

19-8046

USAP9 No. 18-56029

D.C. NO. 2:15-CV-08911-AG-JOE

IN THE

SUPREME COURT OF THE UNITED STATES

FEBRUARY TERM, 2020

ORIGINAL

MICHAEL A. CERVANTES

VS.

W.L. MONTGOMERY, WARDEN

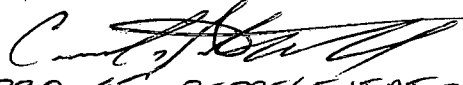
ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURTS OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIFICATE

FILED

MAR 11 2020

OFFICE OF THE CLERK
SUPREME COURT, U.S.


PRO SE REPRESENTATION
CERVANTES A. MICHAEL

RECEIVED

FEB 24 2020

OFFICE OF THE CLERK
SUPREME COURT, U.S.

QUESTIONS PRESENTED FOR REVIEW

1
2 WAS PETITIONERS CONVICTION SUSTAINED IN VIOLATION OF DUE
3 PROCESS WARRANTING HABEAS RELIEF WHERE THE DISTRICT
4 COURT FAILED TO CORRECT THE STATUTORY PRINCIPLE CONCERNING
5 THE INJUSTICE THAT RESULTS FROM THE CONVICTION OF AN
6 INNOCENT PERSON?

7 WAS COUNSEL CONSTITUTIONALLY INEFFECTIVE BECAUSE
8 HE FAILED TO INVESTIGATE AND SOLIDIFY PETITIONERS
9 INNOCENCE CLAIM; FAILED TO OBJECT DURING CRITICAL
10 WITNESS TESTIMONY; AND FAILED TO FILE A PITCHESS
11 MOTION CHALLENGING PROSECUTIONS ONLY WITNESS SUGGESTING
12 PETITIONERS GUILT?

13 WAS PETITIONER MISIDENTIFIED BY UNDULY SUGGESTIVE
14 TACTICS THAT VIOLATED HIS CONSTITUTIONAL RIGHT TO DUE
15 PROCESS?

16 DID THE COURTS BELOW COMMIT REVERSIBLE ERR
17 DENYING PETITIONERS §2254(a)(1)(2) MOTION WITHOUT CONDUCTING
18 AN EVIDENTIARY HEARING TO RESOLVE THE FACTUAL
19 DISPUTES?
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PARTIES TO THE PROCEEDINGS

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SUPREME COURT RULES

RULE 13.3 AND 14.1

PETITIONER, MICHAEL A. CERVANTES, PRAYS THAT THIS HONORABLE COURT WILL ISSUE A WRIT OF CERTIORARI TO REVIEW THE JUDGMENT AND OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE 9TH CIRCUIT, ENTERED ON DECEMBER 20TH, 2019.

I.

CITATIONS OF OPINIONS AND ORDERS IN CASE

THE ORIGINAL JUDGMENT OF CONVICTION OF PETITIONERS DIRECT APPEAL IN THE CALIFORNIA COURT OF APPEAL IS ATTACHED HERETO AS APPENDIX "1".

THE JUDGMENT OF CONVICTION FOR PETITIONERS PETITION FOR REVIEW -- IN THE SUPREME COURT OF CALIFORNIA, WHICH DENIED REVIEW IS ATTACHED AS APPENDIX "2".

THE ORIGINAL JUDGMENT OF CONVICTION FOR PETITIONERS WRIT OF HABEAS CORPUS IN THE SUPERIOR COURT OF CALIFORNIA, FOR THE COUNTY OF LOS ANGELES, WHICH DENIED REVIEW ON A PROCEDURAL BAR IS ATTACHED AS APPENDIX "3".

THE ORIGINAL JUDGMENT OF CONVICTION OF PETITIONER IN THE COURT OF APPEALS OF THE STATE OF CALIFORNIA, WHICH DENIED PETITION FOR REVIEW IS ATTACHED AS APPENDIX "4".

THE ORIGINAL JUDGMENT OF CONVICTION OF PETITIONER IN THE SUPREME COURT OF CALIFORNIA, WHICH DENIED PETITION IS ATTACHED AS APPENDIX "5".

THE REPORT AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE FOR THE CENTRAL DISTRICT OF CALIFORNIA ON PETITIONERS SECTION 2254(d)(1)(2) PETITION IS ATTACHED AS APPENDIX "6".

THE OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA ADOPTING THE UNITED STATES MAGISTRATE JUDGES REPORT AND RECOMMENDATION IS ATTACHED AS APPENDIX "7".

THE OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT IS ATTACHED AS APPENDIX "8".

II.

JURISDICTIONAL STATEMENT

THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT WAS ENTERED ON DECEMBER 20TH, 2020. THE JURISDICTION OF THIS COURT IS INVOKED UNDER 28 U.S.C § 2254(d)(1)(2), AND SUPREME COURT RULES, RULE 13.3 AND 14.1

III.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. THE FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION PROVIDES:

"NO PERSON SHALL BE . . . DEPRIVED OF LIFE, LIBERTY, OR PROPERTY WITHOUT DUE PROCESS OF LAW; NOR SHALL PRIVATE PROPERTY BE TAKEN FOR PUBLIC USE, WITHOUT JUST COMPENSATION."

2. THE SIXTH AMENDMENT OF THE UNITED STATES CONSTITUTION PROVIDES:

"IN ALL CRIMINAL PROSECUTIONS, THE ACCUSED SHALL ENJOY THE RIGHT TO . . . BE CONFRONTED WITH THE WITNESSES AGAINST HIM; TO HAVE COMPULSORY PROCESS FOR OBTAINING WITNESSES IN HIS FAVOR, AND TO HAVE THE ASSISTANCE OF COUNSEL FOR HIS DEFENSE."

3. THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION PROVIDES:

"ALL PERSONS BORN OR NATURALIZED IN THE UNITED STATES . . . ARE CITIZENS OF THE UNITED STATES AND OF THE STATE WHEREIN THEY RESIDE. NO STATE . . . SHALL DEPRIVE ANY PERSON OF LIFE, LIBERTY, OR PROPERTY, WITHOUT DUE PROCESS OF LAW; NOR DENY TO ANY PERSON WITHIN ITS JURISDICTION THE EQUAL PROTECTION OF THE LAWS."

4. THE STATUTE UNDER WHICH PETITIONER SOUGHT HABEAS CORPUS RELIEF WAS 28 U.S.C § 2254 WHICH STATES IN PERTINENT PART:

§ 2254 STATE CUSTODY; REMEDIES IN FEDERAL COURTS

(a) THE SUPREME COURT, A JUSTICE THEREOF, A CIRCUIT JUDGE, OR A DISTRICT COURT SHALL ENTERTAIN AN APPLICATION FOR A WRIT OF HABEAS CORPUS IN BEHALF OF A PERSON IN CUSTODY PURSUANT TO THE JUDGEMENT OF A STATE COURT ONLY ON THE GROUND THAT HE IS IN CUSTODY IN VIOLATION OF THE CONSTITUTION OR LAWS OR TREATIES OF THE UNITED STATES.

(d) AN APPLICATION FOR A WRIT OF HABEAS CORPUS ON BEHALF OF A PERSON IN CUSTODY PURSUANT TO THE JUDGEMENT OF A STATE COURT SHALL NOT BE GRANTED WITH RESPECT TO ANY CLAIM THAT WAS ADJUDICATED ON THE MERITS IN STATE COURT PROCEEDINGS UNLESS THE ADJUDICATION OF THE CLAIM--

(1) RESULTED IN A DECISION THAT WAS CONTRARY TO, OR INVOLVED AN UNREASONABLE APPLICATION OF, CLEARLY ESTABLISHED FEDERAL LAW, AS DETERMINED BY THE SUPREME COURT OF THE UNITED STATES; OR

(2) RESULTED IN A DECISION THAT WAS BASED ON AN UNREASONABLE DETERMINATION OF THE FACTS IN LIGHT OF THE EVIDENCE PRESENTED IN THE STATE COURT PROCEEDING.



IV.
STATEMENT OF THE CASE

ON JULY 25, 2011, THE PEOPLE FOR THE STATE OF CALIFORNIA, FILED A SEVEN COUNT AMENDED COMPLAINT AGAINST PETITIONER, CHARGING HIM WITH THE OFFENSES OF ATTEMPTED ROBBERY [COUNT ONE], CARJACKING [COUNT TWO], EXHIBITING A DEADLY WEAPON TO A PEACE OFFICER TO RESIST ARREST [COUNT THREE] UNLAWFUL TAKING OR DRIVING OF A VEHICLE [COUNT FOUR], ROBBERY [COUNT FIVE], ROBBERY [COUNT SIX], CARJACKING [COUNT SEVEN], PENAL CODE §§ 664/211; 215; 417.8; 211; AND VEHICLE CODE § 10851(A).

ON AUGUST 13, 2012, A LOS ANGELES COUNTY SUPERIOR COURT JURY FOUND PETITIONER GUILTY OF ATTEMPTED ROBBERY, CARJACKING, UNLAWFUL TAKING OR DRIVING OF A VEHICLE, AND ROBBERY, A FOUR COUNT VERDICT, WHILE REACHING A NOT GUILTY VERDICT ON THREE COUNT(S). THE JURY ALSO FOUND TRUE THE CRIMINAL STREET GANG AND FIREARM ENHANCEMENT ALLEGATIONS. (2 CLARK'S TRANSCRIPT [CT] 392-96.)

ON OCTOBER 12, 2012, THE TRIAL COURT SENTENCED PETITIONER TO AN AGGREGATED INDETERMINATE TERM OF TWENTY-FIVE (25) YEARS TO LIFE IN STATE PRISON. (2CT 414-17.) PETITIONER THROUGH COUNSEL, FILED A DIRECT APPEAL RAISING TWO ISSUES.

ON SEPTEMBER 8, 2014, THE CALIFORNIA COURT OF APPEAL AFFIRMED THE JUDGEMENT WITH RESPECT TO THESE TWO ISSUES. SEE APPENDIX "1".

ON NOVEMBER 12, 2014, PETITIONER WAS DENIED REVIEW BY THE SUPREME COURT OF CALIFORNIA. APPENDIX "2".

ON NOVEMBER 16, 2015, PETITIONER COLLATERALLY ATTACKED HIS CONVICTION, FILING A HABEAS PETITION IN THE LOS ANGELES COUNTY SUPERIOR COURT THAT PETITION WAS DENIED ON DECEMBER 29, 2015.

ON AUGUST 10, 2016, PETITIONER'S HABEAS WAS DENIED IN THE CALIFORNIA COURT OF APPEAL.

ON NOVEMBER 30, 2016, THE HABEAS PETITION WAS DENIED IN THE CALIFORNIA SUPREME COURT.

ON APRIL 18, 2018, THE MAGISTRATE JUDGE, ISSUED A REPORT AND RECOMMENDATION TO DENY PETITIONER'S PETITION. SEE APPENDIX "6".

ON JUNE 29, 2018, THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, ADOPTING THE MAGISTRATE JUDGE RECOMMENDATION, AFFIRMED PETITIONER'S



1 CONVICTION. APPENDIX "7."

2 ON DECEMBER 20, 2019, THE UNITED STATES
3 COURT OF APPEALS FOR THE NINTH CIRCUIT AFFIRMED
4 PETITIONERS CONVICTION. SEE APPENDIX "8."

5 V.

6 COURSE OF PROCEEDINGS

7 ON NOVEMBER 16, 2015, PETITIONER MICHAEL A.
8 CERVANTES ("PETITIONER") FILED A PRO SE PETITION FOR WRIT
9 OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY (PETITION),
10 ASSERTING SIX GROUNDS FOR RELIEF. PETITIONER ALSO FILED
11 A STAY IN ORDER TO EXHAUST HIS "NEWLY DISCOVERED
12 EVIDENCE" CLAIM, WHICH FURTHER SUPPORTED HIS "ACTUAL
13 INNOCENCE CLAIM."

14 ON DECEMBER 23, 2016, PETITIONER NOTIFIED THE
15 UNITED STATES DISTRICT COURT THAT THE CALIFORNIA
16 SUPREME COURT SUMMARILY DENIED HIS STATE HABEAS
17 PETITION. ACCORDINGLY THE STAY WAS VACATED AND
18 PETITIONER WAS ORDERED TO FILE A MOTION FOR LEAVE
19 TO PROCEED WITH NEWLY EXHAUSTED CLAIM(S). THIS REQUEST
20 WAS GRANTED AND PETITIONER WAS ALLOWED TO LODGE A
21 FIRST AMENDED PETITION ("FAP") WHICH WAS ORDERED
22 FILED ON JUNE 7, 2017.

23 ON NOVEMBER 3, 2017, RESPONDENT FILED AN
24 ANSWER TO THE FAP. ON MARCH 7, 2018, PETITIONER FILED
25 HIS TRAVERSE ("TRAV.").

26 ON APRIL 18, 2018, THE MAGISTRATE JUDGE ISSUED A
27 REPORT AND RECOMMENDATION DENYING THIS PETITION.

28 ON MAY 8, 2018, PETITIONER FILED TIMELY
OBJECTIONS TO THE MAGISTRATE JUDGE'S REPORT AND
RECOMMENDATION.

ON JUNE 29, 2018, THE DISTRICT COURT ADOPTED THE
REPORT AND RECOMMENDATION AND ISSUED A FINAL JUDGMENT
DENYING PETITIONERS 2254(D)(1)(2) PETITION.

A TIMELY NOTICE OF APPEAL AND MOTION FOR ISSUANCE
OF CERTIFICATE OF APPEALABILITY WAS FILED WHICH WERE
SUBSEQUENTLY DENIED BY THE DISTRICT COURT.

ON DECEMBER 20, 2019, THE UNITED STATES COURT
OF APPEALS FOR THE NINTH CIRCUIT AFFIRMED PETITIONERS
CONVICTION WITHOUT OPINION, AND WITHOUT AN EVIDENTIARY
HEARING TO RESOLVE THE FACTUAL DISPUTES.



VI.
EXISTENCE OF JURISDICTION BELOW

PETITIONER WAS CHARGED AND CONVICTED IN A CALIFORNIA COURT FOR THE LOS ANGELES COUNTY, FOR ATTEMPTED ROBBERY PEN. C. § 664/211, CARTACKING § 215, ROBBER § 211, AND UNLAWFUL DRIVING OR TAKING OF A VEHICLE, VEHICLE CODE § 10851(A). A TIMELY APPEAL AND HABEAS PETITION WAS APPROPRIATELY FILED IN THE CONVICTING COURT AND SUBSEQUENTLY DENIED. A TIMELY APPEAL TO THE UNITED STATES COURT OF APPEALS FOR THE CIRCUIT WAS FILED.

VII.
SUMMARY AND SCOPE OF CONVICTION BEING CHALLENGED

ON SEPTEMBER 25, 2010, AT ABOUT 11:50 A.M., MICHAEL MURILLO AND HIS TWO FRIENDS EMILIO GOMEZ AND JUAN CAZARES WERE INSTALLING A STEREO IN MURILLO'S HONDA ACCORD, OUTFRONT OF MURILLO'S HOME LOCATED ON AVENUE 56 AND MERIDIAN STREET. AT SOME POINT MURILLO SAW TWO HISPANIC MALES, ONE WHICH HE KNEW FROM THE NEIGHBORHOOD APPROACH THE VICTIMS AND WITH GUNS DRAWN. SUSPECT ONE ASKED "WHERE THEY WERE FROM?", WHICH THEY UNDERSTOOD TO MEAN A REQUEST FOR THEIR GANG AFFILIATION. THEY REPLIED "NOWHERE." THEN SUSPECT ONE PROCEEDED TO IDENTIFY HIMSELF AS BELONGING TO THE AVENUES GANG, AND STATING "I KNOW HIGHLAND PARK LIVES IN THIS HOUSE." MURILLO UNDERSTANDING THE SUSPECT REFERRING TO A RIVAL GANG SAID "NO ONE FROM HIGHLAND PARK LIVES HERE."

THE SAME SUSPECT THEN PROCEED TO DIRECT THE VICTIMS TO EMPTY THEIR POCKETS AND PLACE A SPEAKER BOX IN THE TRUNK OF MURILLO'S CAR, WHICH THE VICTIMS COMPLIED. THE TWO GUNNMEN THEN GOT INTO MURILLO'S CAR AND DROVE OFF.

AFTER MURILLO CALLED 9-1-1, TWO OFFICERS ARRIVED AT HIS HOME ABOUT 40 MINUTES AFTER THE INCIDENT. MURILLO TOLD OFFICER GABRIEL RIVAS AND HIS PARTNER THAT SUSPECT ONE HAD A "SILVERISH" AUTOMATIC HANDGUN, WHILE THE SECOND SUSPECT HAD A REVOLVER AND NEVER SPOKE A WORD. MURILLO IDENTIFIED THE SECOND SUSPECT AS "BOOSTER FROM AVENUES".

DURING TRIAL OFFICER RIVAS TESTIFIED THAT MURILLO IDENTIFIED SUSPECT TWO AS "BOOSTER". IN A ATTEMPT TO DEVIATE FROM HIS INITIAL IDENTIFICATION, MURILLO AT TRIAL SUGGEST THE SUSPECT WAS "BUSTER". DETECTIVE AND GANG EXPERT AGUILAR TESTIFIED THAT PETITIONER WAS THE ONLY BUSTER HE KNEW FROM AVENUES. THE PROSECUTION INTRODUCED NINE FIELD IDENTIFICATION (F.I.) CARDS PRODUCED BY THE NORTHEAST POLICE DEPARTMENT AS EVIDENCE. THESE F.I. CARDS RANGED FROM 2008 TO 2010.



1 OUT OF THESE NINE F.I. CARDS THE PROSECUTION ONLY
2 PRESENTED TWO. BOTH WHICH IDENTIFIED PETITIONER AS
3 GOING BY THE MONIKER BUSTER. THE PROSECUTION OUTSIDE
4 THE PRESENCE OF THE JURY, ACKNOWLEDGED THAT THE MOST RECENT
5 F.I. CARDS UP TO THE YEAR OF THIS ALLEGED CRIME 2010 PETITIONER
6 WAS IDENTIFIED AS KNUCKLES FROM AVENUES.

7 AGUILAR FURTHER TESTIFIED THAT MURILLO AND GOMEZ
8 IDENTIFIED PETITIONER IN A OUT-OF-COURT LINE UP. AGUILAR TESTIFIED
9 THAT MURILLOS VEHICLE WAS RECOVERED BY PETITIONERS HOME. DURING
10 MURILLO'S AND GOMEZ TESTIMONY ALLEGATIONS OF MISCONDUCT
11 BY AGUILAR WERE PRESENTED BY THEM. ALL THREE VICTIMS
12 INVOLVED IN THIS CASE DID NOT IDENTIFY PETITIONER AS EITHER
13 SUSPECT WHO CARJACKED THEM.

14 VIII.

15 REASONS FOR GRANTING THE WRIT

16 A. THE COURT OF APPEALS HAS DECIDED A FEDERAL
17 AND CONSTITUTIONAL QUESTION IN DIRECT CONFLICT WITH
18 THE APPLICABLE DECISION OF THIS COURT.

19 1. THE NINTH CIRCUIT AFFIRMING THE DISTRICT COURTS
20 DENIAL OF PETITIONERS ACTUAL INNOCENCE CLAIM ERRED BECAUSE
21 ITS DECISION IS IN DIRECT CONFLICT WITH THIS COURTS DECISION
22 IN SCHWP, I, CARRIER, AND IN RE WINSHIP, INFRA.
23 THE RECORD REVEALS THAT PETITIONER WAS NOT ONE OF THE
24 CARJACKERS. THE COURT ERRONEOUSLY FOUND THAT THIS CLAIM IS
25 A FREE-STANDING ONE, AND SET A EXTRAORDINARILY HIGH STANDARD.
26 THE VICTIMS IN THIS CASE UNEQUIVOCALLY TESTIFIED THAT PETITIONER
27 WAS NOT THE CARJACKER, WAS NOT THE SAME GANGMEMBER
28 WHO HE KNEW, AND NO EVIDENCE WAS PRODUCED WHICH TIES
PETITIONER TO THE VEHICLE PHYSICALLY OR FORENSICALLY. PETITIONERS
NEW EVIDENCE SUPPORTS AND FURTHER CREDITS THE VICTIMS
TESTIMONY AND ALSO COINCIDES WITH MURILLOS INITIAL IDENTIFICATION
OF "BOOSTER FROM AVENUES". CONTRARY TO THE NINTH CIRCUIT
HOLDING, PETITIONER NEED ONLY SHOW THAT THE CONSTITUTIONAL
ERROR "PROBABLY" RESULTED IN THE CONVICTION OF ONE WHO WAS ACTUALLY
INNOCENT. ALLOWING THIS ERR TO CONTINUE UNCORRECTED WOULD
AMOUNT TO A MISCARRIAGE OF JUSTICE. THIS COURT SHOULD
EXERBISE ITS SUPERVISOR POWER OVER THE LOWER COURTS AND
ISSUE THE WRIT.

2. THE NINTH CIRCUIT ERRED AFFIRMING THE DISTRICT
COURT'S DENIAL OF PETITIONER'S INEFFECTIVE ASSISTANCE OF
COUNSEL CLAIMS BECAUSE IT'S DECISION IS IN DIRECT CONFLICT
WITH THIS COURTS DECISION IN STRICKLAND, MICKEY, AND
HART, INFRA. THE RECORD REVEALS THAT COUNSEL FAILED TO
USE A INVESTIGATOR WHOM PETITIONER OBTAINED AND HIRED
DURING HIS SELF-REPRESENTATION, WHICH THE COURTS PROVIDED



1 AND WAS PAID FOR; FAILED TO INVESTIGATE AND SOLIDIFY HIS
2 CLIENT'S INNOCENCE CLAIM WITH RESPECT TO THE CARJACKING IN
3 QUESTION; FAILED TO OBJECT DURING CRITICAL WITNESS TESTIMONY;
4 AND FAILED TO FILE A PITCHESS MOTION IN ORDER TO IMPEACH
5 WITNESS, DETECTIVE AGUILAR, ABSENT COUNSEL'S ERRONEOUS AND
6 DEFICIENT PERFORMANCE PETITIONER WOULD NOT HAVE BEEN
7 WRONGFULLY CONVICTED.

8 3. THE NINTH CIRCUIT ERRED AFFIRMING THE DISTRICT
9 COURT'S DENIAL OF PETITIONER'S UNDULY SUGGESTIVE
10 MISIDENTIFICATION CLAIM BECAUSE ITS DECISION IS IN DIRECT
11 CONFLICT WITH THIS COURT'S DECISION IN BIGGERS, FOSTER, AND
12 PERRY, INFRA. THE RECORD REVEALS THAT GOMEZ WAS DIRECTLY
13 INFLUENCED BY DETECTIVE AGUILAR, WHOM MADE GOMEZ WRITE A
14 GENERIC STATEMENT UNDER PETITIONERS PHOTO, GOMEZ TESTIFIED
15 THAT DET. AGUILAR WAS THE ONE WHO CIRCLED PETITIONERS PHOTO.
16 ABSENT THESE SUGGESTIVE TECHNIQUES PETITIONER WOULD NOT
17 HAVE BEEN WRONGFULLY CONVICTED.

18 4. THE NINTH CIRCUIT COURT'S ERRED AFFIRMING THE
19 DENIAL OF PETITIONER HABEAS CORPUS UNDER SECTION
20 2254(d)(1)(2), WHERE THE DISTRICT COURT FAILED TO PROPERLY
21 APPLY STATUTORY LAW; FAILED TO CONDUCT AN EVIDENTIARY
22 HEARING TO RESOLVE THE FACTUAL DISPUTES, WHICH IF TRUE
23 WARRANTS HABEAS RELIEF AND THE RECORD DID NOT "CONCLUSIVELY
24 SHOW" THAT HE COULD NOT ESTABLISH FACTS WARRANTING RELIEF
25 UNDER § 2254(d)(1)(2), WHICH ENTITLED PETITIONER TO A HEARING.

26 PETITIONER RESPECTFULLY URGES THAT ALL ASPECTS OF
27 THE CIRCUIT COURT DECISION ARE ERRONEOUS AND AT A VARIANCE
28 WITH THIS COURT'S DECISIONS AS EXPLAINED IN THE ARGUMENT
BELOW.

IX.

ARGUMENTS AMPLIFYING REASONS FOR WRIT

1 I. THE COURT OF APPEALS ERRED IN AFFIRMING THE CONVICTION
2 ON THE BASIS THAT PETITIONERS ACTUAL INNOCENCE CLAIM IS
3 A FREESTANDING ONE AND PETITIONER FAILED TO MEET THE
4 "EXTRAORDINARILY HIGH" STANDARD.

5 THE CONVICTION WAS SUSTAINED IN VIOLATION OF DUE
6 PROCESS BECAUSE ASIDE FROM DETECTIVES AGUILAR'S GENERIC
7 GANG TESTIMONY, FACTLESS EVIDENTIARY CLAIMS, THERE
8 WAS NO EVIDENCE WHICH COULD SUPPORT THE VERDICT. THE
9 VICTIMS IN THIS CASE MURILLO, GOMEZ, AND CAZARES DID NOT
10 IDENTIFY PETITIONER AS ONE OF THE CARJACKERS. THIS COURT HAS
11 HELD THAT THE "FUNDAMENTAL VALUE DETERMINATION OF OUR SOCIETY
12 THAT IT IS FAR WORSE TO CONVICT AN INNOCENT MAN THAN TO LET A
13 GUILTY MAN GO FREE." IN RE WINSHIP, 397 U.S. 358, AT 372 (1970) PETITIONER
14 INTRODUCED NEW EVIDENCE OF GANG EXPERT TESTIMONY FROM



1 A DIFFERENT CASE REGARDING A AVENUES GANG MEMBER WITH
2 THE MONIKER "BOOSTER". THIS COURT HAS HELD THAT " TO BE CREDIBLE,
3 SUCH A CLAIM REQUIRED PETITIONER TO SUPPORT HIS ALLEGATIONS OF
4 CONSTITUTIONAL ERROR WITH NEW RELIABLE EVIDENCE-- WHETHER IT BE
5 EXCULPATORY SCIENTIFIC EVIDENCE, TRUSTWORTHY, EYEWITNESS ACCOUNTS,
6 OR CRITICAL PHYSICAL EVIDENCE-- THAT WAS NOT PRESENTED AT TRIAL."
7 SCHLUP V. DELO, 513 U.S. 298, AT. 325

8 AS HELD IN MURRAY V. CARRIER 477 U.S. 478, A HABEAS
9 PETITIONER NEED ONLY SHOW THAT A CONSTITUTIONAL VIOLATION
10 HAS PROBABLY RESULTED IN THE CONVICTION OF ONE WHO IS
11 ACTUALLY INNOCENT. 1D. AT 496. THE LOWER COURTS FOUND THAT
12 DETECTIVE AGUILARS TESTIMONY WAS SUFFICIENT ENOUGH TO UP-
13 HOLD PETITIONERS CONVICTION. HOWEVER, THIS COURT DOES NOT
14 AGREE "FINDING THAT A OFFICER'S TESTIMONY IN ITSELF DOES NOT
15 SUPPORT ENOUGH TO SUSTAIN A CONVICTION WHEN THE RECORD IS
16 DEVOID OF ANY EVIDENTIARY SUPPORT". THOMPSON V. LOUISVILLE,
17 362 U.S 199. FURTHER, AGUILAR'S GENERIC GANG TESTIMONY WAS
18 USED TO BOLSTER HIS BASELESS CLAIMS AND TO STIGMATIZE
19 PETITIONER TO THE JURY IN ORDER TO PREJUDICE THEIR VERDICT.
20 EVIDENCE OF DEFENDANTS GANG MEMBERSHIP ALONE DOES NOT
21 SATISFY, AND INSTEAD REQUIRES SOME EVIDENCE, ASIDE FROM A
22 GANG EXPERTS "GENERIC TESTIMONY", THAT SUPPORTS AN INFERENCE
23 THAT THE DEFENDANT COMMITTED THE CRIME. BRICENO V. SCRIBNER,
24 (9TH CIR. 2009) 555 F.3d 1069; SEE ALSO GARCIA V. CAREY, 395 F. 3d 1099.

25 THE FACT THAT MURILLO INITIALLY IDENTIFIED THE
26 CARJACKER AS "BOOSTER" FROM AVENUES WHOM HE KNEW FROM THE
27 NEIGHBORHOOD AND OFFICER RIVAS CORRESPONDING TESTIMONY TO
28 THIS FACT, AND PETITIONERS NEW EVIDENCE WHICH IS IN CONJUNCTION
WITH A "BOOSTER" FROM AVENUES 57 CLIQUE THE NEXT STREET OVER
FROM THE INCIDENT AND MURILLOS HOME. THIS NEW EVIDENCE
PROVIDES CONCLUSIVE PROOF OF PETITIONERS INNOCENCE, MURILLO
THROUGH OUT HIS TESTIMONY STATED PETITIONER WAS NOT THE
BOOSTER HE WAS TALKING ABOUT OR KNOWS. PETITIONER HAS SHOWN
THAT IT IS MORE LIKELY THEN NOT THAT IN LIGHT OF THE NEW EVIDENCE
NO REASONABLE JUROR WOULD HAVE FOUND HIM GUILTY BEYOND A
REASONABLE DOUBT. SCHLUP V. DELO, 513 U.S. 298, AT. 316; MURRAY
V. CARRIER (1986) 477 U.S. 478, AT 496.

- PETITIONER DID NOT AND COULD NOT HAVE A FAIR TRIAL
WHEN NO SUBSTANTIAL EVIDENCE EXSISTED AND THE STATE
COURTS ACTED UNJUSTLY BY CONVICTING A INNOCENT MAN ON
THE PREMISE OF HIS GANG MEMBERSHIP ALONE, THIS EVIL
HAS CONTINUED BY THE DISTRICT COURT FOR SUSTAINING HIS
CONVICTION IN VIOLATION OF THE FIFTH AND FOURTEENTH
AMENDMENT RIGHTS TO LIFE, AND LIBERTY.. WITHOUT DUE PROCESS
OF LAW, OF THE UNITED STATES CONSTITUTION. DUE PROCESS
REQUIRES THAT A TRIAL MUST PRODUCE AFFIRMATIVE EVIDENCE
AND PROVE THE DEFENDANT GUILTY BEYOND A REASONABLE DOUBT.
IN RE WINSHIP, 397 U.S AT 364.

1 II. THE COURT OF APPEALS ERRED BY DETERMINING THAT
2 PETITIONER'S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS
3 DID NOT MEET THE STANDARDS SET FORTH BY THIS COURT
4 IN STRICKLAND.

5 PETITIONER ASSERTED THROUGH OUT HIS APPEAL PROCESS
6 THAT THE TWO PRONG TEST SET FORTH IN STRICKLAND V.
7 WASHINGTON, 466 U.S. 668, 104 S. CT. 2052 (1984) WHICH READS
8 A PETITIONER SEEKING TO ESTABLISH INEFFECTIVE ASSISTANCE
9 OF COUNSEL MUST DEMONSTRATE THAT (1) COUNSEL'S UNREASONABLE
10 REPRESENTATION FELL WELL BELOW PROFESSIONAL NORMS, (2)
11 PETITIONER IDENTIFIED COUNSEL'S ACTS AND OMISSIONS RESULTING
12 FROM UNREASONABLE PROFESSIONAL JUDGMENT WHICH PREJUDICED
13 PETITIONER AND HAD COUNSEL ACTED REASONABLY THE RESULT OF
14 THE PROCEEDING WOULD HAVE BEEN DIFFERENT.

15 IN THIS CASE THE RECORD REFLECTS THAT COUNSEL
16 FAILED TO PROPERLY INVESTIGATE AND PREPARE FOR PETITIONER'S
17 CARJACKING CASE. COUNSEL HAD AT HIS DISPOSAL A PRIVATE
18 INVESTIGATOR WHOM HIS CLIENT OBTAINED AND WAS PAID
19 FOR BY THE COURT AND HIS CLIENT EXPLICITLY EXPRESSED
20 CONCERNS REGARDING HIS DEFENSE, REQUESTING THAT COUNSEL
21 OBTAIN THE STOLEN VEHICLE TOWING REPORT IN ORDER TO
22 ESTABLISH FORENSIC EVIDENCE THAT SOMEONE ELSE OTHER
23 THAN PETITIONER WAS THE CARJACKER WHILE ALSO BEING USEFUL
24 IMPEACHMENT INFORMATION TOWARDS DET. AGUILAR. HART V.
25 GOMEZ, 174 F.3d 1067, 1070. FINDING A LAWYER WHO FAILS TO
26 TO ADEQUATELY, AND TO INTRODUCE INTO EVIDENCE, RECORDS THAT
27 DEMONSTRATE HIS CLIENT'S FACTUAL INNOCENCE, OR RAISE SUFFICIENT
28 DOUBT AS TO UNDERMINE CONFIDENCE IN THE VERDICT, RENDERS
DEFICIENT PERFORMANCE.

18 PETITIONER CONTINUOUSLY ASKED HIS COUNSEL TO CONDUCT
19 WITNESS INTERVIEWS, AS HE ASSERTED HIS INNOCENCE. ... HAD
20 COUNSEL DONE SO HE WOULD HAVE GAINED THE FACT THAT
21 THE VICTIMS WERE NOT CARJACKED BY PETITIONER BUT ANOTHER
22 AVENUES GANG MEMBER WHO BELONGED TO THE 57 CLIQUE
23 AS WELL AS GAINED IMPEACHMENT INFORMATION WHICH WOULD
24 EXPOSE DET. AGUILAR'S MISCONDUCT AND UNDERMINE HIS TESTIMONY.
25 WHEN A DEFENSE COUNSEL FAILS TO INVESTIGATE HIS CLIENTS ONLY
26 POSSIBLE DEFENSE, ALTHOUGH REQUESTED TO DO SO BY HIM CONSTITUTES
27 INEFFECTIVE ASSISTANCE OF COUNSEL. GOMEZ V. BETO, 462 F.2d
28 596, 597 (1972). PETITIONER INSTRUCTED HIS COUNSEL TO PROPERLY
INVESTIGATED IN ORDER TO SUBSTANTIATE HIS INNOCENCE WHICH
IS FOUND TO BE PROFESSIONALLY UNREASONABLE. BANK V. MILLER,
2003 U.S. DIST LEXIS 5485.

THE DISTRICT COURTS CONCLUDED THAT PETITIONER WAS
PRESENTING A NEW CLAIM, WHEN HE PRESENTED FACTS THAT
COUNSEL FAILED BY STIPULATING TO THE F.I. CARDS REGARDING

1 HIS CLIENTS GANG MONIKER, WHERE COUNSEL ALLOWED THE PROSECUTION
2 TO USE TWO(2) OLD F.I. CARDS FROM 2008, COUNSEL HAD A
3 DUTY TO PRESENT THE MOST RECENT CARDS DATED 2010 WHERE
4 PETITIONER WAS IDENTIFIED AS KNUCKLES AND THEREFORE NOT
5 THE BUSTER MURILLO WAS CAPSACKED BY. THIS INFORMATION IS
6 SUPPLEMENTAL TO PETITIONER'S HABEAS CORPUS AND IS NOT
7 FUNDAMENTALLY ALTERING THE NATURE OF HIS CLAIM, ANDERSON V.
8 JOHNSON, 338 F. 3d 382, 388; VASQUEZ V. HILLERY, 474 U.S. 254
9 260. COUNSEL'S ACTION WAS NOT STRATEGIC WHEN THIS INFORMATION
10 WAS FUNDAMENTAL TO THE IDENTITY OF HIS CLIENTS ACTUAL
11 GANG NAME. ANDREWS V. DAVIS, 2017 U.S. APP. LEXIS 13960.

12 COUNSEL NEEDED TO OBJECT TO AGUILAR'S GENERIC
13 TESTIMONY EXPLICITLY TO FACTS NOT IN EVIDENCE. BURNS V. GAMMON,
14 260 F. 3d 892, 897; WHITLOCK V. BRUEGGEMAN, 682 F. 3d 567, 580
15 HAD COUNSEL OBJECTED TO THE DAMAGING TESTIMONY OF
16 AGUILAR REGARDING THE RECOVERY OF THE STOLEN VEHICLE AND
17 WITNESS OUT-OF-COURT STATEMENTS WOULD HAVE NEVER
18 PREJUDICED PETITIONER WITH THE JURY AND IT IS MORE LIKELY
19 THAN NOT THAT HAD HE TAKEN THESE STEPS THAT A DIFFERENT
20 WOULD HAVE RESULTED. STRICKLAND, 466 U.S. 694.

21 III. THE COURT OF APPEALS ERRED BY DETERMINING
22 THAT PETITIONERS MISIDENTIFICATION CLAIM DID NOT
23 MEET THE STANDARD SET FORTH IN BIGGERS.

24 THIS COURT ESTABLISHED IN NEIL V. BIGGERS, 409 U.S.
25 188, 199(1972) THAT THE STANDARD IS "THE OPPORTUNITY OF THE WITNESS
26 TO VIEW THE CRIMINAL AT THE TIME OF THE CRIME, THE WITNESS'S
27 DEGREE OF ATTENTION, THE ACCURACY OF THE WITNESS'S, PRIOR
28 DESCRIPTION OF THE CRIMINAL, THE LEVEL OF CERTAINLY DEMONSTRATED
BY THE WITNESS AT THE CONFRONTATION, AND THE LENGTH OF TIME
BETWEEN THE CRIME AND THE CONFRONTATION.

THE DISTRICT COURT FAILED BY DISMISS LITIGATION SET
BY THIS COURT IN WILLIAMS V. WOODFORD, 384 F. 3d 567 WHERE
IT WAS HELD THAT "A CRIMINAL DEFENDANT IS ENTITLED TO HABEAS
RELIEF IF THE ADMISSION OF COERCED THIRD PARTY TESTIMONY
RENDERED HIS TRIAL SO FUNDAMENTALLY UNFAIR AS TO VIOLATE
DUE PROCESS" ID. 593. HERE GOMEZ TESTIFIED THAT HE COULD
NOT IDENTIFY ANYONE DURING HIS MEETING WITH AGUILAR FOR
THE OUT-OF-COURT IDENTIFICATION, WHERE HE ALSO CONFIRMS THAT
AGUILAR DIRECTLY POINTED AT PETITIONER AND SPECIFICALLY TOLD
GOMEZ IF PETITIONER WAS THE GUY. UNDER STRESS AND FEELING
HARASSED GOMEZ STATED "LOOKS LIKE HIM, BUT ITS NOT HIM."
AGUILAR PROCEEDED TO HAVE GOMEZ WRITE THAT STATEMENT
UNDER PETITIONER'S PHOTO. THIS COURT HAS LONG SITUATED THAT
"PLACING THE SUSPECT IN A LINE UP AND POINTING OUT THE SUSPECT
TO THE WITNESS BEFORE OR DURING THE LINEUP, VIOLATES DUE
PROCESS". UNITED STATES V. WADE, 388 U.S. 218, AT 224(1967).



1 AN IDENTIFICATION PROCEDURE IS IMPERMISSIBLY SUGGESTIVE
2 WHERE IT PLACES A SPECIAL FOCUS ON AN INDIVIDUAL, SUCH THAT
3 IT COMMUNICATES TO THE WITNESS THAT "THIS IS THE MAN". FOSTER
4 V. CALIFORNIA, 394 U.S. 440, AT 443; PERRY V. NEW HAMPSHIRE, 132
5 S. CT. 716 (2013) FINDING THAT DUE PROCESS PROHIBITS THE USE OF
6 EYEWITNESS IDENTIFICATION PROCEDURES THAT ARE BOTH SUGGESTIVE
7 AND UNNECESSARY. ID. AT 724. HERE THE COURT CANNOT CONFIDENTLY
8 RELIE ON THIS OUT-OF-COURT IDENTIFICATION, WHICH ONLY SHOWS
9 A SUBSTANTIAL LIKELIHOOD OF IRREPARABLE MISIDENTIFICATION. SIMMONS
10 V. UNITED STATES, 390 U.S. 377, AT 384.

11 ALL THREE VICTIMS GOT TO SEE THE SUSPECTS IN BROAD
12 DAY LIGHT AND HAD SUBSTANTIAL TIME TO ANALYZE THESE
13 SUSPECTS. MURILLO KNEW THE SUSPECT FROM THE NEIGHBORHOOD,
14 AS BOOSTER'S CLIQUE WAS THE NEXT STREET OVER FROM HIS
15 HOME AND CRIME. THEREFORE, THE CERTAINLY DEMONSTRATED
16 CAN NOT BE IGNORED. PETITIONER MEETS THE STANDARDS SET
17 IN BIGGERS, AT 199-200.

18 EVEN IF A LINE UP IN ITSELF WOULD TO NOT BE CONSIDERED
19 SUGGESTIVE A WITNESS "PERCEIVED PRESSURE" FROM POLICE TO
20 ACQUIESCE IN IDENTIFYING A PARTICULAR SUSPECT IS A VIOLATION
21 OF DUE PROCESS. MANSON V. BRATHWAITE, 432 U.S. 98, AT 116 (1977);
22 THOMAS V. VARNER, 428 F. 3d 491, 503 (3d CIR. 2005) HAD DETECTIVE
23 A GUILAR NOT ENGAGE IN SUGGESTIVE TACTICS PETITIONER
24 WOULD NOT HAVE BEEN WRONGFULLY CONVICTED. IT IS CLEAR THAT
25 PETITIONER HAS BEEN MISIDENTIFIED UNDER BIGGERS.

26 IV. THE COURT OF APPEALS ERRED AFFIRMING THE DENIAL
27 OF PETITIONERS HABEAS CORPUS UNDER § 2254 (d)(1)(2) WHERE
28 THE DISTRICT FAILED TO ADEQUATELY APPLY SITUATED
CASE LAW BY THIS COURT AND FAILED TO CONDUCT AN EVIDENTIARY
HEARING TO RESOLVE THE FACTUAL DISPUTES

SECTION 2254 (d)(1)(2) PROVIDES THAT FEDERAL COURTS
MAY GRANT HABEAS RELIEF TO A STATE PRISONER "WITH RESPECT TO
ANY CLAIMS THAT WAS ADJUDICATED ON THE MERITS IN STATE COURTS
PROCEEDINGS" ONLY IF THAT ADJUDICATION: (1) RESULTED IN A DECISION
THAT WAS CONTRARY TO, OR INVOLVED AN UNREASONABLE APPLICATION
OF, CLEARLY ESTABLISHED FEDERAL LAW, AS DETERMINED BY THE
SUPREME COURT OF THE UNITED STATES; OR (2) RESULTED IN A
DECISION THAT WAS BASED ON AN UNREASONABLE DETERMINATION
OF THE FACTS IN LIGHT OF THE EVIDENCE PRESENTED IN THE
STATE COURT PROCEEDING. 28 U.S.C § 2254(d).

WHEN A STATE COURT DECISION IS CONTRARY TO CONTROLLING
SUPREME COURT LAW THE REVIEWING FEDERAL HABEAS COURT IS
"UNCONSTRAINED BY SECTION 2254 (d)(1). WILLIAMS V. TAYLOR, 529 U.S.
362, AT 406. HOWEVER THE STATE COURT'S DENIED PETITIONERS
HABEAS WITHOUT ADJUDICATION ON ITS MERITS. THE DISTRICT
REVIEWED PETITIONERS CLAIMS DE NOVO BUT ERRED IN BOTH THIS
SECTIONS PRONG, § 2254(d)(1)(2).

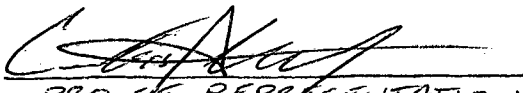
1 THIS COURT HAS HELD THAT RULINGS ON CLAIMS OF
2 UNREASONABLE DETERMINATION SHOULD BE VIEWED IN LIGHT OF THE
3 EVIDENCE PRESENTED IS SO LACKING IN JUSTIFICATION THAT
4 THERE IS AN ERRO WELL UNDERSTOOD AND COMPREHENDED IN
5 EXISTING LAW BEYOND ANY POSSIBILITY FOR FAIRMINDED
6 DISAGREEMENT HARRINGTON V. RICHTER, 562 U.S. 86, AT 103 (2011);
7 JOHNSON V. WILLIAMS, 568 U.S. 289, 292 (2013).

8 AS EXPRESSED ABOVE PETITIONER HAS SHOWN THAT THE
9 DISTRICT COURT HAS ACTED CONTRARY TO, CLEARLY ESTABLISH
10 FEDERAL LAW. PETITIONER REIT(RATES THAT FAILURE TO REVIEW
11 REMAND AND REVERSE WILL AMOUNT TO A MISCARRIAGE OF
12 JUSTICE MURRAY V. CARRIER, 477 U.S. 478. THUS PETITIONER
13 WAS ENTITLED TO AN EVIDENTIARY HEARING. UNITED STATES V. BIRDWELL
14 887 F.2d 643, 645 (5TH CIR. 1989) (EVIDENTIARY HEARING WARRANTED IF
15 PETITION CONTAINS "SPECIFIC FACTUAL ALLEGATIONS NOT DIRECTLY
16 CONTRADICTED IN THE RECORD").

17 CONCLUSION

18 PETITIONER MICHAEL A. CERVANTES, HAS BEEN DEPRIVED
19 OF BASIC FUNDAMENTAL RIGHTS GUARANTEED BY THE FIFTH,
20 SIXTH, AND FOURTEENTH AMENDMENT'S OF THE UNITED STATES
21 CONSTITUTION AND SEEKS RELIEF IN THIS COURT TO RESTORE THOSE
22 RIGHTS. BASED ON THE ARGUMENTS AND AUTHORITIES PRESENTED
23 HEREIN, PETITIONER CONVICTION WAS SUSTAINED IN VIOLATION OF DUE
24 PROCESS DEPRIVING HIM OF LIFE AND LIBERTY, AND EFFECTIVE
25 ASSISTANCE OF COUNSEL IN THE DISTRICT COURT AND APPELLATE COURT.
26 PETITIONER PRAYS THIS COURT WILL ISSUE A WRIT OF CERTIORARI
27 AND REVERSE THE JUDGMENT OF THE NINTH CIRCUIT COURT OF
28 APPEALS!

RESPECTFULLY SUBMITTED ON THIS 17TH DAY OF FEBRUARY, 2020.


PRO SE REPRESENTATION
CERVANTES A. MICHAEL

IF THIS COURT ELECTS NOT TO ADDRESS THE ISSUES PRESENTED IN
THIS PETITION AT THIS TIME, IT IS REQUESTED THAT THE WRIT ISSUE AND
THE MATTER BE REMANDED TO THE DISTRICT COURT OF APPEALS FOR
RECONSIDERATION IN LIGHT OF THIS COURT'S OPINION IN SCHLUP, STRICKLAND,
BIGGERS, AND CARRIER, ALL SUPRA.