No. 19-8437

IN THE

SUPREME COURT OF THE UNITED STATES

Marijan Cvjeticanin — PETITIONER
(Your Name)

vs.

UNITED STATES OF AMERICA — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

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

PETITION FOR WRIT OF CERTIORARI

MARIJAN CVJETICANIN #65437-050
(Your Name)
FEDERAL CORRECTIONAL INSTITUTION FORT DIX
P.O. BOX 2000
(Address)

JOINT BASE MDL, NEW JERSEY 08640-5433
(City, State, Zip Code)

(Phone Number)

QUESTIONS PRESENTED:

1) BRADY VIOLATIONS - "CATCH ME IF YOU CAN" - When, in direct violation of the district court's specific discovery order, the Government fails to turn over Brady evidence (which, by definition, was unknown to the defense pretrial), and the defense discoveries such evidence after the trial and files a new trial motion within 3 years since the trial, isn't such a motion timely under Fed. R. Crim P. 33(b)(1), and wouldn't any conclusion to the contrary produce "catch me if you can " situation, clearly violating the Constitution's Due Process clause?

2) TRIAL PERJURIES - "CATCH ME IF YOU CAN 2.0" - When the defense finds new evidence of substantial trial perjuries, known to, or even solicited by, the Government, and files a new trial motion under Fed. R. Crim. P. 33, in judging the materiality of perjuries, shouldn't the court apply Kyles v. Whitley's "reasonable probability standard" instead of "probably produce an acquittal" standard applicable to typical newly discovered evidence Rule 33 situations?

LIST OF PARTIES

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

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

RELATED CASES

NONE

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES

1) Rules:

- Federal Rules of Criminal Procedure 33(b)(1) and (2);

2) Cases:

- ***Brady v. Maryland, 10 L Ed 2d 215 (1963);***

- ***Kyles v. Whitley, 514 U.S. 419 (1995);***

- ***Napue v. Illinois, 360 U.S. 264 (1959);***

- ***United States v. Bagley, 473 U.S. 667 (1985);***

- ***Giglio v. United States, 405 U.S. 150 (1972);***

- ***United States v. Agurs, 427 U.S. 97 (1976);***

- ***Pyle v. Kansas, 87 L Ed 214 (1942);***

- *Mooney v. Holohan, 79 L Ed 791 (1935);*

- *Moore v. Illinois, 33 L. Ed. 2d 706 (1972);*

- *Mesarosh v. United States, 1 L Ed 2d (1956);*

- *Banks v. Dretke, 157 L Ed 2d 1166 (2004);*

- *Weary v. Warden, 194 L Ed 2d 78 (2016);*

- *Turner v. United States, 198 L Ed 2d 443 (2017);*

- *United States v. Hon. Judge Smith, 91 L Ed 1610 (1947);*

- *United States v. Flores-Rivera, 787 F.3d 1 (1st Cir. 2015);*

- *United States v. Oruche, 484 F.3d 590 (D.C. Cir. 2007);*

- *United States v. Pasha, 797 F. 3d 1122 (D.C. Cir. 2015);*

- *Unite States v. Cook, 170 Fed Appx. 639 (11th Cir. 2006);*

- *United States v. Fernandez, 136 F.3d 1434 (11th Cir. 1998);*

- *Guzman v. Secretary, Department of Corrections, 663 F. 3d 1336 (11th Cir. 2011);*

- *United States v. Lanas, 324 F. 3d 894 (7th Cir. 2003);*

- *Lewis v. Connecticut Commissioner of Correction, 790 F/3d 109 (2d Cir. 2015);*

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

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

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

[X] reported at 2019 U.S. App. LEXIS 34734; 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 C to the petition and is

[X] reported at 2019 U.S. Dist. LEXIS 36021; 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 _____ 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 _____ court appears at Appendix _____ to the petition and is

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

JURISDICTION

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

The date on which the United States Court of Appeals decided my case was 11/21/2019.

[ ] 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: 12/16/2019, 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 _____ (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 _____. A copy of that decision appears at Appendix _____.

[ ] 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

1) United States Constitution:

- 5th Amendment: Due Process Clause;

- 6th Amendment: Confrontation Clause;

2) Federal Court Rules:

- Federal Rules of Criminal Procedure Rule 33(b)(1);

STATEMENT OF THE CASE

FACTUAL STATEMENT FOR QUESTION No. 1:

QUESTION NUMBER ONE - BRADY VIOLATIONS - "CATCH ME IF YOU CAN"

When, in direct violation of the district court's specific discovery order, the Government fails to turn over Brady evidence (which, by definition was unknown to the defense pretrial), and the defense discovers such evidence after the trial and files a new trial motion within 3 years since the trial, isn't such a motion timely under Fed. R. Crim. P. 33(b)(1), and wouldn't any conclusion to the contrary produce a "catch me if you can" situation, clearly violating the Constitution's Due Process Clause?

The Petitioner, a former New York immigration attorney, was charged and convicted of nine counts of mail fraud, in violation of 18 U.S.C. Section 1341, based on a scheme to defraud his employer's big corporate clients (ADP and Broadridge) through false billing practices regarding immigration (green card) advertising.

The trial in this matter was held at the U.S. District Court in Trenton, New Jersey, from June 22 to 29, 2015. One year prior to the trial, in May 2014, defense specifically requested, and the District Court issued, a very broad Discovery Order, including, inter alia, ordering the

Government to disclose to the defense "any impeachment evidence", see district court's order at ECF. No. 21, p.2, 05/21/2014, Appendix at D.

At trial, the Government's key witness was its Lead Investigator in this matter, Special Agent of the Department of Homeland Security (DHS), Rick Patel. In addition to being a Lead Investigator in the Petitioner's matter, Special Agent Patel had another "business" - he was also moonlighting by conducting various unauthorized federal investigations and chasing (good looking) women on New Jersey parking lots. Being a superb investigator, he was shy of no "homeland security" challenges. Just that at one point he went a bit "too far", and was arrested for stalking and chasing Union City, New Jersey, Mayor's girlfriend on one of the City's parking lots ("dirty cop"). The arrest occurred in December 2014, approximately 6 months prior to the Petitioner's trial, Appendix at E. This gave the Government sufficient time to disclose this impeachment evidence to the defense. Just to make sure that the Government was fully aware of its Brady obligations, Agent Patel's arrest also occurred a solid 6 months after the District Court Judge Michael Shipp issued a broad Discovery Order to the Government. But to no avail. While the Government either knew, or should have known, the info concerning the arrest of its Lead Investigator, the Government chose to remain silent and failed to disclose it to the defense. As a lead investigator, Special Agent Patel was the Government's central witness at trial. Given the fact that the Petitioner pleaded not guilty and vehemently professed his innocence, the impeachment evidence of such kind, especially when the Government's lead investigator was not only abusive towards women, but was also conducting some "phantom", or unauthorized, investigations, would have been a major boon for the defense and could have easily swayed not

only a one single juror (as required by Brady rule), but the entire jury. This is, of course, in addition to the fact that, had it been presented to the jury, in the time and age of the #MeToo Movement, such inflammatory anti-female impeachment evidence would have easily changed a mind of at least one female juror, if not of all of them (as it should have). Fully aware of that problem, the U.S. Government decided to stay silent, deliberately defying district court judge's order and testing the fairness of the American justice system in the process, too.

Approximately two years after the trial, while preparing documentation for the Petitioner's Section 2255 post-conviction relief, the Petitioner's daughter, then an NYU student, found the incriminating impeachment evidence online.

The Petitioner timely filed Motion for New Trial, pursuant to Fed. R. Crim. P. 33(b)(1), clearly stating that it was based on newly discovered evidence of numerous constitutional violations, including evidence of Brady violations. Desperate to preserve its ill-gotten gain, trying to cover up its malfeasance and its "dirty cop" witness, the Government argued that the Petitioner was 3 years late due to the time limitations under a different rule - Fed. R. Crim. P. 33(b)-(2). The Government argued that new evidence motion based on Brady-type (constitutional due process) evidence can only be submitted under "any other evidence" (b)(2) Rule, limited to only 14 days after trial, regardless of the Government's discovery and Brady constitutional obligations and regardless of when the defense becomes aware of the (new) evidence.

Both district court and the U.S.Court of Appeals for the Third Circuit sided with the Government, thus virtually giving the Government a "blank check" to continue hiding evidence, ensuring a continued stream of the new Brady violations, 2019 U.S. App. LEXIS 34734 and making the Brady rule meaningless in the process.

FACTUAL STATEMENT FOR QUESTION No. 2:

QUESTION NUMBER TWO - TRIAL PERJURIES - "CATCH ME IF YOU CAN 2.0"

When the defense finds new evidence of substantial trial perjuries, known to, or even solicited by, the Government, and files a new trial motion under Fed. R. Crim. P. 33, in judging its materiality, shouldn't the court apply Kyles v. Whitley's "reasonable probability" standard instead of "probably produce an acquittal" standard applicable to typical newly discovered evidence Rule 33 situations?

The Government knowingly solicited Steven Weinberg's false trial testimony that he had "all" the newspapers, checked "all" advertisements in various public libraries and provided them to the Government, as the Government knew that he did not, and particularly not "all" of them, SA925, Appendix at F.

The Government also knowingly solicited Steven Weinberg's false trial testimony that "all" applications filed by the Petitioner were fraudulent. In addition, the Government knowingly solicited Steven Weinberg's false testimony that he checked 2012 Star Ledger advertisements for indictment counts 6 and 8, as the New York Public Library did not have at that time, and still does not have, Star Ledger newspapers for these dates (indeed carries no longer any Star Ledger after December 2011), and Steven Weinberg produced no newspaper pages bearing Library of Congress stamps or printout pages, SA939, Appendix at F. Moreover, by denying the existence of previously placed advertisements, the Government knowingly solicited Mr. Weinberg's false testimony regarding Computer World Magazine advertisements, SA941, Appendix at F. The Government also knowingly solicited Steven Weinberg's false testimony regarding the Indictment count 9 in which Mr. Weinberg claimed the Petitioner provided to him "wrong" advertisements, SA 944, Appendix at F, and the Government also knowingly solicited special agent Patel's false testimony that he checked and reviewed "hundreds of newspapers" and "a whole bunch of things" (and found no Petitioner's advertisements), SA949, Appendix at F.

The Government also solicited and failed to correct a demonstrably false testimony of Steven Weinberg that, as a result of the Petitioner's alleged fraud, he re-filed 100 (Green Card) applications and personally paid for the new advertisements (in order to rectify problems allegedly caused by the Petitioner) SA952, Appendix at F, and the Government solicited, and then failed to correct Steven Weinberg's perjured testimony regarding the timing of his knowledge of Flowerson's existence (the Petitioner's advertising agency) SA955, Appendix at F, etc, etc.

The Petitioner's new trial motion not only alleged the existence of the above captioned perjuries (which would have sufficed for the evidentiary hearing purposes), but in its Exhibit List even provided newly discovered evidence in terms of various public library slips and other physical evidence items (even the ones inadvertently submitted by the Government), directly proving the existence of the trial perjuries.

In its response, the Government didn't even attempt to deny the existence of widespread perjuries (as it couldn't). The Government either claimed that the Petitioner's motion was untimely (discussed above under question number one), or that the materiality of the new evidence was such that it would probably not produce an acquittal, Appendix at G.

Both district court and the U.S. Court of Appeals for the Third Circuit agreed with the Government and used the same "probably produce an acquittal standard" when judging the materiality of the perjuries presented by the Petitioner's new trial motion.

REASONS FOR GRANTING THE PETITION

1) DEEP CIRCUIT SPLIT CONCERNING CRITICALLY IMPORTANT DUE PROCESS ISSUES

Decision of the U.S. Court of Appeals for the Third Circuit denying the Petitioner's new trial motion opens a yawning circuit split with other sister circuits and, by any reasonable reading, directly violates relevant Supreme Court's decisions.

Third Circuit's decision also significantly weakens constitutional guarantees of due process both regarding the Brady evidence issues (Government failing to turn over/hiding impeachment evidence) and fair trial principles (Government's known introduction of perjured testimonies at trial).

As for question one - the timeliness of submission of new evidence of Brady violations - we should be reminded that "by now government prosecutors should know: betray Brady, give short shirt to Giglio, and you will lose your ill-gotten conviction" *Vaughn v. U.S., 93 A. 3d 1237 (D.C. 2014),* quoting *U.S. v. Olsen, 737 F.3d 625 (9th Cir. 2013).* "Once a court finds a Brady violation, a new trial follows as the prescribed remedy, **not** as a matter of discretion." *U.S. v.*

Pasha, 797 F.3d 1122 (D.C. Cir. 2015) quoting *U.S. v. Oruche, 484 F. 3d 590 (D.C. Cir. 2007),* emphasis added.

Almost fifty years ago this Honorable Court stated that "under the due process clause, the prosecution's suppression of material evidence justifies a new trial irrespective of the prosecution's good faith or bad faith...when the reliability of a given witness may well be determinative of guilt or innocence, the prosecution's non-disclosure of evidence affecting credibility justifies a new trial, under the due process clause..." *Giglio v. U.S., 405 U.S. 1972.*

Since it is an expressly stated function of the Fed. R. Crim. P. 33 to prevent "a miscarriage of justice", we should be reminded, that 35 years ago, this Honorable Court also stated that "the Brady rule is based on the requirement of the due process. Its purpose is...to ensure that a miscarriage of justice does not occur." *U.S. v. Bagley, 473 U.S. 667 (1985).*

Moreover, "under Brady, the prosecution bears an affirmative duty to learn of any favorable evidence known to the others acting on government's behalf in the case, including the police, and to provide it to defense." *Kyles v. Whitley, 514 U.S. 419 (1995).* As "the jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence..." *Napue v. Illinois, 360 U.S. 264 (1959),* this also includes the impeachment

evidence. Also, Brady is not a sufficiency of evidence test as "it also does not remove the taint for a reviewing court to find that there is ample innocent testimony to support (previous verdict)." *Mesarosh v. U.S., 1 L Ed 2d (1965).* Needless to say, Third Circuit followed none of this in the Petitioner's matter.

Moreover, unlike the Third Circuit, the First Circuit Court of Appeals reminds us that "motions for a new trial based on newly discovered evidence generally require a four-prong showing that (1) the evidence was unknown or unavailable to the defendant at the time of trial....However, when the basis for the motion is that government failed to disclose evidence required to be disclosed under Brady, either willfully or inadvertently, the court applies the more **defendant - friendly** *Kyles v. Whitley* standard to the test's third and fourth prongs." *U.S. v. Flores-Rivera, 787 F.3d 1 (1st Cir. 2015)*, emphasis added. Same Eleventh Circuit: "the district court erred because it evaluated defendant's motion using standard for a Rule 33 motion based on newly discovered evidence INSTEAD of Rule 33 motion based on Brady evidence." *U.S. v. Cook, 170 Fed. Appx. 639 (11th Cir. 2006)*, emphasis added. But the Third Circuit would have none of it. The Third Circuit insists on applying a "classical" new evidence standard for both timeliness and the materiality of evidence even for Brady and similar constitutional violations.

Deep circuit split is even more obvious when the Brady (undisclosed) evidence relates to the disclosure of false trial testimony. Other circuits have concluded that "a new trial based on newly discovered evidence that discloses false testimony should only be granted if (1) the court is reasonably satisfied that the witness testified falsely, (2) the jury might have reached a different conclusion without the false testimony and (3) the moving party was taken by surprise by the false testimony and was unprepared to meet it." *U.S. v. Lanas, 324 F.3d 894 (7th Cir. 2003)*. Same Eleventh Circuit in *U.S. v. Fernandez, 136 F. 3d 1434 (11th Cir. 1998),* again Seventh Circuit in *U.S. v. Dimas, 3. F.3d 1015 (7th Cir. 1993)*, and Second Circuit in *Lewis v. Conn. Commis. of Corr, 790 F. 3d 109 (2d Cir. 2015).*

But not the Third Circuit in the Petitioner's case. This is in addition to the fact that the district court completely failed to inquire (and Circuit Court affirmed) as to "how the defense's knowledge of the withheld info would have impacted not just the evidence presented at trial, but also strategies, tactics and defenses that the defense could have developed and preserved to the trier of fact." *Guzman v. Sec. Dept. of Corr., 663 F.3d 1336 (11th Cir. 2011),* issue usually addressed at the district court's evidentiary hearing. Once again, the Third Circuit would have none of it.

As for the second question - the issue of the legal standard for judging the materiality of newly discovered evidence of various constitutional violations, both the circuit split and the blatant violation of the Supreme Court's presidential decisions is even more pronounced.

In concluding that the evidence presented by the Petitioner was "not of such nature that it would probably produce an acquittal at a new trial", Appendix at C, District Court Judge Michael Shipp used, and the Third Circuit affirmed, a completely erroneous legal standard. Namely, district court used the fifth prong of the "typical" new evidence test (in the Third Circuit called Ianelli/Quiles test), instead of the Bagley/Kyles/Agurs "reasonable probability" standard. It is well established in Brady cases that "favorable evidence is material, and constitutional error results from its suppression by the government, if there is a "**reasonable probability**" that had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Kyles v. Whitley, 514 U.S. 419 (1995)*, emphasis added.

Moreover, "probably produce an acquittal" standard, was specifically rejected by this Court's holding in *U.S. v. Agurs, 427 U.S. 97 (1976)*. Agurs "rejected a standard that would require the defendant to demonstrate that the evidence if disclosed probably would have resulted in acquittal." Kyles at 434. The Agurs holding was affirmed by no less than two recent decisions of this Honorable Court, see *Wearry v. Warden, 194 L Ed 2d 78 (2016)* and again in 2017 in

Turner v. U.S., 198 L Ed 2d 443 (2017) ("evidence is material....when there is a reasonable probability..." Turner at 452).

None of this can be justified as "just" the Third Circuit's (erroneous) reading of the Rules. "A construction of Rule of Criminal Procedure which would present a serious constitutional issue is to be avoided." *U.S. v. Hon. Judge Smith, 91 L Ed 1610 (1947).*

Last but not the least, and regardless of any possible interpretation of the Rules, even if the "Petitioner's papers are inexpertly drawn (or prepared in jail conditions in Ft. Dix), but they set forth allegations that his imprisonment resulted from perjured testimony, knowingly used by state authorities to obtain his conviction, and from the deliberate suppression by those same authorities of evidence favorable to him...if proven would entitle Petitioner to release from his present custody." *Pyle v. Kansas, 87 L Ed 214 (1942)*,comment added.

2) GRAVE AND MANIFEST INJUSTICE TO THE PETITIONER

A grave and manifest injustice was caused and inflicted on the Petitioner at least twice. The first time when the Government deliberately withheld Brady evidence and allowed demonstrably

false and perjured trial testimonies to be openly aired to the jury. The second time it was caused by the incredible insensitivity of the lower courts to these issues, almost giving a blank check to the Government to continue with such grossly unfair and unconstitutional practices, to say the least.

As once again we are reminded of this Honorable Court's wisdom stating that "a rule thus declaring "prosecutor may hide, defendant must seek" is not tenable in a system constitutionally bound to accord defendants due process." *Banks v. Dretke, 157 L Ed 2d 1166 (2004),* as well as that "....the defense could not be expected to make a request for specific evidence that it did not know was in existence." *Moore v. Illinois, 33 L Ed 2d 706 (1972).*

The Petitioner's trial ended on June 29, 2015 and he filed his new trial motion on June 25, 2018. Thus, the motion was timely under Fed. R. Crim. P. 33(b)(1)- filed within the three years "since the verdict." The Petitioner's motion clearly stated that it was filed under Rule 33(b)(1) and based on new evidence of various Brady and other constitutional violations. While it is undeniable that the existence of various constitutional violations (such as Brady, etc) can be brought to the Court's attention under Fed. R. Crim. P. 33(b)(2)- "other grounds", for which the time to file is considerably shorter, at the same time, no provision of the Rules requires the

Petitioner to do so. Once timely filed (meaning containing newly discovered evidence from the defense point of view), the nature of the new evidence claim itself is irrelevant for the purposes of the timing of the motion (constitutional violation or not).

It is not only that numerous other circuits have held so (see *U.S. v. Campa, 459 F.3d 1121 (11th Cir. 2006), U.S. v. Beasly, 582 F. 2d 337 (5th Cir. 1978), etc),* once again creating an unnecessary circuit split, but any conclusion to the contrary gives a blank check to the Government to commit the most heinous Brady violations and get away with that if the defense does not discover them and file such motions within 14 days since the verdict. Such a reading of the Rules would create an insurmountable obstacle for any defense and no defense should be subjected to such a treatment.

In this respect, the Third Circuit's decision, in effect mandating and requesting that the defense finds Brady evidence within 14 days since the verdict, or forfeits its claim for the Rule 33 new trial purposes, represents a grave and manifest injustice to the Petitioner and makes the Petitioner's case an exceptional one for this Court's review.

3) UNITED STATES OF AMERICA BETWEEN DEMOCRACY AND DICTATORSHIP - THE RISE OF THE AUTHORITARIAN GOVERNMENT AND THE HOBBES' S LEVIATHAN; PUBLIC POLICY ISSUES OF EXCEPTIONAL IMPORTANCE

On surface, the issues presented herein are about some (technical) Rules of Criminal Procedure. But we should look below the surface.

We should lose no sight as to why the Constitution exists (if indeed still does). We should lose no sight of its origin in Magna Carta, Glorious Revolution and the English Bill of Rights. It's to protect the rights of the ordinary Americans and to prevent miscarriage of justice, just as the Rule 33 purports to say.

We should equally lose no sight of the fact that the constitutionally guaranteed Brady rule is "not punishment of the society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused. Society wins not only when the guilty are convicted but when criminal trials are fair.." *Brady v. Maryland, 10 L Ed 2d 215 (1963).*

Most importantly, we should lose no sight of the fact that the United States of America is a democracy and not a dictatorship or an authoritarian government, and it is primarily so due to the constitutional protections guaranteed to its citizens. Enabling the Government to hide

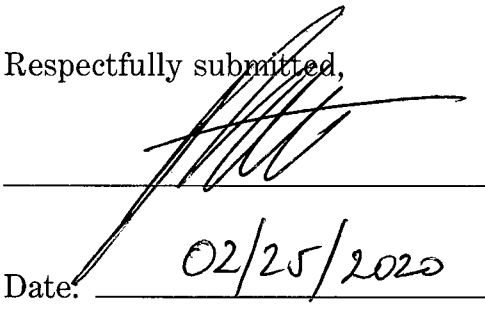
evidence, suborn perjuries and commit similar trial misdeeds and then hide behind technical procedural rules is highly offensive to constitutional guarantees. This is even if the Rules can be interpreted in such a way.

In this respect, the Petitioner very much hopes that this Honorable Court will not let Hobbes' Leviathan win.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Date: 02/25/2020