempts by investigating officers to resolve this case at petitioners expence. (Det Avila also filed a drug charge on the witness.) (leverage)

Sub-claim #4. Officer Chivas claimed during testimony that the victim Martinez stated to him that the suspect was petitioner and that thats why the circling and initialing of the victim took place. At that point in time it brings to 'question' why the officer did not continue to complete the G-pack photo identification application [marked peoples #5.] as to having the victim make a comment in the Comment section of the form. It makes no sence that the officer "if" having an alledged possative I.D. of petitioner that he not complete the form. The fact of the issue is 'common sence' and clear to petitioner, that taking into account the victim Martinez testimony of 'not being sure' of the photo and making it clear over 20 to 100 times to the officer of not identifying a suspect. That the officer 'failed to preserve the recording' and 'destroyed it' in order to attempt to rewrite the facts of the interview in holding petitioner accountable for a crime not committed by petitioner. It was erroneous by the officer to not-

to not fill out the form properly. Further it is still erroneous by all of the courts who are penalizing petitioner for this officers errors. For its common practice to remove any doubt that may question the officers investigation and tactics used.

Sub-claim #5. Petitioners defence and jury were deprived of the actual state and frame of mind that the victim Martinez was in at the exact time, date, night of the alledged robbery. The victim testified that she was 'frazzeled', 'vulnerable' and that she was a 'Methamphetamine user' (An illegal drug) we were shocked at the poor attempt of the investigating officer Det. Avila of his attempt to re-record a second interview in attempting to salvage the violation by 'duplicating attempt' where even at the second interview the victim did not say that petitioner was 'the robbery suspect' which this officer only reinforced petitioners claim due to the fact that this Det Avila also failed to have the victim comment in the comment section of the form. The Det Avila only succeeded in tainting the victims memory into becoming more in depth of the 'fruit of poisonous tree theory'. Still it was not possible to re-record a statement and deem it 'harmless' for the victim was not in the same mind frame in order to satisfy the Due Process rights guaranteed to petitioner. (The re-recorded interview was 4 days after the initial destroyed recording.)

Sub-Claim #6. The officers subjected the witnesses to a photo of an exact make and model as well as color of vehicle that petitioner drove. The fact that they did not compile a six pack of photos was 'indicating' as well as 'overly suggestive' on the part of investigative officers. The facts of the case stated that the victim told officers that the vehicle looked like a Toyota then at trial

The victim Martinez changed to Mini-van which was the term that the investigative officers Chivas and Avila were using, Due to there training in identification of vehicles (Detailed). This is an example of the coercion that occurred through out the investigation causing the 'fruit of the Poisonous tree syndrome' and Theory to be implied. Officers should have compiled a G-pack array of photos in order to keep from tainting the victim, witness mind memory by embedding the Mini-van term upon them. (Victim and witness) Its obvious that the officers did this in order to aim there identification and the probability of petitioner being the suspect. By the trial date the victim and witness were so tainted that they were both saying Mini-van and Mazda. Toyota had already been removed from the victims mind as well. She did not even want to acknowledge that she ever stated Toyota on the initial police report. This victim became 'so tainted' by investigative officers it became impossible to know what was true and what was not. Clearly the recording would have aligned the evidences in place had it not been "destroyed."

Sub-claim #7 Its common sence and clear that an investigating officer (Chivas) Should not need to ask a victim over twenty (20) times or over One hundred (100) times about an identification that's indicating petitioner. Its a Due Process violation for it became 'Overly Suggestive' by not letting it go and simply allowing for the victim on her own to make an identification if thats what shes gonna do. Due to the above petitioner became targeted. The victim never 'detered' from this at preliminary or at trial. She was persistent and consistent with informing the court that not only was she 'not sure' but also

that petitioner was not a robbery suspect. The victim informed the court over and over about this. Not to exclude that the victim pointed out that petitioners 6-Pack ~~photo~~ was, appeared 'slightly larger' than the rest, which is a shady tactic used by investigative officers. The theory that the victim Martinez was in fear of her life and alledging that, that is why she testified the way she did is absurd. The victim never knew petitioner was a gang member and nor was it at all crossing her mind. This was volunteered by investigative officers due to the victim non identification of petitioner. Officers had to figure out a way to cover up there shady tactics used in that initial interview while attempting to still try and secure petitioner as a suspect. Which is why the initial recorded interview was destroyed and the 'Gang Enhancement' plus 'Dissuading of a witness' was added to petitioners charges by pure testimony of the investigative officers. This is 'prejudicial bias' by the officers Chivas and Detective Arila. Petitioner was punished for the investigative officers errors. The victim never stated in the initial interview that the suspects were gang members nor that she was in fear of her life.

Sub-claim #8 The photo array was a Due Process violation due to the fact that the victim Martinez claimed that petitioners photo appeared 'slightly' bigger than the rest of the photos. Its Common sence that a photo that is bigger than the rest has the tendency to 'jump out at you' only by making all of the photos the same size would the line-up be deemed righteous, and not prejudicing petitioner. This issue is based on the victims testimony.

Sub-claim #9 The fact that the victim Martinez and the

witness both testified that petitioner probably did meet the victim or seen the victim in the past like at a Chino Hills motel clearly rings the bell as to why the victim Martinez testified that petitioners eyes, eyebrows looked familiar, not from the robbery. The victim did not identify petitioner as being a suspect in the robbery, she made that clear. Its not petitioner fault that he may have crossed paths with the victim Martinez in the past, but it does explain as to why one looked familiar. But its a clear abuse to attempt to call this sub-claim a possative identification of petitioner. It is a clear abuse and violation for the officer to pervert by attempting to rewrite this sub-claim in order to turn it into an identification to a robbery.

Sub-claim #10. The fact that investigative officers deprived the defence of the initial recording and of the contents that were held within the good and/or the bad was prejudicial for it is now 'impossible' to attempt to Authenticate the officer's procedures and tactics used, petitioner remains prejudiced due to this sub-claim.

Sub-claim #11 The victim Martinez could no longer attempt to bear good fruit in the investigation. The victim only continued to sucume to 'fruit of thy poisonous tree' syndrome and theory, which occurred in the first interview and in the second interview which was four days later. The victim Martinez attempted to reinforce the fact that she did not pick out petitioners photo as a robbery suspect. Due to the 'overly suggestive' here-in the victim had lost the ability to focus on apprehending by identifying a potential subject. The victim was not shown more photo six-pack arrays, which the investigating officers were informed of 2 to 4 suspects. They should have compiled more photos where they could have

gotten a 100% positive identification. Instead because of 'tunnel vision' investigating officers pursued to indicate petitioner, and leaned on there allegation of petitioner gang status and cause of fear. This was clearly bias and prejudicial.

Sub-claim #12 The destruction of the initial recording deprived petitioner of showing with proof that the victim never stated that she was threatened or that the suspect(s) told her not to tell authorities due to them having her information so that she should not tell authorities who robbed her. This is content held within the destroyed recording that the officers alledge was her statement. petitioners defence was deprived of showing with proof that the victim Martinez initially did not make that statement. That only after authorities destroyed the initial interview they added that claim in order to justify and attempt to explain as to why the victim did 'allegedly' not want to cooperate. At trial petitioner holds the right to confront his accuser's. I need not confront the victim who is not testifying that petitioner is a suspect. Petitioner was deprived of confronting the investigative officers of the false allegations by showing the initial recording which is proof that would credit petitioners theory in front of a jury. Instead prejudice insued.

Sub-claim #13. The photo identification interview could not be duplicated without prejudicing petitioner Valencia. Due to the fact that the victim Martinez testified that after she left the police station from the initial interview, she had went back to the home of the witness Contreras, where the alledged robbery had occurred. He also sat in the vehicle before the police came, upon being called. Due to the

initial recording being destroyed its difficult to know what was said and was not said as far as added details of the robbery. But the fact that the victim Martinez felt it safe to go back to the scene of the robbery with her friend the witness Contreras lets us know that she was not in fear of her life especially not in fear of a local gang. If she was she would not have returned to the witness home. Instead she would have went to her home, not the scene of the robbery alleged. Common Sence tells us that they spoke about the crime. Which in order to avoid that the officers should of had a temporary no contact order in order to avoid Cohercion. Therefore when officers attempted to re-record and try to salvage the identification (if thats what it was which it wasnt, due to the victims testimony) It was not possible to do so because the victim had become further in debth with the 'fruit of the poisonous tree theory.' Not to exclude the initial interview with officer Chivas and also the second interview with Det Avila when he informs the victim Martinez that she is not the only one who identified the suspect, he was clearly attempting to Coherse the victim due to her statements of her not identifying the photo as a suspect. It was a shady and desperate attempt to get the victim to 'go along' with the identification (false). Some where along these interviews or talks with the witness Contreras the victim Martinez was informed that the vehicle was a Mini-Van and a Mazda also that the petitioner was a gangmember. The victim withheld from the court of who told her that the witness Contreras owed money to people. She claimed to not recall who. The destruction of that initial recording presented a 'snow ball' effect of irreversible damage to petitioners defence and theory in front of a jury.

Sub-claim #14. The fact that officer Chivas testified that he could

not recall the exact words of the initial interview with the victim Martinez is troublesome. For the exact words are needed when it comes to an identification of a citizen who could be possibly convicted. Clearly this officer Chivas on the side of the prosecution team was not going to volunteer any statement, information that would benefit the defence of petitioner. His one sided testimony proves this. Yet his testimony immediately contradicted the victim Martinez testimony. The jury clearly gave the benefit of the doubt to the officer Chivas due to him being a police officer, and because there was no other evidence to challenge the officers authenticity of investigating tactics because he had 'destroyed it'. The victim Martinez testimony even though convincing, lacked the 'solid' backup corroboration of that initial recording. Petitioner can honestly say that had that initial recording been preserved, this case would have been resolved in a different manner and plausibly not in front of a jury. That was the "strength" of that initial recording that the prosecution and the state, federal courts have been "attempting to down play,"

Sub-claim #15 Petitioner offers how its evident that the investigative officers due to targetting petitioner how they compiled and composed a composite of a six-pack photo arrays with petitioners photo within. The victim Martinez informed the officers that it was a Toyota and that the suspects were wearing hoods or hats. Never did the victim state that anyone had tattoos or drove a Van which is the modus operandi that Azusa's detective Avila claimed. This Detective had already attempted in the past to resolve cases at petitioners expense. The fact that petitioner was not indicted on the recent federal indictment is evident how petitioner was not even being investigated by the FBI. Yet Detective Avila targeted petitioner

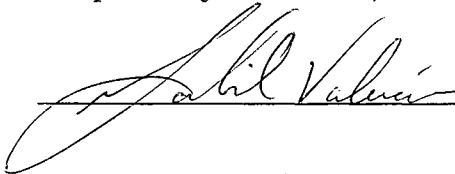
in this robbery charge.

In closing: In regards to the sub-claims stated here-in which not just only by itself petitioner believes each one standing alone presented a danger in petitioners case calling for BRADY violation to be implied. But the totality of all the sub-claims put together without a doubt calls to question the investigative officers and the prosecution team as a whole. This is undoubtedly a BRADY violation. Also its unjust to hold and punish a citizen of the United States or any human being for that matter for an alledged malfunction of investigative authorities recording devices. Or for any of their errors. Petitioner is not a test subject for the 'prosecution team' to deprive him of crucial evidence and deem it or down play it as harmless error. There is logically no such thing as harmless error when there is a life in the ballance, which petitioner lost thirty years and four months, (Sentence total). The initial recording of Martinez that was 'destroyed' was the most important because it was the foundation of which all of the theory and motive as well as authenticity of the investigation began. This interview (initial) set the stage of how this case was gonna be resolved. Clearly it had the material to show and prove 'actual innocence' in this case of circumstantial evidences. The destruction by investigative officers clearly punished petitioners side and rewarded their side by basically making the victims testimony near irrelevant where the officers destroyed the main piece of evidence that would call to question there shady tactics and investigative procedures in identification. BRADY is the remedy where petitioner in this showing of prejudices of his 'Due Process Rights' shows with proof that had not for the error, The case would have been resolved differently.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Date: 12/19/18