

19-6993

(TO BE ASSIGNED BY THE CLERK)

ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

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AUGUST LARRY LUNDY  
PETITIONER

V

WARDEN TONEY  
STATE OF ALABAMA et al...  
RESPONDENTS

FILED

DEC 12 2019

OFFICE OF THE CLERK  
SUPREME COURT, U.S.

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PETITION FOR ORIGINAL WRIT OF HABEAS CORPUS  
PURSUANT TO 28 U.S.C. §1651

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Augustus Larry Lundy  
AIS #249202  
28779 Nick Davis Road  
Harvest Alabama 35749

PETITIONER PRO SE

QUESTIONS PRESENTED

QUESTION I

Did the trial court divest itseld of personal jurisdiction of Lundy when it Administered the Law in an improper and unconstitutional manner?

QUESTION II

Was Lundy's conviction in violation of Due Process of Law under the Sixth and Fourteenth Amendment due to the Constructive Denial of counsel, thus entitling him to relief?

LIST OF PARTIES

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:

1. Hon. Judge Tjoflat - Eleventh Circuit Court of Appeals - 56 Forsyth Street - Atlanta Georgia 30303 - Appeal no: 19-13574-A.
2. Hon. Judge William Pryor - Eleventh Circuit Court of Appeals - 56 Forsyth Street - Atlanta Georgia 30303 Appeal No: 19-13574-A.
3. Judge Jordan - Eleventh Circuit Court of Appeals - 56 Forsyth Street - Atlanta Georgia 30303 -Appeal No: 19-13574-A.
4. Chief Justice Tom Parker - Alabama Supreme Court - 300 Dexter Ave.- Montgomery Al. 36130- Case No: CR-18-0360.
5. Judge Mary B. Windom - Alabama Court Criminal Appeals - 300 Dexter Ave. - Montgomery, Al. 36130 - Case No:CR-18-0360.
6. Steven T. Marshall Attorney General - State of Alabama - 501 Washington Ave. - Montgomery Al. 36130
7. Judge Virginia Vinson - Circuit Court Jefferson County - 716 Richard Arrington Blvd. - Birmingham Al. 35203 Case No:CC-05-003627
8. District Attorney Brandon Falls - Circuit Court Jefferson County - 716 Richard Arrington Blvd. - Birmingham Al. 35203

IN THE SUPREME COURT OF THE UNITED STATES  
PETITION FOR ORIGINAL WRIT OF HABEAS CORPUS

Petitioner respectfully prays that the Original Writ of Habeas Corpus issue to review the judgment below.

**OPINIONS BELOW**

The opinion of the United States Court of Appeals for the Eleventh Circuit appears at APPENDIX   A   to the petition.

The opinion from the highest state court to review the merits on appeal appears at APPENDIX   B   to the petition.

The opinion of the Alabama Court of Criminal Appeals appears at APPENDIX   E   to the petition, is unpublished.

The opinion of the Circuit Court of Jefferson County appears at APPENDIX   F   to the petition.

## JURISDICTION

The All Writs Act 28 U.S.C. §1651 extends to habeas corpus proceedings and authorizes the courts to fashion appropriate modes of procedure by analogy to existing rules or otherwise in conformity with judicial usage where the duties require it, this is the inescapable obligation of the courts.

The All Writs Act grants the federal courts the power to issue "all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. §1651(a) - Writs - (a) The Supreme Court and all courts established by Acts of Congress may issue all writs necessary or appropriate. The traditional use of the writ in aid of appellate jurisdiction so that both common law and in federal courts has been to confine an inferior court to a lawful exercise of its proscribed jurisdiction or to compel it to exercise its authority when it is its duty to do so." Roche v Evaporated Milk Assoc. 319 U.S. 21, 87 L.Ed.2d 1185 (1969)

Lundy asserts that under the above cited authority's, he has invoked the exclusive jurisdiction of this Honorable Court to entertain and adjudicate his Petition For Original Writ of Habeas Corpus.

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- Exhibit I - Explanation of Rights and Plea of Guilty Form.
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- Exhibit K - Sentencing Order.



STATEMENT OF THE CASE

1. On May 8, 2005 Lundy shot and killed his wife, Lundy was arrested by law enforcement and transported to the Jefferson County Alabama County Jail.

2. On August 14, 2006 Lundy's trial began with Lundy being represented by counsel Erskin R. Mathis, whereas prior to trial, attorney Mathis had Lundy undergo a mental examination by Dr. Kimberly Ackerson. Prior to trial, Dr. Ackerson informed Lundy's defense counsel that "...based on her interviews with Lundy, he did not suffer from any form of 'serious mental illness' necessary to establish a successful insanity defense.'" EXHIBIT A:EXHIBIT B:EXHIBIT C:EXHIBIT D.

3. During Lundy's trial, defense counsel who's defense strategy was "mental insanity" at the time of the offense. Placed Dr. Ackerson on the stand as a defense witness to testify to the jury that Lundy "did not suffer from any form of serious mental illness at the time of the offense." EXHIBIT E

4. At the conclusion of trial, the trial court informed counsel that he was not going to give any jury instructions on the insanity defense or a lesser included manslaughter charge. Defense counsel objected and stated that if the court will not change its mind, then he would be in a position of entering a plea of guilty as charged. At which point defense counsel submitted an Explanation of Rights Plea of Guilty Form to the Court wherein Lundy pled guilty to the offense of murder.

The trial court then sentenced Lundy to a term of life imprisonment for the offense of murder, on August 16, 2006.

5. Lundy undertook a direct appeal and on December 7, 2007 issued its certificate of judgment affirming the trial court's judgment in an unpublished memorandum.

6. On February 29, 2008 Lundy filed an Ala.R.Crim.P. Rule 32 petition in the trial court and after the state responded the circuit court summarily denied the petition on April 4, 2008.

7. Lundy appealed to the Alabama Court of Criminal Appeals the denial of his Ala.R.Crim.P. Rule 32 petition. The Court of Criminal Appeals affirmed the trial courts judgment in an unpublished memorandum on June 12, 2009.

8. Lundy filed petition for writ of certiorari to the Alabama Supreme Court with the court issuing it's writ denied - no opinion on November 13, 2009.

9. Lundy filed a petition for writ of habeas corpus to the UNITED States District Court Northern District of Alabama with the District Court denying the habeas petition on procedural grounds.

10. In or about August 2017 Lundy filed another Ala.R.Crim.P. Rule 32 petition in the Circuit Court of Jefferson County.

11. On November 7, 2018 the circuit court denied Lundy's Rule 32 petition on the grounds it was a successive petition.

12. In March 2019 Lundy filed his brief on appeal from the Circuit Courts denial of his Rule 32 petition to the Alabama Court of Criminal Appeals.

13. On May 17, 2019 the Alabama Court of Criminal Appeals denied Lundy's appeal in its unpublished memorandum.

14. In May 2019 Lundy filed petition for writ of certiorari to the Alabama Supreme Court, with the court denying writ on August 9, 2019.

15. On November \_\_\_\_\_ 2019 Lundy submitted an Application to file a second or successive habeas corpus petition in the Eleventh Circuit Court of Appeals, submitting the application in compliance with the Eleventh Circuit's rules.

16. On October \_\_\_\_\_ 09 2019 the Eleventh Circuit Court of Appeals denied Lundy' application citing as grounds that Lundy did not submit arguments, cite cases or cite any rules. The application specifically states that when filing the application, that the applicant is not to cite arguments, cite cases or rules.

## STANDARD OF REVIEW

Lundy respectfully seeks that this Honorable Court exercise its' review of his claim under the following premises.

Lundy argues and alleges that the United States Constitution and the rights, privileges, protections and immunities therein, when coupled with the actions of a tribunal in a criminal proceeding, must be in accord with the United States Constitution Amendments which impose an obligatory duty upon the tribunal, in its' Administration of Justice. To safeguard the citizens rights, privileges, immunities and protections.

That the Constitution of the United States is a contract between the Government and the people of the sovereign states. Wherein the Constitution in its promulgation insures to the people that these said same rights in it's promulgation, are to be recognized, protected and guaranteed, and that such is not to be forfeited except upon a finding that the citizen has violated a criminal law. Then and only when that criminal proceeding is conducted before a tribunal with the authority to do so under the laws, and, only upon the proper administration of those same laws in accord with the United States Constitution. The Administration of the Law must be in accord with Due Process of Law, and in a manner that is fundamentally fair.

This contract grants to the citizen Lundy the right to petition the courts for redress when those same rights are violated by a court in a criminal proceeding before it. Wherein that proceeding, Lundy's substantive and fundamental Due Process was violated, when he was by the actions of court officials, deprived, denied his right to a fair trial, which is held to be the law of the land. In this instant case the term contract is the case of the legal relations resulting from the operative acts consisting of a right or rights impersonam and

corresponding duties, accompanied by certain powers, privileges and immunities. The sum of these legal relations is often called "obligation". In this instant case the Contract, i.e., the Constitution of the United States and its principles governing our society, would be a unilateral contract in which no promisor, i.e., the Government, receives a promise as consideration for the promise given. The "promise" in this instant case are the substantial fundamental United States Constitutional rights, privileges, immunities, guarantees and protections promised to Lundy as a citizen. The right to a fair trial is an inherent right that is Lundy's as long as he is a citizen of the United States and one which he cannot be denied, deprived nor divested of.

In its full and more liberal significance, the term contract comprises every description of agreements, obligations or legal ties by which a party binds himself, or becomes bound, expressly or impliedly...to do a certain act. The writing, in this instant case is the United States Constitution, is not the contract, but written evidence of it. The duty imposed by law on the parties to a contract to perform their undertaking constitutes the obligation of the contract. It arises from obligation by reason of public policy. The obligation of the contract is found in the terms in which the contract is expressed.

The purpose of every contract is to bind the parties to performance, and to place the risks of performance upon the promisor, i.e., in this case the judicial branch of the government. The strength of every contract lies in the rights of every promisee (Lundy) to rely on constitutional security against impairment of its obligation...and in the right to resort to the courts for redress of its violation, and a contract without means of enforcement ceases to be.

The Fourteenth Amendment's Due Process Clause incorporates and renders applicable to the States, Bill of Rights protections, "fundamental to or scheme of ordered liberty." McDonald v Chicago 177 L.Ed.2d. If a Bill of Rights protection is incorporated, there is no daylight between the federal and state conduct it prohibits or requires. A Bill of Rights protection is incorporated if it is fundamental to our scheme of ordered liberty or deeply rooted in our nations history or tradition.

The first Right in the Bill of Rights is the right to petition. It was incorporated into the First Amendment in recognition of this most precious and essential right as the most important right a person has in our system of government. The right to petition is therefore a right as of right. The right to a fair trial is held to be an inviolate, sacrosanct right. Whereas when Lundy was on trial, his defense constitutes his petitioning through testimony, evidence, through the representation by counsel to serve as his advocate, to preserve his liberty. And whereas in view of the particulars of this case, when his defense counsel effectively, constructively abandoned his obligatory duty to serve as Lund's advocate. Constructively aiding the State in it's prosecution and conviction of Lundy. That this constitutional injury was compounded by the actions of the trial court. EXHIBIT F

That his efforts to seek relief in the State Appellate courts, and the Federal Circuit Court of Appeals. Were frustrated, inhibited by the improper administration of the laws and the refusal to recognize or address the violations of his United States Constitutional rights, privileges, immunities, protections and guarantees. In a manner that was disparate in treatment and practice, fundamentally unfair, arbitrary and capricious.

This United States Supreme Court has held, the right to petition for redress of grievances is among the most precious of liberties safeguarded by the Bill of Rights. See United States Mineworkers of America District 12 v Illinois State Bar Association 389 U.S. 217 (1967). Inseparable from this guaranteed right entrenched in the First Amendment the right to petition for redress occupies a "preferred place" in our system of representative government, and enjoys a sanctity and sanction not permitting dubious intrusions." Thomas v Collins 323 U.S. 516, 530 (1945). This right is the foundation right to the United States Constitution. This Supreme Court has expressly held that the First Amendment right to petition protects the individuals right to file an action with a "reasonable basis" in a state tribunal. Bill Johnsons Restaurants Inc v NLRB 461 U.S. 731, 742-753 (1983).

In this instant case the act and conduct complained of is such as to constitute a deprivation of rights, privileges and or immunities secured by the Constitution and laws of the United States. ex rel Moore v Koelzer C.A.N.J. 457 F.2d 892.

The All Writs Act 28 U.S.C. §1651 extends to habeas corpus proceedings and authorizes the Court to fashion appropriate modes of procedure by analogy to existing rules or otherwise in conformity with judicial usage. The All Writs Act grants this Court the power to issue all writs necessary or appropriate in aid of its respective jurisdiction and agreeable to the usages and principles of law

"The traditional use of the writ in aid of appellate jurisdiction so that both common law and in federal courts has been to confine an inferior court to a lawful exercise of its proscribed jurisdiction or to compel it to exercise its authority when it is the duty to do so." Roche v Evaporated Milk Assoc. 319 U.S. 21, 87 L.Ed.2d 1185 (1969).

## REASONS FOR GRANTING THE PETITION

In this instant case, the testimony of the defense's own expert witness as opposed to Lundy's testimony constitutes the testimony of competing witnesses. The action of the trial court and Lundy's defense counsel, denied Lundy his right to have the jury weigh the competing testimony in reaching their determination of Lundy's guilt or innocence. That by doing so, these parties invaded the province of the jury. See Perry v New Hampshire 181 L.Ed.2d 694, 565 U.S. 228 (2012); Blakely v Washington 159 L.Ed.2d 403 (2004).

Lundy's case is an atypical case in which Lundy, the defendant, was by the actions of his defense counsel placed in the impossible position of having to defend his own case, and the sole defense that he had, **against the testimony submitted to the jury by his own expert witness.** This already impossible situation was exacerbated by the facts of the record, that his own defense counsel, rendered no assistance in any degree as his advocate. Rather a simple reading of the record as to the testimony and conduct of his own counsel at trial, leave a reasonable and prudent person lost in a sea of the record, looking for a defense counsel who performed as a defense counsel in the common understanding of that concept and principle of law.

To claim that Lundy had a fair trial with a counsel who served as his ardent advocate, if one were to read the record of his case and his efforts in the State appellate process. Would strain the imagination and require one to read into the actions and conduct of the Court officials, the trial judge, Lundy's defense counsel, and the prosecutor, that which was never there. One would have to turn a blind eye to the facts. For the record of this case speaks for itself.



## QUESTION PRESENTED

### I

Did the trial court divest itself of personal jurisdiction of Lundy when it Administered the law in an improper and unconstitutional manner?

Lundy argues and asserts that whereas the right to a fair trial is the fundamental right in the Bill of Rights and incorporated in the First Amendment to the United States Constitution. That it is recognized as the fundamental law of the land.

The Fourteenth Amendment's Due Process Clause incorporates and renders applicable to the States, Bill of Rights protections, "fundamental to our scheme of ordered liberty." McDonald v Chicago 177 L.Ed.2d. If a Bill of Rights protection is incorporated, there is no daylight between the federal and state conduct it prohibits or requires. A Bill of Rights protection is incorporated if its is fundamental to our scheme of ordered liberty or deeply rooted in this nations history and tradition.

Alabama courts have traditionally understood "due process of law" to be with "the law of the land". Opinion of the Justices 624 So.2d 107,161 (Ala.1973)(due process) provision secures for every citizen against arbitrary actions of those in authority, and places him (or her) within the protection of the law of the land." McCollum v Birmingham Post Co. 259 Ala. 65 So.2d 689,695 (1953). The relevance of this comparison lies in the fact that the phrase "law of the land" illustrates more clearly the phrase "due process" the species guaranteed provided in Ala.Const. 1901 §§6 and 13.

This is so because, 'by the law of the land' is most clearly intended the general law... The meaning is that every citizen shall

hold his life, liberty, property and immunities under protection of the general rule which governs our society. Zeigler v South & North Ala. R.R. 58 Ala. 594, 597-598 (1877) "The principle arises to ensure that 'the rights of every individual...stands or falls by the same rule of law that governs every other member of the body politic or "land" under similar circumstances." Burrington v Burrington 206 Ala. 192, 89 So. 512 (1921).

Lundy asserts that in his case, the record substantiates and appropriately shows beyond reasonable dispute that his counsel, with the trial court, engaged in actions were egregious to the degree, that not only was his trial rendered into a farce, a sham, it deprived Lundy of his right to a fair trial. That the criminal court had no jurisdiction and could not enter into his trial of the particular controversy between the State and Lundy, until an action has been commenced and perfected in a lawful and proper manner. It is a universal principle as old as the law that the proceedings in a court without jurisdiction are a nullity and its judgment void. Springer v Sjavender 118 N.C. 33, 23 S.E. 976, 54 Am.St.Rep. 708. There can be no conviction or punishment for crime, except on accusation in the manner prescribed by law.

In Lundy's case the following transpired which Lundy asserts was atypical in the conducting of a trial;

(A) Prior to Lundy's trial his defense counsel Erskine Mathis submitted a motion to the trial court for a mental insanity evaluation to be conducted of Lundy. The trial court approved the defense motion and issued orders for Lundy to have a mental examination. EXHIBIT A: EXHIBIT B. EXHIBIT C

(B) On August 14, 2006 immediately before the jury venire there was a proceeding involving the trial court, the prosecutor Mr. Carr and defense counsel wherein the following exchange occurred:

The Court: "Mr. Mathis has filed on behalf of his client a motion of not guilty by reason of mental disease or defect. There have been some deliberations done of Mr. Lundy and I believe I am correct in saying that there is no true issue regarding his competency to stand trial, correct?"

Mathis: "No, there is none."

Court: "Everybody is in agreement his competence to stand trial, correct Mr. Mathis?"

Mathis: "Yes ma'am."

Court: "And Mr. Carr."

Carr: "Yes ma'am."

Court: "So we are left with the issue of not guilty by reason of mental disease or defect. After some further looking and deliberating... I believe it would be appropriate to get into this matter during voir dire and during opening statements."\*

EXHIBIT C at pp. 4-5.

(C) During Lundy's trial the defense called their expert, the only expert to conduct an evaluation of Lundy, to testify regarding the mental disease or defect defense, which was the sole defense of Lundy. Dr. Kimberly Ackerson - forensic pathologist testified in pertinent part that:

"Based on her interview with Lundy he did not suffer from any form of serious mental illness necessary to establish a successful insanity defense." EXHIBIT D.

This testimony by the defense witness placed on the stand to testify to the jury, by the actions of defense counsel, divested Lundy of the sole defense he had. This testimony eliminated the issue of mental disease or defect as an issue to be determined by the jury. There can be no reasonable performance of defense counsel to take affirmative steps to eliminate his client of the only defense he possesses.

Defense counsel's actions eliminated any need for the State to challenge this testimony by the defense witness, as it corroborated and established that claim by the State that Lundy was not suffering

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\* Regarding statements made during voir dire and opening arguments concerning the mental disease defect issue. The record of the trial court as it does not reflect any statements made.

from a mental disease or defect. That Lundy was cognizant of and aware of his actions when he committed the offense charged,, thus guilty as charged.

(D) Defense counsel had Lundy testify at his trial, and without objection, stood mute while the prosecution elicited answers from Lundy that terminally prejudiced him with thhe jury. Whereas the prosecution had Lundy in response to questions asked, Lundy stated and, or agreed with the proescution a total of sixteen (16) times that he shot, killed, murdered his wife. Ten 910) times on pages 131-133; one (1) time on page 136; two (2) times on pages 138-139, and three (3) times on pages 141-142. EXHIBIT F EXHIBIT G

When Lundy answered in the affirmative that he had murdered his wife, by the leading questions of the prosecution, the prosecution removed from the jury's determination the matter of whether Lundy was guilty or innocent. At that point a finding of guilty by a jury was a foregone conclusion.

Lundy's defense counsel Mr. Mathis not only failed to enter a single objection to Prosecutions exmination of Lundy, whereas the Prosecution repeatedly asked Lundy about his culpability in the murder of his wife. He also undertook no further questioning of Lundy in any attempt to mitigate Lundy's statements and the impact they had on the jury. Whereas once the Prosecution had no further questions of Lundy, defense counsel informed the trial court that the defense rests.

Immediately thereafter trial was concluded and before closing arguments and jury instructions, the following occurred outside the presence of the jury.

Court: "...it's the opinion of the Court that there is not sufficient evidence for it to go to the jury on that issue. (mental insanity). So, therefore, I'm denying the defendant's request to have the affirmative charge of not guilty by reason of mental disease or defect being considered by the jury."

Mathis: "Judge, under those circumstances, the fact that you have denied my requested charges on manslaughter and my requested charges on the insanity defense, we have no defense whatsoever...and if the Court will not change its mind, then we would possibly be in a position of entering a plea of guilty as charged."

Court: "All right."

Mathis: "Judge, in light of the fact that we have completely tried this case and both parties have rested, do I still need to fill out Exhibit A?" \* (Lundy's EXHIBIT A)

Court: Yes, please fill out an Exhibit A so we'll have that."

#### EXHIBIT I

From the trial court's record it appears that Lundy's defense counsel had anticipated and had consulted with the trial court prior to the close of trial, that he would be submitting a plea of guilty as evidenced by his statement to the "...do I still need to fill out Exhibit A."

At that point Lundy submitted his Explanation of Rights and Plea of Guilty Form to the trial court pleading guilty to the offense of murder as charged. EXHIBIT I:EXHIBIT J:EXHIBIT K.

Lundy's counsel failed to investigate the law regarding a defense of not guilty by reason of mania transitoria - literally temporary insanity, based on the facts that his defense counsel was aware of that led to the offense. Whereas, if he had done so, he would have discovered that due to the facts and circumstances, this particular defense was a valid defense and if presented to the jury, would have created a reasonable doubt in the minds of the jury as to the culpability of Lundy.

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\* Exhibit A (Lundy's EXHIBIT A) is the Explanation of Rights and Plea of Guilty Form Lundy signed and submitted to the trial court pleading guilty to the offense of murder as charge. There was no term of years pursuant to any plea agreement as Lundy's counsel made no effort to negotiate.

Whereas this form of insanity is produced by a violent excitement of emotions or passions, although reasoning facilities may remain unimpaired; a passion that for a period of time creates complete derangement of the intellect. Which created an irresistible impulse to do the act. A temporary state that existed only at the time of the criminal act.

In Lundy's case, as testified to at trial, his wife had engaged in adulterous relationships with other men prior to this incident. Lundy had struggled over the preceeding years to have his wife stop these relationships. He had repeatedly discussed this with her and tried using reason for these years. There was brief testimony by Lundy how he had to have a DNA test done to make certain one of his children was his biological child. However this testimony was cut short by objection from the prosecutor.

At the time preceeding this incident there was some testimony about his wife's most recent relationship with a Mr. James. Once again Lundy found himself trying to talk with his wife about this. Lundy had at one point spoke with Mr. James about his stopping his relationship with his wife. In response, Mr. James began threatening Lundy, calling him at home, amd calling him on his job letting Lundy know that he was aware of where he worked and when he was at work.

These threats, which his wife was aware of, escalated to the point that Lundy was put in fear of his health and life. Lundy, had been sleeping in the basement bedroom away from his wife. Lundy had, due to the threats, bought a shotgun which he began carrying with him everywhere. He kept this shotgun in a large backpack and even took it to his job and kept it by his desk in the backpack. Lundy had also began to sleep with the shotgun in fear that James would come after him in his bedroom while asleep.

On the day of the incident, Lundy was asleep in his bedroom with the shotgun under the sheets when his wife came down to the basement bedroom. Again Lundy tried to talk his wife into stopping these relationships. The end result of the conversation was Lundy's wife telling him that she was not going to stop, she was going to keep her relationship with Mr. Jones, and ended when standing up with a smirk telling Lundy "deal with it".

At that point Lundy has no memory as to exactly what transpired with the exception of when he first "woke up" it was with standing over his wife who was laying on the kitchen floor and her saying the word "Jesus" when he pulled the trigger for the last time. To this day Lundy has no memory of what actually transpired. At trial it was stated that law enforcement found "buckshot" in other parts of the house other than where the shooting took place. Lundy has no memory of or knowledge of how the buckshot wound up in these other rooms. Due to his "blacking out".

Lundy's defense counsel failed to subpoena and have Dr. testify as to hear treatment and counseling Lundy over a period of years for his emotional turmoil over his wives affairs. The stress that Lundy was under from working approximately 80 hours per week for a period of years, coupled with his wives adulterous conduct and his fears over the threats of Mr. Jones.

This was an alternative defense under the mental insanity defense. And if counsel had prepared and presented this defense to the jury, it would have provided them with the information to determine the culpability of Lundy to the offense he was on trial for. As it was, if the case had gone to the jury, there was no alternative or set of facts that had been presented to them except that Lundy had no defense.

Mr. Jones was cited as a witness for the state but did not take the stand. Lundy's counsel, if he had investigated this matter, obtained phone records showing when and how often Jones called Lundy. Could have called Jones to the stand and questioned about his behavior and the threats he was making to Lundy. Establishing mitigating facts.

Lundy's counsel failed in all aspects to put the state's case to any adversarial testing. The State was allowed to operate unopposed in all areas of the trial process. This fact is not one of opinion by Lundy. rather it is a fact evidenced and established by the courts own records. In that the consequence of counsel's actions was to divest Lundy of his right to a fair trial.

Lundy attempted to present these issues to the Federal District Courts of Alabama by submitting his application to file a second or successive §2254 habeas corpus petition to the Eleventh Circuit Court of Appeals. Lundy filled out the application in compliance with the rules established by the Eleventh Circuit. On the application the Eleventh Circuit instructed Lundy to submit **SUPPORTING FACTS** (tell your story briefly without citing cases or law), and Lundy did as instructed and did not cite cases or law.

The Eleventh Circuit denied Lundy's Application stating as grounds for denying access to the Federal District Court of Alabama, that Lundy did not cite any cases or law. The denial of Lundy's Application because he complied with the Eleventh Circuit's instructions was strictly an arbitrary and capricious ruling. This denial improperly and unconstitutionally denied Lundy his access to the courts to petition for redress, in a manner fundamentally unfair and without Due Process.

#### REASONS FOR GRANTING THE WRIT

Lundy would seek that this Honorable Court would review this case under the principles of law determined by this Court in Harris v Nelson 394 U.S. 286,22 L.Ed.2d 281 (1969) taking into account the office of the writ and the fact that Lundy by being in custody is handicapped in developing the evidence needed to support in detail the



facts alleged in his petition, that a habeas corpus must not be allowed to founder in a procedural morass. Lundy asserts the allegations presented before this Court, being based upon the state courts own records. That if fully developed he would be able to demonstrate that he is confined unconstitutionally and is therefore entitled to relief.

Lundy seeks that this Court will utilize the procedures appropriate, whether they are found in civil or criminal rules or elsewhere, in the usages and principles of law.

In Lundy's case, when the prosecuting attorney was of the opinion that Lundy had committed the crime alleged and had determined to prosecute him for this crime, the trial court had general jurisdiction to try and determine cause of the class to which a prosecution for the alleged offense belonged. However the criminal court can have no jurisdiction and cannot enter upon a trial, of the particular controversy, between the State and Lundy, until an action has been commenced and perfected in a lawful and proper manner. There can be no conviction or punishment for crime, except in the manner prescribed by law. Springer v Sjavender 118 N.C. 33,23 S.E. 976, 54 Am.St.Rep. 708.

Lundy asserts that the record of the proceedings before the trial court make the appropriate showing that he was for all practical purposes constructively denied the assistance of counsel, that his defense counsel's conduct was so unresonable, allowing his trial to proceed without, as the record shows, subjecting the state's case to any adversarial testing. This "conduct" led to Lundy being divested of his substantial and fundamental right to a fair trial. That this right to a fair trial has long been held to bethe law of the land. That any trial conducted outside this principle of a fair trial, is a trial conducted absent Due Process.

\_\_This is so because "by the law of the land" is most clearly intended the general law... The meaning is, that every citizen shall hold his life, liberty, property and immunities under protection of the general rule which governs our society. Zeigler v South & North Ala.R.R. 58 Ala. 594, 597-98 (1877). The principle arises to ensure that "the rights of every individual...stands or falls by the same rule of law that governs every member of the body politic or "land" under similar circumstances." Burrington v Burrington 206 Ala. 192, 89 So. 512 (1921).

The Alabama courts have consistently and in a dogmatic manner, refused to adhere or follow their own State Supreme Court's opinion and interpretation of the principle of law as presented by Lundy, wherein Opinion of the Justices 624 So.2d 107,161 (Ala.1973) it held

"Alabama courts have traditionally understood "due process of law" to be with "the law of the land" (due process) "provision secures for every citizen against arbitrary actions of those in authority and places him within the protection of the law of the land. See McCullum v Birmingham Post Co. 259 Ala. 65 So.2d 689,695 (1953). "The relevance of this comparison lies in the fact that the phrase "law of the land" illustrates more clearly than the phrase "due process" the species guaranteed in Ala.Const.1901 §§6 and 13."

Lundy was deprived of his protected interest to be represented by counsel who performed in the role of his advocate, that such deprivation of this protected interest, resulted in the violation of the "law of the land" which entails an obligatory duty on the Court to afford Lundy his right to a fair trial. A Court is not to engage in or allow actions which transpire before it, that violate this fundamental, substantial right. Lundy was not provided an opportunity for a hearing to be able to develop the facts necessary to his claim.

Lundy asserts and argues that throughout the entire appellate process, thus far, he must be afforded opportunity for some kind of hearing. Stump v Sparkman 55 L.Ed.2d 331 (1978)

Lundy argues that the record of the trial court, substantially evidences the severity and degree the fundamentally unfair manner by which his liberty was divested, would arguably rise to the level that the trial court and the prosecutor, coupled with the action of his defense counsel, deprived the trial court of personal jurisdiction. Lundy cites the following is support of his contention, the absence of personal jurisdiction.

In Rankin v Howard 633 F.2d 844 (9th.Cir.1980)(cert. denied) 451 U.S. 9393, 101 S.Ct. 2020, 68 L.Ed.2d 326 (1981)

"An absence of personal jurisdiction may be said to destroy 'all jurisdiction' because the requirements of subject matter and personal jurisdiction are conjunctional. Both must be met before a court has authority to adjudicate that party's rights, whether or not the subject matter is properly before it." Kulko v Superior Court ...[i]t has long been the rule that a valid judgment imposing a personal obligation or duty in favor of the plaintiff (the state) may be entered only by a court having jurisdiction over the person of the defendant.(citations omitted).Because the limits of personal jurisdiction constrain judicial authority, acts taken in the absence of personal jurisdiction do not fall within the scope of legitimate decision making. Dykes v Hoseman 743 F.2d 1488 (1984) it was held "...the rationale for when subject matter jurisdiction is lacking applies with equal force when personal jurisdiction is lacking. When a court acts without personal jurisdiction its authority is as much a usurped authority as when a court acts without subject matter jurisdiction."

Lundy asserts and argues that the United States Constitution and the rights, protections, privileges and immunities therein, when coupled with the actions of a tribunal in a criminal proceeding, which must be administered in recognition of the substantial, fundamental and inherent rights, protections, privileges and immunities guaranteed to a citizen, is done in a manner and spirit contrary to those same principles of law. Would, in an atypical case like Lundy's. Place a trial court in the position of divesting itself of the personal jurisdiction required to convict and imprison Lundy.

QUESTION PRESENTED

Was Lundy's conviction in violation of Due Process of Law under the Sixth and Fourteenth Amendment due to the constructive denial of counsel, thus entitling him to relief?

Lundy argues and asserts that the actions of his trial counsel Erskine Mathis in his trial by jury constituted "constructive denial of counsel" and meets the Cronic test where at his trial, there was a complete breakdown of the adversarial process, when his counsel failed to subject the prosecution's case to any meaningful adversarial testing. Case law makes clear that when case law speaks of the possibility of presuming prejudice based on an attorney's failure to test the prosecutions case, the attorney's failure must be complete.

Lundy asserts that the record in his case as to the matters that transpired in his trial. Makes an appropriate and substantial showing that the degree of utter failure by his counsel to subject the state's case to any meaningful adversarial testing. That it rendered his trial to an invalid state procedure by which his conviction and imprisonment was a consequence thereof.

In Lundy's case his attorney Mr. Mathis engaged in the following conduct at his trial which rose to the level to constitute his being constructively denied the assistance of counsel, whereas;

(A) Prior to Lundy's trial his defense counsel submitted a motion to the trial court for a mental insanity evaluation to be conducted of Lundy. The trial court approved the defense motion and issued orders for Lundy to have a mental examination. EXHIBIT A; EXHIBIT B.

(B) On August 14. 2006 immediately before the jury venire there was a proceeding involving the trial court, the prosecutor Mr. Carr and Lundy's defense counsel Mr. Mathis, wherein the following exchange occurred:

The Court: "Mr. Mathis has filed on behalf of his client a motion of not guilty by reason of mental disease or defect. There have been some deliberations done of Mr. Lundy and I believe I am correct is saying that there is no true issue regarding his competency to stand trial, correct?

Mathis: "No, there is none."

The Court: "Everybody is in agreement his competence to stand trial, correct Mr. Mathis?"

Mathis: "Yes ma'am."

The Court: "And Mr. Carr?"

Carr: "Yes ma'am."

Court: So we are left with the issue of not guilty by reason of mental disease or defect. After some further looking and deliberating,...I believe it would be appropriate to get into this matter during voir dire and during opening statements.

EXHIBIT C at pp.4-5.

Regarding matters stated during the jury voir dire and during opening statements concerning the mental competency issue, the record of the trial court is cold. There is nothing in the record reflecting any statements made by the trial court, the prosecution or defense counsel.

During trial as reflected in the trial transcript, Lundy's defense counsel called to the stand Dr. Kimberly Ackerson - forensic pathologist - the "defense's expert witness" who, in pertinent part testified before the jury that;

Based on her interview with Lundy he did not suffer from any form of serious mental illness necessary to establish a successful insanity defense."

EXHIBIT D

Defense counsel had Lundy testify with defense counsel allowing Lundy, without objection, to terminally prejudice himself whereas, at the "urging" of the prosecution, Lundy testified regarding his "four small children" being in the house at the time of the murder with Lundy stating at one point;

"Those kids were walking around in that house. The evidence shows that I went from room to room shooting a shotgun. And what in the world would I be doing shooting any type of gun while I've got four kids in the house walking around going to

the bathroom, going to the kitchen, ones watching one TV and the other one watching another? Buckshot was in the living room. Buckshot is all over that house."

EXHIBIT E

During cross-examination by the prosecutor Mr. Carr, the State without any objection by defense counsel elicited the following statements from Lundy as to his actions, admitting to shooting and killing his wife. Ten (10) times on pages 131-133; one (1) time on page 136; two (2) times on pages 138-139 and three (3) times on pages 141-142. In seven (7) pages of the trial transcript the prosecution had Lundy state to the jury a total of sixteen (16) times that he shot, killed, murdered his wife.

EXHIBIT F

Lundy's defense counsel Mr. Mathis not only failed to object once to the prosecution repeatedly asking Lundy about his culpability in the murder of his wife. He also undertook no further questioning of Lundy in any attempt to mitigate Lundy's showing of culpability. In that following Lundy's testimony in response to the prosecutions questions, Lundy's defense counsel informed the trial court that the defense rests.

Trial was concluded immediately thereafter, and before closing arguments and jury instructions outside the presence of the jury the following exchange occurred;

Court: "...it's the opinion of the Court that there is not sufficient evidence for it to go to the jury on that issue. (mental insanity). So therefore, I'm denying the defendant's request to have the affirmative charge of not guilty by reason of mental disease or defect being considered by the jury."

Mathis: "Judge, under those circumstances, the fact that you have denied my requested charges on manslaughter and my requested charges on the insanity defense, we have no defense whatsoever...and if the Court will not change it's mind, then we would possibly be in a position of entering a plea of guilty as charged.

Court: "All right."

Mathis: "Judge, in light of the fact that we have completely tried this case and both parties have rested, do I still need to fill out Exhibit A?"\* (Lundy's EXHIBIT G)

Court: Yes, please fill out an Exhibit A so we'll have that."

From the trial court's record it is appears that Lundy's defense counsel anticipated and had consulted with the trial court prior to the close of trial, that he would be submitting a plea of guilty evidenced by his statement to the court of "...do I still need to fill out Exhibit A."

In Lundy's appeal from his most recent Ala.R.Crim.P. Rule 32 petition, both the State and the Alabama Court of Criminal Appeals erroneously held that the claim of constructive denial of counsel, was the same as in his prior Ala.R.Crim.P. Rule 32 petition. This is erroneous whereas in this most recent action, Lundy raised for the first time the "constructive denial of counsel". The contradictory stance by the State and the Court of Criminal Appeals is evidenced wherein the last paragraph of the State's response to the Court of Criminal Appeals the State correctly stated in part:

"While Lundy's ineffective assistance of counsel claims in the present petition are different from the claims raised in his first Rule 32 petition, Lundy failed to show good cause exists for his failure to raise these 'new claims' in his prior petition, and that failure to entertain the present petition would result in a miscarriage of justice. Ala.R.Crim.P. Rule 32.2(b). Accordingly there was no abuse of discretion in the circuit court denying Lundy's present Rule 32 petition as being a successive petition."

The Court of Criminal Appeals held in their unpublished memorandum of May 17, 2019;

"On appeal Lundy argues that he was 'constructively denied the effective assistance of counsel,' when the trial court denied his counsel the right to present the defense of mental insanity at his trial.'" Lundy did not raise this claim in his

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\* Exhibit A (Lundy's EXHIBIT G) is the Explanation of Rights and Plea of Guilty Form Lundy signed and submitted to the trial court pleading guilty to the offense of murder as charged. There was no term of years pursuant to any plea agreement as Lundy's counsel made no effort to negotiate.

Rule 32 petition. It is well settled that 'an appellant cannot raise an issue on appeal from the denial of a Rule 32 petition which was not raised in the Rule 32 petition'. Because Lundy did not first raise his constructive-denial-of-counsel claim in his Rule 32 petition, this issue is not properly before this Court for appellate review." Arrington v State and Yarbrough v State."

Lundy asserts and argues that the constructive denial of counsel, and in his case, the conduct of counsel at his trial would also constitute the abandonment of counsel. Whereas this conduct of counsel was to the degree to constitute a structural error in the trial mechanism, denying him his fundamental right to a fair trial. The record substantially shows that at no point did Lundy's defense counsel, object or subject to the states case to the proving of the adversarial process.

In fact, by the lack of his serving as Lundy's advocate in any meaningful sense, defense counsel assisted the State in it's prosecution of Lundy for the offense he was on trial for. The trial record is void of any statements, objections, or any conduct that his counsel served in any meaningful manner, as Lundy's advocate.

Lundy asserts that this error divested the trial court of personal jurisdiction over the person of Lundy, in that for all intents and purposes, Lundy was tried without the benefit of counsel, he was in the same position as if he had not counsel at trial. The State and the trial court misapplied the law and administered the law in a manner that was fundamentally unfair.

The State in its response recognized that this claim was a new claim, and by doing so acknowledged that the constructive denial of counsel is a separate and distinct claim from an ineffective assistance of counsel claim. Yet, rather than address this claim, the State "shuffles" it off by claiming it is "barred" by Rule 32.2(b) Ala.R.Crim.P.. And the Court of Criminal Appeals attempts to avoid reviewing this issue by seeking to rely on a procedural step.



The United States Supreme Court has determined in Weaver v Massachusetts 198 L.Ed.2d at 420 (2017) relieved the defendant of the obligation to make the affirmative showing in only a very narrow set of cases in which the accused has been denied counsel altogether: These include the actual or constructive denial of counsel... Prejudice can be presumed with respect to these errors because they are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified."See Strickland v Washington 80 L.Ed.2d 674 (1984): Mickens v Taylor 535 U.S. 162, 152 L.Ed.2d 291.

Lundy's desire to exercise his right to a trial by jury is evident by the record. The only fair interpretation of the actions by the trial court and defense counsel, is that it was a deliberate, arbitrary and capricious action to deny Lundy his only defense to the crime for which he was on trial for.

This is substantially shown whereas there could not be any reasonable strategy for a Lundy's defense counsel, to knowingly admit to the trial court before the start of trial, that whereas the defense proffered would be a mental insanity defense. There was issue of Lundy's competence in that he was competent. Then counsel proceeded to place the expert witness on the stand knowing in advance that the expert witness would testify that Lundy did not have a defense of mental insanity. Then counsel proceeded to offer no defense to any statements or conduct of the prosecution, going so far as to stand mute while the prosecution did on sixteen (16) separate occasions during Lundy's testimony have Lundy admit that he shot, killed, murdered his wife. There was no adversarial process in Lundy's trial.

The Court of Criminal Appeals, in regards to this issue, made the claim that Lundy's conviction was from a guilty plea and not a trial, as grounds to not entertain or rule on the constructive denial of counsel. This claim is of no moment in this case. For the Court of Criminal Appeals ignored or overlooked the fact that the reason for Lundy entering the guilty plea was that (a) the trial court denied any jury instructions on the defense of mental insanity, and it would not be presented in closing arguments. That the trial court denied this sole defense even though counsel advised the trial court that it was depriving Lundy of his sole defense.

The Court of Criminal Appeals ignored that the submission of the guilty plea was one that Lundy entered that was not voluntary. Lundy felt compelled to do so. Lundy's counsel convinced him to do so even though the maximum penalty as imposed, would not have been any different than that which could have been imposed by the trial court, if a guilty verdict had been returned by the jury. Lundy was afraid to state to the trial court that he felt compelled, pressured into pleading guilty. He also believed, properly, that the trial court by its actions, desired and was going to be certain that Lundy was convicted and imprisoned for the crime he was on trial for.

Lundy claimed that when the incident occurred, that he blacked out and possessed no memory of what transpired. This testimony constituted a mitigating factor presented to the jury for it to consider in its determination of Lundy's guilt or innocence. However, by the actions of defense counsel and the trial court. The consideration of any mitigating evidence was removed from the province of the jury in its determination of the credibility of Lundy, as opposed to any contradictory evidence presented by the State.

The United States Supreme Court held in Kansas v Ventris 173 L.Ed.2d 801, 556 U.S. 586 (2009);

"Our legal system is built on the premise that it is the province of the jury to weigh the credibility of competing witnesses."

WHY THE ISSUANCE OF THE ORIGINAL WRIT OF HABEAS CORPUS  
WOULD BE IN AID OF THIS COURTS JURISDICTION

Lundy has attempted to obtain a fair and impartial review of the facts of his case in the trial court, the Alabama Court of Criminal Appeals and the Eleventh Circuit Court of Appeals. And has been denied that fair review where the State through the office of the prosecutor and the courts. Have misconstrued, engaged in reading into the case that which is not there. And ignoring and refusing to recognize his claims of the denial of his substantive fundamental Due Process rights, privileges, protections, guarantees and immunities.

In one example, in the affirmance by the Alabama Court of Criminal Appeals decision of July 12, 2009, Lundy's direct appeal, wherein the Court stated on page #5;

"The record clearly shows that the Defendant was given two mental examinations prior to trial, one by a state psychiatrist and one who was chosen by the defense. Both experts agreed that the Defendant was competent to stand trial and that at the time of the offense he did not suffer a mental illness to the extent that he was 'unable to appreciate the nature and quality or wrongfulness of his acts'. No material issue of fact or law exists which would entitle the petitioner to relief under Rule 32. This claim is hereby denied."

The only area of the record that indicates a possible examination by a state expert is a request from the Taylor Hardin Secure Medical Facility for Lundy's medical records from Eastern Medical Specialists P.C. in Birmingham Alabama and Dr. Kimberly Ackerson Lundy's expert witness. There is nothing in the record of a second examination having been conducted and Lundy only recalls one examination and that was Dr. Kimberly Ackerson.

This "second examination" cited by the Alabama Court of Criminal Appeals does not exist in the records.

Whereas Lundy's efforts in the State and Federal Courts have proven to be inadequate to protect his rights. And, whereas the Original Writ of Habeas Corpus is an extraordinary remedy with this Court the only Court to possess the authority to entertain and adjudicate this Writ. Lundy has no other available or adequate avenue to seek relief, except this Court.

The preceding facts and circumstances clearly illustrate a criminal proceeding that was extraordinary in the manner in which it was conducted. The circumstance where the defendant Lundy, was having to submit his testimony as a witness competing against his own expert, could be fairly described as unusual, atypical. Especially when his own defense counsel sits mute, while the state leads Lundy to admit in his testimony a total of sixteen (16) times, that he shot, killed, murdered his wife.

When Lundy was led to state that he "murdered" his wife, at that point of the trial, there was no longer an issue that fell within the province of the jury. Lundy's counsel and the state, decided the truth of the matter, and not the jury. Reducing Lundy's trial to a mockery, a manifest injustice.

In order for Lundy to receive a fair and impartial review, the record shows that there is only one court to which he may petition for redress, and that is this Honorable Court. And Lundy presents that his case would address the disparate treatment by the State of Alabama courts and the Eleventh Circuit Court of Appeals. A ruling in Lundy's favor by this Court, would place the State of Alabama trial and appellate courts, that they cannot turn their face from the requirements imposed upon them by the United States Constitution, that a habeas proceeding, in Alabama the Ala.R.Crim.P. Rule 32 proceeding,

must not be allowed to founder in a procedural morass. Which is exactly what had transpired in Lundy's case. Lundy has yet to be accorded any manner of an adequate inquiry by any court to correct what is best described as a trial that was a farce, and that he has been subjected to a manifest injustice.

Lundy asserts that the demands of justice and the office of the Writ requires and must be accorded more than what has transpired thus far in this instant case. That in a case such as his, whereas the trial court itself, displayed a personal desire to assure that Lundy was going to be convicted, when it removed from the province of the jury, the determination of guilt or innocence. When his defense counsel placed Lundy in the untenable position of having to be the competing witness against his own expert witness. Where in this instant case the record indisputably shows that his defense counsel did not subject the state's case to any adversarial testing, sat mute allowing the prosecution to lead Lundy into admitting that he shot, killed, murdered his wife a total of sixteen times, failing to enter any objection. And that when jury instructions were being discussed, his counsel had already prepared an Explanation of Rights and Plea of Guilty Form, rather than have the case go to the jury. Lundy was never accorded his right to a fair trial.

That in his case, the Law was Administered in a manner fundamentally unfair, that there was no Equal protection of the law accorded to Lundy. That the Law in this instant case and those who are charged with the responsibility and the obligatory duty, holding the public trust to do so, to assure that no citizen is subjected to the improper and unconstitutional wielding of the law. For the law is not and was never meant to be a "blunt instrument" at the hands of those in the position of authority.

CONCLUSION

Lundy alleges that the record of his trial substantially evidences that the manner in which the Law was administered in his case, was improper and unconstitutional. That despite his efforts and express desire, he was never accorded his right to a fair trial. That his defense counsel Mr. Mathis, did far more harm than good. Whereas he stood by and allowed the State to pursue a conviction without subjecting the State's case to even one instance of adversarial testing. That the State, the trial court and defense counsel invaded the province of the jury.

The result being that Lundy was compelled by these concerted actions into entering a guilty plea. The finding of guilty pursuant to a guilty plea, does not negate the fact the Lundy was denied his right to a fair trial, the consequence which led to the guilty plea.

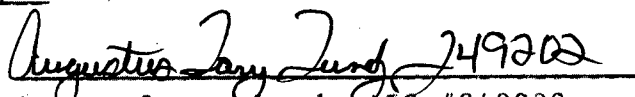
The State appellate courts ignored or refused to address this improper and unconstitutional Administration of the Law. Violating the "unilateral contract" of the United States Constitution and Lundy's inherent, substantial and fundamental rights, privileges, protections and guarantees. This action continued into the Eleventh Circuit where Lundy's application was denied because he did comply with their rules.

Lundy's case is atypical in all aspects, and the only avenue he has to a fair and impartial review in petitioning for redress, is this Court in his petition for the original writ of habeas corpus.

RELIEF PRAYED FOR

Lundy respectfully prays that this Court will issue it's original writ of habeas corpus.

Respectfully submitted this the 12<sup>th</sup> day of December 2019.

  
August Larry Lundy AIS #249202  
28779 Nick Davis Road  
Harvest, Alabama 35749