19-6581 ORIGINAL

UNITED STATES SUPREME COURT
WASHINGTON, D.C.

N0:

4:15-cr-00142 JM

In RE: JAVIER LEON

Defendant- Appellant

-V-

UNITED STATES V. AMERICA

Plaintiff- Appellee

APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE EIGHT CIRCUIT

SUBMITTED AUGUST 16, 2019

JAVIER LEON
FED. REG. # 29202-009
FEDERAL CORRECTIONAL
INSTITUTION - LA TUNA
P.O. BOX 3000
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CONSTITUTIONAL QUESTION

WHETHER COUNSEL'S FAILURE TO SUBJECT THE GOVERNMENT'S CASE TO STRICT ADVERSARIAL TESTING, BY REASON OF A FICKLE, BARE-BONES 'MERE PRESENCE' THEORY OF DEFENSE, ELEMENTS OF 'CONSENT TO SEARCH' RULE, CONSTITUTED INEFFECTIVE ASSISTANCE OF COUNSEL. COUNSEL WAS ALSO GROSSLY INEFFECTIVE FOR NOT ARGUING A FATAL MATERIAL VARIANCE OR CONSTRUCTIVE AMENDMENT ON THE POSSESSION WITH INTENT TO DISTRIBUTE METHAMPHETAMINE CHARGE, WHERE THE ELEMENTS OF DISTRIBUTION WERE NOT PROVEN.

LIST OF PARTIES

[☑] 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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INDEX TO APPENDICES

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[✓] is unpublished.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[✓] is unpublished.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[ ] is unpublished.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[ ] is unpublished.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

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

The date on which the United States Court of Appeals decided my case was MAY 24, 2019.

[✓] 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).

STATEMENT OF JURISDICTION

The Supreme Court of the United States has original jurisdiction over three categories of cases. First, the Supreme Court can exercise original jurisdiction over "actions proceedings to which ambassadors, other public ministers, consuls, or vice consuls of foreign states are parties." See, Maryland v. Louisiana, 451 U.S. 725, 737 (1981). Second, the Supreme Court also possesses original jurisdiction for "(all) controversies between the United States and a State." 28 U.S.C. Section 1251 (b)(2). Finally, Section 1251 provides for original jurisdiction in the Supreme Court, for "all actions or proceedings by a state against the citizens of another state or against aliens." See, e.g. Oregon v. Mitchell, 400 U.S. 112 (1970); United States v. Louisiana, 339 U.S. 699 (1951); United States v. California, 332 U.S. 19 (1947).

The statutes defining the Supreme Court's jurisdiction between "appeals" and "certiorari" as vehicles for appellate review of the decisions of state and lower federal courts. Where the statute provides for "appeal" to the Supreme Court, the Court is obligated to take and decide the case when appellate review is requested. Where the state provides for review by "writ of certiorari," the Court has complete discretion to hear the matter.

The Court takes the case if there are four votes to grant certiorari. Effective September 25, 1988, the distinction between appeal and certiorari as a vehicle for Supreme Court review virtually eliminated. Now almost all cases come to the Supreme Court by writ of certiorari. Pub. L. No. 100-352, 102 Stat., 662 (1988).

WRIT OF PROHIBITION PURSUANT TO 28 U.S.C. SECTION 1651(a) IN AID OF THE SUPREME COURT'S JURISDICTION.

(A) The Supreme Court and all courts established in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(B) An alternative writ or rule may be issued by a justice (Chief Justice Roberts) to whom an application to a writ of Prohibition is submitted may refer to the Court for determination.

CONSTITUTIONAL AND STATUTORY PROVISIONS

LAW RELATED TO STRUCTURAL ERROR OR MANIPULATION OF EVIDENCE

Despite the government's attempt to skirt around the propriety of Maurice Licea's conviction, it forgets that there are dire consequences to prosecutorial misconduct outside of the indictment process. Defective jury instructions, advocacy for judicial activism, constructive denial of counsel, and other blatant constitutional violations cannot be considered harmless. In conducting harmless error analysis of constitutional violations, including direct appeal and especially habeas generally.

The Supreme Court repeatedly has reaffirmed that "(s)ome constitutional violations ...by their very nature case so much doubt of the fairness of the trail process that, as a matter of law, they can never be considered harmless. Safferwhie v. Texas, 486 U.S. 249, 256 (1988); accord Neder v. United States, 527 U.S. 1, 7 (1999)("We have recognized a limited class of fundamental constitutional errors that defy analysis by "harmless error" standards." Errors of this type are so intrinsically harmful as to require automatic reversal (i.e. 'affect substantial right') without regard to their effect on the outcome.").

Sullivan v. Louisiana, 508 U.S. 275, 279 (1993)("Although most constitutional errors have been held to harmless-error analysis, some will always invalidate the conviction "(citations omitted); Is. at 283 (Rehnquist, C.J., concurring); United States v. Olano, 507 U.S. 725, 735 (1993); Rose v. Clark, 478 U.S. 570, 577-78 (1986)("some constitutional errors require reversal without regard to the evidence in the particular case...because they render a trial fundamental unfair"); Vasquez v. Hilary, 474 U.S. 254, 283-264 (1986); Chapman v. California, 386 U.S. 18, 23 (1967)("there are some constitutional rights so basic to a fair trail that theory infraction can never be treated as harmless error").

JUDICIAL NOTICE/STATEMENT OF ADJUDICATIVE FACTS PURSUANT TO RULE 201 OF THE FEDERALS RULES OF EVIDENCE.

The right to Effective Assistance of Counsel. See Kyles v. Whitley, 514 U.S. at 435-436; United States v. Cronic, 466 U.S. 648, 654-57 (1984); Hill v. Lockhart, 28 F.2d 832, 839 (8th Cir,. 1994))"It is unnecessary to adds a separate layer of harmless error analysis to bar evaluation of whether a petitioner has presented a constitutionally claim for ineffective assistance of counsel").

LAW RELATED TO STRUCTURAL ERROR OR MANIPULATION OF EVIDENCE.

Included in the rights granted by the U.S. Constitution, is the protection against prosecutorial misconduct or manipulation of exculpatory evidence and other prosecutorial and judicial failures that amount to fru=aud upon the court. Failure to make available to defendant's counsel, information that could well lead to the assertion of an affirmative defense is mat material, when "materiality" is defined as at least a "reasonable probability that ha the evidence has been disclosed to the defense, the result of the judicial proceedings would have been different. Kyles v. Whitley, 514 U.S. at 435 (quoting United States v. Bagley, 473 U.S. 667, 682 (1985)(plurality opinion); Id. at 685 (White, J, concurring in judgment)).

In addition to Bagley, which addresses claims of prosecutorial suppression of evidence, the decisions listed below-all arising in "what might be loosely be called the area of constitutionally guaranteed access to evidence." Arizona v. Youngblood, 488 U.S. 51, 55 (1988)(quoting United States v. Valenzuela-Bernal, 458 U.S. 856, 867 (1982) or require proof of "materiality" or prejudice.

The standard of materiality adopted in each case is not always clear, but if that standard requires at least a "reasonable probability" of a different outcome, its satisfaction also automatically satisfies Bretch harmless error rule. See e.g. Arizona v. Youngblood, supra at 55 (recognizing the due process violation based on states' loss or destruction before trial go material evidence); Pennsylvania v. Ritchie, 480 U.S. 39, 57-58 (1987)(recognizing due process violation based on states agency's refusal to turn over material social services records; "information is material" if it "probably would have changed the outcome of this trial "citing United States v. Bagley, supra at 685 (White L, concurring in judgment).

Ake v. Oklahoma, 470 U.S. 68, 83 (1985)(denial of access by indigent defendant to expert psychiatrist violates Due Process Clause when defendant's mental condition is "significant factor" at guilt-innocence or capital sentencing phase of trial); California v. Trombetta, 467 U.S. 479, 489-90 (1984)(destruction or=f blood samples might violate Due Process Clause, if there were more than slim chance that evidence would affect outcome of trial ad it=f there were no alternative means of

demonstrating innocence).

United States v. Valenzuela-Bernal, supra at 873-874 ("As in other cases concerning the loss (by state or government of material evidence, sanctions will be warranted for deportation of alien witness only if there is a reasonable likelihood that the testimony could have affected the judgment of the Trier of Fact." Chambers v. Mississippi, 40 U.S. 284, 302 (1973)(evidentiary rulings depriving defendant of access to evidence "critical to (his) defense violates traditional and fundamental standards of due process.") Washington v. Texas, 388 U.S. 14, 16 (1967)(violation of Compulsory Process Clause when could arbitrarily deprives defendant of testimony (that) would have been relevant and material and ..vital to his defense.").

STATEMENT OF THE CASE

In March 2015, Senior Corporal Olen Craig of the Arkansas State Police observed a Tractor-Trailer parked on the shoulder of an entrance ramp. Craig claimed during testimony in the court ensuing court proceedings that because parking on the Ramp was illegal, he approached the truck. He stated typically, he only saw vehicles parked there when the driver had a problem.

He stopped at a welfare check and met Javier Leon, the driver. Leon stated that he was not having an emergency and had just pulled over to call his dispatch. However, Craig claimed he did not see Leon on the phone. Craig asked to see Leon's Bill of Lading, and his Logbook, and Leon provided those. From his own experience as a truck driver, Craig determined there were two abnormalities in Leon's Logbook: (1) Leon had been off duty for two weeks, which is unusually long for a truck driver, who owns his own truck; and (2) Leon waited two days after picking up his load before beginning his route.

Based on the abnormalities in Leon's Logbook, Craig asked if Leon was carrying drugs in his truck. Leon denied he was. Craig perceived Leon was very nervous when he made this denial. Craig asked for permission to search the truck for anything illegal, and Leon consented. After Craig examined the cab, Leon unlocked the padlock on the back of the truck. Craig saw that it was heavily loaded with furniture, and he decided he was too old to actually climb in and over the cargo and search the vehicle.

Because Craig knew that another Officer, Chase Melder, was nearby, with a drug dog, he called Melder to come assist with the search. After less than five minutes, Melder arrived. He ran his dog around the truck, and the dog has a profound alert at the rear doors and about a quarter of the way from the back of the riser. Melder crawled up into the truck and found approximately 116.5 Kilograms (almost 260 pounds) of meth at the section where his dog had alerted. Leon testified the total search time between Craig's arrival and the search was slightly over thirty minutes. In contrast, Craig estimated the time to be more like fifteen minutes.

REASONS FOR GRANTING

WHETHER INSTRUCTIONAL ERROR AND THE LACK OF A DUAL-ROLE JURY INSTRUCTION REGARDING ORLEN CRAIG OF THE ARKANSAS STATE POLICE'S OBSERVATIONS, DID NOT SO INFECT THE ENTIRE TRIAL SUCH THAT THE RESULTING CONVICTION VIOLATED DUE PROCESS.

The record of Leon's jury trail provides inconvertible evidence that Senior Corporal Olen Craig of the Arkansas States Police observations and conclusions as Leon's truck was parked in a ramp was worthy of a dual role jury instruction. That he deviated from his role as a lay witness to an expert witness, is extensive and extremely probative to the question of prejudice. A few important examples of this can be gleaned from the Page 2 of 11 entitled "Background" in Document 124 Filed 05/24/19 by the Court of Appeals for the Eight Circuit." Prejudicial information it relied on in denying Leon's motion to suppress and his jury conviction for possessing more than 500 grams of methamphetamine.

See, Paragraph one;

"Because parking on the ramp is illegal, Craig typically only saw vehicles parked there when the driver has a problem..." "...Craig asked to see Leon's bill of lading and his logbook. and Leon provided those. From his own experience as a truck driver, Craig determined there were two abnormalities in Leon's Logbook: (1) Leon had been off duty for two weeks, which is unusually long for a truck driver who owns his own truck; and (2) Leon waited two days after picking up his load before beginning his route."

Also see paragraph two;

"Based on the abnormalities in Leon's logbook, Craig asked if Leon was carrying rugs in his truck. Leon denied he was. Craig perceived Leon as very nervous when he made this denial. Craig asked for permission to search the truck for anything illegal, and Leon consented. After Craig examined= the cab, Leon unlocked the padlock on the back of the truck. Craig saw it was heavily loaded wit furniture, and he decided he was too old to actually climb in and over the cargo and search the vehicle..."

It is noteworthy this dual role played by Craig as a law enforcement officer and a lay witness did not deserve a dual- role instruction by the court.

As a threshold matter, Defendant Leon avers that, the question presented when a defendant like him collaterally challenges faulty jury instructions does not mean the district court plainly erred, but whether the erroneous instruction, as it did in this instant case, "so infected the entire trial that the resulting conviction violates due process." United States v. Frady, U.S. 152, 169 (1982)(internal quotation marks and citation omitted)(holding that "the degree of prejudice resulting from instruction error (must) be evaluated in the total context of the events at trial"), Egger v. United States, 509 F.2d 745, 749 (9th Cir. 1975) ("Collateral relief is not available to set aside a conviction on the basis of erroneous jury instructions unless the error had such an effect on the trial as to render it so fundamentally unfair that it constitutes a denial of a fair trial in a constitutional sense.").

Under the Due Process Clause of the Fifth Amendment, the prosecution is required to prove beyond a reasonable doubt every element of the crime with which a defendant is charged. See, In re Winship, 397 U.S. 358, 364 (1970)(holding that the government must prove "every fact necessary to constitute the crime, beyond a reasonable doubt), See also United States v. O'Brien, 560 U.S. 218, 224 (2010)(distinguishing between "(e)lements of a crime (that) must be charged in an indictment and proved to a jury beyond a reasonable doubt" and "(s)entencing factors (that) can be proved to a judge at sentencing by a preponderance of the evidence"). The ambiguous testimony of SA Craig may be spinned by the government as having no injurious effect on the Mauricio, just because the government with little of legal backing assumes the the lack of a dual-role jury instruction did not "infect the entire trial that the resulting conviction violates due process."

The Winship "beyond-a-reasonable doubt" standard applies both state and federal proceedings. See, Sullivan v. La, 500 U.S. 275, 278 (1993). the standard protects three interests. First, it protects the defendant's liberty interests. See, Winship, 397 U.S. at 363. Second, it protects the defendant from the stigma of conviction. Id. Third, it encourages community confidence in criminal laws by giving "concrete substance" to the presumption of innocence. Id. at 363-64. There is no way of determining how much impact, one expert opinion placed in the minds of the fact-finders, the jury. For example in paragraph two of page 14, of its opposition, the government opined;

n all of its responses except one, Senior Corporal Craig based his opinion on his knowledge of the investigation and also lay ɔpinion that may have confounded the understanding of the jury, lending credibility where it was not due. For instance at trail, _eon testified that the total search time between Craig's arrival and his arrest was more than thirty minutes , while Craig testified he total search time was approximately fifteen minutes.

Officer Craig's contextualization of the total time that transpired during the search of the truck at the ramp, was given a boost of ɔredibility. In his own words here and throughout the trial, Officer Craig, was testifying based on his training and experience ɜnd knowledge of the investigation, based on his role as an expert and lay or percipient witness. This dual-role without a dual-ole instruction is highly prejudicial to Leon. The panel of the Eight Circuit Court of Appeals and the government apparently did ɪot pay any deference to what Justice Harlan noted, that the standard is founded on "a fundamental value determination of our ɔociety that it is far worse to convict an innocent man than to let a guilty man go free" id. at 372 (Harlan, J., concurring).

The reasonable requirement applies to elements that distinguish criminal from non-criminal conduct. See, Apprendi v. New lersey, 530 U.S. 466, 488-92 (2000)(requiring proof beyond a reasonable doubt that defendant's crime was racially motivated o support increased hate crime sentence). Thus, a state may not distinguish between similar offenses that have different naximum penalties without requiring the prosecution to prove beyond a reasonable doubt the facts that distinguish the two ɔffenses. See. Id. In this case many circuits require conviction should based on more than 'mere presence' which Leon ɪsserted on trial.

The government's failure to meet its burden of proof results in the defendant's acquittal at trial or reversal of the conviction on ɪppeal. See Winship, 397 U.S. at 363, See e.g. United States v., Perez-Melendez, 599 F.3d 31, 46-47 (1st. Cir. 2010); United States v. Brozmeyer, 616 F.3d 120, 125-27 (2nd Cir. 2010); United States v. Cuevas-Reyes, 572 F.3d 119, 122-23 (3rd Cir. 2009); United States v. Bonner, 648 F.3d 209, 214 (4th Cir. 2011); United States v. Steen, 634 F.3d 822, 826-28 (5th Cir. 2011) prosecutor's failure to prove beyond a reasonable doubt ---required reversal of conviction..."

Proper general instructions on the government's burden of proof will not correct the failure of the trial court to advise the jury of he government's specific burden to disprove a tendered defense. United States v. Sanchez-Lima, 161 F.3d 545, 549 (9th Cir. 998); De Groot v. United States, 78 F.2d 244, 253 (9th Cir., 1935); United States v. Corrigan, 548 F.2d 879, 882 (10th Cir. 997). This is so because, in the absence of an instruction specifically informing the jurors of the government's burden of lisproof of a defense, the average juror can be expected to assume that while the government has to prove its case beyond a easonable doubt, if the defendant asserts a defense, he has the burden of proving that defense.

ɪ Sanchez-Lima, supra, the defendant claimed that he acted in self-defense and the district court instructed on self-defense. lowever, the court never advised the jury to disprove beyond a reasonable doubt any claim of self-defense.)Id. 161 F.3d at 45). This court held that the instructional error was reversible despite the fact that the district court did instruct the jury that;

1) "the government has the burden of proving every element of the charge beyond a reasonable doubt. If it fails to do so, you ɪust return a non-guilty verdict."

2) "if after consideration of all the evidence, you are not convinced beyond a reasonable doubt that the defendant is guilty, it is our duty to find the defendant not guilty," and;

3) "the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any vidence because the burden of proving guilt beyond a reasonable doubt is always assumed by the government."(Ibid).

A specific instruction which is defective in respect to the burden of proof is not remedied by correct general statements of law lsewhere given in the charge unless the general statement clearly indicates that its consideration must be imported into the lefective instruction. (citation)...The district court's failure to give the Dual-Role instruction means it lightens government's ɪurden of Craig's testimony, which is reversible error." Ibid, De Groot v. United States, supra, 78 F.2d at 253.

.eon's conviction must be reversed. "(A) constitutionally deficient reasonable-doubt instruction is a breed apart from many ɪther instructional errors that we have held are amenable to harmless error analysis." Sullivan v. Louisiana, supra, 508 U.S. at 84 (Rehnquist, C.J., concurring.); United States v. Gonzalez-Lopez, 548 U.S. 140, 148 (2006); United States v. Navarro, 2010 J.S. App. LEXIS 11935 (9th Cir. 2010).

WHETHER COUNSEL'S FAILURE TO SUBJECT THE GOVERNMENT'S CASE TO STRICT ADVERSARIAL TESTING, BY REASON OF A FICKLE, BARE-BONES ARGUMENT ON A 'MERE PRESENCE' THEORY OF DEFENSE, ELEMENTS OF THE CONSENT TO SEARCH RULE, CONSTITUTES INEFFECTIVE ASSISTANCE OF COUNSEL. COUNSEL WAS ALSO GROSSLY INEFFECTIVE BY NOT ARGUING A MATERIAL VARIANCE OR CONSTRUCTIVE AMENDMENT OF THE POSSESSION WITH INTENT TO DISTRIBUTE CHARGE, WHERE THE ELEMENTS OF DISTRIBUTION WERE NEVER PROVEN.

STANDARD OF REVIEW AND LEGAL ANALYSIS

The Sixth Amendment right to counsel is the right to effective assistance of counsel. McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970). The benchmark for judging any claim of ineffective assistance of counsel, however, is whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. Strickland v. Washington, 466 U.S. 668, 688 (1984); also Boykin v., Wainwright, 737 F.2d 1539, 1542 (11th Cir. 1984).

Because a lawyer is presumed to be competent to assist a defendant, the burden is not on the accused to demonstrate the denial of the effective assistance of counsel. United States v. Cronic, 466 U.S. 648, 658 (1984). Ineffectiveness of counsel may be grounds for vacating conviction if;

(1) counsel's performance fell below an objective standard of reasonable assistance and;

(2) the defendant was prejudiced by the deficient performance. Strickland, 466 U.S. at 687, 694. "There is no reason for a court deciding an ineffective assistance claim...to address both components of the inquiry of the defendant makes an insufficient showing on one." Strickland, 466 U.S. at 697.

Thus, if the defendant fails to show that his is prejudiced by the alleged error of counsel, this court may reject the defendant's claim without determining counsel was deficient. See Coulter v. Herring, 60 F.3d 1499, 1504 n.8 (11th Cir.1995). For performance to be deficient, it must be established that, in light of all the circumstances, counsel's performance was outside the wide range of professional competence. "Strickland, 466 U.S. at 690.

In other words, when reviewing counsel's decisions, "the issue is not what is possible or "what is prudent or appropriate, but only what is constitutionally compelled." Chandler v. United States, 218 F.3d 1305, 131 (11th Cir. 2000)(en banc)(quoting Burger v. Kemp, 483 U.S. 776 (1987), cert denied, 531 U.S. 1204 (2001).

Furthermore, "(t)he burden of persuasion is on a petitioner to prove, by a preponderance of the evidence, that counsel's performance was unreasonable." Id. (citing Strickland, 466 U.S. at 688). The burden of persuasion, though not insurmountable, is a heavy one. See Id. at 1314 (citing Kimmelman v. Morrison, 477 U.S. 365 (1986)).

"Judicial scrutiny of counsel's performance must be highly deferential," and courts "must indulge (the) strong presumption "that counsel's performance was reasonable and the counsel made all significant decisions in the exercise of reasonable professional judgment." Id. (quoting Strickland, 466 U.S. at 689-90). Therefore, "counsel cannot be adjudged incompetent for performing in a particular way in a case, as long as the approach taken "might be considered sound trial strategy." Id. (quoting Darden v. Wainwright, 477 U.S. 168 (1986).

If the record is incomplete or unclear about counsel's actions, then it is presumed that counsel exercised reasonable professional judgment. See Id. at 1314-15 n.15. Thus, the presumption afforded counsel's performance "in no ...that the particular defense lawyer in reality focused on and, then deliberately decided to do or not to do a specific act." Id. Rather, the presumption is "that what the particular defense lawyer did at trial...were acts that some reasonable lawyer might do." Id.

Moreover, "(t)he reasonableness of a counsel's performance is an objective inquiry." Id. at 1315. For a petitioner to show deficient performance, he "must establish that no competent counsel would have taken the action that his counsel did take." Id. To uphold a lawyer's strategy, a court "need not attempt to divine the lawyer's mental processes underlying the strategy." Id. at 1315 n. 1 6. Finally, "(n)o absolute rules dictate what is reasonable performance for lawyers." Id. at 1317.

Further, counsel does not provide ineffective assistance when frivolous arguments are not raided on appeal. Jones v. Barnes, 463 U.S. 745 (1983); see also United States v. Winfield, 960 F.2d 970, 974 (11th Cir. 1992)(attorney not ineffective for ailing to argue a meritless issue).

American Bar association standards are to be used only as "guides" in reviewing whether an attorney's performance is reasonable, reversing a finding of deficient performance where the lower court treated the ABA standards as "inexorable commands that attorneys must "fully comply with," United States v. Mooney, 497 F.3d 397, 404 (4th Cir. 2007)(counsel in criminal cases are charged with the responsibility of conducting appropriate investigations, both factual and legal, to determine if matters of defense can be developed).

The critical issue is whether, applying prevailing professional norms, trial counsel conducted an objectively reasonable investigation to mitigating evidence. Porter v. McCallum, 558 U.S. 30, 40, 130 S.Ct. 447, 452-53, 175 L.Ed.2d 398 (2009); Kramer v. Kemna, 21 F.3d 305, 309 (8th Cir. 1994)(failure to interview witnesses or discovering mitigating evidence may be a basis for finding ineffective assistance of counsel)," Hart v. Gomez, 174 F.3d 1067, 1070 (9th Cir. 1996)(a lawyer who fails adequately to investigate, and to introduce into evidence, records that demonstrate his client's factual innocence, or that raises sufficient doubt as to that question to undermine confidence in the verdict, renders deficient performance)."

AN ABUNDANCE OF INVESTIGATIVE AND TRIAL RELATED PREJUDICE WITH RESPECT TO COUNSEL'S REPRESENTATION

The Third Circuit in United States v. Kaufman, 109 F.3d 186, 191 (3d. Cir. 1997), also held that (in the context of a claim that counsel failed to conduct an adequate investigation prior to the entry of a guilty plea, prejudice is demonstrated by showing that the defendant would have insisted on going to trial instead of pleading guilty).

APPLICABLE LAW TO CLAIMS

Generally, claims of ineffective assistance of counsel are analyzed pursuant to Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In order to prevail on such a claim, Movant must show;

(1) deficient performance-counsel's performance fell below the unprofessional errors the result of the proceeding would have been different. Strickland v. Washington, 466 U.S. at 687-88, 684; see also United States v. Thornton, 23 F.3d 1532, 1533 (9th Cir. 1994)(per curiam); and United States v. Solomon, 795 F.2d 747, 749 (9th Cir. 1986).

A Whether Leon's consent to a warrantless search was given to officer Craig, is a question of fact, Counsel did not aggressively litigate this critical issue, by arguing the totality of the circumstances. United States v. Purcell, 236 F.3d 1274 (11th Cir. 2001). He should have contended that the government bears the burden that the consent was not a function of acquiescence to a claim of lawful authority, but rather was given freely and voluntarily. Florida v. Royer, 460 U.S. 491 (1983); United States v. Tovar-Rico. 61 F.3d 1529 (11th Cir. 1995). The absence of the official coercion is the sine qua non of effective consent, as it is axiomatic that where there is coercion, there cannot be consent. Schneckloth v. Bustamante, 412 U.S. 218 (1973); Bumper v. North Carolina, 391 U.S. 543 (1968); Florida v. Bostick, 501 U.S. 429 (1991); Moreover the failure to object to a search does not amount to consent to the search. United States v. Gonzalez, 71 F.3d 819 (11th Cir. 1996).

EVIDENCE AT TRIAL SHOWED THERE WAS A FATAL MATERIAL VARIANCE OR A CONSTRUCTIVE AMENDMENT OF THE INDICTMENT.

The court has defined the terms "distribute" and "deliver" broadly. Even one who merely arranges a sale from one person to another, without touching the drugs, may be convicted. United states v. Catchings, 922 F.2d 777 (11th Cir. 1991). The statute, 21 U.S.C. Section 802(8), defines "deliver" as the "actual, constructive, or attempted transfer of a controlled substance or a listed chemical, whether or not there exists an agency relationship." Counsel should have argue that the government did not meet its burden to prove intent to distribute. At best, the actual proof at trial showed a fatal variance of attempt to transfer a controlled substance.

WHAT CONSTITUTES A "REASONABLE PROBABILITY IN THE CONTEXT OF LEON'S CLAIMS.

The Circuits have all been very vocal on this issue. In Ward v. Dretke, 420 F.3d 479, 487 (5th Cir. 2005), the court held (prejudice inquiry where defendant claims that he would have not pled guilty and insisted on going to trial but for counsel's deficient performance partially depends on a prediction of what that outcome of the trial might have been); See also Trottie v. Stephens, 720 F.3d 231, 251 (5th cir. 2013)(materiality exists if here is "a reasonable probability that, had the evidence been

CONCLUSION

Traditionally, efficiency and finality have carried less with than fairness in the criminal context, because criminal sanctions may result in imprisonment and greater social stigma than civil sanctions. see, Stacy & Dalton, supra note 2, at 137 ("As our ...commitment to the availability of habeas corpus, finality and efficiency concerns carry relatively less sway in criminal cases than in civil cases -a product of criminal defendant's countervailing liberty interest." (footnote omitted).

The category of errors known as trial errors can be harmless if the government can show beyond a reasonable doubt that they did not contribute to the verdict. See id at 24, see also, Sullivan v. Louisiana, 508 U.S. 275, 279 (1993)(stressing that the test for harmlessness "is not whether, in a trial that occurred without the error, a guilty verdict would have surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error.").

The Supreme Court has recognized a narrow set of rights that, if denied are structural errors; the rights to counsel, see Gideon v. Wainwright, 372 U.S. 335, 343-45 (1963) and to counsel of choice, see, United States v. Gonzalez- Lopez, 548 U.S. 140, 150 (2006)(deeming deprivation of counsel of choice a structural error.); the right of self representation, see,, Mckaskle v. Wiggins, 465 U.S. 168, 177 n.8 (1984)(finding harmless error analysis inapplicable to deprivations of the right to self-representation, because exercising the right increases the chance of a guilty verdict); the right to an impartial judge, see, Tunney v. Ohio, 273 U.S. 510, 534 (1927)(holding that trial before a biased judge "necessarily involves a lack of due process").

Also denominated in the narrow set of rights deemed structural error, is the freedom from racial discrimination, in grand jury selection. This denial of have been found to undermine "the objectivity of those charged with bringing a defendant to judgment"); the right to a public trail, see, Waller v. Georgia 467 U.S. 30, 49 (1984)("the defendant should not be required to prove specific prejudice in order to obtain relief for a violation of the public-trial guarantee"), and the right to accurate reasonable-doubt instruction, see, Sullivan v. Louisiana, 508 U.S. 275, 280 (1993)(finding that because of an inadequate reasonable doubt instruction, no actual jury verdict could thus not apply harmless error analysis to determine whether error affected the verdict.).

By contrast, the list of trial errors is extensive. See, Arizona v. Fulminante, 499 U.S. 279, 306-07 (1991) (declaring that "almost constitutional errors can be harmless," and naming sixteen examples of trial error. While the list of structural errors have remained consistent t, the Supreme Court's m ethos of distinguishing between trial and structural= errors have fluctuated. The prejudicial impact of these constitutional errors is assessed by asking whether the error hard " a substantial and injurious effect or influence in determining the jury's verdict." Bretch v. Abrahamson, 507 U.S. 619, 623, 113 S.Ct. 1710, 123 L.Ed.2d 353 1993), See also, Fry . Pliler, 551 U.S. 112, 119-120, 127 S.Ct. 2321, 168 L.Ed.2d 16 (2007) (holding that the Bretch standard applies whether or not the state court recognized the error and reviewed it for harmlessness.).

CONCLUSION

WHEREFORE, premises permitted, Javier Leon, respectfully moves this Honorable Court to grant his petition for writ of Prohibition, in the interest of justice.

Date: August 14, 2019.

Respectfully Submitted,

Javier Leon

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