20-5830

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

TARYN CHRISTIAN,

Petitioner

v.

TODD THOMAS,

Respondent

ORIGINAL

On Petition for Writ of Certiorari Before Judgment to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI BEFORE JUDGMENT

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QUESTIONS PRESENTED

Counterintuitive though it may be in this later stage in the litigation, which has gone on for more than two decades, the fact is, that this petitioner has never had his case heard on the actual facts and evidence that was in the possession of the prosecutors at the time of his trial. Given the existing record of new developments, it is clear, and as this Court's decision in McCoy v. Louisiana, 584 U.S. __ (2018), has confirmed, that the trial was not fair, was a perversion of the truth, and produced an unreliable result.

At petitioner's 1997 trial, the trial court excluded three witnesses from testifying that the initial suspect had confessed to the murder and implicated the victim's girlfriend in the crime. Defense counsel went to trial having conducted no investigation of the initial suspect and his ties to the victim. As trial began, counsel insisted petitioner give his signed consent allowing him to argue "self-defense" and admit identification. Over petitioner's objection and without written consent, counsel abandoned the defense's position from his opening statement that petitioner was an innocent party, and in a stunning turnaround—argued in closing, that petitioner, in extreme emotional disturbance had stabbed the victim in "self-defense."

In 2008, the district court granted petitioner habeas relief under Chambers v. Mississippi, 410 U.S. 284 (1973), and denied petitioner's Sixth Amendment claim involving trial counsel's actions arguing "self-defense" over petitioners' objection. Despite well-establish law at the time, the district court defended counsel's actions as "strategic" trial strategy on grounds that because there was not "strong enough" evidence to corroborate a third-party's confessions to the murder, *"it was within the wide range of competence and trial strategy to argue that in the event the jury believed the prosecution, it should consider that the stabbing was in self-defense."*

The district court failed to recognize that a strategic decision that does not conform to the client's objectives is ethically impermissible. As the record below documents—the district court engaged in a pattern of egregious legal error by intentionally failing to follow the law. More fundamentally, the effort to excuse the misconduct of habeas prosecutors to constrain the judiciary's inherent authority to police fraud on the court, is an alarming position for a district court to embrace. The district court's repeated failure to rule on petitioner's Brady claims presented in the original petition and in subsequent motions is not ambiguous. The district court's disabling conflict lies in the simple fact that the judge would have to find Brady misconduct against his former law students—a decision the district court has avoided at all costs.

The original panel deciding Christian v. Frank, (2010) took the unprecedented step to set in place an order permanently barring petitioner's case from *any* collateral review, no matter the circumstances. These errors of law combined to deprive

petitioner of the habeas review of his claims to which he was entitled under 28 U.S.C. §2254, effectively depriving him of his first habeas corpus petition.

A decade after the district court defended trial counsel's actions in conceding petitioner's guilt, this Court pronounced in McCoy v. Louisiana, 138 S. Ct. 1500, 1508 (2018), that the Sixth Amendment guarantees a defendant the right to choose "the objective of his defense and to insist that his counsel refrain from admitting guilt." McCoy's holding confirms the district court's manifest error in defending trial counsel's actions over petitioner's objection, resulted in "a grave miscarriage of justice" because petitioner was denied the right to make a fundamental choice about his own defense.

Under these circumstances, petitioner properly sought to reopen his habeas application invoking McCoy, because he had been erroneously left without any adjudication of the merits of his claims on the exculpatory evidence known and in the possession of the state. Therefore, petitioner's Rule 60(d)(1) independent action is analogous to the motion at issue in Stewart v. Martinez-Villareal, 523 U.S. 637 (1998), which determined that since a habeas petitioner was entitled to an adjudication of all of the claims presented in his earlier, reviewable, application, a petitioner is not required to get authorization to file a "second or successive" application in which he seeks to re-raise a claim previously presented, where, as here, is inextricably intertwined with his Brady claims, that were never decided.

The questions presented are as follows:

1. Whether the district court ignored due process by its repeated failure to rule on petitioner's Brady claims.

   Whether a district court judge's impartiality might reasonably be questioned requiring recusal under 28 U.S.C. §455(a) and reassignment, where the court's disabling conflict lies within the fact that the government's attorneys who violated Brady—are former law students of the district court judge.

2. Whether the failure by the Ninth Circuit to address a viable claim of fraud on the court directed at the three-judge panel, is in square conflict with decisions of this Court and of other circuits.

3. Whether the Court of Appeals can properly assess the equities involved in a recharacterized valid Rule 60(d)(1) independent action, without the full court first addressing fraud on the court that corrupted the panel's Chambers analysis, where the same material facts are involved in petitioner's Sixth Amendment claim invoking McCoy.

4. Whether the panel's order entered on September 15, 2011, permanently closing petitioner's habeas case from review, can continue to be enforced where two members of the panel are deceased.

PARTIES TO THE PROCEEDING

Petitioner, Taryn Christian, is the Petitioner in the District Court and the Petitioner-Appellant in the Court of Appeals for the Ninth Circuit.

The Respondents are the State of Hawaii.

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VOLUME II

PETITION FOR WRIT OF CERTIORARI BEFORE JUDGMENT

Petitioner Taryn Christian respectfully petitions for a writ of certiorari before judgment to review the decision of the United States District Court for the District of Hawaii in this case. The order of the District Court transferring petitioner's case to the United States Court of Appeals for the Ninth Circuit is currently pending.

In the alternative, petitioner respectfully requests review of the orders entered in the Court of Appeals that rely and refer to an order entered September 15, 2011, stating petitioner's case is "closed" from any further review.

OPINIONS AND ORDERS BELOW

The order of the District Court transferring petitioner's Rule 60(d)(1) independent action invoking McCoy v. Louisiana, 584 U.S. ___ (2018), to the Court of Appeals as an application to file a "second or successive" habeas petition corpus requiring authorization, dated January 4, 2019, is attached as (App. A-1).

The order of the District Court dated January 4, 2019, denying Rule 60(b)(6) motion requesting resolution of contrary rulings in light of McCoy and for recusal, is attached as (App. A-2). The order of the District Court dated February 4, 2019, denying a Certificate of Appealability, is attached as (App. A-3).

The order of the Appellate Commissioner dated May 7, 2019, denying motion for full court review of Christian v. Frank, 595 F.3d 1076 (9th Cir. 2010), because case is "closed" per order September 15, 2011, and holding case in abeyance pending final resolution of Rule 60(b)(6) appeal under **19-15179**, is attached as (App. B-1).

The order of the panel dated June 14, 2019, denying reconsideration of the

Appellate Commissioner's order under **19-70036**, is attached as (App. B-2).

The order of the panel dated December 13, 2019, denying [Petitioner's Urgent Motion Requesting Judicial Determination by the Full Court Whether his Habeas Case is Subject to Comprehensive Review of his Transferred Rule 60(d)(1) Independent Action Invoking McCoy v. Louisiana or is Precluded Review per Order of September 15, 2011], and holding case in abeyance pending resolution of McGee v. United States, (18-72243) is attached as (App. B-3).

The order of the panel dated December 20, 2019, denying *en banc* review of denial of COA in **19-15179**, is attached as (App. B-4). The order of the panel dated February 28, 2020, requiring Respondent's response to petitioner's transferred motion under McCoy, in **19- 70036**, is attached as (App. B-5).

The order of the District Court dated February 15, 2017, denying motion to reopen the Rule 60(d)(3) proceedings to admit testimonial evidence of trial counsel, regarding the state's false claim that critical Brady material was produced to counsel at petitioner's trial, is attached as (App. C-1).

The order of the District Court dated July 10, 2013, acknowledging true Rule 60(b)(3) motion filed by petitioner in 2011 was not a "successive" petition and defining fraud on the court, is attached as (App. C-2). The order of the District Court dated January 31, 2014, setting hearing and compelling production of specified Brady material, is attached as (App. C-3). The order of the District Court dated February 23, 2011, recharacterizing and transferring true Rule 60(b)(3) motion to Ninth Circuit as an unauthorized "successive" habeas petition, is attached as (App. C-4). The order

of a three-judge panel dated November 15, 2011, denying the Rule 60(b)(3) motion as a prohibited "successive" petition, is attached as (App. C-5).

The published opinion of the Ninth Circuit dated February 19, 2010, reversing the grant of habeas relief in Christian v Frank 595 F.3d. 1076 (9th Cir. 2010), is attached as (App. D-1). The panel's unpublished memorandum denying a COA, dated February 19, 2010, is attached as (App. D-2). The panel orders denying petitioner's pro se 'motion to recall the mandate' on July 27, 2011, and denial of rehearing *en banc*, on September 15, 2011, are attached as (App. D-3) and (App. D-4).

The order of the District Court granting in part and denying in part habeas corpus relief, dated September 30, 2008, is attached as (App. E).

JURISDICTION

The order of the District Court transferring the case to the Ninth Circuit was entered on January 4, 2019. The order of the Ninth Circuit directing the state's response was entered February 28, 2020. The case is docketed in the Ninth Circuit under **No. 19-70036** and is currently calendared for oral argument on October 19, 2020. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1254(1), 2101(e).

CONSTITUTIONAL, STATUTORY, AND OTHER PROVISIONS INVOLVED

This case involves U.S. Const. art. I sec. 9 (Suspension Clause); Const. amend. V (Due Process Clause); Const. amend. VI and VIII; Federal Rule of Civil Procedure 60(d)(3); Rule 60(b)(6); Rule 60(d)(1); Rule 11, Rules Governing Section 2254 Cases; the Antiterrorism and Effective Death Penalty Act of 1996 (Apr. 24, 1996); 28 U.S.C. § 2244 and 28 U.S.C. § 455.

STATEMENT OF THE CASE

1. Trial and State Appeal.

At petitioner's 1997 trial for second-degree murder, the trial court excluded three witnesses from testifying that the initial suspect, James Burkhart, had confessed to acquaintances and implicated the victim's girlfriend in the crime. Prosecutors argued he was just bragging and that the witnesses were not trustworthy because he was not identified and because two people placed him somewhere else. Appointed counsel, Anthony Ranken, went to trial having conducted no investigation of the initial suspect and his ties to the victim. Before trial, Ranken produced a letter outlining his strategy and insisted petitioner give his signed consent permitting him to argue "self-defense" and to admit identification···despite that petitioner did not match the suspect's description. Petitioner refused consent.

In closing argument, counsel abandoned the defense's position from his opening statement that petitioner was innocent and that a third-party was present at the scene. In a stunning reversal, counsel told the jury that the state's independent witness, Phillip Schmidt, had identified petitioner leaving the scene after an altercation ensued, where petitioner in "self-defense" had stabbed Vilmar Cabaccang. In summation, prosecutors vouched for girlfriend, Serena Seidel's, credibility, arguing Schmidt's failure to identify Burkhart, proved, she was being truthful and had no reason to lie. Petitioner was convicted on all counts and his direct appeal denied in State v. Christian, 88 Hawai`i 407, 411, 967 P.2d 239, 243 (1998). All post-conviction appeals were denied.

2. **District Court Habeas Proceedings.**

Petitioner filed a timely petition for writ of habeas corpus on December 22, 2004. When the magistrate judge granted discovery, prosecutors argued petitioner was on a "fishing expedition" as all evidence had been produced before trial. On May 4, 2006, prosecutors argued: (Dkt. #32 at p. 11) (emphasis from original document).

> "Here, Petitioner's entire actual innocence claim is premised upon James Burkhart being the killer. Indeed, Petitioner concedes that he was at the crime scene, but that someone else killed Cabaccang. **However, Petitioner cannot point to any physical evidence remotely establishing that Burkhart was present at the crime scene on the morning of the murder."**

During an interview before the hearing, Phillip Schmidt identified a photograph of Burkhart in a photographic line-up introduced at trial. An interview with a second witness, Annie Leong, revealed prosecutors had withheld her identification of the person matching Burkhart's description that entered the store where she worked the grave-yard shift. Petitioner's habeas counsel presented argument that the suppression of both Schmidt and Leong's initial identifications "of a different person" made prior to petitioner's arrest, violated the state's' duty under Brady v. Maryland, 373 U.S. 83 (1963). Habeas prosecutors denied any Brady violations. At the hearing, prosecutors attempted to discredit Schmidt's identification of Burkhart -- telling the court his identification was a suspicious "recantation" of his original identification. Regarding Leong, prosecutors introduced testimony that when she met with detectives and made an identification, petitioner's attorney and defense investigator were *also* present. The magistrate judge adopted the argument in its entirety, disregarded Brady and denied petitioner's claim of actual innocence on

grounds that Schmidt had "failed" to originally identify Burkhart. On September 30, 2008, the district court adopted the magistrate judge's recommendation to grant in part and deny in part habeas relief. In granting relief under Chambers, and denying petitioner's Sixth Amendment claim, the court held: (Dkt. #153 at p. 14-17, 29 of 35). See (App. E: 2008 Habeas Order).

> This Court agrees with the Magistrate Judge and after a de novo review independently finds that with respect to the ruling by the Hawaii Supreme Court, it was an unreasonable application of Chambers because it did not consider the strong indicia of reliability of self-inculpatory statements, it did not consider the fact that Burkhart had confessed to at least three persons, each of which provides corroboration for the other, and it did not recognize that the Chambers case does not require the same level of corroboration that was present in Chambers for all cases... Accordingly, this Court finds that the exclusion of the Burkhart confessions was contrary to clearly established federal law, as set forth in Chambers.
>
> This Court also finds on a de novo review that a change of the theory of defense did not fall below an objective standard of reasonableness. As the main theory of defense that Burkhart committed the killing was not supported by strong evidence, it was within the wide range of competence and trial strategy to argue that in the event the jury believed the prosecution, it should consider that the stabbing was in self-defense.

Petitioner was granted relief and ordered released. The state appealed.

3. Ninth Circuit Proceedings.

At oral argument on September 15, 2009, habeas prosecutors argued that petitioner's case lacked the corroboration of eyewitness identification required by Chambers. See (App. D-1(i) – Oral Argument).

> "In this case, the eyewitnesses at the location identified the Petitioner, *not anybody else.* There's nothing to tie this third party, Mr. Burkhart to the location."
>
> The panel, adopting the argument reversed the grant of habeas relief on

February 19, 2010 in Christian v. Frank, 595 F.3d 1076 (9th Cir. 2010), characterized Schmidt's 2008 identification of Burkhart as a "recantation" of his original identification and held petitioner's case "materially" distinguishable from Chambers. See (App. D-1: – Panel's Published Opinion).

> The Hawaii Supreme Court noted that, unlike in Chambers, no eyewitness linked Burkhart with the scene of the crime. Id. at 262. On the contrary, the Hawaii Supreme Court noted that the only two eyewitnesses present at the murder, Seidel and Schmidt, had both failed to identify Burkhart in photo lineups and instead had individually identified Christian as the culprit...And two witnesses had actually placed Burkhart at a completely different location at the time of the stabbing.

The panel revoked petitioner's release and denied a COA on all other claims. Christian v. Frank, 365 F. App'x 877,879 (9th Cir. 2010). See (App. D-2). Certiorari review was denied on November 1, 2010. Christian v. Frank, 131 S. Ct. 511 (2010).

4. Rule 60(b)(3) Motion in the District Court.

On January 7, 2011, petitioner pro se, filed a true Rule 60(b)(3) motion in the district court presenting after-discovered evidence of fraud on the court and underlying Brady violations. (Dkt. #229). In opposition, prosecutors argued petitioner's lack of diligence in not uncovering the evidence. (Dkt. #247). On February 23, 2011 the district court recharacterized and transferred the motion as an unauthorized "successive" petition, stating petitioner seek relief directly in the Ninth Circuit. See (App. C-4).

5. Petitioner's Motion to Recall the Mandate was Denied without a Ruling.

Petitioner's pro se motion to recall the mandate in Christian v. Frank, (2010) filed on June 14, 2011, was denied by order dated July 27, 2011 that simply read:

"Petitioner's motion to recall the mandate is DENIED." See (App. D-3). Without reaching the merits of fraud upon the panel, an order entered on September 15, 2011 denying petitioner's timely petition for *en banc* review as filed "late." See (App. D-4).

> The panel has voted to deny leave to file appellant's late petition for rehearing and petition for rehearing en banc in this closed case. No further filings will be accepted.

6. Petitioner's Rule 60(b)(3) Motion was Denied as "Successive" Petition.

Four weeks later, on November 15, 2011, a panel adopted the district court's recharacterization and denied the Rule 60(b)(3) motion as an unauthorized "successive" petition. See (App. C-5).

7. Petitioner's Rule 60(d)(3) Motion in the District Court.

On July 10, 2013, the district court acknowledged petitioner's 2011 Rule 60(b)(3) motion was not a "successive" petition. The court wrote: See (App. C-2).

> In the instant case, Petitioner asserts that officers of the court perpetrated a fraud upon this Court during the 2008 habeas corpus proceedings by engaging in the same behavior as the defendant in Pumphrey: (1) failing to disclose evidence favorable to Petitioner (such as the Gas Express video and the fact that eyewitnesses had identified Burkhart shortly after the crime); (2) mischaracterizing other critical evidence (such as the "testimony" of the purported alibi witnesses and the contents of the 911 call) to deceive the court; and (3) willfully eliciting false testimony or failing to correct the false impression created by a witness's testimony (such as the testimony of Annie Leong). If true, Petitioner's allegations may well establish that state prosecutors—those attorneys trusted to do justice on behalf of the State of Hawaii—did indeed perpetrate a fraud upon this Court that would justify reopening the 2008 habeas proceeding.

Petitioner moved the district court under Rule 60(d)(3) to reopen his habeas petition to allow amendment of his constitutional claims: that (1) the State suppressed exculpatory evidence violating Brady v. Maryland, 373 U.S. 83 (1963); (2)

violating his right to present a defense pursuant to Chambers v. Mississippi, 410 U.S. 284 (1973); (3) impacting the denial of his right to testify pursuant to Rock v. Arkansas, 483 U.S. 44 (1987); (4) resulting in the denial of effective assistance of counsel pursuant to Strickland v. Washington, 466 U.S. 668 (1984); and (5) undermined his claim of actual innocence pursuant to Schlup v. Delo, 513 U.S. 298 (1995). In response, habeas prosecutors claimed they were "unaware" that Schmidt identified Burkhart.

8. The District Court's Brady Orders were Contemptuously Ignored.

The district court ordered production of described Brady materials on January 31, 2014, May 27, 2014 and March 24, 2015, which included reports of eyewitnesses, Schmidt and Leong, and numerous interviews with Burkhart which the state's attorneys simply ignored. See (App. C-3). At the hearing, the district court raised the issue of Leong's withheld identification. (Dkt. #386 at p. 26.)

> Well, either way it doesn't look good. One way -- I mean, if the prosecutor knew that these photographs didn't exist and let her testify and perjure herself in front of Judge Kobayashi, which then carried over to my hearing, that these photographs in fact did exist, then that would have constituted a fraud upon the court. Now, if the photographs do in fact exist, then where are they? So, I mean, either way it's not looking good.

Later, regarding Schmidt, the court stated unequivocally: (Dkt. #359 at p. 102.)

> If there was an identification of Mr. Burkhart which the prosecutors were aware of that was not disclosed to the habeas court, that was not disclosed to the Ninth Circuit, that could be a fraud on the Court. So, the objection is overruled.

(i) The State's Admission of Schmidt's Initial Identification of Burkhart.

In written closing argument on July 20, 2015, four months after Schmidt testified about his initial interviews with detectives and his identification from a

photographic line-up following the murder, civil attorneys standing in for habeas prosecutors, **reversed** the state's position after two decades and admitted Schmidt's identification of Burkhart. Attempting to avoid their Brady violations, civil attorneys told the court that "all information" of Schmidt's identification was produced to the defense at trial. (Dkt. #391: p. 7-9). Attorneys for the state wrote:

> "The fact that Schmidt had initially identified a photograph of Burkhart was well known to Petitioner at the time of his criminal trial. In any case, Petitioner was made aware of all information related to Schmidt's identifications during his criminal trial..."

In rebuttal on July 27, 2015, petitioner's counsel argued: (Dkt. #395 at p. 2-8).

> "...For twenty years the Respondent has failed to acknowledge that their key witness initially identified Burkhart as the killer and not the Petitioner. The habeas record is replete with previous denials of the existence of this newly recognized evidence. ...Where is the proof that this critical original identification by Phil Schmidt was ever given to the Petitioner? For twenty years the courts that have presided over this prosecution have been made to believe that the original identification by Phil Schmidt was of Taryn Christian..."

(ii) The District Court Denied Rule 60(d)(3) Relief Without Addressing Brady.

On December 28, 2015, the district court denied Rule 60(d)(3) relief without holding the state to its burden of proof, stating petitioner failed to prove that habeas prosecutors knew of Schmidt's "initial" identification. Refusing to address actual innocence, the district court again failed to decide petitioner's Brady claims. Contrary to its habeas judgment and the panel's decision, the district court held that Schmidt's identification of Burkhart was really irrelevant to the case. (Dkt. #460 at p. 21).

> And, while it is true, as Petitioner contends, that Respondents did not inform the habeas court or the Ninth Circuit that Schmidt previously identified Burkhart in the first photo lineup, Petitioner has not produced clear and convincing evidence that Respondent's counsel, at any stage of

> the proceedings, ever had knowledge of Schmidt's initial identification of Burkhart. Cf. Beggerly, 524 U.S. at 47 (holding that a party's failure to "thoroughly search its records and make full disclosure to the Court" is not fraud on the court). Without such evidence, Petitioner cannot meet his burden of demonstrating fraud on the habeas court...
>
> In any case, Petitioner also failed to disclose Schmidt's identification to the habeas court and the Ninth Circuit, despite evidence that Petitioner knew about Schmidt's initial identification of Burkhart in the photo lineup at least as far back as Petitioner's 1997 criminal trial... Despite all of this, even if Petitioner had clear and convincing evidence that Respondents intentionally withheld evidence of Schmidt's initial identification of Burkhart the night of the murder, it does not appear to be evidence that is "so fundamental that it undermined the workings of the adversary process itself." Estate of Stonehill, 660 F.3d at 445.

All post-judgment motions were denied as unauthorized "successive" petitions. On November 23, 2016, attorney, Anthony Ranken, provided a statement denying the state's new claim that "all information" of Schmidt's identification was disclosed. Specifically, Mr. Ranken declared that had Schmidt's identification been produced, *"it would have undoubtedly had a significant impact upon the deliberations of the jury, in support of his actual innocence."* See (App. F-1). On December 27, 2016, petitioner moved the district court to reopen the Rule 60(d)(3) proceedings to address the continuing fraud and Brady violations. The request was denied on February 15, 2017, leaving in place contrary rulings the court refused to address. See (App. C-1)

9. The Ninth Circuit Denied Appellate Review.

On March 3, 2017, petitioner filed a Notice of Appeal in 17-15460 and for mandamus relief on April 19, 2017 in 17-71122, both were denied.

10. Petitioner's 'Motion to Recall the Mandate' in the Ninth Circuit.

On May 31, 2017, Petitioner's counsel properly filed a motion to recall the

mandate in Christian v. Frank, (2010), supported by the newly developed record. Within three hours, the clerk disposed of the motion without submission to the court, despite telling counsel that the panel reviewed the motion and directed that a copy of the September 15, 2011 order be sent to counsel. (Doc.76). Counsel later learned that Judge Beezer was deceased and Judge Fisher had retired, raising the question why a court clerk was making judicial decisions in denying the case. See (App. F-2).

11. The District Court Denied, Recharacterized and Transferred Petitioner's Valid Rule 60(d)(1) Independent Action Invoking McCoy v. Louisiana, as A "Successive" Habeas Petition Requiring Authorization.

On October 19, 2018, petitioner moved the district court under Rule 60(d)(1) independent action for equitable relief from judgment pursuant to McCoy v. Louisiana, (2018), where the district court was the last court to rule on petitioner's Sixth Amendment claim. (Dkt. #453). On December 3, 2018, Petitioner moved separately under Rule 60(b)(6), requesting the district court to address its contrary rulings on the central facts critical to deciding his independent action under McCoy. (Dkt. #459). On January 4, 2019, the district court recharacterized the Rule 60(d)(1) independent action as an application to file a "second or successive" habeas petition requiring authorization by the Ninth Circuit. The Ninth Circuit docketed the case under **19-70036**. See (App. A-1: Transfer Order).

Without addressing its contrary rulings, the district court denied Rule 60(b)(6) relief the same day. See (App. A-2). A Notice of Appeal was docketed under **19-15179**. The district court denied a COA on February 4, 2019. See (App. A-3).

On April 9, 2019 under **19-70036**, counsel filed Petitioner's Request for

Independent Review by the Full Court of the Published Decision in Christian v. Frank, (2010), where the panel's decision stands contrary to the existing record and cannot be reconciled with the district court's judgments entered in 2015 and 2017. (Doc. 5). On May 7, 2019, the appellate commissioner denied the motion without submission to the remaining panel members, stating petitioner's case was "closed." See (App. B-1). A panel denied reconsideration on June 14, 2019. See (App. B-2).

On November 8, 2019 under **19-15179,** a panel denied a COA without discussion of the constitutional nature of McCoy at issue. On November 22, 2019 in **19-70036**, counsel filed petitioner's [Motion Requesting a Judicial Determination by the Full Court Whether his Habeas Case is Subject to Comprehensive Review of his Transferred Rule 60 (d)(1) Independent Action Invoking McCoy v. Louisiana, 584 U.S. __ 2018, or is Precluded Review per Order of September 15, 2011]. (Doc. 12).

On December 13, 2019, a panel denied the request, holding case in abeyance pending resolution of McGee v. United States, (18-72243). See (App. B-3). On December 20, 2019 under **19-15179,** a panel denied *en banc* review of the order denying a COA to appeal the district court's contrary rulings and refusal to recuse, stating "No further filings will be entertained in this closed case." See (App. B-4).

On February 28, 2020, in **19-70036**, Respondent was ordered to respond to the transferred motion. See (App. B-5). On May 1, 2020, attorney, Richard B. Rost, attempted to change the state's position argued in the habeas proceedings, stating petitioner's "successive" petition failed because McCoy was inapplicable and not retroactive. (Doc. 34). Opposing the Motion for Judicial Notice on May 15, 2020,

counsel wrote: (Doc. 25).

> "Any issues regarding Burkhart have nothing to do with the question of whether Ranken admitted Christian was guilty, and obviously cannot not show any misrepresentation or inconsistent position by Respondent on this point."

Counsel's claim stands in stark contrast to what the district court held in 2008.

> Respondent's argument that the presentation at closing of a self-defense theory and extreme emotional disturbance diminished the value of the Burkhart confessions is also an irrelevant consideration because those alternative defense theories likely would not have been presented had Petitioner been able to introduce into evidence the Burkhart confessions.

On May 23, 2020, petitioner argued that his independent action could not be recharacterized as a "second or successive" habeas petition subject to restrictions under § 2254(b), because the circumstances are governed by the Court's holding in Stewart v. Martinez-Villareal, 523 U.S. 637 (1998), where the district court has never ruled on petitioner's Brady claims presented in the original petition, or in subsequent motions, which underly petitioner's Sixth Amendment claim. (Doc. 34).

Oral argument is currently calendared for October 19, 2020.

REASONS FOR GRANTING THE PETITION

A. The Questions Presented Warrant This Court's Immediate Review.

This Court has jurisdiction to review "[c]ases in the courts of appeals * * * [b]y writ of certiorari * * * *before or* after rendition of judgment or decree." 28 U.S.C. 1254(1) (emphasis added). "An application * * * for a writ of certiorari to review a case before judgment has been rendered in the court of appeals may be made at any time before judgment." 28 U.S.C. 2101(e). Certiorari before judgment is appropriate when "the case is of such imperative public importance as to justify deviation from

normal appellate practice and to require immediate determination in this Court." Sup. Ct. R. 11. This case satisfies that standard where it involves an issue of imperative public importance: when the integrity, independence and impartiality of the judicial system has been irreparably harmed and remains unchecked—it undermines the public's trust in a justice system that promises safeguards for human rights, delivery of equal justice under the law, and transparent and objective recourse enabling all manner of disputes to be resolved within a structured and orderly framework under controlling principles of law.

This Court has admonished that the "integrity of the judicial process" hinges on vigilantly policing fraud on the court and eliminating the appearance of judicial partiality. Hazel-Atlas Glass Co. v. Hartford Empire Co., 322 U.S. 238, 246 (1944); Liljeberg v. Health Servs. Acquisition Corp., 486 U.S. 847, 859-60 (1988). The decisions below fall far short on both fronts. The district court decided "important federal question[s] in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c). The court of appeals has entered a decision in conflict with the decision of another court of appeals on the same important matter; has decided an important federal course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power.

"The very essence of civil liberty ... consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803). And "where there is a legal right, there is also a legal remedy." Ibid. (quoting 3 William Blackstone, Commentaries on the

Laws of England 23 (1765)). The questions presented in this petition test these twin principles. Accordingly, a writ of certiorari before judgment is likely the only way to protect this Court's opportunity for plenary review.

ARGUMENT

I. The Integrity of the Judicial System is Irreparably Harmed When a Decision By a Court of Appeals Corrupted by Fraud Stands Unchecked and Unremedied: While the Federal Courts Rely on a Void Judgment as Circuit Authority Under this Court's Precedent in Chambers v. Mississippi.

Recall of a mandate traditionally has been warranted when and to the extent necessary "to protect the integrity" of a court's earlier judgment. Certainly, such integrity may be jeopardized when the solemn declarations of a court are called into question by a showing of fraud upon the court, amidst Brady violations that have never been decided. By refusing to address petitioner's fraud claim presented in his 2017 motion to recall the mandate, the Ninth Circuit has left in place a corrupted judgment that is a blatant distortion of the facts, while allowing the decision to stand as controlling authority of a case *distinguishable* from Chambers, even if it is not, creating irreparable harm each day the mandate is not recalled.

A. The District Court's Failure to Adjudicate Petitioner's Brady Claims Presented in the Initial Petition and in Subsequent Pleadings-- Establishes Petitioner's Rule 60(d)(1) Independent Action Invoking McCoy is Not a "Successive" Petition Subject to Restrictions Under § 2244(b)(1).

Petitioner's Rule 60(d)(1) independent action is analogous to the motion at issue in Stewart v. Martinez-Villareal, 523 U.S. 637 (1998), where the Court found the Ninth Circuit correctly held that respondent was not required to get authorization to file a "second or successive" application before his Ford claim could be heard. The

Court refused to construe a second habeas petition as being second or successive even though the ground raised --competency to be executed-- had been raised in the original petition. Rather than read the second and successive ban literally, at the expense of a first habeas corpus ruling on the issue (implicating constitutional concerns), the Court instead seized upon the fact that the district court never ruled on the merits of the original claim. 523 U.S. at 645. This allowed the Court to find that the second filing was not successive and permitted the claim to be heard, despite the apparent statutory prohibition. Id.

Relying on Stewart v. Martinez-Villareal, petitioner's independent action cannot be designated a "successive" § 2254 petition requiring authorization, because his Strickland-based claim is inextricably intertwined with his Brady claim, which the district court failed to adjudicate on the merits in the original petition, and in subsequent Rule 60 pleadings. The purpose of Brady is to ensure that "criminal trials are fair," Brady, 373 U.S. at 87, 83 S.Ct. 1194, and "that a miscarriage of justice does not occur," United States v. Bagley, 473 U.S. 667, 675, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985). Where petitioner's Sixth Amendment claim is inextricably intertwined with his Brady claims, they must be considered collectively in the context of the entire record. See e.g. Breakiron v. Horn, 642 F.3d 126 132 (3rd Cir, 2011) (considering the cumulative effect of Brady and ineffective assistance of counsel claims; Cargle v. Mullin, 317 F.3d 1196, 1200 (10th Cir. 2003) ("We conclude that prejudice may be cumulated among different kinds of constitutional error, such as ineffective assistance of counsel and prosecutorial misconduct."). Because petitioner's Brady

claims were not ruled on by the habeas court in 2008, or during the course of the Rule 60(d)(3) proceedings -- allowing petitioner to supplement his original application with the newly developed record would not be contrary to one of the recognized purposes of AEDPA finality. See Panetti, 127 S.Ct. at 2854; United States v. Mitchell, 518 F.3d 740, 746-47 & 747 n. 9 (10th Cir. 2008).

B. The District Court's Refusal to Address Brady and its *Contrary* Rulings Reveals a Disabling Conflict, Requiring Recusal and Reassignment.

In 2008, the district court defended Ranken's "self-defense" argument, believing there was not strong evidence corroborating Burkhart's confessions.

> ... As the main theory of defense that Burkhart committed the killing was not supported by strong evidence, it was within the wide range of competence and trial strategy to argue that in the event the jury believed the prosecution, it should consider that the stabbing was in self-defense.

Seven years later, the court would enter a contrary ruling:

> ...even if Petitioner had clear and convincing evidence that Respondents intentionally withheld evidence of Schmidt's initial identification of Burkhart the night of the murder, it does not appear to be evidence that is "so fundamental that it undermined the workings of the adversary process itself...

Such a result would be unlikely if the district court had ruled on petitioner's Brady claims presented in the original application. A disabling conflict reveals the district court knew he would have had to rule against his former law students for violating their ethical and discovery obligations under Brady, requiring reversal.

There are principally two issues with the district court's approach. The district court provided no explanation for its stark departure from this Court's precedent in Brady v. Maryland, when denying Rule 60(d)(3) relief, and this Court's Brady holding does not support the district court's decision denying the requested relief. The district

court also did not explain why it accepted the government's reversal of its position after two decades on an unsupported claim made months after the hearings, where -- in the face of admitting possession of the evidence --the state contemptuously refused to produce the investigation reports it was ordered to produce. Because the district court did not explain its reasons for not addressing the bulk of the issues concerning prosecutorial misconduct --constituting fraud on the court-- separately from Brady violations, as the law prescribes, and because the court failed to make factual findings supporting its ruling, and because the district court has rejected petitioner's request to cure its error, petitioner submits the district court be disqualified and the case reassigned.

The principles of Brady are well settled. In Brady v. Maryland, 373 U.S. 83, (1963), the Court held that the Fifth and Fourteenth Amendments bar prosecutors from suppressing favorable evidence "material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." As this case was before the district court, the primary question was whether the failure to disclose Schmidt's initial identification of Burkhart was prejudicial: i.e., whether the withheld evidence was "material to [the defendant's] guilt or punishment." Cone v. Bell, 129 S. Ct. 1769, 1782 (2009); see also Smith v. Cain, 565 U. S. ___ (2012). As this Court explained, "evidence is 'material' within the meaning of Brady when there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different." Cone, 129 S. Ct. at 1783; see Strickler, 527 U.S. at 280; Kyles, 514 U.S. at 433-434; see also Banks v. Dretke, 540 U.S. 668, 698 (2004).

It is virtually a bright-line rule that, where the prosecution's case turns on a critical eyewitness, failure to disclose impeachment evidence demands reversal. In this case, the sum of Brady and Giglio violations completely changes the lens through which the state's case against petitioner can be viewed. The truth-seeking policy under the Brady doctrine mandates that it encompasses two situations: the prosecutions offering of evidence that it knew or should have known to be false and the prosecutions suppression of evidence favorable to the defense. Because each type of prosecutorial misconduct perverts and "corrupt[s] ... the truth-seeking function of the trial process," United States v. Agurs, 427 U.S. 97, 104 (1976), this Court has uniformly and adamantly denounced both. This Court has recognized that suppression of evidence tending to impeach a key witness is a cardinal Brady violation. See Giglio v. United States, 405 150, 154 (1972). In Giglio this Court held "[w]hen the 'reliability of a given witness may well be determinative of guilt or innocence.' Nondisclosure of evidence affecting credibility falls within this general rule." Id. at 154. Where identification of the assailant is the key issue, impeaching an eyewitness "would take out the heart of the State's case and greatly undermine the guilty verdicts." Bowen v. Maynard, 799 F.2d 593, 610 (10th Cir. 1986); see also Crivens v. Roth, 172 F.3d 991, 998, 999 (7th Cir. 1999) (impeachment would have "severely damaged" the "heart of the state's case"). Thus, this Court has explained that "'[i]f, for example, one of only two witnesses to a crime had told the prosecutor that the defendant was definitely not its perpetrator, and if this statement was not disclosed to the defense, no court would hesitate to reverse the conviction resting on

the testimony of the other eyewitnesses." Argurs, 427 U.S. at 113 n.21 (quoting Victor Bass, Comment, Brady v. Maryland and the Prosecutor's Duty to Disclose, 40 U. Chi. L. Rev. 112, 125 (1972)).

The violation is all the more relevant, where, as here, prosecutors relied on Schmidt to lend credibility to Seidel's changing story. As this Court emphasized, an eyewitness's changing story is therefore undoubtedly material and perhaps "fatal" to his credibility. Kyles, 514 U.S. at 444. Indeed, it is "classic Brady material." Boyette, 246 F.3d at 91. More generally, the courts of appeals find Brady violations where evidence undermines a key or crucial witness—even if not an eyewitness. Where "the foundation of the government's entire case rests upon the testimony of one key witness, ... the reliability of that witness clearly is determinative of the defendant's guilt or innocence." United States v. Serv. Deli Inc., 151 F.3d 938, 943 (9th Cir. 1998).

It is therefore incumbent on the prosecution to disclose a witness's previous statements, as here, the key witness's initial identification of the 'initial suspect' that conflicts with his later trial testimony. Throughout the trial, prosecutors argued that Schmidt's failure to identify Burkhart *proved* that Seidel was being truthful that Burkhart was not present. Accordingly, Schmidt's "credibility was not just a major issue; it essentially was the only issue that mattered." Serv. Deli, 151 F.3d at 944. If that was not bad enough, the state also concealed the identification of a second eyewitness, Annie Leong, who identified Burkhart from different photographs never produced. The district court also made no ruling on the state's continuing withholding of at least six separate statements made by Burkhart to the authorities, both, prior

to, and after petitioner's trial, including a "debriefing" with the FBI., during the state's appeal in the Ninth Circuit. The fact that prosecutors suppressed *two* corroborating witness identifications impeaching both Schmidt and Seidel's trial testimony makes this case even more worthy of reversal. Here, the district court's failure to rule on proven Brady violations cannot be reconciled with decisions of other courts involving similar facts.

(i) The District Court's Recharacterization of a Valid Rule 60(d)(1) Independent Action as an Unauthorized "Successive" Petition, Continues a Pattern of Egregious' Legal Error.

This Court's holding in Castro v. United States, 540 U.S. 375 (2003), militates against informing a decision in this case contrary to the terms of Rule 60(d)(1), in a way that effectively deprives the district court of jurisdiction to hear the merits of the Rule 60(d)(1) matter. Here, the district court denied the motion without addressing the elements, limitations, or requirements of an independent action. The "indisputable elements" of an independent action are:

> (1) a judgment which ought not, in equity and good conscience, to be enforced; (2) a good defense to the alleged cause of action on which the judgment is founded; (3) fraud, accident, or mistake which prevented the defendant in the judgment from obtaining the benefit of his defense; (4) the absence of fault or negligence on the part of the defendant; and (5) the absence of any adequate remedy at law.

Barrett, 840 F.2d at 1263 (citing 11 C. Wright & A. Miller, Federal Practice & Procedure § 2868, at 238 (1973), and National Surety Co. v. State Bank, 120 F. 593, 599 (8th Cir.1903)). Moreover, when a motion under Rule 60(d) is filed in relation to a federal habeas corpus proceeding, "in order to establish that relief is required to prevent a grave miscarriage of justice, [a petitioner] must make a strong showing of

actual innocence." Mitchell at 596, citing Calderon v. Thompson, 523 U.S. 538, 557-58, (1998). Apart from refusing to address Brady, the district court stated in open court he would not rule on actual innocence. Here, certain aspects of the proceedings below make disqualification and reassignment necessary.

"Section 455(a) of the Judicial Code, 28 U.S.C. §455(a), is not intended to protect litigants from actual bias in their judge but rather to promote public confidence in the impartiality of the judicial process. If a judge's attitude or state of mind leads a detached observer to conclude that a fair and impartial hearing is unlikely, the judge must be disqualified." [Emphasis added]. Liteky v. U.S., 114 S.Ct. 1147, 1162 (1994). Should a judge not disqualify himself, then the judge is in violation of the Due Process Clause of the U.S. Constitution.

C. The Ninth Circuit's Failure to Address Fraud on the Court of Appeals, Conflicts with Decisions from this Court, other Courts and Common Sense.

This Court held that an appellate hearing on a petition to impeach a judgment based on fraud is "not just a ceremonial gesture," and the petition "must contain the necessary averments, supported by affidavits or other acceptable evidence." Hazel-Atlas Glass Company v. Hartford-Empire Company, supra, 322 U.S. at 248. The Court concluded in Hazel -Atlas, that the judgment against Hazel-Atlas could not stand, as the record offered troubling evidence of a "planned and carefully executed scheme to defraud not only the Patent Office but the Circuit Court of Appeals." Id. at 245. Hazel-Atlas makes clear that litigants may prevail on Rule 60(d)(3) motions alleging fraud on the court in the district court or its equivalent --a motion to recall the mandate-- in the court of appeals, when they possess some evidence of a trail of

fraud, but learn the complete picture only after judgment. "Almost all of the principles that govern a claim of fraud on the court are derivable from the Hazel-Atlas case." 11 Wright & Miller, Federal Practice and Procedure §2870 (3d ed.).

The Sixth Circuit defined fraud on the court as (1) conduct by an officer of the court, (2) directed towards the judicial machinery itself, that is (3) intentionally false, willfully blind to the truth or is in reckless disregard for the truth, is (4) a positive averment or concealment when one is under a duty to disclose, and that (5) deceives the court. Thompson v. Bell, 373 F.3d 688 (6th Cir. 2004), quoting Demjanjuk v. Petrovsky, 10 F.3d 338, 356 (6th Cir. 1993) (quoting 7 Moore's Federal Practice and Procedure ¶ 60.33). The Seventh Circuit held ("A] decision produced by fraud on the court is not in essence a decision at all, and never becomes final."); Kenner v. C.I.R., 387 F.3d 689 (1968); 7 Moore's Federal Practice, 2d ed., p. 512, ¶ 60.23. See, Drobny v. C.I.R., 113 F.3d 670, 677 (7th Cir. 1997) see also Wright & Miller,11 Federal Practice & Procedure § 2870 (3d ed.). As a reviewing court, the Ninth Circuit's refusal to address fraud, is extraordinary, in and of itself.

(i) Recall of the Mandate is Necessary to Promote Uniformity Between Litigants and this Court's Decisions.

This Court stated that a mandate may be recalled when it is necessary to address new circumstances before the court which are "grave" and "unforeseen" or which are, in other words, unforeseeable circumstances which implicate the justice of the judgment previously rendered. Calderon v. Thompson, 523 U.S. 538, 549, 118 S.Ct. 1489, 140 L.Ed.2d 728 (1998). According to Calderon, the Courts of Appeals are recognized to have an inherent power to recall their mandates, subject to review for

abuse of discretion. See id. at 549, 118 S.Ct.1489 (citing Hawaii Housing Authority v. Midkiff, 463 U.S. 1323, 1324, 104 S.Ct. 7, 77 L.Ed.2d 1426 (1983)); see also Bell South Corp. v. Federal Communications Comm., 96 F.3d 849, 851 (6th Cir.1996). One of the reasons which would justify recalling a mandate is the potential existence of a fraud upon the court. See id. at 557, 118 S.Ct. 1489.

The Sixth Circuit held that society's interest in the fair and uniform administration of justice weighs in favor of recalling the mandate. See, e.g. Workman v. Bell, 484 F.3d 837, 844 (6th Cir. 2007) (Cole, J., dissenting) ("manifest miscarriage of justice" and "inconsistency in the administration of the death penalty" would ensue if capital petitioner alleging fraud was denied a stay of execution and similarly situated capital petitioner raising the same claim received a stay).

Recently, the Fifth Circuit acted to correct an unjust sentence and recalled its mandate in United States v. Montalvo-Davila, Case No. 16-20081 (5th Cir., May 16, 2018), stating "here, recalling the mandate is necessary 'to prevent injustice'" and that failure to recall the mandate "would produce an unwarranted disparity between him and similarly situated defendants in other cases." The court held the petitioner was entitled to recall because the ruling in another case rendered the court's decision in his case "demonstrably wrong," stating that "both of these factors favor recall and find that a third consideration—Montalvo's demonstrated diligence in asserting his claim—does as well." The court recognized that "Courts exist not merely to decide cases, but to decide them correctly." See W. Virginia Oil & Gas Co. v. George E. Breece Lumber Co., 213 F.2d 702, 704 (5th Cir. 1954) (recognizing "two principles of judicial

administration founded on sound public policy, namely, that litigation must finally and definitely terminate within a reasonable time and that justice must be done unto the parties"). The public interest in correcting an erroneous conviction or sentence "may counsel a more generous recall rule in criminal cases" than in other contexts. 16 CHARLES ALAN WRIGHT, ARTHUR R. MILLER, & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3938, p. 880 (3d ed. 2012) (hereinafter, "WRIGHT & MILLER"). Here, the failure to act cannot be reconciled with actions taken in other cases when fraud undercut the legal conclusions reached by the court.

(ii) Extraordinary Circumstances Warrant Recall of the Mandate, Where the State Waited for Two Decades Before Admitting the Critical Identification Evidence Corroborating a Third-Party's Confessions Required by Chambers, Entitling Petitioner to Habeas Relief.

To be sure, given finality interests, a reviewing court applies an appropriately high threshold to determine whether there has been a fraud on the court. The interests in preserving judicial integrity are no less weighty than the interests in preserving finality, and the costs of leaving fraud on the court unaddressed are enormous. Six years after prosecutors convinced three circuit judges that petitioner's case was distinguishable from Chambers, the state ***reversed*** its position and admitted the critical Chambers identification it swore to the panel did not exist.

In such circumstances, petitioner is entitled to relief because Schmidt's identification was pivotal to the Chambers analysis, and which exceeds the evidence considered by the Ninth Circuit in granting habeas relief in the cases of Chia v. Cambra, 360 F.3d 997, 1004 (9th Cir. 2004); Lunbery v. Hornbeak, 605 F.3d 754 (9th Cir. 2010); Cudjo v. Ayers, 698 F.3d 752 (9th Cir. 2012); and in United States v.

Espinoza, 880 F.3d 506 (9th Cir. 2018). Because the Constitution prohibits unequal protection of the law in an arbitrary and capricious manner, the Ninth Circuit's disparate treatment of petitioner's case should not go unchecked. It would be a grave miscarriage of justice to deny redress under Chambers without allowing petitioner the process that petitioners like Chia, Lunbery, Cudjo, and Ezponiza, have enjoyed.

(iii) Despite its Admission, the State's Failure to Produce the Evidence of Schmidt's Identification of Burkhart to Petitioner and the Ninth Circuit, Perpetuates a Fraud Upon the Federal Courts.

The government cannot blame petitioner for its Brady violations where the due process rights of a defendant have been violated because prosecutors failed to turn over exculpatory information. State attorney, Richard Rost's contention that "all information" of Schmidt's identification of Burkhart was produced to trial counsel, is not supported by his claim. There can be no question that the allegation as pled shows that counsel violated his duty of candor to the district court, and that it was part of a broader scheme to affect the administration of justice in this case. There can be no question that regardless of his admission that Burkhart was initially identified, counsel had an affirmative obligation as an officer of the court to produce the evidence to petitioner and the Ninth Circuit in the proceedings below.

The fact that counsel now attempts to persuade another panel that Schmidt's identification of Burkhart is irrelevant to why Ranken argued "self-defense" – is emblematic of the manner in which the state has proceeded in this case from beginning to end. Rost does not attempt to meaningfully explain why due process does not require him to produce such evidence here, nor can he. Ignoring his broader

duty of candor, including the "continuing duty to inform the Court of any development which may conceivably affect the outcome" of the litigation as described by the Supreme Court, Rost's claim that he has no obligation and that the matter was addressed by the district court, side-steps the law at issue. A failure to disclose the evidence violates, at a minimum, the duty of candor. As officers of the court, prosecutors do not have the liberty to watch while the administration of justice is so thoroughly corrupted involving their own key witness, only to thereafter wash their hands of any responsibility when the scheme is finally exposed.

(iv) This Court's Decision in Calderon v. Thompson, Required the Ninth Circuit to Address Petitioner's Claim of Actual Innocence.

The Court's precedent in Calderon v. Thompson, made clear that a Court of Appeals has the authority to recall its mandate if it acts to avoid a miscarriage of justice or to address fraud on the court. The Court pronounced that the merits of concluded criminal proceedings, not be revisited in the absence of a strong showing of actual innocence. Calderon v. Thompson, 523 U.S. 538, 558, 118 S.Ct. 1489,140 L.Ed.2d 728 (1998). To be credible, a claim must be based on reliable evidence not presented at trial. Schlup v. Delo, 513 U. S. 298, 324. A petitioner asserting his actual innocence of the underlying crime must show "it is more likely than not that no reasonable juror would have convicted him in light of the new evidence" presented in his habeas petition. *Id.,* at 327. See also House v. Bell, 547 U.S. 518, 537-39 (2006).

The Calderon dissenters also stated that "as the Court realizes, our standard dealing with innocence of an underlying offense requires no clear and convincing proof... and the Court would be satisfied with a demonstration of innocence by

evidence not presented at trial, even if it had been discovered, let alone discoverable but unknown, that far back." 523 U.S. at 573 (Souter, J., dissenting) (internal quotation marks omitted).

Many circuits recognize that denying federal habeas relief from an actually innocent petitioner would be "constitutionally problematic." See Souter v. Jones, 395 F.3d at 601-02 (6th Cir. 2005). See Triestman v. United States, 124 F.3d 361, 378-79 (2d Cir. 1997) (finding serious Eighth Amendment and due process concerns if AEDPA's procedural limitations barred a habeas petitioner claiming actual innocence from collateral review); Holloway, 166 F.Supp.2d at 1190 (holding that the use of AEDPA's one-year limitations period "to preclude a petitioner who can demonstrate that he or she is factually innocent of the crimes that he or she was convicted of would violate the Suspension Clause ... as well as the Eighth Amendment's ban on cruel and unusual Punishment"). Certainly, the state's admission supports "new" evidence not presented at trial, supporting actual innocence.

II. The Ninth Circuit Cannot Properly Address a Valid Rule 60(d)(1) Independent Action Invoking McCoy, Until the Court Addresses the Fraud that Corrupted its Chambers Analysis, Because the Same Set of Facts are Involved.

The prosecutorial misconduct that corrupted the panel's Chambers analysis, is the very same conduct that influenced the district court to deny petitioner's Sixth Amendment [McCoy] claim, where the district court defended Ranken's "self-defense" argument believing there was not "strong" evidence supporting Burkhart's confessions. Together, the fraud upon both federal courts, resulted in errors of law which combined to deprive petitioner of the habeas review of his claims to which he

was entitled under 28 U.S.C. § 2254, effectively depriving him of his first habeas corpus petition. In these circumstances, the Ninth Circuit cannot properly decide petitioner's independent action under McCoy, until the full court resolves the fraud that corrupted its Chambers analysis, because the same facts are involved.

A. The Panel's Order Aimed to Permanently Bar Review of its Decision Denying Habeas Relief Has Led to an Unconstitutional Result, Contrary to this Court's Precedents.

The panel's response to petitioner's diligent efforts to alert the court to fraud, was to deny review and enter an order on September 15, 2011 that denied petitioner's timely petition for rehearing *en banc* as filed "late" --stating petitioner's case was effectively "closed" from any further review. Petitioner is unaware of any other habeas case where a court of appeals has entered an order permanently barring a habeas case from any post-judgment review, even if the court's decision was procured by fraud, and or, where actual innocence is at stake. The Court avoids the Suspension of the Writ and Due Process implications of 2244(b)(1) by overruling the panel's September 15, 2011 order. If, however, the order stands --barring review under all circumstances--where two members of the panel are deceased, substantial questions regarding the constitutionality of 2244(b)(1)'s complete res judicata bar would arise.

CONCLUSION

Petitioner has no reference for the exceptional procedural posture of his case that compels this Court's intervention. By any standard, petitioner's request is reasonable. He only asks that he be provided an opportunity, based on a record already made, to have all of his claims fairly addressed by a competent tribunal—at

least once. This Court may grant certiorari before judgment to direct the Ninth Circuit to address fraud on the court, where the panel's decision is defeated by the state's admission that its 'independent' witness had initially identified Burkhart-- establishing the corroboration required under Chambers.

This Court may grant certiorari before judgment to review an order that has barred petitioner's case from collateral review, and which has allowed the district court's errors to stand unchecked. The Ninth Circuit's treatment in this case over the past decade makes no sense and needlessly casts doubt on the integrity of the judicial system in the circumstances where preserving integrity is vital. The Court's statutory authority to grant certiorari before judgment exists precisely to avoid this sort of scenario.

The petition for a writ of certiorari before judgment should be granted.

Respectfully submitted.

Dated 8-20-, 2020

Taryn Christian,
Petitioner, pro se