No. 18-9554

IN THE SUPREME COURT OF THE UNITED STATES

IN RE BILLIE J. ALLEN, PETITIONER

(CAPITAL CASE)

ON PETITION FOR A WRIT OF HABEAS CORPUS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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CAPITAL CASE

QUESTIONS PRESENTED

1. Whether this Court should issue an original writ of habeas corpus under 28 U.S.C. 2241 based on petitioner's contentions that his Sixth Amendment rights were violated under McCoy v. Louisiana, 138 S. Ct. 1500 (2018), and that collateral relief for that purported violation is warranted, where petitioner's counsel did not admit petitioner's guilt at trial and attempted to identify reasonable doubt in the face of overwhelming evidence of petitioner's guilt.

2. Whether this Court should issue an original writ of habeas corpus under 28 U.S.C. 2241 based on petitioner's contention that the omission of death-penalty-eligibility factors from his federal indictment before Ring v. Arizona, 536 U.S. 584 (2002), is a structural error warranting relief, where this Court after Ring denied petitioner's certiorari petition raising this same contention on direct appeal.

3. Whether this Court should issue an original writ of habeas corpus under 28 U.S.C. 2241 based on petitioner's contention that his trial counsel should have discovered and presented DNA evidence and gas chromatographic analysis that petitioner asserts would have shown that he did not commit the crimes for which he was convicted.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (E.D. Mo.):

United States v. Allen, No. 4:97-cr-141 (June 11, 1998)

Allen v. United States, No. 4:07-cv-27 (June 25, 2014)

Allen v. United States, No. 4:16-cv-963 (July 22, 2016)

United States Court of Appeals (8th Cir.):

United States v. Allen, No. 98-2549 (Apr. 12, 2001)

United States v. Allen, No. 98-2549 (Feb. 2, 2004)

United States v. Allen, No. 98-2549 (May 2, 2005)

Allen v. United States, No. 14-3495 (July 20, 2016)

Allen v. United States, No. 16-2094 (July 26, 2016)

Supreme Court of the United States:

Allen v. United States, No. 01-7310 (June 28, 2002)

Allen v. United States, No. 05-6764 (Dec. 11, 2006)

Allen v. United States, No. 16-8229 (Oct. 2, 2017)

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OPINIONS BELOW

Prior opinions of the court of appeals are reported at 829 F.3d 965, 721 F.3d 979, 406 F.3d 940, and 247 F.3d 741. Prior opinions of the district court are not reported in the Federal Supplement but are available at 2014 WL 4219471, 2014 WL 2882495, and 2011 WL 1770929.

JURISDICTION

The petition for an original writ of habeas corpus was filed on May 24, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 2241.

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Missouri, petitioner was convicted of

killing a person in the course committing an armed bank robbery, in violation of 18 U.S.C. 2113(a) and (e) (Count 1); and using a firearm to commit first-degree murder during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c) and (j)(1) (Count 2). The district court sentenced petitioner to life imprisonment on Count 1 and to a capital sentence on Count 2. The court of appeals affirmed. 247 F.3d 741. This Court granted certiorari, vacated the court of appeals' judgment, and remanded for further consideration in light of Ring v. Arizona, 536 U.S. 584 (2002). See 536 U.S. 953. On remand, a panel of the court of appeals vacated the capital sentence, 357 F.3d 745; the en banc court vacated the panel's judgment and affirmed, 406 F.3d 940; and this Court denied certiorari, 549 U.S. 1095.

Petitioner subsequently moved to vacate his sentence under 28 U.S.C. 2255. The district court denied all but one of petitioner's claims without an evidentiary hearing, 2011 WL 1770929; denied his remaining claim after a hearing, 2014 WL 2882495; and denied reconsideration, 2014 WL 4219471. The court of appeals denied a certificate of appealability (COA) on all but one of petitioner's claims, 14-3495 C.A. Corrected Order (May 18, 2015), granted a COA on the remaining claim, ibid., and affirmed on that claim, 829 F.3d 965. This Court denied certiorari. 138 S. Ct. 59.

1. On March 17, 1997, petitioner and Norris Holder robbed the Lindell Bank & Trust in St. Louis, Missouri. 247 F.3d at 755.

Petitioner and Holder had planned the crime extensively: they visited the bank four days before the robbery, watched movies depicting "assault-style takeover" bank robberies, and acquired two stolen vans and a car belonging to Holder's mother, which they intended to use as getaway vehicles. Id. at 756. On the same day they visited the bank, petitioner and Holder went to a store where Holder purchased a bulletproof vest. 4:07-cv-27 D. Ct. Doc. 79, at 23, 25 (Oct. 31, 2008) (Gov't 2255 Resp.). Petitioner told the salesman that he likewise wanted to buy a vest but did not have enough money. Ibid. Holder also obtained two semiautomatic assault rifles and approximately 200 rounds of ammunition, mostly military-style hollow-point bullets. 247 F.3d at 756.

On the morning of the robbery, Holder telephoned petitioner, told him it was "payday," and then picked petitioner up in one of the stolen vans and drove to the bank. Gov't 2255 Resp. 26, 29. Petitioner and Holder donned ski masks, armed themselves with the assault rifles, and rushed inside. 247 F.3d at 756; see Gov't 2255 Resp. 29.

As soon as petitioner entered the bank, he aimed his assault rifle at Richard Heflin, the bank's security guard, and started shooting. 247 F.3d at 756; see Gov't 2255 Resp. 9. Petitioner's shots hit Heflin in the legs, causing him to fall to the ground, where he laid unarmed with "his palms wide open." Gov't 2255 Resp. 9-10, 17. As Heflin was "lying on the floor helpless and not moving," petitioner "walked over on top of him and fired

repeatedly." Id. at 9-10. Heflin bled to death from least eight gunshot wounds. 247 F.3d at 756; see Gov't 2255 Resp. 16-17. Ballistics evidence later showed that a total of 16 shots from the two assault rifles had been fired during the robbery, at least 11 of which came from petitioner's assault rifle. 247 F.3d at 756; see Gov't 2255 Resp. 15 & n.3, 21.

While petitioner was shooting Heflin, Holder jumped over the teller counter and managed to steal over $51,000. 247 F.3d at 756; see Gov't 2255 Resp. 11-12. Petitioner and Holder then ran from the bank toward the getaway van. 247 F.3d at 756. As they fled, petitioner removed his ski mask. Gov't 2255 Resp. 12. A witness saw petitioner's face and, the very next day, positively identified him as one of the robbers. Id. at 12, 29.

Another witness followed petitioner and Holder as they drove away from the bank and into a public park (Forest Park), where petitioner and Holder had hidden the second stolen getaway van. 247 F.3d at 756; see Gov't 2255 Resp. 12-13, 22. Holder and petitioner had planned to switch vehicles in the park, and Holder had soaked the first getaway van in gasoline before the robbery so that he and petitioner could quickly destroy it after switching to the second one. 247 F.3d at 756. As they drove through the park, however, Holder flicked a cigarette lighter, causing the van to explode prematurely. Ibid.; Gov't 2255 Resp. 30. Petitioner jumped out of the burning van and ran into the woods. 247 F.3d at 756.

Holder, who was on fire, was rescued by two park employees and then arrested. Ibid.

Petitioner emerged from the woods a few minutes later and approached another park employee, Bobby Harris. 247 F.3d at 757. Harris, who positively identified petitioner one day later as the person who approached him, noticed that petitioner's hair was burned. Ibid.; see Gov't 2255 Resp. 18-19, 29. Petitioner made up a story to explain his burns and persuaded Harris and another employee to drive him to the nearest transit station. 247 F.3d at 757. Petitioner then made his way to the Northwest Plaza mall, where he went shopping. Gov't 2255 Resp. 30.

A search of the burned-out van revealed the assault rifles that petitioner and Holder had used during the robbery, hollow-point ammunition that matched the bullets fired during the robbery, a radio transceiver, and a large amount of burned money. Gov't 2255 Resp. 19-20. Police found petitioner's leather jacket nearby, with five clips of hollow-point ammunition and three shotgun shells in the pockets. Id. at 20. Police later found the other two getaway vehicles and more evidence linking petitioner to the robbery: the second stolen getaway van (found in Forest Park) contained a shotgun loaded with ammunition that matched the shells found in petitioner's jacket, and the car belonging to Holder's mother (found in a hospital parking lot) contained petitioner's fingerprints and a cellphone that had been used to call petitioner's residence shortly before the robbery. Id. at 22-23, 27-28.

When police arrived at petitioner's residence early the next morning, he immediately said, "I didn't kill anybody." Gov't 2255 Resp. 28. The police observed that petitioner had burns on his ear and nose, that his hair was singed, and that he "reeked of smoke." Id. at 19 n.4, 28. They also observed melted plastic on petitioner's pants that was similar to melted plastic found on Holder's pants and on the jacket petitioner had discarded at the scene of the fire. Id. at 28. Petitioner initially told the police that he sustained his injuries in a fight, but he later told a medical technician that he was burned when he was "going through the park and the van caught fire." Id. at 28-29.

Later that day, after three eyewitnesses identified petitioner from a lineup, petitioner waived his Miranda rights and confessed to participating in the armed bank robbery. 247 F.3d at 764-765. Petitioner described the robbery in detail and admitted to shooting Heflin multiple times. Gov't 2255 Resp. 29-30. Petitioner also told police that he was in the getaway van when Holder, who was driving, flicked a cigarette lighter and started a fire. Id. at 30.

While awaiting trial, petitioner made several telephone calls to his then-girlfriend and to a friend, Johnnie Grant, in which petitioner admitted that he robbed the bank with Holder. Gov't 2255 Resp. 30. Petitioner also wrote several letters to Grant in which he asked Grant to testify, falsely, that petitioner was not

involved in the robbery and had no relationship with Holder. Id. at 30-31.

2. A federal grand jury indicted petitioner for killing a person in the course of an armed bank robbery, in violation of 18 U.S.C. 2113(a) and (e), and using a firearm to commit first-degree murder during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c) and (j)(1). 247 F.3d at 755. The government later filed a notice of intent to seek the death penalty pursuant to 18 U.S.C. 3593 and provided petitioner with notice of both the applicable statutory aggravating factors under 18 U.S.C. 3592(c) and the mens rea requirement in 18 U.S.C. 3591(a)(2). See 406 F.3d at 941.

During the guilt phase of petitioner's bifurcated trial, the government presented overwhelming evidence of petitioner's guilt, including the testimony of eye witnesses and petitioner's repeated confessions. 247 F.3d at 771, 777; see Gov't 2255 Resp. 7-31. Petitioner's counsel then attempted at closing argument to undermine the credibility of evidence about petitioner's oral confession by emphasizing the presumption of innocence; the government's burden of proving guilt beyond a reasonable doubt, 2/26/98 Trial Tr. (Tr.) 61-62; and the absence of contemporaneous notes on the confession. Tr. 64-66. Counsel similarly questioned the credibility of a detective's testimony that petitioner had stood up to demonstrate how he had used the gun during the robbery, emphasizing the detective's testimony that petitioner was "handcuffed to the

loop on the table" during the interrogation, which, counsel argued, would have made it impossible for petitioner to stand. Tr. 69. Counsel further suggested that detectives had obtained petitioner's confession without affording him basic rights that protect against "coercion" and "compulsion," like a phone call and access to an attorney. Tr. 63-64 ("There w[ere] no efforts whatsoever to ensure that the rights they read to him and promised him were meaningful, had any meaning.").

Petitioner's counsel also sought to identify weaknesses in the testimony of eye witnesses to the bank robbery, as well as other witnesses linking petitioner to Holder and the preparations for the robbery. Tr. 69-77. For example, counsel explained that although a bank customer who had identified petitioner as one of the robbers was a "nice woman," she clearly was "[c]onfused" and told multiple "versions of what she had seen." Tr. 72-74. Counsel also attacked the credibility of the salesman who had identified petitioner as accompanying Holder when Holder purchased a bulletproof vest a few days before the robbery, suggesting that the salesman had identified petitioner because he had seen petitioner's picture in the newspaper and wanted to be "the citizen of the year." Tr. 70-71.

Finally, petitioner's counsel argued to the jury that, at worst, the trial evidence showed that petitioner fired a gun without intending to kill Heflin, the bank's security guard. Tr. 79-83. Counsel argued that even "if * * * we say, 'Okay, the

government has all the evidence on its side, it is going to win, we can't dispute it all,' there still is reasonable doubt as to intent." Tr. 79-80. Counsel argued that it "would have been extremely easy" to have killed Heflin on the ground if that had been the intent, but that the guard's fatal injuries resulted from bullets that had "ricochet[ed]" off of other objects, not bullets that had been "aimed at him." Tr. 82. Counsel thus argued to the jury that the government had failed to establish that petitioner killed the guard with "malice aforethought" and that, "even discounting everything else in the case, if you take [petitioner's] statement, he tells the police, 'I shot, but I missed.'" Ibid.

The jury found petitioner guilty on both counts and, after a penalty-phase hearing, recommended that petitioner be sentenced to life imprisonment on Count 1 and death on Count 2. 406 F.3d at 941. The district court sentenced petitioner accordingly. Ibid.

3. a. The court of appeals affirmed. 247 F.3d 741. The court rejected petitioner's claims that his Fifth and Sixth Amendment rights were violated because the grand jury's indictment did not allege the aggravating factors that made him eligible for the death penalty. Id. at 762-764.

b. While petition for a writ of certiorari was pending, this Court issued its decision Ring, supra. In Ring, this Court held that the Sixth Amendment requires a jury finding on a statutory aggravating factor that makes a defendant eligible for the death penalty because such a factor is "the functional

equivalent of an element of a greater offense." Ring, 536 U.S. at 609 (quoting Apprendi v. New Jersey, 530 U.S. 466, 494 n.19 (2000)). This Court granted certiorari, vacated the judgment of the court of appeals, and remanded the case "for further consideration in light of Ring." 536 U.S. 953.

c. On remand, a divided panel of the court of appeals took the view that it was error not to charge "at least one statutory aggravating factor" in the indictment, and that the error was not harmless. 357 F.3d at 749; see id. at 748-758. The en banc court of appeals, however, granted rehearing and vacated the panel's judgment. 406 F.3d at 942. The en banc court agreed with the panel that "the same facts that the Sixth Amendment requires to be proven to the petit jury beyond a reasonable doubt in state and federal prosecutions must also be found by the grand jury and charged in the indictment in federal prosecutions." Id. at 943. The court accordingly concluded that although the government had identified the statutory aggravating factors for petitioner's case in its notice of intent to seek the death penalty, Ring now showed that it was a Fifth Amendment error not to include at least one of the statutory aggravating factors in the indictment. Ibid. But the en banc court further determined that the indictment's defect was not a structural error requiring automatic reversal, and instead was subject to harmless-error review and harmless beyond a reasonable doubt in the circumstances here. Id. at 943-949.

After noting that Arizona v. Fulminante, 499 U.S. 279 (1991), and Neder v. United States, 527 U.S. 1 (1999), had identified only a limited class of defects that qualify as structural error, the court of appeals stated that it was inclined "to think that the Supreme Court meant for its lists of structural errors in [those decisions] to be exhaustive." 406 F.3d at 944. But even if that were not so, the court found it "particular[ly] significan[t]" that Neder had determined that jury instructions that erroneously omitted an element of the offense did not reflect structural error and, instead, were subject to harmless-error review. Id. at 944-945. "[J]ust as Neder was deprived of his Sixth Amendment right to have the petit jury determine an essential element of his offense," the court reasoned, "[petitioner] was deprived of his Fifth Amendment right to have the grand jury decide whether to charge the statutory aggravating factors and the mens rea requirement that are the functional equivalent of elements of his offense." Id. at 945. The court thus determined that the standard established by Chapman v. California, 386 U.S. 18 (1967), for assessing the harmlessness of a constitutional error on direct review, applied to the error asserted by petitioner. 406 F.3d at 945.

Applying that standard, the en banc court of appeals determined that the indictment's defect was harmless beyond a reasonable doubt. 406 F.3d at 945-949. The court stated that the proper inquiry in this context is "whether any rational grand jury * * * would have found the existence of the requisite mental state

and one or more of the statutory aggravating factors found by the petit jury if the grand jury had been asked to do so." Id. at 945. In order to "avoid unnecessary adjudication of constitutional issues," the court assumed arguendo that, in conducting harmless-error analysis, it could consider only "the evidence presented to the grand jury at the time it was asked to indict [petitioner]." Id. at 946. And the court determined that the indictment error in this case was harmless beyond a reasonable doubt because any rational jury presented with the same evidence presented to the grand jury in this case would have found probable cause to believe the existence of a requisite aggravating factor and mental state. Id. at 946-948.

Specifically, the court of appeals determined that any rational grand jury would have found the grave-risk-of-death-to-others statutory aggravator in respect to the bank robbery, in light of grand jury testimony showing that petitioner and Holder had fired 16 shots from their semiautomatic assault rifles in the bank, some of which had ricocheted through the lobby; had pointed a gun at one bystander's head and fired at another; and had crashed a flaming van into a public park when fleeing the scene. 406 F.3d at 947-948. The court also determined that any rational grand jury would have found the requisite mens rea of intentionally inflicting serious bodily injury resulting in Heflin's death. Id. at 948. The court noted that an FBI agent had testified that both defendants had identified petitioner as the robber who had entered

the bank first and shot Heflin, and that another witness had testified that Holder was the second robber to enter, such that a grand jury would logically infer that petitioner was the first assailant who had shot the guard. Id. at 948-949.

d. Petitioner petitioned for a writ of certiorari, arguing that the Fifth Amendment indictment error in his case was a structural error not subject to harmless-error review. 05-6764 Pet. 6-15. This Court denied certiorari. 549 U.S. 1095.

4. In 2008, petitioner filed a motion to vacate his sentence under 28 U.S.C. 2255. See 4:07-cv-27 D. Ct. Doc. 60 (Feb. 11, 2008). As relevant here, petitioner argued that his trial counsel had been constitutionally ineffective during the guilt phase of trial on the theory that counsel had failed to investigate or present evidence that petitioner was not involved in the robbery or murder. Id. at 29-32. The district court rejected that Sixth Amendment claim, finding that petitioner failed to establish deficient performance and prejudice, as required by Strickland v. Washington, 466 U.S. 668 (1984). See 2011 WL 1770929, at *3, *23-*26.

Of particular relevance here, petitioner argued that evidence could suggest that another man, Jerry Bostic, had committed the bank robbery with Holder. See 2011 WL 1770929, at *23-*26. Petitioner argued, for instance, that his counsel should have investigated whether DNA from a blood-stained strap of fabric

recovered during the investigation -- which did not match petitioner or the murdered bank guard (Heflin) -- was a match for Bostic. Id. at *23. The district court observed, however, that the strap was "fairly clear[ly] * * * from Holder's bulletproof vest" and concluded that, in any event, petitioner's theory was "entirely speculative * * * given the lack of any colorable allegations linking Bostic to the crimes." Id. at *23 & n.13. The court further determined that, even if Bostic's DNA had been found on the strap, it would not have undermined confidence in the trial's outcome given the compelling evidence of petitioner's guilt, including his confession, evidence that he helped plan the robbery with Holder, and the "numerous eyewitness" reports that the relevant robber was from 5'8" to over 6 feet tall, which described petitioner but not Bostic (who was 5'5"). Ibid.

Petitioner also argued that counsel had been ineffective in not presenting evidence that a "gas chromatographic analysis of the clothing [petitioner] was wearing when he was arrested" did not reveal the presence of any "petroleum distillates," arguing that such evidence could have been used to impeach an officer's testimony that petitioner "smelled strongly of smoke" when he was arrested. 2011 WL 1770929, at *23. The district court rejected that argument because the gas-chromatography test was "a test for petroleum distillates" that reflected only the absence of "actual petroleum products" and therefore would not address whether petitioner's clothes had "'the smell of smoke'" or "trace evidence

left by smoke." Ibid. The court further determined that even if the testing could have reflected the absence of the smell of smoke, the evidence would have been "relatively minor" in the context of the trial and "incredibly unlikely" to "have resulted in a different outcome." Ibid.

The district court rejected petitioner's remaining Section 2255 claims, see 2014 WL 2882495, at *3, *144-*152, and denied a COA, id. at *160-*161.

b. The court of appeals summarily denied petitioner's request for a COA on the aforementioned issues, granted a COA on one unrelated ineffective-assistance claim, 14-3495 C.A. Corrected Order (May 18, 2015), and affirmed on that claim, 829 F.3d 965. This Court again denied certiorari. 138 S. Ct. 59.

ARGUMENT

Petitioner contends (Pet. 2-3, 20-27) that this Court should grant an original writ of habeas corpus under 28 U.S.C. 2241 based on petitioner's new claim that he is entitled to collateral relief under McCoy v. Louisiana, 138 S. Ct. 1500 (2018), which rests on petitioner's assertion that his counsel admitted his guilt to the jury against his instructions. Petitioner further contends (Pet. 3-6, 27-35) that an original writ is warranted based on an argument that the court of appeals rejected on direct review, and as to which this Court denied certiorari, namely, that his indictment's omission of death-penalty-eligibility factors was a structural error not subject to harmless-error review. Finally, petitioner

appears to contend (Pet. I, 1, 18, 36-37) that an original writ is warranted on an ineffective-assistance claim that was rejected on the merits on Section 2255 review, i.e., petitioner's claim that his trial counsel was constitutionally ineffective in failing to discover and present evidence of "'negative DNA results' and 'negative gasoline results,'" Pet. I. Petitioner's contentions lack merit and do not present extraordinary circumstances that might warrant this Court's issuance of an original writ of habeas corpus.

Under Rule 20.4(a) of the Rules of this Court, "[t]o justify the granting of a writ of habeas corpus, the petitioner must" make two showings. Sup. Ct. R. 20.4(a); see Felker v. Turpin, 518 U.S. 651, 665 (1996). First, the petitioner must show that "adequate relief cannot be obtained in any other form or from any other court." Sup. Ct. R. 20.4(a). Second, the petitioner must show that "exceptional circumstances warrant the exercise of the Court's discretionary powers." Ibid. This Court "rarely grant[s]" such a writ, ibid., and petitioner has failed to establish either prerequisite for habeas relief directly from this Court. The habeas petition should be denied.

1. Petitioner argues (Pet. 2-3, 20-27) that his trial counsel admitted his guilt to the jury against his instructions, in violation of the Sixth Amendment as construed by this Court in McCoy in 2018, and that McCoy's intervening rule should be applied retroactively to grant him collateral relief. Petitioner fails to

show that his claim warrants habeas relief directly from this Court and, in any event, the claim lacks merit, because petitioner's counsel defended petitioner's innocence at trial and did not admit his guilt.

a. First, petitioner has failed to show that "adequate relief cannot be obtained in any other form or from any other court," Sup. Ct. R. 20.4(a). Petitioner could have sought leave from the court of appeals to file a second or successive motion under 28 U.S.C. 2255 to assert his McCoy claim. The court of appeals would have then performed its important statutory screening function by determining whether petitioner made a prima facie showing that his McCoy-based application relied on "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable," so as to permit petitioner to pursue a successive Section 2255 motion raising that claim in district court. 28 U.S.C. 2244(b)(2)(A), (3)(A) and (C); see 28 U.S.C. 2255(h).

Petitioner suggests (Pet. 6-7) that a district court order in his original Section 2255 proceedings foreclosed any "avenue" for his McCoy claim. In that order, the district court addressed one of petitioner's pro se filings, which the court construed as a supplement to petitioner's "previous request to raise additional grounds for his [then-]pending Amended [Section 2255] Motion." 4:07-cv-27 D. Ct. Docket Entry No. 372 (Feb. 12, 2014). The court stated that a government response "to this latest filing" in the

Section 2255 proceedings "[wa]s not required" and directed that the "Clerk of the Court shall not accept any future pro se filings in this matter" and that "pleading[s] filed on behalf of [p]etitioner shall be filed by counsel of record only." Ibid. (emphasis added). That order simply applied to the proceedings regarding petitioner's first Section 2255 motion in which petitioner was represented by counsel, not to any separate proceedings.[1] Moreover, the district court's order to the district court clerk would not have foreclosed petitioner from filing in the court of appeals an application for leave to file a successive Section 2255 motion. See 28 U.S.C. 2255(h) (requiring application to court of appeals rather than district court). And if the court of appeals had granted such leave for petitioner's McCoy claim, petitioner identifies no basis for the district court to have declined adjudication of that claim.

b. Second, petitioner fails to show "exceptional circumstances" warranting the exercise of this Court's discretionary authority to grant habeas relief. As a threshold matter, McCoy arose on direct review, see McCoy, 138 S. Ct. at 1507, and

[1] In 2016, petitioner, acting through counsel, filed a second Section 2255 motion in district court raising new claims, which the court dismissed without prejudice pending a decision from the court of appeals whether to certify the successive motion for the district court's consideration. 4:16-cv-963 D. Ct. Order (July 22, 2016); see 28 U.S.C. 2244(b)(3)(C), 2255(h). The court of appeals denied petitioner's certification request. 16-2094 C.A. Judgment (July 26, 2016). That denial would not preclude a further request for leave to file a successive Section 2255 motion. See 28 U.S.C. 2255(h).

petitioner provides no sound basis for contending that the procedural rule it adopted falls within the "small core of rules," such as the right to counsel recognized in Gideon v. Wainwright, 372 U.S. 335 (1963), that are "watershed rules of criminal procedure" that would apply retroactively and undo already-final convictions, Beard v. Banks, 542 U.S. 406, 417 (2004) (citations omitted). In any event, even assuming McCoy applies retroactively on collateral review and even assuming that petitioner clearly instructed defense counsel not to admit his guilt, petitioner's McCoy-based claim lacks merit. The trial record demonstrates that petitioner's attorney never admitted petitioner's guilt and instead attempted to sow reasonable doubt in the minds or jurors in the face of the overwhelming evidence of petitioner's guilt.

In McCoy, this Court held that a defendant has a Sixth Amendment right to instruct that his counsel refrain from admitting guilt. 138 S. Ct. at 1505. In that case, the state of Louisiana charged McCoy on three counts of first-degree murder and provided notice of its intent to seek the death penalty; McCoy expressly told his attorney before trial not to concede guilt; but counsel, who "reasonably thought the objective of his representation should be avoidance of the death penalty" (id. at 1512), attempted to avoid that result by focusing on the penalty phase and admitting to "the jury [that] the defendant 'committed three murders,'" was "'guilty,'" and that the jury could not "'reasonably' * * * reach 'any other conclusion.'" Id. at 1505-1506 (citations omitted).

The Court concluded that when defense counsel is "[p]resented with express statements of the client's will to maintain innocence, * * * counsel may not steer the ship the other way." Id. at 1509.

Unlike defense counsel in McCoy, petitioner's counsel contested and never admitted petitioner's guilt to the jury. See pp. 7-9, supra. Although petitioner asserts (Pet. 22) that his counsel effectively admitted his guilt by "re-introducing [his] alleged confession" during closing arguments, his counsel did not discuss petitioner's confession in the manner petitioner suggests. Counsel instead attempted to defuse the evidence of petitioner's confession that had already been presented to the jury by emphasizing the government's high burden of proof and by undermining the reliability of the evidence, arguing that contemporaneous notes had not been taken, that government-witness testimony about the confession was unreliable, and that legal protections necessary to avoid coercion and compulsion had been disregarded. See pp. 7-8, supra.

Petitioner similarly takes (Pet. 22) other statements made by his counsel during closing argument out of context. Petitioner faults counsel for referring to petitioner's confession that he "shot" at the security guard "but * * * missed." Ibid. (citation omitted). But counsel's reference to that statement arose in the context of counsel's argument that even "if" the jury were to believe the government's evidence -- including the evidence of petitioner's confession -- the evidence was insufficient to show

the requisite mental state for the murder charge. See Tr. 79-83; pp. 8-9, supra. Counsel emphasized evidence that he argued showed an absence of intent to kill: evidence indicating that it would have been "extremely easy" to have killed Heflin lying on the ground if that had been intended; evidence that Heflin's wounds were the result of "richochet[ed]" bullets, which was consistent with evidence indicating that petitioner said that that he "'shot'" but "'missed'"; and evidence that Heflin did not die immediately and left the bank alive. See ibid.

Rather than imprudently ignore altogether the overwhelming evidence of petitioner's guilt -- which included physical evidence, eyewitness testimony, and his own admissions -- petitioner's counsel attempted to explain, minimize, and undermine that evidence in a bid to persuade jurors that the government had failed to prove guilt beyond a reasonable doubt. Counsel, like most attorneys "representing capital defendants[,] face[d] daunting challenges in developing trial strategies, not least because the defendant's guilt [was] clear." Florida v. Nixon, 543 U.S. 175, 191 (2004). But because counsel did not admit petitioner's guilt over petitioner's objections, petitioner has failed to identify a colorable Sixth Amendment claim under McCoy.

2. Petitioner separately argues (Pet. 3-6, 27-35) that the omission of death-penalty-eligibility factors from his indictment was a structural error not subject to harmless-error review. But the en banc court of appeals in 2005 correctly rejected that

contention on direct review, 406 F.3d 940, 943-945, and this Court in 2006 denied petitioner's certiorari petition from that decision raising the same issue that petitioner now presents in an original writ of habeas corpus, 549 U.S. 1095. Petitioner does not dispute that, if harmless-error review applies, the en banc court correctly determined that the omission from his indictment was harmless beyond a reasonable doubt. 406 F.3d at 945-949. And petitioner fails to show that this Court should issue an original habeas writ on a structural-error argument on which it previously denied review.

a. The full litigation of petitioner's claim through the en banc court of appeals, and this Court's own denial of discretionary review, cannot provide the basis for an assertion that "adequate relief cannot be obtained in any other form or from any other court," Sup. Ct. R. 20.4(a), for purposes of satisfying the prerequisite for original habeas relief. This Court's discretion to grant habeas relief directly under Section 2241 is not a procedural vehicle for litigants to renew previously rejected claims as to which this Court already declined review in the litigant's own case. And petitioner identifies (Pet. 7) nothing in the intervening years since this Court's 2006 denial of certiorari that might constitute "exceptional circumstances" warranting the rare exercise of this Court's habeas discretion, Sup. Ct. R. 20.4(a).

b. In any event, the court of appeals correctly concluded that the omission from petitioner's indictment was not structural

error and was therefore subject to harmless-error review. The Fifth Amendment requires that facts subject to the rule in Apprendi v. New Jersey, 530 U.S. 466 (2000), must also be charged in a federal indictment. United States v. Cotton, 535 U.S. 625, 627 (2002). The Court's decision in Ring v. Arizona, 536 U.S. 584, 609 (2002), therefore means that capital eligibility factors must be charged in an indictment. But an indictment's omission of such a factor bears no relation to the limited category of pervasive and fundamental errors that this Court has held to be structural. See, e.g., Johnson v. United States, 520 U.S. 461, 468-469 (1997) (listing examples). Indeed, "'if the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other errors that may have occurred' are not 'structural errors.'" United States v. Marcus, 560 U.S. 258, 265 (2010) (citation omitted).

Significantly, in Neder v. United States, 527 U.S. 1 (1999), the Court held that the omission of an offense element from jury instructions, which prevented the petit jury from making a determination on that element necessary to a finding of guilt, does not constitute structural error and is subject to harmless-error review. Id. at 8-15. It necessarily follows that the omission of an offense element from the indictment also does not constitute structural error. Indeed, the type of omission at issue here constitutes a far weaker candidate for structural error than the type of omission in Neder. First, the Fifth Amendment right to an

indictment by a grand jury, unlike the Sixth Amendment right to a trial by a petit jury, has not been incorporated against the States through the Fourteenth Amendment as an essential requirement of fundamental fairness. See Hurtado v. California, 110 U.S. 516, 538 (1884). Second, although the grand jury undoubtedly performs a vital protective function, the petit jury ultimately provides greater protection for the accused, insofar as the prosecutor has no obligation to present exculpatory evidence to the grand jury; the accused has no right to present evidence at all; the grand jury decides whether to indict by majority vote; the grand jury need find only probable cause; and the grand jury's findings, if favorable to a defendant, are not accorded the finality of a petit jury's acquittal.

That conclusion is reinforced by this Court's decisions in United States v. Mechanik, 475 U.S. 66 (1986), and United States v. Cotton, supra. In Mechanik, the Court held that a violation of Federal Rule of Criminal Procedure 6(d) -- namely, the simultaneous testimony of two government witnesses before the grand jury -- was susceptible to harmless-error review. See 475 U.S. at 70. Notably, the Court concluded that the error in question was in fact harmless when the petit jury had subsequently returned a guilty verdict, on the ground that the verdict "means not only that there was probable cause to believe that the defendants were guilty as charged, but also that they are in fact guilty as charged beyond a reasonable doubt." Ibid. Mechanik therefore suggests

that the omission of an element (or sentence-enhancing fact) from the indictment is likewise harmless -- and that, in analyzing such an error for harmlessness, a court may properly consider whether the petit jury actually found that element at trial.

The Court in Cotton similarly held that the failure either to allege drug quantity in the indictment or to obtain a finding on drug quantity by the petit jury did not constitute reversible plain error. See 535 U.S. at 631-634. Although the Court did not pass specifically on the question whether the third component of the federal plain-error inquiry (which is analogous to the harmless-error inquiry for preserved errors) had been satisfied, the Court concluded that the fourth component was not satisfied because any error did not seriously affect the fairness, integrity, or public reputation of judicial proceedings. Id. at 632-633. In so holding, the Court noted that the evidence concerning the sentence-enhancing fact was "overwhelming" and "essentially uncontroverted." Id. at 633. The Court's conclusion in Cotton that the omission of a sentence-enhancing fact from an indictment will not seriously affect the fairness, integrity, or public reputation of judicial proceedings "cuts against the argument that [such an omission] will always render a trial unfair" and thus should constitute structural error. Neder, 527 U.S. at 9.

Contrary to petitioner's suggestion (Pet. 29-32), Weaver v. Massachusetts, 137 S. Ct. 1899 (2017), does not suggest otherwise. The Court in Weaver cautioned that structural errors are only those

errors that "affect[] the framework within which the trial proceeds." Id. at 1907 (citation omitted). And as the court of appeals' en banc decision illustrates, 406 F.3d at 945-949, the effect of the error here was not "too hard to measure," nor would such an error "always result[] in fundamental unfairness." Weaver, 137 S. Ct. at 1908.

c. The majority of the courts of appeals to have considered the issue agree that the omission of an element of an offense (or a sentence-enhancing fact) in an indictment, even if subject to a timely objection, is subject to harmless-error review. See United States v. Stevenson, 832 F.3d 412, 427 n.11 (3d Cir. 2016), cert. denied, 137 S. Ct. 674 (2017); United States v. Dentler, 492 F.3d 306, 310 (5th Cir. 2007) (following United States v. Robinson, 367 F.3d 278, 285-286 (5th Cir.), cert. denied, 543 U.S. 1005 (2004)); United States v. Higgs, 353 F.3d 281, 304-306 (4th Cir. 2003), cert. denied, 543 U.S. 999 (2004); United States v. Cor-Bon Custom Bullet Co., 287 F.3d 576, 580-581 (6th Cir.), cert. denied, 537 U.S. 880 (2002); United States v. Prentiss, 256 F.3d 971, 981-985 (10th Cir. 2001) (en banc) (per curiam), overruled in part on other grounds by Cotton, 535 U.S. at 633; United States v. Corporan-Cuevas, 244 F.3d 199, 202 (1st Cir.), cert. denied, 534 U.S. 880 (2001). Only the Ninth Circuit has concluded that "if properly challenged prior to trial, an indictment's complete failure to recite an essential element of the charged offense is not a minor or technical flaw subject to harmless error analysis, but a fatal

flaw requiring dismissal of the indictment." United States v. Du Bo, 186 F.3d 1177, 1179 (1999). But the Ninth Circuit's decision and the lopsided split in which it stands alone existed when this Court in 2006 denied certiorari in petitioner's direct appeal on this same issue. Petitioner identifies no exceptional circumstances, let alone ones based on intervening events, to revisit the issue in his case through an original writ of habeas corpus.

3. Petitioner lists (Pet. I) a third question presented that appears to reference his ineffective-assistance claim in his Section 2255 motion based on his counsel's purportedly deficient failure to investigate and present certain DNA and gas chromatographic evidence that petitioner asserts would have exonerated him. Petitioner briefly mentions (Pet. 18, 36-37) that evidence but has not developed an argument showing ineffective assistance violating the Sixth Amendment. Federal courts generally "refuse to take cognizance of arguments that are made in passing without proper development." Johnson v. Williams, 568 U.S. 289, 299 (2013). And petitioner's failure to develop an argument on this issue underscores his failure to show "exceptional circumstances" warranting this Court's rare review under Rule 20.4(a).

In light of the district court's analysis rejecting petitioner's claim on Section 2255 review, 2011 WL 1770929, at *23-*26; see pp. 13-15, supra, petitioner's bare assertion (Pet. 8) that "the DNA and other evidence * * * support his innocence" is

insufficient to make that showing. Indeed, petitioner has offered no new information that would justify this Court's exercise of its discretionary review after it has denied certiorari in petitioner's Section 2255 proceedings, 138 S. Ct. 59.

CONCLUSION

The petition for an original writ of habeas corpus should be denied.

Respectfully submitted.

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