No 18-9554

ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

"IN RE BILLIE JEROME ALLEN" (pro se)
Petitioner

AN ORIGINAL WRIT OF HABEAS CORPUS

** CAPITAL CASE **

BILLIE JEROME ALLEN
#26901-044
P.O. BOX 33
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** CAPITAL CASE **

QUESTIONS PRESENTED

1. Whether McCoy V Louisiana, 138 S. Ct. 1500 (2018) is a new "watershed rule", akin to Gideon v Wainwright, 372 U.S. 335 (1963), which falls within the "watershed rule paradigm", because "the effect of 'revoking [counsel's] agency'" before trial (quoting McCoy), is the denial of "the assistance of Counsel" for trial (quoting Gideon). See Alabama v Shelton, 535 U.S. 654 (2002) ("Where the inference . . . draw[n] is that it is the sheer importance of 'the right to counsel' that is the 'primacy in the analysis'") (emphasis added).

2. Where every conduct of a non-capital case and capital case proceedings are different; the prosecutor; defense counsel (their experience and strategies); the judge; the motions filed and not filed; the rulings and orders; the jury (a death qualified jury or a regular jury); the jury questionnaires; the trial; the opening statements; closing statements; and then the level of the sentence that can be imposed.

Whether it's a "structural error", "affecting the framework within which the trial proceeds" Arizona v Fulminante, 499 U.S. 279, 309-310 (1991), when the grand jury is excluded from authorizing a non-capital case to proceed to trial with capital case proceedings and an enhanced punishment; and both the government and the court "guess" it's what the grand jury "would've authorized."

3. Whether trial counsel not discovering and not presenting "negative DNA results" and "negative gasoline results" that would've exonerated the defendant at trial, because counsel went against the defendant's objective to maintain and prove the defendant's innocence at trial, qualify as "exceptional circumstances to warrant the excercise of this Court's discretionary power to issue an original writ of habeas corpus." (quoting S. Ct. R. 20.4(a)). See In re Davis, 557 U.S. 952, 953 (2009) ("[T]he substantial 'risk' of putting an innocent man to death . . . is sufficiently 'exceptional' to warrant utlization of this Court's . . . original habeas jurisdiction." (Stevens, J., concurring, joined by Ginsburg, J., and Breyer, J..).

PARTIES TO THE PROCEEDINGS BELOW

Solicitor General

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PETITION FOR AN ORIGINAL WRIT OF HABEAS CORPUS

Billie Allen respectfully petitions this Court for an original writ of habeas corpus. This writ will be in aid of this Court's habeas jurisdiction to determine whether McCoy is a "watershed rule", and should be applied to cases on collateral review, where "evenhanded justice requires retroactive application 'to all similary situated defendants '" (quoting Teague v Lane, 489 U.S. 288, 300 (1989)), and "adequate relief cannot be obtained in any other form from any other court." (quoting S. Ct. R. 20.4(a)). Because the traditional avenues for relief have been foreclosed to Allen, and only this Court can make such a determination; question 1.

This writ will also be in aid of this Court's habeas jurisdiction to correct a clear misapplication on constitutional and Supreme Court law. Which has left a structural error in place where a new trial is the required corrective; question 2.

The exceptional circumstances to "warrant the exercise of the Court's discretionary powers", (quoting S. Ct. R. 20.4(a)), are presented throughout this petition. Which include, but are not limited to; 1) the Government's "negative DNA results; where Allen's DNA was tested against DNA found at the crime scene (APPENDIX A); 2) The Government's "negative gasoline results"; where all of Allen's clothes were tested for traces of gasoline (APPENDIX B); 3) Statement's from witnesses; who saw someone other than Allen fleeing the crime scene (APPENDIX C); 4) Statement from a witness; who saw someone other than Allen, talking to the suspect who was arrested at the crime scene about robbing the bank. All evidence that was never discovered or presented in Allen's defense, when counsel chose to override Allen's objective to maintain and prove Allen's innocence and concede Allen's guilt. See In re Davis, 557 U.S. 952, 953 (2009) ("[T]he substantial risk of putting an innocent man to death . . . is sufficiently exceptional to warrant utilization of this Court's . . . original habeas jurisdiction."

Allen is presenting this petition pro se[1] and prays that this Court will allow him to do so.

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1 Allen is proceeding pro se because his court appointed counsel of record have refused to aid and assist him in the presentation of this petition. Thus, forcing Allen to waive his claim. Or, Allen file pro se and pray this Court will entertain this petition in the "interest of justice."

INTRODUCTION

In McCoy v Louisiana, 138 S. Ct. 1500 (2018), this Court established a new rule of law, by announcing that the "defendant has the right to insist that counsel refrain from admitting guilt, even when counsel's experienced-based view is that confessing guilt offers the defendant the best chance to avoid the death penalty."

The holding by this Court in McCoy embodies the centrality and primacy of both Gideon v Wainwright, 371 U.S. 355 (1963), and the "watershed rule" in character and effect. When concluding that a McCoy violation "has the effect of 'revoking [counsel's] agency.'" McCoy (quoting Scalia, J., concurring in judgment, in Gonzalez v United States, 553 U.S. 242, 248 (2008)); see also Alabama v Shelton, 535 U.S. 654 (2002) ("Where the inference . . . draw[n] is that it is the sheer importance of 'the right to counsel' that is 'the primacy in the analysis.'")

McCoy becomes an extension of Gideon when, even if the defendant is granted "the right to counsel", but before trial counsel states his intent to override the defendant's objective to maintain and prove the defendant's innocence by conceding guilt. Then does so at trial. The intent beforehand, and then carrying out the act at trial, "has the effect of revoking [counsel's] agency." McCoy. Because "counsel's conduct amounts to disloyalty or renunication of his role, which 'terminates his authority.'" (quoting Restatement (Second) of Agency 112, 118 (1957)). Thus, leaving the defendant without the "Assistance of Counsel", while still longing for "the right to counsel" that the Sixth Amendment guaranteed him. See Howard v United States, 374 F.3d 1068, 1077-1081 (11th Cir. 2004) ("[T]he Supreme Court has held 'every extension of Gideon to have retroactive application.'") (emphasis added) (Relying on Alabama v Shelton, 535 U.S. 654).

Like McCoy, when met with opposition from counsel to maintain and prove his innocence; Eight months before trial, Allen, not learned in the law and with limited eduction, would ask the Court for help in substituting counsel from his capital case. See McCoy, 138 S. Ct. _____ ("[I]f counsel is appointed and unreasonably insists on admitting guilt over the defendant's objections, a capable trial judge will almost

certainly 'grant a timely request to appoint substitute counsel.' And if such a request is denied, the ruling may be vulnerable on appeal." (Alito, J., Thomas, J., and Gorsuch, J., dissenting). But the court would deny Allen's motion(s) without a hearing, an inquiry, nor any investigation by the court into whether counsel should be removed.

With counsel left on Allen's case from the court's denial of Allen's motion(s), counsel would override Allen's objective to maintain and prove Allen's innocence, by sacrificing Allen's guilt for Allen's life when conceding Allen's guilt to the jury. Allen would be found guilty and later sentenced to death. And in the Motion For A New Trial, counsel would make a concession to the court, stating that "The District Court erred, clearly erred, or abused its discretion in denying [Allen's] motion[s] for appointment of different counsel." (filed in the District Court, May, 18, 1998). The court would deny the motion without a hearing, an inquiry, nor any investigation by the court to see if Allen's "right to the Assistance of Counsel" had been violated by leaving counsel on Allen's case.

This writ is in aid of this Court's jurisdiction to determine whether McCoy is a new "watershed rule of law", akin to Gideon, which falls within the "watershed rule paradigm", and should be retroactively applicable to cases on collateral review. Because "evenhanded justice 'requires' retroactive application 'to all similary situated defendants.'" (quoting Teague v Lane, 489 U.S. 288, 300 (1989)). See also Atley v Ault, 191 F.3d 865, 874 (8th Cir. 1999) ("The Brecht Court, 'drawing no distintion between collateral and direct review', recognized that 'the existence of . . . defects not subject to harmless error review requires reversal of the conviction because they 'infect the entire trial process.'") (quoting Brecht v Abranhamson, 507 U.S. 619, 629-30 (1993)). This Court should grant this writ. Allen deserves a new trial.

II. Every conduct of a non-capital case and a capital case are different in every way possible; the arraignment; the prosecutor assigned; the defense attorney assigned (their qualifications on capital cases); the trial judge; every motion filed or not filed; the rulings and orders by the court; the investigation (guilt/innocence or

guilt/innocence and penalty phase); the jury pool; the jury questionnaires; jury selection (whether they are a regular jury or a "death qualified" jury); opening statements; the trial proceedings; jury instructions; the verdict (if any); and the punishment (which can end in one-phase or two). And when the grand jury is excluded from its constitutional role of ensuring that "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury." (quoting U.S. Const. amend V). The entire conduct of the trial from beginning to end is obviously affected, and made unreliable, fundamentally unfair, tainted, and the error too hard to measure because the proceedings and punishment will be unauthorized by the grand jury.

Both the government and the Eighth Circuit would concede that Allen's "indictment cannot be reasonably construed to charge a statutory aggravating factor, 'as required for imposition of the death penalty', it is 'constitutionally deficient to charge a capital offense.'" United States v Allen, 357 F.3d 745, 747 (8th Cir. 2004); see also United States v Allen, 406 F.3d 940 ("[I]t 'was clear' [Allen's] indictment 'suffered a Fifth Amendment defect' [and there was a] deprivation 'of [Allen's] Fifth Amendment right.'") (emphasis added).

Yet, before trial, and before the error would infect the proceedings as a whole. Counsel for Allen would object to Allen's non-capital case being allowed to proceed to trial with capital case proceedings and an enhanced punishment that the grand jury never authorized. The court would overrule the objection by denying the motion, and the government wouldn't seek a superseding indictment to correct the error that was brought to their attention before the trial began. See Weaver v Massachusetts, 137 S. Ct. 1899, 1910 (2017) ("Thus, in the case of a structural error where there is an objection at trial and the issue is raised on direct appeal,[2] the defendant generally is entitled to 'automatic reversal regardless of the error's actual effect on the outcome.'")

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2 Allen would raise the claim on direct appeal and in his 28 U.S.C. 2255 proceedings. There is also "one" other case in which the same error occured. See United States v Robinson, 367 F.3d 278 (2004). Where counsel would object at trial and raise the claim on direct appeal.

To excuse the error, the Eighth Circuit would deem it "harmless", and justify its stance by stating "'[I]f the grand jury had been asked to charge the grave-risk-of-death-to-others statutory aggravating factors, [as required for imposition of the death penalty], 'it would have done so.'" Stating further "that 'any rational grand jury, including Allen's grand jury, would have found probable cause to charge that Allen knowingly created a grave risk of death to persons others than Heflin while committing the bank robbery or escaping apprehension.'" United States v Allen, 406 F.3d 940,942,949 (8th Cir. 2005) (en banc) (emphasis added).

The Eighth Circuit's holdings in Allen's case are in clear conflict with "all' of this Court's holdings on the Fifth Amendment, prosecutors and courts intruding into the grand juries deliberations, and revising anything outside of what the grand jury authorized. See Costello v United States, 350 U.S. 359, 362-363 (1956) ("No case has been cited, nor have we been able to find any, furnishing an authorization for 'looking into and revising the judgment of the grand jury upon the evidence.") (quoting United States v Reed, 2 Blatchf. 435, 27 Fed. cas. 727, 738, F. Cas. No. 16134 (C.C.N.D.N.Y. (1852)); United States v Dionisio, 410 U.S. 1, 16-17 (1973) (The Fifth Amendment guarantee by indictment by a grand jury "presupposes an investigative body 'acting independently of either prosecuting attorney or judge.'"); see United States v Calandra, 414 U.S. 338, 343 (1974) "No judge presides 'to monitor its proceedings. [The grand jury] [d]eliberates in secret and 'may determine alone the course of its inquiry.'"); see Vasquez v Hillery, 474 U.S. 254, 263 (1986) ("The grand jury . . . [decides whether to] charge a greater offense or a lesser offense; numerous counts or a single count; and perhaps most significant of all, a capital offense or a noncapital offense--all on the basis of the same facts."); and this Court has boldly stated that "[b]oth Congress and 'this Court have consistently stood ready to defend against unwarranted intrusion'" into the grand jury process. United States v Sells Enginerring Inc., 463 U.S. 418, 425 (1983).

Nothing in this Court's history of its holdings on this issue support the misapplication of law that was applied by the Eighth Circuit. If anything, the

Eighth Circuit has created a split between themselves and this Court as to whether the Fifth Amendment demand that "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury" (quoting U.S. Const. amend. V.) is an actual constitutional guarantee, and whether or not there are exceptions when the grand jury can be excluded from its constitutional role. But the most troubling is the Eighth Circuit's intrusion into the grand jury process; "guessing" what, if anything the grand jury found, deliberated, and then appoint themselves as the grand jury by leaving in place an enhancement in Allen's proceedings and an enhancement in punishment that Allen's actual grand jury didn't authorize. Which is clearly outside the respected jurisdiction of both the prosecutor and the Eighth Circuit.

There is no doubt that this error is a "defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself" and "defy[s] analysis by 'harmless error standards.'" Arizona v Fulminante, 499 U.S. 279, 309-310 (1991). Because the entire conduct of the trial, after the grand jury, from beginning to end, is obviously affected when excluding the grand jury from making a decision and/or giving authorization for proceedings and a punishment that only they have the jurisdiction to approve moving forward.

This writ is in aid of this Court's habeas jurisdiction to correct an egregious misapplication of federal law in an area of great public concern.

OPINIONS BELOW

On February 12, 2014, in the Eastern District of missouri, (where Allen's charges and conviction originated), the District Court would order that the "Clerk of the Court shall 'not accept any future pro se filings' . . . [and] [a]ny 'future pleadings filed on behalf of [Allen] shall be filed by counsel of record only.'" see (E.D. Mo. Case #4:07-cv-00027-ERW Doc-372). And with the standing order still in place by the reviewing court; to whom a possible grant of an application pursuant 2255 (h)(2)

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3 All (Doc) will relate to (E.D. Mo. Case #4:07-cv-00027-ERW), unless stated otherwise with the (Doc:Document).

would appear. There's no avenue for Allen's "McCoy claim" to be heard on the merits, when Allen has been forced to proceed pro se, and the reviewing court will not "accept any future filings" unless by counsel of record for Allen.

While drafting this petition, Allen has sought leave in the Seventh Circuit, (where he is being held), to seek relief pusuant McCoy, being a new rule of law that applies to his case and circumstances and he's trying to ensure that he meets the one-year statute of limitations for such relief.[4] The court would send the order from the court to counsel of record, instead of Allen, and counsel would inform Allen that the motion was denied "as being a second or successive petition". The court would then inform Allen to file in the Eighth Circuit. Thus, forclosing the other traditional avenue for relief to Allen pursuant a new rule of law, and where "adequate relief cannot be obtained in any other form or from any other court " (quoting S. Ct. R. 20.4(a)), except this Court.

On question (2), the Eighth Circuit's misapplication of law, and its split from this Court's holdings, spawned from this Court granting Allen certiorari, Allen v United States, 536 U.S. 953 (2002). The court, in granting certiorari, vacated the Eighth Circuit's decision, United States v Allen, 247 F.3d 741, 795 (8th Cir. 2001) (affirmed), and remanded for reconsideration in light of Ring v Arizona, 536 U.S. 584 (2002). A panel of the eighth Circuit would vacate Allen's death sentence, United States v Allen, 357 F.3d 745, 747 (8th Cir. 2004). The Eighth Circuit en banc Court would deem the error harmless, and reinstate Allen's death sentence, United States v Allen, 406 F.3d 940, 942,949 (8th Cir. 2005) (en banc). This Court denied certiorari, United States v Allen, 549 U.S. 1095 (2006). The error was never resolved, a structural error remains in place, in need of revision from a misapplication of law and "adequate relief cannot

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4 This "close-to-the-deadline" filings wasn't intentional. I, Billie Allen suffer from a serious medical condition, which for the last several years, has kept me in and out of the hospital; sometimes for months, weeks, or days. (Sometimes having to be sent to I.C.U.) But since McCoy was decided, without counsel's help, and when I've been able. I've spent every moment trying to complete this petition in a timely fashion. Because I never know when, or if I will have to go back. And in order to meet the one-year statute of limitations for a new rule of law. I swear that the following is true and will provide "this Court" with proof of my stays in the hospital throughout this time, if needed.

be obtained in any other form or from any other court (quoting S. Ct. R. 20.4(a)), except this Court.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked pursuant to 28 U.S.C. 1651(a), and S. Ct. R. 20.4(a).

This writ also turns to this Court's history of maintaining both, its authority and jurisdiction to entertain original habeas petitions "first". When the writ shows that exceptional circumstances exist, and even when the writ hasn't been denied by the lower court's first. See Cf. Parisi v Davis, 405 U.S. 34, 48. 1 (1972) (Douglas, J., concurring) (Court "has not settled" [question whether it has] "jurisdiction to issue an original writ of habeas corpus 'except when issuance of the writ has first been denied by the lower court.'"); Felker v Turpin, 518 U.S. 651,658 (1996) ("We conclude that although [AEDPA] does impose new conditions on our authority to grant relief, 'it does not deprive this Court jurisdiction to entertain original habeas petitions.'") And this Court taking into account (without necessarily being bound by) AEDPA's criteria for review of a claim presented in a second or successive petition. ("Whether or not we are bound by th[e] [Statutory] restrictions [on repetitive and new claims], they certainly inform our consideration of original habeas petitions.") Felker, 518 U.S. at 663; see Boumediene v Bush, 553 U.S. 723, 777-78 (2008) (explaining that Felker "interpret[ed] Title I of AEDPA to not strip from this Court the power to 'entertain original habeas petitions.'") see In re Davis, 557 U.S. 952, 953 (2009) Stevens, J., concurring, joined by Ginsburg and Breyer, J., J.) (Describing Felker as "expressly leaving open the question 'whether and to what extent' the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) applies to original petitions."); And with the DNA and other evidence to support his innocence. "The substantial risk of putting an innocent man to death . . . is sufficiently 'exceptional' to warrant utilization of this Court's . . . original habeas jurisdiction."

Though some have been laid out earlier. The exceptional circumstances

that warrant the excercise of this Court's discretionary power to issue a writ of habeas corpus for the reasons set forth, infra, "THE STATEMENT OF FACTS", "REASONS FOR GRANTING THE WRIT", and "EXCEPTIONAL CIRCUMSTANCES WARRANT THE EXCERCISE OF THIS COURT'S HABEAS JURISDICTION."

STATEMENT PURSUANT TO RULE 20.4(a)

This writ satisfies the requirements to Rule 20.4(a).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

This petition involves the following provisions of the U.S. Constitution:

Article III, Section 2, Clause 2, of the U.S. Constitution provides in relevant part;

> [T]he Supreme court shall have appellate Jurisdiction, both as to Law and Fact[.]

The Fifth Amendment to the U.S. Constitution provides in relevant part;

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury.

The Fifth Amendment to the U.S. Constitution provides in relevant part;

> No person . . . shall be compelled in any criminal case to be a witness against himself.

The Sixth Amendment to the U.S. Constitution provides in relevant part;

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.

STATEMENT OF FACTS

A. CRIME, ARREST, CHARGES

On March 17, 1997, two masked men would drive up to the Lindell Bank & Trust, in St. Louis, Missouri, in a van that had been doused in gasoline "before" the robbery. Both robbers would exit the van and then enter the bank. During the robbery, the security guard, Richard Heflin (Heflin), would be shot and later die from bullets discharged from one of the weapons.used in the robbery by one of the robbers.

After taking money, both robbers would exit the bank and re-enter the "gasoline soaked" van. They would drive away in the van, when a few miles away from the bank, the van would suddenly catch fire and crash in a forestry area. One of the suspects inside the van would be arrested and identified as Norris Holder. The other suspect would escape, by running over a hill and deeper into the forestry area. The next morning, Billie Allen would be arrested at an apartment he shared with a girlfriend and told he was being arrested in connection with the bank robbery and murder at the Lindell Bank & Trust.

Allen would be taken to the homicide office, where he would be put in an interrogation room and handcuffed to the leg of the table. Allen would inform the first officers to interview him that at the time the crime took place, he was shopping at a shopping mall, "Northwest Plaza", which was many miles away. He would even go so far as to tell the officers which stores he shopped at, what purchases he made, and then told them to get both the mall and the stores surveillance videos to show he was innocent. Both officers would state that they would look into the alibi, and also see if the mall had any surveillance video to look at. They would then tell Allen that if he "really wanted to show his innocence", he would give them DNA samples to test against evidence found at the crime scene. Allen would immediately agree to give the samples. The officers would also take his clothes as evidence.

Later an F.B.I. agent would enter the room and begin to read Allen his Miranda rights. To which Allen immediately asked for "counsel from the court." The agent then left the room, with Allen still handcuffed to the leg of the table.

Officers would state that they left Allen handcuffed to the leg of the table, inside the interrogation room for several hours after his request for counsel, "that no steps had been taken to secure counsel for Allen", and that he would "suddenly" confess to the crime.

A St. Louis grand jury would later indict Allen on two counts;

1. 18 U.S.C. 2113(a)&(e) (armed robbery by force or violence in which a killing occurs), and,
2. 18 U.S.C. 924(c)&(j) (carrying or using a firearm during a crime of violence and committing murder).

The indictment submitted and returned didn't authorize Allen's proceedings or sentence to be capital case proceedings or a capital case punishment in nature. But the government would "later" "Give notice of its intent to seek the death penalty", through a filing "signed" by the prosecutor and accepted by the court.

Being indigent, the court would appoint counsel from the Public Defender's office to represent Allen in his defense. With counsel, Allen would plea "not guilty" to all charges. But not long after being appointed to Allen's case. The Public defender's office was removed from Allen's case because of a conflict of interest.

B. **PRETRIAL: FACTS RELATED TO WRIT**

After the Public Defender's offices' removal from Allen's case, the court would then appoint criminal and capital defense attorney, Richard Sindel (Sindel) to represent Allen. Immediately, Sindel would object, by filing a motion to the court, informing both the government and the court that Allen's non-capital case was proceeding to trial with capital case proceedings and an enhanced punishment that was never authorized by Allen's grand jury. The government would oppose the motion, instead of filing a superseding indictment to correct the error, and the court would deny the motion and allow the error and proceedings to move forward.

Left with both capital case proceedings and a punishment to defend Allen against. Sindel would ask the court to appoint counsel John William Simon (Simon) to aid

him in his defense of Allen.

Both Sindel and simon would visit Allen in the county jail where Allen was being housed until the trial. Sindel would then inform Allen that he, Sindel was lead counsel and would handle "all" of the guilt-innocence phase of Allen's case, and that Simon would aid him in places at the penalty phase. Allen would then inform Sindel that he was "innocent", that his plea of "not guilty" was confirmation that trial was the only option against the charges, and Allen would then instruct Sindel and Simon that they were to "win" his case; by maintaining and proving Allen's innocence at trial.

Allen would then repeat what he had told officers upon his arrest, and then tell Sindel that he should send someone out to "Northwest Plaza" to secure any and all surveillance video from the stores and mall. He too would inform Sindel that officers hadn't went by his apartment to get the clothes and other items he had bought the day of the crime and that he should send someone there to retrieve them. Because the receipts were still in the bags. Sindel and Simon would state that they would "look into it" and leave.

After their visit, Allen would have problems communicating with Sindel about what Sindel was doing, his investigation into the case, and whether or not Sindel had look into his alibi. Simon would come to see Allen when Allen threatened to contact the court about what was going on. Allen would voice his concerns with Simon and Simon would inform Allen that Sindel was handling "all" of the guilt phase part of the trial and that he haad "no idea" what Sindel was or wasn't doing. Allen would tell Simon to get Sindel to come and see him abou the case or he would go to the court. Because he was innocent and didn't deserve to be in prison for a crime he didn't commit.

Sindel would come to see Allen some time later. Allen would voice his concerns with Sindel and ask for an update on the case, and where Sindel was at on his alibi and getting the clothes. Sindel would inform Allen that he, Sindel had found some "evidence" while going through the government's files that changed his mind about Allen's innocence. Sindel would show Allen the government's report of an alleged confession that

officer's claimed Allen gave while in their custody. Allen told Sindel that officer were lying, that he never confessed, and that Sindel was never to attribute the alleged confession or any of its contents to him, Allen. Explaining to Sindel that doing so would mean that he was admitting to everything in it.

Sindel would inform Allen that there was other evidence that pointed to Allen's guilt and that Allen should thnk of taking a plea. Allen became very upset and told Sindel that he "was innocent." Sindel then told Allen that he, Sindel had never lost a client to the death Penalty and that he could do the same for Allen by getting him a life sentence. Allen would again tell Sindel that he was "innocent" and that Sindel should just do his job and prove his innocence. Sindel became upset and then told Allen that he, Allen couldn't "win" and that he, Sindel had decided to focus Allen's defense on trying to save Allen's life. Allen ended the visit.

Exactly eight months before the trial was set to begin. Allen, not learned in the law and with a limited education, would send a letter/motion to the court, asking for the court's aid in "substituting counsel" from his capital case before trial. (E.D. Mo. Criminal Docket for Case #4:97-cr-00141ERW-2 Doc No. 95) (filed July of 1997).

The court would immediately deny Allen's motion without a hearing, an inquiry, nor any investigation by the court to determine, if true, should counsel be removed from Allen's case. Or whether leaving counsel on Allen's case violate Allen's Sixth Amendment right to the "Assistance of Counsel."

Things only got worse between Allen and Sindel. Sindel began to avoid Allen's calls and wouldn't keep him updated on the case or what, if anything Sindel was doing to maintain and prove Allen's innocence. Sindel would come to see Allen and inform Allen that he, Sindel had made the decision to see if he could get Allen a life sentence. To which Allen told Sindel wasn't "a win" for someone innocent. Sindel told Allen that he, Allen couldn't "win" and that he wouldn't damage his credibility by putting forth things that would make the jury disbelieve him, Sindel when he asked for them to spare Allen's life. Allen ended the visit.

Allen, clearly desperate, would write a letter to the U.S. representative in St. Louis, and ask for help to remove counsel from his case. Since the court wasn't helping. The representative would write back and inform Allen that it was a matter for the court, his attorney's and the government to handle. Allen would then send another letter/motion to the court, asking for the court's aid in substituting counsel from his case before trial. And with the letter/motion, Allen would include the letter from the representative to show how far he had went to get others to help. (E.D. Mo. Criminal Docket Case #4:97-cr-00141-ERW-2, Doc No. 97) (filed July of 1997).

The court would immediately deny Allen's second motion to the court. Doing so without a hearing, an inquiry, nor any investigation by the court to see, if true, would removing counsel from Allen's case be warranted. Or, if leaving counsel on Allen's case would violate Allen's Sixth Amendment right to the "Assistance of Counsel."

The court's decision to not look into Allen's motion, or hold a hearing, left Allen with only one option. To proceed to trial with counsel who had informed Allen that he planned to go against Allen's right to maintain and prove Allen's innocence at trial.

C. TRIAL: FACTS RELATED TO WRIT

At trial the government would present their case against Allen. Sindel would cross-examine witnesses as to their accounts. But he focused on the testimony of witnesses whose testimony casted one of the robbers as being the lessor of the two evils. Sindel would cross-examine officer's about the alleged statement. But he didn't present a single piece of evidence, or call any witnesses who would challenge any of the forensic expert's testimony. Nor did Sindel call any witnesses that would show Sindel was trying to maintain and prove Allen's innocence. The government would rest their case against Allen without Sindel putting it to any real adversarial challenges.

For Allen's defense, Sindel would present the testimony of four officers involved in the crime. And whose testimony was used to highlight that witnesses said that one of the robbers was the lessor of the two evils. (Tr. Vol. 12, pg. 155-189). Further

ignoring Allen's instructions for Sindel to maintain and prove his innocence. And after the officer's testimony. Sindel would rest Allen's defense.

In Sindel's closing, Sindel would show why he had taken the effort to bring forth facts to show that one of the suspects was the lessor of the two evils. But he would strategicly try to establish his credibility with the jury, by showing that he, Sindel wasn't trying to say that Allen was innocent. **Sindel;**.

> "Now the law has this phrase and it's called justification and it has a meaning in the law and I want to tell you a little bit 'because it doesn't apply in this case, but I want to make sure we're clear on that.' Justification means that you can do something against somebody that might normally be illegal but there's a legal reason that allows you to do that. That doesn't exist in this case. There's no justification under the law for what happened in that bank. 'But what happened in that bank, you do have to look to intent." (Tr. Record Vol. 12, pg. 79).

Continuing with his closing, Sindel would further strip away "any reasonable doubt" about Allen's innocence. **Sindel;**

> "And if we just take everything, we say okay, 'the government has all the evidence on their side, it's going to win, we can't dispute it all. There is still reasonable doubt as to intent". . . "Basically the situation is, we know that according to the ballistic person, that the Russian gun is fired within the bank at least three times." (Tr. Vol.12, pg.79).

But then, Sindel would give testimoney against Allen, by reintroducing the alleged confession's contents, and reciting what would implicate Allen in the crime. **Sindel;**

> "If you take Allen's statement, 'he tells the police, "I shot, but I missed.'" (Tr. Record Vol. 12, pg. 82).

Sindel, in re-introducing the alleged confession, reciting its contents, and then attributing them to Allen went against Allen's objective for Sindel to maintain and prove Allen's innocence. And in doing so, Sindel would testify to facts within the

alleged confession that implicated Allen in the crime and told a story that Allen had refused to testify to when he didn't take the stand.

With Sindel testifying, and conceding Allen's guilt while doing so. The jury would find Allen guilty on all counts.

But it was in Sindel's closing argument's at the penalty-phase of Allen's trial where Sindel would show why he had sacrificed Allen's guilt for Allen's life and what his, Sindel's intent was when he, Sindel used the alleged confession against Allen in the guilt phase. **Sindel;**

> "[A]ll right, what is 'Mr. Allen's intent?' 'Remember, he tells you, he tells the police', "I think I missed with every shot that I fired."" (Tr. Record Vol. 19, pg. 74).

Sindel making it clear that his, Sindel's use of the alleged confession was to give the jury the impression that at the guilt/innocence phase of Allen's trial, when Sindel recited its contents and then attributed them to Allen. That it was Sindel's way of telling the jury that Allen confessed that he was the lessor of the two evils. But culpable none-the-less.

The jury would return with a sentence of "life" on Count One and a sentence of "Death" on Count two. Ultimately sentencing Allen to death.

After Allen, trial, after Allen's conviction, and after Allen had been sentenced to death. In the Motion For A New trial, Sindel would make a concession to the court. Stating;

> "The District Court erred, clearly erred, or abused its discretion in 'denying the defendant's [Allen's] motion[s] for appointment of different counsel.' (Doc. Nos. 95 &97) in violation of the First, "Fifth", "Sixth", and Eighth Amendments." (filed to the trial court on May 18, 1998).

Dispite the trial court receiving the concession from counsel and what it meant, when coupled with Allen's earlier motions to substitute counsel before trial. The court would immediately deny the motion without a hearing, an inquiry, nor any investigation by the court to see why it was that counsel stated it was a mistake not to

substitute Sindel from Allen's case, and whether leaving Sindel on Allen's case had actually violated Allen's Sixth Amendment right to counsel when counsel stated the substitution should have been made.

D. POSTCONVICTION: FACTS RELATED TO WRIT

Allen would find counsel who would come on and take over as counsel. Sindel would be removed.

Postconviction counsel would appeal Allen's conviction[5] and sentence to the Eighth Circuit. United States v Allen, 247 F.3d 741, 795 (8th Cir. 2001) (affirmed). This Court granted certiorari, vacated the Eighth Circuit's decision, and remanded for reconsideration in light of Ring v Arizona, 536 U.S. 584 (2002). Allen v United States, 536 U.S. 953 (2002).

On remand, a panel of the Eighth Circuit vacated the death sentence, finding that the indictment's failure to charge a statutory aggravating factor violated Allen's Fifth Amendment right that "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury.", (quoting U.S. Const. amend. V), and because Allen's indictment "cannot be reasonably construed to charge a statutory aggravating factor, as required for imposition of the death penalty, it is constitutionally deficient to charge a capital offense." Thus, finding the error "was not harmless." United States v Allen, 357 F.3d 745,747 (8th Cir. 2004)

The en banc Court would reverse the decision, stating "'[I]f' the grand jury 'had been asked to charge the grave-risk-of-death-to-others statutory aggravating factor, it would have done so.'" Then conclude by stating "[T]hat 'any rational grand jury, including Allen's grand jury, would have found probable cause to charge that Allen knowingly created a grave risk of death to persons other than Heflin while committing the bank robbery or in escaping apprehension.'" Then found the error was harmless, and reinstated Allen's death sentence. United States v Allen, 406 F.3d 940,942,949 (8th Cir. 2005) (en banc). This Court denied certiorari. United States v Allen, 549 U.S. 1095 (2006).

Michael Gross would withdraw as counsel shortly after and the court

5 The "structural defect" from allowing Allen's non-capital case proceedings to proceed to trial with capital case proceedings would be raised on direct appeal.

would appoint new counsel to represent Allen on his 28 U.S.C. 2255 proceedings.

Upon meeting 2255 counsel, Allen would inform counsel that he was innocent and then instruct them to aid him in proving his innocence. Counsel would then send Allen copies of the files that had been turned over to Sindel in discovery. Immediately, both Allen and counsel would discover some of the following evidence;

1) (APPENDIX **A**): A government lab report; where the government would test the DNA of the victim, Heflin and the DNA of Allen against DNA found at the crash site, on evidence linked to the crime and both suspects. The results would exclude both Heflin and Allen.

2) (APPENDIX **B**): A government lab report; where the government would test all of the clothing that suspect Holder was arrested in and all of the clothes that were taken from Allen[6] while he was in police custody. The clothes would be tested for traces of gasoline. Being that the getaway van was "soaked throughout" in gasoline and it would leave traces of gasoline on the clothes of those involved. "All" of the clothing and other items that belonged to Holder would come back "positive" for traces of gasoline. "None" of Allen's clothing would come back with a single trace of gasoline on them.

3) (APPENDIX **E**): A government lab technician report; where government investigators would find a "Damp Rag", found in an area that was connected to the suspects involved in the crime, that had "possible traces of DNA" on it. It was sent for testing. But there are no records of what the results were.

4) (APPENDIX **D**): A government report; where a witness would call authorities about seeing and overhearing Holder and someone other than Allen talking about robbing the bank a few days before it happened.

5) (APPENDIX **C**): A government report; where witnesses would state that they saw someone other than Allen running from the crash site.

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6 Allen's clothes were taken because they were supposed to be clothes Allen supposedly wore at the time he was supposedly in the van and commited the crime with Holder. At Allen's trial, an officer Thomas Carroll would be the only officer to testify that Allen's clothes "reeked" of smoke. Testimony used to put Allen inside the van. (Tr. Record Vol. 9 pg 177) Thomas Carroll would be arrested in another matter outside of this case.

In 2007, 2255 counsel would initiate proceedings pursuant to 28 U.S.C. 2255, and on February 11, 2008, counsel would file an amended motion,[7] raising eighteen claims for relief, and using "some" of the evidence in the files to show the extent of Sindel's ineffectiveness. When Allen would question why hadn't "all" of the evidence been used to show Sindel had more than enough evidence that he could've used. Counsel would state that what was used was "sufficent."

On November 25, 2013, while Allen's 2255 was still pending, Allen filed a pro se motion, seeking leave from the Eighth Circuit District Court to file additional claims for relief. Which were either abandoned or not fully argued by counsel.in the 2255 motion. (E.D. Mo. Case #4:07-cv-00027-ERW Doc-358). Asked to be used alongside what was already presented in the 2255 motion filed by counsel. The government would oppose Allen's request, (Doc-360 at 1-2), because Allen was represented by counsel.

On December 11, 2013, the District Court gave Allen leave to file additional grounds for relief. Though represented by counsel. (Doc-361). Allen would do so in subsequent pro se submissions,[8] (Doc-362; Doc-363; Doc-367; Doc-369; Doc-370).

On February 12, 2014, the District Court would direct that the "Clerk of Court shall not 'accept any future pro se filings' in this matter. 'Any future pleadings filed on behalf of [Allen] shall be filed by counsel of record only.'" (Doc-372).

On June 25, 2014, the district Court would deny the claim of ineffective assistance of counsel at the penalty phase- - the sole remaining claimed from the counseled amended 2255 motion. On the same date, the court would also deny all of Allen's pro se claims for relief. (Doc-373).

Not based solely on the court's rulings. But more on the fact that the court's rulings were contradicted by law and evidence. Allen would file a motion to recuse the District Court Judge from taking part in his proceedings. Because of signs of bias. (Doc-377).

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7 Again, Allen would present his grand jury claim.

8 Allen would present actual evidence to show that officer's lied about the alleged confession and what officers said took place while Allen was in their custody. (APPENDIX G).

On July 8, 2014, consistent with the District Court's order of February 12, 2014, (denying Allen's ability to file anything pro se), the court would strike Allen's motion from the record. (Doc-378).

On July 23, counsel for Allen would file a motion to Alter and Amend the Judgment, pursuant to FED. R. CIV. P. 59(e). Because Allen was denied the ability to file anything pro se and challenge his pro se filings himself. He instructed counsel to add them in their filing. Including the motion to recuse. On August 22, 2014, the District Court would deny the Rule 59(e) motion. (2014 U.S. Dist. LEXIS 116878 Allen v United States). The court would also deny COA on all claims.[9]

Allen would appeal the District Court's denial to the Court of Appeals. The Court of Appeals would deny the appeal on July 20, 2016, Allen v United States, 829 F.3d 965 (8th Cir. 2016). On October 6, 2016, Allen petitioned for a panel rehearing and for rehearing en banc off the denial of his appeal. The Court of Appeals denied both petitions for rehearing and rehearing en banc on November 1, 2016 (2016 U.S. App. LEXIS 19758 Allen v United States).

On March 1, 2017, Allen filed a petition for a writ of certiorari in this Court from the denial of his appeals to the lower courts. The petition was denied by this Court on October 2, 2017. Allen v United States, 199 L.Ed. 2d 44 (2017).

On May 14, 2018, this Court would decide McCoy v Louisiana, 138 S. ct. 1500 (2018), and announced a new rule of law that Allen seeks relief from his conviction and sentence pursuant to the new rule. He pleads with this Court to grant this writ.

Allen's petition meets the one-year statute of limitations for seeking relief pursuant a new rule of law.

I. REASONS FOR GRANTING THE WRIT

A. ALLEN ON PAR WITH MCCOY

Like MCoy, Allen would enter a plea of "not guilty", inform counsel of

9 Allen would try to submit correspondence between himself and Sindel, showing that Sindel hadn't tried to go through the files to find any of the evidence that was found by 2255 counsel and Allen. Allen wanted to show the court that it's "strategic defense" to excuse Sindel's ineffectiveness was clearly an error. (APPENDIX F).

his "innocence", and would then instruct counsel to "maintain and prove his innocence at trial". For the Sixth Amendment, in "grant[ing] to the accused personally the right to make his defense" "speaks of the 'assistance' of counsel, and an assistant, however expert, is still an assistant." McCoy. (quoting Faretta, 422 U.S., at 819-820); see also Gannett Co. v DePasquale, 443 U.S. 368, 382, n. 10 (1979) (The Sixth Amendment "contemplat[es] a norm in which the accused, and not the lawyer, is the master of his own defense.")

When confronted with Sindel's opposition to maintain and prove his innocence, Allen, like McCoy, would inform the court. Mccoy verbally and through motions. Allen through motions only. See Martel v Clair, 565 U.S. 648 (2012) ("As all Circuits agree, court's cannot properly resolve substitution motions, 'without probing why a defendant wants a new lawyer.'"); see United States v Iles, 906 F.2d 1122,1130 (CA 1990) ("IT is hornbook law that '[w]hen an indigent defendant makes a timely and good faith motion requesting that appointed counsel be discharged and new counsel appointed, the trial court clearly has a responsibility to determine the reasons for defendant's dissatisfaction . . . '") (quoting 2 W. LaFave & J. Israel, Criminal Procedure 11.4, p. 36 (1984)). See also, McCoy ("[I]f counsel is appointed, and unreasonably insists on admitting guilt over the defendant's objection, a capable trial judge 'will almost certainly grant a timely request to appoint substitute counsel. And if such a request is denied, the ruling may be vulnerable on appeal.'") (Alito, J., Thomas, J., and Gorsuch, J., dissenting). But Allen's court would immediately deny Allen's motions without a hearing, an inquiry, nor any investigation by the court as to whether substituting Sindel was warranted. Or whether leaving Sindel on Allen's case would violate Allen's Sixth Amendment right to the "assistance of counsel." And being that the motions were filed eight months before trial, before "all" of the discovery was turned over, and in more than enough time to find replacement counsel to mount Allen's defense.

After the denials to substitute counsel. McCoy's court would verbally inform counsel "[Y]ou are the attorney . . . you have to make the trial decision of what you're going to proceed with." McCoy. Whereas Allen's court. The denials of Allen's motions,

without a hearing, an inquiry, nor any investigation by Allen's court. It would have the same effect of McCoy's court's directions to counsel. And the court's actions in both situations completing the violation to allow counsel(s) for McCoy and Allen to "usurp control of an issue within McCoy and Allen's sole prerogative." (quoting McCoy).

Left with nothing to stop counsel from conceding McCoy's guilt. Counsel for McCoy would boldly proclaim Mccoy's guilt to the jury. Sindel's strategy and concession of Allen's guilt was more tactical. Tailored towards Sindel's strategy to highlight, through his cross-examination of witnesses, that one of the suspects was the lesser of the two evils. With Sindel stating in his closing;

"Even discounting everything else in the case, 'if you take Allen's statement(s)', he tells the police, "I shot, but I missed"'" (Tr. Record Vol. 12, pg. 82).

For "Allen" to have "shot, but missed". As Sindel would attribute to Allen as stating. Allen would have had to plot the robbery with Holder; For Allen to have "shot, but missed". Allen would have had to been in the "gasoline doused" van with Holder; For Allen to have "shot, but missed." Allen would have had to posess one of the weapons used in the robbery; For Allen to have "shot, but missed." Allen would have had to enter the bank, discharge a gun, take part in the robbery, and take part in the death of the security guard, Richard Heflin. All of which Allen's "alleged statement(s) suggested."

With Sindel re-introducing the alleged confession against Allen, reciting its contents, and then Sindel attributing Sindel's words to the jury as if being those of Allen. It made Sindel a "witness" for the government and a witness against his own client, Allen. See United States v Hubbell, 530 U.S. 27 (2000) ("The Court's opinion, relying on prior cases, essentially defines 'witness' as a person who gives testimony."); see Cf. Parker v Randolph, 442 U.S. 62, 72 (1979) (plurality opinion) ("[T]he defendant's own confession [is] probably 'the most probative and damaging evidence that can be admitted against him.'"); see United States v Chagra, 669 F.2d 241, 251-252 n. 11 (CA5 1982) ("A jury may have difficulty in disbelieving or forgetting a defendant's opinion of his own guilt.") And when the admission of guilt comes from counsel. "Such an admission blocks

the defendant's right to make the fundamental choices about his own defense, and the effects of the admission would be immeasurable, because 'the jury would almost certainly be swayed by a lawyer's concession of his client's guilt.'" McCoy, 138 S. Ct. at 1511. Thus, Sindel violating Allen's Fifth Amendment right that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." (quoting U.S. Const. amend. V.). See also Rock v Arkansas, 483 U.S. 44, 49 (1987) ("[T]he structure of the [Sixth] Amendment" "necessarily implie[s]" that right because the "accused's right to present 'his own version' version of events 'in his own words'" is "fundamental to a personal defense." Id. at 52 (quotation marks omitted). And Sindel would testify to the jury about an alleged confession that Allen himself refused to take the stand and admit to making.

For Sindel to override Allen's objective to maintain and prove Allen's innocence. Even if to argue that Allen's "intent" was lessor of the two evils. It was still an admission of Allen's guilt. Because, "the felony-murder doctrine traditionally 'attributes death caused in the course of a crime to all participants who intended to commit the felony, regardless of whether they killed or intended to kill.'" Miller v Alabama, 567 U.S. 460 (2012); see also dean v United States, 556 U.S. 568 (2009) ("[I]f any accidental michief happens to follow from the performance of a lawful act, the party stands excused from all guilt; 'but if a man be doing any thing unlawful, and the consequences ensues which he did not forsee or intend, as the death of a man or the like, his want for foresight shall be no excuse'; for, 'being guilty of one offense, in doing antecedently what is in itself unlawful, he is criminally guilty of whatever consequence may follow the first misbehaviour.'" (quoting, 4 W. Blackstone, Commentaries on the Laws of England 26-27 (1769)). This being a well known fact to Sindel from his years of handling both felony-murder and capital cases.

There was only one verdict that Allen's jury could come back with. Especially with Sindel instructing them to "[D]iscount[] . . . everything else in the case . . . take Allen's statement(s), he tells the police, "I shot, but I missed."" The jury would hear Sindel clear when Sindel conceded Allen's guilt using an alleged confession

against Allen, by vouching for its truthfulness, accuracy, and even its authenticity, by Sindel attributing it to Allen.

With Allen's instructions to Sindel to maintain and prove his innocence, and then to not attribute the alleged confession to Allen. For Sindel to override Allen's objective and then Sindel try "his case against his client", Allen: Andus v California, 386 U.S. 738, 745 (1967). When Sindel did that, Sindel was no longer acting as Allen's agent, and Allen's defense is "stripped of the personal character upon which the [Sixth] Amendment insists." Faretta, 422 U.S. at, 820.

With Sindel conceding Allen's guilt. "[T]he effects of that admission would be immeasurable, because a jury would almost certainly be swayed by a lawyer's concession of his client's guilt." McCoy, 138 S. Ct. at 1511. Thus, putting Allen's circumstances on par with McCoy and entitling Allen to a new trial.

B. MCCOY IS A "NEW WATERSHED RULE OF LAW", AKIN TO GIDEON V WAINWRIGHT, AND MUST BE APPLIED TO CASES ON COLLATERAL REVIEW

McCoy establishes a new rule of constitutional law, by announcing that the "defendant has the right to insist that counsel refrain from admitting guilt, even when counsel's experienced-based view is that confessing guilt offers the defendant the best chance to avoid the death penalty." While "holding" that "when" counsel does override the defendant's objectives to maintain and prove their innocence, by counsel conceding the defendant's guilt to the jury. It "has the effect of 'revoking [counsel's] agency'", it "create[s] a 'structural defect in the proceedings as a whole", it's "not subject to harmless error review", and only "a new trial is the required corrective." McCoy.

For the first time this Court has "held" that a "McCoy violation" has the effect of "revoking counsel's agency", and only a new trial is the required corrective" for such a violation. See Nixon v Florida, 543 U.S. 175, 179 (2004) (holding counsel "is not barred" from concluding guilt where his client does not expressly forbid counsel from doing so.).

McCoy is a "watershed rule of criminal procedure", and has retroactive

effect "to all similary situated defendant." In Teague v Lane, the Court held that new constitutional rules of law are retroactive when they fall under two exceptions. Teague, 489 U.S. at 307 (1989). The first exception, which is not applicable here, controls new "substantive rules". A new substantive rule applies retroactively when it "places certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe." Teague, (quoting Mackey v united States, 401 U.S. 667, 692 (1971)). The second exception under Teague is for "watershed rules of criminal procedure." Under this exception, procudural rules that "are . . . implicit in the concept of ordered liberty" are applied retroactively. Teague, 489 U.S. at 311 (quotations omitted).

To qualify as a watershed rule, the new rule must meet two requirements; 1) the rule must be necessary to prevent a large risk of an inaccurate conviction: and 2) the rule must alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding. Whorton v Bocking, 549 U.S. 406, 418 (2007).

One example of a watershed rule, as explained by the Teague Court, "is the case with the right to counsel at trial now held a necessary condition precedent to any conviction for a serious crime." Id. at 311-12 (citations and quotations omitted).

In Saffle v Parks, 494 U.S. 84 (1990), this Court explained that the holding in Gideon, that a defendant has "the right to be represented by counsel", is the type of rule that falls under the "watershed rule 'exception.'" Id. at 495.

A McCoy violation and the new rule announced, embodies the primacy and centerlity of both Gideon and a "watershed rule" in character and effect. See Alabama v Shelton, 535 U.S. 654 (2002) (Where [t]he inference . . . draw[n] is that it is the sheer importance of 'the right to counsel' that is the 'primacy' in the analysis.")

The Sixth Amendment "right to counsel" is the "right to the Assistance of Counsel." As "the right to the Assistance of Counsel" is to "grant to the accused 'personally' the right to make 'his defence.'" see Faretta v California, 422 U.S. 806, 819 (1975) (emphasis added). Because while they are at times charaterized seperately

for argument's sake, they are the lifeline that gives each its essence, and gives the Sixth Amendment life. For to grant the right to counsel, and then counsel no longer "assists", because counsel overrides the defendant's "right to make his defense." Does not "counsel's conduct amoun[t] to disloyalty or renunciation of his role, which terminated his authority [?]" see Restatement (second) of agency 112, 118 (1957). And does it not also "ha[ve] the effect of revoking [counsel's] agency." see McCoy. Thus, having the effects of denying the "right to counsel" and "the Assistance of Counsel for his defence." see U.S. Const. amend. V. Because one was denied access to the other.

In Tyler v Cain, 533 U.S. 656 (2001), this Court explained that the statutory term "made' in 2255(h)(2) is synonymous with "held" and that, an explicit statement of retroactivity is not necessary because a rule can be "made" retroactive over the course of two cases with the right combination of holdings. Id. at 666 (majority); id. at 668-669 (O'Connor, J. concurring);[10] Id. at 672-673 (Breyer, J. dissenting). Justice O'Conner explained that "if we hold in Case One that a particular type of rule applies retroactively to cases on collateral review and hold in Case Two that a given rule is 'of that particular type', then it necessarily follows that the given rule applies retroactively to cases on collateral review." Tyler, 533 at 668-669 (O'Connor, J., concurring). Here, case One is Saffle. For, it follows that if the defendant's right to be represented by counsel has retroactive effect. Then, so too must a defendant's right to instruct counsel to maintain his innocence. see McCoy, 138 S. Ct. at 1509.

This Court found in McCoy that a concession of guilt from counsel would almost certainly result in juror's decision to be swayed, and the risk of an inaccurate conviction would be too high." See McCoy, 138 S. Ct. at 1511; see also Howard v United States, 374 F.3d 1068, 1078 (11th Cir. 2004) ("The supreme Court has instructed us that the right to representation by counsel is inevitably 'tied to the accuracy of a conviction.").

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10 Justice O'Connor wrote separately, in language endorsed by the four dissenting justices and that the majority did not dispute, to explain that a new substantive rule of constitutional law has been "made" retroactive on collateral review. Tyler, 533 U.S. at 668-669.

The McCoy rule also alters our understanding of the bedrock procedural elements essential to the fairness of a proceeding, as it mandates, for the first time, that, "Presented with the express statement's of a client's will to maintain innocence, however, counsel may not steer the ship the other way." And, "[A]ction taken by counsel over his client's objection . . . ha[s] 'the effect of revoking [counsel's] agency' with respect to the action in question." see McCoy. (quoting Scalia, J., concurring in judgment, in Gonzalez, 553 U.S. at 254). Concluding that such a violation is "immeasurable", "create[s] a 'structural defect in the proceedings as a whole'", it's "not subject to harmless error review", and only "a new trial is the required corrective." Which is the character and effect of a Gideon violation of one's Sixth Amendment right that "in all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." (quoting U.S. Const. amend. V.).

Because Allen, is on par with McCoy,, and McCoy is on par with Gideon. All which fall within the "watershed rule paradigm" and meets both prongs of the Whorton test. McCoy should be applied retroactive to cases on collateral and direct review.

II. WHETHER IT'S UNCONSTITUTIONAL FOR A NON-CAPITAL CASE TO PROCEED TO TRIAL WITH CAPITAL CASE PROCEEDINGS AND AN ENHANCED PUNISHMENT THAT WAS NEVER AUTHORIZED BY A GRAND JURY

A. NON-CAPITAL CASE WITH CAPITAL CASE PROCEEDINGS AND PUNISHMENT

Counsel for Allen would immediately object to Allen's non-capital case being allowed to proceed to trial with capital case proceedings and the possibility for an enhanced punishment. Being that the indictment that was submitted to Allen's grand jury, by the government, and then returned with what the grand jury authorized. Didn't charge the homicidal mens rea, nor a single statutory aggravating factor. Both of which are "required elements" for imposition of the death penalty.

Allen's court would deny Allen's objection to prevent his case from moving forward with proceedings and a punishment that was beyond what the grand jury

authorized. Then the government, with notice that the proceedings and possible punishment would exceed what the grand jury had authorized, would not seek a superseding indictment to ensure that Allen's proceedings and possible punishment were on par with what they asked for and what the grand jury authorized. Thus, allowing Allen's non-capital case to proceed to trial in violation of Allen's fifth Amendment right that "No person shall be held to answer for a capital . . . crime, unless on . . . a indictment of a grand jury." (quoting U.S. Const. amend. V).

The question isn't whether Allen's indictment and Allen's proceedings suffered a Fifth Amendment defect. Both the government and the Eighth Circuit would concede as much. See United States v Allen, 406 F.3d 940 (8th Cir. 2004). "Although it 'was clear that [Allen's] indictment suffered a Fifth Amendment defect', the deprivation of [Allen's] Fifth Amendment right was not structural." Nor is it a question of whether it was the government and Allen's court who authorized Allen's non-capital case to proceed to trial with capital case proceedings and an enhancement in punishment, and not Allen's grand jury. Both the government and the Eighth Circuit would concede as much. "[I]f the grand jury 'had been asked to charge the grave-risk-of-death-to-others statutory aggrravating factor", [as required for imposition of the death penalty], "it would have done so." 406 F.3d at___.

The question is when the government and the court disregard the constitution's demand that"No person shall be held to answer for a capital . . . crime, unless on . . . a indictment of a grand jury." (quoting U.S. Const. amend. V.); When the government and the court disregard this Court's holdings on the Fifth Amendment, in regards to enhancing an indictment beyond what the grand jury authorized; When the government and the court intrude on the grand juries deliberations, by "guessing what they did or didn't find."; When the government and the court take on the role of the grand jury, then decide whether to charge a greater offense or a lessor offense, numerous counts or a single count, and perhaps the most significant of all, a capital offense or a non-capital offense--all based on the basis of the same facts." Vasquez v Hillary, 474 U.S. at 263. The

question is will this Court exercise it's habeas jurisdiction to answer a question of federal law, as to whether it's a structural error for a non-capital case to proceed to trial with capital case proceedings and an enhanced punishment. Which were never authorized by the grand jury, is in conflict with this Court's holdings, excludes the constitutional role of the grand jury, and disregards the demand of the Fifth Amendment that "unless" the grand jury authorizes a non-capital case to be enhanced to a capital case. Then anything after the grand jury is a structural defect in the proceedings as a whole.

B. STRUCTURAL DEFECT IN THE PROCEEDINGS AS A WHOLE

The Eighth Circuit would hold that allowing Allen's non-capital case to proceed to trial with capital case proceedings and a punishment that was beyond what the grand jury authorized was a "harmless error". Concluding that, "[A]ny rational grand jury, including Allen's grand jury, would have found probable cause to charge that Allen knowingly created a grave risk of death to persons other than Heflin while committing the bank robbery or in escaping apprehension." See United States v Allen, 406 F.3d 940, 942, 949 (8th Cir. 2005) (en banc), and "the deprivation of [Allen's] Fifth Amendment right was not 'structural'".

Last Term, in Weaver v Massachusetts, this Court identified "three broad rationales" supporting the conclusion that an error is structural and therefore not subject to harmless error review. 137 S. Ct. 1899, 1908 (2017). Here, each of the Court's rationales, standing alone or taken together, demonstrate that Allen's Fifth Amendment defect is a structural error and only a new trial is the required corrective.

First, an error is structural "if the right at issue is not designed to protect the defendant from erroneous conviction but instead protects some other interest." Weaver, 137 S. Ct. at 1908. The fifth Amendment right that "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury" is not designed to protect the defendant from erroneous conviction. But rather reflects the fundamental legal principle that not the court

nor the government can determine whether an indictment charges "a greater offense or a lessor offense, numerous counts, or a single count, and perhaps the most significant of all, a capital offense or a non-capital offense -- all on the basis of the same facts." Vasquez, 474 U.S. 263. And that the Fifth Amendment's guarantee to indictment by a grand jury "presupposes an investigative body 'acting independently of either prosecuting attorney or judge." see Dionisio, 410 U.S. at 16-17. Which allows the grand jury to be an intermediary "between the people and their government." (quoting Exparte Bain, 121 U.S. 1, 11 (1887). Thus, protecting the fundamental fairness of all proceedings.

Second, "an error has been deemed structural if the effects of the error are simply too hard to measure." Weaver, 137 S. Ct. at 1908. Here, allowing Allen's non capital case to proceed to trial with capital case proceedings and an enhanced punishment that was never authorized by Allen's grand jury changed the entire character of the proceedings. Every aspect of a non-capital case and a capital case are different, and change in nature; the arraignment; every motion that each side files; the suppression/ evidentuary hearing; the investigation by both sides; the judgements and rulings by the court(s); the jury instructions; the jury selection process; the jury questionnaires; the juror's who are selected; a death qualified jury or just a regular jury; opening statements; the trial/trial strategies; closing statements; the trial ending in one phase or having to have two; and the verdict. It would be too much for anyone to guess what can happen when every function is different when a case is a capital one, or a non-capital one. Which makes such an error as this too hard to measure.

Third, and final, "an error has been deemed structural if the error always results in fundamental unfairness." Weaver, 137 S. Ct. at 1908. Failure to protect the constitutional role of the grand jury process would allow punishments to exceed the crimes; allow the government to indict on information instead of facts and evidence; allow the government to have power over the people, instead of people ensuring that the power given to the government isn't abused and unfairly tilts the Scales of Justice in favor of something other than justice and truth. Then, with the

political climate and the divides amongst people. Without protecting the Fifth Amendment, and the constitutional role of the grand jury to ensure fairness from "the start of the judicial proceedings." We leave ourselves and our system of justice to digress back to when the grand jury did not function as a shield to protect the accused, but more as a sword to be wielded on behalf of the Crown; (the court's, the government, prosecutors, politicians, police, or anyone in the position of power who wants to abuse it.) The grand jury was more "oppressive and much feared by the common people" because of its unfettered power" and because "the Crown" would manipulate the grand juries "through suggestive instructions and fines levied against grand juries that failed to reach their quota of accusations." See Schwartz, 10 AM. Crim. L. Rev. at 709; see also Simmons, 82 B.U.L. Rev. at 6.

Since the grand jury first started to come into its own, in 1681, when two London grand juries "refused to indict the Earl of Shaftesbury and his follower Stephen Colledge"; the political enemies of King Charles II . The grand jury has since been the sword "for fundamental fairness". Thus, without fully applying the Fifth Amendment in every situation, and without ensuring the constitutional role of the grand jury is applied, it will always "undermind the fairness of [the] criminal proceedings as a whole." United States v Davila, 569 U.S. 597, 602 (2013). Because excluding either will taint any proceedings when a violation will be leading the charge in the interest of justice.

Allen's Fifth Amendment "defect", and the exclusion of the grand juries role that allowed Allen's non-capital case to proceed to trial with capital case proceedings, and an enhanced punishment. Doesn't make this error susceptible to harmless error review. Because this is clearly a structural defect in the proceedings as a whole, which Allen also objected to before trial, raised on direct appeal, and again in his 2255 motion. See Weaver, 137 S. Ct. at 1910, ("Thus, in the case of a structural error where there is an objection at trial and the issue is raised on direct appeal, the defendant generally is entitled to 'automatic reversal regardless of the error's actual effect on the outcome.'")

(quoting Neder v United States, 527 U.S. 1,7 (1999). And, "[W]hen a structural error is 'preserved and raised on direct review', the balance is in the defendant's favor, and 'a new trial generally will be granted as a matter of right.'" Weaver, 137 S. Ct. at 1914. Allen deserves a new trial.

C. THE EIGHTH CIRCUIT'S ERRONEOUS DECISION AND THIS COURT'S HOLDINGS SHOW A SPLIT BETWEEN BOTH COURT'S THAT PUT THE FIFTH AMENDMENT AND THE GRAND JURIES AUTHORITY AT RISK

Counsel for Allen would "object before trial" to . Allen's non-capital case was allowed to proceed to trial with capital case proceedings and an enhanced punishment that was never authorized by Allen's grand jury. (The claim would be raised in both direct appeal and Allen's 2255 motion.) See Weaver, 137 S. Ct. at 1914 ("[W]hen a structural error is 'preserved and raised on direct review', the balance is in the defendant's favor, and 'a new trial generally will be granted as a matter of right.'"

Even when given notice of the error, neither the government, nor the court made any attempt to correct the indictment's defect; by filing a superseding indictmnent, or try to prevent the structural defect in the proceedings as a whole; by making the proceedings equal to what the grand jury authorized. When left uncorrected, anything after the grand jury was unauthorized, unreliable, fundamentally unfair, and the effect from the error would be too hard to measure.

The government, through their brief's filed to the court(s), in opposition, and verbally at a panel hearing on the subject in front of the Eighth Circuit Court, would concede that Allen's indictment excluded the grand jury from making any decision that would justify an enhancement in Allen's proceedings and punishment.

The Eighth Circuit would even concede to the defect in Allen's indictment, and even go so far as to say that Allen suffered "a Fifth Amendment defect." See United States v Allen, 357 F.3d at 747(Allen's indictment "cannot be reasonably construed to charge a statutory aggravating factor, 'as required for imposition of the death penalty', it is 'constitutionally deficient to charge a capital offense.'"); see also United States v Allen, 406 F.3d 940 ("[I]t was clear [Allen's] indictment suffered a Fifth Amendment

defect," [and there was a] "deprivation of [Allen's] Fifth Amendment right."). Thus, invoking the first part of the Fifth Amendment's demand that "No person shall be held 'to answer for a capital . . . crime'". (quoting U.S. Const. amend. V.). (emphasis added).

This Court has and continues to "hold" that "only the grand jury" decides whether "to charge a greater offense or a lessor offense, numerous counts or a single count, and perhaps the most significant of all, a capital offense or a non-capital offense--all based on the same basis of the same facts." Vasquez, 474 U.S. at 263; see Russell v United States, 369 U.S. 749, 770 (1962) ("An indictment 'may not be amended except by "resubmission" to the grand jury.'") But the Eighth Circuit's decision is clearly in conflict with this Court's rulings, creating a split between both Courts, and sending mixed messages about the Fifth Amendment's importance and whether it should be honored at all times. Or just some of the time.

Both the government and the Eighth Circuit would further stray outside their respected jurisdictions, to uphold the error, by intruding into the grand jury process, speculate what, if any facts and/or evidence the grand jury did or didn't find, did or didn't deliberate, and then take on the role of Allen's grand jury by authorizing Allen's non-capital proceedings to proceed to trial with capital case proceedings and an enhanced punishment. And then hold the defect and error was harmless because "had" the grand jury been asked what they were excluded from considering. They would've done what wasn't authorized. See United States v Allen, 406 F.3d 940,942,949 (en banc)("[I]f the grand jury 'had been asked' to charge the grave-risk-of-death-to-others statutory aggravating factors, 'it would have done so'", and "any rational grand jury, 'including Allen's grand jury, would have found probable cause to charge' that Allen knowingly created a grave risk of death to persons other than Heflin while committing the bank robbery or in escaping apprehension.") (emphasis added). Thus, invoking the last and most important part of the Fifth Amendment. Which determine whether or not any proceedings take place, ". . . 'unless' on a presentment or indictment 'of a Grand Jury.'" (quoting U.S. Const.

amend. V.) (emphasis added).

There are many words, when trying to apply the law correctly and fairly, in the interest of justice, which are at times in need of clarification. But "unless", in the context of the FifTh Amendment, when stating "No person shall be held to answer for a 'capital' . . . crime, "unless" on a . . . indictment of a Grand Jury." (quoting U.S. Const. amend. V.). (extra emphasis added). The Cluase in remarkably clear in its restrictions, and doesn't need any clarification. Because "unless" the grand jury is involved with any decision concerning "whether to charge a greater offense or a lesser offense; numerous counts or a single count; and perhaps most significant of all, a capital offense or a noncapital offense -- all based on the basis of the same facts." Vasquez, 474 U.S. at 263. Then, "No person shall be held to answer for " anything that comes afterwards, if it wasn't authorized by the grand jury. Because if unauthorized, it would taint the proceedings, make them unreliable, fundamentally unfair, and "the effects of the error are simply too hard to measure." Weaver 137 S. Ct. at 1908. All of this Court's holdings consistently echoing such. The Grand jury belongs to no branch of government, and it is a "constitutional fixture 'in its own right.'" Williams, 504 U.S. at 47; Dionisio, 410 U.S. at 16-17 (The Fifth Amendment's 'guarantee' to indictment by a grand jury "presupposes an investigative body 'acting independently of either prosecuting attorney or judge.") (footnote omitted) (quoting Stirone, 361 U.S. at 218); Calandra, 414 U.S. at 343 ("[T]he grand jury has been accorded wide latitute to inquire into violations of criminal law. 'No judge presides to monitor its proceedings. it deliberates in secret' and 'may determine alone the course of its inquiry.'"); Costello, 350 U.S. at 362-363 ("No case has been cited, nor have we been able to find any, furnishing any authority 'for looking into and revising the judgment of the grand jury upon the evidence.'") (quoting United States v Reed, 2 Blatchf. 435, 27 Fed. Cas. 727, 738, F. Cas. No. 16134) (C.C.N.D.N.Y. 1852); see also United States v Sells Engineering Inc., 463 U.S. at 425 ("Both Congress 'and this Court have consistently stood ready to defend against unwarranted intrusion" [into the grand jury proceedings]).

There is clearly a split between this Court, the Eighth Circuit, and even that of the Fifth Circuit, in United States v Robinson, 367 F.3d 278 (2004). Where in both circuits, the government would bypass the grand jury and the court's would allow non-capital cases to proceed to trial with capital case proceedings and an enhanced punishment that was never authorized by a grand jury. And unlike other cases with such a violation. Both Allen and Robinson would raise their claims on direct appeal. See Weaver, 137 S. Ct. at 1910 ("Thus, in the case of a structural error where there is an objection at trial and the issue is raised on direct appeal, the defendant generally is entitled to automatic reversal regardless of the error's actual effect on the outcome.") Allen would also raise the claim in his 2255 proceedings.

The holdings by both the Eighth and the Fifth Circuit send mixed signals as to whether the Fifth Amendment "must" be honored and followed, and/or whether a judge and a prosecutor can "guess" what the grand jury would've done if they deemed the evidence, or certain facts support their conclusion.

This case warrants this Court's original habeas jurisdiction to answer this question, and to correct a clear erroneous holding that only this Court can correct. A new trial is warranted in this situation, because such a defect "affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." (quoting Fulminante, 499 U.S. at 310). And the entire conduct of the trial from beginning to end is obviously affected by the absence of authorization by the grand jury to allow non-capital case to proceed to trial with capital case proceedings and an enhanced punishment.

III. EXCEPTIONAL CIRCUMSTANCES WARRANT THE EXERCISE OF THIS COURT'S HABEAS JURISDICTION

Whether viewed seperately or collectively, this writ presents the precise circumstances in which this Court recognized that it would be proper to exercise original habeas jurisdiction. First, where a clear showing of a McCoy violation, such as the one shown by Allen also, does, or at least should warrant the utilization of this Court's original habeas jurisdiction. Where such a violation has been deemed "rare" by the dissent, and a "structural defect in the proceedings as a whole", "not subject to harmless error

review", and where "a new trial is the required corrective." And relief as such has only been granted in exceptional and extraordinary circumstances.

This Court and only this Court can determine whether a clear, and identical showing of a McCoy violation should be applied retroactively to cases on collateral review. See Atley v Ault, 191 F.3d 865, 874 (8th Cir. 1999) ("The Brecht Court, drawing no between collateral and direct review, recognized that the existence of . . . defects not subject to harmless error review requires reversal of the conviction because they infect the entire trial process.") (quoting Brecht v Abranhamson, 507 U.S. 619, 629-30 (1993)).

Second, counsel for Allen shouldn't have had the option, nor considered sacrificing Allen's guilt for Allen's life. Especially when Allen's case, when returned by the grand jury, was a non-capital case. As Allen's trial counsel knew when counsel objected to Allen's enhanced proceedings and punishment. For, the Fifth Amendment clearly states that "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury." (quoting U.S. Const. amend. V)

By excluding the grand jury from its constitutional role of determining whether to charge Allen's case as a capital one. Both the Eighth Circuit and the government retained power to act as the grand jury, "guess" what the grand juries deliberations would be, and then conclude what the grand jury would've done. When such choices and decisions are outside of both the court and the prosecutor's respected jurisdiction. See Dionisio, 410 U.S. at 16-17 (And the Fifth Amendment's guarantee to indictment by a grand jury "presupposes an investigative body acting independently of either prosecuting attorney or judge.")

Third, the "sufficiently exceptional circumstances" of the evidence that trial counsel didn't discover, didn't investigate, and didn't present on Allen's behalf. Because counsel went against Allen's objective to maintain and prove Allen's innocence at trial, and conceded guilt. When counsel "ignored pertinent avenues for investigation of which he should have been aware," and counsel's "decision not to investigate did not reflect reasonable professional judgment." Porter v McCollum, 558 U.S. 30,40 (2009). And such

evidence shows "the substantial risk of putting an innocent man to death" and is "sufficently exceptional to warrant utilization of this Court's. . . . original habeas jurisdiction." In Re Davis, 557 U.S. at 953.

Third. The correspondance between trial counsel and Allen (APPENDIX F), shows that Allen's motions, before trial, to substitute counsel warranted counsel's removal. Where the evidence counsel states he would've investigated and presented was turned over in the discovery that counsel requested. But was neglected because counsel had sole control of Allen's defense.

Fifth, in Felker v Turpin, 518 U.S. 651, 661-62, this Court held that the availability of the original habeas jurisdiction in this Court preserves Article III grant of appellate jurisdiction over the lower federal courts. This petition is in aid of tis Court's jurisdiction on the two important questions of federal law, and the exercise of this Court's original habeas jurisdiction would aid in exercising the appellate authority provided to it by Article III, 2 with respect to the split between this Court and both the Eighth and Fifth Circuit on the issue of whether Allen's grand jury issue is a structural error that requires a new trial. Because only this Court can revise a clear misapplication of law that has been applied in Allen's case.

CONCLUSION

Allen respectfully pleads with this Court to grant this writ, permit briefing, and/or arguments on the issues presented. Or, grant Allen a new trial with the facts and evidence presented.

Respectfully submitted,

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