No 18-9554

IN THE SUPREME COURT OF THE UNITED STATES

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

AN ORIGINAL WRIT OF HABEAS CORPUS

# REPLY TO THE GOVERNMENT'S RESPONSE IN OPPOSITION

****CAPITAL CASE*****

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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 (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" (APPENDIX A) and "negative gasoline results" (APPENDIX B), 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 exercise 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..).

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## REPLY TO THE GOVERNMENT'S BRIEF IN OPPOSITION

In this capital case, Petitioner Billie Jerome Allen, pro se, filed an Original Writ of Habeas Corpus to this Court on May 24, 2019. The petition would be docketed on June 5, 2019. After (8) extensions, the Government has now filed their Brief In Opposition on March 26, 2020.

Because the Government's Brief In Opposition, (Gov. B.I.O.), throughout its presentment, makes countless misleading, false, and/or clear misrepresentations of the facts, circumstances, and evidence to this Court. Allen now files a timely reply; highlighting, not only the Government's misleading, false, and/or misrepresentations to this Court. But this reply also furthers Allen's contention, using evidence from the Government's own investigation, that "the 'risk' of putting an innocent man to death . . . is 'sufficiently exceptional' to warrant utilization of this Court's Rule 20.4(a), and . . . original habeas jurisdiction," In re Davis, 557 U.S. 952,953 (2009) (emphasis added), to answer the questions presented.

### I. ALLEN'S "EVIDENCE" SATISFIES THIS COURT'S DEMAND THAT FOR ISSUANCE OF AN ORIGINAL WRIT THAT "EXCEPTIONAL CIRCUMSTANCES BE PRESENT

Allen's circumstances are exceptional, and when coupled with the evidence and claims presented. This writ presents claims unlike "numerous other claims made by . . . petitioners that the Court has had occasion to review." Felker v Turpin, 518 U.S. 651,665 (1996). Because when counsel for Allen made the decision to override Allen's instructions for counsel to maintain and prove Allen's innocence at trial, and then conceded Allen's guilt to the jury. Counsel for Allen not only "usurp[ed] control of an issue within [Allen's] sole prerogative." McCoy v Louisiana, 200 L.ED 2d, at 833. But counsel would also fail to discover, investigate, and present the following evidence that could've helped counsel uphold Allen's instructions and objective for Allen's defense.

1. "THE GOVERNMENT'S" TESTS/LAB REPORTS/RESULTS; Where the Government would test the DNA of the victim, Richard Heflin (Heflin), and the DNA of Allen[1], against DNA found at the crime scene, on evidence linked to the crime and murder of Heflin. (Appendix A).

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1 First, the Court should note that the Government only chose to test Heflin and Allen's DNA against the DNA found. Second, both the Government and the Eighth Circuit have, and continue to "speculate", that because the results of their testing exclude Heflin and exonerate Allen. The DNA "must" be that of Holder's. Third, the Eighth Circuit, with the support of the Government, then claim that if the DNA was to be tested and come back to someone other than Holder. that those results wouldn't matter because "it would not have underminded confidence in the trials outcome." Gov. B.I.O. pg. 14. But such a finding would undermind the confidence in the trial. Because it would place 3 people at the crime scene. When no evidence supports such a theory. Lastly, the Government has opposed any and all requests for DNA testing against Holder and other possible suspects. Proving they have no real confidence in their "assumption."

1A. RESULTS;"The Government's results" would exclude Heflin as a possible source for the DNA found at the crime scene. Then the same testing would be used to exonerate Allen as being a suspect to have left his DNA on evidence, at the crime scene, that is linked to the crime and murder of Heflin. Where this Court has held that law enforcement, the American Bar Association, and Courts have acknowledged DNA testing's "unparalleled ability both to exonerate the wrongly convicted and identify the guilty." DA's Office v Osborne, 557 U.S. 52,55 (2009). Because "a DNA profile is evidence that tends to exculpate 'all but one' of more than 7 billion people in the world today." Williams v Illinois, 567 U.S. 50,58 (2011) (emphasis added).

2. "THE GOVERNMENT'S" TESTS/LAB REPORTS/RESULTS; Where the Government would seize all of the clothing and other items that suspect Norris Holder (Holder) was arrested in at the crime scene, next to a "gasoline soaked getaway van", and where the Government would seize all of the clothing Allen was arrested in at his home.[2] Items that were then taken to the Government's crime lab and specifically tested for traces of gasoline.

2A. RESULTS; "The Government's results" would conclude that "all" of Holder's clothing and other items he was arrested in would come back POSITIVE for traces of gasoline. Yet, the same testing done on "all" of Allen's clothing would come back NEGATIVE. (Appendix B).

3. "GOVERNMENT REPORT: ANONYMOUS WITNESS; Who contacted the FBI, after Holder and Allen's arrests, and who would inform the FBI that he or she had personally saw Holder and someone other than Allen, a few days before the robbery, and overheard them talking about robbing the bank with Holder. (Appendix D).

4. "GOVERNMENT'S REPORT":DISPATCH TAPE; Where several witnesses, who were in close proximity to the crime/crash site; in Forest Park, in real-time, would report to police and the FBI, that they witnessed someone other than Allen,[3] matching the description of the second, fleeing suspect; who had "an injury to his right hand." While at trial, and further presented in the Gov. B.I.O., the Government claims that Allen "emerged from the woods and approached park employee Bobby Harris", and "persuaded Harris and another park employee 'to drive him to the nearest transit station.'" (Gov. B.I.O. pg.5) (emphasis added).

But the dispatchtape, broadcasted in real-time, reveals that at the exact time Bobby Harris and the other park employee; the Government's key witnesses, would claim, at trial, to have given Allen a ride to the nearest Metrolink station. An Officer, in Forest

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2 The Government would present the testimony of Officer Thomas Carroll, (Carroll), to infer that the clothes Allen was arrested in were the clothes that Allen allegedly wore in the crime, robbery, and murder of Heflin. But Carroll would allege that the clothes worn were also clothes worn in the "gasoline soaked getaway van", and Carroll would testify to Allen's jury that upon arresting Allen, he, Carroll noticed that Allen "reeked of smoke." Yet, Carroll, out of all of the arresting officers would be the only one to make such a claim. But what the Government fails to address in Gov. B.I.O., is that Carroll has since been arrested in another matter, for lying under oath and beating a suspect in his custody. (Appendix C).

3 The government has yet to disclose the identity of these witnesses. Clearly favoarable, and excupatory.

Park, with both witnesses next to him, in real-time, would radio in that the second suspect "talked to one of the workers when he, he saw him crawling underneath the fence, and 'he asked which way was the closest Metrolink station'", and "that's the way he [the second suspect] headed." (Dispatch Tape Transcript, pg. 3). (Appendix E)

5. "GOVERNMENT'S" POLICE EVIDENCE TECHNICIAN'S REPORT; Where the police and FBI , in their investigation of the crime scene, would discover another possible source of DNA; found on a "DAMP RAG"[4], in a location linked to the crime, crash site, and the second suspect; because of the location where the "DAMP RAG" was found. Detective Joseph Nickerson, (DSN # 0944), would then send the "DAMP RAG" to their crime lab; specifically asking for DNA testing to be done. (Appendix F) See Williams, 567 U.S., at 58 (Concluding that the use of DNA to exonerate persons who have "been wrongfully accused and convicted is well known.").

6. "GOVERNMENT'S TRANSCRIPT"; INTERVIEW BETWEEN FBI AND ALIBI WITNESS; Where (2) FBI agents, interviewing a security guard; (C.S.); who was at Northwest Plaza Shopping Mall, picking up his paycheck, at the exact time the crime was taking place, and who would inform both agents, that upon him entering the mall, that he saw Allen, talking to several people, and that Allen had in his posession, several bags, from stores that he shopped at. (Appendix G).

7. "Pro se FILING; PROVING OFFICER'S LIED UNDER OATH ABOUT THE ALLEGED CONFESSION; Allen would make a clear showing to the District Court that according to the Government's own files and the record in Allen's case, that officer's intentionally and deliberately lied under oath, at Allen's suppression hearing and at Allen's trial, about what did and what didn't happen while Allen was in custody upon his arrest for his alleged role in the bank robbery at hand. (Appendix H).

8. "CORRESPONDANCE BETWEEN ALLEN AND TRIAL COUNSEL"; Showing that when trial counsel was asked, "had he known before trial", about most of the above-mentioned facts and evidence, "would he have investigated it, and/or used it in Allen's defense". Where counsel would state "Yes". Proving that counsel never attempted to look for, investigate or present evidence in Allen's favor. Because counsel chose to override Allen's objective for Allen's defense. (Appendix I).

9. "INVESTIGATION INTO DETECTIVE JOSEPH NICKERSON; WASHINGTON POST"; Showing that Det. Joseph Nickerson, (Nickerson), and his actions in a prior case; lying under oath, and hiding and withholding evidence to secure a wrongful conviction,[5] (Appendix J), matters.

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4 While Nickerson would send the "DAMP RAG" in for DNA testing. The results have never been turned over to the defense.

5. Nickerson's action's in the mentioned case become relevant to Allen's, being that Allen would inform Nickerson and Carroll that he was at Northwest Plaza at the time the crime took place. Where both Nickerson and Carroll would claim to not have found anyone who would corroborate his alibi. Yet, as shown in the FBI's interview with (C.S.). There were witnesses. And, asking; if they did go to the mall and investigated Allen's alibi, did they ask to see any surveillance videos? And if so, where are they?

The above-mentioned facts and evidence clearly fall into the catagory of their being "exceptional" in their value to Allen's case, the issues presented, and in the consideration of granting issuance of this writ.[6] Being that those facts and evidence, when taking into account Allen's instructions for counsel to maintain and prove Allen's innocence at trial, prove that counsel's decision to override Allen's objective for Allen's defense, "ha[d] the effect of revoking [counsel's] agency", at trial. McCoy. Because when counsel made the sole decision to "steer the ship the other way", In complete disregard to Allen's direct instructions to counsel, Counsel's decision also caused counsel to "ignore 'pertinent avenues for investigation' of which [counsel] 'should have been aware'", and doing so "did not reflect 'reasonable professional judgment.'" Porter v McCollum, 558 U.S. 30,40 (2008) (emphasis added).

In Baldayaque v United States, 338 F.3d 145,154 ( Cir. ), the court held that "when an agent acts in a manner completely adverse to the principal's interest, the principal is not charged with [the] agent's misdeeds." And this Court held "[t]hat is particually so 'if the litigent's reasonable efforts to terminate the attorney's representation has been thwarted by forces wholly beyond the petitioner's control." Holland v Florida, 560 U.S. 631, ( ) (emphasis added). But in this case, dispite Allen's many attempts to terminate and/or substitute counsel before trial. Allen is charged with counsel's misdeeds; counsel conceding Allen's guilt. Where as a result, "the substantial risk of putting an innocent man to death . . . is 'sufficiently exceptional' to warrant utilization of this Court's Rule 20.4(a), and . . . original habeas jurisdiction.'" In re Davis, 557 U.S., at 953 (emphasis added).

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6 In the Gov. B.I.O., pg(s), 14,15,16, and 27, the Government states that their DNA results, their gasoline results, their officer's and agents interviews with witnesses, and other supportive evidence, from their files, and presented in this petition, doesn't qualify as "exceptional" under Allen's circumstances.

In In re Davis, this Court found that affidavits; from witnesses who would recant their eye-witness testimony, and/or statements about Davis' involvement in the crime, was "sufficiently exceptional". Allen's evidence goes well beyond the affidavits that prompted this Court to utilize S. Ct. R. 20.4(a), and . . . original habeas jurisdiction. Id. at 953. Then, alongside the above-mentioned facts and evidence, Allen presents circumstances, when viewed in their entirety , show; Allen sought to remove counsel from his case because counsel planned to override Allen's objective at trial and concede Allen's guilt to the jury; The court, aware of Allen's wish to substitute counsel, wouldn't hold a hearing; the court would deny Allen's motions and pave the way for counsel to concede Allen's guilt; counsel would ignore all of the above-mentioned evidence; which could've proved that witnesses and even officer's lied, and prove Allen's innocence; the government has and continues to withhold favorable evidence; counsel would inform the trial court, after sacrificing Allen's guilt for Allen's life, that the court "erred" when it didn't substitute counsel from Allen's case, before trial, as Allen requested; the court wouldn't hold a hearing on counsel's concession; and, lastly, Allen is currently on Federal Death Row, when both the Government and the Eighth Circuit concede that Allen's indictment suffered a "Fifth Amendment defect", and Allen's indictment "wasn't sufficient to charge a capital offense."

The Government tries to misdirect Allen's evidence as a seperate claim, But they are in support for the issues raised and to establish "exceptional circumstances."

## I. ALLEN IS ON PAR WITH MCCOY

The Government doesn't argue, this concedes that when Allen was faced with opposition from trial counsel to maintain and prove Allen's innocence at trial, that Allen, (8) months before trial, on (2) seperate occasions, would file (2) seperate motions to the court; asking the court for its help to substitute counsel from his capital case, before trial.

The Government doesn't argue, thus concedes that the court did fail in its duty and obligation, once aware of Allen's request to substitute counsel, to hold a hearing or an inquiry into whether Allen's **Sixth Amendment** right's would be violated by leaving counsel on Allen's case. Where the court would do nothing. See Martel v Clair, 565 U.S. 648 (2012) (Holding that "court's cannot properly resolve substitution motions, 'without probing why a defendant wants a new lawyer.") (emphasis added). See also McCoy, 138 S.Ct., at _____, (Concluding that "if counsel is appointed, and unreasonably insists on admitting guilt over the defendant's objection, a capable trial judge 'will almost ceratinly grant a timely request to appoint substitute counsel.' And if such a request is denied, the ruling may be vulnerable on appeal.'") (Alito, J., dissenting, with Thomas, J., and Gorsuch, J., concurring.)

The Government doesn't argue, thus concedes that when Allen sought the court's help to substitute counsel, and the court denied the request without a hearing, an inquiry, nor any investigation into the motions. That like McCoy's court verbally telling counsel "you are the attorney . . . you have to make the trial decision of what you're going to proceed with." McCoy. The court's denial of Allen's motions had the same effect. because in both situations, it allowed counsel(s) to "usurp control of an issue within" both Allen and McCoy's "perogative." McCoy.

The only point, within this particular issue, that the Government argues, unsuccessfully, is their claim that counsel for Allen, in closing, at the trial's guilt/innocence phase, didn't concede Allen's guilt. But the Government's analysis of what counsel said, and the Government's analysis of counsel's intent, is completely misleading and incorrect.

As shown here, counsel would concede Allen's guilt to the jury when stating;

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

It's clear in its context that by counsel "first" telling the jury that "[e]ven 'discounting everything else in the case'", (emphasis added), that counsel was specifically asking the jury to disregard "eveything else in the case", and to just focus their attention on what counsel planned to say next. Which would be, "if you take Allen's statement(s), he tells the police , "I shot, but I missed.""

"Take" and "everything else" in counsel's statement to the jury being the key words in establishing counsel's intent, and curcial in the analysis. Not "if", as the Government clearly misapplies and misrepresents.

First, if the jury follows counsel's first instructions, and they're (the jury) "even discounting 'everything else' in the case". And second, counsel then tells the jury "if you "take" Allen's statement(s), he tells the police, "I shot, but I missed ". Then, there's nothing after "discounting 'everything else' in the case" for the jury to consider, except that Allen's alleged statement(s) to **"THE POLICE"**, that Allen **"SHOT"**, **"BUT MISSED"**, were true and conceded Allen's participation and guilt in the crime. Where "the defendant's own confession [is] probably 'the most probative and damaging evidence that can be admitted against him.'" Cf. Parker v Randolph, 442 U.S. 62,72 (1979) (plurality opinion). (emphasis added). 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.

Lastly, this Court should look at counsel's closing argument's in the penalty phase of Allen's trial. Which the Government omits from Gov. B.I.O., and from their analysis. But it is in counsel's closing argument's in the penalty phase of Allen's trial that clarifies, not only counsel's intent and proves counsel did actually concede Allen's guilt in the guilt/innocence phase of Allen's trial. It too will debunk the government's claim to this Court, that counsel conceding Allen's guilt was merely counsel trying to "defuse the evidence of [Allen's alleged] confession" that counsel would use against Allen. (quoting Gov. B.I.O., pg 20).

As shown here, counsel would clarify counsel's statements to the jury in the guilt/innocence phase, where counsel would tell the jury;

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

Counsel not only doubles-down on attributing the alleged state to Allen, as counsel did in the guilt/innocence phase. Counsel also doubles-down on conceding Allen's guilt to the jury and confirming that it was counsel's intent in the guilt/innocence phase. The latter made apparent when counsel urged the jury to **"REMEMBER"** counsel's concession in guilt/innocence phase of Allen's trial, and then counsel reiterating that **"he** [Allen] **'tells you'** [the jury], **he** [Allen] **'tells the police', "I think I missed with every shot that I fired.""** And counsel's actions; conceding Allen's guilt in the guilt innocence/phase, and then asking the jury to **"REMEMBER"** that concession, confirms counsel conceded Allen's guilt and it had the effect of counsel trying "his case against his client", Allen. Andus v California, 386 U.S. 738 (1967).

With all the facts to support and prove counsel conceded Allen's guilt. The full impact of conceding of Allen's guilt helped the Government to confirm that, for Allen

to have "shot", "but missed". Allen would have had to plot the robbery with Holder months beforehand. For Allen to have "shot", "but missed". Allen would have had to ride with Holder to the bank in the "gasoline soaked getaway van". For Allen to have "shot", "but missed". Allen would have had to posess one of the weapons used in the robbery. And, for Allen to have "shot", "but missed". As counsel told the jury after counsel told the jury to **"REMEMBER"** what counsel conceded to the jury in the guilt innocence phase. Allen would have had to enter the bank with Holder, intend to rob the bank with Holder, discharge one of the weapons used in the crime, aid and assist Holder in robbing the bank, and take part in the death of Heflin. 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) (emphasis added).

But what makes this situation and the circumstances of Allen's McCoy violation "extraordinary" is that the Government doesn't argue, mention, and concedes that trial counsel was right when counsel made his concession to the trial court, stating, "[t]he 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).

Counsel conceded Allen's guilt when Allen gave counsel instructions for counsel to maintain and prove his innocence at trial. And once Allen "[p]resented [counsel] with express statements of [Allen's] will to maintain innocence . . . 'counsel may not steer the ship the other way.'" McCoy, at 1509. Allen deserves a new trial.

A. MCCOY IS A "WATERSHED RULE" AND THE GOVERNMENT'S CONTENT ION THAT "EVEN ASSUMING MCCOY IS RETROACTIVE ON COLLATERAL REVIEW" CAN AND SHOULD IMPLY THAT IT'S DEBATABLE

In the Government's B.I.O., the Government "suggests" to this Court that, "[i]n any event, 'even assuming that McCoy applies retroactively on collateral review' and even assuming that [Allen] clearly instructed defense counsel not to admit his guilt., [Allen's] McCoy based claim lacks merit." (Gov. B.I.O. pg 19).

because the Government "suggests", as the Court should, that "even assuming McCoy applies retroactively on collateral review. . . " It seems fair to "assume" just the same that the Government, even in the slightest, feels that it is. Or that it should be. So, let's assume so moving forward.

If the Government is correct about McCoy's retroactivity to cases on collateral review; Allen wins on that point in their (3) prongs. If the Government is correct that Allen "clearly" instructed counsel not to admit guilt; Allen wins on that prong. So, the Government's only

prong left that Allen must overcome and the Government hinges their argument on, is that Allen's McCoy-based claim has no merit. But, in Allen's previous filing, and furthered in this reply, Allen proves that his McCoy claim has merit and that counsel conceded his guilt after instructing counsel to maintain and prove his innocence at trial. Leaving nothing in the way of this Court granting this petition and granting the relief sought.

But to further support this Court finding McCoy retroactive to cases on collateral review, Allen will highlight to this Court, within McCoy's text, why this is a "watershed rule and why it must be applied to cases on collateral review.

When this Court held in McCoy that a McCoy violation "[h]as the 'effect of revoking [counsel's] agency,'" McCoy, (quoting Scalia, J., concurring in judgment in Gonzalez v United States, 553 U.S. 242, 254 (2008)) (emphasis added), because when counsel is ... "[p]resented with the express statements of the client's will to maintain innocence", and counsel does "steer the ship the other way." McCoy. "[C]ounsel'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. (quoting U.S. Const. amend. VI and Gideon v Wainwright, 371 U.S. 355 (1963); 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.'" (Relying on Alabama v Shelton, 535 U.S. 654); see also Atley v Ault , 191 F.3d 865,874 (8th Cir. 1999) ("The Brecht Court, ' . 'drawing no distention 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.

## III. THE GOVERNMENT AND THE EIGHTH CIRCUIT CONCEDE ALLEN'S INDICTMENT SUFFERED A FIFTH AMENDMENT DEFECT WITH THE COURT ERRONEOUSLY FINDING THE DEFECT TO BE HARMLESS

The Government and the Eighth Circuit have and still continue to concede that Allen's "indictment 'cannot be reasonbly 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) (emphasis added), and that "'it was clear [Allen's] indictment suffered a Fifth Amendment defect' [and there was a 'deprivation of [Allen's] Fifth Amendment right.'" United States v Allen, 406 F.3d 940, ____ (8th Cir. 2004)(emphasis added). Because "[t]he prosecutor 'did not ask the grand jury to charge the [grave risk of death] statutory aggravating factor.'"

357 F.3d at 762 (Hanson, J., dissenting) (emphasis added).

Dispite acknowledging the Constitutional violations, defects, deprivation of Allen's Fifth Amendment rights, and Allen's indictment was "constitutionally deficient" to allow Allen's proceedings and punishment to be capital in nature. The Eighth Circuit would hold, in contrary to, and in complete contradiction of the Constitution, this Court's precedent(s), and would reason that "if the grand jury had been asked to charge the grave-risk-of-death-to-others statutory aggravating factor", for imposition of capital proceedings and a possible capital punishment", "it would have done so." Allen, 406 at 948. Thus, holding the violation and deprivation "harmless."

In Resendez-Ponce, 549 U.S. 102, 117 (2007), Justice Scalia, in the dissent, would inform this Court that it "will undoubtedly have to speak to the point"; answer the question that was presented in Allen v United States,[7] 536 U.S. 953 (2002), "on another day." See Gamble v United States, 139 S.Ct. 1960,1983-84 (2019) (Holding that "[i]f . . . any solemnly adjudged case can be shown to be founded in error, it is 'no doubt "the right" and "the duty" of the judges who have a similar case before them, to correct the error.'") (Thomas, J., concurring in judgment) (quoting 1J.Kent, Commentaries on American Law 443 (1826)) (emphasis added).

A. ALLEN'S INDICTMENT DEFECT WAS A STRUCTURAL ERROR PRUSUANT STIRONE v UNITED STATES AND THE ERROR AFFECTED THE FRAMEWORK WITHIN WHICH ALLEN'S TRIAL PROCEEDED

Allen pricipally relies on this Court's decision in Stirone v United States, 361 U.S. 212,215-16 (1960), to support the conclusion that the Fifth Amendment Defect in his indictment, and the deprivation of his Fifth Amendment rights were a "structural error" that "affected the framework within which the trial proceed[ed]," Arizona v Fulminante, 499 U.S. 279,309-10 (1991), When, the trial court allowed the Government to introduce at trial, the omitted from the indictment, "grave risk of death statutory aggravating factor"; which "operate[s] as 'the functional equivalent of an element of a greater offense'", Ring v Arizona, 536 U.S. 584,609 (2000), and allowed a conviction for a criminal plan broader than, but not included within the crime and plan set forth in the indictment. See United States v Farr, 536 F.3d 1174,1179-80 (10th Cir. 2008) Where the court held that "[i]t is 'axiomatic in our legal system' that a court cannot permit a defendant to be tried on charges that are not made in the indictment against him.") (Gorsuch, J., quoting Stirone, at 217) (emphasis added).

In Stirone, the offense proved at trial was not fully contained in the indictment and trial evidence "amended" the indictment by broadening the possible basis for conviction from that which appeared in the indictment. Just as the evidence the Government introduced

at trial to support the "grave risk of death" statutory aggravating factor, broadened the possible basis for Allen's conviction from that which appeared in the indictment.

Counsel for Allen would make a timely objection to the Government's pursuit of, not only the "Government's Intent To Seek The Death Penalty", But also to the Government's "stealth" maneuver to add additional allegations, purported facts, elements, evidence, and charges in the Notice Of Intent; hidden vaguely within the "grave risk of death" statutory aggravating factor that was not in the indictment submitted to Allen's grand jury, in Allen's indictment. (Case No. 4:97-Cr-00141 ERW, doc 172).

Though put on notice that Allen's indictment, going foward, "suffer[ed] a fifth Amendment defect", Allen, 406 F.3d at 943, and given ample time and the opportunity to seek a superseding indictment. Which the Government refused to do, and instead chose to challenge the objection/motion. Doing so successfully. Thus, allowing Allen's case to proceed to trial with an indictment that was without "at least one" statutory aggravating factor, nor a single "requisite mens rea". Both, without which, precluded imposition of capital proceedings and the possibility of a capital punishment. See United States v Pennington, 2003 U.S. Dist. LEXIS 24478, No. 3:01-cr-35-R, slip op. at 3 (W.D. Ky. (6th Cir) Feb 21, 2003) (granting defendant's motion to preclude imposition of the death penalty where the indictment did not allege death-qualifying statutory aggravating factor or requisite mens rea, and the Government did not seek a superseding indictment . . . Not withstanding the acknowledged mandate from the Attorney General to seek a superseding indictment in all pending federal death penalty cases so as to include the requisite intent and statutory aggravators."); United States v Regan, 221 F. Supp. 2d 672, 675 (E.D. Va 2002) (noting that in light of Ring v Arizona, the government filed a second superseding indictment "re-alleging" espionage charges and including the statutory aggravating factors "previously set forth only in the notice of intent to seek the death panalty.") (emphasis added).

The Government's charges, allegations, purported facts, elements and evidence at trial went beyond the indictment's reach when the Government would also present an earlier and later operative timeline, for a criminal plan, broader than, but not fully included within the plan set forth in the indictment, by introducing it under "grave risk of death.";

1. First Degree Tampering; Where the Government would introduce (2) stolen minivan's into evidence; stolen the day before the robbery; where the Government facts and evidence to show that one of the vans was "soaked throughout in gasoline" before the robbery, and that the other was later discovered on a Forestry area; Forest Park, and said to be the second getaway vehicle.

2. Arson; Which the Government would introduce as evidence, as being intentionally done, when the getaway van that was "soaked in gasoline" was set ablaze by one of the suspects to destroy evidence; according ot the Government's forensic expert.

3. Escape; Which the Government would allege to have taken place; through the testimony of two park workers.

4. Posession Of A 12 Guage Shotgun; Which was intro duced at trial and said to have been left inside the getaway van inside Forest park. Thus, increasing the firearm count from (2) firarms; used in the robbery, to (3). But only the firearms used in the robbery were mentioned in the indictment.

5. Posession of Hundreds Of Rounds of Ammunition; Which were alleged to have been left inside the getaway van, which was "soaked in gasoline", and set ablaze, and stated to be "exploding ammunition" that was used to cause a "grave risk of death to others."

When reading the indictment's text, it's impossible to take anything from its text to suggest that the Government, at Allen's trial, would present the above-mentioned purported facts, charges, alligations, elements, or evidence in support of them. A fact that even the Government would imply, when stating "that the crime is 'greater in degree' than that 'described in the definition.'" (4;97-cr-00141 ERW doc. 503 p. 501 (March 9, 1998)) (emphasis added). A greater than that described in the difinition; purported facts, charges, alligations, elements, and evidence that should've been reflected in the indictment's text. Especially when the most basic of due process' customery protections is the demand offacir notice. See Connally v General Const. Co., 269 U.S. 385, 391 (1926); see also Note, textulalism as fair Notice, 123 Harv. L. Rev. 543 (2009) ("From the inception of Western culture, fair notice has been reconized 'as an essential element of the rule of law.") Because criminal indictments at common law had to provide "precise and 'sufficient certainty'" about the allegations and charges invloved. 4 W Blackstone, Commentaries on the Laws of Englad, 301 (1769) (emphasis added)

If the Government wasn't satisfied with the parameters within which they limited the indictment; purported facts, charges, allegations, elements, and evidence. Which the "grave risk of death" statutory aggravating factor suggests they weren't. They were under no obligation "to sign the return." Which they did upon the Grand Jury authorizing "what they sought". See Uniteed States v batchelder, 442 U.S. 114, 124 (1979) ("Whether to prosecute and what charge to file or bring before a grand jury 'are decisions that generally rest in the prosecutor's discretions.") And once the prosecutor; the indictment's draftsman decided to sign the return. "[I't̀s charges may not be braoadened through amendment except by the grand jury itself." Stirone, 361 U.S. at 215-216.

Lastly. The record in this case shows that the unindicted; "grave risk of death" statutory aggravating factor, came with it additional purported facts, allegations, elements, charges, and evidence; legally relevant and "legally essential to the punishment to be inflicted", United States v Reese, 92 U.S. 214,232-33 (1875) (Clifford, J., dissenting); "opera[ting] as the 'functional equivelant of an element of a greater offense'", Ring, 536 U.S. at 609,

and as such, "must appear in the indictment." Jones v United States, 526 U.S. 227,243(1999).

And because the "grave risk of death" statutory aggravating factor(s) were introduced to Allen's jury as evidence and presented in the jury instructions, See Allen, 406 F.3d at 943-44 ("The petit jury found . . . that Allen in the commission of the offense, 'or in escaping apprehension' . . . 'knowingly created a "grave risk of death"'") (emphasis added); Id. at 947 (One of the two statutory aggravating factors that the petit jury found in imposing the death sentence was that Allen, in the commission of the offense, or in escaping apprehension . . . 'knowingly greated a grave risk of death'") (emphasis added); Id. at 948 (Concluding that "a grave risk of death was created when, 'in fleeing the scene of the crime,' . . . 'crashed a "flaming gasoline-saturated van" which "contained exploding ammunition" into St. Louis' largest park on St. Patrick's Day.'") (emphasis added); see also Allen v United States, 2011 U.S. Dist. LEXIS 49851 (8th Cir. May 10, 2011) ("The Government 'relied on the proof offered in "the guilt phase" to "prove" the statutory aggravating factors; "knowingly created a grave risk of death."'") (emphasis added), the Government constructively amended Allen's indictment. Thus, proving the Fifth Amendment defect wasn't harmless.

Like in Stirone, this Court too should find and hold that "because of the [Eighth Circuit's] admission of the evidence and under its charge this "might have been" the basis upon which the trial jury convicted [Allen]. If so, [Allen] was convicted on a charge the grand jury never made against him. This is a fatal error." Id. at 218-19 (emphasis added).

Allen does not concede that the cases cited by the Government have any bearing on this case, by his not addressing them. As show, Allen relies, correctly on Stirone, and all of the caselaw presented in the petition and in this reply.

This Court should grant this writ. Allen deserves a new trial.

## IV. REPLY TO THE GOVERNMENT'S STATEMENT OF JURISDICTION

Allen filed this original writ, invoking this Court's jurisdiction pursuant to 28 U.S.C. 1651(a), and S.Ct. R. 20.4(a), and would do so "pro se".

The Government, in Gov. B.I.O., misrepresents the record and the facts, as it pertains to Allen not willing to use, and/or him bypassing "the Court of Appeals" to seek leave "to file a second or successive motion under 28 U.S.C. 2255[(h)] to assert his McCoy claim." If anything, the record will show that Allen has been diligent with following the proper avenues and rules of the Court in regards to the Court's protocol. But because Allen has been proceeding "pro se", because as Allen stated in the petition, his counsel's of record have and will at times fail to present facts and evience and/or issues on the merits. And to ensure that "the defendant" isn't blamed for waiving an issue,or didn't do something. Allen has tried to show the Court's when and/or if his attorneys get it wrong. And the Eighth

has "refused" to accept "any future **pro se filings.**" Which have not been limited to Allen's supplement filing to his Section 2255 motion.

As the Court can note, and the record can reflect, Allen would file another "pro se" motion to the Court in a motion to recuse. (E,D, MO. Case: 4:07-cv-00027-ERW Doc-377). The motion came after the Court told the Governemnt that a response "wa[s] not required." Which was in response to Allen asking the Court to compel the Government to turn over "recordings" from witnesses to the crime. Which the Government admitted to knowing about. But has yet to be turned over to the defense as of yet. And 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 Clerk of the Court would reject/strike the motion from the record. Which was filed "after" the filing the Government relies on; 4:07-cv-27 D.Ct. Doc 372.

Most notably, the Government doesn't mention and omits from this Court, that Allen did seek leave to make an application to the district court of the district in which [Allen] is held." quoting S.Ct. R. 20.4(a). But the Court would reject/strike the motion and send it to counsel; who has refused to aid Allen (see petition pg., 1,4), and why Allen has been forced to proceed pro se.

Allen asks this Court to rely on his Statement Of Jurisdiction in his petition pg.8, this Jurisdictional Statement, and the record to show that Allen has tried to be diligent to obey the rules in every Court.

Allen satisfies this Court's Rule 20.4(a), with the "exceptional evidence" and the "exceptional circumstances" to support this Court granting this writ and entertaining the questions presented.

## CONCLUSION

Allen respectfully pleas with this Court to grant this writ, permit further briefing, and/or arguements on the issues presented. Or, the Court can find that Allen's petition presents enough facts and evidence to grant the relief sought; a new trial.

Respectfully Submitted,

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Additional material from this filing is available in the Clerk's Office.