No. 19-6845

IN THE

SUPREME COURT OF THE UNITED STATES

DAVID STEWARD — PETITIONER
(Your Name)

ORIGINAL

vs.

PENNSYLVANIA, et al. — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

THE SUPERIOR COURT OF PENNSYLVANIA, Eastern District
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

DAVID STEWARD
(Your Name)

1100 Pike Street
(Address)

Huntingdon, PA 16654-1112
(City, State, Zip Code)

N/A
(Phone Number)

QUESTION(S) PRESENTED

Whether the newly established constitutional right, announced in McCoy v. Louisiana, 138 S.Ct. 1500(2018), created a substantive decision, that applies retroactively to individuals similarly situated on collateral review?

LIST OF PARTIES

[ ] All parties appear in the caption of the case on the cover page.

[X] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Montgomery County District Attorney's Office
Montgomery County Court House, 4th Floor
Swede and Airy Streets
P.O. Box 311
Norristown, PA 19404-0311

The Attorney General of Pennsylvania
Harrisburg, PA

All parties in this matter have been represented throughout by the District Attorney of Montgomery County, PA Assistant District Attorney Robert Falin, Esquire, of that office has entered his appearance on their behalf.

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OTHER

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[ ] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix D to the petition and is

[X] reported at C.A. No. 18-2534; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the United States district court appears at Appendix F to the petition and is

[X] reported at 2007 U.S.Dist.LEXIS 64599; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[X] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix A to the petition and is

[X] reported at No. 3196 EDA 2018; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

The opinion of the Montgomery County Common Pleas court appears at Appendix B to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

JURISDICTION

[ ] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was _____.

[ ] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[X] For cases from **state courts**:

The date on which the highest state court decided my case was 10/22/2019. A copy of that decision appears at Appendix C.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., Amend. VI

In all criminal prosecutions, the accuses shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district where in the crime shall have been committed... and to have the Assistance of Counsel for his defense.

28 U.S.C. §2254

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(d) An Application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim-

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; ...

28 U.S.C. §2244(b)(2)(A)

This provision covers claims that "rely on a new rule of Constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable".

STATEMENT OF THE CASE

The District Court's August 30, 2007 Opinion, Appendix "F", summarized the underlying facts of this case, as proven by the Commonwealth of Pennsylvania, the verdict winner in the state court. However, amid the late hours of January 1, 1986, the home of Mary and Dr. Michael Groll was broken into by two intruders. During the course of this night burglary in Montgomery County, Pennsylvania, Dr. Michael Groll was shot and killed. Mary Groll, the sole witness, was robbed of her jewelry and money. She eventionally identified Petitioner as one of the assailant after being unable to in an earlier photo array, and placed Petitioner in the clothing recovered at or near the crime scene which was admitted as evidence at trial. On January 15, 1986, Petitioner was in the custody of the Philadelphia, Pennsylvania, police on an unrelated incident and allegdedly confessed to the Groll's homicide, although Petitioner categorically denied ever seeing or signing onto a typewritten confession. Moreover, this confession was admitted into evidence at trial. There were numerous amount of physical evidence collected and sent to the FBI Crime Lab in Washington, D.C., for comparison tests. Two(2) FBI forensic examiners testified for the prosecution, linking blood and ballistic to the recovered bullet and the recovered and determined murder weapon; but no forensic

evidence was ever linked to Petitioner, in fact, the hair analysis excluded Petitioner. However, throughout the proceeding and up until the closing argument of the guilt phase, Petitioner's trial counsel, Authur H. James, challenged the evidence, and followed the directions and instructions of Petitioner to seek an acquittal. More importantly, there was never any discussion of any change in strategy - such as, conceding to guilt or admitting to a lesser degree, or anything. Nevertheless, at a critical moment of this trial, as the guilt phase drew to a close, following co-defendant's Moore's closing, who argued full and complete acquittal for co-defendant Briggman, and before the District Attorney Waters' closing(note:James' closing is the only transcripts missing, 56 minutes), James disregards Petitioner's wishes, overrides Petitioner's independent choice of defense and pleads Petitioner guilty to murder, to enhance his credibility with the jury at sentencing and to help avoid what he thought was an inevitable death sentence; see, Appendix "G", N.T. ppg. 14-15.

Now following a nine day jury trial, with 29 hours of deliberation, over 4 days, in June of 1986, Petitioner ultimately was found guilty of first degree murder, aggravated assault, robbery, burglary, theft by unlawful taking, possession of an instrument of crime, criminal conspiracy, receiving stolen property, reckless endangerment, and carrying firearms without a license; and sentenced by the jury to life imprisonment.

Petitioner's first attempt at an appeal was dismissed by Superior Court for counsel's failure to file Appellant's brief on August 4, 1988; 549 A.2d 1343. Thereafter, appointed counsel, Joseph J. Hylan, assigned to pursue direct appeal in 1988, let case lay dormant until Petitioner filed a pro se PCRA petition in 1996, where Petitioner's direct appeal rights were reinstated, nunc pro tunc, by the Pennsylvania Supreme Court on November 20, 1999; 740 A.2d 1141. A direct appeal was filed, which included, "Was not trial counsel ineffective in essentially pleading Appellant "guilty" to murder in his closing statement to the jury, without ever discussing approach with Appellant nor gaining his consent". This appeal was denied by the PA Superior Court on April 25, 2001, 777 A.2d 819, because there was no transcripts of James' closing argument to review this claim and was forced to deem the issue waived. Petitioner was also denied review from the PA Supreme Court on December 4, 2001; 779 A.2d 2001. Thereafter, a second pro se PCRA petition was filed on May 14, 2002, requesting a hearing on James' ineffectiveness during his closing, submitted a PaR.A.P.1923 statement for the missing transcripts, along with a Discovery motion for all scientific tests, and a motion for DNA testing on the two hair(s) recovered on the evidence; specifically, the jacket and pants. That petition and motions were denied and dismissed by the PCRA court on December 16, 2002. Petitioner appealed the PCRA Court's decision to PA Superior Court, which was denied on October

20, 2003, 142 EDA 2003; relying primary on the PCRA Court's Opinion; Appendix "H". The Pennsylvania Supreme Court declined to review this matter on May 11, 2004, ending the first state-court collateral review process. On July 29, 2004, Petitioner filed a pro se 2254 petition for Writ of Habeas Corpus in the Eastern District. Now although an evidentiary hearing was held on November 4, 2004, under **Steward v. Grace**, 04-CV3587, on James' ineffective summation strategy, Petitioner was denied relief; Appendix "F", 362 F.Supp.2d 611. The Third Circuit Appeals Court, denied relief on November 13, 2008, No. 07-3632, Appendix "E"; and The United States Supreme Court denied review on March 23, 2009, No. 08-8674, respectively. Petitioner filed his third(3) pro se PCRA petition, and a pro se motion for Post Conviction DNA testing under 9543.1. That Third PCRA petition was dismissed on January 19, 2016. Petitioner filed a pro se appeal to the PA Superior Court, that was affirmed November 22, 2016; 469 EDA 2016. And now on June 8, 2018, following the **McCoy's** decision, Petitioner filed his fourth(4) PCRA petition. While pending, Petitioner also filed a 28 U.S.C.§2244(b)(3) motion before the Third Circuit Court of Appeals, that motion was denied on July 30, 2018, "..because the new rule of constitutional law which Steward, (the Petitioner), relies has not yet been made retroactive to cases on collateral review by the United States Supreme Court", Appendix "D". Thereafter, on October 10, 2018, Petitioner's fourth PCRA motion was dismissed with opinion,

Appendix "B". Petitioner appealed this decision to the Pennsylvania Superior Court who stated that, "there appears to be merit in Appellant's(Petitioner's) contentions that the PCRA court erred in concluding there was no support in the record for his claim that counsel conceded Appellant's guilt in the closing argument", Appendix "A", p.4; however, they also stated, that "they have no jurisdiction to address the substantive merit of the petition". Therefore, this court affirmed the lower court's decision on March 27, 2019, Appendix "A". Now On October 22, 2019, The Pennsylvania Supreme Court denied Petitioner's Petition for Allowance of Appeal, Appendix "C".

Accordingly, this appeal is before this Honorable Court.

REASONS FOR GRANTING THE PETITION

The "new" right established in McCoy v. Louisiana is a substantive rule, under Teague, and should be made retroactive to those similarly situated prior to its decision; therefore, Petitioner's conviction now becomes invalid and unconstitutional, thus violating his Sixth Amendment right to a personal defense.

When Petitioner pled not guilty in open court, in his joint trial in 1986, and instructed and expected his trial attorney to maintain his innocence and present his choice of defense to the jury, but later disregards said request, and concedes Petitioner guilty to murder, even 2nd degree, in his closing argument of the guilt phase of his capital trial, and again in the penalty phase, without ever discussing approach with Petitioner, qualifies as "structural error" and now considered unconstitutional? Some courts had thought so then. However, up until the **McCoy's** decision, there had been conflicting opinions and rulings concerning trial counsel's unauthorized concession; most courts had placed it in the category of **Strickland**, where one would have to prove prejudice. Moreover, unlike **Florida v. Nixon** or **McCoy**, these trial attorneys consulted with their clients prior to trial, and gave them the awareness and an opportunity to object to this strategy. However, in

Petitioner's case, there was never that opportunity, or any discussion concerning trial counsel James change of strategy. James' main concern, although afraid, was that he didn't want Petitioner to be his first client on death row, so he relied on his own initiative and devine guildance; and conceded Petitioner guilty to murder in his closing argument(Appendix "G"), unbeknownst to Petitioner. An evidentiary hearing was ordered and held on this issue on November 4, 2005, in the district court, under **Steward v. Grace**(Appendix "F"). Although the Honorable Judge Rufe strongly disapproved of trial counsel James' tactics, and even condemned James' conduct(App. "F", pg.22), because of the various dissimilarities among the various courts then, and considering there was no precedent case on point until the **McCoy** decision that could grant Petitioner relief, all of Petitioner's appeals and his writ of habeas corpus motion were denied. Now that this Court has clarified the divergency among the various courts and established this newly discovered right as "structural error", should this new ruling also be retroactively applicable to cases on collateral review to those few prisoners similarly effected under **Teague**?

Now under **Teague v. Lane**, a "new" constitutional rule of criminal procedure will not be applicable to those cases which have become final before the new rules were announced, 489 U.S., at 310. A case announces a new rule when it breaks new ground, or if the result was not dictated by precedent

existing at the time the defendant's conviction became final. Moreover, **Teague** and its progenies recognizes two categories of decisions that fall outside this general bar on retroactively, they are substantive rules, see, **Montgomery v. Louisiana**, 136 S.Ct.718; and watershed rules, **Saffle v. Parks**, 494 U.S. at 495. Petitioner will focus mainly on the substantive rule, such as in, **Welch v. U.S.**, 136 S.Ct.1257, the first exception, considering it focuses on the issue at hand; although it does embark on the watershed exception as well, because it "reworked our understanding of the bedrock criminal procedure", and it also made Petitioner's trial fundamentally unfair. However, when a new substantive rule alters the range of conduct... and controls the outcome of a case, as with James' tactical closing which could only render a guilty verdict; the Constitution requires state collateral review courts to give retroactive effect to that rule, see **Penry v. Lynaugh**, 492 U.S. at 330. By holding that new substantive rules are indeed retroactive, the **Teague** exception continues a long tradition of recognizing that substantive rules must have retroactive effects regardless of when the defendant's conviction became final; ...."for a conviction under an unconstitutional law is not merely erroneous, but illegal and void, and cannot be a legal cause of imprisonment" see, **Ex parte Siebold**, 100 U.S. 371. Therefore, a court has no authority to leave in place a conviction or sentence that violates a substantive rule, regardless of whether the

conviction or sentence became final before the ruling was announced.

Now considering this Honorable Court has already acknowledged that there were a few, although a rarity, of individuals similarly situated prior to **McCoy** in its decision; they did not rule on its retroactivity issue. Moreover, in **Schriro v. Summerlin**, this Court appears to have merged the first **Teague** exception with the principle that new substantive rules generally apply retroactively. And considering in **Weaver v. Massachusetts**, this Court has ruled that structural error and ineffective assistance of counsel doctrines "are intertwined"; should relief be granted? Therefore today, for the above stated reasons, in the limited circumstances as this, **McCoy v. Louisiana**, should be made retroactively applicable to those similarly effected, and Petitioner should be granted a New Trial where the structural error in his case deprived him also of a fair trial which violated his Sixth Amendment secured autonomy right concerning his defense.

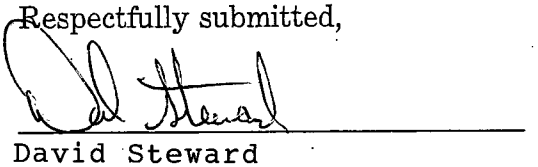
CONCLUSION

WHEREAS, Petitioner respectfully requests this Honorable Court to grant Certiorari to the Pennsylvania Superior Court's decision, and rule **McCoy** retroactive on collateral review, and award Petitioner a New Trial.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



David Steward

Date: November 27, 2019