20-7316

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

JOSELUIS MORALES — PETITIONER
(Your Name)

vs.

STUART SHERMAN — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United States district Court, Central District of California
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Joseluis Morales #P63392
(Your Name)

RJ Donovan Correctional Facility
480 Alta Rd.
(Address)

San Diego, CA 92179
(City, State, Zip Code)

N/A
(Phone Number)

QUESTION(S) PRESENTED

1. Does the Sixth Amendment right to effective counsel on appeal apply to a case when the appeal takes place years after conviction and the defendant had a state statutory right to appeal a post judgment ruling and it was the defendant's first appeal?

2. Did the district court abuse its authority by not addressing state precedent used to rebut the assumption of a summary denial being on the merits as explained in Johnson v. Williams (2013) 568 US 289 and in Harrington v. Richter (2011) 562 US 86?

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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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

[X] 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,
[X] is unpublished.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,
[X] is unpublished.

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

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

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[ ] is unpublished.

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

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[ ] is unpublished.

JURISDICTION

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

The date on which the United States Court of Appeals decided my case was 11-23-20.

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

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

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

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

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

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

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

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

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Sixth Amendment:

The Assistance of Counsel.

STATEMENT OF THE CASE

This matter pertains to whether effective assistance of counsel is guaranteed by the Sixth Amendment on a first appeal even though the appeal took place over a decade later after sentencing and appellate counsel was appointed by the state court. The District Court ruled that it did not because the Supreme Court had not ruled on the issue.

On December 13. 1999, in a cause then pending in the California Superior Court for the County of Riverside, titled PEOPLE v. MORALES, case number RIF081595, the Petitioner was sentenced to a plea bargain of 29 years to life with the possibility of parole, for first degree murder and a gun enhancement. At the time of the offense, the Petitioner was a juvenile offender, 17 years old, and a junior at his high school. The Petitioner was a first time offender with no prior delinquent record.

In September of 2012, the Petitioner appeared before a prison classification committee for an annual review. During this hearing, the Petitioner was asked whether he would like to "go do your time in Mexico." The Petitioner inquired why he was being asked and a committee member replied that there was an INS-ICE hold. The Petitioner declined the offer and explained that his whole family lived in the United States and were citizens of the United States and that he had lived in the United States since he was a month old when his parents brought him.

At the time of Petitioner's plea bargaining process and sentencing, he had not been given notice of immigration consequences as part of the plea bargain. With due diligence, the Petitioner discovered that under state law, criminal attorneys were required to give their clients immigration warnings if their clients were not natural citizens, before advising their clients to accept a plea bargain. See California Penal

Code, section 1016.5(b).

Prior to being sentenced under the plea bargain, the Petitioner made an informal request to the court to withdraw his plea and requested for a Marsden hearing due to conflict with trial counsel. The trial court releaved trial counsel and scheduled for Marsden proceedings, appointing new counsel to the Petitioner. When the Petitioner met with his Marsden counsel, the Petitioner explained that trial counsel had pressured him to accept the plea bargain when trial counsel refused to prepare for trial and told the Petitioner to prepare his own defense, meeting with Petitioner on three occassions to convince the Petitioner to accept the plea because the Petitioner "had to" with no explanation. The Petitioner also explained to the Marsden counsel that in attempting to prepare his own defense that he asked trial counsel to set up a psychological evaluation because he suffered from post traumatic stress disorder after witnessing his mother stabbed to death when he was eight years old. Unknown to the Petitioner at the time, the symptoms had increased months prior to the offense after witnessing two killings while walking to the supermarket prior to turning 17 years old. The Petitioner explained to Marsden counsel that trial counsel told him that there were no funds for a psychological evaluation. The Petitioner told his Marsden counsel that the day he had accepted the plea bargain that he had not read it and that he had signed or initialed wherever trial counsel told the Petitioner to sign or initial and that he had done so with tears in his eyes.

On December 13, 1999, prior to sentencing, the Marsden hearing took place. Petitioner's Marsden counsel filed moving papers to withdraw the plea based on that the Petitioner did not have an interpreter during the plea bargaining process. The Petitioner never told Marsden counsel that he

needed an interpreter. Trial counsel was required to testify during the Marsden proceeding regarding the plea bargaining stages. At one point, trial counsel admitted not knowing the Petitioner's place of birth. (Reporter's Transcripts (RT) at page 6) However, the topic of whether the Petitioner had been given immigration warnings prior to trial counsel advising the Petitioner to accept the plea bargain was not put in question by Marsden counsel nor the trial court when Petitioner's birth place was addressed. (Id.)

Per state law, the Petitioner was allowed to file a motion to vacate judgment for not being warned of the immigration consequences. California Penal Code § 1016.5(c). In preparing a motion to vacate judgment, the Petitioner prepared a petition for writ of habeas corpus to raise claims of ineffective assistance of counsel against trial counsel and Marsden counsel, respectively, in support to the motion to vacate judgment. After filing both the motion and petition, the trial court denied both. On April 15, 2013, the Petitioner filed a timely notice of appeal since by state law the denied motion was an appealable order.

On July 22, 2015, appointed appellate counsel, Marilee Marshall, notified the Petitioner by letter of her appointment. On July 31, 2015, the Petitioner replied by letter, agreeing to Marshall's representation, and giving Marshall instructions to allow the Petitioner to revise any brief before finalizing for filing with the court. In this same letter, the Petitioner explained to Marshall about the claims of ineffective assistance of counsel. Marshall acknowledged the Petitioner's concerns regarding the claims of ineffective assistance of counsel. On September 3, 2015, Marshall filed the opening brief without giving the Petitioner the opportunity to revise the brief. California Court of Appeal, case number

E058677. On September 9, 2015, the Petitioner wrote to Marshall to inquire why she had filed without his approval; why the issues of ineffective assistance of counsel were not filed; and whether an addendum could be filed. Marshall did not respond to this letter.

Instead, the only issue raised by Marshall was based the interpreter not being present that the Marsden counsel had raised. In its opinion, the appellate court wrote that it did not understand why Marshall would try to revive a claim that was "meretricious". Opinion dated March 9, 2016, at page 7, case number E058677. The appellate court pointed out the fact the Petitioner had stated himself in the habeas corpus in support to the motion to vacate that the issue of an interpreter was baseless. Id. The appellate court recognized that the claims of ineffective assistance of counsel were not raised by Marshall, including the childhood trauma. Id., at footnote 6. Being that the interpreter issue was the only claim raised by Marshall, it denied the appeal, never addressing the motion to vacate judgment nor claims against counsel.

The Petitioner diligently filed for habeas corpus relief in the same appellate court where he raised claims of ineffective assistance of appellate counsel against Marshall for not raising the meritorious claims against trial counsel and the Marsden counsel that were incorporated with the motion to vacate the judgment. California Court of Appeal, case number E065697. On May 17, 2016, the appellate court denied relief without an opinion for the denial. On June 22, 2016, the Petitioner filed a renewed habeas corpus petition with the state supreme court. On August 24, 2016, the state supreme court denied relief without an opinion.

On September 9, 2016, the Petitioner filed in the Ninth Circuit Court of Appeals for leave to file a successive federa habeas corpus since

he had filed previously in 2008 on grounds of treaty violation. USDC, Central Dist. of California, case number 5:09-cv-01109. The Court of Appeals ruled that the claims against appellate counsel had not ripen until the opening brief had been filed, and the motion for leave to file a second or successive federal habeas corpus was unnecessary. Court of Appeals, Ninth Circuit, case number 16-73184. The Court ordered for the proposed federal habeas corpus to be transfered to the district court and deemed filed on September 24, 2016. See Order dated May 26, 2017.

REASONS FOR GRANTING THE WRIT

I. EFFECTIVE ASSISTANCE OF COUNSEL ON APPEAL IS GUARANTEED BY THE SIXTH AMENDMENT REGARDLESS OF WHEN A FIRST TIME APPEAL IS EXERCISED.

In adopting the magistrate's reports, the district court ruled that there is no clearly established Supreme Court precedent holding that the Sixth Amendment right applies to an appeal from a post conviction motion denial. (Appendix-B; Magistrate's Final Report, at page 14:9-11) However, the right to competent counsel has been clearly established by the Strickland standard. See Cullen v. Pinholster (2001) 563 US 170, 131 S.Ct. 1388, 1403. The Strickland standard is the "general rule" to all claims of ineffective assistance of counsel and all other interpretations or applications of the Strickland standard are called the "garden variety". Cf. Chaidez v. United States (2013) 568 US 342, 185 L.Ed.3d 149, 156. The district court did not address either citation above when adopting the magistrate's reports. (Appendix-C, District Court Order) The district court has confused the "garden variety" to mean what is clearly established by the Supreme Court. For example, in Lafler v. Cooper, the lower state court had applied what it believed to be the standard in Hill v. Lockhart, 474 US 52, but this Court corrected the misapplication to be contrary to Strickland. 566 US 156. Therefore, the district court ruling that there is no clearly established federal law by the Supreme Court on an ineffective assistance of counsel claim is the corollary to the Strickland standard being nonexistant.

The district court ruled that the Petitioner was "confusing" a state law statutory right to appeal a particular type of order with the Sixth Amendment Jurisprudential concept of a "first appeal of right", and that it need not and would not resolve the question of whether the Supreme Court

Sixth Amendment jurisprudence actually does or does not govern the Petitioner's claim. (Appendix-B, at page 14:5-13) However, there is no federal constitutional "first appeal of right" or any appeal after a criminal conviction unless it is provided by state law. See Martinez v. Court of Appeal of California (2000) 528 US 152, 160; Douglas v. California (1963) 372 US 353; also Halbert v. Michigan (2005) 545 US 605 (appeal after guilty plea). The district court did not address the precedent above.

Instead, the district court ruled that the Petitioner had waived his right to appeal by accepting the plea bargain. (Id., at page 13:7-11) An appeal waiver that does not bar claims outside its scope follows from the fact that although the analogy may not hold in all respects, plea bargains are essentially contracts. See Garza v. Idaho (2019) 139 S.Ct. 738, 203 L.Ed.3d 77, 86. And as with any contract, the language of appeal waivers can vary widely, some waiver clauses leaving many types of claims unwaived. Id. Here, the Petitioner filing the motion to vacate judgment after being notified of the INS-ICE hold, was implicit that the plea bargain contract was not completely disclosed to the Petiitoner. The fact that the state supreme court holds that the denial of such a motion is an appealable matter proves that the Petitioner did not waive all rights to appeal. See People v, Totari (2002) 28 Cal.4th 876. Therefore, the Petitioner had a statutory right to appeal after a guilty plea was entered. Id.; Halbert v. Michigan, supra. The right to appeal is "purely a creature of statute". Martinez v. Court of Appeal, supra. Due to that this statute exists, the right to effective assistance of counsel on appeal is guaranteed by the Sixth Amendment. Douglas v. California, supra.

It is the Petiitoner's understanding that the district court made its analogy based on the misconceptions of when an appeal should take place. The district court ruled that had the Petitioner appealed the conviction in 1999, that the initial appeal would have the Constitutional protections of effective assistance of counsel on appeal. (Appendix-B, at page 13:7-10) However, the district court did not give any ruling on when an appeal must take place as guided by clearly established federal law. The district court and the state concede that the Petitioner had a right to appeal the denied motion. (Appendix-B, at page 13:24-25)

II. APPOINTED APPELLATE COUNSEL ON APPEAL WAS INCOMPETENT PREJUDICIALLY AFFECTING THE RESULT ON APPEAL.

The district court ruled that appointed appellate counsel, Marshall, was not appointed to raise claims separately on habeas corpus and was solely appointed in connection with the appeal of the trial court's order denying the motion to vacate. (Appendix-B, at page 16) The district court reasoned that Marshall was not obligated to raise the ineffective assistance of counsel claims against trial counsel and the Marsden counsel because such claims are not allowed to be raised in the motion to vacate judgment. (Id., at page 14:23-28)

First and foremost, like the district court ruled, Marshall was appointed in connection with the appeal from the trial court's order to deny the motion to vacate judgment. However, Marshall did not file anything in connection to the motion to vacate jdugment and instead filed the issue of an interpreter. The appellate court ruled that it did not understand why Marshall would file such a meretricious claim. (Appendix-D, Opinion at page 7, case number E058677)

The Petitioner's motion to vacate judgment incorporated the claims against counsel via a petition for writ of habeas corpus. The California supreme court has long held that claims against trial counsel must be filed simultaneously and or in conjunction with the opening brief on habeas corpus when it is brought to the appellate counsel's attention. See People v. Pope (1979) 23 Cal.3d 412, 426; People v. Frierson (1979) 25 Cal.3d 142, 158. In "noncapital cases appointed [appellate] counsel in this state who are aware of a basis for collateral relief should not wait for the outcome of the appeal to determine if grounds for collateral relief exist. While they have no obligation to conduct an investigation to discover if facts outside the record on appeal would support a petition for habeas corpus or other challenge to the judgment, if they learn of such facts in the course of their representation they have an ethical obligation to advise their client of the course to follow to obtain relief, or to take other appropriate action." See In re Clark (1993) 5 Cal.4th 750 fn20. Here, Marshall did not follow the ethical obligation to advise the Petitioner on what to do nor took action to raise the claims against trial counsel and the Marsden counsel. Not only was Marshall notified by the motion to vacate and the habeas incorporated of the claims against counsel, but the Petitioner wrote to Marshall and notified her about those claims. Marshall completely failed to address why she did not file those claims after the Petitioner inquired why she had not raised them in conjunction to the appeal. The agency that contracted Marshall to represent the Petitioner on appeal requires for appellate counsel "to pursue remedies outside of the four corners of the appeal, including habeas corpus, when reasonably necessary to represent the client appropriately." See Appellate Defenders Inc., California, Criminal Appellate Practice Manual (July 2007

revised) §§ 8.2-8.3.

"The Attorney General's suggestion that § 1016.5 [motion to vacate judgment] be construed as a categorical bar to immigration based ineffective assistance of counsel would deny defendants who prove incompetence and prejudice a remedy for specific constitutional deprivation viz, the Sixth Amendment right to effective counsel. Any construction that engender such constitutional infirmity is to be avoided." See In re Resendiz (2001) 25 Cal.4th 230, 241-242. "If anything, the statutory scheme [of § 1016.5] contemplates an enhanced, not a diminished, role for counsel." People v. Patterson (2017) 2 Cal.5th 885, ; Resendiz, supra; People v. Soriano (1987) 194 Cal.App.3d 1470, 1478 (habeas corpus filed in conjunction to appeal granted claims of ineffective assistance of counsel for failing to advise client of immigration consequences).

"The generic advisement [on a plea form] under § 1016.5 is not designed, nor does it operate, as a substitute for such advice [from counsel]." Patterson, supra. The "state of mind" of the defendant at the time of the plea that bears on the defendant is the evidence required in evaluating a later claim that the defendant would not have entered the plea had he understood the plea would render the defendant deportable. see People v. Martinez (2013) 57 Cal.4th 555, 565-566. Here, the Petitoner had asked to withdraw his plea because he had felt pressured by trial counsel to accept it when trial counsel refused to prepare for trial. The trial court held a Marsden hearing to review whether the plea was properly entered. The Petitioner's "state of mind" was to have a trial and would not have entered into the plea bargain had he been told of the immigration consequences. Marshall had a simple task at hand. Raising the interpreter issue was complete incompetence because in the habeas corpus in support to the motion

to vacate judgment, the Petitioner explained to the trial court that the interpreter claim raised by the Marsden counsel was baseless and counsel's idea. Had Marshall read the habeas corpus, Marshall would have known that that raising the interpreter issue was "meretricious" as the appellate court stated. (Appendix-D, at page 7)

The prejudice here is that the Petitioner never had the motion to vacate judgment and its supporting claims heard on appeal. Had Marshall acted competently, Marshall would have presented on appeal the Petitioner's "state of mind" at the time of the plea. People v. Martinez, 57 Cal.4th, at 565-566. Had Marshall filed the appeal based on the Petitioner's "state of mind" the appeal would have been granted.

III. STATE COURT SUMMARY DENIALS WERE NOT ON THE MERITS PER STATE LAW THAT REQUIRES DE NOVO REVIEW AND NO AEDPA DEFERENCE IN FEDERAL COURT.

The district court ruled that state habeas corpus claims raised agsinst Marshall were decided on the merits by the state courts and have AEDPA deference. (Appendix-B, at page 7:24-26)

This Court holds that "in the absence of any indicator or state law procedural principles to the contrary", summary denials by state courts will be considered to be on the merits and AEDPA deference afforded to those decisions. See Johnson v. Williams (2013) 568 US 289, 133 S.Ct. 1088, 1096; Harrington v. Richter (2011) 562 US 86, 131 S.Ct. 770, 784-785. Under California law, the summary denial of a habeas corpus does not have res judicata effect in future proceedings. See Gomez v. Superior Court (2012) 54 Cal.4th 293 fn6(citing Kowis v. Howard (1992) 3 Cal.4th 888, 893). A summary denial is not on the merits even if it is intended to be or if it is accompanies by an explanatory comment, it is not regarded as a

formal opinion. Kowis v. Howard, 3 Cal.4th, at 985. A summary denial of a writ petition is not law of the case. Id., at 899.

The district court did not address the state law cited by the Petitioner regarding summary denials. (Appendix-C) Instead, like all the other issues raised herein, were rubber stamped and pushed through after the magistrate submitted its reports without addressin the objections by the Petitioner.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

Dated: 2-16-21

Joseluis Morales
(pro se)