No. 20-6940

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

ELLERY DENNIS THOMAS — PETITIONER
(Your Name)

vs.

RAYMOND MADDEN, Warden, et al — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Ellery D. Thomas, AY1209
(Your Name)

CMF, I3-327, P.O. Box 2500
(Address)

Vacaville, CA 95696-2500
(City, State, Zip Code)

(Phone Number)

Questions Presented

1. Under the IV amendment of the U.S. Constitution, if the state, fails to provide an opportunity for a full and fair litigation of an unconstitutional warrant for search-seizure by prosecutor never mentioning it to the jury, never producing it to the jury for foundation, and it was never mentioned by trial or appellate counsel, and prose prisoner has never seen it, is this still a "Brady and progeny" violation?

2. Due to ineffective assistance of appellate counsel's lack of constitutional claims; pro se prisoner brings substantial evidence in support of those claims, does that evidence become constitutional merits and worthy to be reviewed?

Questions Presented

7. After resentencing by a Remittitur shall a pro se prisoner be entitled to a new direct appeal, and due to ineffective assistane of appellate counsel pro se prisoner was denied that right, may pro se prisoner still apply for a new direct appeal?

8. Should not any merit claiming "Fraud on the Court be taken seriously to avoid implicating the Courts themselves?

9. If prosecution should not be held to have "access" to any information that an agency not involved in their investigation or prosecution of the case refuses to turn over, but if prosecution uses information in a trial it claims was sent to or received from that agency, should not prosecution now be held to have "access" and prosecutorial liability?

10. The Dist. Ct. claims to have made a de novo determination

Questions Presented

3. If prose prisoner was denied rights under the IV, V, VI, IX and XIV amendments of the U.S. Constitution, does he or she have to still claim actual innocence to be heard or is miscarrige of justice enough?

4. If the Court issues an Order For Temporary Removal Of Prisoner and It Is Further Ordered and directed to return to same prison after Remittitur hearing, but prisoner is not, does the date of finality begin on the date of new amened abstract of judgment and resentencing or when prisoner is returned?

5. May prisoner receive the time differance as equitable tolling?

6. May a judge waive a prisoner's rights without consent?

of the superseding Report and Recomendations of U.S. Magistrate Judge, but is not de novo review of trial record?

11 Since when is merits claiming ineffective assistance of trial and appellate counsels, prosecutorial vindictiveness and misconduct, forgery, fraud, fraud on the court, perjury and pretense of ownership, invalid search warrant and improper search and seizure, bald self-serving allegations as Dist Ct stated?

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:

RELATED CASES

Bulos Zumot v. Dean Borders, Warden, 3:19-cv-01378
U.S.D.C Northern. Judgment entered Sep. 2, 2020

Ortiz v. Ryan, No. CV-17-00623, U.S. District
Court for the District of Arizona Judgment entered Nov. 8, 2019

Mitchell v. Fox, No. 16-cv-03885, U.S. Dist. LEXIS
26445. Judgment entered Feb. 24, 2017

Harrington v. Richter, 178 L.Ed 2d 624,
No. 09-587 Judgment entered Jan. 19, 2011

U.S. v. Zuno-Arce, No. CV98-2930. US District
Court for Central District of California. August 25, 1998

Related Cases (Continued)

Wiggins v. Smith, NO. 02-311, Supreme Court of the United States Judgment entered June 26, 2003

Abu-Jamal v. Horn, U.S. District Court for Eastern District of PA, U.S. Dist. LEXIS 20812 Judgement entered Dec. 18, 2001

U.S. v. Wolfenbarger, U.S. Dist. LEXIS 115764 Judgment entered July 11, 2019

Simpkins v. Holland, U.S. Dist. LEXIS 47040 Judgment entered Jan. 26, 2017

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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 August 6, 2020.

[ ] 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: ~~June 8, 2020~~ 08/06/2020, and a copy of the order denying rehearing appears at Appendix A.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including August 6, 2021 (date) on Jan. 6, 2021 (date) in Application No. __A____. See Nov 3, 2020 letter Court issued a 150 day extension on March 19, 2020

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

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

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

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

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

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2107 (a); Fed. R. App. P. 4(a)(1)(A), (c) Appendix A
Ninth Circuit Rule 42-1 Appendix A
Slack v. McDaniel, 529 U.S. 473, 484 (2000) Appendix A
28 U.S.C. § 2253 (c)(2) Appendix A
Gonzalez v. Thaler, 565 U.S. 134, 140-41 (2012) Appendix A
9th Cir. R. 27-10 Appendix A
Local Rule 5-4.1 Appendix B
28 USC § 2253 (c)
Fed. R. App. P. 22(b)
Rule 11(a) of § 2254
28 U.S.C. § 2253(c)(2)
28 USC § 2254
28 USC § 2244 (d)
Slack v. McDaniel, 529 U.S. 473 (2000)
529 @ 84
§ 2253
§ 2253 (c)
529 @ 485
28 U.S.C § 636
28 USC § 2244 (d)(1)(D)
Holland v. Florida, 560 U.S. 631, 649 (2010
Espinoza-Matthews v. California, 432 F. 3d 1021, 1027-28 (9th Cir 2005)
Lott v Mueller, 304 F. 3d 918, 924-25 (9th Cir. 2002)
Rhodes v. Kramer, 451 Fed. Appx. 697, 698 (9th Cir. 2011
Chaffer v. Prosper, 592 F. 3d 1046, 1049 (9th Cir 2010
Ramirez v. Yates, 571 F. 3d 993, 998 (9th Cir 2009)
Miller v Marr, 141 F. 3d 976, 978 (10th Cir)
525 U.S. 891 (1998)
Giraldes v. Ramirez, 1998 WL 775085 *2 (ND Cal Nov 3 1998
Waldon-Ramsey v. Pacholke, 556 F. 3d 1008, 1013 n. 4 (9th Cir)
Rasberry v. Garcia, 448 F. 3d 1150, 1154 (9th Cir 2006)

Lott v. Mueller, 304 F. 3d @ 924
Ford v. Pliler, 590 F. 3d 782, 790 9th Cir (2009
Schlup v Delo, 513 U.S. 298, 329 (1995)

Statement of the Case

This case represents the violation of a person's rights under the Fourth, Fifth, Sixth, Ninth and Fourteenth amendments to the United States Constitution. These miscarriages of justice came in the forms of invasion of privacy, suppression of exculpatory evidence, invalid warrant, invalid search and seizure, false and misleading evidence, failure to establish a chain of custody of evidence, violation of confrontational rights, ineffective assistance of trial and appellate counsel, prosecutorial vindictiveness and misconduct, fraud, forgery, fraud on the court, misprisons of felonies; pretense of ownership. These miscarriages of justice denied the Petitioner a full and fair opportunity to litigate Fourth amendment claims and actual innocence in state courts. Stone v. Powell, 428 US 465, 494, 49 L.Ed 2d 1067, 1088, 96 S. Ct. 3037 (1976) (Please refer to case notes); Calwell v. Cupp, 781 F. 2d 714 (9th Cir. 1986) (Please refer to case notes). These merits of fact infected the adversarial system with unfairness as to make the resulting convictions a denial of due process.

On April 4, 2014, Daisy, my ex-wife and a designated witness against me, and I were preparing Andrea's two sons for bed at our home. Andrea was going to the Church to attend Praise dance rehearsal and return to spend the night because on April 5, 2014 we were going to Las Vegas, NV for Daisy's son's birthday.

Daisy took off Andrea's youngest son's tee shirt and called Andrea into the bathroom. When Andrea arrived, Daisy asked her "what is this? Daisy was indicating a mark on the boy's stomach. Andrea answered, "Oh, that's eczema." Daisy slapped her. This was a case of assault and battery, and a case of domestic violence rolled into one quickly. Daisy screamed, "That is not eczema! That is a burn! How did it get there?" I can not remember verbatim the rest of the conversation, but Daisy threatened Andrea with CPS due to the fact Daisy was a LCSW a1 and a mandated reporter. I calmed the situation down as best as possible given the circumstances. Andrea went to the rehearsal and the rest of the evening was quiet for the most part. When Andrea came back there were no other instances, but Daisy and Andrea did talk.

The next morning Daisy left to teach anger management and parenting classes. Daisy left Apple Valley, CA usually by 8:30 AM to start the classes at 9:00 A.M in Victorville, CA and she liked to be a little early. She was to return at 1:30 P.M. and we were to leave for Vegas. At 9:00 A.M., I got out of bed and approached Andrea about sex. Andrea was willing as this was our usual get together time. At approximately 9:15 A.M., Andrea came into the room fully clothed with the cell phone, I lent to her in her hand. We talked causally. Every thing was good and I asked her to take off her clothes. She complied and folded her clothes as she took them off in my bedroom, not the bathroom as she would later testify to doing. It was nice and quiet and I had an expectancy of privacy. I was in my own home. I thought I was secure. I had a willing sexual partner who was undressing at the foot of my bed. Then the boys started crying. Where the cellphone was at this time I do not know, but when I asked Andrea to put on my robe and see about the boys, she left the bedroom wearing my robe on carrying her folded clothes and carrying the phone in her left hand.

When Andrea returned, she was empty-hand with the robe open. We started getting back in the mood. She got on the bed. I was just laying there. She moved toward me. I reached for her and she said, "No" and it all went downhill from there. Please note that nothing before the "No" was presented into evidence that was favorable to me; that would have verified I believed I was in a consentual relationship. I admit to saying some terrible thing, but the activites before the "No" could have possibily lead some jurist to understand why, while still disagreeing with my verbal behavior, verbally aggressive behavior. She said, "No" and I complied. There is no sexual activity on the recording. No licking, slurping, sucking, moaning, rustling of sheets or any bouncing of the bed. There was no rape; there was no physical force. The recording should have ended with the door opening and Andrea's oldest son rushing in; climbing on the bed and all of us talking. There is between 26-36 minutes missing from recording. Trial counsel ineffective in challenging or questioning downloader.

Federal Rules of Evidence (FRE) 901(a), evidence sufficient to support finding that matter in question is what its proponents claims satisfies requirement of authentication or identification; in other words, there must be prima facie evidence that item is what it is purported to be. The only indentification prosecution had was the testimony of Andrea, the alleged victim and perpetrator of the invasion of privacy. No expert witness was called. While the exclusionary rule does not apply to evidence seized by private individuals, The Court should still take into account whether the party performing the misprison of felony intended to assist law enforcement efforts or to further the party's own end. U.S. v. Blocker, 104 F.3d 720, 725 (5th Cir. 1997) (see scheme to defraud); U.S v. Young, 153 F. 3d 1079, 1080 (9th Cir 1998). Another consideration is whether the prosecution offered the private party, Andrea, a reward U.S v. Hall, 142 F. 3d 988, 993 (7th Cir. 1998) Please take notice: There is no discuss of the burn on Andrea's youngest son or the assault and battery of Daisy on Andrea the night of April 4, 2014. Andrea testified to the jury that she drove to the house at 8:45 A.M or 9:00 AM and talked with Daisy, who was in another city teaching an anger management class that was approved by the San Bernardino County Probation Department. One can not be talking to some one personally in a Kitchen in Apple Valley when that person is in another city nor can some one drive themselves to where they are already at. Both are physically impossible. Prosecution must have given the ladies a reward for three misprisons as follows (1) invasion of privacy, (2) possible child abuse, assault and battery. This withheld evidence was favorable and material to Petitioner as to any charges against them is still unknown. However, this was prosecutorial misconduct using false testimony. The testimony of driving to the house that morning and talking to Daisy at 9:00 A.M was false and/or misleading. The prosecution must have known or should have known it was false and/or misleading. The material of the testimony evidence created fundamental unfairness. Napue v. Illinois, 360 U.S. 264, 79 S. Ct. 1173, 3 L. Ed 2d 1217 (1959); Panah v. Chappell, 935 F. 3d 657 (9th Cir. 2019).

Trial counsel showed "deliberate indifference" to Petitioner's version of the facts. Trial counsel refused to impeach witness about driving to Petitioner's home in the morning when she had been there all night. Trial counsel failed to raise any claims of Petitioner concerning the night of April 4, 2014. This was deficient performance and prejudicial. With 10 men on the jury, trial counsel failed to litigate invasion of privacy; California being a Two-Party state or prosecutorial vindictiveness (Petitioner exercised constitutional right refusing plea bargain) Lafler v. Cooper 566 U.S. @ 123 (2012) 132 S. Ct. 1376, 182 L. Ed 2d 398. Missouri v. Frye, 566 U.S. 134 (2012). These actions constitute ineffective assistance of trial counsel. The deliberate indifference to facts, deficient performance undermined the proper functioning of the adversarial process. Trial counsel's action or rather lack of actions failed to ensure a fundamentally fair trial.

Evidence used to convict Petitioner was seized by the product of unconstitutional search and seizure which trial counsel failed to tell petitioner about. Petitioner does not know if he knows about it. Mapp v. Ohio, 367 U.S. 643 (1961). Petitioner asked trial counsel to speak with family, especially oldest sister, Candace and her husband, Henry, there were no weekends or summer vacations described by Andrea and my other three sisters would agree. Plus other family matter concerning Andrea. Mr. Lee, trial counsel, assured me he would. He never did. Petitioner went to trial thinking family would stand up. At trial, they sat behind me. Mr. Lee never once acknowledge them. When prosecution asked the court about them, he still did not acknowledge them. This gave Petitioner the feeling of abandonment. They would visit, but a wall was between us, and after hearing in court that false and misleading and illegal audio recording it got worse. Some still don't talk to me. I didn't talk to them because I thought they were potential witnesses and I didn't want a recording at trial accusing me of witness tampering. Mr. Leo by his actions allowed substantial interference with Petitioner's witnesses' free and unhampered choice to testify and violated the due process rights of his own client. When such a violation of due process rights occur, a court must reverse the conviction without regard to prejudice to the defendant. Abu-Jamal v. Horn, U.S. District Court for Eastern District of PA U.S. Dist. LEXIS 20812 Judgment entered Dec. 18, 2001 Trial counsel was ineffective by failing to challenge the

Prosecution's lack of foundation before a sound recording is admitted into evidence. Foundation must be established under FRE 901(b)(5)(6) by showing that (1) recording device was capable of taking conversation offered into evidence; (2) operator of device was competent to operate it; (3) recording is authentic and correct; (4) changes, additions or deletions have not been made in recording; (5) recording was preserved in a manner that is shown in court; (6) speakers are identified; (7) conversation elicited was made voluntarily and in good faith without inducement. If the jury had the benefit FRE 901(a) and 901(b) the outcome would probably been different. Trial counsel was ineffective presenting only the one letter from the Board of Vocational Nurses and Psychiatric

Technicians (BVNPT) when there were two and refused to get the other one because "I won't need it." These actions were prejudicial to Petitioner because allowed the witness to produce a forgery and commit fraud on the court. It gave false credibility to Andrea while undermining the credibility of the petitioner. To make matters worse, Mr Lee violated attorney-client priviledge by giving Izazaga Protected, court protect, information to the Prosecution against explicted and implicted request of Petitioner. This gave rise to the Prosecutor going to Detective Quintard, the Prosecutor's investigator, going to Andrea for the second BVNPT letter. Now, Andrea has not been truthful from day one. She testified that she drove to a place she was already at. Andrea whips up a letter.

A letter, if Prosecution really wanted the truth, Prosecution could have received via email in less than one hour and had a certified copy of a notarized letter instead of a unsigned forgery, by simply picking up a phone, and calling the BVNPT in Sacramento, CA. It could have been faxed, but it would have been certified. When Andrea was on the witness stand, Prosecution vouched for Andrea's credibility. Prosecution vouched for the unsigned letter before submitting it into evidence. To make matters worse, Mr. Lee accepted it; Knowing it was a forgery with "deliberate indifference." Mr. Lee failed to stop the forgery and he failed to stop the prosecutorial misconduct of improper vouching. This ineffectiveness due to "deliberate indifference" caused deficient performance.

and prejudice so serious as to deprive Petitioner of a fair trial. The trial counsel's performance was deficient of the counsel guaranteed to Petitioner by the Sixth amendment. U.S. v. Elem, 269 F.3d 877 (7th Cir. 2001); Danielle v. Adriazola, 284 F. Supp. 2d 1368; Hobbs v. Cappelluti, 899 F. Supp. 2d. 738.

Trial counsel's failure to impeach prosecution witness by using police report to impeach officer's testimony.

Detective Quintard testified the recording he received from Andrea, by "And is that a true and accurate copy of the recording that Andrea provided you? He answered, "Yes." He was asked again by Prosecution, "And that in fact is a true and accurate copy?" He answed again "Yes." Prosecution asked, "Did you follow any unusual procedure in this case?" He answer was, "No."

Mr. Lee asked no questions on the audio recording at trial. He did ask, "And nothing of note was found on the cellphone?" and Detective Quintard answered, "No."

The police report Petitioner received was incomplete, but it did contain references that (1) Deputy Munoz received the cellphone from Andrea, (2) Deputy Munoz applied for the warrant on Andrea's cellphone (it was lent to Andrea) and (3) Detective Swan downloaded the audio recording and discussed the difficulty he had. Prosecution suppressed both officers and the role they took in the investigation from the jury. Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed 2d 215 (1963) Darden v. Wainwright, 477 U.S. 168, 91 L. Ed 144, 106 S. Ct. 2464 (1986); Donnelly v. De Christoford, 416 US 637, 643, 94 S. Ct. 1868, 40 L. Ed 2d 431 (1974). Mr. Lee

Knew or should have Known about the police report. Detective Quintard should not have been allowed to testify for the other officers. His testimony involved a corruption of the truth seeKing function of the trial process. The entire criminal justice system is built around the belief, and necessity, that law enforcement officers will testify truthfully. This deliberate, cynical flagrancy of official misconduct by law enforcement strikes at the very core of our system of law. It manipulates and thereby perverts the entire judical process. Daubert v. Merrel Dow Pharmaceuticals, Inc., 509 U.S. 579-592-93, 113 S. Ct. 2786, 125 L. Ed 2d 469 (1993); Kumho Tire Co. v. Carmichael, 526 U.S. 137, 147, 119 S. Ct. 1167, 143 L. Ed 2d 238 (1999); FRE 702; Indiviglio v. U.S., 612 F. 2d 624 (2nd Cir. 1971).

Trial counsel's failure to impeach Detective Quintard with prior statement for impeachment purposes. Detective Quintard testified at the Prop 115 Preliminary that, "As far as what? As far as like grunting or groaning or any thing? No, I don't believe I did..." At the trial, Mr Lee never asked about that or any thing concering the audio recording. Because Mr Lee conducted a minimal investigation, and other wise deceived Petitioner, Mr. Lee's representation was deficient and Petitioner's subsequent verdict warrants reversal. Mr. Lee presented little mitigating evidence even while much more potentially mitigated evidence was easily accessible. He defrauded the Court, He deprived the jury the opportunity to consider a substantial amount of mitigating evidence that competent counsel would drave and should have presented. If not for his deficient performance, there is a reasonable probability a different verdict would have been reached. In Re Kenneth Earl Gay on Habeas Corpus No. S130263 Cited as 2020 DJDAR 1151.

Under Federal Rules of Criminal Procedure, Rule 16 the government is required to provide discovery to a defendant where two elements are met (1) The information sought is within the government's possession, custody, or control, and (2) the information is material to the case (see 2019 U.S. Dist LEXIS 115764;: U.S. v. Wolfenbarger;: July 11, 2019 opinion) A criminal defendant, the Petioner, had raised a Fourth amendment violation in post-conviction proceeding under and through ineffective assistance of counsel for failure to raise or properly litigate the claim, Kimmelman v. Morrison, 477 U.S. 365, 91 L.Ed 2d 305, 106 S.Ct. 2574 (1986). The claim was the search warrant, but the heart of it was a Ninth amendment violation, "Pretense of Ownership," 71 F. 460, Sullivan v. Colby (7th Cir. Jan. 6, 1896).

"Now in the strict sense, there cannot be any lawful possession by any one, under any circumstances, as against a true owner. There cannot be two antagonistic rights to the same specific property. Right, like truth, is necessarily one and indivisible. Any possession antagonistic to that of the true owner must be found wrong." McIntire v. Pryer, 10 App. D.C. (Feb. 16, 1897)

The cellphone was mine. It was lent to Andrea. I established the account in my name to give Daisy a cellphone for her birthday in 1996.

"Every person to whom property has been entrusted who fraudulently appropriates that property to [her][his] own use or purpose, is guilty of the crime of theft by embezzlement" 2017 U.S. Dist. LEXIS 47040; Simpkins v. Holland; Jan. 26, 2017. "Legal possession of a seized good is not a substitute for a factual finding that the owner of the good had a legitimate expectation of privacy in the area searched" U.S. v. Zermeno, 66 F. 3d 1058, 1061 (9th Cir. 1995).

"Searches implicate expectation of privacy in the places or things searched. Possessory interest are often important in deciding who has standing to challenge a search because of our society's shared belief that, to a greater or lesser extent, ownership carries with it a right to exclude. Ownership creates, in other words, an expectation of privacy that society is prepared to recognize as reasonable. The Fourth amendment protects this expectation." U.S. v. Powell, 929 F. 2d 1190, 1194-95 (7th Cir. 1991)

Mere physical possession or control of property is not sufficient to establish standing to object to a search of that property. Property interests protected by the Fourth amendment include (1) I never abandoned the cellphone; (2) I had standing to challenge the search of cellphone; (3) I was denied the right to a full and fair opportunity to challenge the search or the warrant for the cellphone; (4) I had a reasonable expectation of privacy U.S. v. Conway, 73 F. 3d 975, 979 (10th Cir. 1995). If a search or seizure is conducted pursuant to a warrant, the defendant bears the burden of demonstrating that the warrant is invalid once its existence has been proven." Frank v. Delaware, 438 U.S. 154, 155-56, 57 L.Ed 2d 667, 98 S.Ct. 2674 (1978); U.S. v. Burston, 159 F.3d 1328, 1333 (11th Cir. 1983); U.S. v. Box, 193 F.3d 1032, 1034-35 (8th Cir. 1998); Berger v. New York, 388 U.S. 41, 51, 87 S.Ct. 1873, 18 L.Ed 2d 1040 (1967); People v. Acevedo, 209 Cal App. 4th 1040 (Oct. 3, 2012 opinion citing Berger v. New York). U.S. v. Kiser, 716 F.2d 1268 (Mar. 18, 1983).

The Fourth amendment right to privacy is enforceable against the states through due process clause of the Fourteenth amendment - restrictions on states. If trial counsel had not failed to raise or properly litigate the

Pretense of Ownership claim under the Ninth amend; the search warrant claim under the Fourth amendment; the due process claim under the Fourteenth amendment, there is a reasonably probability the results of the proceeding would have been different.

Petitioner has demonstrated cause for default by ineffective assistance of counsel, and actual prejudice as a result of the violations of federal law. Petitioner has demonstated that failure to consider the merits would result in a fundamental miscarriage of justice Coleman v. Thompson, 501 U.S. 722, 750, 111 S. Ct. 2546, 115 L. Ed 2d 640 (1991).

Petitioner's appeal was an exercise in miscarriage of justice. Appellate counsel failed to raise significant and obvious issues such as: (1) Ineffective assistance of counsel, prosecutorial vindictiveness, prosecutorial misconduct, invalid warrant, improper search and seizure, denied right to present a full defense by calling witnesses, fraud, fraud on court, forgery, perjury and pretense of ownership. Failure of this magnitude should be considered deficent performance. When appellate counsel fails to raise significant and obvious issues, failure will generally be considered deficient performance under Strickland, supra, 466 U.S. 668 if the missed issues are "clearly stronger than those presented" Gray v. Greer, 800 F. 2d 644, 646 (7th Cir. 1985), quoted with approval in Smith v. Robbins, supra, 528 U.S. @ p. 288, and where "an issue which was not raised may have resulted in a reversal of the conviction, or an order for a new trial, the failure [is] prejudical" Gray v. Greer, supra, @p. 646.

Appellate counsel's failure to advise Petitioner to the right to challenge resentencing and advising to start federal habeas corpus was deficent performance. The advise was prejudical as it give cause to Petitioner to fail exhausting meritorious merits. A petitioner's reasonable confusion about whether a state filing would be timely will ordinarily constitute good cause for Petitioner to file in federal court. If Petitioner had good cause for failure to exhaust; unexhausted claims were potentially meritorious; there is no indication Petitioner engaged in intentionally dilatory tactics, the District Court should stay, rather than dismiss the mixed petition. Pace v.

DiGuglielmo, 544 U.S. 408, 125 S. Ct. 1807, 161 L.Ed 2d 669 (2005) (see case notes). Reinstatement of appeal is appropriate remedy of ineffectiveness of assistance of appellate counsel where counsel failed to litigate Petitioner's claims. Due process guarantees Petitioner the right to effective assistance of counsel on first direct appeal. Evitts v. Lucey, 469 U.S. 387, 83 L.Ed 2d 821, 105 S. Ct. 830 (1985); Lofton v. Whitley, 905 F.2d 885 (5th Cir. 1990); Lombard v. Lynaugh, 868 F.2d 1475 (5th Cir. 1989). Appellate counsel's filing of frivolous claims amounted to no counsel at all, which actually or constructively denied Petitioner of the right to appellate counsel, and the prejudice prong of the Strickland test is not required.

Petitioner believes rights to a fair trial and due process were violated by District Court and magistrate judge. Magistrate exceeded jurisdiction and authority under the Federal Magistrate Act 28 U.S.C.S. § 631 et. seq. Petitioner's habeas corpus never consented to proceed before a magistrate judge. See 28 U.S.C.S § 636 (c) "Not withstanding any provision of law to the contrary — (1) Upon the consent of the parties... Upon the consent of the parties, pursuant to their specific written request.. (2)... shall also advise the parties that they are free to withhold consent without adverse substantive consequences. Rules of Court for reference of civil matters to magistrates [" "] shall include procedures to protect the voluntariness of the parties' consent. Petitioner gave no consent. Petitions for writs of habeas corpus may be referred only for evidentiary hearing, proposed findings and recommendation. Magistrate judge failed to find merits of ineffective assistance of trial counsel; ineffective assistance of appellate counsel; prosecutorial vindictiveness; prosecutorial misconduct, invalid warrant; improper search and seizure; forgery; fraud; fraud on the court; perjury; denied right to present a full defense by calling witnesses and pretense of ownership worthy for an evidentiary hearing or violations of the Fourth, Fifth, Sixth, Ninth, and Fourteenth amendments of the U.S. Constitution. Failure to consider these merits are a fundamental miscarriage of justice. Instead the Magistrate took the Deputy AG's Motion to Dismiss with

Prejudice for time-barred. The Ninth Cir. and the District Court all agreed with the the AG and the Magistrate that the date of finality was January 30, 2018. However, Petitioner was resentenced and given a new amended abstract of judgment on April 24, 2018 resetting habeas statute of limitations to run from conclusion of delayed appeal 129 S. Ct. 992, 173 L. Ed 2d 287(2009) Petitioner final date should have been April 24, 2019 plus all equitable and statutory tolling the AG stated Petitioner was entitled. Petitioner was not time-barred. Petitioner was timely. Federal Rules of Civil Procedure 15(a) provides that leave to amend "Shall be freely given when justice so requires" this mandate is to be heeded. The S. Ct. has interpreted Rule 15(a) and confirmed the liberal standard district courts must apply when granting leave. In Foman v. Davis, 371 U.S. 178, 83 S.Ct. 227, 9 L.Ed 222 (1962). . . "the leave sought should, as the rule requires, be freely given."

Where district court relies entirely on state court record in ruling on petition of habeas corpus and does not hold evidentiary hearing, reviews of district court's decision by Court of Appeals is plenary Satterfield v. Johnson, C.A.3 (PA) 2006, 434 F.3d 185; In re Meyer, U.S. Dist. Ct. of Third Cir.: Feb 4, 2019 opinion 596 B.R. 112 plenary; "Where the proof can be fully developed, questions answered, issues clearly focused and facts definitively found"

Isaiah 59:4 "No one calls for justice, nor does any plead for truth. (NKJV). Petitioner has and still does. The merits has made a substantial showing of denial of several constitutional rights. The District Court and the Court of Appeal have not given full consideration to the substantial evidence which Petitioner has put fourth in support of merits that requires exhaustion. Failure to do so is a fundamental miscarriage of justice.

REASONS FOR GRANTING THE PETITION

1. United States Court of Appeal has entered a decision in Conflict with the S.Ct.; the 11th Cir and itself. Petitioner was resentenced On April 24, 2018 resetting habeas statute of limitation to April 24, 2019 plus any and all equitable tolling. Petitioner was not time barred.

2. Court has departed from the accept and usual course of judicial proceeding. The Ninth Cir. stated: "Pro se litigants could not be held to the same technical standards as litigants represented by counsel and Dist Ct. should construe pro se habeas petition as a motion to amend at least once that a valid claim may be stated. Petitioner give merit of ineffective assistance of trial counsel and appellate counsel and fraud on the Court.

3. Ineffective assistance of trial and appellate counsel were the causes for Petitioner's failure to exhaust merits

4. Trial counsel by his actions, allowed substantial interference with Petitioner's witnesses' free and unhampered choice to testify violating the due process of his own client

5. Ninth Circuit entered a decision in conflict with S.Ct and self denying Petitioner a full and fair opportunity to litigate Fourth amendment claims and actual innocense in state Cts. per Stone v. Powell, Federal Rules of Evidence (FRE) 901 (a); 901 (b) (5) (6); Federal Rules of Criminal Procedure, Rule 16, Ninth and Fourteenth amendments to U.S. Constitution

6. Under 10(c) Should not any and all merits claiming fraud on the Court be taken seriously to avoid implicating the Court itself

7. Generally, Cts should not dismiss claims contained in a complaint filed by prose litigant without granting leave to amend it at least once if Complaint gives any indication a valid merit / claim may be stated: Fed R. Civ P 15(a) 2

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Date: January 6, 2021