

26-5747
No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

ORIGINAL

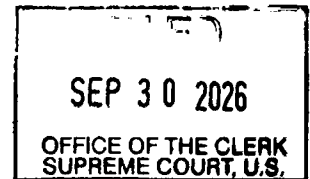
JESUS ERIC CARASCO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.



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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a federal court may reject a claim, presented in Rule 33 proceedings, that the Government suppressed favorable evidence undermining an alleged confession on the grounds that the evidence is “merely impeaching” and would not probably produce acquittal, without applying Brady’s reasonable-probability standard to that evidence in the context of the trial record.

LIST OF PARTIES AND RELATED PROCEEDINGS

The parties to the proceeding below are Petitioner Jesus Eric Carasco and Respondent United States of America. There are no corporate parties.

Directly related proceedings include:

United States v. Carasco, No. 8:19-cr-00169-JVS-1 (C.D. Cal.). Criminal judgment entered February 28, 2022; Rule 33 order entered March 14, 2025.

United States v. Carasco, No. 22-50038 (9th Cir.). Judgment affirming the conviction entered October 18, 2024; mandate issued November 12, 2024.

Carasco v. United States, No. 8:22-cv-00755-JVS (C.D. Cal.). Section 2255 filing dismissed as premature on July 19, 2022 while direct review was pending; reconsideration denied August 17, 2022.

Carasco v. United States, No. 8:22-cv-01946-JVS (C.D. Cal.). Section 2255 filing denied on November 9, 2022 while the direct appeal remained pending; the court stated that the Section 2255 petition remained premature and that it lacked subject-matter jurisdiction while the appeal was pending.

United States v. Carasco, No. 25-2010 (9th Cir.). Judgment entered March 19, 2026; rehearing en banc denied July 6, 2026; mandate issued July 14, 2026. This is the proceeding from which certiorari is sought.

Jesus Eric Carasco v. United States of America, No. 8:26-cv-00116-JVS (C.D. Cal.). The court ruled on June 26, 2026 that the January 13, 2026 Section 2255 petition was then ripe and timely; on August 26, 2026 it dismissed the petition as an unauthorized second or successive motion and denied a certificate of appealability. Petitioner filed a Rule 59(e) motion and a protective notice of appeal dated August 31, 2026.

United States of America v. Carasco, No. 26-5767 (9th Cir.). Appeal concerning the August 26, 2026 denial of Section 2255 relief, arising from No. 8:19-cr-00169-JVS-1. The September 4, 2026 docketing notice assigns this appellate number and states that no briefing schedule will be set unless a certificate of appealability is granted.

In re Jesus Eric Carasco, No. 21-71448 (9th Cir.). Related proceeding filed December 29, 2021; denied January 20, 2022, as recorded on the docket of the direct criminal appeal, No. 22-50038.

RELATED PROCEEDINGS (continued)

Carasco v. United States District Court for the Central District of California, No. 24-4104 (9th Cir.). Related discovery-mandamus proceeding identified in Dkt. 196 at 1, filed August 19, 2024. The materials accompanying this petition do not identify a judgment date or disposition for that proceeding.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Jesus Eric Carasco petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in No. 25-2010. This petition concerns the constitutional new-trial claim arising from the Smith recording submitted in Dkt. 202 and the district-court filings explaining its significance under *Brady v. Maryland*, 373 U.S. 83 (1963). The panel rejected that claim as “merely impeaching” and insufficient to show probable acquittal. Those grounds contradict the constitutional standard. Petitioner seeks vacatur and remand for adjudication under *Brady*, *Bagley*, and *Kyles*, with findings addressing the related false-testimony evidence.

OPINIONS AND ORDERS BELOW

The unpublished March 19, 2026 memorandum affirming denial of a new trial appears at App. 2-3. The district court's March 14, 2025 order, Dkt. 210, appears in full at App. 4-12. The July 6, 2026 rehearing denial and July 14, 2026 mandate appear at App. 13-14. The related March 13, 2025 disclosure order, Dkt. 209, appears at S. App. 22-26. Its treatment of the earlier recording dispute is addressed below.

JURISDICTION

The court of appeals entered judgment on March 19, 2026, and denied Petitioner's timely rehearing petition on July 6, 2026. App. 2-3, 13. Under Supreme Court Rule 13.3, the certiorari period runs from the rehearing denial. The ninetieth day is October 4, 2026, a Sunday; Rule 30.1 extends the deadline to Monday, October 5, 2026. This Court has jurisdiction under 28 U.S.C. § 1254(1). The district court exercised criminal jurisdiction under 18 U.S.C. § 3231.

CONSTITUTIONAL AND RULE PROVISIONS

The Fifth Amendment's Due Process Clause governs the federal prosecution's disclosure and truthfulness obligations. The Fifth Amendment, Federal Rule of Criminal Procedure 33, and the relevant jurisdictional statutes are reproduced at App. 15-17.

STATEMENT OF THE CASE

A. The alleged recorded confession.

The jury convicted Petitioner of possessing heroin and cocaine with intent to distribute and possessing a firearm in furtherance of drug trafficking. He received a 360-month sentence. App. 4. The prosecution's account depended in significant part on Deputy Gaetano Nicassio's testimony that Petitioner admitted ownership of the apartment and drugs after receiving Miranda warnings. Dkt. 154 at 135-137; Rec. App. 117-119. Petitioner has consistently charged that Nicassio fabricated that confession. The post-trial Smith evidence directly concerns the reliability of that central account.

At the October 4, 2021 suppression hearing, Nicassio said the warnings and interview were digitally recorded. Explaining why his own recorder was not used, he testified: "That's why we used his recorder." Dkt. 152 at 11-12; Rec. App. 106-107. His account attributed the recording to his partner's device and its disappearance to a malfunction. The testimony placed the alleged confession behind a claim of electronic verification while leaving the defense without the asserted recording.

Deputy Amir Awad then described Nicassio giving Miranda warnings while Petitioner sat in the back of Awad's patrol car.

Questioned specifically about recording those warnings, Awad acknowledged that his recorder was not on. When asked again, "Did you have the belt recorder on?" he answered, "No." Dkt. 152 at 24-25; Rec. App. 109-110. These answers addressed the Miranda event itself. They supply affirmative evidence against the recorded-interview account on which Nicassio relied.

The prosecutor, Mr. Beshai, acknowledged the recording problem at the same hearing: the deputies "admitted on the stand that they didn't record the Mirandized statement or the reading of the Miranda rights," Dkt. 152 at 29; Rec. App. 111. He also referred to a "technical glitch." *Id.* The transcript thus contains both the express acknowledgment of nonrecording and the asserted malfunction explanation. Petitioner answered that the officers never read him the warnings and that their testimony was false. The court found warnings were given. Dkt. 152 at 30; S. App. 17.

Eight days later, on the first trial day, the same prosecutor elicited Nicassio's assertion that the interview was recorded. Asked, "Was that interview recorded?" Nicassio answered, "It was." He explained, "I utilized my partner's digital recorder," then said its contents were "deleted or erased." Dkt. 154 at 136; Rec. App. 118. The prosecutor immediately elicited the

alleged admissions. Nicassio testified that Petitioner admitted the cocaine and heroin were his and "self-admitted that it was his apartment." Id. at 137; Rec. App. 119.

At trial the next day, Awad said he lent Nicassio his recorder, but also said he did not hear the interview. Dkt. 156 at 23-24; Rec. App. 131-132. His trial testimony therefore did not independently verify the alleged admissions. His additional testimony concerning nonactivation appears at Dkt. 156 at 31; S. App. 18. Petitioner relies on these conflicting accounts, the prosecutor's own acknowledgment, and the documentary contradictions discussed below as substantial evidence that Nicassio invented the recorded confession and the admissions attributed to Petitioner.

B. The two Smith recordings.

At trial Petitioner tried to present a recording of his conversation with Lieutenant Joshua Smith. Petitioner identifies that trial-era recording as Bates 231. Beshai told the court that he and Petitioner had listened to the recordings Petitioner wanted to use. Dkt. 154 at 138; S. App. 100. Petitioner then identified the Smith conversation and explained that he repeatedly said, "It's not my apartment." The court excluded Petitioner's own statements as hearsay. Id. at 139-140; S. App. 101-102.

During Smith's testimony, Petitioner again referred to the recording he possessed and asked about telling Smith that the apartment was Jesse Gonzalez's. The prosecutor objected, and the court prevented Petitioner from offering his past statements through Smith or the recording. Dkt. 156 at 118; S. App. 104. The official transcript establishes Petitioner's contemporaneous effort to place the recorded denial before the jury. The apartment-ownership dispute was explicit at trial; it was not constructed after conviction.

The post-trial submission identified a different recording, titled "Carasco Miranda - Lt. Smith." Dkt. 202 at 2; Rec. App. 56. Petitioner stated that he received that recording after trial,

Most directly, Dkt. 208 states that Petitioner was not given the pertinent recordings until after trial, refers the court and Government to Dkt. 202, and explains that the missing evidence prevented an effective response to Nicassio's confession testimony and the prosecution's summation. *Id.* at 44; S. App. 49. Thus, the district court had a specifically identified recording, an allegation of post-trial receipt, an explanation of favorable significance, and an express Brady presentation before it ruled.

The district court granted leave to supplement but denied a new trial. It reasoned that Petitioner had already disputed Miranda warnings and Nicassio's belt recording before and during trial, making the evidence not newly discovered. The court expressly declined to address the remaining Rule 33 elements. Dkt. 210 at 7 & n.1; App. 10. The order did not decide whether the particular Smith file was included in an identified pretrial production or apply Brady materiality to that file and the trial record together.

The preceding disclosure order must also be considered. In addressing cell-phone and recording requests, Dkt. 209 recounted the earlier hearing determination that a recording was accidentally erased and that Nicassio did not recall why

S. App. 82, 87, 91. Petitioner disputed that production assertion. C.A. Dkt. 37.1 at 3; S. App. 97.

The panel assumed that the evidence could be newly discovered but held it “merely impeaching” and insufficient to indicate that a new trial would probably result in acquittal. App. 3. It cited the ordinary five-part test in *United States v. Harrington*, 410 F.3d 598, 601 (9th Cir. 2005), and abuse-of-discretion review under *United States v. Hinkson*, 585 F.3d 1247, 1259 (9th Cir. 2009) (en banc). It separately stated that claims first raised on appeal would not be considered, citing *Padgett v. Wright*, 587 F.3d 983, 985 n.2 (9th Cir. 2009). The memorandum did not identify which claims that sentence excluded. Rehearing was denied. App. 13.

REASONS FOR GRANTING THE PETITION

I. The decision conflicts with this Court's constitutional new-trial standard.

The question presented concerns the rule of decision for a constitutional new-trial claim. Under *Brady*, suppression of favorable, material evidence violates due process. 373 U.S. at 87. Favorable evidence includes impeachment of a prosecution witness. *United States v. Bagley*, 473 U.S. 667, 676 (1985). Materiality requires a reasonable probability of a different result sufficient to undermine confidence in the outcome. *Id.* at 682. These principles directly govern a claim that the Government withheld a recording bearing on the truth of its central confession witness's testimony.

The panel's stated grounds track a different standard. Calling the evidence "merely impeaching" treats its effect on credibility as a reason to reject it; demanding probable acquittal imposes the ordinary Rule 33 threshold. App. 3. Neither answers the constitutional question. Evidence demonstrating that a witness fabricated a confession has impeachment value precisely because the witness supplied substantive proof of guilt. Its bearing on credibility is the mechanism by which it exposes the unreliable accusation.

Giglio v. United States, 405 U.S. 150, 153-155 (1972), itself arose from a new-trial motion based on newly discovered evidence affecting a principal witness's credibility. The Court applied due process, examined the importance of the witness, and ordered a new trial. The constitutional obligation cannot turn on whether favorable evidence is placed under the heading of impeachment. A court must examine what the impeachment would reveal and how it would change the jury's evaluation of the prosecution's proof.

Strickler v. Greene, 527 U.S. 263, 281-282 (1999), states the three components: favorable evidence, suppression by the prosecution, and resulting prejudice. Petitioner identified each component below. Dkt. 202 described the recording and post-trial receipt; Dkt. 208 expressly invoked Brady and explained the inability to counter the alleged confession without the recordings. Rec. App. 56-57; S. App. 39-49. The constitutional analysis therefore was required by the substance of the claim presented, not by a newly attached label in this Court.

Kyles v. Whitley, 514 U.S. 419, 434-436 (1995), further explains why probable acquittal is the wrong measure. Brady materiality does not require proof that disclosure would more

likely than not have produced acquittal, and it is not a sufficiency-of-the-evidence test. The inquiry asks whether disclosure would place the case in a sufficiently different light to undermine confidence in the verdict. A court must evaluate the favorable evidence in relation to the prosecution's actual theory and the evidence used to support it.

The Ninth Circuit's published decision in *United States v. Kohring*, 637 F.3d 895, 901-902, 907-913 (9th Cir. 2011), illustrates the required approach. There, newly disclosed impeachment was evaluated under *Brady* and *Giglio* in relation to the entire prosecution case, including recordings offered as independent evidence. The court examined how the witness's credibility affected interpretation of that evidence. The same constitutional method was necessary here. The existence of an exhibit or a second category of proof does not decide whether its inculpatory interpretation depends on the challenged account.

Review is warranted under Supreme Court Rule 10(c). A constitutional suppression claim cannot be rejected through an impeachment exclusion or a probable-acquittal requirement. The distinction governs federal new-trial litigation whenever undisclosed evidence exposes the unreliability of a prosecution

witness. Treating a claim's Rule 33 procedural vehicle as controlling its constitutional merits deprives defendants of the standard this Court prescribed. The judgment expressly employs the incompatible tests. App. 3. The record demonstrates why that choice mattered here.

II. The Smith suppression claim was presented below.

The panel's sentence concerning claims first raised on appeal cannot dispose of the Smith claim without confronting Dkts. 202 and 208. The relevant inquiry is what those filings told the district court. Dkt. 202 identified the recording by title, alleged receipt only after trial, described Smith's advisement, provided an excerpt, and argued that the evidence contradicted the confession testimony. Rec. App. 55-61. Dkt. 208 then expressly discussed Brady suppression and incorporated Dkt. 202 into its confession analysis. S. App. 39-49.

Dkt. 208 at 44 is especially important. It states that the recordings were withheld from Petitioner until after trial and that he therefore could not effectively counter the confession account that the Government emphasized in summation. S. App. 49. That is a claim of prejudice from nondisclosure of favorable evidence in the prosecution's possession. Reading the pending submissions together identifies the constitutional issue

without requiring the court to invent a claim or obtain facts from appellate argument.

Dkt. 208 also invoked *Napue* while alleging that the prosecution actively elicited false testimony about the apartment evidence. Dkt. 208 at 35; Rec. App. 99. Its ensuing confession discussion tied Nicassio's alleged fabrication to Dkt. 202. Id. at 37-41; S. App. 42-46. The constitutional presentation thus linked suppressed evidence, false testimony, and the asserted corroboration before the new-trial decision.

The proper disposition must address both possible readings of the panel's memorandum. If the panel reached the Smith constitutional claim, the ordinary impeachment and probable-acquittal test was inadequate. If the panel intended to exclude that claim as first raised on appeal, the district-court presentation requires reconsideration of that premise. The memorandum's unexplained preservation sentence cannot replace examination of the filings that actually raised the claim.

The Government sought plain-error review on the premise that suppression had never been alleged. C.A. Dkt. 34.1 at 15-17; Rec. App. 84-86. Dkt. 208 at 44 defeats that premise: it identifies the withheld recordings, refers expressly to Dkt. 202, and explains the resulting inability to answer the confession

testimony. S. App. 49. If preservation remains disputed, the appellate court must identify the particular claim it considers forfeited and address these submissions. The remand request rests on the presented Smith claim; the manager, documents, and Exhibit 22 establish its materiality.

III. Disclosure requires a finding about the particular Smith recording.

A. Bates 231 and the Smith supplement are distinct.

The trial record is unusually useful because it documents both Petitioner's access to a Smith recording and the particular use he sought to make of it. At Dkt. 154 at 138-140, Petitioner sought to play his recorded denial of apartment ownership; the prosecutor acknowledged listening to the proposed recordings; and the court rejected Petitioner's statements as hearsay. S. App. 100-102. At Dkt. 156 at 118, Petitioner again described the recorded statement identifying Jesse Gonzalez. S. App. 104.

Petitioner offers the post-trial Smith recording as exculpatory evidence of the interrogation itself. It supplies recorded words and conduct against which the officers' account can be tested, including Smith's inquiry about warnings, another deputy's response, and Smith's own advisement. Dkt. 202 at 2-3, 7; Rec. App. 56-57, 61. Together with Awad's

nonactivation testimony and the documented apartment-attribution discrepancies, it supports Petitioner's contention that the purported Miranda-and-confession account was fabricated. Its significance reaches the existence and accuracy of the alleged admissions, not simply a collateral trait of the witness.

The trial court's hearsay rulings remain part of the record. The present claim concerns the defense's ability to confront the officers using the later-received evidence, establish who gave warnings, examine the recorder history, and test the asserted admissions. It requires analysis of those concrete uses under the rules applicable to the trial. The rulings excluding Petitioner's own recorded statements do not themselves answer whether disclosure of the different Smith file would have materially changed the defense's examination of the Government's witnesses.

B. The disputed July 9, 2020 production.

The Government did make an assertion of production. Its bail opposition stated that, according to its records, it provided the Smith recording to the defense on July 9, 2020. C.A. Dkt. 33.1 at 6; S. App. 82. It repeated that position at pages 11 and 15. S. App. 87, 91. Petitioner disputed the claim, including possession and usable access, in his bail reply. C.A. Dkt. 37.1 at 3; S. App. 97. The petition addresses that dispute directly.

The required inquiry is whether the file provided on the asserted date was the recording submitted with Dkt. 202. The production passages identify a date but do not identify a Bates number, a file-specific receipt, or the particular delivery documentation resolving that comparison. The trial transcripts establish access to other recordings, including the denial recording. They cannot supply the missing identification by themselves. Dkt. 140 at 6-7 describes arrangements for reviewing discovery CDs and signing receipts, but does not identify the Dkt. 202 file. B. App. 204-205. Those records make a file-specific comparison possible and necessary.

The district court did not make a finding that the July 9 production included the Dkt. 202 file. Its stated reason was that the Miranda issue had been raised before. App. 10. That

reasoning conflates knowledge of an event with possession of the Government's recorded evidence of the event. A defendant may remember what happened and dispute an officer's version while remaining deprived of a recording that would materially strengthen the challenge.

Banks v. Dretke, 540 U.S. 668, 695-698 (2004), rejects treating the defense's failure to uncover concealed evidence as a substitute for the prosecution's disclosure obligation. Applied here, the question is whether the prosecution delivered the favorable recording in time for effective use. Petitioner's knowledge that he spoke with Smith does not establish delivery, identify the file, or answer the asserted absence of access before trial. The Government's records and Petitioner's specific contrary account warrant findings on that issue.

Under *Kyles*, the prosecutor's disclosure responsibility includes favorable evidence known to police acting on the Government's behalf in the case. 514 U.S. at 437-438. Smith and Nicassio were participants in the investigation and trial. Dkt. 202 identifies evidence generated during that investigation. Its availability cannot be analyzed solely by asking what the individual trial prosecutor remembered; the

relevant custody and production records of the investigative team matter.

C. The claim concerns suppression before trial.

The Government's district-court opposition argued that Brady does not create a continuing general right to post-conviction discovery. Dkt. 207 at 5-6; S. App. 34-35. District Attorney's Office for the Third Judicial District v. Osborne, 557 U.S. 52, 68-69 (2009), addresses an asserted post-conviction right to obtain evidence for new testing. Petitioner's Smith claim concerns a recording that existed at the time of trial and allegedly was withheld until afterward. The injury alleged is deprivation of favorable evidence for use at the trial itself.

IV. The “powerful evidence” theory fails to account for the record.

The Government’s reliance on drugs and cartridge casings recovered from the BMW on March 13, 2019, concerns a separate incident from the April 15 Apartment 350 offenses charged in this indictment. Dkt. 154 at 17-18, 92-95; S. App. 111-116. Those earlier items cannot be treated as the contraband charged here. Before trial the Government promised not to introduce or “even reference or mention” the March drugs. Dkt. 140 at 10; B. App. 208. Its direct examinations nevertheless elicited Campas’s reference to BMW narcotics and Nicassio’s description of cocaine and suspected heroin. Dkt. 154 at 94-95, 114; S. App. 115-116; B. App. 223. The Government later invoked those drugs as corroboration on appeal. C.A. Dkt. 34.1 at 15; Rec. App. 84. That sequence cannot supply the missing apartment-specific connection or establish the truth of the alleged confession.

A. The recorded-confession account.

The core allegation is fabrication of a confession that supplied direct proof of ownership and knowing possession. The record supports that allegation through affirmative contradictions. Nicassio said the interview was recorded on his partner's device. Awad, questioned about the Miranda event, said his recorder was off. The prosecutor acknowledged that the warnings and statement were not recorded. Nicassio then told the jury that the interview was recorded and later erased. Rec. App. 106-111, 118-119. These are conflicting sworn and on-record accounts of a supposedly verifiable event.

Awad's answers concerned the Miranda event itself. Dkt. 152 at 24-25; Rec. App. 109-110. The prosecutor's reference to a technical glitch does not establish that the device was activated or captured the alleged admissions.

Awad's later statement that he lent the recorder also requires examination in light of the suppression testimony. At trial he did not claim to have heard the contents of the interview. Dkt. 156 at 24; Rec. App. 132. Thus, his testimony about a device did not supply an independent witness to Petitioner's alleged admissions. The prosecution's account of what Petitioner confessed remained Nicassio's account,

accompanied by a claim of a recording that was unavailable for comparison.

The Smith submission adds evidence to this existing contradiction. Petitioner reported that the identified file records Smith administering warnings, contains no confession during the ensuing recorded period, and places the encounter at intake. Dkt. 202 at 2-3, 7; Rec. App. 56-57, 61. Its evidentiary force must be assessed with the conflicting recorder accounts and the documented denial Petitioner sought to present at trial. The fabrication argument rests on that combined showing.

The short excerpt's "Yeah" answer to Smith's question does not identify Nicassio as the person who administered warnings, identify Awad's device as recording them, or attribute any confession to Petitioner. Rec. App. 61. Treating that exchange as verification of the entire Nicassio narrative supplies facts the exchange does not contain. The complete recording and the witnesses' accounts should be tested against one another before that interpretation is used to defeat materiality.

The Internal Affairs response supplies additional, specific context. It sustained the finding that Nicassio failed to submit the audio belt recording of the Miranda interview into evidence. Dkt. 184 at 34-35; Rec. App. 37-38. That finding bears on the

recording's handling and the investigation of its absence.

Petitioner relies on the disclosed finding as written, together with the sworn contradictions; the constitutional claim does not require relabeling the letter as an adjudication of perjury.

This issue affected substantive guilt. In closing, the Government invoked Nicassio's alleged interview to establish that Petitioner stayed in the apartment and admitted the heroin and cocaine were his. Dkt. 158 at 24-25; Rec. App. 150-151. Evidence exposing fabrication of that interview would directly change the jury's evaluation of possession. Describing it as "merely impeaching" obscures the importance of the proposition being impeached.

The jury was expressly instructed to decide whether Petitioner made the alleged statement. Dkt. 158 at 12; S. App. 109. Evidence of fabrication answers that substantive question of guilt.

B. The absent manager's statements and the tenancy records.

The Government presented the manager account through Nicassio. He testified that management identified Petitioner as the person who rented the apartment using another name. Dkt. 154 at 111, 198-200; Rec. App. 113, 126-128. The manager did not testify. The jury therefore could not assess the manager's own description of the transaction, the identification procedure, or the basis for the supposed cash-payment account. It heard Nicassio's report of those matters.

Nicassio acknowledged that neither he nor another team member recorded the management conversation and that no supervisor obtained a written statement. Dkt. 154 at 158-160; S. App. 19-21. The supposed corroboration consequently had the same critical source as the confession: Nicassio's unrecorded retelling. Impeachment showing fabrication of his confession account would affect the weight of his manager account as well, especially where the documentary record points to a different tenant.

The landlord's contemporaneous notice identifies Jessie Gonzalez as the tenant of Apartment 350, invokes his written rental agreement and Section 20 of his lease, and records

contacts with the resident. Bates 479; Rec. App. 165. Together with the cashier's check identifying Jessie Gonzalez and Nicassio's acknowledgment that the leasing identification depicted another man, this evidence supports Petitioner's position that Gonzalez was a separate tenant and directly challenges the account that Petitioner rented the apartment using an alias and cash. Dkt. 184 at 32; Rec. App. 35; Dkt. 154 at 199-200; Rec. App. 127-128.

The cashier's check identifies Jessie Gonzalez and an amount of \$3,408.50. Dkt. 184 at 32; Rec. App. 35. That document supplies concrete evidence against the cash-payment narrative. Nicassio testified that management said cash was used, but acknowledged he did not know the deposit had been paid through Gonzalez's bank account. Dkt. 154 at 200; Rec. App. 128. The post-trial evaluation must compare the asserted payment method with the actual document, not repeat the officer's characterization as established corroboration.

Nicassio also acknowledged that the leasing identification showed another man's face. Dkt. 154 at 199; Rec. App. 127. He then attributed identification of Petitioner to the absent manager after showing her Petitioner's photograph. The significance is concrete: the document identified another

person, while the claim converting that tenancy into Petitioner's use of an alias came through the same officer accused of fabricating the confession. The jury's confidence in that officer was therefore central to both theories.

C. The documents, CTS-V paper, and photographs.

Nicassio testified that he found documents bearing Petitioner's name on the kitchen island. When questioned about the photograph, he acknowledged, "I didn't take a picture of the documents, sir." Dkt. 154 at 191-192; Rec. App. 121-122. He described receipts and documents bearing Jennifer Tapia's information and the cost of a Cadillac Escalade. Id. at 193-194; Rec. App. 123-124. Those statements supplied another asserted link between Petitioner and the apartment.

The vehicle-financing paper at Bates 478 instead displays "JESSE," identifies a 2019 Cadillac CTS-V, and states a vehicle price of \$98,435. Rec. App. 164. The printed name and vehicle description do not match Nicassio's account of Tapia's Escalade document. The face of the exhibit therefore supplies objective evidence of misattribution. Petitioner identifies Jesse Gonzalez as the person to whom that paper belonged; the document itself supplies the name and vehicle discrepancy without depending on Nicassio's recollection.

The search return and receipt do not specifically list the claimed Louis Vuitton receipts bearing Petitioner's name. Dkt. 184 at 20-21; Rec. App. 23-24. That omission must be examined alongside Nicassio's statement that he collected the documents to establish who lived at the searched address. Dkt. 154 at 192; Rec. App. 122. An assertion that he recovered residence-linking documents is susceptible to verification through the contemporaneous evidence records; it should not be accepted as self-corroborating proof of residence.

The photographic contradiction concerns Nicassio's own description of an assembled display of the evidence. He identified Exhibit 9 as depicting 'all the items that I located' and testified that he waited until he had 'all the evidence together' before taking the overall photograph. Dkt. 154 at 120, 174; Rec. App. 115, 120. Smith's comments about an incomplete camera view do not reconcile that testimony with the failure to identify the claimed name-bearing documents in the Bates 42-48 photographs. Dkt. 156 at 128, 131-132; Rec. App. 140, 143-144, 157-163. Considered with the inventory omissions and disputed document attribution, this inconsistency supports Petitioner's contention that Nicassio fabricated the claimed documentary connection.

The Brady inquiry should therefore assess how the Smith evidence would strengthen a defense already grounded in these objective discrepancies. Petitioner could challenge the same officer's reconstruction of a purported recorded confession while demonstrating that his descriptions of the residence-linking evidence did not match the actual documents. That is a particularized attack on the accuracy of the prosecution's proof, not a generalized complaint that an officer made mistakes.

D. Exhibit 22 and the apartment-specific confession.

The Government also relied on Exhibit 22, a recording involving an effort to make a deal and a reference to five kilos. The examination and playback appear at Dkt. 156 at 112-114; Rec. App. 134-136. The legal question is what the recording establishes about the charged apartment and its contents, and whether its interpretation independently supports the precise admissions attributed to Petitioner by Nicassio.

Smith acknowledged that the word "upstairs" was not in the recording. When Petitioner pressed the point, Smith explained that he was referring to the implication that five kilos had been found upstairs. Dkt. 156 at 138; Rec. App. 146. The distinction between the recorded words and an officer's

inference is central. A location supplied by testimony cannot be treated as though Petitioner spoke it on the recording.

The prosecutor's closing argument expressly offered two interpretations: the kilos could refer to the heroin in the apartment, or the statement could refer to a separate stash house. Dkt. 158 at 25; Rec. App. 151. Thus, the Government itself presented an alternative-location interpretation. Exhibit 22 did not contain the apartment-specific admission to ownership that Nicassio attributed to Petitioner, and Smith's acknowledgment prevents adding "upstairs" to Petitioner's actual words.

The jury requested Exhibit 22 and heard it replayed twice. Dkt. 158 at 50-52; S. App. 106-108. Its request underscores why the constitutional inquiry must examine how exposing a fabricated confession would change the jury's interpretation of that recording and its unstated location.

E. The combined evidence supports fabrication.

The challenged proof has a common dependence that the "powerful evidence" description conceals. Nicassio supplied the alleged confession, relayed the absent manager's identification and payment account, and attributed residence-linking documents to Petitioner and Tapia. The actual documents identify Gonzalez's tenancy and a differently named vehicle paper. The recording testimony conflicts at its foundation. Exhibit 22's apartment-specific interpretation required an inference that its own witness acknowledged was not stated in the recording.

The later Smith recording would have been used against this evidentiary background. It bears on the contested warnings and confession sequence, while the earlier denial recording establishes the defense account Petitioner sought to present at trial. The documents and photographs provide concrete points of comparison for the officer's other assertions. Petitioner submits that this pattern supplies substantial evidence of fabrication and establishes a reasonable probability sufficient to undermine confidence in the verdict.

Kyles requires evaluation of the combined effect of favorable evidence in the context of the trial. 514 U.S. at

436-437. The already-available contradictions matter because they show why the particular withheld evidence would change the weight of the prosecution's proof. The inquiry must examine whether that evidence would make the fabricated-confession defense persuasive when anchored to the objective record, rather than dismissing each item separately as one more attack on credibility.

The Government also invoked Brady materiality and asserted that the other evidence defeated prejudice under that test. C.A. Dkt. 34.1 at 17-18; Rec. App. 86-87. That assertion must be tested against the dependencies identified above and the entire trial record. Physical exhibits establish what was seized; their attribution and knowing possession remain contested. Repeating one officer's claims in several categories does not make them independent. The panel supplied only the ordinary Rule 33 rationale, without resolving this constitutional analysis. App. 3.

V. The related false-testimony evidence requires a distinct constitutional analysis.

Napue v. Illinois, 360 U.S. 264, 269-271 (1959), prohibits a prosecution from knowingly presenting material false testimony or allowing known false testimony to remain uncorrected. Its protection extends to falsehoods affecting credibility. *Glossip v. Oklahoma*, 604 U.S. 226, 246 (2025), reaffirms that relief is required when the false testimony could in any reasonable likelihood have affected the jury's judgment. That standard must remain distinct from the ordinary probable-acquittal test and from Brady's reasonable-probability formulation.

Petitioner's allegation identifies the false account, its importance, and the record supporting prosecutorial awareness. Beshai participated in the suppression hearing and expressly acknowledged nonrecording of the warnings and statement. Eight days later, he elicited affirmative trial testimony that the interview was recorded, followed by the alleged admissions. Dkt. 152 at 29; Dkt. 154 at 136-137; Rec. App. 111, 118-119. The claim therefore rests on identified testimony and the same prosecutor's own participation at both stages.

Petitioner charges that the trial testimony was false and that the prosecution elicited it despite the contrary record. The remand should determine what the prosecution knew about the recorder accounts and the Smith evidence when that testimony was presented. Those findings must address the actual inconsistency and the Government's explanation of it.

The importance of the falsehood follows from the function it served. The assertion of a recorded interview made the alleged confession appear to have had an objective evidentiary basis, then explained away the inability to produce that basis through a malfunction. The jury was asked to accept Nicassio's recollection of ownership and drug admissions. A knowing falsehood concerning that supposed recording could affect both the credibility of the witness and the jury's acceptance of the admissions themselves.

The Smith Brady claim independently requires adjudication. Brady covers suppression without proof of bad faith. 373 U.S. at 87. The question presented concerns the Smith Brady standard. Petitioner seeks lower-court adjudication of the related Napue claim on remand, including findings concerning prosecutorial knowledge. Each constitutional standard must govern its own elements and the same recording history. This

preserves the force of the fabrication allegation and supplies the findings necessary to resolve it lawfully.

VI. The procedural posture supports remand.

A. Timing and forfeiture under Eberhart.

The original January 17, 2024 motion fell within three years of the October 14, 2021 verdict. The Smith supplement was filed October 31, 2024; its mailing exhibit bears October 28, after the three-year anniversary. Dkt. 184 at 1; Dkt. 202; Rec. App. 4, 55-64. Petitioner's procedural answer rests on the treatment of that supplement and forfeiture of the deadline objection, rather than a different computation of the dates.

Eberhart v. United States, 546 U.S. 12, 16-19 (2005) (*per curiam*), holds that Rule 33's time restrictions are claim-processing rules and that the Government can forfeit an untimeliness defense by failing to raise it before the district court reaches the merits. The district court here granted leave to supplement, expressly noted the Government's lack of opposition to that request, and rejected the evidence as not newly discovered. App. 10 & n.1. It did not deny the Smith submission for missing the three-year deadline.

The Government's post-supplement opposition argued that disclosure motions were untimely and asked that the new-trial

motion be denied for the reasons in its earlier opposition. Dkt. 207 at 4-7; S. App. 33-36. Petitioner presented forfeiture in his appellate supplemental-authority letter. C.A. Dkt. 42.1; Rec. App. 166. He contends that a new deadline defense on appeal came too late under Eberhart. Granting leave and forfeiting a deadline objection are distinct issues; the record supports addressing the latter on its own terms.

The panel affirmed on impeachment and probable acquittal, not on a finding that the Government had preserved and prevailed on a Rule 33 deadline defense. App. 3. A remand can resolve any remaining procedural issue under the correct claim-processing framework and then adjudicate the constitutional claim. The Court should not sustain the decision through an unexplained assumption that the calendar alone eliminated authority to consider the supplemented motion.

B. The prior rulings and the Smith submission.

The suppression ruling found that warnings were given, and the subsequent disclosure order recounted an earlier determination of accidental erasure. S. App. 17, 25. The new-trial order relied on Petitioner's prior litigation of the Miranda and recording issues. App. 10.

Petitioner contends that those rulings did not assess how the Smith submission, considered together with the conflicting officer testimony, photographs, inventory records, and tenancy documents, undermines the alleged confession and the Government's asserted corroboration under the Rule 33 elements the district court left undecided. Petitioner maintains that these contradictions reveal a pattern of fabricated attribution by Nicassio, whose accounts supplied several central links in the Government's case.

A prior challenge to a confession does not establish possession of all recordings bearing on it. A finding about one recording's disappearance does not identify another recording's disclosure history. The Smith submission required examination of the particular evidence and its constitutional significance.

The petition seeks review of the Rule 33 judgment in No. 25-2010. It does not request review here of the separate judgment entered in the later Section 2255 proceeding. The trial transcripts and earlier orders supply the background against which the Smith claim must be adjudicated. Keeping the requested relief tied to the appealed new-trial judgment gives the Court a defined procedural route for correcting the constitutional error.

VII. The Court should vacate and remand for findings.

An appellate court may affirm on another ground supported by the record. Petitioner's objection concerns the constitutional standard used and the unresolved historical facts necessary to apply it. The district court's omission of other Rule 33 factors, standing alone, is not the asserted constitutional error.

DeMarco v. United States, 415 U.S. 449, 450 (1974) (*per curiam*), supplies the remedial model. When a material dispute concerning alleged false testimony turned on facts not resolved by the district court, this Court vacated and directed a remand for an evidentiary hearing. The unresolved disclosure and recorder-history disputes here likewise concern identifiable historical events on which the constitutional claims depend.

First, the court should identify and compare the recordings. It should examine the complete file submitted with Dkt. 202 and the accompanying flash drive entry, distinguish the trial-era Smith denial recording identified as Bates 231, and determine the participants, sequence, and relevant statements. The filed excerpt and the trial proffers provide starting points. Comparing the actual files would prevent one recording's availability from being used to decide another recording's disclosure history.

Second, the court should resolve production through the actual records. The Government's July 9, 2020 assertion and Petitioner's denial create a specific issue: what file was delivered, to whom, in what form, and with what opportunity for use before trial. Relevant production correspondence, file identifiers, delivery records, and testimony can answer that issue.

Third, the court should resolve the recorded-confession account. The examination should address Nicassio's use-of-partner-recorder testimony, Awad's nonactivation answers and later lending testimony, the alleged deletion, the prosecutor's suppression-hearing statement, and the Smith material. The court should determine which account is accurate and what the Government knew when it elicited the trial testimony. The disclosed Internal Affairs finding concerning failure to submit the recording is relevant to that defined inquiry.

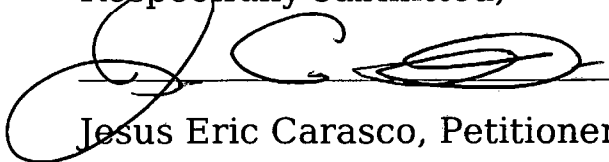
Fourth, the court should assess materiality against the Government's actual trial theory. That requires examining the absent manager's account as relayed by Nicassio, the tenancy and payment records, the alleged name-bearing documents and the CTS-V paper, the photographs and return, and Exhibit 22's

actual words and interpretation. The question is how the Smith evidence would affect the jury's evaluation of these connections and the alleged confession, applying Brady and, where established, Napue.

CONCLUSION

The Court should grant the petition, vacate the Ninth Circuit's judgment, and remand with instructions to secure district-court adjudication of the Smith-specific constitutional new-trial claim under Brady, Bagley, and Kyles, including an evidentiary hearing on the material factual disputes and lower-court adjudication of the related false-testimony claim under Napue and Giglio. A material constitutional violation requires a new trial. Alternatively, the Court should set the question presented for plenary review.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "J. Carasco", is written over a horizontal line.

Jesus Eric Carasco, Petitioner Pro Se

Reg. No. 26019-112

Date: 9/30/2026