ORIGINAL

No. 21-5544

IN THE

SUPREME COURT OF THE UNITED STATES

THOMAS CHARLES SCOTT, — PETITIONER
(Your Name)

vs.

STEWART SHERMAN, et al., — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

California Court of Appeal, Third Appellate District
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Thomas Charles Scott
(Your Name)

Valley State Prison, 21633 Avenue 24
(Address)

Chowchilla, CA 93610
(City, State, Zip Code)

NONE
(Phone Number)

QUESTION(S) PRESENTED

Were petitioner's rights under the Fourth and Sixth Amendments to the United States Constitution violated by trial counsel's failure to challenge the validity of a search warrant obtained via the intentional or reckless omission of a material fact, that was known to the affiant at the time, and would have invalidated the statements of probable cause made in the affidavit supporting the warrant?

Is it not the trial court judge's duty under the United States Constitution's Fourteenth Amendment Due Process Clause to require the prosecution to prove every element of the offense being tried, and to give the jury a required instruction, sua sponte, concerning the meaning of a material element necessary to convict?

Should a convicted indigent person forever have to suffer the adverse penalties caused by his or her state-appointed trial counsel's failure during trial, and his or her appellate counsel's failure to raise meritorious paramount issues during that person's first appeal as of right; and due to the failures of counsel, should that convicted person be barred from raising the omitted issues via a postconviction relief proceeding? (Such as a petition for writ of habeas corpus.)

LIST OF PARTIES

[ ] All parties appear in the caption of the case on the cover page.

[X] 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:

1) Stewart Sherman, Warden

2) Jennifer Mary Poe, Esquire, California Attorney General, Respondent.

RELATED CASES

None

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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 "F" 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 Tehama County Superior court appears at Appendix "E" 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 March 26, 2021.

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

[X] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: April 20, 2021, and a copy of the order denying rehearing appears at Appendix "C".

[X] An extension of time to file the petition for a writ of certiorari was granted to and including September 17, 2021 (date) on March 19, 2020 (date) in Application No. A. (See Appendix "G").

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

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

The date on which the highest state court decided my case was May 25, 2016. A copy of that decision appears at Appendix "F".

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

[X] An extension of time to file the petition for a writ of certiorari was granted to and including Sept. 17, 21 (date) on March 19, 2020 (date) in Application No. A. (See Appendix "G").

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The right of a State prisoner to seek federal habeas corpus relief is granted in 28 U.S.C. § 2254.

Pursuant to California Health & Safety Code § 11362.775, a qualified patient - someone with a doctor's recommendation for medical marijuana - is allowed to sell marijuana, and products thereof, to marijuana dispensaries for medical use.

The United States Constitution's Fourth Amendment safeguards the right of citizens against unlawful search and seizures.

The United States Constitution's Sixth Amendment guarantees the right to effective assistance of counsel during both, trial and during the convicted person's first appeal as of right.

The United States Constitution's Fourteenth Amendment safeguards the right of citizens to Due Process of Law, which includes the right to a properly instructed jury, and to have the jury determine whether the State has proved each element of the offense beyond a reasonable doubt.

STATEMENT OF THE CASE

Petitioner was convicted by a California jury of one count of cultivating marijuana, one count of possession of marijuana for sale, one count of possession of concentrated cannabis, one count of maintaining a place for selling or using a controlled substance (i.e., marijuana), and one count of possession of child pornography. (Cal. H & S Code, §§ 11358, 11359, 11357(a), 11366, and Cal. Pen. Code, § 311.11(b), respectively.)

Petitioner's trial counsel had neglected any attempt to attack the validity of the search warrant, of which the affiant of the affidavit of probable cause leading to the issuance of that warrant intentionally or recklessly omitted from his affidavit significant information, that was known to him at the time, and would have completely eleminated all otherwise probable cause.

Petitioner's conviction for possession of child pornography was based solely on the fact he owned the computer, specifically, the "unallocated space" of the computer's hard drive where the unknown to him illicit pictures were discovered. There was absolutely no evidence of material knowledge presented during trial that connected petitioner directly to that crime. During trial, the prosecution's computer expert indirectly admitted as much. (See RT 431-439; appendix "H")

The trial court judge failed to give, sua sponte, a required instruction defining all elements of the crime; specifically, the § 311(e) definition as it applies to the scienter element of Cal. Pen. Code, § 311.11. During petitioner's first appeal as of right, his state-appointed appellate counsel obstinately chose not to proffer any attack to oppose that conviction.

Petitioner filed his initial Petition for Writ of Habeas Corpus (hereafter, Petition) in the Tehama County Superior Court. He asserted the following claims for relief (Pertinent part): Insufficiency of Evidence (ground 3); Instructional Error (ground 4); Ineffective Assistance of Trial Counsel For Failure to Challenge the Search Warrant and Move to Suppress Evidence (ground 5); Ineffective Assistence of Appellate Counsel For Failure to Raise Meritorious Claims on Appeal (ground 8). The last reasoned rejection of petitioner's claims is the summary decision of the Tehama County Superior Court on the petition for writ of habeas corpus. (Appendix " F").

In that summary decision, the court states:

> "As for the substance of this petition, the grounds stated in the petition are issues which could have been stated on appeal, and could have been, or were, considered by the appellate court. Absent some justification, the issues subject to appellate review may not be presented in a Petition for Writ of Habeas Corpus. (In re Clark, 5 Cal. 4th at p. 765.)
>
> The remaining issues concern the alleged incompetence of trial and appellate attorneys. Petitioner has not shown that counsel failed to act in a manner to be expected of reasonable competent attorneys acting as diligent advocates. (Strickland, supra, 466 at pp. 687-688.) Secondly, petitioner did not demonstrate that it is reasonably probable a more favorable result would have been obtained in the absence of counsel's failings."

After that summary decision by the Superior Court was rendered, Petitioner filed his petition in the California Court of Appeal, 3rd Appellate District, and raised the same claims for relief as he did in the Superior Court. The Court of Appeal rendered an one-line postcard denial (i.e., "The petition for writ of habeas corpus is denied.") (See appendix "D ")

Petitioner then filed his petition in the California Supreme Court, again raising the same claims for relief, and like the Court

of Appeal, the State's highest Court also rendered an one-line post-card denial. (See Appendix "F")

After exhausting his State remedies, Petitioner filed an application for a writ of habeas corpus, under 28 U.S.C. § 2254, in the United States District Court, Eastern District of California. Therein he raised the same claims for relief as he did in all lower courts that considered those claims. The matter was referred to an United States Magistrate Judge.

After the magistrate judge filed his Findings and Recommendation (F&R), Petitioner timely filed his Objection to the F&R based on a misapplication of material facts and the omission of material facts important to Petitioner's factual claims of Constitutional violations. The court conducted a de novo review of the case. Having claimed it reviewed the entire file, the court adopted the F&R in full, denied Petitioner's application for a writ of habeas corpus, and declined to issue a Certificate of Appealability (COA). (See Appendix "B")

Petitioner filed a timely request for a COA, and a motion for appointment of counsel, in the United States Court of Appeals for the Ninth Circuit. Being undereducated, unschooled in law, and without counsel, Petitioner did his best to explain to the Court of Appeals that the District Court's denial of his application for a writ of habeas corpus is based on an unreasonable determination of facts, and the omission of facts important to his factual claims of Constitutional violations.

In that filing, Petitioner demonstrated that the District Court's F&R is in error. Petitioner had provided the Court of Appeals with specific references to the record of the case, of which indisputably

demonstrated that the District Court Judge had NOT "reviewed the entire file," as claimed.

Petitioner had also provided the Court of Appeals with a document he had previously tried to obtain - of which was referenced by Respondents, and the debatable statements made therein adopted by the District Court in its F&R - which supports petitioner's claim of ineffective assistance of trial counsel. Nevertheless, the Court of Appeals claimed [petitioner] had not made a substantial showing of the denial of a constitutional right, and, subsequently, denied petitioner's request for a COA and his motion for appointment of counsel. (See appendix "A")

Petitioner immediately thereafter filed in that same court a timely motion for rehearing en banc, and another motion for appointment of counsel. On April 20, 2021, Graber and Tallman, Circuit Judges, ordered both motions denied. (See appendix "C")

Petitioner had then written to this Court seeking information regarding an extention of time for which to file his petition for a writ of certiorari. In response, this Court's Office of the Clerk mailed petitioner a copy of the order of this Court issued March 19, 2020. That order states in pertinant part: "IT IS ORDERED that the deadline to file any petition for a writ of certiorari due on or after the date of this order is extended to 150 days from the date of the lower court judgment, order denying discretionary review, or order denying a timely petition for rehearing." (See appendix "G") Hence, the instant petition for a writ of certiorari is timely.

REASONS FOR GRANTING THE PETITION

The following factors were all present in this case:

(1) Petitioner's trial counsel failed to conduct a thorough pretrial discovery, review the record of all previous court proceedings, diligently investigate applicable laws and possible defenses, and use the information he could have learned to attack the validity of the search warrant, which is a bad faith warrant. (U.S. CONST. Amends. IV and VI)

(2) The trial court failed to give, sua sponte, the jury a required instruction defining the meaning of an essential element of the offense, which resulted in an unreliable verdict. (U.S. CONST. Amend. VI)

(3) During Petitioner's first appeal as of right, his appellate counsel failed to raise meritorious issues, including an attack challenging the legality of one of the convictions, of which there exists U.S. Supreme Court precedents establishing such an attack would not have been futile. (U.S. CONST. Amend. IV)

(4) The reasons given in the Superior Court's summary judgment/denial of Petitioner's Petition for Writ of Habeas Corpus is based on an unreasonable determination of the facts, and conflicts with U.S. Supreme Court precedents. (U.S. CONST. Amends. VI and XIV)

(5) The United States District Court's Findings and Recommendations related to its denial of Petitioner's Application for Writ of Habeas Corpus is based on conjectures unsupported by the record and the omission of material facts in the record. (U.S. CONST. Amend. XIV)

When Petitioner's trial counsel was appointed to this case, he had a duty to review the record of all previous court proceedings, conduct pretrial discovery, and deligently investigate the applicable laws and possible defenses. As explained below, counsel failed to

preform those duties, virtually leaving Petitioner without counsel.

Significant to this issue, Petitioner had a valid doctor's recommendation for medical marijuana (appendix "I"), and that the search warrant in this csae is based on Petitioner's suspected sales of marijuana edibles to medical marijuana dispensaries, which pursuant to California law is legal conduct for qualified patients, i.e., those who have a doctor's recommendation for medical marijuana. (See Cal. H & S Code, § 11362.775, and the California Department of Justice "Guidelines For The Security And Non-Diversion Of Marijuana Grown For Medical Use." (hereafter, "DOJ Guidelines") The intended purpose of the DOJ Guidelines (appendix "J") is to "help law enforcement agencies preform their duties effectively and in accordence with California law." (See DOJ Guidelines Instructions)

Also significant to this issue is the Statement of Expertise attached to the Affidavit of Probable Cause (appendix "K") used to procure the related search warrant. Investigator Eric Clay, affiant, claimed therein that in 2008 he had completed 8 hours of formal training in the field of search warrants, and in 2010 he had completed 4 hours of formal training in the field of medical marijuana investigations; and had written over 200 search warrants, primary for narcotics.

During Investigator Clay's claimed 4 hours of training in medical marijuana investigations, he had a duty to familiarise himself with those DOJ Guidelines - particularly, section III(B)(5) concerning investigations - before applying for a search warrant involving the sales of marijuana by a qualified patient suspected of selling marijuana edibles only to medical marijuana dispensaries.

After trial counsel was appointed to the case, he failed to familiarise himself with the record of Petitioner's previous court proceedings. Had he done so, he could have learned that Investigator Clay was aware of Petitioner's doctor's recommendation for medical marijuana, before he submitted his affidavit to the magistrate judge for consideration.

Further, had trial counsel examined that affidavit, he could have discovered that Investigator Clay had failed to explicitly mention in that affidavit the well-known-to-him fact that Petitioner had the said doctor's recommendation for medical marijuana.

Given Investigator Clay's claimed training, there is no excuse for him not to have known what the DOJ Guidelines say concerning the sales of marijuana by qualified patients to dispensaries of marijuana for medical use (see DOJ Guidelines, sections IV(A)(1), (A)(2), and (B)(4)), or what the state law allows regarding such sales by qualified patients (see Cal. H & S Code § 11362.775).

Moreover, Investigator Clay should have known what information was expected and required to be given in an affidavit of probable cause that is to be used to procure a search warrant regarding marijuana. Any reasonable person most certainly would have known that a suspect's known doctor's recommendation for medical marijuana is the kind of thing a Magistrate Judge would wish to know when considering the issuance of a search warrant for marijuana; especially as it could invalidate all otherwise probable cause claimed in the affidavit. Investigator Clay's omission of that significant information from his affidavit of probable cause was reckless and could only have been intentional.

Consequently, by omitting the known-to-him information that Petitioner had a doctor's recommendation for medical marijuana, Investigator Clay misled the magistrate judge, and that failure to notify the magistrate judge violated Franks v. Delaware (438 U.S. 154 (1978)) by depriving him of key information necessary to a determination of probable cause. ["An affiant can mislead a magistrate by reporting less than the total story, thereby manipulating the inferences a magistrate will draw." - Franks, at].

Having shown that relevant information was recklessly omitted from the search warrant affidavit, Petitioner now shows that the affidavit, if supplemented with the omitted information, would not be sufficient to support a finding of probable cause: The search-warrant affidavit in the instant case (appendix "K") speaks for itself. To wit, aside from a confidential informant's unsupported statement that he, years earlier, seen petitioner sell marijuana to a person - and then refused a request to attempt a controlled buy - there is nothing asserted in Investigator Clay's affidavit that indicates illicit activity by a person with a doctor's recommendation for medical marijuana.

In light of U.S. Supreme Court precedents, had Petitioner's trial counsel conducted a proper pretrial discovery and therefrom examined the affidavit of probable cause used to procure the related search warrant, then applied his learned knowledge earnestly to attack the deficiency in that affidavit, there is no doubt the attack would have been successful; because as explained above, if the affidavit was supplemented with the omitted information, there would be no probable cause. Consequently, absent the failings of counsel, it is reasonably probable a more favorable result would have been obtained during

Petitioner's pretrial or trial proceedings. In Kimmelman v. Morrison, 477 U.S. 365 (1986), this Court held that "counsel's failure to conduct any pretrial discovery and file timely suppression motion was prejudical because counsel was ignorant of law and below prevailing professional norms." (Kimmelman, st 385.)

Petitioner was also convicted of one count of possession of child pornography, which was based solely on the fact he owned the computer. Specifically, the "unallocated space" of the computer's hard drive, which is the only place where the unbeknown to him deleted illicit images were discovered; there was absolutely no credible evidence of material knowledge presented during Petitioner's trial which connected him directly to that crime. During trial, the prosecution's computer expert indirectly admitted as much. (See RT 431-439; appendix "H")

The prosecution's computer expert, Investigator Martin Perrone, testified that he had conducted forensic analysis on a Hewlett Packard (HP) computer tower (RT 413) and a Dell computer tower (RT 425). On the HP, Perrone claimed to have found 33 images of child pornography, or suspected child pornography (RT 418). On cross-examination, Perrone claimed that the images were found in the unallocated space of the HP computer's hard drive (RT 434). Those images were not immediately viewable, but in the form of machine code - "if you look at the hard drive, all you're going to see is zeros and ones, zeros and ones." (RT 431) - and to view them, Perrone had to reconstruct them (RT 654). Perrone could not determine how the images got there, just that they were present (RT 434). He also testified that he could not determine who put the images there, or who viewed them or ordered them (RT 435). Neither could he determine when the images got there (RT 439). There-

fore, the only conceivable explanation for the jury's decision to convict would be a lack of a proper instruction; which as explained below, is what happen.

Petitioner's appellate counsel indisputably failed to diligently examine the trial court record of the case, as was required. Had he done so he could have discovered that when instructing the jury, the judge had stated: "The mental state required is knowledge and further explained in the instructions for the crimes." (RT 794) But thereafter, the judge failed to give that explanation for the possession of child pornography offense (Cal. Pen. Code § 311.11). Under California law, the trial court judge was required to give the jury an instruction defining all elements of the crime - see CALCRIM 1145 Bench Notes regarding Instructional Duty, which states: "The court has a sua sponte duty to give an instruction defining the elements of the crime" - specifically, the § 311(e) definition, which states: "Knowingly" means "being aware of the character of the matter or live conduct." (I.d., § 311, subd. (e); Stats. 1969, ch. 249, § 1, p. 598).

Had the omitted instruction been given, the jury would have had a clear understanding of the meaning of the scienter element and what was required to convict. Hence, having heard testimony from the prosecution's computer expert that indirectly said there was no credible or material evidence showing Petitioner was "aware of the character of the matter," the jury must have been confused by the lack of proper instruction.

When a jury has not been properly instructed concerning an essential element of the offense that has been charged, then the accused has been deprived of his or her Sixth and Fourteenth Amendment rights

to have the jury determine whether the State has proved each element of the offense beyond a reasonable doubt. Faced with an incorrect instruction and a general verdict of guilty, a reviewing court simply lacks any adequate basis for deciding whether the jury has performed its constitutionally required function. (Citations omitted) Moreover, the federal constitution's due process clause is suppose to protect the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he or she is charged.

This Court's holding in Osborne v. Ohio, 495 U.S. 103, is instructive. The Osborne Court considered the defendant's objection that his child pornography conviction violated due process because the trial court judge had not required the government to prove [all] elements of the alleged crime. This Court reversed his conviction and remand for a new trial in order to ensure that Osborne's conviction stemmed from a finding that the State had proved each of the elements.

Upon reviewing his Appellant's Opening Brief, Petitioner discovered that his appellate counsel had failed to include in that brief, any argument - other than an argument concerning fines and restitution - to attack the possession of child pornography conviction. In a letter to his appellate counsel, dated May 14, 2013, Petitioner expressed his dissatisfaction with the brief and had asked counsel to amend it or submit a Supplemental Brief to include an attack on the conviction itself. In counsel's response letter (appendix "L"), dated May 18, 2013, counsel states the following (pertent part):

> "Without knowledge of such files, there can be no 'knowing' possession under federal statue. California law, on the other hand, goes much further and makes it directly illegal

> to knowingly 'possess [] or control' any 'image' of child pornography;" "As I explained above, there was sufficient evidence for the jury to infer that since you possessed the computer and had sole access thereto, you knowingly possessed the images therein;" "Given that none of my arguments touched on that count, I see no reason to correct the brief in that regard."

What is evident from a reading of the above excerpt is, appellate counsel made no attempt at all to attack the legality of Petitioner's conviction for possession of child pornography. In light of the above stated facts and U.S. Supreme Court precedents, appellate counsel's statements in his response letter dated May 18, 2013 (supra), falls short of a reasonable explanation for his unreasonable decision not to attack that conviction. In Harrington v. Richter, 562 U.S. 86 (2011), this Court reasoned that "the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied Strickland's deferential standard." (Harrington, 562 U.S. at 105.)

Petitioner's appellate counsel indisputably provided him with ineffective assistance during his first appeal as of right, because counsel's representation of the issue amounted to no representation at all. Consequently, counsel's inaction fell below "an objective standard of reasonableness...under prevailing norms," and, "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the [appeal] proceeding would have been different." (Strickland v. Washington, 466 U.S. 668, 688 (1984)).

When Petitioner raised the above stated issues in his initial petition for writ of habeas corpus, filed in the Superior Court of conviction(s), that court reasoned in its summary judgment/denial of the petition that they were issues "which could have been stated on

appeal, and could have been, or were, considered by the appellate court." And, "absent some justification, issues subject to appellate review may not be presented in a Petition for Writ of Habeas Corpus." In the following paragraph, that court states: "The remaining issues concern the alleged incompetence of trial and appellate counsel. Petitioner has not shown that counsel failed to act in a manner to be expected of reasonable competent attorneys acting as diligent advocates. Secondly, Petitioner did not demonstrate that it is reasonablely probable a more favorable result would have been obtained in the absence of counsel's failings."

The Superior Court's summary judgment/denial of the above stated issues is not supported by facts or the record. Petitioner had in fact asserted in that petition that: (1) counsel was ineffective for failing to attack the vaildity of the deficient affidavit of probable cause used to procure the related search-warrant, and that the issue was not raised on direct appeal because of ineffective assistance of appellate counsel (see petition grounds 5 and 8); and (2), that the evidence presented at trial is insufficient to support Petitioner's conviction pursuant to the text of Cal. Pen. Code § 311.11 (possession of child pornography), because there was absolutely no proof or credible evidence that Petitioner had material knowledge of the unlawful images found in the unallocated space of his computer's hard drive, and that appellate counsel was ineffective for failing to raise the issue on direct appeal. (see petition grounds 3 and 8). Further, in that petition, Petitioner had also demonstrated the harm caused by both, trial and appellate counsel, regarding the issues, as well as the probability that a more favorable result would have been obtained in the ab-

sence of counsel's failings. (see petition grounds 3, 5, and 8).

When Petitioner raised the above stated issues via a petition for writ of habeas corpus, filed in the California Court of Appeal, Third Appellate District, that court rendered an one-line postcard denial (i.e., "The Petition for Writ of Habeas Corpus is denied."). Petitioner subsequently filed his petition for writ of habeas corpus in the California Supreme Court, which included the same issues as those filed in the lower courts. That court - the highest State court that considered the issues - had also rendered an one-line postcard denial.

Petitioner then raised the above stated issues before the United States District Court, Eastern District of California, via a Application for a Writ of Habeas Corpus under 28 U.S.C. § 2254. A Magistrate Judge was assigned to the case. The magistrate judge rendered a langthy Findings and Recommendations (F&R) that ultimately resulted in the denial of the habeas corpus petition. As explained below, the magistrate's F&R (in pertinent part) is based on conjectures unsupported by the record and the omission of material facts in the record, thereby further violating Petitioner's right to due process.

Petitioner refutes the District Court's logic regarding trial counsel's failure to challenge the validity of the search warrant, specifically, the affidavit used to procure that warrant. The district court's analysis of the issue - F&R at pp. 42:28-43:17 - relies mainly on the California Attorney General's fallacious assertion that "a reasonable inference can be made from the People's Informal Response to Petitioner's Request for Writ of Habeas Corpus, filed with the Tehama County Superior Court, that Investigator Clay did in fact include Petitioner's status as a qualified patient in his affidavit." The pas-

sage in question reads as follows:

> [Petitioner's] principal complaint appears to be that Investigator Clay failed to mention his status as a medical marijuana recommendation holder. A reading of the warrant makes clear that Investigator Clay implicitly acknowledges Petitioner's status as of the fall of 2007. "At that time, your affiant observed marijuana plants growing in a fenced area behind his residence. [Petitioner] refused to allow agents to look inside his residence. At that time there was insufficient evidence to prove [petitioner] was outside the intent of the medical marijuana laws in California and in violation of the law." (Search warrant Statement of Probable Cause, p. 6, lines 9-12.)

The F&R, at p. 44:9-14, concluded that "it would have been futile for trial counsel to challenge the search warrant on the basis that Investigator Clay failed to advise the reviewing magistrate that [Petitioner] was a qualified patient because the affidavit stated as much;" and that "the balance of petitioner's argument requires the court to adopt his erroneous interpretation of the law partaining to marijuana used for medical purposes." Further concluding that "because the motion to suppress would not have been successful, petitioner has failed to show prejudice."

Petitioner disagrees with the District Court's denial and adopted analytical assessment of the issue, because it is illogical and fails to comprehend and/or except what this state's medical marijuana laws and the DOJ Guidelines legally allow; and failed to consider the entire record of the case. Specifically, a statement in the record made by C. Todd Bottke, the magistrate judge who issued the deficient search warrant in this case.

During Petitioner's preliminary hearing, an issue was brought up concering an unrelated compliancy check at Petitioner's residence in the fall of 2007. During that hearing, Judge Bottke had made a statement unrelated to the said search warrant, but nevertheless pertinet

because it involves that compliancy check, Investigator Clay's evaluation of petitioner's status as a medical marijuana patient, and Judge Bottke's explict mind-set as it relates to the time-line between the said 2007 incident and when he issued that deficient search warrant.

The explicit statement made by Judge Bottke reads as follows:

> "THE COURT: Well, Mr. Burg, now to the extent that that was in 2007 and these circumstances apparently took place in 2011, potentially up to four years latter....I don't find that that information at that point being almost four years old is relevant." (RT 117:9-14)

Petitioner asserts that had Judge Bottke found the said time-line relevant, further testimony could have been unobjectionably elicited from Investigator Clay to demonstrate that his presence at Petitioner's residence, during the said fall of 2007 incident, was meant to harrass Petitioner for a conviction he had not been on parole for since May of 2001; and to emphasize that the deficiency in Investigator Clay's affidavit of probable cause was intentional, and that it was Clay's last chance at a pay-back - for Petitioner's unyielding attitude during the said 2007 incident - a week before transferring his job to another county. (It should be noted that Petitioner had a hired attorney during that preliminary hearing.)

As for the District Court's apparent bias and unfounded conclusion that "the balance of petitioner's argument requires the court to adopt his erroneous interpetation of the law partaining to marijuana used for medical purposes," well, that statement is fallacious and establishes that the district court had failed to investigate what California's medical marijuana laws and the related DOJ Guidelines explicitly allows. A copy of the DOJ Guidelines is included herewith as appendix "J", and Cal. H & S Code § 11362.775 reads as follows:

"Qualified patients, persons with valid identification cards, and the designated primary caregiver of qualified patients and persons with identification cards, who associate within the State of California in order to collectively or cooperatively to cultivate marijuana for medical purposes, shall not solely on the basis of that fact be subjected to state criminal sanctions under Section 11357, 11358, 11359, 11360, 11366, 11366,5, or 11570."

As relevant here, Petitioner was a qualified patient who only associated within the State of California in order collectively and cooperatively to cultivate marijuana for medical purposes, and was convicted of Cal. H&S Code §§ 11357, 11358, 11359, and 11366.

By the District Court's reliance on the Superior Court's fallacy concerning this issue, its denial of the issue is erroneous because it is based on a misinterpetation and misapplication of state law, which resulted in an unreasonable determination of the facts. Moreover, the denial of the issue by all the lower courts that claimed to have considered the issue, which relied on that same fallacy by the Superior Court, besed their decision on an erroneous determination of the facts and law.

Regarding the District Court's resolution of Petitioner's conviction for possession of child pornography: Petitioner's petition in the district court included an argument that, in People v. Petrovic, 224 Cal. App. 4th 1510 (2014), the California Court of Appeal acknowledged the Tecklenburg (169 Cal. App. 4th 1402) holding, which was in response to an order from the California Supreme Court that it consider the standard in the Kuchinski (469 F. 3d 853) case. The Kuchinski Court held that:

"Where a defendant lacks knowledge about the cache file, and concomitantly lacks access to and control over the files, it is not proper to charge him with possession and control of the [illicit] images located in those files,

without some other indication of dominion and control over the images."

The Tecklenburg Court concluded that the Kuchinski standard does not apply to section 311.11 convictions. However, the facts in the Tecklenburg case were NOT present in Petitioner's case, to wit, there was no admission or credible evidence indicating Petitioner had material knowledge of, or dominion and control over, the illicit images found on his computer's hard-drive; not in the temporary internet file, cache file, history file, brower cookie file, or any other file accessible without the use of sophisticated computer software - of which Petitioner's computer was not equipped.

The F&R analysis, at p. 35:22-24, concluded that a conviction for possession or control of child pornography does not require any showing that defendant had the ability to access, view, manipulate or modify the images that were on his computer. (Citing People v. Mahoney, 220 Cal. App. 4th 781, 795 (2013)). And the F&R analysis, at p. 36:1-21, further states that:

> "Petitioner places significance on the differences he perceives between the facts in People v. Tecklenburg, 169 Cal. App. 4th 1402 (2009), and his case, arguing it does not apply and that this court should instead apply the holding in United States v. Flyer, 633 F. 3d 911 (9th Cir. 2011).'
>
> "The narrow question of law presented in Tecklenburg was whether the defendant could be convicted of knowingly possessing pornography images of children contained in his computer's 'temporary internet files' without evidence he knew that the images had been stored there. Ticklenburg, 169 Cal. App. 4th at 1414-15.'
>
> "Here, the prosecution was not required to present evidence that Petitioner was aware that he possessed the matter, representation of information, data, or images containing the child pornography in order to prove a violation of section 311.11(a) of the California Penal Code."

That analogy, subsequently adoped by the District Court Judge, is

erroneous and conflicts with what due process requires. It also supports Petitioner's claim made herein regarding the omitted jury instruction. As shown above, the analysis clearly states that "the prosecution was not required to present evidence that Petitioner was 'aware that he possessed the matter...or images' in order to prove a violation of section 311.11(a) of the California Penal Code." However, the text of Cal. Pen. Code § 311.11 clearly includes the word "knowingly," which is an essential element of the charge that must be proven. And, as previously asseverated herein, the omitted instruction defining the word "knowingly" means "'being aware of' the character of the matter." (I.d., Cal. Pen. Code, § 311(e)). And as previously shown herein, there is no credible or material evidence indicating Petitioner was "aware of the character of the matter...or images" located in the unallocated space of his computer's hard-drive.

The District Court's bias resolution of the issue, as shown above, asserts what showings are not required, but fails to acknowledge what showings are required; to wit, credible material evidence showing that Petitioner "knowingly" possessed the illicit images located in the unallocated space of his computer's hard-drive. It also requires the trial court to give, sua sponte, a jury instruction pursuant to Cal. Pen. Code § 311(e) defining the meaning of the word "knowingly" as it applies to the text of Cal. Pen. Code § 311.11, which is the instruction the trial court judge failed to give the jury. (Please take judicial notice of the holding in Osborne v. Ohio, supra, 495 U.S. 103). Further, the federal constitution's due process cluse requires the prosecution to prove every element of the charged offense beyond a reasonable doubt. (Citation omitted). Moreover, with the necessary

instruction omitted, "no rational trier of fact" could have found the essential element of the charged offense.

In an age where personal computers are often sold used, and when connected to the internet (perhaps wirelessly) are subject to receive unwanted and unbeknown data and other matter caused by computer malware and/or computer hackers, a computer owner should not be penalized for the unbeknown contents of the "unallocated space" of that computer - of which is not accessable to the user without the use of a sophisticated computer software program - without at least some credible corroboration of material knowledge connecting him or her directly to the charged offense.

Considering the foregoing scenario, an exercise of this Court's Supervisory Power is requested to dictate an universal standard for all states to obey regarding ownership and the element of scienter as they apply to the unbeknown contents of the "unallocated space" of a computer's hard-drive; that of which was at sometime connected to the internet and subject to computer malware and/or accessed by others - including computer hackers. Hence, an universal standard by this Court is needed to ensure U.S. citizens are not punished based solely on the ownership of a computer.

Regarding the District Court's resolution of Petitioner's claim of ineffective assistance of appellate counsel: The district court's F&R, at p. 51:21-27, acknowleges Petitioner's argument that "appellate counsel failed to raise meritorious issues on direct appeal that have the potential for success, and there is no strategic or tactical reason not to have raised them," but subsequently found that "the California Supreme Court's denial of those claims was not unreasonable or contrary

to Supreme Court precedent, nor did any involve an unreasonable determination of facts." The issues referred to include those previously presented herein.

In the F&R, at p. 52:10-17, the district court concluded that "appellate counsel's decision to press only issues on appeal that he believed, in his professional judgment, had more merit that those suggested by petitioner was 'within the range of competence demanded of attorneys in criminal cases.'" Further concluding, ibid, that "there is no evidence in the record that counsel's investigation of the issues was incomplete, that a more thorough investigation would have revealed a meritorious issue on appeal, or that appellate counsel's decision not to raise these issues fell below an objective standard of reasonableness."

Petitioner's refutation of the district court's erroneous conclusion of this issue has previously been expressed as it applies respectively to the issues presented herein. But to expand upon appellate counsel's unprofessional representation, it is apparent the merits of an issue had no bearing on counsel's judgment to press only the less significant issues on appeal, rather than meritorious paramount issues of which may have resulted in a reversal of the conviction(s). E.g., in spite of U.S. Supreme Court precedents, appellate counsel made no attempt to, and had even obstinately refused to, attack Petitioner's conviction for possession of child pornography.

As previously explained herein, Petitioner's conviction for possession of child pornography could have been and should have been attacked on direct appeal, specifically on the basis that the trial court judge had failed to give, sua sponte, an essential and required

jury instruction. Pursuant to this Court's ruling in Osborne v. Ohio, supra, 495 U.S. 103, such an attack would not have been futile. Hence, there is no reasonable explanation for appellate counsel's failure, and refusal, to attack the possession of child pornography conviction. "To perform as a constitutionally effective advocate, appellate counsel must raise all assignments of error that arguably may result in a reversal or modification of judgment." (Douglas v. California (1963) 372 U.S. 353.)

Therefore, the District Court's fallacious assertion that "there is no evidence in the record that counsel's investigation of the issues was incomplete, that a more thorough investigation would have revealed a meritorious issue on appeal, or that appellate counsel's decision not to raise these issues fell below an objective standard of reasonableness," is groundless.

The Fourteenth Amendment Due Process Clause guarentees the right to effective assistance of counsel on a first appeal as of right. Evitts v. Lucey (1985) 469 U.S. 387, 396-99; see also Yarborough v. Gentry (2003) 540 U.S. 1, 5; Padilla v. Ky (2010) 130 S. Ct. 1473, 1480-81. And the Sixth Amendment right to counsel is the right to effective counsel. Evitts v. Lucey, supra, 469 U.S. 387, 395-96; Strickland v. Washington, supra, 466 U.S. 668, 686; Cuyler v. Sullivan (1980) 466 U.S. 335, 344; McMann v. Richardson (1970) 397 U.S. 759, 771 n. 14.

After finding the F & R in error, Petitioner timely moved the district court for a de novo review based on the magistrate's misapplication of material facts and the omission of material facts important to Petitioner's claims of constitutional violations. The de novo review was granted, but the district court judge assigned to the case subse-

quently denied the petition, as well as Petitioner's request for a Certificate of Appealability (COA) and his motion for appointment of counsel.

In sum, the United States District Court's resolution of the issues presented herein is based on an unreasonable determination of the facts, and is contrary to, and/or involved an unreasonable application of, clearly established federal law, as determined by the United States Supreme Court. Consequently, it cannot be said Petitioner received a fair or unbias hearing of the issues, in the district court or any of the lower courts that claimed to have reviewed the entire record of the case.

Petitioner filed a timely request for a COA in the United States Court of Appeals, for the Ninth Circuit. That request was denied, the court claiming that [petitioner] had not made a "substantial showing of the denial of a constitutional right." Petitioner filed in that same court a timely motion for rehearing. That motion was also denied, as was his motion for appointment of counsel.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

T. C. Scott

Date: August 24, 2021