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2 For Los Angeles County
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9
10 **IN THE SUPERIOR COURT FOR THE COUNTY OF LOS ANGELES**
11 **STATE OF CALIFORNIA**

12 In re) Case No. BA139642
13)
14 JAVIER FRANCISCO OVANDO) **PETITION FOR WRIT OF**
15) **HABEAS CORPUS;**
16) **VERIFICATION; POINTS**
17) **AND AUTHORITIES;**
18) **DECLARATIONS**
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15 TO THE HONORABLE LARRY P. FIDLER, PRESIDING JUDGE OF THE
16 CRIMINAL COURTS, SUPERIOR COURT OF THE STATE OF CALIFORNIA,
17 COUNTY OF LOS ANGELES, CENTRAL DISTRICT, DEPARTMENT 100, AND TO
18 JAVIER FRANCISCO OVANDO:
19
20 The People of the State of California, Real Party in Interest in the above
21 entitled action, by their counsel, Gil Garcetti, District Attorney for Los Angeles
22 County, allege in support of this petition for writ of habeas corpus as follows:
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I

29 This petition is being brought by the District Attorney for Los Angeles County
30 pursuant to Penal Code section 1474 on behalf of petitioner Javier Francisco
31 Ovando. In the proceeding commenced by the filing of this petition, the District
32 Attorney represents the People of the State of California and is acting as a friend of
33 the court and the petitioner. The purpose of this petition is to seek the
34 unconditional release of petitioner Ovando from all restraints whatsoever
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1 resulting from the criminal judgment in case number BA139642.

2 II

3 Petitioner Javier Francisco Ovando was charged in information number
4 BA139642 with two counts of assault with a firearm on a police officer in violation
5 of Penal Code section 245(d)(2), and one count of exhibiting a firearm in the
6 presence of a police officer in violation of Penal Code section 417(c). Firearm use
7 enhancements were also alleged. Following a jury trial in 1997 on these charges,
8 petitioner Ovando was found guilty, essentially as charged (one count was reduced
9 to a violation of section 245(b) P.C.), and sentenced to 23 years and 4 months in
10 state prison. He is now incarcerated in Salinas Valley State Prison, located in
11 Monterey County, California. The primary witnesses who testified against
12 petitioner at his trial were former LAPD Officer Rafael Perez and LAPD Officer
13 Nino Durden. On appeal, the judgment was affirmed by the Court of Appeal for
14 the Second Appellate District on June 2, 1998. (Ref. *People v. Javier Ovando*, case
15 number B110980.) Prior to September 8, 1999, the District Attorney's Office had no
16 reason to believe these LAPD officers were not telling the truth.

17 III

18 On August 25, 1998, and thereafter in superseding criminal filings, former
19 LAPD Officer Rafael Perez was charged with 10 felony counts, involving the theft
20 of approximately eight (8) pounds of cocaine from the Property Division of the
21 LAPD and the possession for sale of the stolen cocaine. The first trial on these
22 charges ended with a hung jury. Prior to the scheduled retrial on these charges,
23 Perez and his lawyer discussed his case with Deputy District Attorney Richard
24 Rosenthal requesting a case settlement. On September 8, 1999, the day set for
25 retrial, as part of settlement negotiations, Perez stated that in October of 1996 he
26 and his partner had overreacted and shot an unarmed man and subsequently

1 planted a gun on the shooting victim. An investigation was immediately initiated
2 by the LAPD and the District Attorney's office and it was determined that the
3 incident involved petitioner Ovando. As a result of this statement, a more
4 extensive statement under oath was taken from Perez after his plea of guilty in
5 which he admitted that petitioner Ovando had been framed, and that he (Perez)
6 had committed perjury in his testimony at Ovando's trial. (See Exhibits A and B,
7 attached herein).

8 IV

9 As a result of this statement by LAPD Officer Perez, further investigation was
10 conducted by both LAPD and the L.A. District Attorney's Office into the case against
11 petitioner Javier Francisco Ovando. Based upon statements given by LAPD officer
12 Perez, and other information already known to LAPD, the District Attorney's
13 Office has concluded that perjury may have been committed at Ovando's trial and
14 that the judgment of conviction should be overturned.

15 V

16 Under the circumstances outlined above and in the accompanying
17 Declarations attached herein, based on the applicable law as set forth in the
18 attached Points and Authorities in support of this petition, a new trial need not be
19 granted. Rather, the District Attorney believes, and does hereby move that, upon
20 the granting of this petition, this case be dismissed, and all rights and privileges be
21 restored to petitioner Ovando.

22 VI

23 The District Attorney hereby incorporates by reference, as though set forth in
24 haec verba, all Appendices filed herein, as well as the attached Points And
25 Authorities submitted in support of this petition.

26 ///

1 WHEREFORE, the District Attorney requests that the petition be granted, that
2 petitioner Ovando be ordered released forthwith, and that all rights and privileges
3 be restored to Mr. Ovando.
4

5 Dated: September 16, 1999

Respectfully Submitted,

6 GIL GARCETTI,
7 District Attorney

8 By *R. A. Rosenthal*

9 RICHARD A. ROSENTHAL
10 Deputy District Attorney
11 Special Investigations Division

12 Attorneys for Real Party in Interest
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VERIFICATION

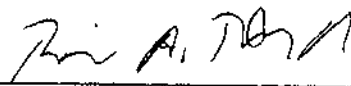
I, the undersigned, declare under penalty of perjury as follows:

I am an attorney at law, duly licensed to practice in all the courts of California, and I am employed as a deputy district attorney for the County of Los Angeles.

In this capacity, as an officer of the court and a person acting in behalf of petitioner in the foregoing petition for writ of habeas corpus, I make this verification in that the allegations made therein are more within my knowledge than petitioner's.

I have read the foregoing petition and believe of my own personal knowledge that the matters alleged therein are true, based on the declarations attached hereto.

Executed this 16th September, 1999, at Los Angeles, California.



RICHARD A. ROSENTHAL
Deputy District Attorney

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II

THE SUPERIOR COURT HAS JURISDICTION TO HEAR
THIS MATTER GRANT RELIEF

Habeas corpus is guaranteed by both the federal and state constitutions. (See U.S. Const., Art. I, Sec 9; Cal. Const., Art I, Sec. 11.) Its purpose is to obtain prompt judicial release from illegal restraint. (*Carbo v. United States* (1961) 364 U.S. 611, 5 L.Ed.2d 329, 81 S.Ct. 338, 340; Penal Code section 1473.) The normal relief granted on a successful application showing illegal restraint is discharge of the prisoner. (Penal Code section 1485.)

This court, Department 100 of the Superior Court, has jurisdiction to grant relief in this matter. (Cal. Const., Art. VI, sec. 10; Witkin & Epstein, Cal. Crim. Law, Second Ed., Vol. 6, sec. 3348, p. 4152.)

III

PETITIONER WAS DENIED HIS CONSTITUTIONAL
RIGHT TO DUE PROCESS OF LAW AT HIS TRIAL

Under Penal Code section 1473(b), a prisoner may seek habeas relief for the following reason: "(1) False evidence that is substantially material or probative on the issue of guilt or punishment was introduced against a person at any hearing or trial relating to his incarceration. . . ." "False evidence is 'substantially material or probative' if it is of 'such significance that it may have affected the outcome,' in the sense that 'with reasonable probability it could have affected the outcome. . ..'" (*In re Sasounian* (1995) 9 Cal.4th 535, 543, emphasis in original.)

1 In this case, the District Attorney submits that the testimony given by former
2 LAPD Officer Perez at petitioner Ovando's trial was false, was substantially
3 material to the guilt of petitioner Ovando, and, had its falsity been known to
4 petitioner (or the District Attorney), the court and the jury, it would have affected
5 the outcome of the trial.

6
7 It is the burden of the petitioner to prove his allegations by a preponderance
8 of the evidence in order to merit relief in a habeas corpus proceeding. (*People v.*
9 *Ledesma* (1987) 43 Cal.3d 171, 243.) Given the position of the District Attorney,
10 together with the evidence shown by Exhibits A and B, it is clear that petitioner has
11 met his burden.

12
13 CONCLUSION

14 For the reasons set forth above, the petition should be granted, the conviction
15 of petitioner Ovando should be reversed, the case should be dismissed, and all
16 rights and privileges should be restored to petitioner.

17
18 Dated: September 16, 1999

Respectfully Submitted,

19 GIL GARCETTI,
20 District Attorney

21 By

22 RICHARD A. ROSENTHAL
23 Deputy District Attorney
24 Special Investigations Division

25 Attorneys for Real Party in Interest

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DECLARATION OF RICHARD A. ROSENTHAL

1. I, RICHARD A. ROSENTHAL, am a deputy district attorney employed by the Los Angeles County District Attorney's Office, currently assigned to the Special Investigations Division. I am the prosecutor assigned to the case entitled People v. Rafael Perez, Case No. BA109900. Perez is a former Los Angeles Police Officer who was charged with ten felony counts involving four thefts of approximately eight pounds of cocaine.

2. On September 8, 1999, Officer Perez pled guilty to eight of the ten charged counts in exchange for a five-year state prison term and an agreement to cooperate with law enforcement. Pursuant to the agreement Perez would not be granted immunity for any incident involving an unlawful use of force resulting in great bodily injury or death. Based upon this agreement, Perez made a statement, under a grant of derivative use immunity, which disclosed one incident involving a shooting of an unarmed criminal suspect. Perez admitted that he and his partner planted a gun on a suspect to cover-up the fact that he was unarmed at the time of the shooting.

3. Although this incident did involve "great bodily injury" to the suspect, the District Attorney's Office concluded that the interests of justice required that the facts of this incident be fully investigated to ensure that no wrongfully convicted person remain incarcerated. Therefore, the District Attorney's Office authorized a plea agreement which included immunity for this incident and a condition that the defendant fully cooperate with law enforcement; further that he not make any false material statement or omission. If he failed to honor this commitment, his

1 guilty plea will be considered "open" and he could be sentenced to the maximum
2 time for the charges, up to twelve years in state prison.

3
4 4. The Officer Involved Shooting (OIS) Report relating to the October 1996
5 incident was immediately located by the LAPD Robbery Homicide Division. The
6 shooting victim was discovered to be Javier Francisco Ovando. A check of District
7 Attorney records verified that Ovando had been charged with three felony counts
8 relating to the incident. Ovando was alleged to have been armed with a
9 semiautomatic rifle at the time of the shooting. Officers Rafael Perez and Nino
10 Durden were the alleged victims of the defendant's criminal conduct. People v.
11 Javier F. Ovando, Superior Court Case No. BA139642 (Reference Court of Appeal
12 No. B110980).

13
14 5. According to the OIS Report and the arrest report contained in the District
15 Attorney file, defendant Ovando broke into a vacant apartment being used by
16 Officers Perez and Durden as an "Observation Post." Ovando was armed with a
17 semiautomatic rifle complete with a military-style "banana clip." Perez and
18 Durden ordered him to put down the weapon, but he refused to comply. Durden
19 shot Ovando once and Perez an additional three times. Ovando was hit in the
20 chest and head. According to the preliminary hearing transcript, Ovando was
21 brought into the Municipal Court on a gurney.

22
23 6. Ovando was convicted by a jury on February 20, 1997. He was sentenced by
24 Judge Stephen Czuleger in Department 123 of the Los Angeles Superior Court to
25 the maximum possible custodial term of 23 years, 4 months. According to the
26 Probation Report, the defendant had no prior felony convictions, although he was
27

1 an admitted member of the 18th Street gang. Based upon a review of the
2 prosecution's sentencing memorandum, it appears that the defendant was given
3 the maximum sentence based upon the prosecution theory that the defendant
4 broke into the apartment where Perez and Durden were located with an intent to
5 kill the involved officers for their surveillance of the activities of the 18th Street
6 gang.

7
8 7. On September 10, 1999, I placed Officer Perez under oath and questioned him
9 about the Ovando shooting. He admitted that Ovando did not break into the
10 apartment in which he and Durden were present and that Ovando was not armed.
11 He stated that Officer Durden planted a firearm on Ovando after shooting him.
12 The firearm had been seized by Perez and Durden a few days earlier. Its serial
13 number had been obliterated by Officer Durden shortly before the Ovando
14 shooting. The interview was tape recorded and conducted in the presence of a
15 District Attorney court reporter.

16
17 8. On September 13, 1999, I spoke with Deputy District Attorney Frank Lukus,
18 the trial prosecutor. He advised me that he had no reason to believe at the time of
19 the trial that either Officer Perez or Officer Durden testified falsely.

20
21 9. On September 14, 1999, I received a copy of the trial transcript from the
22 Attorney General's Office. Upon review of that transcript, I determined that
23 Officers Perez and Durden were the sole percipient witnesses presented by the
24 prosecution. Officers Perez and Durden testified consistently with the statements
25 taken from them as indicated in the Officer Involved Shooting report. According
26 to a proffer made to Ovando's attorney during the course of a motion in limine, at
27

1 the time of his trial, Ovando had no recollection of the facts of the shooting due to
2 a head wound suffered at the time of the incident. (Reporter's Transcript at 233-
3 234).


4
5 10. According to Deputy Attorney General Martin Pitha, who was assigned to
6 handle the Ovando appeal, the conviction against the defendant was affirmed by
7 the Court of Appeal in an opinion dated June 2, 1998.
8

9 11. I have read an interview report, prepared by Detective Brian Tyndall, relating
10 to the interview of defendant Ovando at the State Prison on September 11, 1999
11 and discussed the interview with the detectives who were present. Based upon
12 the statements of Rafael Perez and Javier Ovando, it is my belief that there is now
13 substantial doubt as to the credibility of the evidence supporting the verdict.
14

15 12. I am aware of the details and facts of this investigation, including the
16 statements of Rafael Perez. After a careful legal analysis, the District Attorney
17 believes that due to this new information the case against Javier Ovando (Case
18 No. BA139642) has been hopelessly compromised and a new trial would not satisfy
19 the interests of justice.
20

21 I declare under penalty of perjury that the aforementioned is true and correct.

22 Signed this 16th day of September, 1999 at Los Angeles, California.
23

24 
25 _____
26 Richard Rosenthal, Declarant
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2
3 DECLARATION OF BRIAN TYNDALL

4 1. I, BRIAN TYNDALL, am a Detective in the employ of the Los Angeles Police
5 Department. I am currently assigned to the Robbery-Homicide Division (RHD)
6 Task Force.

7 2. I was present on Friday September 10, 1999 when former Los Angeles Police
8 Officer Rafael Perez was interviewed by Deputy District Attorney Richard
9 Rosenthal pursuant to a plea agreement reached between Perez and the Los
10 Angeles District Attorney's Office. Perez was placed under oath and asked about
11 the shooting incident which he revealed for the first time to Deputy District
12 Attorney Rosenthal on Wednesday, September 8, 1999. The interview was tape
13 recorded and taken in the presence of a district attorney court reporter.

14
15 3. Perez stated that he was involved in a shooting on October 12, 1996 involving
16 an 18th Street Gang member identified as Javier Ovando. The incident took place
17 in an apartment building on Lake Street in the Rampart Division. Perez and his
18 partner, Officer Nino Durden, were manning an "Observation Post" inside a
19 vacant apartment in the building. Perez was in the kitchen/dining area when he
20 heard his partner talking to someone in the living room/entryway area. Perez
21 went into the living room where he saw his partner arguing with a Male
22 Hispanic. Officer Durden pulled out his service weapon and shot the Male
23 Hispanic. In response to Officer Durden pulling out his service weapon, Perez
24 pulled out his weapon and also shot the Male Hispanic. The shooting victim was
25 unarmed. Officer Durden left the location and retrieved a semi-automatic rifle,
26 equipped with a military-style "banana clip" that was located in a gang sweep a few
27

1 days before. Prior to the shooting incident, Officer Durden had, in Perez' presence,
2 obliterated the serial number on the weapon with a file. Officer Durden placed the
3 firearm near the victim in order to make it appear that the victim was armed
4 when he was shot.

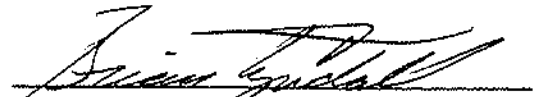
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6 4. On Saturday, September 11, 1999, I was present at an interview of prison
7 inmate Javier Ovando at Salinas Valley State Prison. Ovando was in a wheel chair
8 as the result of the October 12, 1996 shooting incident involving Officers Perez and
9 Durden. Ovando was informed that former Officer Perez had been arrested and
10 convicted of narcotics dealing and that the Ovando shooting was under
11 investigation. The interview was tape recorded.

12
13
14 5. Inmate Ovando told the interviewing Detectives that he was unarmed at the
15 time of the shooting. He admitted being a member of the 18th Street Gang as of
16 October of 1996. He stated that he had been stopped by Officers Perez and Durden
17 in front of the Lake Street apartment building the day before the shooting. An
18 "F.I." card was completed. The next night, he was in his apartment, located on the
19 same floor as the "Observation Post" manned by Perez and Durden. The officers
20 knocked on the door and demanded entrance. A "homeboy" of Ovando was told
21 to leave the apartment which was subsequently searched by Officer Perez. No
22 narcotics were located. Ovando was handcuffed and taken to Apartment No. 407.
23 Shortly thereafter, he was shot in the chest by both Officers. Perez subsequently
24 grabbed him by the front of the shirt, held him upright and shot him in the head.
25 Detectives noted a scar on the top of Ovando's head consistent with a gunshot
26 wound. Ovando was never questioned by LAPD Detectives prior to his being
27 charged with Assault with a Firearm on a Police Officer. He did not testify at his

1 trial based upon his attorney's advice that he would not be believed by a jury. He
2 states he was not armed at the time of the shooting and is not guilty of the crimes
3 of which he was convicted.
4

5 I declare under penalty of perjury that the aforementioned is true and correct.

6 Signed this 16th day of September, 1999 at Los Angeles, California.
7

8 
9 Detective Brian Tyndall, Declarant

