No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2020

MIGUEL WOOTEN,

Petitioner

v.

WARREN MONTGOMERY, WARDEN,

Respondent.

On Petition For a Writ of Certiorari to the
Ninth Circuit Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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Questions Presented

1. On habeas corpus review of a state-court judgment under 28 U.S.C. § 2254, did the District Court fail to uphold petitioner's Sixth Amendment right to the effective assistance of counsel, where trial counsel failed to make a motion to suppress evidence of petitioner's confession, obtained during an interrogation following his arrest, in violation of his Fourth Amendment right to be brought before a magistrate for a determination of probable cause for arrest without unreasonable delay, as required by County of Riverside v. McLaughlin, 500 U.S. 44 (1991) , and the District Judge found that such Fourth Amendment right was "clearly violated" but that state-court jurists might reasonably have found that such Sixth Amendment right was not violated because counsel *might* have believed that the trial court *might have denied it*, finding that such Fourth Amendment right was not violated because there was probable cause to arrest petitioner for the crime to which he confessed, whereas the true test is whether reasonably competent counsel would make a motion that there was a reasonable probability *would be granted*, as the District Judge found it should have been?

2. Whether the District Court violated petitioner's Fifth Amendment right to due process of law when the respondent Warden did not argue in the state courts that there was probable cause to arrest petitioner, based on an eyewitness's description of a shooter, but made that argument for the first time in the District Court, and the District Court denied petitioner's request to expand the record to include evidence, which he had no reason to present in the state courts, that not only did the eyewitness's description not match petitioner's appearance but also the witness failed to identify his photograph in photo lineups?

3. Whether the panel of the Ninth Circuit Court of Appeals failed to uphold petitioner's Sixth Amendment right to the effective assistance of counsel where counsel failed to make a motion to suppress evidence on meritorious McLaughlin grounds, by ruling that clearly established United States Supreme Court law does not require suppression for a McLaughlin violation (i.e., a *federal* court would not necessarily suppress the evidence), *even though California law does require suppression* (i.e., the state court would suppress the evidence), thereby treating petitioner's Sixth Amendment claim as though it were a Fourth Amendment claim?

4. Whether the Ninth Circuit panel violated petitioner's Fifth Amendment due process rights by setting the appeal for oral argument and then deeming oral argument to be unnecessary, *before briefing and the record were complete*, thereby apparently deciding the merits of the appeal without considering the Reply Brief and all the evidence?

Parties to the Proceedings

The parties to the proceedings in the Ninth Circuit included the petitioner Miguel Wooten and the respondent Warren Montgomery, Warden of Calipatria State Prison, represented by the California Attorney General. There are no parties to the proceedings other than those named in the petition.

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PETITION FOR WRIT OF CERTIORARI

The petitioner, MIGUEL WOOTEN, respectfully petitions this Court for a writ of certiorari to review the decision of the Ninth Circuit Court of Appeals, filed May 19, 2020 (Petition for Rehearing and Rehearing En Banc, denied June 24, 2020).

Opinions Below

The Memorandum Decision of the Ninth Circuit Court of Appeals panel, filed May 19, 2020, affirming the Order of the District Court for the Northern District of California, denying petitioner's Petition for Writ of Habeas Corpus under 28 U.S.C. § 2254, are attached hereto as, respectively, Appendices B and A.

Jurisdiction

A Petition for Rehearing and Rehearing En Banc, filed May 31, 2020, was denied by an Order filed June 24, 2020, which is attached hereto as Appendix C. This petition is filed within 90 days of that date. Rule 13.1. Petitioner invokes this Court's jurisdiction under 28 U.S.C. section 1254(1).

Constitutional and Statutory Provisions Involved

A. Federal Constitutional Provisions

The Fifth Amendment to the United States Constitution provides, in pertinent part: "... nor shall any person ... be deprived of life, liberty, or property, without due process of law ...."

The Sixth Amendment to the United States Constitution provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed ...."

Statement of the Case

State Court Proceedings

Petitioner Miguel Wooten was charged by Information No. 161722, filed August 31, 2009, in the Alameda County Superior Court with the murder (Pen. Code, § 187, subd. (a)) of William Jeffery Johnson, on September 21, 2008, with the personal and intentional discharge of a firearm, causing death (Pen. Code, §§ 12022.5, subd. (a), and 12022.53, subds. (b), (c), (d), and (g)). (ER 90)

Petitioner was represented by a court-appointed attorney. (ER 99)

Prior to jury selection, petitioner moved to exclude his statement to the police – confessing that he shot Johnson – on the ground of violation of his Miranda rights, which motion was denied. (ER 124, 132)

The jury found petitioner guilty of first degree murder with personal and intentional discharge of a firearm. (ER 219-229, 233)

On November 18, 2011, the court sentenced petitioner to a term of 25 years to life for murder and a consecutive term of 25 to life for the firearm enhancement, for an aggregate term of 50 years to life. (ER 235, 237)

Petitioner appealed to the California Court of Appeal for the First Appellate District, Division Four, in No. A133860, which affirmed the judgment in an opinion filed March 7, 2014. (ER 241, 1138-1154)

In an ancillary habeas corpus proceedings, the same court on the same date denied petitioner's Petition for Writ of Habeas Corpus, No. A138377, without an evidentiary hearing or statement of reasons. (ER 2071)

In No. S217789, petitioner petitioned the California Supreme Court for review of the Court of Appeal's decision, which petition was denied on May 14, 2014. (ER 1102-1137, 2089) The Supreme Court requested "informal opposition" from the Attorney General (ER 1670-1732) to petitioner's Petition for Writ of Habeas Corpus in that court, No. S217876 (ER 1356-1424), and then summarily denied it on July 8, 2015. (ER 2090)

District Court Proceedings

Petitioner filed a Petition for Writ of Habeas Corpus in the U.S. District Court, No. 16-03755-VC on July 4, 2016. (ER 1746-1824)

The District Court judge heard oral argument on March 16, 2017 (ER 2335), and requested supplemental briefing (ER 2335, 2192-2206), but, without conducting an evidentiary hearing, denied the Petition by an Order, filed August 1, 2017. (ER 2263-2267) Petitioner filed a Motion to Alter Judgment, etc., which was scheduled for hearing on January 1, 2018, which the respondent's attorney failed to attend. (ER 2269-2280, 2335, 2337) The judge ordered a second round of supplemental briefing (ER 2337, 2303-2304), and, without further hearing, denied the Petition by an Amended Order, filed August 15, 2018 (Appendix A), which granted a Certificate of Appealability as to Question 1

above (ER 2325-2329;) Petitioner moved for a certificate as to Question 2, which was granted. (ER 2331)

Ninth Circuit Court of Appeal proceedings

Petitioner appealed to the Ninth Circuit. (ER 2332)

Petitioner filed an Appellant's Opening Brief on August 13, 2019. (Dkt.# 26) The respondent filed an Appellee's Answering Brief on December 16, 2019. (Dkt. # 37, 39) Petitioner obtained an extension of time to file his Appellant's Reply Brief until March 6, 2020. (Dkt. # 48) On March 1, 2020, *before petitioner filed his Reply Brief,* the court set oral argument on May 15, 2020. (Dkt. # 49) On March 4, petitioner submitted the Reply Brief for Review, along with a motion for leave to file oversized brief, and on March 23, the motion was granted by a "clerk order," but the brief was not actually filed until April 27. (Dkt. ## 52. 53. 55) *In the meantime,* on April 20, the court gave notice that it deemed oral argument to be unnecessary and that the matter would be submitted for decision on May 15. (Dkt.# 54)

On May 19, 2020, the Ninth Circuit panel issued a Memorandum decision, affirming the Order of the District Court. (Appendix B) On May 31, 2020, petitioner filed a combined Petition for Rehearing and Petition for Rehearing *En Banc*. (Dkt# 65) On June 24, 2020, these combined petitions were denied. (Dkt.# 66) Petitioner wrote to the Chief Judge/En Banc Coordinator, Sidney Thomas, asking him to investigate whether the panel had pre-judged the issues on appeal

by setting oral argument and then deeming it to be unnecessary before his Reply Brief had been filed. (Dkt# 67; Appendix D) On July 1, 2020, the panel filed an Order, finding that the letter was improper and that the issues raised were without merit. (Dkt# 68; Appendix E)

Statement of the Facts

Evidence presented on appeal and habeas corpus in the state court.

Jarvis Toussaint, an old friend of petitioner, testified at his trial that on September 21, 2008, he picked up petitioner from a street in Oakland and offered him a ride to San Jose. (ER 467-469, 490) He did not see a gun in petitioner's possession. (ER 481, 500) They pulled into a gas station to get gas. Petitioner glanced to his right and got scared, "like he was seeing a ghost or something." (ER 470, 502) He told Toussaint to stop next to a car near the door of the station. (ER 471, 475) The door of the back left seat of the car was open, and sitting halfway out and talking on his phone was William Johnson. (ER 472-473)

"The dude got out the car" with a phone in his hand, which he hung up, and "start[ed] messing with his pants." Toussaint did not see a gun in his hands, but "he got out the car pulling his belt up like he got a gun." (ER 476, 478) The cars were only a couple of feet apart, and the dude approached Toussaint's car, close enough that he could have touched it if he wanted to. (ER 476-477) Petitioner did not get out of the car. (ER 495) Petitioner and Johnson briefly

"exchanged words about each other", " like they had a problem before." (ER 473-474, 476-477)

After the exchange of words, "that's when it all happened," the shooting. Toussaint heard maybe three gunshots but he did not know who shot whom. He drove off and through his rearview mirror saw Johnson fall. (ER 481) He stopped and kicked petitioner out of his car. (ER 479, 499) He did not see a gun in his possession when he got out. (ER 482)

Oakland California Police Sgt. Tony Jones testified that on September 23, 2008, Jarvis Toussaint was brought to the Homicide Division, where he talked to him for "some hours" and only at the end of the interview – the transcript of which was 140 pages long – did he admit driving the car that was involved in the shooting, and then he identified petitioner as his passenger and the shooter. (ER 608, ER 1928-2068)

Sgt. Jones also testified that he identified Antione Knox as the driver of the car, in the back seat of which Johnson had been sitting, and questioned him on an unstated date – apparently after Toussaint had implicated petitioner. Knox said that he did not know who the shooter was and had not seen him before. (ER 602, 632) No evidence was presented at petitioner's trial of the fact that Knox's description of the shooter did not match petitioner's appearance or that he failed to identify petitioner's photo in photographs.

Sgt. Jones also testified that petitioner and Toussaint were arrested on February 3, 2009, for the misdemeanor offense of placing or allowing to be placed a loaded concealable firearm in a vehicle, by officers who had observed petitioner starting to get into his mother's car, as Toussaint opened the front passenger door, leaned down, and then closed the door, but the officer saw a semi-automatic pistol on the floor. (ER 443-445, 449) Both were arrested and taken to the county jail in Dublin, California. (ER 446, 449) Petitioner showed on habeas corpus in the California Court of Appeal, Supreme Court, and U.S. District Court that at midday on the next day, February 4, Sgt. Jones went alone to a magistrate and, without making a showing of probable cause to arrest petitioner, either for the homicide of for the misdemeanor firearm offense, obtained an order to transfer him from the jail to the Homicide Division in Oakland for the purpose of interrogating him about the homicide. He recorded the interrogation, which was played for the jury. (ER 628) During a substantial portion of the beginning of the interrogation, petitioner denied involvement in the shooting of Johnson. Eventually, however, he admitted that he had committed the shooting and to some degree explained why he did. His statement was generally consistent with his trial testimony, which is related below.

Petitioner testified in his defense that he never really "met" William Johnson, and before the first time he ever saw him he had heard from "some

people" that Johnson had "put a hit out" on him. A couple of weeks before September 21, 2008, petitioner saw Johnson and confronted him about that fact, telling him that he had heard about the hit and asking him what he wanted to do, to which Johnson responded by trying to punch him. They got into a scuffle, which a young woman and her mother helped break up, and the mother offered petitioner a ride home in her car. (ER 671-672, 684) Within minutes, a group of guys – which may or may not have included Johnson – pulled him out of her car, and, again, the young woman and her mother broke it up. (ER 673, 704-705)

On September 21, 2008, petitioner was walking down the street and saw Toussaint, driving his car, which he pulled over, and petitioner got in and asked for a ride to San Jose, where Toussaint happened to be going. (ER 680, 715, 718) Petitioner was not carrying a gun, but when he got in Toussaint's car he saw one, next to the emergency brake, where he had seen it a few times before. Toussaint suggested that they get a Swisher and drove into the gas station for that purpose.

As they drove into the station, petitioner saw William Johnson, sitting in the backseat of a car with his feet resting outside. (ER 682-683) He felt scared because Johnson was the person with whom he had a fight and who supposedly had a hit out on him. He felt that Johnson was the type of person who could kill him. (ER 683, 722) Petitioner told Toussaint to stop the car because he had seen Johnson, they had made eye contact, and Johnson had recognized him. (ER 684,

724) He asked Johnson "What's up?", to which Johnson replied "What's up with that shit you talking?" (ER 684, 723) As he said that, he was standing up. He had one of his hands in his waistband. (ER 387) As petitioner described it to Sgt. Jones, Johnson ran up on him "like the man of steel," referring to Superman. (ER 731) Petitioner believed Johnson was going to try to do something to him and that he looked like he was going for a gun. Petitioner was scared, leaned over toward Toussaint, and grabbed Toussaint's gun from the console area and started shooting. (ER 687-688, 732) Johnson saw the gun and turned around, and at the same time petitioner pointed the gun and shot – three times, he believed. (ER 688, 695, 732) He saw one of the shots hit Johnson in the back but did not see him fall. (ER 695, 733-734) Toussaint was already driving away when he fired the last shot. (ER 689) Toussaint did not make him get out but drove him home to San Jose. (ER 689-690) Petitioner left the gun in the car. (ER 690)

Evidence shown on state and federal habeas corpus

Petitioner showed on habeas corpus in the California Court of Appeal, Supreme Court, and U.S. District Court that he was arrested for the above described misdemeanor offense at about 8:00 p.m. on February 3, 2009, a Tuesday, and take to the Santa Rita County jail in Dublin, California. (ER 441) He was transported from the jail to the interrogation room at the police department in Oakland, California, about 24 hours later, at 8:57 p.m. on

February 4. (ER 314) In the meantime, Sgt. Jones "went and met with a judge and got an order to have [petitioner] removed from custody so that we could bring him to [Oakland Police Department] and interview him." Sgt. Jones himself drove petitioner from the jail to the station. (ER 614-615) The Affidavit for Order and the Order (Exhibit O to Petition, ER 2069-2070) show that Sgt. Jones went before a magistrate at 11:24 a.m. on February 4, 2009 (15 ½ hours after petitioner's arrest), and obtained an order for petitioner to be transferred from the jail to the Oakland Police Department at 8:00 p.m. that day (24 hours after his arrest) "to participate in an interview for the purpose of identification of suspect in a Murder ...."

Sgt. Jones's interrogation of petitioner began at 9:24 p.m. on the 4th and ended at 6:47 a.m. on the 5th, with a pause at 11:24 p.m. to advise him of his Miranda rights. (ER 315, 324, 330) Toward the end of it, petitioner confessed that he shot Johnson. (ER 616)

Evidence sought to be introduced in the District Court

When the respondent argued for the first time in the District Court that the police had probable cause to arrest petitioner for the homicide, when he was arrested for the misdemeanor firearm offense in February 2009 and subsequently transferred to the Homicide Division for interrogation, based on an "identification" of petitioner, petitioner had occasion to argue for the first time that the police did not believe that Toussaint's statement was sufficiently

reliable to provide cause even to interview petitioner, that there was no "identification," and that, to the contrary, the description that witness Antione Knox gave of the shooter did not match petitioner's appearance and, when he was shown photo lineups containing petitioner's picture, he failed to identify him. There had been no occasion to present this evidence in the state courts, so, when the respondent argued that the police had probable cause based on an "identification," petitioner moved to expand the record to include the evidence of Knox's non-identification, which would have shown the lack of probable cause to arrest for the homicide. The District Court denied that motion and subsequently distinguished the leading California appellate decision, which would have required suppression of petitioner's confession because of the McLaughlin violation, on the ground that in that case there was a lack of probable cause. (See Appendix A, pp. 3-4.)

Reasons for Granting the Writ

1. The test on habeas corpus review under AEDPA of whether a state-court defendant was denied his Sixth Amendment right to the effective assistance of counsel by the failure of his attorney to make a Fourth Amendment motion to suppress evidence which was likiely to be granted is not (A) whether state-court judges might reasonably have found that competent counsel might have believed that the motion might be denied, as the District Court ruled, but whether a finding by such judges that such counsel would not make such a motion because it might be denied was unreasonable, and is not (B) whether United States Supreme Court law does not clearly establish that suppression of evidence is the remedy for McLaughlin violation and that, therefore, such a motion would not be granted by a federal court, as the Ninth Circuit panel ruled, but whether Supreme Court law establishes that competent counsel would make a such a motion, which was likely to be granted under state law.

A. Procedural posture of this issue

This issue was raised on appeal in California Court of Appeal No. A133860 but on an incomplete record. On habeas corpus in the California Court of Appeal and Supreme Court, it was supported by the additional facts which are set forth above on pages 10-11, supra, But those courts failed to order an evidentiary hearing at which it could be fully developed. It was also raised on habeas corpus in District Court No. 16-03755, but, because that court failed to conduct an evidentiary hearing, it was not fully developed there, either. When the state Attorney General raised in the District Court – for the first time in the state and federal proceedings – the argument that there was probable cause to arrest petitioner for the shooting, based in part on a purported identification of petitioner as shooter by an eyewitness, the District Court erroneously denied petitioner's motion to expand the record to show that the reason why the police

did not believe that they had probable cause to arrest for that offense was that an unbiased eyewitness described the shooter in a way that did not match petitioner's appearance and failed to identify him in photo lineups (this error, which is raised in Reason 2 below, allowed the District Court to conclude that trial counsel and the state courts may have believed that there was probable cause to arrest for the shooting).

In County of Riverside v. McLaughlin, 500 U.S. 44, 56-57 (1991) this Court held that a person arrested without a warrant must be brought before a judicial officer for hearing on probable cause for the arrest without unreasonable delay and gave as "Examples of unreasonable delay ... delays for the purpose of gathering additional evidence to justify the arrest." In this case the unreasonableness of the delay in taking petitioner before a magistrate was that during the day after petitioner and Toussaint were arrested for the misdemeanor gun offense, Sgt. Jones went to a magistrate *without petitioner* and *without making a showing of probable cause for his arrest*, and instead obtained an order to transfer him from the jail in one city to the police department in another city in order to interrogate him "for the purpose of gathering additional evidence to justify the arrest." He thereby obtained petitioner's confession to the shooting, without which the only evidence at trial that he was the shooter would have been the testimony of the unreliable Jarvis Toussaint, which even the police doubted provided cause for so much as detaining and questioning petitioner, and without which, as the District Court found, petitioner probably would not have testified at trial, where he repeated his confession. (Amended Order, Appendix A, p. 2; ER 2326; see 2264)

The District Court found that petitioner's "Fourth Amendment right to a prompt probable cause hearing was clearly violated " (Amended Order, Appendix A, p. 1; ER 2325; see original Order, ER 2263, 2264), that he "clearly

suffered a Fourth Amendment violation " (Appendix A, p. 2; ER 2326) and that "a motion to suppress very well might have been granted." (Ibid.) However, the District Court erroneously ruled that petitioner was not entitled to relief on federal habeas corpus because state-court judges might reasonably have decided that court-appointed counsel did not ineffectively fail to make a meritorious[1] motion to suppress for the McLaughlin violation because he could reasonably have believed that it *might* be *denied,* but the true test is whether counsel was ineffective in failing to make a motion that was *likely to be granted.*

Petitioner was denied his Sixth Amendment right to the effective assistance of counsel, and the District Court by applying an erroneous standard failed to uphold that right.

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[1] In Kimmelman v. Morrison, 477 U.S. 365, 375 (1986) this Court held:

> In order to prevail, the defendant must show both that counsel's representation fell below an objective standard of reasonableness, Strickland, 466 U.S. [668] at 688 [(1984)], and that there exists a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Id. at 466 U. S. 694. Where defense counsel's failure to litigate a Fourth Amendment claim competently is the principal allegation of ineffectiveness, the defendant must also prove that his Fourth Amendment claim is meritorious and that there is a reasonable probability that the verdict would have been different absent the excludable evidence in order to demonstrate actual prejudice.

2. The District Court violated petitioner's Fifth Amendment right to appellate due process of law when the respondent Warden did not argue in the state courts that there was probable cause to arrest petitioner, based on an eyewitness's "identification" of him as the shooter, but made that argument for the first time in the District Court, and the District Court denied petitioner's request to expand the record to include evidence, which he had no reason to present in the state courts, that not only did the eyewitness's description not match petitioner's appearance but also the witness failed to identify his photograph in photo lineups.

No reasonable state-court jurist could find that it was unlikely that, if a motion had been made to exclude evidence of the confession, the trial court would necessarily have denied it on the ground that there was probable cause to arrest petitioner for the homicide, based on Toussaint's statement, and that, therefore, People v. Jenkins,122 Cal.App.4th 1160 (2004) [holding that the remedy for a McLaughlin violation was suppression of evidence of a confession]was distinguishable. All of the evidence before the state court was that Toussaint's statement was unreliable. (See next page.) The police had no confidence in the truth of the story that Toussaint told them in September 2008, as shown by the fact that, as of February 2009, they had not sought a warrant for petitioner's arrest, based on it, or even questioned him about the shooting. For

all the record shows to the contrary, they might never have arrested petitioner or prosecuted the case, but for the arrests of the two men in February for the misdemeanor gun violation, which enabled them to detain petitioner and obtain his confession. There are a number of reasons for saying that Toussaint's statement was unreliable:

(A) When the police interrogated Toussaint, all the evidence they had as to who committed the shooting was that his car was involved; therefore, he was the prime suspect and had an obvious motive to seek to exonerate himself by naming someone else as the culprit. (See People v. Campa, 36 Cal.3d 870, 882 (1984) ["Information received from sources who are themselves the focus of pending criminal charges or investigations is inherently suspect"].)

(B) Toussaint did exactly that: Sgt. Jones testified that it was only at the end of a 6-hour interrogation that he admitted to driving the car from which the shots were fired, and in the meantime he claimed that he was in San Francisco and that his car was in the possession of a third party. (ER 609-610, 636-637; see 1928-2068 [transcript of Toussaint's statement])

(C) Toussaint had a criminal record for a firearm offense. His rap sheet contained an entry for an arrest of April 13, 2007, by the Oakland Police Department for carrying a loaded firearm, which resulted in the filing of a

complaint No. 528861 for violations of Penal Code sections 12025, subdivision (b), and 12031, subdivision (a) [now section 25850], the former of which was dismissed when he pleaded guilty to the latter on July 12, 2007. (ER 1871-1882)

(D) Most importantly, the police had no evidence corroborating Toussaint's story– absolutely no other evidence that petitioner was the shooter or even present at the shooting; on the contrary, all the evidence they had was that he was *not* the shooter. Although the District Judge refused to expand the record to include the evidence of it, the police had interviewed the driver of the car in which Johnson was a back-seat passenger, Antione Knox, who was an eye-witness to the shooting, and he described the shooter in terms that were inconsistent with petitioner's appearance, and, shown lineups with petitioner's photo in them, he failed to identify him.

If the state courts had followed their own law (People v. Duvall, 9 Cal.4th 464, 474 (1995)) and issued an order to show cause and held an evidentiary hearing, and the respondent had argued that there was probable cause, based on Antione Knox's purported "identification" of the shooter, petitioner would have had occasion to prove that, in fact, Knox's description did not match petitioner's appearance, and he failed to identify petitioner's photos in photo-lineups, thereby negating Toussaint's statement that petitioner was the shooter.

The Memorandum Opinion (Appendix B, p. 6) rejected petitioner's argument that the District Court should have ordered expansion of the record to include evidence of Knox's description and non-identification in order to rebut respondent's argument, made for the first time in the District Court, that the description provided probable cause to arrest petitioner for the homicide – when, in fact, it did exactly the opposite. That evidence was not before the state courts, but the reasons that it was not were (A) the respondent did not argue in those courts that the description provided probable cause and (B) the state courts did not conduct evidentiary hearings at which, if the respondent had made that argument, petitioner would have introduced the contrary evidence that Knox's description did not fit him and that Knox failed to identify his photo in lineups. This was a highly appropriate instance for expansion of the record under Rule 7 of the Rules Governing Section 2254 Cases. It was not an instance in which the habeas petitioner sought to expand the record in order to present a new claim, not presented to the state court, or to bolster a claim which had been so presented, but merely an instance in which he needed for the first time to introduce additional evidence in order to rebut an argument made for the first time by the respondent. It was not an instance under 28 U.S.C. § 2254(e)(2) in which "the applicant has failed to develop the factual basis of a claim in State

court proceedings" – i.e., he was "at fault for the deficiency in the state-court record" (Williams v. Taylor, 529 U.S. 420, 433 (2000)) – and, therefore, he was not required to make a showing of diligence in developing the factual basis for a claim. (See id. at p. 435.) The case cited by the Opinion, Cullen v. Pinsholster, 563 U.S. 170 (2011), is inapposite because it concerned "new evidence" that was introduced at a District Court hearing to bolster a claim of ineffective assistance in failing to introduce mitigating evidence at a penalty trial. That case recognized that, under Rule 7, "state prisoners may sometimes submit new evidence in federal court ...." (Id. at p. 186.)

The District Court's denial of petitioner's motion to expand the record and the Ninth Circuit panel's upholding of that denial violated petitioner's Fifth Amendment right to due process, as well as his right to "appellate due process." (Griffin v. Illinois, 391 U.S. 12, 18 (1956).) The evidence which petitioner proffered clearly rebutted the District Court's and the panel's suppositions that the police had probable cause to arrest petitioner for the homicide when they failed to present him to a magistrate and, instead, detained him for the purpose of developing evidence of such cause, and that state court jurists could have found that the McLaughlin violation was "attenuated" by that supposed fact and distinguished People v. Jenkins, supra, on that ground. (Appendix A, p. 3; Appendix B, pp. 4-5)

3. The panel of the Ninth Circuit Court of Appeals failed to uphold petitioner's Sixth Amendment right to the effective assistance of counsel where counsel failed to make a motion to suppress evidence on meritorious McLaughlin grounds, by ruling that clearly established United States Supreme Court law does not require suppression for a McLaughlin violation (i.e., a *federal* court would not necessarily suppress the evidence), *even though California law does require suppression* (i.e., the state court would suppress the evidence), thereby erroneousy treating petitioner's Sixth Amendment claim as though it were a Fourth Amendment claim.

The Ninth Circuit panel ruled that petitioner was not denied his *Sixth* Amendment right to the effective assistance of counsel by the failure of his attorney to make a motion to suppress on McLaughlin grounds because U.S. Supreme Court law does not clearly establish that suppression is the remedy for a McLaughlin violation, thereby erroneously treating the claim as though it raised a *Fourth* Amendment issue:

> Even assuming deficient performance, a state court could reasonably conclude that Wooten was not prejudiced by his counsel's failure to file a motion under McLaughlin, because suppression was unlikely. In Powell v. Nevada, 511 U.S. 79 (1994), the Supreme Court left open whether suppression is an appropriate remedy for a McLaughlin violation. See id. at 85 n.*. And the Supreme Court has held that under AEDPA, "[i]t is not an unreasonable application of clearly established Federal law for a state court to decline to apply a specific legal rule that has not been

> squarely established by [the Supreme] Court." Richter, 562 U.S. at 101 (quotations omitted).
>
> (Memorandum Opn., Appendix B, p. 4.)

But the question was whether petitioner was denied his *Sixth* Amendment right because state law would have required suppression of the confession and, therefore, reasonably competent counsel would move to suppress it. (See, e.g., People v. Jenkins, supra, 122 Cal.App.4th 1160.) The question is whether it is reasonably probable that the motion, if made, would have been granted by a state-court judge. The question in the federal habeas proceeding was not whether the state court would have violated the *Fourth* Amendment by not applying the exclusionary rule to the McLaughlin violation, but whether petitioner's *Sixth* Amendment right to effective assistance was violated by counsel's failure to make a motion to suppress that the state court was reasonably likely to have granted – as the District Judge said he would have done.

The Memorandum Opinion dismissed petitioner's claim for the reason that, if counsel had made a motion to exclude petitioner's confession, federal constitutional law would not have required that the motion be granted. But the claim is that petitioner's federal constitutional right to the effective assistance of counsel was denied when counsel failed to make such a motion, and that he was

prejudiced by such denial because it is reasonably probable that the state court would have granted it on the ground of violation of petitioner's right to be brought before a magistrate without unreasonable delay when the police detained him for the express purpose of obtaining evidence to justify his arrest. Indeed, the District Judge found that petitioner's right was "clearly violated" and that "a motion to suppress very well might have been granted." (Appendix A, pp. 1, 2; Amended Order, ER 2325-2326; original Order, ER 2263, 2264)

The question of the likelihood – or not – of the motion being granted only enters in when the habeas court decides whether the defendant was prejudiced by the failure of counsel to make the motion, and then the test is not whether it is "more likely than not" that the motion would have been granted but whether it is "reasonably probable" that it would have been. This Court held in Strickland v. Washington, 466 U.S. 668 (1984) that "a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case" (id. at p. 493); instead, "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (Id. at p. 694; see quotation from Kimmelman v. Morrison, supra, 477 U.S. 365, 375 (1986) at fn. 1, p. 14, supra.)

"Meritorious" does not mean "certain to be granted" but merely that there is a "reasonable probability" that the motion will be granted. (Belmontes v. Brown, 414 F.3d 1094, 1121 (9th Cir. 2005) ["To satisfy Strickland's prejudice prong in a Fourth Amendment context, Belmontes must demonstrate a reasonable probability that a motion to suppress would have succeeded"], citing Kimmelman, supra, at p. 375; see Wilson v. Henry, 185 F.3d 986, 990 (9th Cir. 1999) ["had his counsel filed the motion, it is reasonable that the trial court would have granted it as meritorious ...."], followed in Boyde v. Brown, 404 F.3d 1159, 1173 (9th Cir. 2005).) The Third Circuit has required that it be "likely" that a motion to suppress would succeed (Thomas v. Varner, 428 F.3d 491, 502 (3d Cir. 2005), but a "reasonable probability" does not mean "more likely than not." (Strickland, supra, 466 U.S. at p. 693.) The Fifth Circuit has applied the test of whether a "Fourth Amendment claim had an appreciable chance of success." (United States v. Cavitt, 550 F.3d 430, 440 (5th Cir. 2008).) It is not ineffective assistance to fail to make a motion to suppress evidence that would be "meritless," "unmeritorious," "unlikely to succeed" or "likely to be denied" but that is not this case, in which there was, at the very least, a reasonable probability that the motion would succeed – propositions with which no reasonable jurist could disagree.

Although the basis for the motion in the trial court would have been that petitioner's Fourth Amendment right was violated, no such motion was made, and the basis of his claim on state and federal habeas corpus was that his Sixth Amendment right was violated by the failure of trial counsel to make the motion, which the state court would have been reasonably likely to have granted. Whether or not a federal trial judge would have denied the motion under United States Supreme Court law is irrelevant to the question of whether it is reasonably probably that a state trial judge would have granted it under the state exclusionary rule of People v. Jenkins, supra,124 Cal.App.4th 1160, 1176.

Ultimately, the question is not whether reasonable state court jurists might have denied the Fourth Amendment motion to exclude evidence but whether any such jurist could reasonably find that no competent counsel would make such a motion because there was no reasonable probability that it would be granted.

4. The Ninth Circuit panel violated petitioner's Fifth Amendment due process rights by setting the appeal for oral argument and then deeming oral argument to be unnecessary, *before he had filed his Appellant's Reply Brief*, thereby apparently deciding the merits of the appeal without considering the Reply Brief.

The Attorney General's Answering Brief on behalf of the respondent Warden (Dkt# 37) was electronically submitted for review on December 12, 2019, and was filed on December 16, 2019. At the same time, the Attorney General was ordered to file 6 copies of that brief in paper format (Dkt# 39).

Petitioner filed a formal motion for an extension of time to file his Appellant's Reply Brief until February 5, 2020 (Dkt# 44), which was granted on January 7. (Dkt# 45)

Even though the Reply Brief had not been filed and was not yet due, the court issued a notice on January 17, 2020, that "This case is being considered for an upcoming oral argument in San Francisco ... for May 2020 and the 2 subsequent sitting months in that location." That notice stated "you will receive notice that your case has been assigned to a calendar approximately 10 weeks before the scheduled oral argument date." (Dkt# 46)

On January 29, 2020, petitioner filed a second motion for an extension of time to file the Reply Brief until March 6 (Dkt# 47), which was granted on February 4. (Dkt# 48) On March 1, 2020, the court issued a notice of oral argument on May 15. (Dkt# 49) That was "10 weeks before the scheduled oral argument date" but before the Reply Brief was filed or due.

On March 4, petitioner electronically submitted a 47-page, 12,592-word Reply Brief *for review* (Dkt# 52), along with a Motion to File Oversized Brief (Dkt# 51) According to the court's online Docket, this motion was granted by a "clerk order" on March 23 (Dkt# 53), but neither petitioner's attorney nor the Attorney General received an email notifying them of that order (see Appendix D, p. 2), *and there is no indication in the Docket that the brief was actually reviewed, found acceptable for filing, or filed, and it was not filed until April 27.* (Dkt# 55) Petitioner's attorney discovered the order only by reviewing the online docket on April 20, when he received the order referred to in the next paragraph, even though he had not been directed to do so. (Compare Dkt# 55 with Dkt# 39) When he did discover the order, he mailed paper copies of the Reply Brief for filing on April 21 see Appendix D, p. 2), which were received on April 27 (Dkt# 58) Then, on April 27, according to a "clerk order," entered at 2:03 p.m., the electronic Reply Brief was filed but "No paper copies are required at this time."

(Dkt# 55) But the paper copies which had already been mailed were received and filed on the same date and "sent to panel" at 4:44 p.m. (Dkt# 58) Thus, the Reply Brief was filed and sent to the panel 18 days before the scheduled oral argument. These facts suggest an indifference on the part of the court as to whether or not petitioner filed an overlong Reply Brief or not and whether or not he filed paper copies were filed – unlike the seven copies required of the Opening and six of the Answering Briefs (cf. Dkt## 26, 39) – implying that the court had already made a decision without reference to the Reply Brief.

That implication was supported by the fact that on April 20 – one week before the electronic filing of the lengthy Reply Brief and the filing of the paper copies of the Brief – the clerk filed an order that "The Court is of the unanimous opinion that the facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument" and that "This case shall be submitted on the briefs and record, without oral argument, on May 15, 2020 ...." (Dkt# 54)

On April 27, petitioner filed a Motion to Transmit Exhibit (Dkt# 57) – People's trial Exhibit 20, a recording of crime-scene security-cameras videos, showing the homicide and surrounding events – which was relevant to the issue of whether, as argued by the Attorney General, the police had probable cause to

arrest the petitioner based on "the surveillance video" (Appellee's Answering Brief, Dkt# 37, 39, pp. 3, 36, 45, 46, 49, 55) but which, petitioner argued, gave no hint as to the identity of the perpetrator, apart from the fact that he was African-American. (Appellant's Reply Brief, Dkt.# 52, 55, pp. 21-22, 23, 44; see ER 1223-1226.) Petitioner offered to provide the court with a copy of the recording "upon request." (Dkt# 57, p. 3) On April 29, this motion was granted (Dkt# 60), but petitioner was not asked to provide a copy. The facts that the court had already decided on April 20 that the facts were adequately presented in the record, and that the Exhibit or a copy was not actually transmitted or provided to the Court indicate that the court's review of the record and decision did not include viewing the video-recording.

The appeal was submitted on the briefs without oral argument on May 15 (Dkt# 63), and a Memorandum Opinion was filed on May 19 (Dkt# 64).

The fact that a decision as to the need for oral argument was made before the briefing was complete and without a complete record, and that ordinarily there are a number of months between completion of briefing and scheduling of oral argument raises a question as to whether a dispositive decision had been made without the benefit of such briefing and record.

According to The Appellate Lawyer Representatives' Guide to Practice in the United States Court of Appeal for the Ninth Circuit, pages 16-17:

> E. WHAT HAPPENS AFTER MY CASE HAS BEEN ASSIGNED TO A PANEL? After the cases have been assigned to the panels, the briefs and excerpts of record in each case are distributed to each of the judges scheduled to hear the case. The documents are usually received in the judges' chambers twelve weeks prior to the scheduled time for hearing,[2] and it is the policy of the Court that each judge read all of the briefs prior to oral argument.
>
> 1. ORAL ARGUMENT ...
>
> a. How long does it take from the time of the notice of appeal until oral argument? ... For non-priority ... appeals, cases are typically scheduled for oral argument 12 months from the notice of appeal date. If briefing isn't delayed, this is typically approximately 6-10 months from completion of briefing.[3] For a criminal appeal, cases

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[2] Which, in this case, would have been about February 21, 2020, approximately two weeks before petitioner's Reply Brief was due and submitted for review, a month before the order granting leave to file an oversized brief, and about 9 weeks before that brief was actually filed.

[3] In this case, before the completion of briefing.

are typically scheduled for oral argument approximately 4-5 months after briefing is complete.

Thus, it appears that – rather than to proceed step-by-step, from completion of briefing to delivery of the briefs from the clerk's office to the judges' chambers, reading of the briefs, and setting for oral argument generally some 12 weeks thereafter – in this case the matter was set for oral argument on May 15 and about 12 weeks earlier, in mid-February, the decision-making process began and had progressed to the point by March 1 that a date was set for oral argument (on May 15) before the Appellant's Reply Brief was due (March 6) or had been filed, and between the time that the Reply Brief was submitted for review (March 4), leave was granted to file it (March 23), and it was actually filed (April 27) and before a relevant exhibit was transmitted (April 29), a determination had already been made (on April 20) that "the facts and legal arguments are adequately presented" in the incomplete briefing and record. Those facts and the fact that the Memorandum Opinion was filed four days after the date set for argument, imply that the Opinion had been written by April 20. Thereafter, petitioner's combined Petitions for Rehearing and Rehearing En Banc were denied at nearly the first opportunity. (See Appendix D, pp. 4-5)

This "rush to judgment" did not accord with petitioner's right to appellate due process.

Conclusion

Certiorari should be granted so that the Court can clarify that, when a prisoner seeks relief on habeas corpus from a state-court judgment on the ground of denial of his Sixth Amendment right to the effective assistance of counsel by the failure of counsel to make a motion to suppress evidence on Fourth Amendment grounds, the question is not whether Supreme Court law would have required suppression of the evidence but whether there is a reasonable probability that the state court would have suppressed it.

Alternatively, the matter should be remanded to the Ninth Circuit or District Court for application of the proper standard, considering all the evidence that would support the granting of the motion, including evidence that petitioner was not able or called upon to present in the state court until the respondent made an argument in the federal court that such evidence would rebut.

Dated: September 21, 2020

/s/ Richard Such
_____
RICHARD SUCH
Counsel of Record for Petitioner