No. _____

_____

IN THE

SUPREME COURT OF THE UNITED STATES

_____

ERNESTO AGUIRRE — PETITIONER
(Your Name)

vs.

STU SHERMAN, Warden — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Court of Appeals, For The Ninth Circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Ernesto Aguirre (CDCR No. AN2671)
(Your Name)

P.O. Box 2229
(Address)

Blythe, CA. 92226
(City, State, Zip Code)

_____
(Phone Number)

QUESTION(S) PRESENTED

1. May a state court ignore its own exception rules to barring untimely or successive petitions without violating the Constitution to Equal Protection of the Laws and Due Process?

2. May California's post-conviction collateral review scheme to file claims of ineffective assistance of counsel fall within the Martinez v. Ryan (2012) 132 SCt 1309 and Trevino v. Thaler (2013) 133 SCt 1911 decisions for "cause"?

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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CASES

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STATUTE AND RULES

OTHER

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[×] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[×] is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[×] is unpublished.

[ ] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

[X] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was May 4, 2018.

[X] No petition for rehearing was timely filed in my case.

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

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

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

[ ] For cases from **state courts**:

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Sixth Amendment:

In all criminal prosecutions, the accused shall enjoy the right to a speedy trial and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Fourteenth Amendment:

Section1: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On February 9, 2012, in a cause then pending in the Superior Court of California, in the County of San Bernardino, entitled THE PEOPLE V. ERNESTO AGUIRRE, criminal case number FSB1002816, Petitioner was found guilty by a jury on an indictment of two counts on charging violations of first degree murder of the Penal Code section 187, and personal use of a gun of the Penal Code section 12022.53.

On December 17, 2012, the Superior Court entered judgment and sentenced Petitioner to 25 years to life with the possibility of parole on each count. This judgment and sentence was affirmed by the Court of Appeal, Fourth District, Division Two, in PEOPLE V. AGUIRRE, case number D065619. On July 7, 2014, a petition for review was denied by the California Supreme Court.

On September 16, 2015, petitioner filed a petition for writ of habeas corpus in the Superior Court, raising three grounds: (1) trial counsel was ineffective at the plea bargaining stage for not advising Petitioner to accept a favorable plea when facing life in prison; (2) the trial court failed to give a jury instruction on "in-custody informants" testimony that lower the prosecution's burden of proof; (3) appointed appellate counsel was ineffective for not raising the first two grounds above.

On September 24, 2015, filed a motion for a stay and abeyance in the United States District Court, Central District of California, case number 5:15-cv-02102. The motion presented the District Court the additional three claims filed in the Superior Court.

The Magistrate Judge ruled that Petitioner failed to produce physical evidence to show that Petitioner notified appellate counsel of the two claims. (Magistrate's Report and Recommendations, at 8:2-5) Petitioner objected to Magistrate's requirement of physical evidence, averring that it was contrary to Smith v. Robbins (2000) 528 US 259, because the Supreme Court never required any physical evidence other than

the claims that appellate counsel failed to raise on direct appeal.

On December 30, 2015, Petitioner then filed a motion for an evidentiary hearing to develop the facts on the claim of ineffective assistance of appellate counsel, averring that the State Court decisions to deny relief on the ineffective assistance of appellate counsel (IAAC) were contrary to Smith v. Robbins, supra. On June 1, 2016, Petitioner filed another motion for an evidentiary hearing with further precedent to grant a hearing.

On July 12, 2016, the Respondent filed its Answer and Petitioner filed a Traverse soon after.

On September 29, 2017, the District Court denied relief and in making a ruling on "cause" as established by Martinez v. Ryan (2013) 132 Scat 1309, the Magistrate Judge and the District Court never addressed it. The District Court denied a certificate of appealability (COA).

Petitioner filed a timely notice of appeal and a timely request for COA. On May 4, 2018, the Court of Appeals for the Ninth Circuit denied the request for COA.

REASONS FOR GRANTING THE PETITION

I. FAILURE TO FOLLOW EXCEPTION RULE DISCRIMINATES AGAINST PETITIONER'S CLAIM.

Under California law, appointed appellate counsel are required to raise ineffective assistance of counsel (IAC) claims on collateral review (habeas corpus) in conjunction with the direct appeal brief. See *In re Clark* (1993) 5 Cal. 4th 750, 783-784 fn20; also, Appellate Defenders Inc., Cal., Criminal Appellate Practice Manual (July 2007 rev.) sections 8.2-8.3 (appointed counsel are "expected to pursue remedies outside of the four corners of the appeal, including habeas corpus, when reasonably necessary to represent the client appropriately").

In 2012, this Court ruled in sister cases *in Lafler v. Cooper*, 132 SCt 1376, and *Missouri v. Frey*, 132 SCt 1383, where it applied the Strickland standard on plea bargaining representation. When these two cases were decided, Petitioner's case was on direct appeal. Appointed appellate counsel never contacted Petitioner in regards of these two cases and how they affected his case on appeal since there had been two favorable plea deals that were not accepted by the defense. The two plea deals were for lesser charges that ranged from 20 years with two strikes and 25 years with one strike. Petitioner was facing multiple life sentences by going to trial and being found guilty, which did take place. Appointed appellate counsel never investigated whether these two cases were applicable. Had counsel done so, a *Lafler* claim would have been raised in conjunction with the direct appeal. Petitioner had to raise the *Lafler* claim on his own. This included Petitioner attempting to contact trial counsel, which resulted with no responses.

The District Court did not address Petitioner's claim of ineffective assistance of counsel ("IAAC", ground five) and instead regurgitated citations. (Appendix B, Magistrate's Report and Recommendations, at 14.) The proper standard required

the federal court in the appellate context to review is whether Petitioner demonstrated that counsel acted unreasonable in failing to discover and brief a meritworthy issue. *Smith v Robbins*, 528 US at 285. Second, the petitioner must show prejudice, which the petitioner must demonstrate a reasonable probability that, but for appellate counsel's failure to raise the issue, the petitioner would have prevailed in his appeal. *Id.*, at 285-286. The District Court instead reasoned that it was not reviewing the claim based on the state appellate court decision to default the claim, where the state appellate court unreasonably stated that it took Petitioner "nearly three years after he was sentenced and knew or should have known of he claims raised ... without any adequate explanation of the delay ...." (Appendix B, Magistrate's Report and Recommendations, at 9:2-6)

Appellate Court Decision

The direct appeal was denied review by the State Supreme Court on July 7, 2014, and it became final on October 7, 2014. See *Greene v Fisher* (2011) 132 SCt 38, 44(direct appeal becomes final when 90 days to file for certiorari expires.) On September 16, 2015, Petitioner filed his IAAC claim in the Superior Court, stopping the AEDPA clock on the claims that support the IAAC.

As a matter of law, Petitioner could not have filed these claims earlier during his direct appeal. Cf. *Martinez v. Court of Appeal* (2000) 528 US 152, 163-164(criminal defendant does not have constitutional right to represent himself on direct appeal.) For the Appellate Court to have assessed that Petitioner had taken "nearly three years later" to file the three claims "after he was sentenced" was contrary to clearly established federal law. *Id.*

The Appellate Court next ruled that Petitioner had not adequately explained the delay. (Appendix D.) Petitioner was not late on filing, even under the AEDPA statute, and that ruling is factually incorrect. In all of Petitioner's state filings, Petitioner included a

"timeliness" briefing, which would also be found in the motion to stay and abeyance. (Appendix F, State Habeas Corpus Petition "Attachment Four".) This timeliness briefing explained that the issues fell within the "exception rule" on timeliness. (Id.) The Appellate Court never addressed the application for the "exception rule" in ruling that Petitioner had not given an explanation on the delay, if there was a delay whatsoever.

Even though the Appellate Court did not address the "exception rule" application by Petitioner, the Appellate Court went on to make contrary to rulings. For Petitioner's *Lafler* claim (ground one), the Appellate Court ruled that a prima facie case was not presented because Petitioner had not submitted either of the plea deals being raised, and that a "self-serving statement – after trial, conviction, and sentence – that with competent advice [Aguirre] ***would*** have accepted a proffered plea bargain, is insufficient in and of itself to sustain [his] burden of proof as ***to prejudice***, and must be corroborated ***independently by objective evidence.***" ((Appendix D, citing *In re Alvernaz* (1992) 2 Cal. 4th 924, 938.)(emphasis added)

The *Alvernaz* holding that the Appellate Court cited is contrary to the *Lafler v. Cooper's* prejudice prong because the *Lafler* Court held "If a plea bargain has been offered , a defendant has the right to effective assistance of counsel in considering whether to accept it. If that right is denied, ***prejudice*** can be shown if the loss of the plea opportunity led to a trial resulting in a conviction on more serious charges or the imposition of a more severe sentence." (emphasis added) 132 SCt at 1387. The Appellate Court did not address these two polarizing prejudice prong holdings and sided with what is currently state precedent in *Alvernaz.* (Id.) How can a defendant present the deals if trial counsel does not respond to letters that request for such information? Along with the habeas corpus petition, Petitioner filed with the Appellate Court a "motion to recall remittitur". (Appendix H.) In this motion, Petitioner presented the Appellate Court letters he had submitted to counsel to request for the case

files. (Id. "Exhibit A, three letters to trial and appellate counsel".) For the Appellate Court to require the plea deals to have been presented only allows attorneys to ignore requests like Petitioner's and the IAC claim would falter just like in this matter. In the *Alvernaz* case, Justices Mosk and Kennard dissented where it was pointed out that there was no authority that made such a requirement because it was almost impossible for a defendant to meet. 2 Cal.4th at 953. Even then the State Supreme Court acknowledged in part that it was acting contrary to clearly established law though it did not state it as phrased today since it was decided before the AEDPA was enacted. Nevertheless, the Strickland standard had already existed.

If the state court's decision was contrary to Strickland, the federal court must "resolve the claim without the deference AEDPA otherwise requires." *Panetti v. Quarterman* (2007) 551 US 930, 953. The Magistrate Judge nor the District Court acknowledged the contrary to decision. (Cf. Appendix B, Magistrate's Report and Recommendation; Appendix D, Appellate Court decision.)

Had the Appellate Court made the proper review, to begin with, that Petitioner had not taken nearly three years, the IAAC claim would have revealed that Petitioner's *Lafler* claim would have reversed the case and Petitioner would have been sentenced to one of the favorable plea bargaining deals, as it was laid out in the state habeas corpus application that Petitioner filed. (Appendix F.) In agreeing with the Appellate Court decision to procedurally bar the claims, the District Court was allowing the Appellate Court to act contrary to *Smith v. Robbins*.

State Supreme Court Decision

Petitioner filed a rebuttal to the State Supreme Court with a renewed habeas corpus petition to notify the higher court that its own ruling (In re *Alvernaz*, supra) was contrary to the *Lafler v. Cooper* prejudice prong

holding because the *Lafler* case did not require "independent objective evidence". See *Lafler v Cooper*, 132 SCt, at 1384-1385, 1387. This was all briefed in the petition itself when it was filed to the Superior and Appellate Courts as it was presented to the State Supreme Court. (Appendix F)

However, the State Supreme Court barred the petition as successive, citing In re Clark (1993) 5 Cal.4th 750, 767-69. This ruling was improper because Petitioner briefed the state courts on the "exception rule" to successive petitions. (Appendix F, "Attachment Four".) "The only exception to this rule are petitions which ***allege*** facts which if proven would establish a *fundamental* miscarriage of justice occurred as a result of the proceedings leading to conviction and/or sentence." *Clark*, 5 Cal.4th at 797(emphasis added). "Thus, for purposes of the exception to the procedural bar against successive or untimely petitions, a 'fundamental miscarriage of justice' will have occurred ***in any proceeding*** in which it can be demonstrated: (1) that the error of constitutional magnitude ***led to a trial*** that was so fundamentally unfair that absent the error no reasonable judge or jury would have convicted the petitioner; ...." *Id.*(emphasis added) "These claims will be considered on their merits even though presented for the first time in a successive petition or ***one in which the delay has not been justified***." *Id.*, at 798. (emphasis added)

In Petitioner's case, he ***alleged*** in the *Lafler* claim that during his ***plea bargaining negotiation proceeding*** that he was not advised by defense counsel and was left on his own to decide whether to accept or deny the favorable plea deals, and as a result to this constitutional magnitude of being without counsel at a critical stage, it ***led to a trial***, and absent of this error, no jury or judge would have convicted petitioner of the charges he eventually was convicted for after trail. (Appendix F, Ground One.)

Federal Court Review

In *Walker v. Martin* (2011) 562 US 307, this Court acknowledged that California had this "exception rule". 179 LED2D 62, 68. In that case, the Court ruled that petitioner had not alleged that the California's procedural bar discriminated against the claims or claimant. *Id.* That is Petitioner's contention in this matter. *Id.* The District Court and Court of Appeals did not address this issue and has left any petitioner closed off from federal habeas corpus review. Petitioner now seeks this Court's audience to address the issue that was left open in *Walker v. Martin.*

II. CLAIM OF INEFFECTIVE ASSITANCE OF APPELLATE COUNSEL INVOKED "CAUSE" FOR THE DEFAULTED *Lafler* CLAIM.

Without waiving the reason above, Petitioner raises this alternative but equally applicable reason. The District Court deferred to the Appellate Court decision for Petitioner's claim on ineffective assistance of appellate counsel, where the Appellate Court ruled that since the two claims raised did not have merit that appellate counsel was not ineffective. (Cf. Appendix B , at 13-14; Appendix D, at 2.) In that ruling, the Appellate Court cites that "appellate counsel need raise only potentially successful contentions on appeal" (citing *In re Smith* (1970) 3 Cal.3d 192, 203).

Petitioner has established above that his *Lafler* claim was denied contrary to *Lafler's* prejudice prong since the Appellate Court required "***independent objective evidence***" as mandated by state precedent. Petitioner showed the potential claim in *Lafler.* The District Court did not even rule on the matter. (Cf. Appendix B, at 13-15; Appendix F.) Also established above is that under state law, any IAC claim raised must be raised in a habeas corpus petition in conjunction to the direct appeal. Since the District Court improperly deferred to the Appellate Court's decision, the District

Court never made a de novo review of the *Lafler* claim to confirm that it was properly denied by the Appellate Court. In doing so, the District Court did not allow for Petitioner to cite "cause" to begin with. Petitioner had to show that the *Lafler* claim had "some merit", and that he had no counsel or counsel was ineffective during the initial collateral review. " *Martinez v. Ryan,* 132 SCt at 1319.

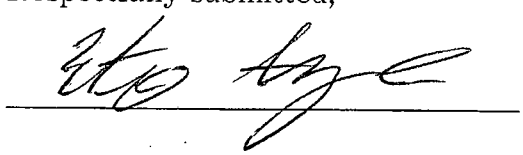
For the District Court to follow the Appellate Court decision in respect of the *Lafler* claim was the improper review it was supposed to take because it was required to look for "some merit", not whether Petitioner made a "prima facie" claim that the Appellate Court reviewed under. *Id.* (Cf. Appendix B, at 13-15; Appendix D.) The District Court was acting contrary to *Martinez v. Ryan*, supra, and the Court of Appeals so followed when it denied certification of appealability. (Appendix J.)

Petitioner now seeks this Court's audience to address the proper review by the District Court in these circumstances as to whether it was proper for deference to be given to the state court as here. Petitioner is of the opinion that a de novo review should be the proper review when an IAAC claim raises an IAC claim to decide on "cause".

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Date: 7-26-18