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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. JOSE A. SALAZAR, Defendant and Appellant.	B117225 (Los Angeles County Super. Ct. No. LA025781)
In re JOSE A. SALAZAR, on Habeas Corpus.	B137034 (Los Angeles County Super. Ct. No. LA025781)

APPEAL from a judgment of the Superior Court of Los Angeles County, Michael B. Harwin, Judge. Dismissed, Granted and Vacated.

Gail Harper, under appointment by the Court of Appeal, for Petitioner, Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Robert F. Katz and Roy C. Preminger, Deputy Attorneys General, for Plaintiff and Respondent.

In September 1997, Jose A. Salazar (petitioner) was convicted by a jury of second degree murder and assault on a child resulting in death (Pen. Code, § 187, subd. (a); 273ab) and was sentenced to 15 years to life. He filed a notice of appeal (Case No. B117225, hereinafter referred to as the Appeal). While the Appeal was pending, petitioner filed a petition for writ of habeas corpus (Case No. B137034, hereinafter, the petition) in which he contended that the Los Angeles County District Attorney's office withheld and was withholding potentially exculpatory evidence in violation of *Brady v. Maryland* (1963) 373 U.S. 83, 87, and Penal Code section 182, subdivision (a)(5). We ordered the Appeal off calendar and addressed the petition. After briefing and argument on the petition, we filed a written opinion, remanding the matter to the trial court for an evidentiary hearing.[1]

The trial court conducted a hearing from November 2001 to February 2002 and concluded in its findings of fact that petitioner's counsel now possessed or had access to the material deemed relevant to his defense. The parties filed supplemental briefs addressing the findings of the trial court. We have reviewed the trial court's findings and the supplemental briefs and we conclude that a *Brady* violation occurred. Further, we conclude that we cannot be confident in the jury's verdict given the information which should have been provided to petitioner. The appeal is dismissed and petitioner's conviction is ordered vacated. The matter is remanded to the trial court for further proceedings.

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1 The opinion was filed on August 11, 2000. We subsequently filed an Order Modifying the opinion on September 6, 2000.

FACTUAL AND PROCEDURAL SUMMARY

Factual Summary[2]

Petitioner was the boyfriend of Sheree Beckwith (Beckwith). He was temporarily staying at the Northridge apartment Beckwith shared with her mother, Joanne Moreau (Moreau). Moreau was a full-time babysitter for Adriana Krygoski (Adriana), the infant daughter of Kimberly Krygoski (Kimberly). Kimberly dropped Adriana off at Moreau's apartment at approximately 7:30 a.m. on the morning of November 18, 1996. Adriana had two bruises on her head, one which she had received a few days earlier while with Moreau, and a bruise which Moreau had not previously seen. Moreau had noticed on previous occasions that Adriana would bang her head against the ground and was afraid of male voices.

A little later that morning, Moreau's daughter Beckwith was watching Adriana, and Moreau heard a scream. Beckwith told Moreau that Adriana had hit her head on the coffee table. At the time, petitioner was in one of the bedrooms. Shortly thereafter, petitioner took Beckwith to work and then returned to the apartment.

Moreau told petitioner she needed to go to Wal-Mart and petitioner offered to take care of Adriana, who was then sleeping. Moreau left at approximately 10:20 a.m. to go to Wal-Mart, approximately 25 minutes away from the apartment. Shortly after Moreau left, Adriana awoke and petitioner attended to her.

At approximately 11:45 a.m., petitioner called 911 when he became concerned about Adriana. Los Angeles Fire Department Paramedic Gordon Robb received an alert at 11:47 a.m. to go to the apartment. The caller said that a child

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2 We summarize the facts from our prior unpublished opinion remanding the matter to the Superior Court for the evidentiary hearing.

was breathing very slowly, had vomited, and that the caller did not know what happened. Robb arrived at the apartment and took the child with him at 12:10 p.m. to Northridge Hospital. Petitioner was calm, and rode with them to the hospital.

At the hospital, Adriana was diagnosed as having injuries consistent with severe damage to her head. She was unresponsive and exhibiting agonal breathing requiring artificial respiration. A computer tomography (C.T.) scan conducted at approximately 12:45 p.m. on November 18, revealed a subdural hematoma with blood in the occipital region and skull fractures. These injuries were consistent with severe trauma resulting from extreme force. Adriana was declared brain dead on November 20, 1997, and removed from life support systems.

Summary of Relevant Trial Evidence and Argument

(a) The Lay Evidence:

The evidence was uncontradicted that Adriana was not under the control of petitioner until at least 10:20 a.m. on November 18, 1996, and that when she arrived that day she had two bruises on her forehead, one noticed on November 15, 1996, and a new one. It is also uncontradicted that Adriana hit her head on the coffee table that morning while under the control of Beckwith and Moreau.

The only percipient evidence we have of what transpired between 10:20 a.m., and 11:47 a.m., when the paramedics arrived, came from petitioner, either in his testimony or statements attributed to him. In connection with his care of Adriana, petitioner testified that after Moreau left, he went to his room and laid down to watch television. He heard some screaming and crying and went to the bedroom where Adriana was sleeping. She was sitting against the wall, crying, and her eyes were red. He picked her up and tried to talk to her. After three or four minutes, he took her to the living room. She kept crying and her eyes were

red and blinking. He checked her diaper, changed it, put her on the floor and tried to play with her. She sat with her head cocked to the side and the crying decreased. Petitioner then turned on the television while Adriana sat there. He watched television for about 10 minutes and then saw Adriana's eyes flutter. He tried to play with her, then tried to feed her with food from her diaper bag. She was eating just a little and her eyes were still red and halfway closed. He dropped the spoon and went to get some toilet paper to clean up the mess. When he returned, she did not respond. He then picked her up and raised her up and down three times, asking what was wrong. He decided to give her a bottle and put her down. He went to the refrigerator to get the bottle, and when he returned, he found Adriana lying down, shaking and hitting the back of her head on the floor. He picked her up and her head was loose. He realized something was wrong so he put her down and got some ice. When he returned, Adriana made a gagging, choking noise, and petitioner decided to call 911. He was told to put Adriana on her side and that the paramedics were being called. He went in the ambulance to the hospital where he was taken into custody by police. He denied shaking Adriana violently or hurting her.

Various consistent and inconsistent statements were attributed to petitioner. Jaime Chacon, a Los Angeles Police Officer, received a radio call to go to the Northridge Hospital on November 18, 1996, at approximately 11:30 a.m. Petitioner told Chacon and his partner that the baby started crying, so he tried to feed her. She started throwing up and her eyes started "acting funny" so he tried to cheer her up, holding her up in the air and tossing her in the air a couple of times.

Officer Terry Lopez read petitioner his rights at the hospital and then interviewed him. Petitioner told Lopez that when Adriana began screaming and crying he brought her over to the bedroom and began to feed her baby food. She spit up and as he went to get some paper towels, Adriana began crawling towards

him. He heard her choking and rolled her over to her side. He lifted her up, her eyes flickered back and her head went to the side. Adriana began to vomit and she suffered a seizure and petitioner called 911.

Petitioner also gave a written statement to Lopez. He said that Adriana woke up at about 10:45 crying, and looked sad. He started to stroke her head or to try to play with her, but she did not appear to want to do anything so he decided to feed her at about 11:25 a.m. She seemed to be swallowing, but very slowly, and he kept feeding her until she threw a spoon at him. He put her down and went to the refrigerator to get the bottle of milk. When he returned, she was crawling and looked tired and suddenly started making faces and noises and her body became very stiff. He picked her up and started rubbing her head, her chest, her back, and she did not respond so he wet a towel with ice cold water and put it on her neck and then her head. Again, she did not respond and was making an awful face, so he called 911. The operator told him to put her on her left side, which he did and she started vomiting through her mouth and her nose. It was at this point the paramedics arrived.

Daniel Gomez, a police officer fluent in Spanish, assisted Detective Lopez in obtaining the written statement from petitioner. Gomez testified that as petitioner spoke about the incident, he demonstrated how he lifted Adriana, by lifting both hands to just over eye level and bringing his hands back in to his body.

When interviewed later at the police station, petitioner told Detective Lopez that he picked up Adriana and shook her three times, and then tossed her approximately three times, demonstrating to Lopez that he placed his hands underneath Adriana's armpits and shaking her. He then said he placed her on the ground and as she began to crawl away, she became rigid, began to vomit and her eyes began to roll back.

(b) The Medical Evidence:

The prosecution called emergency room physician Dr. Harold Lowder. He testified that Adriana arrived at the hospital around noon, was not breathing well, was not responding to light, and was not crying. He felt a "boggy area" in the back of her head, and suspected head injury. Her injuries were not consistent with choking from food, which is what petitioner told him had happened, but consistent with an "automobile accident, falling out of a third or fourth story window, or possibly being beaten with some type of object, or shaken and beaten." In his opinion, the injuries were caused by "shaking of the child possibly with the child's head impacting some type of firm surface." The shaking would have to have been for 10-15 seconds, with moderately severe force. He opined that the onset of symptoms would be "immediate" and that *it would not be possible for the child to receive these injuries three to four hours prior to the onset of symptoms.* It would not be possible for the child to sleep, eat, and vomit afterwards. Adriana could not have received these injuries by falling into a coffee table or pounding her head on the floor. When asked about the time frame of the initial impact of the injury, he answered, "I think that this child had an injury that occurred that caused bleeding and the child probably lost consciousness immediately." He admitted however, that there was a slight possibility that the baby could become conscious afterwards. She probably had two skull fractures. He characterized her injuries as extremely severe.

Dr. Gilbert Mellin, a radiologist at Northridge Hospital, was also called by the People. He reviewed the scan performed on Adriana on November 18, 1996, and confirmed the findings described by Dr. Lowder. He opined that the findings were suggestive of severe trauma, for example, a fall from two or three stories or a major traffic accident, and could not have been from an accidental bump on a coffee table, a simple fall from a chair, or head pounding.

Next, the People called Dr. Dorothy Calvin, a pediatric ophthalmologist at Northridge Hospital. She found at least 20 retinal hemorrhages in Adriana's eyes (bleeding in the back wall of the eye), which, in her opinion, were due to blunt trauma or shaking, not from falling from a chair or bed or head banging, or anything accidental: "A. You do not see retinal hemorrhaging of this severity with non-accidental trauma. The odds of that are extremely low. The odds of seeing retinal hemorrhage with inflicted trauma are 50 to 100 percent. [¶] Q. All of the things that you notice are they associated either with severe, blunt force trauma on or with shaking? [¶] A. They can be associated with either. They are more likely to be associated with shaking."

Dr. James Ribe testified that he was the forensic pathologist who had performed the autopsy on Adriana. He opined that her death was caused by inflicted trauma to her head. He described his various findings which were consistent with testimony rendered by the prior physicians and concluded that Adriana had a skull fracture and optic nerve sheath hemorrhage which were consistent with shaking injuries and a violent impact of the back of Adriana's head against a hard, flat surface. According to Dr. Ribe, the skull fractures, which could not have occurred from an ordinary accidental bump, would have rendered Adriana unconscious "instantaneously," and that vomiting within an hour and eyes rolling back would be expected with these types of fractures. Adriana would not have been able to eat, talk or walk after receiving these injuries. He testified that without medical support, Adriana would only have survived for a range of *a few minutes to at most a couple of hours*. Based on the paramedic description of "agonal breathing," Dr. Ribe opined that when the paramedics arrived, Adriana was in the terminal phase of brain injury and brain swelling. The following colloquy then occurred:

"Q. By [the prosecutor]: Do you have an opinion as to when the onset of the swelling and the hemorrhaging would have occurred given what you know about Adriana's injury?

". . .

"A. These injuries are acute and occurred certainly *within a period of hours before the earlier scan was made*. There is no evidence of sub acute or chronic injuries, *so we're talking about an injury that's most likely only a few hours old*.

"Q. If another physician said that because of the amount of swelling and hemorrhage visible in photographs A, B, and C, the incident causing the injuries would have occurred four to 18 hours before the time of the scan, the scan being done at approximately 12:30 p.m. on November 18 of '96, would you agree or disagree with this opinion?

"A. *Well, the four hours is possible. 18 hours is highly unlikely*. The reason being that these injures are simply not survivable for that length of time without intensive medical care.

"Q. So if the patient, if the little girl had agonal breathing when the paramedics arrived, which is between 11:45 and 12:00 p.m., when do you think the swelling could have begun?

"A. *Most likely it began a couple of hours before the paramedics got there. A longer period of hours is not impossible. It had to be at least half an hour because the swelling usually of any significant degree like this is not seen before about a half an hour.*

"Q. If you were told that the little girl was fine at 10:30 in the morning on November 18, was able to eat food some point after 10:30 in the morning, but had gone unconscious, eyes gone to the back of her head and had the problems breathing at approximately 11:46 in the morning, do you still--*do you think that injuries could have occurred prior to 10:30 a.m.?*

"A. *No, I do not.*

"Q. Why is that?

"A. Because these injuries are instantly incapacitating and for a child with these injuries to be able to eat and swallow food is not possible. So if she ate food at 10:30 in the morning that rules out these injuries having happened before then.

"Q. *Would it be your opinion then that the injuries would have had to occur at some point after she ate and prior to 911 being called?*

"A. *Yes.*" (Italics added.)

Defense counsel cross-examined Dr. Ribe on his various findings, his past history and experience, and his conclusions. When asked whether the injury could have taken place four hours prior to the original C.T. scan, he reiterated, "*From the C.T. scans it could have taken place that long or longer. But from the pathologic findings I said that a survival of four hours without medical support would be unlikely.*" (Italics added.)

On re-direct, Dr. Ribe specifically said it was not probable that Adriana could have been injured prior to 10:30 in the morning, have been conscious and eaten; she would have been incapacitated from the moment of injury. He testified that Adriana's autopsy was detailed and that he spent a significant amount of time thinking about his opinion.

Counsel for petitioner called Dr. Charles Imbus, a child neurologist with 17 years experience in private practice. He had reviewed all the reports and scans. He concluded that based on the amount of swelling in the brain, the injury had occurred a considerable time before the original CT scan was taken (12:46 p.m.), four hours at a minimum. He disagreed with Dr. Lowder's opinion that the injury took place almost immediately before the CT scan. He reviewed Dr. Ribe's

report and while he agreed that Adriana would have become unconscious before the blows, there was a "good possibility" that she would be lucid after that, and that the contrecoup contusion (the blow to the brain from the opposite side of the skull fracture) would not necessarily render her unconscious. After the blows, Adriana could have eaten, but not well, could have made sounds, and could have moved her hands and legs, but not walk. On cross-examination, it was elicited that he had never treated Adriana nor was he an emergency room doctor.

On redirect Imbus testified that he had reviewed petitioner's medical reports and concluded that petitioner did not have full mobility of his shoulders on November 18, 1996. He concluded petitioner could not have caused the blows to Adriana's head.

(c) The Argument:

The prosecution began with the premise that when Adriana was left with petitioner she was healthy and had no symptoms of any of the injuries she exhibited when admitted to the hospital. The prosecutor reviewed the findings and testimony of Drs. Lowder, Calvin and Mellin, the treating doctors at Northridge Hospital, which were all consistent with severe trauma inflicted within a short time before admission to the hospital. Dr. Ribe's autopsy was referenced as consistent with these findings. The prosecutor also pointed out inconsistencies between petitioner's testimony and his out-of-court statements, and among his out-of-court statements. She summarized:

> "The assault. We have a fact the defendant picked Adriana up and moved her up and down several times. He told us he did this. He simply omitted the violence. But the inference you can make is that it wasn't the nice gentle movement that defense counsel showed you during the trial when he questioned People's witnesses. [¶] The inference you can make from this is violent shaking and slamming the head on a hard surface, and the reason you can make this inference is

> the medical evidence points to violence. The retinal hemorrhage and the commotio retinae point to violence. The complex depressed fractures point to violence. The contrecoup contusion points to violence. [¶] The timing, the facts we have, 7:30, Adriana's fine. 10:30, she's fine. She's alone with the defendant. She eats. 11:46, there's a 911 call. Adriana is not fine. [¶] So the inference is that the assault occurred between 10:30 in the morning and 11:46 in the morning while the defendant was alone with Adriana. [¶] And, again, what allows you to make this inference? What direct evidence? What facts support this inference? [¶] The medical evidence, the immediate incapacitation, the loss of the ability to eat and the fact that Adriana vomited means that she ate before the 911 call. She ate when the defendant fed her."

Petitioner's counsel focused on the medical evidence and argued that the jury could conclude that the injuries to Adriana could have occurred up to four hours before the C.T. scan, contrary to Dr. Lowder's testimony. He argued that not only the testimony of Dr. Imbus, but also of Dr. Ribe, supported this theory.

> "Dr. Lowder . . . testified that this injury, the actual injury couldn't have been -- couldn't have happened for three or four hours prior to that. Prior to doing the CT scan at 12:30 on the 18th of November. [¶] Now, he's an emergency room doctor, but this was his testimony. [¶] Then we have the testimony of Dr. Ribe. Dr. Ribe, the pathologist, does postmortem work, and he testified on the 10th of September, in the afternoon session, if you recall, the prosecution finished with direct examination and he said that the blows had to be struck almost an hour before -- almost immediately. *Then when he testified the next day, his testimony came more in line with what Dr. Imbus spoke to you about. He said it could have happened three or four hours before that*, but the baby would have been incapacitated immediately. Immediate incapacitation. [¶] Here's -- this is the issue with the case. When was that baby incapacitated? [¶] We have -- Dr. Imbus testified. Now Dr. Imbus is a pediatric neurologist. But he's been in private practice for 17 years. All right. None of the other doctors who testified -- Lowder, Mel[l]in, Ribe, Calvin or Semnani -- are pediatric neurologists. [¶] He testifies that there was a four-hour lapse between the blows being struck and the swelling of the baby's

> head. [¶] . . . [¶] Dr. Imbus also testified that at the initial contact, the baby would have lost consciousness but could have regained consciousness. And in that period of time, would have taken food but not be able to swallow the food. She would be lucid but spit the food up. And there's photos that you can see the food and the vomit on the floor and on the clothes and other places in the apartment."

Counsel also argued that petitioner's shoulder injury would have precluded him from lifting Adriana and shaking her as argued by the People.

The Brady Issue

(a) Attempts to obtain discovery:

On June 23, 1997, almost three months prior to trial, petitioner's counsel requested discovery from the prosecutor regarding (1) the number of autopsies Dr. Ribe had performed on children with shaken baby syndrome and/or skull fractures; and (2) other cases in which Dr. Ribe had testified regarding children who had shaken baby syndrome and/or skull fractures. No such information was provided to counsel.

The fact that such information existed was first evidenced on the day that Dr. Ribe was testifying on direct examination. Defense counsel requested an Evidence Code section 402 hearing based on a newspaper article in that day's Los Angeles Times regarding Dr. Ribe's prior testimony at a preliminary hearing in another case, *People v. Eve Wingfield*, which involved the death of Eve Wingfield's two-year old son, Lance Helms. (Hereafter this case is referred to either as the *Wingfield* case or the Helms case.)

In *Wingfield*, Dr. Ribe testified that Lance Helms had died within 30 to 60 minutes after he suffered injuries similar to those in this case. Lance's mother had been with him at the time and was charged with his murder. Based

upon the timing indicated by Dr. Ribe, she agreed to enter a plea of no contest to a charge of child abuse. The newspaper article reported that Dr. Ribe later changed his belief about the causal facts and circumstances leading to the death of Lance Helms and as a result the District Attorney's office reopened the matter.

During the Evidence Code section 402 hearing in this matter, Dr. Ribe stated he could not testify about the *Wingfield* case without refreshing his memory and that the coroner's office had a file on the case but that he could not bring the file to court without a court order. The court ordered him to do so but Dr. Ribe also stated he would need a transcript of his testimony. The prosecutor stated that the District Attorney's office had the transcript, but it was downtown. She said she would attempt to contact the deputy who was assigned to the case. The court told the prosecutor to ask her investigator to attempt to obtain a copy. After a short recess, the prosecutor said that the deputy assigned to the *Wingfield* case would be bringing her a copy of the preliminary hearing testimony the next day.

The following day, after re-direct examination of Dr. Ribe, the prosecutor told the court out of the presence of the jury that one of the Los Angeles Police Department detectives had brought a transcript of the preliminary hearing testimony with him, and that he was not authorized by the Police Department to give copies to anyone but the court. The detective (apparently Detective Mahle, although the reporter transcribed his name as "Mella") indicated that he was assigned to assist in the reopening of the *Wingfield* case and had been furnished with the transcript. He cited the "very sensitive matter" of the case but admitted that the case had not been sealed. The prosecutor then gave defense counsel a copy of Dr. Ribe's testimony and the detective indicated that he had the remainder of the transcript. No further discussions occurred during trial regarding the *Wingfield* case or any other case in which Dr. Ribe had testified.

After petitioner's conviction on January 25, 1999, his appellate defense counsel requested all information pertaining to Dr. Ribe, including but not limited to (1) trial and/or preliminary transcripts of any cases in which Dr. Ribe testified as a prosecution witness from 1990 to the present, including but not limited to the cases of *People v. Wingfield, People v. Cauchi, People v. Rathbun*, *People v. Tuccinardi, People v. Hand,* and *People v. Piper Tech*; (2) copies of all coroner's reports in connection with that testimony; (3) transcripts of State Legislative proceedings where Dr. Ribe testified regarding child abuse and *People v. Wingfield*; (4) all internal memoranda from the District Attorney's office involving issues of Dr. Ribe's credibility; and (5) any written complaints pertaining to Dr. Ribe's credibility.

On February 5, 1999, Deputy District Attorney Alan Yochelson telephoned petitioner's appellate counsel and informed her that a package of discovery materials regarding Dr. Ribe had been assembled by the District Attorney's office in 1998 and was to be made available to counsel in cases involving Dr. Ribe. Mr. Yochelson said that he would copy that material and send it to appellate counsel. In a letter dated February 12, 1999, Deputy Yochelson transmitted over 1500 pages of documents to appellate counsel, which consisted of transcripts and/or autopsy reports from the following cases: *People v. Wingfield, People v. Tuccinardi, People v. Cauchi, People v. Vildosola* and *People v. Hand*.

On August 5, 1999, appellate counsel wrote to Deputy Yochelson indicating that not all of the material requested had been provided and listing the materials that appellate counsel knew were missing. Deputy Yochelson did not respond to this letter.

On August 9, 1999, appellate counsel went to one of the branches of the Office of the District Attorney and requested the discovery materials pertaining to Dr. Ribe. Appellate counsel was told that each of the branch offices was

provided with a box of documents that was supposed to be in compliance with any discovery requests regarding Dr. Ribe. One file box of documents was provided for appellate counsel, but she was not allowed to make any copies of the contents. The box contained no cover letter and no inventory of the contents. The documents in the box were not the same as the ones that Deputy Yochelson had provided to appellate counsel and also contained some documents that appellate counsel had not seen before. In addition, appellate counsel noted that even with the documents contained in the box, she did not have all the materials that she had originally requested from the District Attorney's office in her January 25, 1999 letter.

During a phone call on August 19, 1999, with Deputy Yochelson, appellate counsel told him that she had reviewed one of the Dr. Ribe discovery boxes and that its contents were different from the documents Yochelson had provided to her. He expressed surprise, but was not surprised when she told him that she was not allowed to copy the contents of the discovery box.

On September 10, 1999, when appellate counsel still had not received a copy of the Helms reinvestigation report, she called District Attorney Roger Gunson, who was Deputy Yochelson's supervisor. Later that day, Gunson called her back and told her that Yochelson had sent her the report that day by mail. That same day, Yochelson faxed a copy of the report to appellate counsel.

On September 14, 1999, appellate counsel wrote to the trial prosecutor, Jennifer Turkat, informing her that she was preparing a petition for writ of habeas corpus, and requesting answers to the following questions: (1) whether she had ever discussed this case with the trial attorney in the *People v. Arce/Urbano* case, Dinko Bozanich; (2) what she knew at the time of petitioner's trial about Dr. Ribe's credibility; (3) whether she had discussed the prosecution's duty to disclose impeachment evidence regarding Dr. Ribe with her supervisor; (4)

whether she knew that the same detectives investigating this case were the detectives involved in the Helms reinvestigation; and (5) whether she was instructed by anyone in the District Attorney's office not to discuss the Helms reinvestigation.

Turkat did not respond to this letter.

(b) The Petition for Habeas Corpus:

When Turkat did not respond to the letter by appellate counsel, counsel filed a request that we compel discovery. Attached to the request were copies of documents strongly suggesting that a *Brady* violation had occurred. We denied the request, suggesting that a petition for habeas corpus was the proper procedural way to handle the matter.

Petitioner's appellate counsel filed the petition for habeas corpus with supporting documents attached to her petition and identified in her declaration in support of the petition. A declaration of Deputy District Attorney Dinko Bozanich also was filed in support of the petition. The documentation, summarized in a time-line, establishes the following:

> **June 28, 1995**: Dr. Ribe testifies at pretrial of *People v. Wingfield* regarding the death of Lance Helms, son of Wingfield. He testifies that death would have occurred within 30-60 minutes from the injuries inflicted. Based on advice of counsel relating to the testimony of Dr. Ribe, Wingfield pleads *nolo contendere*.
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> **October 20, 1995**: Dr. Ribe testifies at preliminary hearing in *People v. Cauchi* (involving the death of a child).

January 19, 1996: Dr. Ribe testifies before a State Senate Subcommittee about the Lance Helms death. He testifies that death occurred between 30 minutes and *two hours* from infliction of the injuries. He also acknowledges missing certain evidence about broken ribs.

February 9, 1996: Dr. Ribe testifies in *People v. Hand* (a death involving multiple gunshot wounds).

February 28, 1996: Article in Los Angeles Times about *People v. Rathbun* (death of an adult female) and Dr. Ribe's equivocal testimony.

May 11, 1996: Article in Los Angeles Times about *People v. Jacobo*, a shaken baby case, and mentioning Dr. Ribe's testimony.

July 16, 1996: Los Angeles Police Department Internal Affairs reopens the case involving Lance Helms' death.

August 28, 1996: Dr. Ribe testifies in *People v. Hand* and changes from his preliminary hearing testimony regarding diagnosis of and time of infliction of wounds.

October 3, 1996: Article appeared in Los Angeles Times about trial in *People v. Rathbun* and the fact that Dr. Ribe testified.

October 24, 1996: Another article on *People v. Rathbun* reporting that Dr. Ribe changed his testimony.

October 30, 1996: Another article on *People v. Rathbun* and Dr. Ribe's change of testimony.

November 15, 1996: Lance Helms reinvestigation report issued which notes significant changes in opinions by Dr. Ribe regarding timing of the infliction of wounds which places the blame on the father and appears to exonerate the mother. The investigating officer presents the case to Deputy District Attorney Yochelson and requests a criminal filing and felony warrant charging the father with murder.

November 18, 1996: *Adriana is injured and Petitioner is arrested for this case.*

November 21, 1996: Meeting between Roger Gunson, Director of the Bureau of Branch and Area Operations - Region I, of the Los Angeles County District Attorney's Office, Alan Yochelson, Detective Lopez, Lt. King, Dr. Lakshmanan and Dr. Ribe, relating to the Lance Helms death.

November 25, 1996: During testimony in *People v. Cauchi*, a case involving injuries to a child, Dr. Ribe admits that he missed certain injuries to the child, which had been tortured, and he now attributes death to shaken baby syndrome, a theory he developed several months after he carried out the autopsy in the case.

December 10, 1996: Deputy District Attorney Wright, prosecutor in *People v. Cauchi*, says he is surprised about Dr. Ribe's testimony in the case, testimony that Wright characterizes as "evolving." At a bench conference, Dr. Ribe says that he had also changed his mind on another case that had not yet gone to trial.

February 13 and 14, 1997: Dr. Ribe testifies at a preliminary hearing in *People v. Arce and Urbano*, a case involving the death of a three year old, that he changed his mind regarding cause of injury from a bedsore to a "blow," after speaking with Dr. Lakshmanan.

March 24, 1997: Deputy District Attorney Wright sends memo to Deputy District Attorney Bill Hodgman, director of the special operations bureau, regarding his concern relating to the credibility of Dr. Ribe arising from Dr. Ribe's change of mind in the *Cauchi* case.

March 31, 1997: Dr. Ribe testifies in *People v. Tuccinardi*, a case involving stab wounds. There is some equivocation in Dr. Ribe's testimony.

June 18, 1997: Defense counsel Michael Goodman files a petition for writ of coram nobis on behalf of Lance Helms' mother in *People v. Wingfield*, attaching a copy of the Lance Helms reinvestigation memo.

June 23, 1997: *Trial counsel for Petitioner writes letter to Deputy District Attorney Turkat requesting discovery regarding Dr. Ribe.*

July 24-28, 1997: Dr. Ribe testifies in *People v. Jacobo* and says he has changed his opinion regarding the time of infliction of injuries from that he had previously formed. He also admits that at the autopsy he told the police there were no skull fractures but at trial testified that skull fractures were present.

September 3, 1997: *Trial commences in this case.*

September 10-11, 1997: *Dr. Ribe testifies in this case and the question arises regarding his testimony in People v. Wingfield*.

September 13, 1997: Los Angeles Times article about Eve Wingfield being freed from state prison in the Lance Helms murder case.

September 17, 1997: *Petitioner convicted.*

October 1997: Deputy District Attorney John Lynch, Head Deputy of the Norwalk Branch Office, provides to Phillip Mueller, Director of the Bureau of Branch and Area Operations - Region II, information that Dr. Ribe had modified his expert opinions in more than one case and that information should be disclosed to defendants where Dr. Ribe is testifying as an expert witness.

Late October, 1997: Deputy District Attorney Dinko Bozanich speaks with Deputy District Attorney Turkat, prosecutor in this case, and inquires if she knew of problems about Dr. Ribe's credibility. She responds in the negative.

October 27, 1997: *Petitioner's motion for new trial is denied and he is sentenced.*

October 30, 1997: Director Gunson and Director Mueller call their subordinate deputy district attorneys and tell them to advise defense counsel in cases involving Dr. Ribe that there is information available which could potentially impeach Dr. Ribe.

On December 20, 1999, we issued an Order to Show Cause and requested responsive briefing from the Attorney General. We limited briefing to the following related issues: "the ground the prosecution withheld potentially exculpatory evidence from the defense, in violation of defendant's rights under *Brady v. Maryland [supra]* 373 U.S. 83, 87, or on the ground defendant received ineffective assistance of trial counsel with regard to protecting defendant's rights under *Brady*."

The parties fully briefed the matter and oral argument was held on June 22, 2000. We concluded that a prima facie showing of a *Brady* violation had occurred but wanted further input from the trial court. We issued an unpublished opinion remanding the matter to the trial court. In the opinion we concluded:

> "In this instance, we feel it is necessary to reference this matter to the trial court to conduct an evidentiary hearing to resolve whether counsel for petitioner has received all material. In this regard, it may be necessary for the trial court to conduct its own investigation to

> ensure that the District Attorney has turned over all relevant *Brady* material and to issue any necessary orders compelling compliance with valid discovery requests. Additionally, we ask that the court address the issue and issue findings of when, in connection with the facts of this case, the prosecution knew or should have known the information relating to Dr. Ribe was material to petitioner's defense. These issues must be addressed before we can determine the merits of petitioner's *Brady* claims and his appeal."

(c) The Findings of the Trial Court:

The trial court conducted the hearing and issued findings of fact on May 21, 2002. The court found, inter alia: "Petitioner's counsel has now received all the remaining requested evidence with the possible exception of: (a) A definitive list of all Ribe cases where timelines were relevant; (b) Personal notes of Dr. Ribe, not already disclosed and supplied, re: timeline cases with children on which he conducted the autopsy and/or later modified an opinion; (c) While Petitioner's counsel has been allowed to 'look at' one so called 'Ribe box,' she should be given a complete box which it is anticipated will contain the . . . case transcripts [listed in People's Exhibit 13]. Further, she should then be allowed to compare the contents thereof to another 'Ribe box' maintained at a branch office of the District Attorney. . . . Petitioner should also be supplied a Coroner's list of prior Ribe cases involving 'shaken baby' syndrome to the extent that the Coroner's files list cases not on [the District Attorney's computerized case list]. . . . There is no evidence to show that the trial deputy in the instant case knew of any cases other than [petitioner's] involving Dr. Ribe, *but it is clear that supervisory and administrative personnel were on 'Ribe notice' at the time of [petitioner's] trial*. . . . [¶] Whether or not the District Attorney's Office has, or had, a '*Brady* policy' is relevant only to help explain what happened in this case. Regardless of any belief by a District Attorney supervisor that such Ribe testimony information was a

'legitimate change of opinion,' instead of '*Brady* material,' its [e]ffect was of such a magnitude that in a case where a timeline was crucial as to which of several people had custody of a child at the time of injury, such a change of opinion would have to be perceived as potential impeachment on cross examination, Especially in a case so similar to Helms -- a child victim, head injuries, timeline of potential perpetrators -- and where the testifying coroner was the same. Had this Court been informed of the prior changes of opinion, it would have ordered additional disclosure if requested and allowed further defense inquiry on cross examination. Moreover, knowledge of the change of opinion would likely have led any defense counsel to have known to ask for more specific information, as opposed to a general, informal discovery letter on other Ribe cases. Such discovery might have shown such a pattern as has resulted in the so called 'Ribe box' of discovery, or additional, other, expert testimony."

We allowed the parties to file supplemental briefs to address the trial court's findings.

DISCUSSION

(a) The Law Regarding Brady Discovery:

In *Brady v. Maryland, supra,* 373 U.S. 83, the United States Supreme Court held that the suppression by the prosecution of evidence favorable to the accused violates due process where the evidence is material either to guilt or punishment, and the defense has requested the evidence, irrespective of the motives of the prosecutor. Since then, the rule has been modified to impose an even stricter duty upon prosecutors by requiring them to disclose substantial material evidence even when there has been no request by the defense. (*United States v. Bagley* (1985) 473 U.S. 667, 678-680; *In re Ferguson* (1971) 5 Cal.3d 525, 532-533.) The purpose of this rule is to ensure that the defendant has all

available exculpatory evidence to mount a defense. (*In re Brown* (1998) 17 Cal.4th 873, 881.)

"The duty of disclosure, however, does not end when the trial is over. '[A]fter a conviction the prosecutor also is bound by the ethics of his office to inform the appropriate authority of after-acquired or other information that casts doubt upon the correctness of the conviction.' (*Imbler v. Pachtman* (1976) 424 U.S. 409, 427, fn. 25 [47 L.Ed.2d 128, 141-142, 96 S.Ct. 984]; see also *People v. Gonzalez* (1990) 51 Cal.App.3d 1179, 1261 [275 Cal.Rptr. 729, 800 P.2d 1159]; rule 5-520, Rules Prof. Conduct of State Bar; ABA Model Code Prof. Responsibility, DR 7-103(B), EC 7-13; ABA Model Rules Prof. Conduct, rule 3.8(d).)" (*People v. Garcia* (1993) 17 Cal.App.4th 1169, 1179, fn. omitted.)

In order to find a violation of *Brady*, petitioner must prove three elements: (1) the prosecutor has suppressed or withheld evidence; (2) the evidence is favorable to the defense; and (3) the evidence is material to the defense. (*Moore v. Illinois* (1972) 408 U.S. 786; *In re Pratt* (1999) 69 Cal.App.4th 1294, 1312, 1315.)

Evidence favorable to the defense includes evidence which undermines the credibility of a prosecution witness. (*United States v. Bagley, supra,* 473 U.S. at p. 676; *United States v. Gordon* (9th Cir. 1988) 844 F.2d 1397, 1403.)

"The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." (*United States v. Bagley, supra,* 473 U.S. at p. 682.) "The reviewing court should assess the possibility that such effect might have occurred in light of the totality of the circumstances and with an awareness of the difficulty of reconstructing in a post-trial proceeding the course

that the defense and the trial would have taken had the defense not been misled by the prosecutor's incomplete response." (*United States v. Bagley, supra*, 473 U.S. at p. 683.)

Where a factual question is raised as to whether a *Brady* violation has occurred, the defendant is entitled to have it determined by the trial court in an evidentiary hearing. (*United States v. Perdomo* (3d Cir. 1991) 929 F.2d 967, 973; *People v. Duvall* (1995) 9 Cal.4th 464, 478.)

(b) A *Brady* violation occurred:

In our prior opinion, we determined it was appropriate to remand the matter to the trial court for further evidentiary proceedings. We now have the benefit of an extensive transcript of the evidentiary hearing and the findings of the judge who presided over the trial.

This court must give great weight to a referee's findings of fact when they are supported by substantial evidence, because the referee had the opportunity to observe the demeanor of witnesses and their manner of testifying. (*In re Marquez* (1992) 1 Cal.4th 584, 603; *In re Hall* (1981) 30 Cal.3d 408, 416.) As long as there is substantial evidence to support the referee's findings, we will uphold them. (*People v. Garcia, supra,* 17 Cal.App.4th at p. 1182.)

(1) *Was Material Evidence Known and Withheld by the Prosecution?*

The following facts are adduced from the transcripts of the evidentiary hearing.

Jennifer Turkat was the Deputy District Attorney who prosecuted this case. Her supervisor was Head Deputy Alan Yochelson. He, in turn, was supervised by Director Roger Gunson.

At the evidentiary hearing Yochelson testified that he attended a meeting in November of 1996 when the subject of Dr. Ribe's inconsistent testimony in the Helms case was brought up. Shortly after this, Yochelson assigned this case to Turkat and commented to her that Dr. Ribe's testimony in the Helms case was being reviewed for inconsistencies.

Turkat was confronted about what she knew of Dr. Ribe and the Helms case when the September 1997 Los Angeles Times newspaper article about the Helms case was brought up at trial. Her testimony was inconsistent. She said that she did not recall knowing Dr. Ribe was the coroner in the Helms case, nor did she recall being told about the Helms connection by Yochelson. After being shown her declaration filed in connection with this case, Turkat recalled that during trial preparation in this case Yochelson made an offhand remark to her about the inconsistency of Dr. Ribe in the Helms case. She concluded that Dr. Ribe was consistent in this case and that she needn't worry about his inconsistency in the Helms case. She admitted that one month after Salazar was convicted, another Deputy District Attorney, Dinko Bozanich, told her about Dr. Ribe and she related this conversation to Yochelson.

Deputy Bozanich testified that he told Turkat the implications of Dr. Ribe's inconsistent testimony and about the possibility that her supervisors knew more information that they had told her. Turkat did not call Bozanich back and took no further action.

To further complicate matters, both of the detectives in petitioner's case, Mahle and Lopez, had been assigned to the Helms reinvestigation. They did not disclose this to the court during this trial. And Turkat never asked them about the Helms case.

A further breakdown in communications occurred when this case reached the appellate phase. Turkat testified she received petitioner's appellate

counsel's request for discovery, and turned it over to Yochelson, *who told her not to respond* and said that Director Gunson would take care of the matter. Yochelson thought that *Brady* did not apply but denied telling Turkat not to respond. He also testified that he spoke with Deputy Attorney General Michael Wise about producing the documents and that Wise told him that they should await an order from the Court of Appeal before doing so. Gunson did not know about this case until petitioner's attorney called him in September 1999, but thought that Yochelson was handling the matter. He believed that under *Brady* no duty was owed because petitioner had already been convicted and the appeal was pending.

The evidence also established that the District Attorney's office had formed a "*Brady* committee" which was aware of the problems with Dr. Ribe's testimony before September 1998 and had made a list of all cases in which Ribe had testified prior to September 1998. It had compiled a "Ribe discovery box" which was to be made available to defense counsel in those cases, but Turkat was not told about this box until after petitioner was sentenced.

Neither Turkat's lack of knowledge of Dr. Ribe's inconsistent statements, or her failure to appreciate the relevance of that knowledge, absolves the District Attorney's Office of the duty to disclose the information. (*In re Brown, supra,* 17 Cal.4th at pp. 879-880; *United States v. Perdomo, supra,* 929 F.2d at p. 970.) Nor is the office excused because of an alleged mistaken belief that the duty to disclose did not extend beyond the date of conviction. (*People v. Garcia*, *supra*, 17 Cal.App.4th at p. 1179.)

It is clear from our review of the testimony that there was a connection between the *Helms*, *Cauchi*, *Arce* and *Urbano* cases and this case, that Yochelson knew of the connection, that he failed to inform Turkat of the connection, and he failed to follow through with subsequent discovery requests. Furthermore, the connection should have been known by the *Brady* committee, and

steps should have been taken to inform Turkat about the connection and the discovery box.

The evidence about Dr. Ribe was material because it would have provided evidence by which he could have been impeached. (See *United States v. Bagley, supra,* 473 U.S. at p. 676; *United States v. Gordon, supra,* 844 F.2d at p. 1403.) Dr. Ribe's opinion about the timing of the receipt of the injuries resulting in death was crucial to the defense case. Detective Mahle testified at the evidentiary hearing that Moreau and Beckwith were ruled out as suspects as soon as the investigating authorities learned about the timing of the injuries established by Dr. Ribe.

That a *Brady* violation has occurred has been established. We turn to the third element of prejudice.

(2) *Was Petitioner Prejudiced by Failure to Turn Over the Material?*

The People argue in their supplemental brief that even assuming that they failed to disclose evidence concerning Dr. Ribe, petitioner was not prejudiced because petitioner's own medical expert opined that Adriana would have been rendered unconscious at the time of receiving her injuries. Since petitioner himself testified that Adriana was fine, crawling and sitting prior to 11:45 a.m., the People argue that the only conclusion to be made from the defense's own evidence was that petitioner inflicted the injuries.

In *Kyles v. Whitley* (1995) 514 U.S. 419, 435, the Supreme Court explained that prejudice is shown when the fact of the suppression undermines confidence in the outcome of the trial. The *Kyles* court concluded that even though the jury could have found sufficient evidence to convict even with the impeachment evidence, confidence in the verdict was so severely undermined that it must be reversed. It reasoned that the jury might have been troubled enough to

destroy confidence in the police investigation and the credibility of all of its witnesses. (*Id*. at pp. 452-453.)

We must assess whether there was a probability of a different result by considering the evidence in question under the totality of the relevant circumstances and not in isolation or in the abstract. (*In re Pratt* (1999) 69 Cal.App.4th 1294, 1313, citing *In re Sassounian* (1995) 9 Cal.4th 535, 544; and *In re Brown, supra*, 17 Cal.4th at pp. 886-887.)

Here, the People's own investigation was shown to be faulty. Based on Dr. Ribe's timeline conclusion, the investigating detectives immediately focused on petitioner as the perpetrator to the exclusion of any others who had access to Adriana that day, or before. Similarly, in the *Wingfield* case the focus turned to Eve Wingfield based on Dr. Ribe's timeline testimony. It was only after Dr. Ribe changed his opinion that Eve Wingfield was released and the investigation was reopened focusing on the father of Lance Helms. Thus, impeachment of Dr. Ribe, and by extrapolation the impeachment of the investigating detectives, would have cast doubt on the entire manner in which the case was investigated. In addition, there was no forensic evidence linking petitioner to the crime and no eyewitness who had observed petitioner with Adriana. Adriana was in custody of four different people during the time frame in which her injuries could have been inflicted, and there was evidence suggesting suspicious happenings to Adriana with all of them. There was conflicting eyewitness testimony. There was no motive proven, nor was the cause of death definitively proven.

We conclude that while there is sufficient evidence in the record to affirm the conviction, we cannot be confident in the jury's verdict because of the *Brady* violation. Had the jury been aware of Dr. Ribe's credibility problems,

which would have cast doubt on the prosecution's investigation, the case would have been cast in a different light with a reasonable probability of a different result.

DISPOSITION

Because this conclusion is dispositive of the issues before us, we need not consider the claims raised in the Appeal, and it is dismissed.

The petition for writ of habeas corpus is granted. The judgment of conviction is vacated. When this decision is final, the clerk shall remit a certified copy of this opinion to the superior court for filing and the Attorney General shall serve another copy of the opinion on the District Attorney as provided for in Penal Code section 1382, subdivision (a)(2).

CERTIFIED FOR PUBLICATION

HASTINGS, J.

We concur:

EPSTEIN, Acting P.J.

CURRY, J.