No. 20-

IN THE

Supreme Court of the United States

MICHAEL P. O'DONNELL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

MICHAEL P. O'DONNELL
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Dated: August 20, 2020

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QUESTIONS PRESENTED

Pursuant to Sup. Ct. R. 14(1)(a) Petitioner respectfully presents the following four questions for review. Petitioner also respectfully states the "Stipulation" mentioned in Questions 1 and 2 presented for review is annexed as Appendix A (1a-5a).

1. Whether Petitioner is entitled to a new trial because defense counsel in connection with their advice to Petitioner to sign a Stipulation during the pre-trial phase of the proceedings (ostensibly to obtain Government consent to a bench trial) rendered ineffective assistance under the two-part Strickland v. Washington test on the grounds: (i) their advice to sign the Stipulation lacked any plausible strategic and/or tactical justification; (ii) defense counsel did not grasp the elements of the crime of attempted bank fraud under Section 1344 of Title 28 of the United States Code (Bank Fraud); (iii) defense counsel misapprehended the prejudicial consequences of the Stipulation in relation to the attempted bank fraud charged under Section 1344; (iv) defense counsel failed to disclose those consequences to Petitioner prior to Petitioner signing the Stipulation and (v) the Stipulation was equivalent to a guilty plea to attempted bank fraud foreclosing any outcome other than an adverse verdict at the close of the bargained for bench trial?

2. Assuming the advice defense counsel rendered to Petitioner relating to the Stipulation is constitutionally deficient under the first prong of the Strickland v. Washington test, does the magnitude of the deficiency of the advice constitute "structural error" rendering the trial an unreliable vehicle for determining guilt or innocence and automatically

resulting in a presumption of prejudice requiring reversal of the conviction and entry of an order granting Petitioner a new trial?

3. Should the application for a certificate of appealability ("COA") be granted and the case remanded for further consideration of the ineffectiveness-of-counsel and/or structural error issues or in the alternative should the conviction be set aside and vacated and a new trial ordered on the ground Petitioner has made a substantial showing of the denial of a constitutional right based upon his demonstration: (i) jurists of reason could conclude the decision of the court of appeals refusing to grant a COA is debatable and/or incorrect; (ii) the issues presented were adequate to deserve encouragement to proceed further and (iii) the denial of a COA in the court of appeals conflicts with: (a) the statutory threshold for granting a COA set forth in Section 2253(c)(2) of Title 28 of the United States Code and (b) relevant COA decisions of this Court.

4. Whether the circumstances of this case require reversal of the conviction and entry of an order granting a new trial: (i) to prevent irreparable damage to the fundamental integrity of the judicial process; (ii) to maintain and promote public confidence in our system of justice; (iii) to avoid undermining public perception of the fair administration of our justice system and (iv) to prevent the risk of injustice.

PARTIES TO THE PROCEEDING IN THE COURT WHOSE JUDGMENT IS SOUGHT TO BE REVIEWED

Pursuant to Sup. Ct. R. 14(b)(1) Petitioner Michael P. O'Donnell (the "Petitioner") respectfully states the parties set forth in the caption of this Petition for a Writ of Certiorari are all of the parties to the proceeding in the United States Court of Appeals for the First Circuit whose judgment is sought to be reviewed.

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PETITION FOR A WRIT OF CERTIORARI

In accordance with Sup. Ct. R. 14(b)(iii) requiring a list of all proceedings ("including proceedings in this Court") Petitioner respectfully states he has filed this Petition for a Writ of Certiorari to review the final judgment of the United States Court of Appeals for the First Circuit affirming the denial of a COA.

CITATION OF THE OFFICIAL REPORT OF THE OPINION ENTERED IN THIS CASE

Pursuant to Sup. Ct. R. 14(d), Petitioner respectfully states the sole official report of an opinion entered in this case is the First Circuit decision rendered in United States of America, Appellee v. Michael P. O'Donnell, Defendant-Appellant, (No. 16-1008) reported at 840 F. 3d 15 (1st Cir. 2016) (The "Opinion"). That Opinion affirmed on direct appeal the conviction and judgment for attempted bank fraud entered against Petitioner (A. 91a-103a).[1] All of the other opinions and orders entered in the case are unpublished and the pertinent dates, docket numbers and captions of these opinions and orders are set forth in the next Section.

PROCEEDINGS IN THE FEDERAL TRIAL AND APPELLATE COURTS

In accordance with Sup. Ct. R. 14(b)(iii) Petitioner respectfully states the following is a list of proceedings in the federal trial and appellate courts directly related to this case.

(1) The Indictment lodged against Petitioner was filed in the United States District Court for the

[1] References in the form "A." are to the Appendix.

District of Massachusetts in United States of America, Plaintiff-against-Michael P. O'Donnell, Defendant (Criminal Action No. 1:13-CR-102202-DPW). The Indictment was filed on September 11, 2013 (A. 6a-12a);

(2) Petitioner filed a Notice of Motion to Dismiss the Indictment filed in the United States District Court for the District of Massachusetts in United States of America, Plaintiff-against-Michael P. O'Donnell, Defendant (Criminal Action No. 1:13-CR-102202(DPW) on the grounds the mortgage company involved in the events mentioned in the Indictment was not a "financial institution" within the scope of Section 1344 of Title 18 of the United States Code. ("Section 1344" or the "Act"). (A. 13a-43a);

(3) The United States District Court for the District of Massachusetts entered a final Judgment and Order denying the Motion to Dismiss described in subparagraph 2 above on the ground the Motion was not the proper vehicle to test whether the mortgage bank in question was a "financial institution" under Section 1344. The final Judgment and Order denying the Motion to Dismiss was entered on July 23, 2014 (A. 44a);

(4) The United States District Court for the District of Massachusetts held a hearing on July 10, 2015 regarding a jury waiver and Stipulation[2] arising out of negotiations between defense counsel for Petitioner and attorneys for the Government (A. 45a-71a);

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[2] The word "Stipulation" in this Petition refers to the document annexed as Appendix A.

(5) Petitioner and the Government signed a jury waiver and a Stipulation (both dated 2015) in connection with Government consent to a bench trial. The jury waiver and Stipulation were filed in the United States District Court for the District of Massachusetts on July 12, 2015. (For the sake of completeness, a true and accurate copy of the Jury Waiver is annexed as (A. 72a) to this Petition);

(6) The Honorable District Judge Douglas P. Woodlock approved the jury waiver and Stipulation and ordered the entry of both documents on court docket on July 12, 2015. (A. 73a) is a true and accurate copy of this Order);

(7) The case was tried before the Honorable District Court Judge Douglas P. Woodlock from July 15 through 21, 2015. District Judge Woodlock entered a final Sentence and Judgment of Conviction for one count of attempted bank fraud in violation of Section 1344 against Petitioner in United States of America, Plaintiff-against-Michael P: O'Donnell, Defendant (Criminal Action No. 1:13-CR-102202-DPW). The final Judgment and Sentence of conviction for attempted bank fraud was entered against Petitioner on December 18, 2015 (A. 74a-83a);

(8) Petitioner timely filed a Notice of Appeal from the conviction for attempted bank fraud described in subparagraph (7) above in the United States District Court for the District of Massachusetts. The Notice of Appeal was filed on December 21, 2015. (A. 84a-85a);

(9) The Notice of Appeal described in subparagraph (8) above was also timely filed and docketed in the United States Court of Appeals for the First Circuit in United States of America,

Appellee v. Michael P. O'Donnell, Defendant-Appellant (No. 16-1008) on October 12, 2017. (A. 86a-90a);

(10) On direct appeal, the United States Court of Appeals for the First Circuit in an Opinion rendered in United States of America, Appellee v. Michael P. O'Donnell, Defendant-Appellant (No. 16-1008) affirmed the conviction for attempted bank fraud described in subparagraph (7) above. The Opinion affirming the conviction for attempted bank fraud was decided on October 19, 2016 and reported at 840 F. 3d 15 (1st Cir. 2015) (A. 91a-103a);

(12) Pursuant to Section 2255 of Title 28 of the United States Code ("Section 2255") Petitioner timely filed an Application in the United States Court for the District of Massachusetts to vacate, set aside, and/or correct the conviction for attempted bank fraud entered against him and for entry of an Order granting a new trial. The Application was filed in the district court on September 2, 2017 (A. 104a-116a);

(13) The United States District Court for the District of Massachusetts entered a final Judgment and Order in United States of America, Plaintiff v. Michael P. O'Donnell, Defendant (Criminal Action No. 1:13-CR-10262-DPW) denying: (ii) the Section 2255 Application and (ii) a COA. The final Judgment and Order of the District Court was entered on April 2, 2019 (A. 159a);

(14) Petitioner appealed in a timely fashion to the United States Court of Appeals for the First Circuit pursuant to an Application filed under Section 2253(c)(1)(B) of Title 28 of the United States Code. ("Section 2253(c)(1)(B)"). The Notice of Appeal was filed in the First Circuit on May 28, 2019.

Annexed as Appendix T (A. 160a) to the Appendix to this Petition is a true and accurate copy of this Notice of Appeal;

(15) The United States Court of Appeals for the First Circuit affirmed the denial of the COA in a final Judgment and Order entered on February 25, 2020 (A. 162a-163a);

(16) In a Petition timely filed in the United States Court of Appeals for the First Circuit in United States of America, Plaintiff v. Michael P. O'Donnell, Defendant (No. 16-1008) Petitioner sought Panel Rehearing and Rehearing En Banc of the final Judgment and Order denying the COA described in subparagraph 15 above. This Petition was filed on March 10, 2020 (A. 164a-167a);

(17) The United States Court of Appeals for the First Circuit in United States of America, Plaintiff v. Michael P. O'Donnell, Defendant (No. 16-1008) denied without opinion the Petition for Panel Rehearing and Rehearing En Banc of the final Judgment and Order described in subparagraph (16) above. The final Judgment and Order denying this Petition was entered on March 23, 2020 (A. 168a-169a).

BASIS FOR JURISDICTION

In compliance with Sup. Ct. R. 14(1)(e)(i),(ii) and (iv) Petitioner respectfully states this Court has authority to review: (i) the final Judgment and Order of the United States Court of Appeals for the First Circuit entered on March 23, 2020 (A. 164a-167a) and affirming without opinion the denial of a COA and (ii) the final Judgment and Order of the United States Court of Appeals for the First Circuit entered on March 23, 2020 (A. 168a-169a) and denying

without opinion a Petition for Panel Rehearing and Rehearing. Jurisdiction to review the final judgment and order of the court of appeals vests in this Court pursuant to Section 1254(1) of Title 28 of the United States Code ("Section 1254(1)").

In addition, this Court has held: "We may review the denial of a COA by the lower courts" ... "When the lower courts deny a COA and we conclude that their reason for doing so was flawed, we may reverse and remand so that the correct legal standard may be applied ...". Ayestas v. Davis, Dir. Tex. Dep't Crim. Justice, 138 S. Ct. 1080, 1088 n.1, 200 L. Ed. 2d 376, 385 n.1 (2018)(Alito, J.) (citations omitted). See Hohn v. United States, 524 U.S. 236, 238-39, 253, 141 L. Ed. 2d 242, 250-51, 260 (1998)(Kennedy, J). Ineffective-assistance-of-counsel was not argued on direct appeal. In Massaro v. United States, 538 U.S. 500, 504, 155 L. Ed. 2d 714, 720 (2003)(Kennedy, J.), this Court held: "An ineffective assistance of counsel claim may be brought in a collateral proceeding under § 2255 whether or not the Petitioner could have raised the claim on direct appeal United States v. Neto, 659 F. 3d 194, 203 (1st Cir. 2011), quoting, United States v. Rivera Gonzalez, 626 F. 3d 639, 644 (1st Cir. 2010). In light of Massaro, supra, and the First Circuit precedents cited above relating to the proper procedural vehicle for raising ineffective assistance-of-counsel claims, Petitioner respectfully states the questions presented in this Petition are properly before this Court.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS AND RULES

In accordance with Sup. Ct. R. 14(f) Petitioner respectfully states the constitutional provisions,

statutes and rules involved in this case are Constitutional Provision, U.S. Const. Amend. 6 Rights of the Accused; Statutory Provisions, 18 U.S.C. § 1344. Bank Fraud; Rules Governing Section 2255 Proceedings; Rule 11. Certificate of Appealability; Time to Appeal; Federal Rules of Appellate Procedure and Rule 22. Habeas Corpus and Section 2255 Proceedings which are set forth verbatim in the Appendix at A. 188a-192a.

I. STATEMENT OF THE CASE

A. Material Facts

Facts material to the consideration of the questions presented in this Petition are set forth in this Section in accordance with Sup. Ct. R. 14(g). Also included in accordance with Sup. Ct. R. 14(g)(i) are the facts relating to the basis for federal jurisdiction in the court of first instance.

1. The Stipulation

The Stipulation states the Indictment charges Petitioner violated subsections (1) and (2) of Section 1344. (Id. at 16-17) and alleges in pertinent part:

> "petitioner knowingly executed and attempted to execute a scheme and artifice to defraud Countrywide Bank, FSB, a federally-insured financial institution, and to obtain money ... and other property owned by and under the custody and control of Countrywide Bank, FSB, by means of false and fraudulent pretenses, representations, and promises, concerning material facts and matters in conjunction with a mortgage loan in the amount of $44,000 for property located at 40 Harbor

Street, Salem, Massachusetts." (840 F. 3d at 17).

Petitioner in the Stipulation admits to the following concerning the allegations in the indictment. (A. 1a-5a). While serving as a self-employed loan originator operating through his loan originator business, AMEX Home Mortgage Corporation, ("AMEX") Petitioner completed loan applications and submitted them to mortgage companies on behalf of individuals seeking to purchase or refinance property. (Id.). In 2007, Petitioner sought to defraud mortgage lenders in connection with the refinancing of the property in Salem, Massachusetts referenced in the indictment. (840 F. 3d at 17). The scheme began with his efforts to obtain a mortgage loan on a different property owned by a woman named L.T. (Id.). Petitioner also paid approximately $37,000 from a bank account controlled by AMEX to secure the loan for that property. (Id.). L.T. should have paid these funds in connection with securing the loan.

Petitioner was successful in securing the mortgage loan in the name of L.T. (840 F. 3d at 17). He then sought to secure a second mortgage loan in her name, this time for the Salem, Massachusetts property named in the indictment. (Id.). Petitioner sought this loan to obtain the $37,000 he had put down to secure the first loan in L.T.'s name. (Id.).

Petitioner submitted the application for the second loan to a different entity from the one he had submitted the application for the first loan. (Id.). The Stipulation refers to the entity to which Petitioner submitted the second loan application as follows; "Countrywide, where Countrywide Home Loans employees underwrote and processed the application." (Id).

The second loan application contained many of the same false statements that were in the application for the first loan in L.T.'s name. (Id.). Petitioner also provided fraudulent responses to various follow-up inquires in the course of seeking this second loan. (Id.). When this second loan closed, Petitioner pocketed most of the proceeds. (Id.).

2. The Hearing Before Trial Judge Relating to the Stipulation

During a hearing held before the trial judge on July 15, 2015, the trial judge advised Petitioner as follows: (i) if the court accepted the Stipulation then the facts in the Stipulation "are proven" (A. 45a-71a) and Petitioner could not dispute them. Petitioner confirmed he had discussed the Stipulation with defense counsel. (Id.). The trial judge read the Stipulation to Petitioner and Petitioner confirmed he agreed "to all of that." (Id.). The trial judge then stated Petitioner understood the facts set forth in the Stipulation were "established beyond a reasonable doubt" and would be "part of the determination" the court would "make in this case." (Id.). The colloquy did not alert Petitioner the Stipulation without any additional evidence would be sufficient to convict him for attempted bank fraud. The key issue at trial.

In the Opinion annexed as (A. 91a-103a), the Court of Appeals found there was no dispute Countrywide Bank, FSB is a "financial institution" within the meaning of the Act (840 F. 3d at 20) and also found "[t]here is no evidence Petitioner was aware Countrywide Bank, FSB was a "financial institution" under the Act. (Id.). Despite his lack of awareness, the court of appeals upheld the district court finding Petitioner engaged in "a substantial

step ... of such a nature that a reasonable observer viewing it in context could conclude beyond a reasonable doubt it was undertaken" with a "design to violate the statute [Act];" (Id.).

In affirming the conviction for attempted bank fraud, the First Circuit pinpointed the key issues at trial as follows: (i) whether the fraudulent scheme to secure the second loan set forth in the Stipulation targeted Countrywide Bank, FSB, as the Indictment alleged, or (ii) only targeted Countrywide Home Loans as Petitioner argued. (840 F. 3d at 17). The identification of the intended target was crucial because Petitioner stipulated Countrywide Bank, FSB was a "financial institution" within the meaning of Section 1344, while the Government did not dispute Countrywide Home Loans was not a "financial institution" within the ambit of the Act. (Id.).

3. The Ruling From The Bench

In ruling from the bench at the close of the evidence, the trial judge explained the record showed Petitioner was "on notice" Countrywide Bank, FSB was "part of this transaction in some form" in the second loan transaction. (A. 173a). With that finding in place, the trial judge then found Petitioner was guilty of

> "attempt[ing]" to execute - though not of actually executing - a scheme or artifice described in subsections (1) and (2) of Section 1344 because [Petitioner] intended to defraud Countrywide Bank, FSB and intended to obtain money and property under custody and control of Countrywide Bank, FSB. (Id.).

Based upon these findings, the trial judge did not convict Petitioner of the completed offense of bank fraud. (840 F. 3d at 17).

4. Defense Counsel Affidavits

Defense Counsel Denner and Keller in their separate affidavits (A. 148a-153a and A. 154a-157a) aver as follows:

> (i) Defense counsel did not discuss the issue of attempted bank fraud with Petitioner prior to Petitioner signing the Stipulation (Id.);
>
> (ii) Defense counsel acknowledge they never discussed the issue of attempt with Petitioner until the trial court raised the attempt issue during the closing argument of the Government at trial (Id.);
>
> (iii) Defense counsel further aver they did not discuss with Petitioner the ramifications of signing the Stipulation in the context of the attempt issue when they advised Petitioner to sign the Stipulation (Id.);
>
> The sworn statements set forth in paragraphs (i) - (iii) above, compel the conclusion Petitioner was not aware of the consequences of signing the Stipulation because his defense counsel failed to explain those consequences to him prior to Petitioner signing the Stipulation. (Id.). Nor was Petitioner aware the Stipulation was equivalent to pleading guilty to attempted bank fraud because defense counsel did not discuss the attempt charge with him prior to the Government closing at trial. (Id.). Nor did the trial judge

explain the Stipulation alone could be the sole basis to convict Petitioner for attempted bank fraud.

B. Basis For Federal Jurisdiction in Court of First Instance

The questions presented in this Petition were originally raised in the United States District Court for the District of Massachusetts pursuant to an application Petitioner filed to vacate, set aside, or correct his conviction under 28 U.S.C. §§ 2255(a) and (f)(1)., (A. 104a-116a). The district court denied the application without opinion. The district court also stated no application for a COA would be granted (A. 159a). The district court did not direct the parties to submit argument regarding whether a COA should issue. (Id.). Nor did the district court explain why any request for a COA would be denied. (Id.).

Petitioner renewed the ineffective assistance argument in an application to the First Circuit pursuant to a request for a COA under Section 2253(c). (A. 160a). Without opinion, the First Circuit dismissed the application and affirmed the denial of a COA (A. 162a-163a). In a Petition for Panel Rehearing and Rehearing En Banc, Petitioner argued the court of appeals misapprehended material issues of law and the COA should be granted. (A. 164a-167a). The court of appeals without opinion denied the Petition for Panel Rehearing and Rehearing En Banc. (A. 168a-169a). As explained supra, jurisdiction to review the final Judgment and Order of the court of appeals affirming the denial of the COA vests in this Court pursuant to Section 1254(1). Accordingly, the questions presented for review are properly

preserved and ripe for consideration and adjudication by this Court.

ARGUMENT

I. REASONS FOR GRANTING THE WRIT

Petitioner respectfully states the Petition for a Writ of Certiorari should be granted; the Sentence and Judgment of Conviction set aside and vacated and a new trial ordered; or in the alternative a COA granted and the case remanded for a hearing with respect to the ineffectiveness-of-counsel issue for the following reasons: (i) Pursuant to the two-part test enunciated in Strickland v. Washington, 466 U.S. 668, 687-88, 692 80 L. Ed. 2d 674 (1984) (O'Connor, J.); defense counsel rendered ineffective assistance to Petitioner on the grounds their advice to sign the Stipulation fell below an objective standard of reasonableness and caused prejudice to the defense; (ii) The magnitude of the constitutionally deficient advice constitutes a "structural error" automatically resulting in a presumption of prejudice requiring a new trial; (iii) The application for a COA should have been granted in the Court of Appeals on the grounds: (a) Petitioner has satisfied the threshold statutory criteria for demonstrating the substantial denial of a constitutional right and (b) denial of the COA is flatly inconsistent with Supreme Court COA precedent; and (iv) The conviction requires reversal and a new trial granted to safeguard the integrity of the judicial process, promote and maintain public confidence in our justice system; avoid undermining public perception of the fair administration of justice and to prevent manifest injustice arising out of the forfeiture of a true and meaningful adversarial proceeding.

II. DEFICIENT AND PREJUDICIAL ADVICE REGARDING THE BANK FRAUD ACT

The following analysis of the deficient advice rendered in connection with the Bank Fraud Act (18 U.S.C. § 1344) is necessary to place the questions regarding (i) the ineffective-assistance-of-counsel claim; (ii) the existence of structural error and (iii) the improvident denial of the COA in proper perspective and bright-line focus. In reliance upon Loughrin v. United States, 573 U.S. 351, 134 S. Ct. 2384 (2014)(Kagan, J.), the First Circuit concluded: "subsections (1) and (2) of the Act [Section 1344] set out two routes to proving criminal liability under the statute." United States v. O'Donnell, 840 F. 3d 15, 18 (1st Cir. 2015) citing and quoting Loughrin, supra, 573 U.S. at 355-361, 134, S. Ct. at 2389-92. The First Circuit further concluded the Loughrin holding: "[also makes clear that proof the defendant violated either subsection is sufficient to support a conviction under the Act." (840 F. 3d at 18). In light of Loughrin, supra, the First Circuit ruled any defendant who "knowingly executes or attempts to execute a scheme or artifice to defraud a financial institution violates" the Act and an "attempt to defraud a financial institution instead of actually knowingly executing a scheme" is sufficient to convict. (A. 91a-103a).

Defense counsel simply did not understand the ambit of Section 1344. They advised Petitioner to sign the Stipulation to obtain Government consent to a bench trial without telling him the Stipulation itself was equivalent to an admission of guilt. Nor did they discuss the attempt charge with Petitioner before he signed the Stipulation or at any time prior to the trial judge raising the "attempt" issue with the Government during closing

argument. The trial judge found the Petitioner guilty of attempt and convicted him of violating subsection (1) of the Bank Fraud Act (Section 1344). (840 F. 3d at 18). The Stipulation was all that was needed to convict the Petitioner of the attempted bank fraud charge and foreclosed any outcome other than a verdict adverse to the Petitioner at the conclusion of the bench trial. The error embedded in the failure to advise Petitioner of the ramifications of the Stipulation in relation to Section 1344 is structural because the error "affected the framework within which the trial proceeded" and deprived Petitioner of his right to a "true and meaningful adversarial proceeding."

III. ASSISTANCE OF COUNSEL

A. Governing Principles

(1) The Fundamental Right to Assistance of Counsel

Beyond any question, "[t]he right to counsel is a fundamental right of criminal defendants; it assures the fairness, and thus the legitimacy, of our adversarial process." See, Kimmelman v. Morrison, 477 U.S. 365, 385, 91 L. Ed. 2d 305, 326 (1986)(Brennan, J.); (McCoy v. Louisiana, 584 U.S. __, 138 S. Ct. 1500, 1507, 200 L. Ed. 2d 821, 829) ("The Sixth Amendment guarantees to each criminal defendant the assistance of counsel for his defense"); Gideon v. Wainwright, 372 U.S. 335, 343, 9 L. Ed. 2d 799, 804 (1963)(Black, J.) (The assistance of counsel is one of the safeguards of the Sixth Amendment necessary to ensure fundamental human rights of life and liberty ... The Sixth Amendment stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not be done.")(citations omitted) (internal brackets

omitted). Safeguarding the fundamental "right to counsel is the foundation stone of our adversary system." (Trevino v. Thaler, 569 U.S. 413, 422, 185 L. Ed. 2d 1044, 1052 (2013)(Breyer, J.), citing, Martinez v. Ryan, supra, 566 U.S. 1, 12, 182 L. Ed. 2d 272, 285 (2012) (Kennedy, J.).

(2) The Fundamental Right to Effective Assistance of Counsel

Equally fundamental is the right of every criminal defendant to "effective counsel throughout the trial process." Johnson v. Zerbst, 304 U.S. 458, 467, 304 L. Ed. 2d 1461, 1463 (1938)(Black, J.) ("[C]ompliance with this constitutional mandate is an essential prerequisite to a federal court's authority to deprive an accused of life or liberty"); Martinez v. Ryan, supra, 132 S. Ct. at 1317, 182 L. Ed. 2d at 285 quoting Powell v. Alabama, 287 U.S. 45, 69, 77 L. Ed. 2d 158, 170 (1932)(Sutherland, J.) "The [defendant] requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he may not be guilty, he faces the danger of conviction because he does not know how to establish his innocence."). Sixth Amendment precedents of this Court guarantee every criminal defendant the right to effective assistance of counsel. (Strickland v. Washington, 466 U.S. at 668, 686, 688 and 692, 80 L. Ed. 2d 674, 693 and 696 (1984); Garza v. Idaho, 139 S. Ct. 738, 744, 203 L. Ed. 2d 77, 85 (2019)(Sotomayor, J.) (same); Ayestas v. Davis, 138 S. Ct. 1080, 1096, 200 L. Ed. 2d 376, 392 (2018)(Sotomayor, J., concurring) ("The right to the effective assistance of counsel ... is a bedrock principle in our justice system."); Buck v. Davis, 580 U.S. 137, __ S. Ct. 759, 775, 197 L. Ed. 2d 1, 18 (2017)(Roberts, C.J.) ("The Sixth Amendment right to counsel is the right to effective counsel.");

McMann v. Richardson, 397 U.S. 759, 771 n.14, 25 L. Ed. 2d 763, 773 n.14 (1970)(White, J.) ("It has long been recognized ... the right to counsel is the right to the effective assistance of counsel.").

Indeed, "once the adversary judicial process has been initiated" the right to effective assistance attaches at "all critical stages of the criminal proceedings" (Missouri v. Frye, 566 U.S. 134, 140, 182 L. Ed. 2d 379, 387 (2012)(Kennedy, J.), citing Montejo v. Louisiana, 556 U.S. 778, 786, 173 L. Ed. 2d 955, 963 (2009)(Scalia, J.) including critical pretrial stages. Lafler v. Cooper, 566 U.S. 156, 165, 182 L. Ed. 2d 398, 408 (2011)(Kennedy, J.). Addressing the right to counsel during the pre-trial phase; the eminent jurist and constitutional scholar, Mr. Justice Brennan, incisively observed in Maine v. Moulton, 474 U.S. 159, 170, 88 L. Ed. 2d 481, 492 (1985):

> The right attaches at earlier "critical" stages of the criminal justice process where the results might well settle the accused's fate and reduce the trial itself to a mere formality.

(internal quotation marks in original), quoting United States v. Wade, 388 U.S. 218, 294, 18 L. Ed. 2d 1149, 1156 (1967)(Brennan, J.). The Stipulation foreclosed any outcome other than one adverse to the Petitioner. The relevant decisions of this Court cited and discussed above compel the conclusion Petitioner was entitled to effective assistance of counsel when he signed the Stipulation because the Stipulation "held significant consequences" for him. Woods v. Donald, 575 U.S. 135, __ S. Ct. 1372, 1376, 191 L. Ed. 2d 464, 468 (2015)(per curiam) quoting Bell v. Cone, 535 U.S. 685, 696, 152 L. Ed. 2d 914,

927 (2001)(per curiam). Instead of effective advice, Petitioner received just the opposite. He received deficient advice prejudicial to his defense foreclosing any result other than an adverse outcome.

B. Ineffective Assistance - Strickland v. Washington

The standard to determine whether counsel has rendered ineffective assistance is set forth in the two-part test articulated in Strickland v. Washington, supra, 466 U.S. at 688 and 692, 80 L. Ed. 2d at 693 and 696. To establish ineffective assistance Petitioner must demonstrate both deficient performance and prejudice to his defense. (Strickland, supra, 466 U.S. at 688 and 692, 80 L. Ed. 2d at 693 and 696; Lee v. United States, __ U.S. __, 137 S. Ct. 1958, 1964, 198 L. Ed. 2d 476, 484 (2017)(Roberts, C.J.); ("To demonstrate ... counsel was constitutionally ineffective a defendant must show ... representation fell below an objective standard of reasonableness and ... he was prejudiced as a result"); see Sexton v. Beaudreaux, 138 S. Ct. 2555, 2558, 201 L. Ed. 986, 990 (2018)(per curiam); Garza, supra, 139 S. Ct. at 744, 203 L. Ed. 2d at 85; Hill v. Lockhart, 474 U.S. 52, 57, 88 L. Ed. 2d 203, 209 (1985)(Rehnquist, J.). Prejudice is shown if there is reasonable probability the outcome of the proceeding would have been different but for the deficient performance (or unprofessional errors) of counsel. (Strickland, supra, 466 U.S. at 694, 80 L. Ed. 2d at 698; Lafler, supra, 566 U.S. at 163, 182 L. Ed. 2d at 406-07; Bell v. Cone, 535 U.S. 685, 695, 152 L. Ed. 2d 984, 297 (2002)(Rehnquist, C.J.); Hill v. Lockhart, at 57, 88 L. Ed. 2d at 209. Even in the face of the "highly deferential" treatment accorded the performance of counsel (Strickland v. Washington, supra, 466 U.S. at 490, 80 L. Ed. 2d at

694 and the "strong presumption of reliability given to judicial proceedings" (Smith v. Robbins, 528 U.S. 259, 286, 145 L. Ed. 2d 756, 781 (2000)(Thomas, J.) there is not an iota of legitimate doubt defense counsel rendered constitutionally deficient advice to Petitioner during the pre-trial phase of the proceedings. Nor is there any doubt that advice denied Petitioner the right to an adversarial proceeding.

C. Deficient Advice Prejudicial To The Defense

Deference is owed only to the strategic decisions of counsel made after "thorough investigation of law and facts relevant to plausible options, Strickland v. Washington, supra, 466 U.S. at 690, 80 L. Ed. 2d at 695. There is no strategic and/or tactical justification for pleading guilty to the attempt charge in exchange for government consent to a bench trial. In Hinton v. Alabama, supra, this Court declared: "An attorney's ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under Strickland." (571 U.S. at 274; 134 S. Ct. at 1088). In this connection the Hinton Court stressed: "[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigation unnecessary." Hinton v. Alabama, 571 U.S. 263, at 274, 134 S. Ct. at 1089. See Williams v. Taylor, 529 U.S. 362, 395, 146 L. Ed. 2d 389, 419 (Counsel provided ineffective assistance at sentencing as a consequence of failure to ascertain governing law regarding access to records).

Defense counsel advised Petitioner to sign a Stipulation equivalent to a change of plea to the

attempted bank fraud charge. At the time of rendering this advice, Attorney Denner was unaware of the scope and operation of the Bank Fraud Act and still clings to an erroneous view of the law: "I did not then and do not now believe that the conviction for 'attempt' was legally sustainable." Defense counsel also admit "we did not specifically discuss [the attempt issue] with O'Donnell [the Petitioner] until the court raised it with the government during closing argument." The failure to advise Petitioner of the "attempt issue" and the full extent of the ramifications of the Stipulation is an example of pernicious ineffectiveness of structural dimension falling far outside "the wide range of professionally competent assistance demanded by the Sixth Amendment." Hill, supra, 474 U.S. at 62, 88 L. Ed. 2d at 212 citing Strickland, supra 466 U.S. at 687-88, 80 L. Ed. 2d at 693-694 (See Section IV infra).

Failing to understand the operation and scope of the Bank Fraud Act and the specific elements of an "attempt" under the Act is inexcusable and ineffective. Nor is there any justification for defense counsel failing to explain the full significance of the law in relation to the Stipulation. "The failure of an attorney to inform his client of the relevant law clearly satisfies the first prong of the Strickland analysis ...". (Hill v. Lockhart, supra, 474 U.S. at 62, 88 L. Ed. 2d at 212). Defense counsel knew Petitioner had declined to plea and decided to proceed to trial. Petitioner had instructed defense counsel to negotiate to obtain Government consent to a bench trial. He did not authorize defense counsel to conduct plea negotiations. If Petitioner had known of the consequences of executing the Stipulation there is a "reasonable probability" he would not have signed and proceeded to a jury trial. (Lee v. United

States, supra, 582 U.S. __ , 137 S. Ct. , 198 L. Ed. 2d at 483-485). At no time did defense counsel (or the trial judge) advise him the Stipulation was equivalent to entering a guilty plea to the attempt charge.

Petitioner relied upon the advice of defense counsel when he signed the Stipulation; he believed the Stipulation comprised part of an agreement to secure Government consent to a bench trial and he waived his right to a jury in further reliance upon a quid pro quo: Stipulation and jury waiver for a bench trial, not a guilty plea for a bench trial. Just like the defendant in Lee, supra, Petitioner was denied the "entire judicial proceeding to which he had a right." (See Lee, supra, 198 L. Ed. 2d at 484). The advice defense counsel rendered fails the Strickland test and the case should be remanded for a new trial to prevent injustice to Petitioner and irreparable damage to the integrity of the judicial process and undermining public perception of the fairness of the system of criminal justice.

The defense counsel affidavits including the captured perceptions of defense counsel at the time they advised Petitioner to sign the Stipulation. Thus, the affidavits eliminate the potentially "distorting effects of hindsight" [in] reconstructing the circumstance of counsel challenged conduct." Strickland v. Washington, supra, 466 U.S. at 694, 80 L. Ed. 2d at 695.

IV. STRUCTURAL ERROR

A. The Magnitude of the Constitutionally Deficient Advice Constitutes Structural Error.

In certain Sixth Amendment contexts, "prejudice is presumed." Garza, supra, 586 U.S. __, 139 S. Ct. 200 L. Ed. 2d at 85. Because the errors in question "should not be deemed harmless beyond a reasonable doubt." Chapman v. California, 386 U.S. 18, 23, n.8, 17 L. Ed. 2d 705, 710, n.8 (1967) (Kennedy, J.). These particular contexts "came to be known as structural errors" Weaver v. Massachusetts, 582 U.S. __, 137 S. Ct. 1899, 1907, 198 L. Ed. 2d 420, 431 (2017)(Kennedy, J.). The structural error "categories are not rigid." The denial of a true and meaningful adversarial proceeding renders the trial fundamentally unfair and is an error of structural magnitude. (Weaver, supra, 137 S. Ct. at 1908, 198 L. Ed. 2d at 432) as discussed in the ensuing paragraphs.

Defense counsel affidavits filed in this case averring to their conduct at the time they rendered their advice with respect to the Stipulation demonstrate counsel failed in their duty to investigate and to research the case in a manner sufficient to support informed legal judgments. Their misapprehension of the operating scope of Section 1344 and essential elements of an attempt charge under the Act is a quintessential example of unreasonable performance. Hinton v. Alabama, supra, 571 U.S. at 274, 134 S. Ct. 1081, 1089. Deference to the decisions of counsel is not limitless. "Counsel must demonstrate a basic level of competence regarding the proper legal analysis governing each stage of a case." (United States v.

Carthorne, 878 F. 3d 458, 468 (4th Cir. 2017) citing Hinton v. Alabama, supra, 571 U.S. at 274, 134 S. Ct. at 1089). Automatic reversal and a new trial is appropriate on the ground the deficient advice rendered to Petitioner regarding the Stipulation constitutes structural error. Structural errors (i) affect the framework within which the trial proceeds as opposed to an error in the trial itself (Arizona v. Fulminante, supra, 499 U.S. at 310, 113 L. Ed. 2d at 331) and (ii) deprive defendants of "basic protections without which a criminal trial cannot reliably *serve* its function as a vehicle for determination of guilt or innocence." Neder v. United States, 527 U.S. 1, 8-9, 144 L. Ed. 2d 35, 46-47 (1999)(Rhenquist, C.J.), quoting Rose v. Clark, 478 U.S. 570, 577-78, 92 L. Ed. 2d 460, 470 (1986)(Powell, J.). The deficient advice infected "the framework within which the trial proceed[ed] ..." and is much more than rather than simply "an error in the trial itself." Neder, supra, 527 U.S. at 8, 144 L. Ed. 2d at 46 quoting Fulminante, supra, 499 U.S. at 310, 13 L. Ed. 2d 331.

The advice to sign a Stipulation equivalent to pleading guilty to attempted bank fraud "infect[ed] the entire trial process" Brecht v. Abrahanson, 507 U.S. 619, 630, 123 L. Ed. 2d 353, 367 (1993)(Rhenquist, C.J.); "necessarily rendered [the] trial fundamentally unfair" (Rose v. Clark, supra, 478 U.S. at 577, 92 L. Ed. 2d at 470; "deprived Petitioner of basic protections without which a criminal trial cannot reliably serve its function as a vehicle for the determination of guilt or innocence ..." (Neder, 527 U.S. at 8, 144 L. Ed. 2d at 46) and "def[ies] harmless error review." (Id.). The Stipulation: (i) blocked any meaningful opportunity of subjecting the Government case to "the crucible of adversarial testing" (United States v. Cronic, 466

U.S. 648, 656, 30 L. Ed. 2d 657, 666 (1984)(Stevens, J.); (ii) guaranteed an adverse outcome before the bench trial commenced effectively forfeiting the trial itself (See Roe v. Flores-Ortega, 528 U.S. 470, 483, 145 L. Ed. 2d 985, 999 (2000)(O'Connor, J.) and (iii) rendered the entire process including the trial itself presumptively unreliable." This Court has emphatically declared: "It is our responsibility under the Constitution to ensure that no criminal defendant is left to the mercies of incompetent counsel." (Padilla v. Kentucky, 559 U.S. 356, 176 L. Ed. 2d 284, 299 (2010)(Stevens, J.) The Stipulation determined the verdict and of necessity affected "the framework within which the trial proceed[ed]" (Weaver, supra, 137 S. Ct. at 1907, 198 L. Ed. 2d at 431). As a result, the error in advising Petitioner to sign the Stipulation is structural and not "simply an error in the trial process itself." (Fulminante, supra, 499 U.S. at 310; 113 L. Ed. 2d at 331). The Stipulation in this case denied Petitioner the right to a true and meaningful adversarial trial; a right Petitioner "wanted at the time and to which he had a right." (Flores-Ortega, supra, 528 U.S. at 483, 145 L. Ed. 2d at 999. Accordingly, the error ranks as structural, prejudice is presumed and reversal and a new trial are auto.

> Mr. Justice Harlan in his separate opinion in Brookhart v. Janis, 384 U.S. 1, 8-9, 16 L. Ed. 2d 314, 319-320 (1966) provides insight into the devastating effect of the Stipulation. Mr. Justice Harlan observed: "I believe for federal constitutional purposes the procedure agreed to ... involved so significant a surrender of the rights normally incident to a trial that it amounted

> almost to a plea of guilty." The deficient advice in this case is "constructural error of the first magnitude" (United States v. Cronic, 466 U.S. 648, 659, 80 L. Ed. 2d 657, 688 (1984)(Stevens, J.) and no amount of showing want of prejudice [will] cure it."

As in Brookhart, supra, the Stipulation "amounted to the functional equivalent of a guilty plea." United States v. Lyons, 898 F. 2d 210, 214 (1st Cir. 1990)(Torruela, Circuit Judge). Because the Stipulation was "freighted with what is more than ordinary significance" the trial judge should have been at "some special pains to satisfy himself that the defendant is fully informed about what precisely he is giving up." United States v. Strother, 528 F. 2d 357, 404 (D.C. Cir. 1978) cited and quoted with approval in Lyons, supra. At no point during the pre-trial hearing held in connection with the Stipulation and jury waiver did the trial judge inform Petitioner of precisely what he was signing. The trial Judge did not take special pains to advise Petitioner the court could resolve the case on the Stipulation standing alone and could find him guilty of attempted bank fraud because the Stipulation itself was tantamount to a full admission of guilt providing "both evidence and verdict, ending controversy." Boykin v. Alabama, 395 U.S. 238, 242, n.4, 23 L. Ed. 2d 274, 279 n.4 (1969)(Douglas, J.). The Stipulation is "an event of significance" in the proceeding (Florida v. Nixon, 543 U.S. 175, 187, 160 L. Ed. 565, 578 (2004)(Ginsburg, J.) and "not simply a strategic choice." (Boykin, supra, 395 U.S. at 242, 23 L. Ed. at 279. The outcome determinative nature of the Stipulation and concomittant "high stakes for the" Petitioner required "the utmost solicitude" of defense counsel

as well as the trial judge. Florida v. Nixon, supra, 543 U.S. at 187, 160 L. Ed. 2d at 518 (citation omitted); (Boykin, supra, 395 U.S. at 243, 23 L. Ed. 2d at 280). Here counsel failed to render any advice regarding the consequences with respect to the attempt charge and the trial judge did not explain the full extent of the consequences of signing the Stipulation. On multiple levels the system broke down depriving Petitioner of his fundamental right to effective assistance of counsel and to a fair trial.

> The structural error arising out of the ineffectiveness-of-counsel in this case does not "function as a way [for Petitioner] to escape rules of waiver and forfeiture and raise issues not preserved at trial ... this undermining the finality of verdicts." (Weaver, supra, at 1912, 198 L. Ed. 2d at 436). The Stipulation created a core "structural defect" in the "constitution of the trial mechanism" Arizona v. Fulminante, 499 U.S. 279, 309, 113 L. Ed. 2d at 331 (1991) (Rehnquist, C.J.) (separate opinion) affecting "[t]he entire conduct of the [bench] trial from beginning to end" (Id.) and leaving "the prosecution case unexposed to meaningful adversarial testing." Florida v. Nixon, supra, 543 U.S. at 185, 160 L. Ed. 2d at 576 citing Cronic, supra, 466 U.S. at 658-59, 667-68, 80 L. Ed. 2d at 8. The error is structural because the deficient performance resulted in forfeiture of the adversarial proceeding itself (Flores-Ortega supra, 528 U.S. at 483, 145 L. Ed. 2d at 999, ---) which the

Petitioner "wanted at the time and to which he has a right. (Id.).

The Constitutionally deficient performance in this case undermined the proper functioning of the adversarial process; allowed the government case to escape the crucible of "meaningful adversarial testing" Cronic, supra, 460 U.S. at __; 80 L. Ed. 2d at 663, 659 (1984); deprived Petitioner of his right to a true adversarial trial" and "mandates a presumption of prejudice" Flores-Ortega, supra, at 528 U.S. 470, 483 145 L. Ed. 2d at 999. "[T]he adversary process itself [in this case] is presumptorily unreliable." (Cronic, supra, 466 U.S. at 659, 80 L. Ed. 2d at 668). The "fundamental unfairness" to Petitioner is manifest (Weaver v. Massachusetts, supra, 137 S. Ct. at 1907, 198 L. Ed. 2d at 431. For these reasons, the conviction should be set aside and vacated and a new trial ordered.

The structural error doctrine is a safeguard against erosion of public confidence in the integrity and fairness of judicial proceedings. The lower courts should have recognized the magnitude of the error and ordered a new trial or at a minimum remanded for an evidentiary hearing with respect to the ineffectiveness issue. Their failure to implement either remedy is in direct conflict with decisions of this Court holding errors affecting the fairness, integrity or public perception of judicial proceedings require correction. (Rosales-Mireles v. United States, 585 U.S. __, 138 S. Ct. 1897, 1909, 201 L. Ed. 2d 376, 388 (2018)(Sotomayor, J.).

V. CERTIFICATE OF APPEALABILITY

A. Section 2253(c)(2)

The statutory standard for granting a COA is "straight-forward." (Slack v. McDaniel, 529 U.S. 473, 484, 146 L. Ed. 2d 542, 554-55 (2000)(Kennedy, J.). Section 2253(c)(2) of Title 28 of the United States Code ("Section 2253(c)(2") governs issuance of a COA. Pursuant to Section 2253(c)(2) the Petitioner "need only demonstrate 'a substantial showing of the denial of a constitutional right.'" Miller-El v. Cockrell, 537 U.S. 322, 327, 154 L. Ed. 2d 931, 944 (2003)(Kennedy, J.). The most Petitioner must demonstrate is "jurists of reason could disagree with the resolution of his constitutional claims or that jurists could concede the issues presented are adequate to deserve encouragement to proceed further." Miller-El, supra, 537 U.S. at 327, 154 L. Ed. 2d at 944, Buck v. Davis, 137 S. Ct. at 773, 197 L. Ed. 2d at 16 (2016)(Roberts, J.). Affirming the denial of the COA is contrary to the statutory standard as well as relevant COA jurisprudence of this Court.

B. The COA Should Be Granted

With respect to issuance of a COA the only question is "whether reasonable jurists could debate" the denial of the claim or, in the alternative, the claim is adequate to deserve encouragement to proceed further. See Buck v. Davis, 580 U.S. __, 137 S. Ct. 759, 773, L. Ed. 2d 1, 16 (2017)(Roberts, J.); Miller-El v. Cockerell, 537 U.S. 322, 336-37 (2003)(Kennedy, J.); Slack v. McDaniel, 529 U.S. 473, 484, 146 L. Ed. 2d 542, 554 (2000)(Kennedy, J.); Barefoot v. Estelle, 463 U.S. 880, 893 n.4, 77 L. Ed. 2d 1090, 1104 n.4, (1983)(White, J.).

In Buck v. Davis, supra, Mr. Justice Roberts (now Chief Justice of this Honorable Court) (writing for the majority in a 6-2 decision reversing the Fifth Circuit denial of a COA and remanding the case for further proceedings) delineated the proper legal standard for issuance of a Certificate of Appealability:

> The COA inquiry, we have emphasized, is not co-extensive with a merits analysis. At the COA stage, the only question is whether the Applicant has shown that jurists of reason could disagree with the District Court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further ... The threshold question should be decided without full consideration of the factual or legal basis advanced in support of the claims ... When a court of Appeals sidesteps [the COA] process by first deciding the merits of an appeal, and then justifying its denial of a COA based on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction.

(137 S. Ct. at 773, 197 L. Ed. 2d at 16).

Petitioner need only show the issues he raised are debatable among fair minded jurists or adequate to deserve further encouragement to satisfy the statutory threshold for issuance of a certificate of appealability. Petitioner has satisfied the threshold statutory standard for a COA. Consequently the decision of the court of appeals denying the COA

should be reversed and a new trial ordered or in the alternative the case remanded for further consideration of the ineffectiveness-of-counsel issue.

VI. QUESTION OF EXTRAORDINARY AND COMPELLING PUBLIC IMPORTANCE - THE FAILURE TO CORRECT THE STRUCTURAL ERROR FORFEITING THE ADVERSARIAL PROCEEDING WILL UNDOUBTEDLY CAUSE IRREPARABLE DAMAGE TO THE INTEGRITY OF THE JUDICIAL PROCESS; SEVERELY IMPERIL PUBLIC CONFIDENCE IN OUR SYSTEM OF JUSTICE; AND UNDERMINE PUBLIC PERCEPTION OF THE FAIR ADMINISTRATION OF JUSTICE

The stakes in this case are high. The conviction is the direct consequence of ineffective-assistance-of-counsel rising to the magnitude of structural error. The abrogation of a bedrock principle of our system of justice should not and cannot be countenanced without the risk of severe damage to the integrity of the criminal justice system. The enduring effectiveness of our courts depends in large measure on the willingness of the public to respect and follow judicial decisions. (T. Tyler, Why People Obey the Law 164 (2006) cited with approval in Rosales-Mireles, supra, 138 S. Ct. at 1907, 201 L. Ed. 2d at 387. Petitioner states most respectfully failure to correct the structural error in this case and order a new trial "may well undermine public perception of the proceedings!" and impair public confidence in our courts and justice system. (Id.). As a Founding Father observed more than 200-years ago: unlike the executive or legislative, the judiciary "has no influence over either the sword or the purse." (The Federalist No. 78, p. 465 (J. Cooke

ed. 1961) (A. Hamilton). Public confidence in the integrity of our judicial process and the fair administration of justice is the sustaining lifeblood of our criminal justice system. Without such confidence the system would surely wane and wither. Quite apart from the manifest injustice to the Petitioner resulting from the denial of his right to effective counsel and his right to a fair trial through the mechanism of a true and meaningful, adversarial proceeding, the failure to correct the structural error can only erode and damage public confidence in our system of justice. The necessity of avoiding this consequence cannot be overstated.

CONCLUSION

This Court has recognized Sixth Amendment remedies should be "tailored to the injury suffered from the constitutional violation." Lafler v. Cooper, supra, 566 U.S. 162, 182 L. Ed. 2d at 411 and "neutralize the taint of a constitutional violation." (Id.) Petitioner received constitutionally deficient advice prejudicial to his defense. The magnitude of the deficiency and forfeiture of the adversarial proceeding constitutes structural error. Whether viewed from the vantage point of Strickland v. Washington scrutiny or the doctrine of structural error, there is no doubt granting a new trial is the required corrective. Petitioner was deprived of a true and meaningful adversarial trial proceeding rendering the trial unreliable as a mechanism for determining guilt or innocence. Equally apparent is the denial of a COA regarding the issue of ineffectiveness of counsel is contrary to Section 2253(a) and relevant precedents of this Court. The relevant, material facts and applicable law demonstrates fair minded jurists could debate the

court of appeals decision and the gravity of the ineffectiveness shows the issues raised are deserving of further encouragement to proceed. As an alternative to remanding for a new trial, the Application for a COA should be granted and the case remanded for further consideration of the ineffective-assistance-of-counsel issue.

Respectfully submitted,

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Dated: August 20, 2020