

S208221

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re,

NATHAN MEDINA,

On Accusation.

No. _____

(State Bar of California
Complaint No. 11-35448)

PETITION FOR REVIEW

Appeal from the Decision of the
State Bar of California
November 15, 2012

SUPREME COURT
FILED

JAN 24 2013

Frank A. McGuire Clerk

Deputy

NATHAN MEDINA
#AA450
Ironwood State Prison
P.O. Box 2199 / B2-203
Blythe, CA 92226

In Pro Per

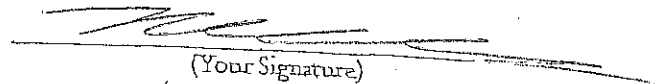
S208221

VERIFICATION—ACCUSATION

I, Nathan Medina, am the person who is filing the
Accusation. I certify and declare that I have read the foregoing, that I know its
contents, and that I am informed and believe the matters stated within are true.

I declare under penalty of perjury and the laws of the State of California
that the foregoing is true and correct.

Executed this 18 day of January, 2013,
at Blythe, California.


(Your Signature)

RECEIVED

JAN 24 2013

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TOPICAL INDEX

	<u>PAGES</u>
<u>ISSUES PRESENTED FOR REVIEW</u>	1
<u>STATEMENT OF THE CASE</u>	
A. STATE BAR PROCEEDINGS	1-2
B. WRIT OF MANDATE PROCEEDINGS	2
C. WRIT OF HABEAS CORPUS PROCEEDINGS	2
<u>STATEMENT OF FACTS</u>	
A. ATTEMPTS TO OBTAIN RECORDS BY PETITIONER	3
B. RESPONSE BY TRIAL COUNSEL	3
C. RESPONSE BY POLICE DEPARTMENT	3
D. RESPONSE BY DISTRICT ATTORNEY'S OFFICE	3
E. DECISIONS OF THE COURT	3-4
F. DECISIONS OF THE STATE BAR	4
<u>ARGUMENT</u>	
I. REVIEW IS WARRANTED TO SETTLE THE IMPORTANT QUESTION OF WHETHER THE STATE BAR OF CALIFORNIA UNREASONABLY DENIED PETITIONER'S COMPLAINT AGAINST TRIAL COUNSEL CONCERNING HIS REFUSAL TO TURN OVER ALL RELEVANT DISCOVERY MATERIALS, WHERE TRIAL COUNSEL MISREPRESENTED TO THE STATE BAR THAT HE HAD TURNED OVER ALL MATERIALS, YET NO PROOF WAS PROVIDED TO SHOW THAT HE HAD TRANSCRIBED THE CONTENTS OF THE MISSING CD'S AND DVD'S.	4-6
II. REVIEW IS WARRANTED TO SETTLE THE IMPORTANT QUESTION OF WHETHER AN AGREEMENT CAN BE MADE BETWEEN TRIAL COUNSEL AND THE PROSECUTOR TO WITHHOLD RELEVANT DISCOVERY MATERIALS BASED ON A CONFIDENTIALITY AGREEMENT BETWEEN THE TWO PARTIES.	6-8
<u>CONCLUSION</u>	8
//	
//	
LIST OF EXHIBITS	
EXHIBITS	

TABLE OF AUTHORITIES

FEDERAL CASES

Pages

Bounds v. Smith (1977) 430 U.S. 817	6
Brady v. Maryland (1963) 373 U.S. 83	7
Griffon v. Illinois (1955) 351 U.S. 12	6
Pennsylvania v. Ritchie (1987) 480 U.S. 39	by reference
U.S. v. Agurs (1976) 427 U.S. 97	7
U.S. v. Bagley (1985) 473 U.S. 667	7

STATE CASES

Academy of California Optometrists, INC. v. Superior Court (1975) 51 Cal.App. 3d 999	by reference
Weiss v. Marcus (1975) 51 Cal.App.3d 590	by reference

STATUTES

Penal Code §1054, et seq.	7
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OTHER AUTHORITIES

California State Bar Rules of Professional Conduct	Infra
California Rules of Court 2-1040	6

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PETITION FOR REVIEW

TO THE HONORABLE CHIEF JUSTICE, AND TO THE HONORABLE
ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT

ISSUES PRESENTED FOR REVIEW

Petitioner, NAIHAN MEDINA (hereafter "petitioner"), hereby petitions this Court for review of the Decision of the State Bar of California denying petitioner's complaint against his trial counsel, filed November 15, 2012, copies of which are attached hereto as Exhibit A, on the ground that review by this Court is necessary to settle the following important questions of law and procedure.

1. Whether or not the State Bar of California's denial of petitioner's complaint against his trial attorney for failure to turn over relevant discovery materials was unreasonable based on the facts, where trial counsel misrepresented that he had turned over all materials, but provided no proof that he had transcribed the contents of the missing CD's or DVD's petitioner had not received.

2. Whether or not, in a case involving the refusal of trial counsel to hand over relevant discovery materials, petitioner's rights to said material may be circumvented by an alleged confidentiality agreement between counsel and the district attorney prosecuting the case, where the material requested is required in order to effectively pursue a petition for writ of habeas corpus.

STATEMENT OF THE CASE

A. STATE BAR PROCEEDINGS

On November 22, 2011, petitioner, through his mother, filed a complaint to the California State Bar Association against his trial attorney, Dirk Manoukian. The complaint concerned the failure of counsel to turn over certain discovery materials related to the criminal matter against petitioner, specifically copies of CD's and DVD's of statements given to police by the victims in the case, but also other discovery that was not turned over.

On April 2, 2012, the State Bar found the complaint was unsubstantiated, and that counsel had represented that he had turned over all discovery material.

On June 28, 2012, petitioner filed a request for Audit and Review of the decision, and requested that the complaint against Mr. Manoukian be re-opened. Additional material in support of the complaint was submitted with the request.

On November 15, 2012, the State Bar declined to re-open the case.

On December 18, 2012, petitioner filed a second request to the State Bar to re-open the case. As of the filing of this accusation, no response has yet been received from the State Bar.

On January , 2013, petitioner filed the instant petition for review.

B. WRIT OF MANDATE PROCEEDINGS

On August 31, 2011, petitioner filed a Writ of Mandate to compel trial counsel to turn over the missing discovery from his criminal case. (This was prior to the State Bar complaint filing.)

On November 21, 2011, counsel filed a response to the petition, claiming he had turned over all materials.

On the same day, a judge other than the one assigned to the case denied the petition based on trial counsel's representation.

C. WRIT OF HABEAS CORPUS PROCEEDINGS

On July 21, 2012, petitioner filed a Writ of Habeas Corpus. Concurrently, he filed a motion for Post-Conviction Discovery in order to obtain the CD's and DVD's that were necessary to support his habeas claims.

On September 14, 2012, the court denied the writ and motion for discovery. The court denied the writ "without prejudice," in order to allow petitioner to obtain the discovery he needed.

On October 23, 2012, petitioner filed a motion for reconsideration of his habeas denial.

On November 27, 2012, the court denied the motion for reconsideration, but recognized the dilemma facing petitioner in obtaining the discovery he needed to support his claims. The court believed that the relationship between petitioner and his attorney had not deteriorated beyond hope of resolution.

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STATEMENT OF FACTS

A. ATTEMPTS TO OBTAIN RECORDS BY PETITIONER

The declaration of JAMIE LATIERI, petitioner's mother, demonstrates the abundance of due diligence undertaken to resolve the issue of the missing discovery not turned over by trial counsel. In addition to the numerous email and letter exchanges between herself and counsel, efforts to obtain the missing items included subpoenas to the district attorney and Walnut Creek Police Department, a writ of mandate, an attempt to purchase the CD's and DVD's from the district attorney, and a motion by petitioner for post-conviction discovery pursuant to Penal Code §1054.9. Every attempt has met with failure, obfuscation, or denial.

B. RESPONSE OF TRIAL COUNSEL

Counsel maintains that he has turned over all discovery materials of the "Medina file." He submitted a list of items turned over to petitioner, but this list did not contain mention of the CD's or DVD's that petitioner was requesting. Nor were there any mention of a transcription made of them. Counsel also filed a response to the writ of mandate stating he had turned over all materials, but did not include a list of what those materials were. Counsel maintains that there was a "confidentiality agreement" that forbade him from disclosing the contents of certain "controlled material," but did not include a copy of this agreement, nor did he specify what the alleged controlled materials were. Counsel also made mention that the CD's and DVD's were "copyright protected," i.e. they could not be copied because of restrictions placed on them by the DA's office. However, counsel never had them transcribed. Counsel also ignored a subpoena for the items.

C. RESPONSE OF THE POLICE DEPARTMENT

The Walnut Creek Police Department responded to a subpoena served by petitioner's mother that they no longer had the documents in question, as they had been turned over to the DA's office.

D. RESPONSE OF THE DISTRICT ATTORNEY'S OFFICE

The DA's office was also served a subpoena. However, they did not respond at all to it. They said it was not necessary for them to respond because the case was over. The DA's office did provide petitioner's mother with information regarding the purchase of discovery items. However, when she attempted to purchase a copy of the Cd's and DVD's, she was told that she could not do so, and would have to get a court order.

E. DECISIONS OF THE COURT

Petitioner attempted to file a post-conviction request for discovery concurrently with his habeas

petition. That motion was denied because an order to show cause had not been issued. When the court subsequent to that order denied petitioner's habeas petition, it did so on the basis that petitioner had not provided sufficient documentation to substantiate his claims. Ironically, on the denial of the petition for re-hearing, the court acknowledged the difficult position petitioner was in, but was "confident that the relationship between counsel and petitioner had not deteriorated to the point where an amicable resolution could be had."

F. DECISION OF THE STATE BAR

The decision of the State Bar was that petitioner's complaint essentially boiled down to a "he said, she said" type of issue. They accepted at face value trial counsel's assertion that he had turned over all discovery material related to petitioner's criminal case. Fantastically, this was asserted even though counsel stated in his response to the complaint that "he had not turned over material relating to the interviews of witnesses on media disks that were provided by the DA's office." His purported reason for this was that he could not copy them because "the DA's office has burn rights on them which prevents any copying." However, counsel did not explain why he had not transcribed them.

Petitioner attempted to point out the inconsistent remarks by counsel and the fact that there was no transcription provided of the CD's or DVD's, but the State Bar just reiterated its previous decision and denied the request to re-open the case.

Also, mention was made to an agreement between counsel and the DA's office to keep certain material confidential, and as such could not be "lawfully turned over." However, this agreement was never produced, and no legal justification, in the form of case law or penal code, was submitted in justification.

ARGUMENT

- I. REVIEW IS WARRANTED TO SETTLE THE IMPORTANT QUESTION OF WHETHER THE STATE BAR OF CALIFORNIA UNREASONABLY DENIED PETITIONER'S COMPLAINT AGAINST TRIAL COUNSEL CONCERNING HIS REFUSAL TO TURN OVER ALL RELEVANT DISCOVERY MATERIALS, WHERE TRIAL COUNSEL MISREPRESENTED TO THE STATE BAR THAT HE HAD TURNED OVER ALL MATERIALS, YET NO PROOF WAS PROVIDED TO SHOW THAT HE HAD TRANSCRIBED THE CONTENTS OF THE MISSING CD'S AND DVD'S.

Petitioner's complaint is actually very simple. The prosecution made CD's and DVD's that contained interviews of the victims regarding the crime which petitioner was charged with. These materials were provided to defense counsel. However, the contents of the CD's and DVD's were not transcribed, either by the DA's office, nor by trial counsel. At the conclusion of the trial, petitioner was given what was

purported to be the "complete Medina file." Not included in this 'complete file' was a copy of the CD's and DVD's, nor was there provided a transcription of their contents.

A. UNREASONABLENESS OF THE STATE BAR DECISION

What follows is a summary of the assertions of trial counsel Dirk Manoukian:

1. Trial counsel tells petitioner's mother that "the remaining portions of [petitioner's] file have been copied. He notes that he cannot copy the CD's and DVD's because of "burn rights" which prohibits copying. Counsel details the discovery being turned over at the time. This list does not contain any mention of victim interview materials. (Ex.A1- Letter dated August 16, 2010)

2. Trial counsel informs petitioner that all of the discovery - which includes interviews, has been provided. (Ex. A1- Letter dated July 12, 2011)

3. Trial counsel states that the file "has been turned over to petitioner. (Ex. B - Response to Writ of Mandate November 21, 2011)

What follows is the evidence used to rebut counsel's assertions:

1. A copy of the lists of exhibits from trial. The CD's and DVD's are listed, but no mention of a transcript having been provided. A docket from the appellate court on appeal noted that they were unable to find a written transcript as required by CRC 2.1040. (Ex. A4)

2. Trial counsel's own assertion that he could not turn over the CD's or DVD's themselves because they were restricted for the "exclusive purpose" of defending [petitioner] in the criminal case. (Ex. A1- Letter dated July 12, 2011)

3. Trial counsel's own assertion that because he couldn't copy the CD's or DVD's, he was unable to turn them over. Petitioner pointed out to the State Bar that counsel did not mention trying to transcribe the contents. (Id; see also Ex. A6 - Letter dated December 18, 2012)

It should be patently obvious to all concerned that it was impossible for trial counsel to have turned over the requested material. First and foremost, counsel admitted he did not. He stated he was not able to copy the media items. But then he says he turned over all witness interviews. This would assume that he made a transcription of the media items. However, nowhere in counsel's itemized list of turned over materials is any mention of them. It was unreasonable for the State Bar to accept counsel's version that he had turned over everything, when it was not possible for him to do so. Petitioner also finds it

unreasonable for the State Bar to characterize the situation as being merely a "he said, she said" conflict only. Petitioner did not merely rely on blanket assertions that counsel was not being truthful. He backed up his claims by the "clear and convincing evidence" the State Bar claimed they needed, which included counsel's own admissions.

Petitioner also finds that it stretches credibility to assume that the DA's office turned over their only copy of the CD's and DVD's to trial counsel. Counsel would have been provided his own copy. If so, then why was the original not turned over to petitioner? Why would counsel give it back to the DA, when petitioner is entitled to it as discovery? (*Griffin v Illinois* (1955) 351 U.S. 12; *Bounds v Smith* (1977) 430 U.S. 817) Moreover, counsel has a duty to turn over all discovery materials at the termination of his or her representation of the client. (Cal. State Bar Rule 3-700(D)(1).

As for the issue of a transcript not being provided in place of the original media, even the appellate court noted on appeal that they could not locate a transcript of the items in question. (Ex. A4) Since it is assumed that public officials perform their duties properly (c.f. *Bracy v Granley* (1997) 520 U.S. 899), then either the DA's office or trial counsel would have produced a transcript as required by Cal. Rules of Court 2.1040. If the DA's office transcribed them, then they would have been turned over to counsel. It follows then that a copy should have been provided to petitioner. It was not, and it was unreasonable for the State Bar to deny petitioner's complaint in the face of this clear and convincing evidence that the disputed items were never handed over.

For the foregoing reasons, the decision of the State Bar should be reversed, and petitioner's complaint against trial counsel be re-opened.

II. REVIEW IS WARRANTED TO SETTLE THE IMPORTANT QUESTION OF WHETHER AN AGREEMENT CAN BE MADE BETWEEN TRIAL COUNSEL AND THE PROSECUTOR TO WITHHOLD RELEVANT DISCOVERY MATERIALS BASED ON A CONFIDENTIALITY AGREEMENT BETWEEN THE PARTIES.

Trial counsel asserts that he cannot turn over the contents of what is assumed to be the CD's and DVD's because said discovery is "restricted and controlled material provided to our office for the exclusive purpose of defending our client..." (Ex. A1- Letter dated July 12, 2011; emphasis in original.) He also stated that the disclosure of these materials can subject the distributor to criminal sanctions. (Id.) He then claimed that his office had determined that "disclosure of the controlled material...for any purpose unrelated to [petitioner's] criminal matter would be a violation of law." (Id., emphasis added.)

Petitioner assumes that counsel is referring to the media items, because he makes reference to his limited ability to "copy" and distribute the discovery. Since counsel had made mention of not being able to copy the media items because of "burn rights" placed on them by the DA's office, this is a reasonable assumption.

The problem here is that counsel offered no justification as to why these items were subjected to non-disclosure. If they contained any sensitive information, such as addresses or phone numbers of the interviewees, that could have been redacted. (This would also have been an exercise in futility, since this information was already known to the parties.) The CD's and DVD's contained interviews of the victims to the crime. As such, they were relevant and necessary for the defense, as counsel was correct in saying. What flies in the face of reason is that counsel asserts that petitioner's stated reason for needing the items - to effectively assert his habeas claims - is "unrelated to [petitioner's] criminal matter.

In the absence of any proper justification for the need for confidentiality, the items were required by Penal Code 1054.1 to be turned over to petitioner. It is patently unconstitutional for the DA's office to require a defense attorney to withhold evidence from a defendant. (United States v Agurs (1976) 427 U.S. 97; c.f. Brady v Maryland (1963) 373 U.S. 83.) The materiality of the non-disclosed items has been demonstrated by petitioner's specificity of why he needs them: to show that the eyewitnesses gave contradictory statements as to their ability to identify him as the perpetrator. (See United States v Bagley (1985) 473 U.S. 667.) Agurs and Brady of course dealt with information withheld during trial, but the argument can be asserted with equal force to material information needed to effectuate an appeal.

What is troubling about this case is the lengths the DA's office and counsel are willing to go to in order to avoid turning this evidence over. But, they do not provide a copy of any agreement between the two parties requiring non-disclosure. Neither the DA's office nor trial counsel offered any reasons as to why it was necessary to withhold the information, nor did they cite any penal code or case law as their basis for such justification. The DA's office even went a step further. They provided petitioner's mother with information as to how to obtain the items at a cost, and then told her that she could not buy them without a court order or an attorney. (Ex. C - Letter dated March 25, 2008; Ex. A3- Declaration of Jamie Latteri.)

Petitioner's rights to this information cannot be circumvented by vague assertions by the DA or

trial counsel. This situation is more like the "he said, she said" rubric alleged by the State Bar. Both parties make a blanket assertion with any "clear and convincing evidence" of the fact.

Based on the foregoing, petitioner's complaint against trial counsel should be re-opened.

CONCLUSION

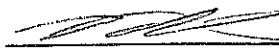
The decision of the California State Bar was unreasonable. Trial counsel offered no proof that he actually had turned over the contents of the missing CD's and DVD's. There was also no justification for any confidentiality agreement to keep the items from petitioner based on any reason or rationale.

WHEREFORE, petitioner respectfully requests this Court to:

- (1) Reverse the decision of the State Bar, and order them to re-open the case;
- (2) Initiate its own disciplinary proceedings against trial counsel and the district attorney;
- (3) Conduct its own investigation into the allegations against trial counsel and district attorney;
- (4) Issue an order requiring production of the CD's and DVD's, both in audio/video format and in written transcript;
- (4) Any and all relief as may be necessary and just.

DATED: 1-10-13, 2013

Respectfully submitted:


Nathan Medina, In Pro Per

PROOF OF SERVICE

Declaration of Service by Mail

I, NATHAN MEDINA, declare that I am over the age of Eighteen (18) and that I (~~am~~) a party to this action. On 1-10, 2013.

I deposited a copy of the following document (s):

PETITION FOR REVIEW WITH EXHIBITS

in a sealed envelope with the postage prepaid into the United States mail outlet via an authorized California Department of Corrections and Rehabilitation employee at Ironwood State Prison, in Riverside County, Blythe California, and addressed as follows:

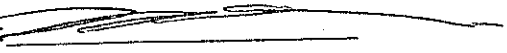
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3 copies state bar of california
General Counsel
350 McAllister St.
San Francisco, CA 94102

I declare under penalty of perjury by the laws of the State of California that the foregoing is true and correct (pursuant to 28 USCA 1746 (2)).

Date: 1-10 2013

Signature: 

S 208221

LIST OF EXHIBITS

SUPREME COURT
LODGED EXHIBITS

JAN 24 2013

Exhibit A - State Bar Complaint

A1 - Letters From Trial Counsel (August 16, 2010; July 12, 2011)

A2 - Responses From State Bar (April 2, 2012; November 15, 2012)

A3 - Declaration of Jamie Latteri/Emails of Attempts to Procure Records

A4 - Docket Entry From Court of Appeals

A5 - List of Trial Exhibits

A6 - Follow Up Letters To State Bar (December 18, 2012)

Exhibit B - Writ of Mandate/Response By Trial Counsel/Denial of Court

Exhibit C - Subpoenas Issued/Responses From District Attorney/Responses From Police Department

Exhibit D - Orders of the Superior Court

Motion for Post Conviction Discovery

Order Denying Habeas Corpus

Order Denying Petition For Re-Hearing

Deputy