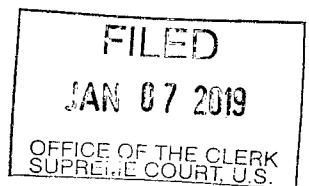


18-7582
No. _____

IN THE
SUPREME COURT OF THE UNITED STATES



RALPH NICHOLAS CANETE, PETITIONER

VS.

W. L. MONTGOMERY, ACTING WARDED, RESPONDENT

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

PETITIONER FOR WRIT OF CERTIORARI

RALPH NICHOLAS CANETE CDCR NO. AI2605
LA PALMA CORRECTIONAL FACILITY N-B 118
5501 N. LA PALMA RD.
ELOY, AZ 85131
PETITIONER IN PRO-PER

QUESTIONS PRESENTED

(1) MAY THE DESTRUCTION OF MATERIAL EVIDENCE BY THE GOVERNMENT VIOLATE PETITIONERS RIGHT TO DUE PROCESS GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS, AND POSSIBLY INFRINGE ON THE SIXTH AMENDMENTS RIGHT TO COMPULSORY PROCESS, RENDERING A CRIMINAL TRIAL FUNDAMENTALLY UNFAIR AND DENYING A DEFENDANT OF A CONSTITUTIONAL RIGHT ?

(2) WHETHER THE USE OF SUGGESTIVE IDENTIFICATION PROCEDURES DEPLOYED BY THE STATE, AND SUBSEQUENT IN- COURT IDENTIFICATIONS VIOLATE THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT RENDERING A CRIMINAL TRIAL UNFAIR?

(3) CAN A TRIAL ATTORNEYS POOR PHYSICAL HEALTH AND DEFICIENT PERFORMANCE INFRINGE ON THE SIXTH AMENDMENTS GUARANTEES TO RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL, RENDERING AND CRIMINAL TRIAL UNFAIR AND DENYING A DEFENDANT OF A CONSTITUTIONAL GUARANTEE?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

TABLE OF CONTENTS

QUESTIONS PRESENTED	i
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISIONS INVOLVED	3
STATUTORY PROVISIONS INVOLVED	4
STANDARD OR REVIEW: DENIAL OF CERTIFICATE OF APPEALABILITY	4
STATEMENT OF CASE	5,6
STATEMENT OF PERTINENT FACTS	7
REASONS FOR GRANTING THE WRIT	7, 12, 15
CONCLUSION	17

INDEX TO APPENDICES

APPENDIX A	Ninth Circuit Court Of Appeals Order Denying COA Case No. 18- 55640 Filed November 5 2018
APPENDIX B	District Court Judgment And Order Case No. CV 15 -316 -RGK (JCG) Dated May 1 2018
APPENDIX C	Magistrate Judge Findings And Recommendations Case No. LA CV 15 -0316 RGK (JCG) Dated March 21 2018
APPENDIX D	California Supreme Court Denying Petition For Writ Of Habeas Case No. S220561 Filed December 17 2018
APPENDIX E	California Court Of Appeal Denied Writ Of Habeas Case No. B254387 Filed June 27 2014
APPENDIX F	California Court Of Appeal Affirm In Part ,Reversed In Part, And Remand Direct Appeal Case No. B234197 Filed March 25 2013

EXHIBITS ATTACHED

EXHIBIT A

Petition For Writ Of Habeas Corpus In The District Court Central District

Filed: January 8, 2015

EXHIBIT B

Answer To Petition For Writ Of Habeas Corpus

Filed: June 4, 2015

EXHIBIT C

Reply To Answer

Filed: September 21, 2015

EXHIBIT D

Objections To Magistrates Report And Recommendations

Filed: April 10 2018

EXHIBIT E

Motion For Certificate Of Appealability In The United States District Court For The
Ninth Circuit Following A Denial Of COA Request By The District Court

Filed : June 13 2018

EXHIBIT F

Declaration Of Petitioner, Appellant In Support Of Petition For Writ Of Certiorari

TABLE OF AUTHORITIES CITED

Cases	Page
Arizona v. Youngblood (1988) 488 U.S 51	7, 8, 9,10
Armory v. Delmirie (K.B. 1722) 93 Eng. Rep. 664	11
Bismark v. Holden (ND 1994) 522 NW 2d 471	9
California v. Trombetta (1984) 467 U.S 479	7, 8, 10
Collins v. Commonwealth (KY 1997) 951 SW 2d 569	10
Commonwealth v. Henderson (MA 1991) 487 NW 2d 539	9
Foster v. California (1969) 394 U.S 440	13
Government Of The Virgin Islands v. Testamark (3 rd Cir. 1978) 570 F.2d 1162	11
Grimsley v. State () 678 SO 2d 1197	9
Halloway v. Arkansas (1978) 435 U.S 475	16
In Re Cordero (1998) 46 Cal 3d. 161	16
In Re Terrorist Bombings Of U.S Embassies In East Africa v. Odeh (2 nd Cir. 2008) 552 F. 3d 122	11
Kannaugh v. Miller (2 nd Cir. 2002) 289 F. 3d 36	13
Kronnisch v. U.S (2 nd Cir. 1988) 150 F. 3d 112	11
Lolly v. State (DE 1992) 661 A. 2d 956	9
Luna v. Cambra (9 th Cir. 2002) 306 F. 3d 954	16
Manson v. Brathwaite (1977) 432 U.S 98	13
Miller v. Vasquez (1989) 868 F. 2d 116	10
Miller- El v. Cockrell (2003) 537 U.S 322	4
Neil v. Biggers (1972) 409 U.S 188	13
People v. Carlos (2006) 138 Cal. App 4 th 907	12
People v. Cooper (CA 1991) 809 P. 2d 865	10

TABLE OF AUTHORITIES CITED CONT.

Cases	Page
People v. Nation (1980) 26 Cal. 3D 169	16
People v. Watkins (1987) 195 Cal. App. 3d 748	13
People v. Wimberly (1992) 5 Cal. 4 th 773	16
Perry v. New Hampshire (2012) 565 U.S 228	12
Prado v. Janda 2013 U.S Dist LEXIS 77881	12
Raheem v. Kelly (2 nd Cir. 2001) 257 F. 3d 122	13
Scoogins v. State (NM 1990) 802 P. 2d 631	9
Slack v. McDaniel (2000) 529 U.S 473	4
Spaulding v. State (GA 1990) 787 394 SE 2d 111	9
State v. Copeland (WA 1996) 922 P.2d 1304	10
State v. Delisle (VT 1994) 648 A 2d 632	9
State v. Drdak (NC 1992) 411 SE 2d 604	10
State v. Dunaley (IA 1992) 493 NW 2d 787	10
State v. Furguson (TN 1999) 2 SW 3d 912	9
State v. Osakalumi (WV 1995) 461 SE 2d 504	9
State v Marshall (NJ1991) 568 A 2d 85	10
State v. Matafeo (HI 1990) 787 P 2d 671	9
State v. Morales (CT 1995) 657 A 2d 585	9
State v. Norman (AL 1989) 774 P 2d 1326	9
State v. Riggs (NM 1992) 838 P 2d 975	9
State v. Schmid (MN 1992) 487 NW 2d 539	9
State v. Smaqula (NH 1990) 578 A 2d 1215	9

TABLE OF AUTHORITIES CONT.

Cases	Page
State v. Youngblood (AZ 1993) 844 P. 2d 1152	10
Strickland v. Washington (1984) 466 U.S 668	15
Tinsley v. Jackson (KY1989) 771 SW 2d 331	9
Throne v. Department Of Public Safety (AL 1989) 774 P. 2d 1326	9
U.S v. Ballesteros (9 th Cir 1975) 527 F. 2d 928	11
U.S v. Cronic (1984) 466 U.S 648	15
U.S v. De Leon (1 st Cir 2009) 588 F. 3d 748	13
U.S v. Di Tommasco (2 nd cir. 1987) 817 F. 2d 201	16
U.S v. Javor (1984 9 th Cir.) 724 F. 2d 831	16
U.S v. Jobson (6 th Cir. 1996) 102 F. 3d 214	10
U.S v Nixon (1974) 418 U.S 683	11
U.S v. Rivera- Relle (9 th Cir. 2003) 333 F. 3d 914	10
U.S v. Russell (6 th Cir. 1976) 532 F.2d 1063	13
U.S v. Saunders (4 th Cir. 2007) 501 F. 3d 384	12
U.S v. Smith (10 th Cir. 1998) 156 F.3d 1046	13
U.S v. Wise (5 th Cir. 2000) 221 F.3D 140	11
U.S v Valenzuel-Bernal (1982) 458 U.S 51	10
White v. Tamlyn (6 th Cir. 1997) 961 F. Supp. 1047	10

Statutes

California Penal Code § 211	5
California Penal Code § 484e(d)	5

TABLE OF AUTHORITIES CONT.

Statutes Cont.	Page
California Penal Code § 654	5
California Penal Code §667	5
California Penal Code §667.5	5
California Penal Code §1054	11
California Penal Code §1054 (1) (2)	11
California Penal Code §1170. 12	5
California Penal Code §12022.7	5
California Penal Code §1203	5
California Penal Code §1203.085	5
California Government Code § 34090.6	12
California Rules Of Professional Conduct Rule 3-700(B) (3)	15
Los Angeles Practice and Procedure Guideline §738.05	12
 Federal Statutes	
28 U.S.C § 1254 (1),(10)	4
28 U.S.C §2253 (c) (1) (2)	4
FEDERAL RULES OF COURT RULE 16 (1) (E)	11
 Constitutional Provisions	
FIFTH AMENDMENT	5
SIXTH AMENDMENT	5
FOURTEENTH AMENDMENT	5

IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARAI

Petitioner Ralph Nicholas Canete respectfully prays that a Writ Of Certiorarai be granted to review the decision of the United States District Court for the Central District Of California granting Respondents motion to Dismiss Petition For Writ Of Habeas Corpus based on Petitioner failing to make a substantial showing of the denial of a Constitutional right, And the affirmation of the District Courts decision by the United States Court Of Appeals Of The Ninth Circuit.

OPINIONS BELOW

The Court Of Appeals For The Ninth Circuit Affirmed the District Court's denial of Habeas relief in an unpublished opinion Appendix A.

The order adopting the Magistrates Judges Findings and Recommendations and the Judgment of the District Court denying Petitioners Habeas petition are unreported, Appendix B.

The Magistrates findings and recommendations are lodged as Appendix C.

The California Supreme Court denied Writ Of Habeas Corpus in an unpublished decision .Appendix D
The California Court of Appeal denied Writ Of Habeas Corpus in an unpublished decision case number B254387 filed June 27 2014 .Appendix E.

JURISDICTION

The present petition for Writ Of Certiorari is filed within 90 days of the denial of The Motion For Certificate Of Appealability by the Ninth Circuit which was denied on November 5th 2018, and is timely filed pursuant to 28 U.S.C §1254 (1) and rule 10 of the rules for the United States Supreme Court.

CONSTITUTIONAL PROVISIONS INVOLVED

UNITED STATES CONSTITUTION

FIFTH AMENDMENT;

“No person shall be held to answer for a capital , or otherwise infamous crime, unless on a presentment of indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia , when in actual service in the time or war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use , without just compensation.”

SIXTH AMENDMENT;

“In all criminal prosecutions, The accused shall enjoy the right to a speedy trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed by law, and to be informed of the nature and cause of the accusation; To be confronted with the witness against him; To have compulsory for obtaining witnesses in his favor; And to have assistance of counsel for his defense.”

FOURTEENTH AMENDMENT;

“All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the protections of laws.”

STATUTORY PROVISION INVOLVED

28 U.S.C 2253 (c) (1),(2)

(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from--

(A) The final order in a habeas corpus proceeding in which the detention complained of arises out of a process issued by the state court.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of a denial of a constitutional right.

STANDARD OF REVIEW:

DENIAL OF CERTIFICATE OF APPEALABILITY

In **Miller- El v. Cockrell**, 537 U.S 322, 123 S Ct. 1029 (2003), this Court clarified the standards for issues of a Certificate of appealability [hereafter “COA”]:

...A prisoner seeking a COA need only demonstrate a “substantial showing of the denial of a constitutional right”. A petitioner satisfies this standard by demonstrating that a jurist of reason could conclude the issues presented are adequate to deserve encouragement to proceed further... We do not require petitioner to prove, before the issuance of a COA, that some jurist would grant the petition for habeas corpus. Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail.

Id., 123 S.Ct. at 1034, citing **Slack v. McDaniel**, 529 U.S 473, 484 (2000).

STATEMENT OF CASE

Information was filed on June 29, 2009, charging Petitioner in count 1 with robbery in violation of Cal Pen Code §211¹, with a special allegation within the meaning of §12022.7 subdivision (a), and in count 2 with theft in violation of §484e subdivision (d). As to count 1 and 2, it was further alleged that appellant committed the offenses while on state parole within the meaning of §1203.085, subdivisions (b) and (a) respectively. One prior conviction was alleged within the meaning of §§1170.12, subdivisions (a)-(d), 667, subdivision (a) (1); six prior convictions were alleged within the meaning of §667.5, subdivision (b); and two prior convictions were alleged within the meaning of §1203 subdivision (e) (4).

Petitioner represented himself for the majority of pretrial motions and retained private counsel for trial only. Trial commenced on February 25, 2011. On March 3, 2011 jurors found Petitioner guilty of both counts 1 and 2 and found the great bodily injury allegation to be true. Appellant waived his right to a jury trial on prior convictions. The trial court found the prior “strike” conviction was true and ordered all §667.5 subdivision (b) prior allegations dismissed for lack of proof.

The total sentence imposed was 19 years 4 months.

A timely Notice of Appeal was filed on June 28, 2011. Said appeal was granted On March 25 2013 in part, reversed in part, and remanded Under the §654 to the trial court. Petitioner was re-sentenced to 18 years On June 3rd 2013.

On February 10th 2014, appellant started the petition for writ of habeas corpus process in the second appellant district B234387. This petition was denied on June 27th 2014.

On August 11th 2014 appellant filed a petition for writ of habeas corpus in the California Supreme Court Case number S2205. This petition was denied on December 17th 2018.

On January 8th, 2015, the appellant filed a petition for writ of habeas corpus in the United States

(5)

¹ All further statutory references are to the California penal code unless otherwise specified

District Court number LA CV 15- 0316 RGK (JCG). This petition was denied on May 1st 2018.

On June 13th 2018 the appellant filed an Appeal in the Ninth Circuit Court Of Appeals to the District Courts judgment and order denying a certificate of appealability (COA). The Ninth Circuit Court Of Appeals denied said appeal and request on November 5th 2018. Case No. 18-55640.

Appellant now respectfully brings forth the Petition for Writ Of Certiorari seeking relief in a State of California criminal conviction for issues that deprived him of Constitutional rights and ultimately a fair trial.

STATEMENT OF PERTINENT FACTS

I

LAW ENFORCEMENT FAILED TO DISCLOSE AND DESTROYED FIRST HAND MATERIAL EYEWITNESS TELEPHONE COMMUNICATIONS RELAYING DETAILS OF THE BUERMANN ROBBERY TO POLICE ULTIMATELY MAKING EYEWITNESS UNAVAILABLE FOR THE DEFENSE

REASONS FOR GRANTING THE WRIT

This court should grant review to resolve an important question of Federal law, whether if the controlling law under **Trombetta / Youngblood** ((**California v. Trombetta** (1984) 467 U.S 479-
Arizona v. Youngblood (1988) 488 U.S 51)) affords the defendants in criminal cases due process protection, and right to present a complete defense, when the government loses material evidence ;And what should be the relief if material evidence under Brady is destroyed which also infringes on the Six Amendments rights to Compulsory Process, the Spoliation Doctrine, and State Statutory Law?

In the instant case a robbery took place and a material eyewitness by the name “Spencer, Ge” called authorities to report and relay first hand information of the attack and the description of the true assailant that accosted Buermann of her personal property.

In pretrial motions the Petitioner requested “any and all pertinent information” of the material witness and information that would aid the defense in locating Spencer Ge and “any and all telephone communications” in connection with the Buermann robbery ,but the defense was met with negative results. Only evidence that the state presented was a print out of communications between police

dispatch and field units where the incomplete name of "Spencer Ge" first appears and an incorrect land line telephone number appears where a cell phone number should appear for "Spencer Ge", depriving the defense the ability to contact "Spencer, Ge".

Petitioner maintains that this is a case where law enforcement knew Petitioner was innocent but harbored animosity and bad blood towards Appellant for his wish to not aid detectives in their investigation and point them in the right direction of the true perpetrator, which caused the law enforcement officers to "lose evidence" and provide fake telephone numbers to the defense.

Law enforcement blamed a "routine purge" of telephone communications and recycling of tapes as the reason why they could not provide the 911 call made by "Spencer, Ge", but the lead investigating officer Robert Casey was a seasoned 15 year veteran officer and knew that said tapes were still part of a pending litigation and the destruction of the 911 call would take place if he did not disclose the 911 call within 120 days of the calls placement. Destruction of the call was not accidental, but calculated to hamper the defense, and the petitioner can point out to numerous instances where Casey made attempts to suppress other evidence .

To add weight to Petitioner claim, Buermann did express her belief to law enforcement that Petitioner -the person police had arrested for using her credit cards fruit of the robbery- was not the same person who robbed her- prior to the calls destruction.

The question here is if the rule under **Trombettta / Youngblood**, that ...

1. Evidence must possess an exculpatory value that was apparent before the was destroyed and of such a nature that the defendant would be unable to obtain comparable evidence by other available means, or

2. If evidence is only potentially exculpatory, Defendant must show the government acted in bad faith.

...Is enough protection to the defendant, and what incentive does the government who wishes to deprive

the prosecutor and the defense of material evidence have to not lose or destroy evidence knowing that a defendant will most likely have to meet an insurmountable burden to prove “Bad Faith” or try to explain and prove an exculpatory value to material that is no longer in existence.

Many States have rejected or criticized **Youngbloods** requirement of “bad faith” and acknowledge that there will be cases where the defense will be unable to prove bad faith but rely on a multi-factor balancing test such as

Alabama: **Grimsley v. State** 678 SO 2d 1197, 1204-06

Alaska: **Throne v. Department of Public Safety** (Al 1989) 774 P2d 1326 ; See also **State v. Norman** (AK 1994) 875 P 2d 775 777-778

Connecticut: **State v. Morales** (CT 1995) 657 A2d 585, 589;

Delaware: **Lolly v. State** (DE 1992) 611 A 2d 956 , 962 fn.6

Georgia: **Spaulding v. State** (GA 1990) 394 SE 2d 111;

Hawaii: **State v. Matafeo** (HI 1990)787 P2d 671, 672;

Kentucky: **Tinsley v. Jackson** (KY1989) 771 SW 2d 331, 332- 333;

Massachusetts: **Commonwealth v. Henderson** (MA 1991) 487 NW 2d 539, 541; [relying on a state statutory scheme]

Minnesota: **State v. Schmid** (MN 1992) 487 NW 2d 539, 541

North Dakota: **Bismarck v. Holden** (ND 1994) 522 NW 2d 471

New Hampshire: **State v. Smaqula** (NH 1990) 578 A 2d. 1215, 1217

New Mexico: **State v. Riggs** (NM 1992) 838 P 2d 975,978; see also **Scoggins v. State** (NM 1990) 802 P 2d 631, 632;

Tennessee: **State v. Ferguson** (TN 1999) 2 SW 3d 912,917

Vermont: **State v. Delisle** (VT 1994) 648 A 2d 632, 642;

West Virginia: **State v. Osakalumi** (WV 1995) 461 SE 2d 504, 512;

Other jurisdictions have strictly adhered to **Youngblood**:

Arizona: **State v. Youngblood** (AZ 1993) 844 P 2d 1152, 1152-58 [en banc];

California: **People v. Cooper** (CA 1991) 809 P2d 865, 886;

Kentucky: **Collins v. Commonwealth** (KY1997) 951 SW 2d 569, 572

Iowa: **State v. Dunlaney** (IA 1992) 493 NW2d 787, 791-93;

Maine: **State v. Marshall** (NJ 1991) 586 A2d 85, 140;

North Carolina: **State v. Drdak** (NC 1992) 411 SE 2d 604, 608 [rejecting state statutory argument];

Washington: **State v. Copeland** (WA 1996) 922 P2d 1304, 1324 [en banc]

The Ninth Circuit Court Of Appeals reversed **Miller v. Vasquez** 868 F2d 116 (1989) and held “a bad faith failure to collect potentially exculpatory evidence would violate the due process clause” was criticized by **White v. Tamlyn** (6th Cir. 1997) 961 F Supp.1047 ,1062 See **U.S v. Jobson** (6th Cir. 1996) 102 F 3d 214, 219 but in the instant case this case falls somewhere between The **Trombetta/ Youngblood** line of cases where material evidence was destroyed and **United States v. Valenzuela-Bernal**, 458 U.S 51, Where **Valenzuela-Bernal** was deprived of a material witness due to the states deportation laws. In **U.S v Rivera-Relle** (9th Cir. 2003) 333 F. 3d 914 the court of appeals found a dispatch tape was also lost which may have contained exculpatory value but there was clearly comparable evidence available to the defendant (both officers in question were available to testify) so refused to sanction the government but in the present case the petitioner was deprived of a person with the power to exonerate the defendant as the person who robbed Buermann.

Petitioner maintains this court should also address whether if the destruction of the 911 call which ultimately deprived him of pertinent information of the 911 caller infringed on his Sixth

Amendment right to Compulsory process. **U.S v. Nixon** (1974) 418 U.S 683, 709 ; **Government Of The Virgin Islands v. Testamark** (3rd Cir. 1978) 570 F.2d 1162, HN 3; **U.S v. Ballesteros- Acuna** (9 Cir. 1975) 527 F2d 928

And,

What should be the Sanction against the government for the violation of the spoliation doctrine
In Re Terrorist Bombings of U.S Embassies in East Africa v. Odeh (2 Cir. 2008) 552 F.3d 122, 149; **Kronnisch v. U.S** (2d Cir. 1998) 150 F. 3d 112, 126 ,**Armory v. Delamirie** 93 Eng. Rep. 664 (K.B. 1722), **U.S v. Wise** (5th Cir. 2000) 221 F.3d 140, 156

And,

What should be the sanctions against the prosecution for discovery violations under California Penal Code § 1054, §1054 (1),(2), California Government Code §34090.6, and Federal Rule 16(1)(E)(i), given the fact Petitioner objected to the discovery violations in pre- trial, trial, and post trial stages?

**LAW ENFORCEMENT DEPLOYED SUGGESTIVE OUT OF COURT IDENTIFICATIONS
PROCEDURES THAT CONTAMINATED SUBSEQUENT IN COURT IDENTIFICATION
PROCEDURES AND TRIAL PROCESS**

REASONS FOR GRANTING THE WRIT

In the present case lead investigating officer Robert Casey summoned Buermann to the Culver City Police Station to see if she could identify someone they believed had robbed her of her property prior to Petitioners arrest. There are many issues with this out of court identification procedure that contaminated the subsequent in court identification procedure, question the reliability of the identification, infected the trial process, and violated the Petitioners Substantial rights.

The first instance that Petitioner complains about is in a six pack photographic array deployed by Casey there is a set of numbers and a name printed right under the Petitioners picture where there is no such numbers or names highlighting any of the other faces depicted in the array. **U.S v. Saunders**, (4th Cir. 2007) 501 F.3d 384, 390. Such markings and labeling have been criticized by the courts in **People v. Carlos** 138 Cal. App 4th 907(2006) HN2 , **Prado v. Janda** 2013 U.S Dist LEXIS 77881*34,*51-*54 , and in violation of the LAPD Practice and Procedure guidelines manual rule §738.05. Due process clause of the Federal Constitution's Fourteenth Amendment held not to require preliminary judicial inquiry into reliability of eyewitness identification when identification was not procured under unnecessary suggestive circumstances arranged by law enforcement officers. **Perry v. New Hampshire** 565 U.S 228 (2012).

It should be noted Buermann made only a tentative pick of Petitioner at this out of court line up and expressed her doubt that the man she picked was possibly not the person who robbed her.

Kennaugh v. Miller (2d Cir. 2002) 289 F.3d 36,46 **Raheem v. Kelly** (2nd Cir. 2001) 257 F. 3d 122 HN 5

The next instance that Petitioner complains about is after Buermann was unable to make a positive identification Casey proceeded to show a surveillance video where Petitioner was seen using one of many credit cards fruit of the Buermann robbery at a fast food place , and then advised Buermann they had caught Petitioner using her credit card and was found to have access to Buermanns property. **Manson v. Brathwaite** (1977) 432 U.S 98,116-118, **U.S v. Russell**, (6th Cir. 1976) 532 F. 2nd 1063, 1068.

During the initial in court identification procedure in a preliminary hearing, Buermann was asked to identify the person who robbed her in a field of one where the defendant was the only hispanic in hand cuffs who remotely resembled the description of the assailant. This was where Buermann identified Petitioner as the person who robbed her. **Foster v. California** (1969) 394 U.S 440, 443-44, **U.S v. De Leon- Quinones** (1st Cir. 2009) 588 F.3d 748, 754.

Petitioner maintains this is a case of “unconscious transference” ((**People v. Watkins** (1987) 195 Cal App.3d 258,264, **U.S v. Smith** (10th Cir. 1998) 156 F.3d 1046,1053)) where Buermann picked defendant not as the person the robbed her but from the familiar face from the out of court identification procedure where defendants picture was highlighted and marked by detectives and where detectives advised Buermann they believed they ad caught the man responsible for the robbery and showed Buermann a video of the defendant using Buermanns credit card.

Taking the Five Biggers Factors into consideration (**Neil v. Biggers** (1972) 409 U.S 188,198)
1)The witness was in a position to get a good view of the actual perpetrator, 2)The witness was did in fact approach her from the opposite direction towards her and she was paying close attention to her surroundings, 3) The description Buermann gave of her attacker did not and does not match the Petitioner , 4) At the initial out of court identification procedure Buermann did express her doubt that the persons depicted might not be the person who robbed her and expressed she did not want to get any

one in trouble due to her doubt, 5) And from the time of the attack to the time of the out of court identification procedure was only seven days leaving little room for Buermann to forget details and characteristics of the true perpetrator.

At trial Ms. Buermann once again expressed doubt that the defendant was the person who accosted her of her property. This is where the District Attorney used and made reference to the initial in court identification procedure at the preliminary hearing that was infected with suggestive factors, and contaminated by an unreliable out of court photographic array line up.

Should identifications stemming from such identification procedures be deemed reliable and admissible in the trial process? Should such identifications stemming from unduly suggestive procedures deployed by law enforcement officers go on to trial without preliminary judicial inquiry as to whether law enforcement agents violated agencies own practice and procedures guidelines?

III

**TRIAL ATTORNEY ALAN ROSS' PERFORMANCE FELL BELOW AN OBJECTIVE
STANDARD OF REASONABLENESS WHICH HAD A NEGATIVE IMPACT ON THE
DEFENDANTS CASE AND TRIAL; AND SAID FAILURES CAN BE ATTRIBUTED IN PART
TO MR. ROSS' POOR PHYSICAL HEALTH CONDITION**

REASONS FOR GRANTING THE WRIT

There is numerous instances petitioner can point to in the trial record, where trial attorney Mr. Allen Ross representation fell below an objective standard of reasonableness, and Ross' failures were prejudicial to petitioners case, and there is a strong likelihood that if it had not been for counsels failures in sum, the outcome of the proceeding would have been different. **Strickland v. Washington** 466 U.S 688 (1984). **U.S v. Cronic** (1984) 466 U.S 648,658.

The following are instances where petitioner complains about and asserts such failures by Ross can be attributed to Ross's physical health , Ross's unpreparedness , And failure to investigate.

1) During the course of trial Ross told the court that he had recently suffered a stroke which "took most of his vision out of one eye and took most of his hearing" making it extremely difficult to hear the proceedings. There was instances where the trial court had to step in and ask why he was not making objections when should, and there is evidence he was not hearing everything going on inside that courtroom such as jury members complaining to courtroom staff during a recess that they where distracted by a loud police radio while Buermann was testifying to important details of the attack, made mistakes of facts of evidence and testimony.

Although Petitioner has not found case law where a ruling has been made for a trial attorneys failures

or inactions may be attributed to poor physical health Petitioner asserts there is similarities of trial counsels omissions and failures due to poor physical health and a trial counsel sleeping through significant portions of trial, And in direct violation of the California Rules Of Professional Conduct Rule 3-700(B)(3). **U.S v. DiTommaso** (2d Cir. 1987) 817 F.2d 201,216, .A mere physical presence of an attorney does not fulfill Sixth amendment entitlement to assistance of counsel. **U.S v. Jarvor** (1984 9th Cir.) 724 F.2d 831 HN 2, **Halloway v. Arkansas**, (1978) 435 U.S 475, 489-91.

2) During the course of pre-trial Petitioner represented himself and filed two meritorious motions seeking sanctions for the loss of material evidence by the prosecution, and motion to suppress out of court and subsequent identification procedures in violation due process, which the trial court never ruled on but reserved said motions as trial motions.

At trial Ross was asked by Petitioner in open court to please seek a court order through a motion to request a jury instruction or dismissal due to the loss of evidence **People v. Wimberly** (1992) 5 Cal 4th 773, and to request suppression of the identification evidence **People v. Nation** (1980) 26 Cal. 3D 169, 179 and Mr. Ross said he could not because said motions where “raised and ruled on pre trial”. This mistake foreclosed any further inquiries and subsequent rulings by the trial court.

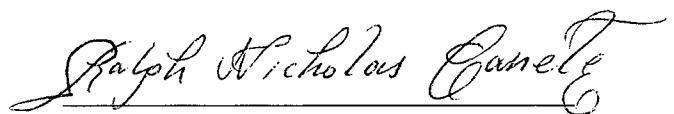
3)Prior to trial, the trial court stated it would be important to hear how property fruit of the Buermann robbery ended in Petitioners home without the defendants knowledge. There were two witnesses that were available to testify that the defendants girlfriend Patricia Rodriguez (Rodriguez) -the very same woman seen on surveillance video handing petitioner a credit card that belonged to Buermann- was the one who brought the stolen property into defendants home. Petitioner made it clear to Ross that these two witnesses had alibi information and were available to testify, but Ross never made any attempts to contact and interview these witnesses who would have corroborated the defenses position of no knowledge how and when Rodriguez brought these stolen items into the home. **Luna v. Cambra** (9th Cir. 2002) 306 F. 3d 954,966, **In Re Cordero** (1998) 46 Cal. 3D 161, 181-87.

CONCLUSION

For the foregoing reasons, petitioner prays this court to grant review to the judgment of the Ninth Circuit, Central District Court of California and California Supreme Court on the issues designated herein.

Date: JANUARY 7TH, 2019

RESPECTFULLY SUBMITTED



Ralph Nicholas Canete