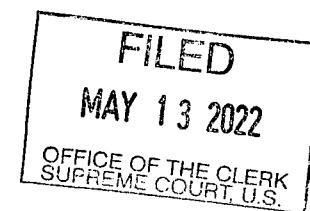


PETITION FOR WRIT OF CERTIORARI

21-7978 ORIGINAL

IN THE



SUPREME COURT OF THE UNITED STATES

PATRICK CLAY KUNKEL — PETITIONER  
(Your Name)

VS.

STATE OF CALIFORNIA- RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

SUPREME COURT OF CALIFORNIA  
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

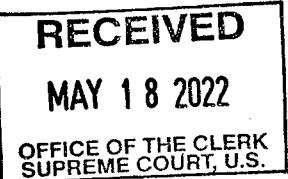
PETITION FOR WRIT OF CERTIORARI

PATRICK CLAY KUNKEL  
(Your Name)

480 ALTA RD.  
(Address)

SAN DIEGO, CA 92179  
(City, State, Zip Code)

N/A  
(Phone Number)



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CAL. PENAL CODE § 1054.9

## QUESTION(S) PRESENTED

1. Where petitioner received a conviction for premeditated attempted murder and attempted manslaughter of two individuals, were such that petitioner was denied his Sixth Amendment right to Confront and Cross-examine witnesses, where
  - (1) the state never disclosed all discovery relevant to impeaching the testimony of the law enforcement officers, and
  - (2) the trial court allowed the non-disclosure of personnel files and reports after in-camera review pursuant to Pitchess Motion?
2. Where the state failed to fulfill their obligation to obtain all evidence that was impeachable, and relevant to guilt or innocence to meet the Brady requirement, and that there must be prejudice flowing from the states failure to disclose exculpatory or inculpatory evidence of reports and records relevant to the incident in question?
3. Where the state prosecutor failed to uphold his ethical obligation as an officer of the court in utilizing his position to protect the rights of the petitioner from a fundamentally unfair trial amounting to prosecutorial misconduct violating due process of the Fourteenth Amendment, where
  - (1) the prosecutor knew that the California Highway Patrol was obligated to turn over all reports and records, and tactical reports relevant to the incident?

4. Should petitioner have been allowed to present newly discovered evidence that was not available during his trial that is a relevant proffer to call into question the legality of the conviction in the underlying criminal case?
5. Does not such violations of the Constitution require more than remand of the case, but therein constitutes the reversal as an acquittal where Double Jeopardy attaches?

## 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:

- A. CALIFORNIA SUPREME COURT
- B. CALIFORNIA COURT OF APPEAL, FOURTH APPELLATE DISTRICT
- C. SUPERIOR COURT OF CALIFORNIA FOR THE COUNTY OF SAN BERNARDINO

## RELATED CASES

1. UNITED STATES V. AGURS, 427 U.S. 97, 103, 49 L. Ed 2d 342, 96 , S. Ct. 2392 (1976)
2. STANKEWITZ V. WOODFORD, 365 F. 3d 706 2004 U.S. APP. LEXIS 6794
3. BRADY V. MARYLAND, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215
4. DELAWARE V. VAN ARSDALL, 475 U.S. 673

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 \_\_\_\_\_ 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 \_\_\_\_\_ 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 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 \_\_\_\_\_ 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

For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was \_\_\_\_\_.

No petition for rehearing was timely filed in my case.

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

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

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

For cases from **state courts**:

The date on which the highest state court decided my case was 2002 \_\_\_\_\_. A copy of that decision appears at Appendix N/A.

A timely petition for rehearing was thereafter denied on the following date: April 13, 2022 \_\_\_\_\_, 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. § 1257(a).

## **CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall, have the right to Confront and Cross-Examine witnesses and with that right the ability to impeach them."

The United States Discovery rules is systematically applied in every state under the Brady standard, and in some cases the violation of Brady automatically violates one's right to Confront and Cross-Examine a witness, or impeach that witness. With that very guideline set, a state official must do everything in their power to protect the rights of an accused under the Constitution. When all of these provisions are violated the accused is denied a fair trial. When a state official goes on record ignoring or circumventing the fundamentals of justice on purpose or indirectly it aggravated the egregious issues that caused the miscarriage of justice.

## STATEMENT OF THE CASE

The California Supreme Court initially decided the final decision of petitioner's case in, or around 2001 or 2002. That particular review was a result of the decision rendered by the California Court of Appeals, Fourth Appellate District on March 29, 2001, in regards to petitioner's appeal. The issues raised then were Brady violations, Due Process violations, and Fourth Amendment violations pertaining to Miranda rights, and a challenge to the insufficiency of the evidence.

During state court proceedings it was discussed on the record of the issues pertaining to the California Highway Patrol's obligation to turn over detailed reports of the incident that took place in this case. It was discussed on the record that numerous Brady violations would deprive the petitioner of a fundamentally fair trial if the California Highway Patrol did not turn over sensitive reports and records that could illuminate what the law enforcement officers did and what is or was their department's policy on use of force. Indicated in the state court's transcript is a discussion about what information particular law enforcement officer's would testify to including their departments policy on use of force.

Defense counsel in those proceedings implored the trial court to not allow the records to be excluded that the California Highway Patrol was withholding. It was also argued in a previous Pitchess Motion for this departments personnel records, where a

state court Judge reviewed the request and records in-camera and decided to deny the Pitchess Motion. **Pitchess v. Superior Court**, 11 Cal. 3d 531 (1974). At that time the state court prevented crucial evidence from being introduced in the trial proceedings that were relevant to proving the actions of all parties involved and those important facts omitted from the trial proceedings had a significant bearing on the petitioner's innocence or guilt. For many years petitioner attempted to find ways to ascertain the needed records to disprove the allegations he was convicted of. New evidence became available in 2020 of November that presented atleast to some degree that the trial court records were manipulated by inconsistent testimony of law enforcement officer's and complicit unethical behavior from the state's prosecutor to prevent a mistrial due to omitted records and reports that never were reviewed in the in-camera review of the Pitchess Motion. In the year 2020 petitioner hired a private investigator by the name of Gary Eccher. Mr Eccher investigated the whereabouts of these sought after records that never made it to the in-camera hearing on the Pitchess Motion. According to [App. C], the state court never had any of the documents in the records that would suggest that they were ever received or reviewed. The facts underlying the Sixth Amendment of ones right to Confront and Cross-examine witnesses attaches to **Brady v. Maryland**, 373 U.S. 83, 10 L.Ed. 2d 215, 83 S.Ct. 1194 (1963.)

The private investigator brought to light the undisclosed personnel records and reports of the incident that were referred to as "tactical". The missing tactical reports alone should have resulted in a mistrial during the trial proceedings, however this was prevented from unethical state official behavior and perjured testimony of law enforcement officer's that had every reason to favor false testimony in order to protect the integrity of there respected political subdivision. Unfortunately, a law enforcement officer was shot in this incident however, the escalation of the incident was the result of one officer's decision to not follow departmental procedural policy and that officer escalated the entire situation that led to an unfortunate shooting.

One of the other California Highway Patrol officer's ended up filing a suit against the California Highway Patrol due to the actions of the officer that started the shooting incident. The missing reports and records absolved Officer Cortinez of any wrong doing, and [App. D], The Jury Call back Questions, presented to this COURT offers clarity into the questions of the missing records and reports. According to California Penal Code § 1054.9 the prosecutor violated this code by not obtaining all of the relevant discovery from the California Highway Patrol. There has been many cases of similar nature where the law enforcement agency withheld key reports and records to cover up wrong-doing.

This case is no different from any of the other questionable cases that have been presented to this COURT. This COURT can, by granting this petition, assure that the state court, the prosecutor, and the California Highway Patrol be reminded of the fundamental principles of due process. In cases such as this present case the convictions have been vacated on the foundations of egregious Constitutional violations.

Most cases in the State of California that involves any form of potential law enforcement misconduct or when the circumstances of surrounding a defendant's defense are predicated on self-defense because of abusive actions of law enforcement officers any records or reports pertaining to the incident in question or the officers moral turpitude always is put under a very microscopic review. That was not done in this particular case due to alot of the reports and records being omitted from the actual in-camera hearing during the Pitchess Motion review by the Judge in Chambers. It is very rare that a state prosecutor would ever fail to produce important tactical reports written by officer's in an incident where questions are raised as to the behavior of the officer's. Records of the subsequent law suit filed by one of the officer's on scene in this incident was also very vital and relevant to the issues and those records were in the possession of the California Highway Patrol as well.

All of the facts of this case presented to the California Court of Appeal were ignored due to missing records and transcripts that

[were] never included in the records of the proceedings. With the petitioner's persistent efforts to ascertain some form of evidence to show that this underlying conviction is the result of a blatant cover-up by a respected political sub-division in California. Coupled with the failed efforts of the state prosecutor in this case to see to it that all of the relevant facts are brought to light is a contribution to an unconstitutional conviction. This conviction is now presented to this COURT with new facts and the petitioner implores this COURT to vacate the conviction.

## REASONS FOR GRANTING THE PETITION

Impeachment evidence, as well as exculpatory evidence, falls within the Brady rule. Such evidence is evidence favorable to an accused. Usually if such evidence is disclosed and used effectively, it may make the difference between conviction and acquittal. A jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend. There is a conflict in our great nation within our judicial system when the credibility of law enforcement official's comes into question in cases such as this one. The integrity of law enforcement is always more favorable than an accused individual. Non-disclosure of sensitive police tactical reports relevant to an officer's behavior is always crucial in any case where deadly force was used. A prosecutor will not have violated his constitutional duty of such disclosure unless his omission is of sufficient significance to result in the denial of the defendant's right to a fair trial. **United States v. Bagley**, 473 U.S. 667; 105 S. Ct. 3375; 87 L.Ed. 2d, 481, (1985).

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The longstanding test for disclosure of evidence is stated in **Brady v. Maryland**, 373 U.S. 83, 87 (1963). Brady requires a showing that the state failed to provide evidence that was relevant to an accused guilt or innocence.

The Brady rule has its roots in a series of cases dealing with convictions based on the prosecution's knowing use of perjured testimony, associated with the deliberate suppression of evidence that would have impeached and refuted the testimony to obtain a conviction. Presented in the proceedings transcript at [App.E], it is discussed on the record that non-disclosure of particular reports and records would deprive the petitioner of a fair trial. The state court judge fell asleep at the wheel of this case and the prosecutor used an excuse to the court that California Highway Patrol would not disclose privileged information and therefore could not force that department to disclose such relevant and critical information. That is more or less dereliction of duty on the part of a states prosecutor who took an oath to protect the rights of an accused protected under the Constitution.

**Mooney v. Holohan, 294 U.S. 103 (1935).**

Petitioner's position in this case is that the prosecutor deliberately failed to pursue evidence from the California Highway Patrol in order to circumvent justice, and the suppression of those sought after reports by the petitioner would have proved false testimony.

**Pyle v. Kansas, 317 U.S. 213 (1942).** The Court again reaffirmed this principle in **Napue v. Illinois, 360 U.S. 264 (1959)**, false testimony given at trial that is not consistent with undisclosed evidence is a violation of due process.

Attached to this principle also is the Court's standards set in **Agurs**, where testimony that is false and the prosecutor knowingly could do something to disclose evidence that brings the truth to

light, and thus creates a situation at trial of error that could never be harmless. The prosecutor in this case should have known that they had a constitutional duty to seek relevant documents to balance the scales of justice on all sides in this case and to protect the integrity of the trial proceedings. The rule that a conviction obtained by the knowing use of perjured testimony must be set aside if there is any reasonable likelihood that the false testimony could have affected the jury's verdict derives from Napue v. Illinois, 360 U.S. at 271. Napue antedated the case of Chapman v. California, 386 U.S. 18 (1967), where the "harmless beyond a reasonable doubt" standard was established. The Court in Chapman noted that there was little, if any, difference between a rule formulated, as in Napue, in terms of whether there is a reasonable possibility that the evidence complained of to be omitted from the record might have contributed to the conviction, and a rule "requiring the beneficiary of a constitutional error to prove beyond a reasonable doubt that error complained of did not contribute to the verdict obtained.

The prosecutor in this case was complicit with the California Highway Patrol's decision to not disclose the records that would have proved that petitioner's actions were provoked by unethical behavior by one of the officers on scene that was not practiced departmental policy. A sergeant from the department was allowed to testify as to the policies of the California Highway Patrol but the tactical report is not disclosed to

[impeach] the credibility of the testifying officer or the testimony of the other officer's involved on scene in the incident.

[App. D], The Jury's Call back Questions show a strong reasonable proffer to this GREAT COURT that their verdict was affected by omitted facts they wanted answers to, and had those reports and records had been disclosed, it may have produced a completely different verdict at trial.

#### I. The Constitutionality of The Prosecutor's Duty To Disclose All Evidence Under Brady v. Maryland

##### The Supreme Court Precedent

While, for purposes of the prosecution's due process duty under the Federal Constitution to disclose material evidence favorable to a criminal defendant, the definition of materiality in terms of the cumulative effect of suppression must be seen as leaving the government with a degree of discretion, the definition must also [be]understood as imposing a[corresponding]burden; on the one side showing that the prosecution knew of an item of favorable evidence unknown to the defense does add to a due process violation, but without more, however, the prosecution, which alone can know what is undisclosed, must be assigned the consequent responsibility to gauge the likely net effect of all such evidence and to make disclosure when the point of "reasonable probability" is reached; this in turn means that an individual prosecutor has a duty to learn of any favorable evidence known to others acting on the government's behalf in the case, including the law enforcement

agency that is heavily involved in the circumstances of the case. Regardless of whether the prosecutor succeeds or fails in meeting this obligation--whether, that is, a failure to disclose in good-faith or bad faith-- the prosecutor's responsibility for failing to disclose known and favorable evidence rising to a material level of importance is inescapable; under such circumstances, and The Court will reject suggested alternatives under which when some of the favorable evidence is not disclosed to the prosecutor until after trial, the government (1) would not be held accountable for evidence known only to police investigators and not to the prosecutor, or (2) would be given an uncertain degree of further "leeway"; the government cannot avoid responsibility knowing when the suppression of evidence has come to portend such an effect on a trial's outcome as to destroy confidence in the trial's result; while this means that a prosecutor anxious about tacking too close to the wind will disclose favorable evidence, this as a Constitutional requirement is as it should be in all states. Such disclosure or the the diligence to seek undisclosed discovery will (1) serve to justify trust in the prosecutor as the representative of a **sovereignty** whose interest in a criminal prosecution is not that the sovereignty shall win a case, but that justice shall be done, and (2) tend to preserve the criminal trial, as distinct from the prosecutor's private deliberations, as the chosen forum for ascertaining the truth about criminal accusations.

**Kyles v. Whitley, 514 U.S. 419; 115 S.Ct. 155;131 L.Ed. 2d 490.**

During the trial proceedings the court informed the state prosecutor that a non-disclosure of any evidence under the Brady rule would result in a mistrial, which was impending in this case. From that admonishment the prosecutor assured the court that all relevant evidence had been disclosed to the defense within the structure of the California Penal Code § 1054.9 of Discovery obligations in accordance with Brady. The prosecutor also knew that [the] California Highway Patrol had a duty as an official branch of the California government to satisfy the set standards of justice.

The Court granted certiorari in the case of, **Davis v. Alaska**, 415 U.S. 308; 94 S. Ct. 1105; 39 L.Ed. 2d 347, where the accused was denied the right to of the Confrontation Clause. It requires that a defendant in a criminal case be allowed to impeach the credibility of a prosecution witness by cross-examination directed at possible bias deriving from the witness. In this case a law enforcement officer was shot as a result of a traffic stop on a busy highway. In *Davis v. Alaska* the State's asserted interest was in preserving the confidentiality of a juvenile's adjudications of delinquency. In this instant case The State's position was in the interest of their inability to access privileged reports and records from the Highway Patrol. And, that excuse was predicated on the Highway Patrol's position of privileged confidential personnel information that was critical to an accused individual's guilt or innocence.

It has been long standing in this Court that principles continue to remain immutable. When dealing with actions of the Government where it injures an individual and threatens the lives of two of its own and wounds another as well, the reasonableness of the action depends on the facts, the evidence used to prove the government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue.

While this is important in the case of documentary evidence it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact might be perjurers or persons motivated by malice, or vindictiveness, intolerance, prejudice, or jealousy. The petitioner was accused of shooting a law enforcement officer and accused of attempting to shoot two others. California Highway Patrolman Cortinas is said to be the officer who escalated the situation and he testified. All of the tactical reports written by Cortinas and Robinson and the third officer were omitted from the disclosure of discovery and not considered in the in-camera hearing of the Pitchess Motion.

The prosecutor did not fulfill his sworn duty to protect the petitioner from violations of his Constitutional rights and his actions rose to level of prosecutorial misconduct, because any well trained state's attorney with trial experience would or should know that such non-disclosure of important documentary evidence renders the entire trial fundamentally unfair.

The unanswered questions in this case should thus be highlighted and the burden placed back on the State of California to turn over those missing portions of documents in reports and personnel records because it is clear that that particular department is or did not play by the rules of its State or the Constitution. Remand is now required and if it is discovered that petitioner's contentions are meritorious the case does meet the standard of an acquittal and Double Jeopardy attaches due to the violations. Petitioner implores the COURT to restore its precedence in this matter.

## **CONCLUSION**

The petition for a writ of certiorari should be granted.

Respectfully submitted,

/s/Patrick Clay Kunkel

Date: 4/25/2022