No. 18-9554

IN THE SUPREME COURT OF THE UNITED STATES

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

ON AN ORIGINAL WRIT OF HABEAS CORPUS

PETITION FOR REHEARING; WHERE COURT HAS VACATED THE JUDGMENTS AND REMANDED CASES FOR THE SAME ISSUE AND CIRCUMSTANCES THAT WERE PRESENTED IN PETITION IN LIGHT OF McCoy v Louisiana, 138 S. Ct. 1500 (2018)

*** CAPITAL CASE ***

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PETITION FOR REHEARING)

Pursuant Sup. Ct. R. 44.2, petitioner Billie Jerome Allen (Allen), respectfully petitions this Court for an order (1) granting rehearing, (2) vacating the Court's MAY 18th, 2020 order denying the original writ of habeas corpus, and (3) redisposing of this case by granting the petition for an original writ of habeas corpus, to consider Allen's case with merits briefing and oral arguments on this issue presented in this petition for rehearing.

REASONS FOR GRANTING REHEARING

A. COURT VACATING JUDGMENTS AND REMANDING CASES IN LIGHT OF McCoy V Louisiana, 138 S.Ct. 1500

Allen submits that, to date, this Court has vacated the judgments and remanded two cases for further consideration in light of this Court's holding in McCoy v Louisiana, 138 S.Ct. 1500 (2018) (Judgment vacated). See Hashimi v United States, 139 S.Ct. 377 (2018) (judgment vacated and case remanded in light of McCoy); see also Clark v Louisiana, 138 S.Ct. 2671 (2018) (judgment vacated and case remanded in light of McCoy).

Vacating the judgments and remanding both Hashimi and Clark, in similar cases raising the same McCoy violation; where counsel would override the defendant's instructions and objective to maintain and prove the defendant's innocence at trial, by conceding the defendant's guilt to the jury, constitutes "intervening circumstances of a substantial or controling effect . . . ", sufficient to warrant rehearing of an order denying Allen's original writ.(quoting S. Ct. R. 44.2). Where vacating the judgments and remanding those cases indicate that the Court intended to vacate any judgment and remand for further consideration in light of McCoy, when, and only when the issue and circumstances are similar to those found by this Court in McCoy. See Teague v Lane, 489 U.S. 288,300 (1989) (Court held that "evenhanded justice 'requires retroactive application "to all" similary situated defendants.[1]'") (emphasis added); 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.'" (emphasis added) (quoting Brecht v Abranhamson, 507 U.S. 619, 629-30 (1993)). (emphasis added). Warranting the same relief for Allen.

B. ALLEN SHOWED HOW HIS ISSUE AND CIRCUMSTANCES ARE ON PAR WITH McCoy, Hashimi, AND Clark

In Allen's petition, (pet.), Allen would show how, when confronted with trial counsel's

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1 To meet the criteria for "similary situated defendants", Teague, 489 U.S. at 300, Allen offers that his circumstances are on par with McCoy, stay within the parameters of those considered by this Court in McCoy, and led to this Court's analysis and holding in McCoy. Equally so when considering why this Court vacated the judgments and remanded both Hashimi and Clark. A fact that most litigants won't be able to satisfy.

opposition to maintain and prove Allen's innocence at trial, Allen, on numerous occasions, filed motions (E.D. Mo. Case# 4:97-cr-00141ERW-2 Doc. No. 95 & 97) to substitute counsel (8) months before trial. (Pet. pg. 2, 12-14, 21-22) Allen would show how his court would deny the motions without a hearing, an inquiry, nor the slightest investigation by the court into whether counsel should've been substituted upon Allen's request. See McCoy, 138 S.Ct. at ___, ("[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). Allen would show how the denial of his motions to substitute counsel would allow counsel to "usurp control" of Allen's instructions and objective for counsel to maintain and prove Allen's innocence at trial, by allowing counsel to concede Allen's guilt to the jury. (Pet. pg 3, 22-24) Allen would also show how trial counsel would inform the trial court that it "erred, clearly erred, or abused its discretion in denying [Allen's] motion[s] for appointment of different counsel." (filed by counsel to the trial court on May 18, 1998). (Pet. pg. 3, 16). And Allen would show where the court would deny counsel's motion without a hearing, an inquiry, nor the slightest investigation by the court into why it was that counsel would concede to the court that counsel should've been removed, at Allen's request. Thus, proving Allen's issue and circumstances are on par with McCoy, Hashimi, and Clark, and why this Court should grant rehearing.

C. ALLEN SHOWED THAT HIS MCCOY VIOLATION REQUIRES RETROACTIVE APPLICATION ALONG WITH HASHIMI AND CLARK

The only exception between Allen's case and those of McCoy, Hashimi, and Clark, is that Allen's McCoy Violation took place over 23 years ago. Where dispite this exception, courts recognize that this 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.'" Atley, 191 F.3d, at 874 (emphasis added) (quoting Brecht, 507 U.S., at 629-30) (emphasis added). Which would demand retroactive application to Allen, as was given to Hashimi and Clark. Where the Government, in their Brief In Opposition[2] (B.I.O.), would ask this Court to assume McCoy applied retroactive to Allen, by stating that "even assuming McCoy applies retroactively on collateral review", (B.I.O. pg. 19), as their defense to Allen's contention about McCoy's retroactivety to Allen's case on collateral review. Thus, giving this Court another reason to grant rehearing.

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2 Instead of challenging whether McCoy is retroactive, whether Allen's court "erred" when it denied Allen's motion(s) and counsel's motion that counsel should've been removed, nor challenge whether Allen directed counsel to maintain and prove Allen's innocence at trial. The Government would only argue, in relation to this issue in the petition, that Allen's counsel didn't concede Allen's guilt. A fact that is clearly disputed in Allen's petition and reply.

D. LOWER COURT'S SHIFTING THE BURDEN TO THIS COURT TO ANSWER WHETHER MCCOY IS RETROACTIVE

By leaving the question open as to whether or not McCoy is retroactive to cases on collateral review, all of the lower federal courts; District Court and Court Of Appeals, have either refused to answer the question, state that this Court didn't find McCoy retroactive, or they have granted this Court the authority and jurisdiction to put the issue to rest. See In re Wheeler, 2019 U.S. App. LEXIS 30690 (6th Cir. 2019) (Holding that "McCoy itself 'is silent' on the issue [of McCoy's retroactivety and a court] may only apply retroactively to cases on collateral review [McCoy] when the Supreme Court has declared that it does.) (emphasis added); In re Hudson, 2019 U.S. App. LEXIS 30690 (11th Cir. 2019) (Concluding that the Supreme Court "has not 'had the opportunity to declare McCoy retroactive on collateral review' because McCoy was decided in the context of a direct appeal.") (emphasis added); In re Banks, 2019 U.S. App. LEXIS 26511 (11th Cir. 2019) (Concluding that the "Supreme Court has not made its [McCoy] rule retroactive to cases on collateral review."); Ponce v Eldridge, 2019 U.S. Dist. LEXIS 103571 (Central Dist. of Cal. June 20, 2019) (Court stating "it is unaware of, any binding authority suggesting that the Supreme Court made McCoy retroactively applicable to cases on collateral review."); In re Young, 2018 U.S. App. LEXIS 26599 (6th Cir. 2018) (Concluding that there is nothing pointing "to any Supreme Court decision declaring that McCoy applies retroactively to cases on collateral review." See In re Conzelmann, 872 F.3d 375,377 (6th Cir. 2017) (noting that a new rule of constitutional law is not made retroactively applicable to cases on collateral review unless the Supreme Court holds it to be.)"); see also In re Nunnally, 2019 U.S. App. LEXIS 2708 (11th Cir. 2019) ("Specifically, the Supreme Court in McCoy 'did not say whether' [or not] its rule would apply on collateral review and McCoy was decided on a direct appeal from a motion for a new trial, not from a collateral attack.") (emphasis added). Ensuring that the lower court, and this Court will be burdened to answer the question of McCoy's retroactive application to cases on collateral review. Thus, giving this Court another reason to grant rehearing.

Because Allen's issue and Allen's circumstances are both on par with McCoy, Hashimi, and those of Clark; where counsel would override their instructions and objective for counsel to maintain and prove their innocence at trial, by conceding their guilt to the jury, Allen's case is not only the perfect vehicle to answer whether or not McCoy applies retroactively on collateral review. Allen's case will also serve the purpose of unburdening this Court and the lower courts, by answering a question, that is sure to keep getting litigated, until the question is answered. Especially when the question is being shifted to this Court for an answer.

Allen, therefore, pleads for this Court to grant rehearing of his petition on this issue, answer the question of McCoy's retroactivity to cases on collateral review, and grant the

petition. Because Allen raised the same exact issue and presented the exact circumstances as those of McCoy, Hashimi, and Clark. Where this Court has held that "a new trial is the 'required corrective'" when a McCoy violation takes place. McCoy, 138 S.Ct., at _____.

E. "EXTRAORDINARY CIRCUMSTANCES" TO SUPPORT GRANTING REHEARING

Allen asks this Court to consider that when trial counsel "usurp[ed] control of an issue within [Allen's] sole prerogative", McCoy, 138 S.Ct. at_____, by conceding Allen's guilt, that counsel didn't look for, didin't investigate, and didn't present:1) Negative DNA results that would've exonerated Allen (Appendix A);2) Negative gasoline results that would've exonerated Allen (Appendix B);3) Transcript, of a security guard, who would tell two FBI agents, that at the time the crime was taking place, he saw Allen at a shopping mall, with bags from purchaces that he had made while at the mall (Appendix C);4) Report, where a witness would tell the FBI that he saw and overheard someone other than Allen, talking to suspect Norris Holder, plotting the robbery (Appendix D);5) Dispatchtape, where several witnesses would state that they saw someone other than Allen, fleeing the crime scene, with an injury to his right hand. (Appendix E). Where counsel's decision to override Allen's instructions and objective for counsel to maintain and prove Allen's innocence, by conceding Allen's guilt to the jury, would cause counsel to "ignore 'pertinent avenues for investigation' of which [counsel] 'should have been aware'", and "did not reflect reasonable professional judgment.'" Porter v McCollum, 558 U.S. 30 (2008) (emphasis added). And 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. 952 (2009) (emphasis added).

CONCLUSION

For the foregoing reasons, Allen pleads with this Court to (1) grant rehearing of the order denying his original writ in this case, (2) vacate the Court's May 18th, 2020, order denying his original writ, and (3) redispose of this case by granting the original writ to consider Allen's case with merits briefing and oral arguments to answer whether a new trial is "the required corrective" McCoy, to McCoy violations raised on collateral review.

Respectfully submitted,

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47808

Billie Allen 5/19/20

No. 18-9554

IN THE SUPREME COURT OF THE UNITED STATES

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ON AN ORIGINAL WRIT OF HABEAS CORPUS

CERTIFICATE OF COUNSEL

I, Billie Allen, as counsel (pro se), hereby certify that this petition for rehearing is presented in good faith, not for delay, and is restricted to the grounds specified in S. Ct. R. 44.2.

Billie Jerome Allen 5/19/20

BILLIE JEROME ALLEN