No.

In the

Supreme Court

of the

United States

Term,

JUSTIN MARTIN,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

1.

As Courts of the United States are Courts of Record, is it structural error for the federal Prosecution to rely upon a state search warrant for the admission of evidence without making such search warrant part of the formal record of the United States District Court by filing it with the District Court? Does the virtually universal practice of federal prosecutors of obtaining state search warrants, then using those state search warrants in federal prosecutions without filing those state search warrants with the District Court, constitute structural error as said warrants usually are critical to the outcome of the case?

2.

Can structural error be waived?

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The Petitioner, Justine Martin respectfully prays that a writ of certiorari issue to review the opinion of the United States Court of Appeals for the Sixth Circuit entered in the above-entitled proceeding on October 24, 2022.

OPINION BELOW

The opinion of the Sixth Circuit in this matter was not published and is attached hereto in the Appendix 1. The opinion of the District Court in this matter was not published and is attached hereto in the Appendix 2. The opinion of the

Magistrate Judge in this matter was not published and is attached hereto in the Appendix 3.

JURISDICTION

The Sixth Circuit denied Petitioner's appeal on October 24, 2022. This petition is timely filed. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1291 and Supreme Court Rule 12.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution states:

> The right of the people to be secure in their persons, houses, papers, and effects, [a] against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

On September 18, 2018, an Information of a prior drug conviction under Section 851 was filed to enhance Martin's sentence. However, Martin had received a sentence of probation for this prior conviction. As the First Step Act changed the requirements for enhancement of a sentence because of a previous conviction, this enhancement was a nullity. (R. 120: Information, PageID 393-395).

A series of indictments and superseding indictments were filed prior to February 7, 2019, when Martin filed a motion to suppress the evidence acquired from the search of his residence and of his post arrest statements for an alleged failure to Mirandize him. [R. 201: Motions, PageID 799]. Martin filed a brief in support of his motion to suppress. [R. 202: Brief, PageID 800-11]. As an attachment to his motion to suppress, Martin filed the search warrant used to search his residence and its affidavit. [R. 202-1: Search Warrant and Affidavit, PageID 812-17]. The return was not filed nor is there any record that it was disclosed to Martin. Martin filed an affidavit claiming that he had never been Mirandized and denying any drug deals in the vicinity of the intersection of Union Avenue SE/Thomas St. SE. [R. 202-2: Search Warrant and Affidavit, PageID 818-19].

On March 7, 2019, the government filed a response to Martin's motions. [R. 234: Government response, PageID 881-901]. (Affidavit will hereinafter refer to the affidavit for the search warrant for Martin's residence.) In its response the government argued facts concerning the investigation which were not included in the affidavit, ostensibly for the Miranda issue. The government clearly strongly suggested to the District Judge that information not included in the affidavit but known to the police nevertheless could be included in the determination of whether or not the affidavit established probable cause.

The affidavit alleges five drug purchases from Martin in the six months preceding the search warrant.

The government presented cell telephone texts, interviews with informants, and testimony ostensibly for the Miranda issue but this information found its way into the analysis of the affidavit.

The government argued that the affidavit established that Martin was a large-scale ongoing drug trafficker who had been seen exiting his residence right before a controlled drug purchase a block away from his residence. None of these facts were in the affidavit.

Statements in the Affidavit regarding Probable Cause to Search Martin's

Residence

Aside from the standard boilerplate assertions, the affidavit states in pertinent part the following:

> "Affiant says that he has probable cause to believe that the above-listed things to be seized are now located upon said described premises, based upon the following facts:
>
> "Your affiant is a Deputy with the Kent County Sheriff Department for the past 8 years.
>
> "Your affiant is currently assigned as a Detective with the Kent Area Narcotics Enforcement Team. The Kent Area Narcotics Team is a multi-jurisdictional task force charged with investigating narcotics trafficking and other related drug crimes.
>
> "Your affiant has participated in the investigation of many narcotic cases of varying degrees while employed at the Kent County Sheriff Department…
>
> "The Kent Area Narcotics Enforcement Team has been involved in an investigation regarding the sale and delivery of heroin at 657 Thomas St SE in the City of Grand Rapids with Justin David Martin 1/5/86 being the suspect.
>
> "Within the past seven days your affiant utilized a credible, reliable, and confidential informant #2186 (the first informant mentioned in the affidavit) to purchase heroin from Justin David Martin 1/5/86, using pre-recorded vice funds. While under the constant surveillance of KANET Detectives, the informant (emphasis added) met with Justin Martin and purchased heroin from him near the intersection of Union Ave SE/Thomas St SE. The informant completed the heroin transaction with Justin Martin, and after the heroin transaction was completed turned the heroin over to KANET Detectives which field tested positive for heroin. The informant stated that he/she has been purchasing heroin from Justin Martin for over six months and has bought more than 5 times.
>
> "The informant, working under the direction and control of your

affiant, has made five controlled purchases of controlled substances and gave credible and reliable information on each occasion. All controlled purchases tested positive for the presence of a controlled substance. The informant was searched before and after each of the above-described purchases and no controlled substances was found to be concealed on said informant. To the best of your affiant's knowledge, this informant has never provided any false information.

"Your affiant observed Justin Martin exit the front door (of) (sic) 657 Thomas St SE, prior to meeting with CI #2186. Several law enforcement databases list Justin David Martin's address as 657 Thomas St SE.

"Justin David Martin 1/5/86 has three prior VCSA convictions on his Michigan CCH.

"Based upon the above experience and training of your affiant, a pattern of criminal behavior has become apparent and predictable to your affiant. Traffickers of controlled substances can be classified both by the amount of controlled substances they are able to deal in and the purpose of trafficking.

"The 'user' type of trafficker is an individual who deals in controlled substances to support his need to obtain the controlled substance can be differentiated from the individual who traffics a controlled substance for 'profit'. The 'user' normally deals in smaller quantities, for example, one (1) gram of cocaine or one (1) ounce of marijuana deliveries or less: Normally, this individual traffics enough controlled substances to supply his or her personal needs. They normally do not have an organized system for his/her trafficking.

"However, the 'profit' type of trafficker is usually capable of multiple grams and ounce sales of heroin and cocaine or multiple ounces and pound sales of marijuana. These individuals normally have a relatively stable network of suppliers and customers. These individuals may or may not be gainfully employed while engaging in their trafficking. Because of the ongoing nature of these traffickers, it is necessary for these 'profit' traffickers to maintain a base of operations where they can be contacted both by their suppliers and customers. This business type atmosphere generates the expected paper trails of phone calls, messages,

use of communications devices, pagers, etc.

"These dealers also need the equipment to process the controlled substances, such as scales for weighing and repackaging and/or cutting materials to 'step' on their controlled substances…

"WHEREFORE, your affiant for the foregoing reasons does verily believe that evidence of further narcotics trafficking and manufacture, proceeds of narcotics trafficking and manufacture, and/or records/documents or other indication of narcotics trafficking and manufacture will be discovered at (Martin's residence.)" (R. 202-1: Affidavit, PageID 812-17).

COMBINED HEARING ON THE MOTIONS TO SUPPRESS FOR AN ALLEGED MIRANDA VIOLATION AND FOR LACK OF ANY PROBABLE CAUSE NEXUS TO MARTIN'S RESIDENCE

The hearing regarding Martin's motions to suppress was held on April 24, 2019. The prosecution said they would call one witness solely on the Miranda issue.

The prosecution initially conceded that obviously the warrant is judged on its own merits.

The only witness at the suppression hearing was Detective Lindsey Moorehead called by the prosecution. Moorehead testified that she was employed by the Kent County Sheriff's Department and was assigned as a task force officer to the DEA. Moorehead testified that she had investigated Martin

for dealing heroin. Moorehead testified that she believed that two deaths had resulted from Martin dealing heroin or Fentanyl. Moorehead testified that she arranged two drug purchases from Martin on March 19th and April 2nd of 2018. The warrant was executed on April 3rd of 2018. Moorehead testified that both purchases occurred in the area of Union and Thomas Streets in Grand Rapids. (Id., PageID 5844-45).

Moorehead testified that she was the affiant on the affidavit for the search warrant to search Martin's residence. Moorehead testified that as part of the process of executing the search warrant, she contacted a second informant to order heroin from Martin. Moorehead testified that this informant made a recorded telephone call to Martin to order heroin. Moorehead testified that she followed the second informant to the area of Union and Thomas. Moorehead testified that at one point the second informant informed Moorehead that she was in the area where she was supposed to meet with Martin. Moorehead testified that Martin then left 657 Thomas Street, Southeast and was taken into custody. (Id., PageID 5846).

Moorehead testified that Martin was placed in an undercover police vehicle and interviewed. Moorehead testified that the interview was not

recorded. Moorehead testified that she Mirandized Martin prior to the interview and offered into evidence the Miranda card she claimed that she read to Martin. Moorehead testified that she did not have Martin sign the card because he was handcuffed. Moorehead testified that she had conducted over one hundred custodial interviews and never failed to Mirandize a subject of the interview. Moorehead testified that she generated a report from the execution of the search warrant at 657 Thomas Street, Southeast (Martin's residence) but it was never filed. (This is not the "return" on the warrant because it concerned her interview of Martin solely concerning the Miranda issue). (Id., PageID 5847-51).

Moorehead testified that Martin agreed to be interviewed and admitted selling illegal drugs. Moorehead testified that Martin identified his source of supply of illegal drugs. Moorehead testified that although the affidavit filed by Martin denied being Mirandized or selling drugs near the intersection of Union and Thomas, this was untrue.

Moorehead testified that she had obtained a separate state search warrant for Martin's cell telephone. (Emphasis added, this state search warrant was not filed). Moorehead testified extensively to text messages from Martin's cell telephone in which Martin told customers to meet him near Union and

Thomas in order to sell them heroin. Moorehead testified to various drug deals which seem to be referenced in the cell telephone messages, many of which reference streets other than Union and Thomas, but which may be in the general vicinity. (Id., PageID 5851-63).

Moorehead testified that she had handwritten reports of "controlled heroin purchases" from Martin on April 2, 2018, and March 19, 2018, in the vicinity of Union Avenue and Thomas Street in Grand Rapids during the week preceding the search warrant. [Id., PageID 5863-65].

On cross examination Moorehead admitted that no drug activity had taken place at Martin's residence. Moorehead admitted that none of the text messages told anyone to meet Martin at his residence. Moorehead admitted that her report concerning the drug deal of April 2, 2018, which might be the deal referenced in the affidavit, does not indicate that she watched Martin exit his residence and travel to the controlled drug buy. The court immediately shut down this line of inquiry because the testimonial hearing was concerned solely with the Miranda issue. [Id., PageID 5865-74].

In closing argument, the prosecution addressed the search warrant's nexus of illegal activity with Martin's residence. The prosecution agreed that

the search warrant's probable cause to search Martin's residence was to be determined only by the information contained in the warrant and the affidavit, not upon other information known to the police which had not been included in the affidavit. [Id., PageID 5874].

While agreeing on the one hand that extra-affidavit information could not be considered in assessing the affidavit's establishment of probable cause, the prosecution later strongly suggested that extra-affidavit information could be so used, which is exactly what the district court did. [Id., PageID 5877-78].

The prosecution misstated the averments in the affidavit. The prosecution claimed that Moorehead had watched Martin leave his residence and travel to meet the confidential informant for the controlled buy, within the week preceding the execution of the search warrant. The prosecution falsely argued that it was reasonable for the issuing magistrate to find that there was a nexus of illegal activity to Martin's home, since Martin went directly from that home to do a controlled buy. The prosecution falsely argued that the affidavit established that Martin was a major drug trafficker with a connection to his residence. (The affidavit said nothing of the sort.)

The prosecution argued that the officers relied upon the warrant in good

faith because there was a minimally sufficient nexus between the illegal activity and the place to be searched. (The affidavit did not establish any nexus between the illegal activity and Martin's home.) The prosecution argued that this was not a bare bones warrant. (It was a bare bones warrant.) (Id., PageID 5875-77).

The prosecution disingenuously argued that there was a split of authority concerning whether extra-affidavit information not included in the affidavit but known to the police could be blended into a search warrant affidavit to establish probable cause. This is untrue. The prosecution argued that this issue would be clarified in a case captioned United States v. Christian. The prosecution was again disingenuous. In Christian informants stated that the owner of the residence was a large-scale drug dealer from whom they had purchased large quantities of drugs at his residence and that a drug purchaser was observed leaving that residence, whereupon he was promptly stopped, searched, and found to be in possession of drugs. United States v. Christian, 893 F.3d 846 (6th Cir.), reh'g an banc granted, opinion vacated, 904 F.3d 421 (6th Cir. 2018), and on reh'g *an banc*, 925 F.3d 305 (6th Cir. 2019). There is nothing like that in Martin's affidavit. There is no information concerning Martin's residence except that on one occasion he left it. (Id., PageID 5877-78).

The prosecution noted that there had been a search warrant for Martin's cell phone, "separate and apart" from the search warrant for Martin's residence. (This search warrant for Martin's cell phone also was not filed). (Id., PageID 5879). The district court denied the motions to suppress on April 24, 2019. (R. 270: Order, PageID 1043).

A sixth superseding indictment was filed on September 17, 2019. (R. 377: Indictment, PageID 1759-1778). On September 18, 2019, the government refiled the Information of a prior felony drug conviction for which Martin received a sentence of probation, which does not meet the criteria of the First Step Act, rendering it a nullity. (R. 380: Information, PageID 1785-1787).

On July 21, 2020, Martin entered into a plea agreement in which he pled guilty to Counts 1, 8, 9, and 10 of the Sixth Superseding Indictment which offenses were Conspiracy to Distribute and Possess With Intent to Distribute Controlled Substances, in violation of Title 21, United States Code, Sections 846 and 841(b)(l)(C); Possession With Intent to Distribute Heroin and Fentanyl, in violation of Title 21, United States Code, Section 841(b)(l)(C); Felon In Possession of a Firearm, in violation of Title 21, United States Code, Section 922(g); and Possession of a Firearm in Furtherance of Drug Trafficking, in

violation of Title 18, United States Code, Section 924(c). The government agreed to dismiss the remaining counts, and to dismiss the "Information regarding Prior Conviction," and Martin agreed to continue his cooperation with the government, for which he received nothing. Martin waived his appellate rights except for a few, including his right to appeal ineffective assistance of counsel. (R. 547: Plea Agreement, PageID 2467-2479).

The district court entered judgment on April 14, 2021, for Conspiracy to Distribute and Possess With Intent to Distribute Controlled Substances (Methamphetamin Heroin, Marijuana, Fentanyl, and Cocaine) 21 U.S.C. §§ 846, 841(a)(1), and (b)(1)(C); Possession with Intent to Distribute Heroin and Fentanyl 21 U.S.C. § 841(a)(1) and (b)(1)(C); Felon in Possession of a Firearm 18 U.S.C. § 922(g)(1); and Possession of a Firearm in Furtherance of Drug Trafficking 18 U.S.C. § 924(c)(1)(A)(i). (R. 747: Judgment, PageID 4240-4246).

REASONS FOR GRANTING THE WRIT

1. Courts of the United States are "Courts of Record." Therefore it is structural error for the Prosecution to rely upon a state search warrant for the admission of evidence without making such search warrant part of the formal record of the United States District Court by filing it with the District Court. The virtually universal practice of federal prosecutors in obtaining state search warrants, then using said state search warrants in federal prosecutions, without filing such warrants in federal court, must be corrected. Some of the time, it is impossible to know precisely what happened to allow the admission of evidence critical to the outcome of the federal case. In a Court of Record, orders critical to the outcome of a case infallibly must appear in the formal record of the court. It is structural error to not file such state search warrants.

2. The Sixth Circuit has created precedent that structural error is waived if not asserted in objections to a Magistrate Judge's report. This rule is contrary to this Court's precedent and is a dangerous erosion of insistence upon certain basic constitutional guarantees that should define the framework of any criminal trial.

This Court should grant certiorari to determine whether state search warrants used in federal prosecutions must be filed with the district court when prosecution is in that court, and whether it is structural error to fail to do so.

This Court should clarify that structural error cannot be waived by not being asserted in objections to a Magistrate Judge's report. This is contrary to this Court's precedent and is an erosion of this Court's insistence upon certain basic

constitutional guarantees that should define the framework of any criminal trial. This Court has held that even if an error issue is raised for the first time on appeal, if it appears there is structure error, the result is automatic reversal of the conviction. Neder v. United States, 527 U.S. 1 (1999).

The prosecution should be required to file their search warrants as a precondition to the prosecution of a home owner or of a cell telephone owner.

This Court has instructed that the purpose of the structural error doctrine is to ensure insistence on certain basic, constitutional guarantees that should define the framework of any criminal prosecution. Weaver v. Massachusetts, _____ U.S. __, 137 S. Ct. 1899, 1907 (2017).

The instant search warrants were critical to Martin's prosecution. The district court declared:

> "The affidavit does set forth facts which concern the informant's -- let me go back a minute. The nexus requirement does require a connection between the residence to be searched and the illegal activity. And here I've talked about this quite a bit already. The affidavit sets forth facts concerning the informant's controlled purchase and that she had been purchasing heroin from Mr. Martin for over six months, and on at least five occasions, and that the affiant observed Martin exit the front door of his home, which as indicated I think that's a little bit up in the air, but, again, there is sufficient testimony and observation to demonstrate a nexus to the house. …The facts indicating Mr. Martin's ongoing drug transactions over a period of time, the drug activity took place near his home, and as the text messaging shows, he would talk with the buyers, set up a time and place to meet and it was usually almost contemporaneous with the texting that was going on,

> and these meetings to deliver drugs were within a block or so of where he lived. I mean I don't know how much more nexus is necessary really. If it had been one time, perhaps, but this was a continuing pattern that we see. So given these ongoing drug transactions near his home, I think is sufficient to establish probable cause to search." (R. 827: PageID 5894-95).

The trial Court concluded that there was a substantial basis for a finding of probable cause for the search of Martin's residence relying in large part upon the averments contained in the search warrant affidavit and upon cell telephone data. The court erroneously interpreted the affidavit's averments, but they were nonetheless crucial to the Court's denial of Martin's motions to suppress.

The Constitution of the United States requires that documents of such critical importance as search warrants be presented by filing them and making them part of the record of the case, not merely by talking about them, informally disclosing them, or having the defense attach some documents to a motion.

This Court reviewed the history of structural error beginning in Chapman v. California, 386 U.S. 18, at 23 (1967), wherein the Court noted that some errors should not be deemed harmless beyond a reasonable doubt. These errors came to be known as structural errors. Arizona v. Fulminante, 499 U.S. 279, at 309-310 (1991).

This Court stated that, "The purpose of the structural error doctrine is to ensure insistence on certain basic, constitutional guarantees that should define the framework of any criminal trial. Thus, the defining feature of a structural error is that it 'affect[s] the

framework within which the trial proceeds,' rather than being 'simply an error in the trial process itself.' Id., at 310. For the same reason, a structural error "def[ies] analysis by harmless error standards." Id., at 309 (internal quotation marks omitted). Weaver v. Massachusetts, _____ U.S. __, 137 S. Ct. 1899, at 1907- 08 (2017).

This Court explained:

> "The precise reason why a particular error is not amenable to that kind of analysis—and thus the precise reason why the Court has deemed it structural—varies in a significant way from error to error. There appear to be at least three broad rationales.
>
> "First, an error has been deemed structural in some instances if the right at issue is not designed to protect the defendant from erroneous conviction but instead protects some other interest. This is true of the defendant's right to conduct his own defense, which, when exercised, "usually increases the likelihood of a trial outcome unfavorable to the defendant." McKaskle v. Wiggins, 465 U.S. 168, 177, n. 8, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984). That right is based on the fundamental legal principle that a defendant must be allowed to make his own choices about the proper way to protect his own liberty. See Faretta v. California, 422 U.S. 806, 834, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). Because harm is irrelevant to the basis underlying the right, the Court has deemed a violation of that right structural error. See United States v. Gonzalez–Lopez, 548 U.S. 140, 149, n. 4, 126 S.Ct. 2557, 165 L.Ed.2d 409 (2006).
>
> "Second, an error has been deemed structural if the effects of the error are simply too hard to measure. For example, when a defendant is denied the right to select his or her own attorney, the precise 'effect of the violation cannot be ascertained.' Ibid. (quoting Vasquez v. Hillery, 474 U.S. 254, 263, 106 S.Ct. 617, 88 L.Ed.2d 598 (1986)). Because the government will, as a result, find it almost impossible to show that the error was 'harmless beyond a reasonable doubt,' Chapman, supra, at 24, 87 S.Ct. 824, the efficiency costs of letting the government try to make the showing are unjustified.
>
> "Third, an error has been deemed structural if the error always results in fundamental unfairness. For example, if an indigent defendant is denied an

> attorney or if the judge fails to give a reasonable-doubt instruction, the resulting trial is always a fundamentally unfair one. See Gideon v. Wainwright, 372 U.S. 335, 343–345, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963) (right to an attorney); Sullivan v. Louisiana, 508 U.S. 275, 279, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993) (right to a reasonable-doubt instruction). It therefore would be futile for the government to try to show harmlessness.
>
> "These categories are not rigid. In a particular case, more than one of these rationales may be part of the explanation for why an error is deemed to be structural. See e.g., id., at 280–282, 113 S.Ct. 2078. For these purposes, however, one point is critical: An error can count as structural even if the error does not lead to fundamental unfairness in every case. See Gonzalez– Lopez, supra, at 149, n. 4, 126 S.Ct. 2557 (rejecting as 'inconsistent with the reasoning of our precedents' the idea that structural errors 'always or necessarily render a trial fundamentally unfair and unreliable' (emphasis deleted)). Weaver, U.S. 137, at 1907-1908.
>
> Two of the above rationales apply to Martin's prosecution.

Beginning with the first rationale, requiring that the prosecution file the search warrants, affidavits, and returns of the warrants goes beyond protection of Martin. It protects the integrity of the process by ensuring insistence upon certain basic, constitutional guarantees that should define the framework of any criminal prosecution. Requiring that important Constitutionally mandated documents, as are search warrants, appear in the record of a prosecution for all to see is an obvious component of such a constitutional framework.

The second rationale also applies as the effects of the error are simply too hard to measure. We cannot know what an examination of the residential search warrant return or of the cell telephone search warrant documents would have yielded. The consequences

of this deprivation are necessarily unquantifiable and indeterminate, which again qualifies these omissions as structural errors.

Assessing what a timely examination of the return of the search warrant for Martin's residence or what an examination of the cell telephone search warrant would yield is a speculative inquiry into what might have occurred in an alternate universe. Were there issues of over-breadth in the execution of the residential warrant? Was the cell telephone search warrant defective or overbroad? These issues cannot be determined from the record.

This Court has categorically exempted structural errors from the case-by-case harmlessness review to which trial errors are subjected. This Court does not attempt to parse which structural errors are truly egregious. It simply views all structural errors as "intrinsically harmful" and holds that any structural error warrants "automatic reversal" on direct appeal "without regard to [its] effect on the outcome" of a trial. Neder. The errors in Martin's prosecution are such errors and automatic reversal of the suppression decision and of the concomitant guilty plea and conviction is warranted.

This Court should clarify that structural error cannot be waived by not being asserted in objections to a Magistrate Judge's report. This rule is contrary to this Court's precedent and is an erosion of this Court's insistence upon certain basic constitutional guarantees that should define the framework of any criminal trial.

This Court has held that even if an error issue is raised for the first time on appeal, if it appears there is structure error, the result is automatic reversal of the conviction. Neder.

CONCLUSION

Petitioner requests that this Court grant certiorari, reverse the Sixth Circuit's affirmance, and remand for further proceedings.

Respectfully submitted,

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APPENDIX

1. COURT OF APPEALS Opinion October 24, 2022
2. Decision of the District Court March 27, 2019
3. Order of the District Court Denying Suppression April 24, 2019