No._____

In the
Supreme Court of the United States

RANDALL PIERCE, Petitioner

v.

STUART SHERMAN, Warden
Respondents

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1) **Was the District Court Judge's Illiberal Construction of the Pro Se Pleadings a Denial of Access to the Courts?**

2) **Does a State Court Fail to Unreasonably Apply Clearly Established Law of the Supreme Court's *Iowa v. Tovar* Decision and its Progeny When it Concedes it Never Advises the Defendant on WhatAllowable Punishments Are Faced in View of the Charges?**

PARTIES TO THE PROCEEDINGS

Petitioner is RANDALL PIERCE

Respondent is STUART SHERMAN

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Petitioner Randall Pierce respectfully petitions the Court for a writ of

certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit affirming the District Court's denial of the petition for a writ of habeas corpus.

WHY THIS PETITION SHOULD BE GRANTED

On January 29, 2019, the Court of Appeals, in a memorandum decision, affirmed the judgment of the District Court denying with prejudice the petition for writ of habeas corpus by a state prisoner filed by appellant. Exhibit A, slip opinion attached hereto.

This is a case where the 9th Circuit memorandum opinion leaves out crucial facts which are actually the strongest evidence to support the grant of the petition. By leaving out the crucial, clear, fact, stated in the CCA and the District Court Order denying the petition, that petitioner had never been informed of the punishment he faced (Appendix ER13 lines 19-20) the opinion misstates the record to the detriment of petitioner.

By leaving out the crucial, clear, fact that petitioner was *pro se* all throughout the District Court habeas proceeding and a good part of the

appellate proceeding, the opinion avoids the liberal pleading and proof requirement for *pro se* pleadings.

Certiorari must be granted to illustrate to all the state federal courts that, under *Iowa v. Tovar*, 541 U.S. 77, 81 (2004) the range of allowable punishments must be clearly explained to a defendant who seeks to waive the assistance of counsel and that evading this requirement by holding "the entire record" satisfied the court the defendant knew this range, is not enough, especially when the record does nothing of the sort.

Certiorari additionally must be granted to remind federal courts that liberally interpreting *pro se* pleadings, especially in 2254 cases where the petitioner is often indigent and of little education, means just that. In this case there was no such liberal reading by the district court. In fact the opposite occurred.

OPINIONS BELOW

Cases from Federal Courts:

On January 29, 2019, the Ninth Circuit Court of Appeals, in a

memorandum decision, affirmed the judgment of the District Court dismissing the petition for writ of habeas corpus by a state prisoner filed by petitioner. (Appendix B, 9th Ckt. Memorandum opinion.)

The unpublished order of the Ninth Circuit, dated March 4, 2019, denying the petition for rehearing is Appendix A.

The judgment of the United States District Court for the Northern District of California denying the petition for a writ of habeas corpus with prejudice but granting a Certificate of Appealability was issued on February 13, 2017, 2016 as to the issue of whether petitioner is entitled to habeas relief on the ground that his waiver of his right to counsel was not knowing and intelligent and is Appendix ER 4-24..

Cases from State Courts:

The California Supreme Court denied a petition for review, on April 15, 2015, Appendix C.

The unpublished opinion of the California Court of Appeal (CCA) affirming petitioner's conviction was filed January 26, 2015, and is

Appendix ER 59-68.

JURISDICTION

The Ninth Circuit denied the petition for rehearing on March 4, 2019. The jurisdiction of this Court is, thus timely invoked under 28 USC section 1254(1). *Hohn v. United States,* 524 U.S. 236 (1998).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

A defendant in a criminal case must have effective assistance of counsel under the Sixth Amendment and Fourteenth Amendments of the United States Constitution.

28 U.S.C. Section 2254(d) provides:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim-
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law as determined by the Supreme Court of the United States; or
> (2) resulted in a decision that was based on an

unreasonable determination of the facts in light of
the evidence presented in the State court proceeding.

STATEMENT OF RELEVANT PROCEDURAL FACTS

The transcript of trial before the CCA and the District Court reveals the possible defense that for a homeless person to register was incredibly complicated, requiring first unregistering and then re-registering every 30 days thereafter as long as he was homeless. (Document 36-10 Filed 06/20/16)pp. 152-153, 163-164 attached as Appendix E).

The potential punishment part of the form was left blank (Appendix ER7).

He was sentenced to five years and four months , Appendix ER 8, ER11, and filed his petition in District Court *pro se* .(ER25 et seq.)

The District Court judge ruled that the decision of the CCA was unreasonable under 2254(d)(1) and *Tovar, supra,* due to the failure of the CCA to inform him of the possible punishments. The District Court did not grant the petition because Pierce did not "plead or prove that he did not

knowingly and intelligently waive his right to counsel". Appendix ER 19.

A certificate of appealabilty was issued by the judge on the issue "whether the petitioner is entitled to habeas relief on the ground that his waiver of his right to counsel was not knowing and intelligent." Appendix ER 24.

Pierce requested appointment of counsel in the 9th Circuit and this counsel was appointed. Appendix ER73.

The order of the District Court judge was affirmed by the 9th Circuit in a memorandum opinion, Appendix B.

A petition for rehearing was denied. Appendix A.

ARGUMENT

I

THE CCA OPINION, AND THE BRIEF FILED FOR HIM IN STATE COURT, ATTACHED TO PETITIONER'S PLEADINGS IN THE DISTRICT COURT, PROVIDED PROOF PETITIONER WAS NEVER INFORMED OF THE RANGE OF PUNISHMENT HE COULD RECEIVE

The memorandum opinion states, at Appendix B, page 3, that the petition was not denied by the District Court because of pleading failure

but a failure of proof and that the federal judge below considered the entire record to find a failure of proof. But that is not what the District Court stated at all. The District Court opinion at page16 of Appendix C stated that what was "fatal to petitioner's claim is his failure to plead or prove that he did not knowingly and intelligently waive his right to counsel."

But that hypertechnical examination of Pierce's pleadings is the exact opposite the law requires in examining a *pro se's* pleading. That failure to grant liberality to a *pro se* pleading is discussed below.

Both the District Court's decision and that of the Ninth Circuit erroneously did not credit the attached state briefing petitioner attached to his habeas petition with raising the issue that Pierce's waiver was not knowing and intelligent. But that briefing at ER 46 asked the reviewing court "how does an appellate court determine that a purported waiver of counsel is knowing and intelligent?" On that same page petitioner's state appellate counsel answered his own question "To that end, the court must conduct an extensive colloquy with the defendant, so that he or she understands the nature of the charges and possible punishments....."

The briefing even cited this Court's case in *Tovar, supra,* ER48.

Once the applicable law was cited, the brief went right to the prejudicial error requiring reversal in the state court and should have resulted in the granting of the petition.

At ER50 the brief clearly points out "At no point did either the form or the commissioner discuss with petitioner the nature of the charges he was facing, the elements of the offenses, the possible defenses to those charges, or the possible punishments. (Fn11.}" Then footnote 11 nailed down the point on which this appeal and then petition turns even more clearly. It states in its entirety:

> Once again, while the form had a place where the court might have filled in what the maximum sentence would be, that spot was left blank. And while in the order granting petitioner the right to represent himself the commissioner averred that she had 'inquired into the defendant's education and understanding,' in fact she did not.

In addition to the above which was attached to the petition, the CCA clearly stated that petitioner was never informed of the punishment he faced.ER66.

The District Court noted at ER 16 that the Supreme Court of the United States demanded this information of allowable punishment be conveyed to a defendant seeking self representation.

Again at ER 16, line 16, the District Court reiterated this requirement in Supreme Court law citing *Tovar, supra*.

At ER 20, line 7 et seq, the District Court stated that all petitioner did was attach his state briefing to his federal pleading but of course fn. 1 noted the District Court had the CCA opinion before it which responded to state appellate counsel's claims by admitting a failure to inform of allowable punishment.

The SER shows the judge reminding the prosecutor it was a three strikes case, and that reminder could not possibly fill the *Tovar* requirement of showing allowable punishments. It was akin to closing the barn door when the horse was long gone. That does not cut the mustard of what *Tovar* requires.

Finally, if petitioner had not waived counsel, he had a good chance of

convincing one or more members of the jury[1] that when he had to register, he was in jail for his birthday, was homeless afterward and then tried unsuccessfully to register. Those were facts he was trying to get before the jury but as a non attorney he failed to get the documentation of his jail stay etc. The trial transcript before the District Court reveals that possible defense. (Appendix E, partial transcript from document 36-10 Filed 06/20/16).

Once he got to the federal court, petitioner's 2254 petition showed just the way his mind was working or not working when he filled out the form *pro se*. (ER25-40). That is all a judge needs to liberally construe *pro se* pleadings which evidence significant mental challenge as can be revealed in the pages of his federal petition.

Finally, the federal judge had doubts if that judge really "got it right" and that is why a COA was issued by that District Judge.

The District Court judge, by granting the COA, was right to doubt the rightness of the dismissal with prejudice and this Court would be right

[1] Under *People v. Soojian,* 190 Cal.App.4th 491,520 (2010) a hung jury is considered a more favorable verdict than a guilty verdict.

to grant Certiorari on this case on the basis that indeed petitioner did both plead and prove his allegations through the CCA and the state briefing he attached to his federal petition which correctly laid out the error of non-advisement of allowable punishments under U.S. Supreme Court law in *Tovar, supra.* Certiorari should be granted.

II

THE COURT OF APPEALS MEMORANDUM OPINION CONCEDED THAT THE CCA NEVER INFORMED PETITIONER OF THE MAXIMUM SENTENCE HE COULD RECEIVE IF CONVICTED. YET THE DISTRICT COURT AND THE COURT OF APPEALS APPLIED A STRICT PLEADING and PROOF REQUIREMENT TO A *PRO SE* PETITIONER IN CONTRAVENTION OF CLEAR SUPREME COURT OF THE UNITED STATES LAW

By leaving out the crucial, clear, fact that petitioner was *pro se* all throughout the District Court habeas proceeding and a good part of the appellate proceeding, the 9th Circuit opinion avoids the liberal pleading and proof requirement for *pro se pleadings*. *Erickson v. Pardus*, 551 U.S. 89, 94, 127 S. Ct. 2197, 167 L. Ed. 2d 1081 (2007) (per curiam) (quoting *Estelle v. Gamble*, 429 U.S. 97, 106, 97 S. Ct. 285, 50 L. Ed. 2d 251 (1976)); see also *Zichko v.*

Idaho, 247 F.3d 1015, 1020 (9th Cir. 2001) (The liberal construction "rule particularly applies to . . . motions filed by pro se prisoners." (citing *United States v. Seesing*, 234 F.3d 456, 462-63 (9th Cir. 2000))).

The 9th Circuit memorandum, never mentioning the petitioner's mental deficits and that petitioner was his own lawyer, faulted petitioner for not taking advantage of the District Court's offer to prove that he was unaware of the punishment he faced. In doing so, both the appellate court and the District Court completely sidestepped the liberal pleading requirement for *pro se* petitioners set forth above and denied petitioner the fair appeal to which he was entitled under the law of the Supreme Court of the United States.

All of this hypertechnical viewing of the petitioner's pleadings was the result of petitioner attaching his appellate counsel's petition for review to his federal petition to do his pleading for him. The coup de grace was the failure of this *pro se* petitioner to respond to the state's assertion that he never alleged that he himself did not know his punishment.

But this manner of proceeding was warned against by this Court in

Slack v. McDaniel, 529 U.S. 473, 487, (2000) (admonishing against interpretation of procedural prescriptions in federal habeas cases to "trap the unwary *pro se* prisoner" (quoting *Rose v. Lundy*, 455 U.S. 509, 520, (1982))).

But trapped indeed was the unwary petitioner Pierce, who should have had counsel appointed for him in the District Court, not, *finally*, in the Court of Appeals, when it was too late.

CONCLUSION

Certiorari must be granted, and the denial of the petition reversed on the basis that the record clearly shows petitioner was never informed of the punishment he faced and that his pleading deficiency should not have ousted him from access to the federal court.

Respectfully submitted,
/s/Charles R. Khoury Jr.
Attorney for Appellant Randall Pierce
By Appointment of the Court of Appeals

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Supreme Court Rule 33.1(h) Certification

As required by Supreme Court 33.1(h), I certify that the document filed with this certification contains 2,201 words, excluding the parts of the document that are exempted by Supreme Court Rule 33.1(d), according to the word-count function of the word processing used to prepare it.

Dated: April 30, 2019 /s/ *Charles R. Khoury Jr.*
Attorney for Petitioner

IN THE

SUPREME COURT OF THE UNITED STATES

PIERCE v. SHERMAN

PROOF OF SERVICE

I hereby certify that I am a member of the Bar of the Supreme Court of the United States and not a party to this action and that on this 7th Day of May, 2019 a petition for In Forma Pauperis Status and petition for Certiorari with volume of exhibits, were e- mailed to the email of counsel for the Respondent whose email is as follows:
michele.swanson@doj.ca.gov

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

Respectfully submitted,
/s/CHARLES R. KHOURY JR.

Executed on May 7, 2019

By: _____
/S/CHARLES R. KHOURY JR.
Attorney for PETITIONER