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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

TARYN CHRISTIAN,

Petitioner

v.

TODD THOMAS,

Respondent

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

APPENDICES

VOLUME I

TARYN CHRISTIAN Pro Se
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UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII

TARYN CHRISTIAN, Petitioner, vs. CLAYTON FRANK, Director, State of Hawaii Department of Public Safety, and STATE OF HAWAII DEPARTMENT OF PUBLIC SAFETY, *Respondents.*	§	CIV. NO. 04-00743

ORDER: (1) REFERRING SUCCESSIVE PETITION FOR HABEAS RELIEF TO NINTH CIRCUIT COURT OF APPEALS; AND (2) DENYING PETITIONER'S MOTION FOR EXPEDITED HEARING

Before the Court are Petitioner's: (1) Independent Action for Equitable Relief from Judgment Under Federal Rule 60(d)(1) Pursuant to Intervening Supreme Court Precedent in McCoy v. Louisiana (Dkt. # 453), and (2) Motion for Expedited Hearing to Admit Testimonial Evidence in Support of Independent Action for Equitable Relief (Dkt. # 459). For the following reasons, the Court: (1) in the interests of justice, **REFERS** the independent action for equitable relief to the Ninth Circuit Court of Appeals pursuant to Ninth Circuit Rule 22-3(a) because it is a successive petition for habeas relief; and (2) **DENIES** Petitioner's motion for an expedited hearing.

FACTUAL BACKGROUND

Petitioner is a Hawaii state prisoner serving a life sentence with a forty-year minimum period of incarceration for murder in the second degree. (Dkt. # 267 at 12.) The conviction arose out of his alleged involvement in the July 14, 1995 murder of Vilmar Cabaccang ("Cabaccang"). The facts that follow are taken from the voluminous record in this case.

On the night of the murder, Cabaccang and his girlfriend, Serena Seidel ("Seidel"), awoke from sleep and saw through the window that someone was inside of Cabaccang's car. Cabaccang and Seidel ran outside to confront the intruder, but the intruder fled on foot. Cabaccang and Seidel began chasing the intruder, but Seidel briefly stopped to summon a friend's help from a nearby residence. When no one answered the door, Seidel continued her pursuit.

When Seidel caught up to Cabaccang and the intruder, she found the two men engaged in a struggle. Cabaccang warned Seidel that the intruder had a knife. Seidel was undeterred from attempting to assist Cabaccang, and eventually their combined effort caused the intruder to drop the knife and flee the scene. At that point, Seidel observed blood in the area of the struggle and saw that Cabaccang had been stabbed. A short time later, Phillip Schmidt ("Schmidt") a local resident who had heard the noise from the struggle, rushed to the scene.

When Schmidt saw Cabaccang's injuries, he called 911. Cabaccang eventually died from the knife wounds.

Although police also investigated James Burkhart ("Burkhart") and Christian Dias ("Dias") as potential suspects, they ultimately prosecuted Petitioner Taryn Christian ("Petitioner" or "Christian") for the crime. The prosecution's theory was based on six major categories of evidence: (1) a statement from Christian's ex-girlfriend, Lisa Kimmey ("Kimmey"), that he had confessed to her; (2) a recording of a call between Christian and Kimmey, which the prosecution argued contained a confession; (3) Christian's baseball cap, which was found at the scene of the crime; (4) discarded gloves at the crime scene that matched the type that Christian's employer, Pukalani Country Club and Restaurant, had in its kitchen; (5) the fact that Christian had previously stolen car radios from parked cars and had identified Cabaccang's car as a target in a notebook; and (6) photo identifications from Seidel and Schmidt identifying Christian in a photo lineup.

Petitioner was ultimately convicted by a jury in 1997 of second-degree murder, attempted third-degree murder, attempted third-degree theft and use of a deadly or dangerous weapon in the commission of a crime.

PROCEDURAL BACKGROUND

On December 22, 2004, Petitioner filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254, challenging his 1997 conviction and sentence

("Prior Petition"). (Dkt. # 1.) On September 30, 2008, this Court issued an order granting the Prior Petition as to one ground and denying it as to all other grounds. (Dkt. # 153.) The Court ordered that Petitioner be released within seven days of the entry of judgment unless the State elected to retry Petitioner. However, of relevance to the instant motions, the Court found the following claim to be without merit: Petitioner's ineffective assistance of counsel claim for counsel's change in defense theory during closing argument. (See Dkt. # 153 at 28–29.) Both Petitioner and Respondents filed notices of appeal. (Dkts. ## 157, 165.)

On February 19, 2010, the Ninth Circuit reversed the Order as to the Court's order granting Petitioner habeas relief. Christian v. Frank, 595 F.3d 1076, 1078 (9th Cir. 2010). However, the Ninth Circuit did not order remand and declined to issue a certificate of appealability. Christian v. Frank, 365 F. App'x 877, 879 (9th Cir. 2010). The Ninth Circuit left undisturbed the Court's findings on Petitioner's claim for ineffective assistance of counsel based on a changed defense theory in closing argument.

On March 11, 2010, Petitioner filed a petition for panel rehearing and a petition for rehearing en banc. The Ninth Circuit denied both petitions on May 19, 2010 (Dkt. # 221), issuing its Mandate on May 27, 2010 (Dkt. # 222). Petitioner filed a petition for writ of certiorari with the Supreme Court on

August 17, 2010, which was denied on November 1, 2010. Christian v. Frank, 131 S. Ct. 511 (2010).

On January 7, 2011, Petitioner moved to reopen his habeas proceeding pursuant to Federal Rule of Civil Procedure 60(b), alleging newly discovered evidence of fraud on the Hawaii state court, this Court, and the Ninth Circuit Court of Appeals. (Dkt. # 229.) In an order dated February 23, 2011, this Court held that it had been stripped of jurisdiction to consider Petitioner's Rule 60(b) motion when Respondents and Petitioner filed notices of appeal with respect to the Prior Petition. (Dkt. # 255 at 3.) Instead, the Court construed Petitioner's motion as a second or successive petition for writ of habeas corpus. (Id.) Noting that a petitioner may not file a second or successive petition for writ of habeas corpus unless he first obtains authorization from the court of appeals, see 28 U.S.C. § 2244(b)(3), the Court transferred Petitioner's motion to the Ninth Circuit. (Id. at 4.)

On November 15, 2011, the Ninth Circuit, treating Petitioner's motion as an application for authorization to file a second or successive petition for writ of habeas corpus, denied the application. See Christian v. Frank, No. 11-70561 (9th Cir. Nov. 15, 2011) (Dkt. # 16). On January 23, 2012, Petitioner filed a writ of mandamus, arguing that the Ninth Circuit failed to follow established procedures of appellate review in characterizing Petitioner's Rule 60(b)(3) motion as

"something it is not" (Dkt. # 261-1); the Ninth Circuit denied the writ on February 16, 2012 (Dkt. # 260).[1] On May 14, 2012, Petitioner filed a petition for a writ of certiorari (Dkt. # 261), which the Supreme Court denied on October 9, 2012 (Dkt. # 263).

On April 17, 2013, Petitioner filed a Motion to Reopen Habeas Corpus Proceedings Pursuant to Federal Rule of Civil Procedure 60(b) Motion, alleging newly discovered evidence of fraud on the Court. (Dkt. # 267.) In his Motion, Petitioner argued that evidence came to light that Respondents perpetrated a fraud on the court, which corrupted the integrity of Petitioner's original habeas corpus proceeding. (Id. at 11.) The Court determined that Petitioner's motion was not a second or successive petition for writ of habeas corpus, but instead alleged fraud upon the court, a matter this Court had jurisdiction to review under Rule 60 of the Federal Rules of Civil Procedure. (Dkt. # 286 at 5–11.)

Because the record before the Court was insufficient to establish the precise value of the evidence allegedly withheld, the Court ordered that an evidentiary hearing be held on Petitioner's motion. (Dkt. # 348.) Respondents sought a writ of mandamus in the Ninth Circuit to block the Court from proceeding with the hearing. The Ninth Circuit denied the writ. The Court held the evidentiary hearing on July 16, 2014. (Dkt. # 348.) However, because the Court

[1] The Ninth Circuit denied Petitioner's subsequent writ of mandamus on December 23, 2013. (Dkt. # 293.)

was unable to hear all of the relevant evidence and because Petitioner had obtained counsel only shortly before the hearing, the hearing was continued until March 16, 2015, at which time additional evidence was presented to the Court. (Dkts. ## 362, 377.) On December 1, 2015, final oral argument was held on the motion. (Dkt. # 404.) On December 28, 2015, the Court entered an order denying Petitioner's motion to reopen habeas corpus proceedings. (Dkt. # 406.)

On January 6, 2016, Petitioner filed a motion to reconsider the Court's order denying his motion to reopen. (Dkt. # 407.) On February 10, 2016, the Court denied this motion on the grounds that Petitioner had not cleared the high hurdle necessary to warrant the extraordinary remedy of reconsideration. (Dkt. # 410.) On April 12, 2016, the Court denied Petitioner's second motion for reconsideration and stated that "[n]o further motions to reconsider will be entertained." (Dkt. # 420 at 16.) On June 2, 2016, the Court denied Petitioner's third motion to reconsider. (Dkt. # 425.) On June 29, 2016, the Court denied Petitioner a Certificate of Appealability. (Dkt. # 427.) On September 12, 2016, a petition for writ of mandamus filed by Petitioner was received by the Ninth Circuit. (Dkt. # 431.) On November 21, 2016, the Ninth Circuit denied the petition for writ of mandamus. (Dkt. # 433.)

On December 27, 2016, Petitioner filed a motion for relief pursuant to Rule 60(d)(3) and to disqualify the undersigned pursuant to 28 U.S.C. §§ 455(a),

455(b)(1). (Dkt. # 434.) On February 13, 2016, Petitioner filed a motion asking that his case be reassigned to a different district court judge. (Dkt. # 439.) On February 15, 2017, the Court denied both of Petitioner's motions, finding that the motion for Rule 60(d)(3) relief was in effect a fourth attempt at reconsideration of the Court's order denying Petitioner's Rule 60(b) motion alleging fraud on the habeas court. (Dkt. # 440). The Court also denied Petitioner a certificate of appealability. (Dkt. # 445.) On March 13, 2017, Petitioner appealed the Court's order to the Ninth Circuit. (Dkt. # 441.) On June 12, 2017, the Ninth Circuit declined to issue a certificate of appealability. (Dkt. # 450.) On August 2, 2017, the Ninth Circuit denied Petitioner's "Motion for Clarification and Reconsideration," stating that "[n]o further filings will be entertained in this closed case." (Dkt. # 452.)

On April 19, 2017, while his March 13, 2017 appeal was still pending, Petitioner filed a Petition for Writ of Mandamus for Disqualification Pursuant to 28 U.S.C. §§ 455(a) and 455(b)(1), which essentially repeated the relief he sought in the district court. (Dkt. # 448.) On July 26, 2017, the Ninth Circuit denied the petition for a writ of mandamus. (Dkt. # 451.)

On October 19, 2018, in Petitioner's most recent round of filings, Petitioner moved the Court for equitable relief from judgment under Rule 60(d)(1) of the Federal Rules of Evidence. (Dkt. # 453.) Petitioner contends that the

Supreme Court's recent decision in McCoy v. Louisiana, 138 S.Ct. 1500 (2018), is intervening precedent that justifies vacating the Court's prior habeas judgment and reopening the proceedings in this case "to rectify error that has resulted in a grave miscarriage of justice." (Dkt. # 453 at 2.) On November 8, 2018, Respondents filed a response in opposition. (Dkt. # 455.) Petitioner filed a reply on November 15, 2018. (Dkt. # 456.)

On December 4, 2018, Petitioner filed a motion for expedited hearing to admit testimonial evidence in support of his motion for equitable relief pursuant to Rule 60(d)(1). (Dkt. # 459.) On December 20, 2018, Respondents filed a response in opposition. (Dkt. # 461.) On December 28, 2018, Petitioner filed a reply. (Dkt. # 463.)

APPLICABLE LAW

I. Federal Rule of Civil Procedure 60(d)(1)

Rule 60(d)(1) permits the Court to "entertain an independent action to relieve a party from judgment, order, or proceeding. . . ." Fed. R. Civ. P. 60(d)(1). Because a Rule 60 independent action is an equitable one, the proponent must show a meritorious claim or defense. Furthermore, relief under Rule 60(d) is reserved for the rare and exceptional cases where a failure to act would result in a miscarriage of justice. United States v. Beggerly, 524 U.S. 38, 42–46 (1998).

Rule 60 may not be used to challenge once again the movant's underlying conviction after his habeas petition attacking the same conviction has been denied. Like a Rule 60(b) motion, one brought under Rule 60(d) may not be used as a substitute for appeal. Fox v. Brewer, 620 F.2d 177, 180 (8th Cir. 1980); see Payton v. Davis, 906 F.3d 812, 818 (9th Cir. 2018). An independent action brought under Rule 60(d) is generally treated the same as a motion under Rule 60(b). Nevada VTN v. Gen. Ins. Co. of Am., 834 F.2d 770, 775 (9th Cir. 1987).

II. Successive Habeas Petition

Because Rule 60(b) and 60(d) are similar, a court performs the same analysis with respect to a Rule 60(b) motion. See Blackwell v. United States, No. 4:99-CV-1687, 2009 WL 3334895, at *7 (E.D. Mo. Oct. 14, 2009). For habeas petitioners, a Rule 60(b) motion may not be used to "make an end-run around the requirements of AEDPA or to otherwise circumvent that statute's restrictions on second or successive habeas corpus petitions" set forth in 28 U.S.C. § 2244(b). Jones v. Ryan, 733 F.3d 825, 833 (9th Cir. 2013) (quoting Calderon v. Thompson, 523 U.S. 538 (1998)) (internal quotation marks omitted). This statute has three relevant provisions: (1) § 2244(b)(1) requires dismissal of any claim that has already been adjudicated in a previous habeas petition; (2) § 2244(b)(2) requires dismissal of any claim not previously adjudicated unless the claim relies on either a new and retroactive rule of constitutional law or on new facts demonstrating actual

innocence of the underlying offense; and (3) § 2244(b)(3) requires prior authorization from the Court of Appeals before a district court may entertain a second or successive petition under § 2244(b)(2). Absent such authorization, a district court lacks jurisdiction to consider the merits of a second or successive petition. United States v. Washington, 653 F.3d 1057, 1065 (9th Cir. 2011); Cooper v. Calderon, 274 F.3d 1270, 1274 (9th Cir. 2001).

There is no "bright-line rule for distinguishing between a bona fide Rule 60(b) motion and a disguised second or successive [§ 2254] motion." Jones, 733 F.3d at 834 (quoting Washington, 653 F.3d at 1060). In Gonzalez v. Crosby, the Supreme Court held that a Rule 60(b) motion constitutes a second or successive habeas petition when it advances a new ground for relief or "attacks the federal court's previous resolution of a claim on the merits." 545 U.S. at 532. "On the merits" refers "to a determination that there exist or do not exist grounds entitling a petitioner to habeas corpus relief under 28 U.S.C. §§ 2254(a) and (d)." Id. at 532 n.4. A legitimate Rule 60(b) motion "attacks, not the substance of the federal court's resolution of a claim on the merits, but some defect in the integrity of the federal habeas proceedings." Id. at 532; accord United States v. Buenrostro, 638 F.3d 720, 722 (9th Cir. 2011) (observing that a defect in the integrity of a habeas proceeding requires a showing that something happened during that proceeding "that rendered its outcome suspect"). For example, a Rule 60(b) motion does not

constitute a second or successive petition when the petitioner "merely asserts that a previous ruling which precluded a merits determination was in error—for example, a denial for such reasons as failure to exhaust, procedural default, or statute-of-limitations bar"—or contends that the habeas proceeding was flawed due to fraud on the court.[2] Id. at 532 nn. 4–5; see, e.g., Butz v. Mendoza-Powers, 474 F.3d 1193 (9th Cir. 2007) (holding that "where the district court dismisses a petition for failure to pay the filing fee or to comply with the court's orders, the district court does not thereby reach the "merits" of the claims presented in the petition and a Rule 60(b) motion challenging the dismissal is not treated as a second or successive petition"). The Court reasoned that if "neither the motion itself nor the federal judgment from which it seeks relief substantively addresses federal grounds for setting aside the movant's state conviction," there is no basis for treating it like a habeas application. Gonzalez, 545 U.S. at 533.

On the other hand, if a Rule 60(b) motion "presents a 'claim,' i.e., 'an asserted federal basis for relief from a . . . judgment of conviction,' then it is, in substance, a new request for relief on the merits and should be treated as a disguised" habeas application. Washington, 653 F.3d at 1063 (quoting Gonzalez,

[2] The Court notes that Petitioner has already unsuccessfully challenged his habeas proceeding on grounds that it was flawed due to fraud on the Court pursuant to Rule 60(b). (See Dkt. # 406.)

545 U.S. at 530). Interpreting Gonzalez, the court in Washington identified numerous examples of such "claims," including:

> a motion asserting that owing to excusable neglect, the movant's habeas petition had omitted a claim of constitutional error; a motion to present newly discovered evidence in support of a claim previously denied; *a contention that a subsequent change in substantive law is a reason justifying relief from the previous denial of a claim*; a motion that seeks to add a new ground for relief; a motion that attacks the federal court's previous resolution of a claim on the merits; a motion that otherwise challenges the federal court's determination that there exist or do not exist grounds entitling a petitioner to habeas corpus relief; and finally, an attack based on the movant's own conduct, or his habeas counsel's omissions.

Id. (internal quotations and citations omitted) (emphasis added). If a Rule 60(b) motion includes such claims, it is not a challenge "to the integrity of the proceedings, but in effect asks for a second chance to have the merits determined favorably." Gonzalez, 545 U.S. at 532 n.5.

ANALYSIS

Petitioner seeks equitable relief from the judgment on his Prior Petition for habeas relief pursuant to Rule 60(d)(1). (Dkt. # 453.) Specifically, Petitioner contends that the Supreme Court's May 2018 decision in McCoy v. Louisiana, 138 S.Ct. 1500 (2018), warrants the Court's relief from his prior judgment. (Id.) According to Petitioner, in light of McCoy, the relief he requests is necessary to avoid a "grave miscarriage of justice" in his case. (Id. at 11.)

In his Prior Petition for habeas relief, Petitioner claimed that his trial counsel's change in defense theory resulted in ineffective assistance of counsel. (See Dkt. # 153 at 28.) Petitioner argued that his trial counsel's presentation of alternate theories of defense during closing argument that Petitioner did not commit the crime, but that if he did do it, it was in self-defense, had no chance of convincing the jury to find him not guilty. (See id.) Relying on Strickland v. Washington, 466 U.S. 668, 687 (1994), this Court adopted the Magistrate Judge's recommendation that trial counsel's performance did not fall below an objective standard of reasonableness as it was within the wide range of competence and trial strategy. (Id. at 28–29.) Thus, the Court determined that Petitioner's ineffective assistance of counsel claim on that basis was without merit. (Id.)

In the instant motion, Petitioner now argues that this Court's findings regarding counsel's trial strategy conflicts with the Supreme Court's rule in McCoy. (Dkt. # 453 at 20.) According to Petitioner, McCoy establishes that the Court erred in deciding the merits of his prior habeas petition, raising exceptional circumstances justifying the independent action for relief he now presents to the Court. (Id.)

In McCoy v. Louisiana, the Supreme Court considered the case of a defendant who had been convicted on three counts of first-degree murder and sentenced to death. 138 S.Ct. at 1500. The defense attorney there concluded that

the evidence against the defendant was overwhelming and that the best or only way to avoid a death sentence at the penalty phase of the trial was to concede at the guilt phase of the trial that the defendant was the killer and then urge mercy in view of his "serious mental and emotional issues." Id. at 1506–07. The defendant both before and during the trial "vociferously insisted that he did not engage in the charged acts and adamantly objected to any admission of guilt." Id. at 1505. The state court nonetheless denied his requests to terminate his counsel's representation and for a new trial, concluding that the defendant's counsel had the authority to concede guilt despite the defendant's opposition to the concession. Id. at 1506–07. The Supreme Court reversed and held that "a defendant has the right to insist that counsel refrain from admitting guilt, even when counsel's experienced-based view is that confessing guilt offers the defendant the best chance to avoid the death penalty." Id. at 1505.

The Court reasoned that while "[t]rial management is the lawyer's province," including decisions as to "what arguments to pursue, what evidentiary objections to raise, and what agreements to conclude regarding the admission of evidence," id. at 1508 (quoting Gonzalez, 553 U.S. at 248), a criminal defendant is entitled to "[a]utonomy to decide that the objective of the defense is to assert innocence" and to "insist on maintaining her innocence at the guilt phase of a capital trial." McCoy, 138 S.Ct. at 1508. As the Court stated, "[t]hese are not

strategic choices about how best to achieve a client's objectives; they are choices about what the client's objectives in fact are." Id.

As in McCoy, Petitioner argues that the record in his case demonstrates that his Sixth Amendment right to autonomy was violated by his trial counsel when he abruptly switched defense theories during closing argument despite Petitioner's insistence on maintaining his innocence. He relies on evidence that he refused to provide written consent to his trial counsel's request that he authorize him to argue a "self-defense" theory of the case. (Dkt. # 456 at 10.) Petitioner also contends that the record is clear that he disagreed with trial counsel throughout trial, and that he attempted to have his counsel removed from the case during trial to no avail. (Id. at 11.) Additionally, Petitioner asserts that his trial counsel's post-trial pleadings confirm Petitioner's specific intent to maintain his innocence at trial. (Id. at 11–12.) For these reasons, Petitioner contends that McCoy demonstrates that his Sixth Amendment right to autonomy was violated when his counsel argued a self-defense theory of the case over Petitioner's objections. He requests that the Court grant him relief pursuant to an independent action filed under Rule 60(d)(1).

Upon careful review, the Court finds that Petitioner's argument reveals that he is not attacking "some defect in the integrity of federal habeas proceedings," as he has already done in previous filings, but rather, is presenting a

federal basis for relief from his underlying conviction, predicated on his Prior Petition for habeas relief. Thus, the Court finds that Petitioner's Rule 60(d)(1) motion amounts to a successive habeas petition for which this Court lacks proper jurisdiction to review under 28 U.S.C. § 2244 absent permission from the Ninth Circuit Court of Appeals.

Ninth Circuit Rule 22-3(a) provides, "If a second or successive petition or motion, or an application for authorization to file such a petition or motion, is mistakenly submitted to the district court, the district court shall refer it to the court of appeals." Because Petitioner's motion is a "second or successive" § 2254 motion that requires certification before it may proceed in this Court, the Court refers the matter to the Ninth Circuit pursuant to Rule 22-3(a) for certification purposes. This referral leaves nothing pending before this court. Additionally, because the Court is without jurisdiction to consider Petitioner's successive habeas petition, the Court will **DENY** Petitioner's motion for expedited hearing related to the petition.

CONCLUSION

Based on the foregoing, the Court **REFERS** Petitioner's "second or successive" § 2254 motion to the Ninth Circuit pursuant to Rule 22-3(a) for certification purposes. The Clerk of Court is directed to send this order, along with Petitioner's motion, to the Ninth Circuit. The Clerk of Court is also directed to

terminate Petitioner's motion pending the Ninth Circuit's certification decision. The Court **DENIES** Petitioner's Motion for Expedited Hearing to Admit Testimonial Evidence in Support of Independent Action for Equitable Relief (Dkt. # 459).

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, January 4, 2019.

UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII

David Alan Ezra
Senior United States Distict Judge

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

TARYN CHRISTIAN

CIV. NO. 04-00743 DAE-KSC

Petitioner

vs.

CLAYTON FRANK,

Respondent.

PETITIONER'S INDEPENDENT ACTION FOR EQUITABLE RELIEF FROM JUDGMENT UNDER FEDERAL RULE 60(d)(1) PURSUANT TO INTERVENING SUPREME COURT PRECEDENT IN MCCOY V. LOUISIANNA, (2018)

Petitioner, Taryn Christian, by and through his undersigned counsel, respectfully moves by Independent Action under Fed. R. Civ. P. 60(d)(1) for equitable relief from judgment of his federal habeas corpus application closed by the judgment of this Court entered on September 30, 2008 (Doc. 153). Petitioner's grounds for equitable relief are cognizable under Fed. R. Civ. P. 60(d)(1) /Independent action as interpreted in Beggerly, Gonzalez, Article III, and/or 28 U.S.C. §2243.

This Independent Action is brought on the grounds that the Supreme Court's

intervening decision in McCoy v. Louisiana, 584 U.S. ___, (2018), which governs the facts and circumstances of Petitioner's Sixth Amendment claim, warrants the District Court's notice in the interests of fundamental justice, to vacate its habeas judgment and reopen the proceedings to rectify error that has resulted in a 'grave miscarriage of justice.' Extraordinary circumstances are demonstrated where the Justices of the Supreme Court have opined that the Sixth Amendment violation described herein, as one that is "rare" and therefore corrected on appeal. The federal courts have repeatedly concluded that when a party to federal litigation receives an inconsistent application of the law which deprives him of a right accorded to other similarly situated parties, "extraordinary circumstances" exist which warrant post-judgment relief.

The motion for equitable relief from judgment is outlined more fully in the accompanying Memorandum of Points and Authorities and supporting documents. Using its power to ensure justice, this Court should grant equitable relief where the common law tradition, developed over centuries across the English-speaking world, mandates that if the client gives clear instruction that his defense is to be "not guilty", defense counsel is required to honor that instruction and is forbidden to argue his client is guilty.

Dated this 19th day of October, 2018.

/s/ Gary A. Modafferi

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

TARYN CHRISTIAN

CIV. NO. 04-00743 DAE-KSC

Petitioner,

v.

CLAYTON FRANK,

Respondent.

PETITIONER'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF FEDERAL RULE 60(d)(1) INDEPENDENT ACTION FOR EQUITABLE RELIEF FROM JUDGMENT PURSUANT TO INTERVENING SUPREME COURT DECISION IN MCCOY V. LOISIANNA, 584 U.S.___(2018).

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INTRODUCTION

The Supreme Court in its recent landmark decision in McCoy v. Louisiana, 584 U.S. __ (2018), addressed the constitutional question whether it is unconstitutional for defense counsel to admit an accused's guilt to the jury over his client's express objection. The Court's decision, authored by the Honorable Justice, Ruth Bader Ginsburg, affirmed that the Sixth Amendment guarantees a defendant the right of autonomy to choose the objective of his defense and to insist that his counsel refrain from admitting guilt.

McCoy sought to exercise his autonomy on one of the most fundamental decisions a defendant can possibly make—whether to admit or deny his own guilt before a jury. On trial for his life, McCoy made an informed, intelligent, and timely decision to maintain his innocence and put the state to its burden. That decision was not respected by his attorney. Over McCoy's express objection, the trial court permitted his attorney, Larry English, to tell the jury that McCoy was guilty of murder. A unanimous jury returned a verdict for first degree murder and sentenced McCoy to death. The Supreme Court reversed the Louisiana Supreme Court's decision that McCoy's attorney had authority to concede guilt despite McCoy's opposition—finding that it was incompatible with the Sixth Amendment and because the error was 'structural' and not subject to harmless-error review, a new trial was the required corrective.

The Sixth Amendment is addressed to the accused; it grants to him personally the right to make a defense—not to his lawyer and not to the state. Faretta v. California, 422 U.S. 806, 819 (1975), and therefore it is the accused who must have the ultimate authority to admit guilt. The Supreme Court observed that autonomy to decide whether to

concede guilt is a fundamental component of the client's right to set the objectives of his representation; it is not a mere question of tactics best left to the lawyer's expertise. Justice Ginsburg wrote that where a client's autonomy, not counsel's competence, is in issue, ineffective assistance jurisprudence is an inapt frame-work for understanding defendant autonomy—therefore its ineffective-assistance-of counsel jurisprudence under Strickland v. Washington, 466 U. S. 668 (1984), did not apply.

Petitioner, Taryn Christian, like Robert McCoy, made it clear beyond any doubt, both to his lawyer, Anthony Ranken, and the trial court, that he chose to defend against the charges and assert his innocence. This was especially clear where he plead not guilty and the defense had proffered three witnesses to testify that a third party had confessed to the murder for which Petitioner was charged. Yet, over Petitioner's express objection, and over Petitioner's request to testify before closing argument, his attorney reversed the defense's position from its opening statement, and in closing-summation, told the jury that Petitioner had committed the murder—but had acted in "self-defense". A unanimous jury returned a verdict of second-degree murder and Petitioner was sentenced to life.

Upon habeas review, the District Court, adopting the Magistrate Judge's findings and recommendation, attached no constitutional significance to Petitioner's protected Sixth Amendment right of autonomy to assert his innocence at trial, or the "structural" error that resulted from its violation. Applying a narrow reading of Strickland, the habeas court concluded Mr. Ranken's decision in his closing summation was reasonable defense strategy. The District Court's reasoning reflects the conclusion that defense counsel, not Petitioner, controlled the decision whether to admit guilt. Such reasoning posited a

conflict between the Sixth Amendment right to defend against the charges and that of having the assistance of counsel. The Supreme Court's explicit holding in McCoy made clear that no claim of coherent defense strategy could justify counsel's admission—indeed, prosecution—of his client's guilt in the face of his express objection. The District Court's habeas judgment is contrary to the fundamental principles affirmed by McCoy's holding, where the Supreme Court held that the Constitution does not permit what happened here.

Taryn Christian's Sixth Amendment right of autonomy was indeed violated by the actions of his trial attorney, and that his constitutional claim was wrongly decided and erroneously foreclosed from appellate review—resulting in a 'grave miscarriage of justice' warranting the District Court's immediate notice and correction of its habeas judgment, that can no longer in good conscience be enforced.

JURISDICTION

In United States v. Beggerly, 524 U.S. 38 (1998), the Supreme Court held that "an independent action brought in the same court as the original lawsuit [does not] requir[e] an independent basis for jurisdiction." Id. at 46. In every federal case—habeas or non-habeas—Article III provides a District Court "inherent power ... over its own judgments." Bronson v. Schulten, 104 U.S. (14 Otto) 410, 417 (1881). Article III provides a district Court plenary equitable power to revisit and/or revise its own judgments in the interest of fundamental justice. That inherent power dates to the adoption of Article III itself, which extends federal jurisdiction to all matters of equity. See U.S. Const. Art. III §2. See also United States v. Ohio Power Co., 353 U.S. 98, 99

(1957) (per curium (acknowledging a federal court's "power over [its] own judgment."). In habeas proceedings, 28 U.S.C. § 2243 compliments a District Court's inherent Article III equitable powers over its judgment, endowing a District Court with "all the freedom of equity procedure" necessary to revise a judgment in the interest of fundamental justice.

STATEMENT

A. Trial Proceedings

On August 17, 1995, Petitioner, Taryn Christian, was arrested without warrant or grand jury indictment and charged with the murder of Vilmar Cabaccang that occurred on July 14, 1995. From the time he was arrested Petitioner consistently maintained his innocence of the offense, requesting DNA testing of crime scene evidence and forensic examination of certain audio and video recordings. All requests were denied. Prior to trial, appointed counsel, Anthony Ranken, proffered to the court that the defense would call three witnesses to testify that the initial suspect in the case, James Hina Burkhart, had confessed and bragged to committing the fatal stabbing of Cabaccang.

On February 24, 1997, prior to the commencement of trial, Anthony Ranken produced to Petitioner a letter requiring Petitioner to give his signed authority to argue self-defense and attempted theft to the charge of murder in the second degree. Petitioner refused consent, insisting counsel argue his innocence which was supported by evidence that Burkhart had confessed to his friends that he committed the murder. See (Appendix B – Ranken's Letter Requesting Petitioner's Signed Consent). Because of Ranken's pre-trial admonitions, his refusal to withdraw, and his adamant insistence that Petitioner not testify despite being a percipient witness—Petitioner produced a notarized hand-written

'Affidavit' describing the events witnessed on the morning of July 14, 1995, and served his Affidavit on both Ranken and the prosecutor at the onset of trial.

In his opening statement to the jury, Ranken indicated that Petitioner was innocent and did not commit the murder, stating "that there was another man there" whom the prosecutor had not mentioned—a man known to the decedent and his girlfriend. See (Appendix C-1 – Ranken's Opening Statement). In the midst of trial, the trial court held an *in chambers* hearing and ruled to exclude the testimony of the witnesses that were proffered to testify that James Burkhart had confessed to the stabbing of Cabaccang, and that Serena Seidel, [Cabaccang's girlfriend] had furnished him with the keys to Cabaccang's vehicle. During the hearing while Burkhart asserted his Fifth Amendment privilege, the State argued to the court that the confession witnesses were "not reliable or trustworthy" because "no witnesses had identified Burkhart from any photographic arrays" and "two witnesses" placed him *within* their residence at the time of the crime. Petitioner's request to testify as his own witness before the commencement of closing arguments was denied by the trial court. Ranken, in siding with the prosecution that Petitioner not be allowed to take the stand, argued to the trial court:

> "I've informed him that we're beyond that stage of the trial and advised him not engage in any further outburst in front of the jury because I believe it will only hurt his case..."

Then, in closing summation, over Petitioner's expressed objection, Ranken proceeded to argue to the jury that Petitioner, while under great duress had committed the murder in "self-defense", reversing the defense's position which was paramount to him changing Petitioner's plea: See (Appendix C-2 – Ranken's Closing Argument at pp. 40;

55; 56) (emphasis supplied). Ranken argued in part:

> "... *I'm going to explore with you what really happened that night... But I have to admit to you I don't really know what happened...* I've got to move on, and you know it's-this is the hardest thing for a lawyer to do because now you're going to say well, Mr. Ranken, you are contradicting yourself. You just told us that Taryn didn't do it, and now you're talking about well he did it, its self-defense, whatever. There's no way around it, ladies and gentlemen, I'm-I don't know what happened... So, yes, I'm going to assume now for the sake of argument that Taryn was the one that inflicted these wounds despite everything I said... Lets try to reconstruct how this fight happened....Mr. Cabaccang tackles Taryn. His shirt -Taryn's shirt conies up enough to expose his belly or Vilmar pushes the shirt up to get his knife hand under against Taryn's flesh. Taryn's lying face down on the pavement...with this larger, heavier, stronger man on top of him...pinning him down and cutting him with a knife...There was after that–after Taryn felt the pain of his own blood being drawn, after he felt the knife against his belly that he grabbed that knife only to again - *I submit to you it was then that Taryn, the terrified teenager, took his own knife out of its sheath to defend himself...*"
>
> None of this information was supported by any eyewitness or by Petitioner.

Petition had no cuts or wound(s) as Ranken described. Earlier, counsel represented that he did not know what happened. Yet, he argued specific details not supported by any evidence, providing a theory that was substantially similar to that of the prosecution, and in effect, testified for the prosecution. (Refer at pp. 70-72; 74; 80-86) (emphasis added).

> "... *So then how did Vilmar get stabbed? The way Vilmar got stabbed is obviously Taryn from that position,* if Taryn was the one who did it, managed to get up his knife without seeing what he was doing, just thrust blindly behind him and up where Vilmar was sitting on him...And it looks like he was acting in self-defense, never really realizing the harm that he was inflict-ing because he could not see the harm he was inflicting. He did not know where that knife was landing... Blindly, without being able to see, just stabbing behind his own back...He was tackled, and that's how he ended up face down. And there was a struggle, Vilmar was getting the best of Taryn. *Taryn had the knife, and Taryn defended himself."*
> "...What was Taryn's intent that night? ...Taryn never intended to kill anyone. Taryn never knowingly killed anyone...Taryn didn't want this fight to happen. He didn't intend this fight to happen... *he didn't intend for Vilmar to end up dead."*

As supported by the record, Ranken in his summation, profoundly separated himself from his client when he stated to the jury, "I don't really know what happened." This was undoubtedly against the best interests of his client, as counsel, prosecutor and the court, were fully aware that Petitioner had requested the trial court grant him his constitutional right to testify before closing argument. Ranken argued: (emphasis added).

> "... Now, my client's asked me, won't the jury hold it against me if I don't testify? My client's asked me, won't they think I'm hiding something? But when I'm handling a case this serious, I ask myself if I do put my client on the stand, are you going to believe him anyway? *If someone's facing a charge this serious, are you going to believe whatever he says, or are you going to figure that he'll say whatever he needs to say to try get acquitted. I figure there's not much point in putting him on the stand."*

After telling the jury that he didn't really know what happened that night, Ranken's comments as to the irrelevance of his client's testimony were profoundly prejudicial and cannot be considered harmless error. His concession to the jury that while Petitioner was pinned down under the weight of Cabaccang, he was just, *"blindly, without being able to see, just stabbing behind his own back"* does not demonstrate mere negligence in the presentation of his client's case or a "strategy" to gain a favorable result that misfired. Instead, Ranken's statements lessened the government's burden of persuading the jury that Petitioner was the person who stabbed Cabaccang. In yet another instance of counsel's concession to the jury that his client was the perpetrator he states: "He's never been in trouble...He's facing shame of being caught for stealing..."

Again, when counsel made this claim to the jury, implying and confirming for them that his client was a thief and had unlawfully entered Cabaccang's vehicle, he ceased to function as defense counsel. Counsel's conduct cannot be considered a tactical

admission in order to persuade the jury to focus on a defense, such as the one of self-defense. When counsel abandoned his duty of loyalty to his client and effectively joined the state in their effort to attain a conviction, he suffered an obvious conflict of interest. Thus, when Ranken failed to subject the prosecution's case to meaningful adversarial testing, there was a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable.

After Petitioner was convicted of second-degree murder, Ranken filed a motion for new trial and a supplemental memorandum representing a reversal of his position during summation. Ranken, in his pleadings, attempts to shift blame to the trial court in an effort to mask counsel's deplorable conduct during the trial. (Dkt. 1-2: Exhibit #47-F). Ranken wrote at #1 and #2 as follows:

1. When Defendant Requested a New Attorney in the Middle of The Trial, the Court Failed to Conduct the Required "Penetrating and Comprehensive Examination" of the Defendant to Determine the Basis of His Request.

2. When Defendant Informed the Court Before Closing Arguments That He Wished to Testify Before the Jury, the Court Should Have Reopened the Evidentiary Portion of The Trial to Allow Defendant to Testify.

Attached to his Supplement for New Trial, in an 'Affidavit of Anthony Ranken' counsel wrote at #3: (Dkt. # 1-2: Exhibit # 52-A).

3. If allowed to testify, Defendant would have denied being the person who stabbed Vilmar Cabaccang and would have told the jury about the presence of a third man at the scene of the stabbing.

In his Affidavit, counsel concedes that his representation of Petitioner at trial and his closing argument was inconsistent with what Petitioner would have testified to under oath. The trial court denied Ranken's Motion for New Trial and the Hawai'i

Supreme Court upheld Petitioner's conviction.

B. Habeas Judgment.

On December 22, 2004, Petitioner filed a timely petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. On August 29, 2008, the Magistrate Judge, the Honorable Leslie E. Kobayashi, issued her Findings and Recommendations to grant the Petition in part and deny it in part. In deciding Petitioner's Six Amendment claim on the issue of trial counsel's concession of guilt over Petitioner's objection, the Magistrate concluded that where the trial court had excluded the witnesses from testifying that Burkhart had confessed to the killing, trial counsel's "strategic decision" to argue self-defense was "objectively reasonable". (Dkt # 146: pp. 60-61). See (Appendix D – The Magistrate Judge's Findings and Recommendations to Grant in Part and Deny in Part Petition for Writ of Habeas Corpus). The court wrote:

> At the outset of trial, the defense's strategy was to establish that Petitioner did not kill Cabaccang. By the time of closing arguments, however, trial counsel apparently altered the defense's strategy and presented self-defense and extreme emotional disturbance as alternative arguments. This Court finds that, under the circumstances of the trial, this decision was within "the wide range of professionally competent assistance." See Strickland, 466 U.S. at 690. As discussed, supra, Burkhart invoked the Fifth Amendment when called as a defense witness and the trial court excluded the witnesses who would have testified that Burkhart confessed to killing Cabaccang. These events certainly hurt the defense's ability to establish that another person, namely Burkhart, killed Cabaccang. Trial counsel's strategic decision to also argue self-defense and extreme emotional disturbance was objectively reasonable under the circumstances.

On September 30, 2008, the District Court entered its judgment and adopted the Magistrate's findings and recommendations regarding trial counsel's concession of guilt. (Dkt. #153 at p. 28). See (Appendix E - Habeas Order). The District Court wrote:

> ...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 denied a COA on his Sixth Amendment claim by the Ninth Circuit Court of Appeals, foreclosing appellate review and the opportunity to seek certiorari review in the United States Supreme Court.

On May 14, 2018, the U.S. Supreme Court entered its landmark decision in McCoy v. Louisiana, 584 U.S. __ (2018), establishing governing precedent of the specific facts and circumstances found in Petitioner's trial that was incorrectly decided by the District Court during Petitioner's §2254 proceeding. See (Appendix A – The Supreme Court's Decision in McCoy v. Louisiana).

Petitioner's instant Independent Action in Equity pursuant to Fed. R. Civ. P. 60(d)(1), demonstrating a 'grave miscarriage of justice' and exceptional circumstances is properly before the District Court.

* * *

ARGUMENT

I. IN LIGHT OF SUPREME COURT PRECEDENT IN MCCOY V. LOUISIANA, WHICH GOVERNS PETITIONER'S SIXTH AMENDMENT CLAIM—PETITIONER'S RULE 60(d)(1) INDEPENDENT ACTION TO ADDRESS A 'GRAVE MISCARRIAGE OF JUSTICE' IS PROPERLY BEFORE THE DISTRICT COURT.

The Supreme Court's May 2018 decision in McCoy v. Louisiana, 584 U.S. __ (2018), has been hailed as a decisive statement of the priority of the value of a criminal defendant's autonomy over the fairness and reliability interests that also inform both the Sixth Amendment and the ethical obligations of defense counsel.

In its decision, the Supreme Court affirmed when a defendant expressly asserts that the objective of "his defence" is to maintain innocence of the charged criminal acts, "his lawyer must abide by that objective and may not override it by conceding guilt." U.S. Const., Amdt. 6 (emphasis added); see ABA Model Rule of Professional Conduct 1.2(a) (2016) (a "lawyer shall abide by a client's decisions concerning the objectives of the representation"). "Presented with express statements of the client's will to maintain innocence … counsel may not steer the ship the other way". See Gonzalez, 553 U. S., at 254 (Scalia, J., concurring in judgment) ("[A]ction taken by counsel over his client's objection… ha[s] the effect of revoking [counsel's] agency with respect to the action in question.").

Robert McCoy was charged with the murder of three of his family members in Bossier City, Louisiana. The state brought capital charges against him, but McCoy maintained his innocence—claiming he was not even in the state at the time of the murders—and demanded a jury trial. But in light of the evidence against him, McCoy's

lawyer thought the best trial strategy would be to admit guilt to the jury and hope for leniency in sentencing. McCoy adamantly opposed this plan, but his lawyer pursued it anyway and told the jury that McCoy was guilty. The jury returned three murder convictions and sentenced McCoy to death.

The Supreme Court reversed the decision of the Louisiana Supreme Court—finding that it was incompatible with the Sixth Amendment and because the error was 'structural' in kind, a new trial was required. The majority opinion by the Honorable Justice Ginsburg accords with the principle of defendant autonomy, and the long-standing maxim that the Sixth Amendment guarantees the right to a *personal* defense.

While a defendant is, of course, guaranteed the "Assistance of Counsel," the defendant himself remains master of the defense and is entitled to make fundamental decisions in his own case. The precept of the right of a defendant to serve as the master of his own defense finds resonance in the Sixth Amendment, which grants the right to put on a defense directly and personally to the accused—not to his lawyer and not to the state. Faretta, 422 U.S. at 819. A defendant who accepts the assistance of counsel does not forfeit the right to be the master of his defense. See Faretta, 422 U.S. at 819-21; see also United States v. Teague, 953 F.2d 1525, 1533 (11th Cir. 1992) ("[W]hile defense counsel serves as an advocate for the client, it is the client who is the master of his or her own defense. The Sixth Amendment "speaks of the 'assistance' of counsel, and an assistant, however expert, is still an assistant." Faretta, 422 U.S. at 820.

The heart of the Supreme Court's analysis emphasized that defendant autonomy—not ineffective assistance of counsel—was the proper lens through which to view the

case. The McCoy Court addressed that the issue is not whether such a strategy is reasonable; it is whether a competent defendant, fully informed of his situation, may decide for himself whether to maintain his innocence and demand the state prove his guilt beyond a reasonable doubt. The Court observed that autonomy to decide whether to concede guilt is a fundamental component of the client's right to set the objectives of a representation; it is not a mere question of tactics best left to the lawyer's expertise. "These are not strategic choices about how best to *achieve* a client's objectives; they are choices about what the client's objectives in fact *are*." Weaver v. Massachusetts, 582 U.S. __, (2017) (slip op., at 6) (2017) (self-representation will often increase the likelihood of an unfavorable outcome but "is based on the fundamental legal principle that a defendant must be allowed to make his own choices about the proper way to protect his own liberty"); Martinez v. Court of Appeal of Cal., Fourth Appellate Dist., 528 U. S. 152, 165 (2000) (Scalia, J., concurring in judgment) ("Our system of laws generally presumes that the criminal defendant, after being fully informed, knows his own best interests and does not need them dictated by the State.").

The Court discussed that because a client's autonomy, not counsel's competence, is in issue, the Court does not apply the ineffective-assistance-of-counsel jurisprudence discussed in Strickland v. Washington, 466 U.S 668 (1984), or United States v. Cronic, 466 U.S. 648 (1984), to the claim." The Court explained that to gain redress for attorney error, a defendant ordinarily must show prejudice. See Strickland, 466 U. S., at 692. "Here, however, the violation of McCoy's protected autonomy right was complete when the court allowed counsel to usurp control of an issue within McCoy's sole prerogative."

Id. This principle of autonomy has received the most judicial attention in the context of self-representation, but also finds expression in the defendant's right to choice of counsel, see United States v. Gonzalez-Lopez, 548 U.S. 140 (2006), and in a defendant's "ultimate authority to make certain fundamental decisions regarding the case," Jones v. Barnes, 463 U.S. 745, 751 (1983), even when represented by counsel.

There is nothing in the common law history of counsel-client relations before the adoption of the Bill of Rights to suggest that such assistance empowered the advocate to ignore or override the client's manifest instruction as to his plea and defense.

A. An Independent Action Pursuant to Rule 60(d)(1) Codifies Legal Grounds and Procedures to Relieve a Party of the Final Judgment to Address a "Grave Miscarriage of Justice."

Rule 60 of the Federal Rules of Civil Procedure, entitled "Relief from a Judgment or Order," provides that judgments, while ordinarily accorded a degree of finality, are subject to being set aside when appropriate, whether for ministerial reasons at one end of the spectrum or for fraud at the other. Fed. R. Civ. P. 60. Pursuant to Fed. R. Civ. P. 60(d)(1); "[T]he reference to 'independent action' in the saving clause is to what had been historically known simply as an independent action in equity to obtain relief from a judgment." Barrett, 840 F.2d at 1262–63 (quoting 11 C. Wright & A. Miller, Federal Practice & Procedure § 2868, at 237–38 (1973)). The rule therefore "does not limit a court's power to . . . entertain" such an action regardless of the passage of time. Fed R. Civ. P. 60(d), (d)(1). Thus, an independent action may be dismissed if filed within one year, when other Rule 60(b) remedies are available. See Moore's, supra note 7, at §60.82 [3]. An independent action is appropriate only where there is no adequate remedy at law.

See, Bankers Mortg. Co. v. United States, 423 F. 2d 73, 79 (5th Cir. 1970).

The Supreme Court addressed the topic of Rule 60 independent actions in United States v. Beggerly, 524 U.S. 38, 118 S.Ct. 1862, 141 L.Ed.2d 32 (1998), accord Pickford v. Talbott, 225 U.S. 651, 657, 32 S.Ct. 687, 56 L.Ed. 1240 (1912) (available when enforcement of the judgment is "manifestly unconscionable"). In that case, the Beggerly family entered into a settlement with the United States Government quieting title to disputed land in favor of the latter in return for a sizeable payment. 524 U.S. at 39. The family filed an independent action in federal court several years later to set aside the settlement, citing new evidence. See id. at 39, 40–41. In denying relief, the Supreme Court explained the family's allegation that the government withheld information during the original action would have, at most, "form[ed] the basis for a Rule 60(b)(3) motion," id. at 46, and "it should [have been] obvious that [the family's] allegations d[id] not nearly approach th[e] demanding" "grave miscarriage of justice" standard. Id. at 47.

The Beggerly Court was very specific as to the issues it addressed and those it did not address. In a concurring opinion, Justice Stevens and Justice Souter explained:

> ...We are not confronted with the question whether a doctrine such as fraudulent concealment or equitable estoppel might apply if the Government were guilty of outrageous misconduct that prevented the plaintiff, though fully aware of the Government's claim of title, from knowing of her own claim. Those doctrines are distinct from equitable tolling, see 4 C. Wright & A. Miller, Federal Practice and Procedure §1056 (Supp.1998); cf. United States v. Locke, 471 U. S. 84, 94, n. 10 (1985) (referring separately to estoppel and equitable tolling), and conceivably might apply in such an unlikely hypothetical situation. The Court need not (and, therefore, properly does not) address that quite different type of case.

The Supreme Court summed up the standard by stating that "an independent action should be available only to prevent a *grave miscarriage of justice.*" Id, at 47.

(emphasis added). The Court held that only a plausible claim alleging an injustice "sufficiently gross" to merit departing from the strict doctrine of res judicata will compel relief in such cases. Beggerly, 524 U.S. at 46. In other words, the injustice must be so severe that enforcement of the original judgment would be "manifestly unconscionable." Mitchell, 651 F.3d at 599 (citing Pickford v. Talbott, 225 U.S. 651, 657 (1912)). See, Barrett, 840 F.2d. at 1263 ("Relief pursuant to the independent action is available only in cases 'of unusual and exceptional circumstances.'" (quoting Rader v. Cliburn, 476 F.2d 182, 184 (6th Cir. 1973)). In Solomon v. DeKalb County, Georgia, the Eleventh Circuit again addressed Rule 60 independent actions. 154 Fed. Appx. 92 (11th Cir. 2005). The court observed that the Rule 60 independent action gives the court "the power to set aside a judgment whose integrity is lacking..." The court further stated: Relief under this clause... is an extraordinary remedy which may be invoked only upon a showing of exceptional circumstances. The party seeking relief has the burden of showing that absent such relief, an 'extreme' and 'unexpected hardship will result." *Id.* (quoting Griffin v. Swim-Tech Corp., 722 F.2d 677, 680 (11th Cir. 1984).

Second, a petitioner may seek equitable relief under Rule 60(d)(1) where manifest error is shown to have caused "*some defect in the integrity of the federal habeas proceedings.*" Gonzalez, 545 U.S. ___, 125 S.Ct. at 2648 (emphasis supplied). This mirrors the Sixth Circuit's holding in In Re Abdur'Raman, 392 F.3d 174 (6th Cir. 2004) (en banc), which specifically held that a motion for equitable relief is permissible if the motion contains arguments which show "reason to doubt the integrity of a habeas judgment." Id. at 180. Such a motion is proper if it "attacks the manner in which the

earlier habeas judgment was procured." Id. At 177. While a petitioner invoking Rule 60(d)(1) may seek relief from judgment in accordance with Gonzalez, a petitioner may also seek relief proceeding directly under Article III of the Constitution, which confers upon a District Court inherent equitable powers over its own judgment.

(i) The 'Miscarriage of Justice' Standard Defined.

In 1927, Justice Dundedin of the Privy Council (whom the British, in accordance with their parochial tradition, called "*Viscount* Dunedin") wrote in *Robins*:

> "... *miscarriage of justice* ... means such departure from the rules which permeate all judicial procedure as to make that which happened not in the proper use of the word judicial procedure at all."

In Fanjoy v. R., (1985): Justice McIntyre of Canada's Supreme Court wrote:

> "A person charged with the commission of a **crime** is entitled to a fair trial according to law. Any error which occurs at trial that deprives the accused of that entitlement is a *miscarriage of justice*. It is not every error which will result in a *miscarriage of justice*, the very existence of the proviso to relieve against errors of law which do not cause a miscarriage of justice recognizes that fact."

In Lin v Tang, 147 D.L.R. (4th) 577 (1997): Justice Huddard of the British Columbia Court of Appeal opined:

> "Miscarriage of justice is a difficult concept. It is not simply unfairness as viewed by the party who perceives himself the victim of an unfair process.... In my view, miscarriage of justice means that which is not justice according to law. A miscarriage of justice will almost always be procedural. The blemish must be such as to make the judicial procedure at issue not a judicial procedure at all."

In R. v. Duke, 6 W.W.R. 386, 22 C.C.C. (3d) (1985), Justice McClung: Alberta Court of Appeal wrote, in reference to an appeal and the *Canadian Criminal Code*:

> "... the determination of whether a *miscarriage of justice* has occurred rests on broader considerations than those attaching to the demonstration of

a *substantial wrong*. Proof of actual prejudice resulting from an error of law is not requisite to a finding that a *miscarriage of justice* has occurred. It may be enough that an appearance of unfairness exists."

West's Encyclopedia of American Law, edition 2:

"A miscarriage of justice arises when the decision of a court is inconsistent with the substantive rights of a party."

Ballentine's Law Dictionary:

A decision inconsistent with substantial justice. Kotteakos v United States, 328 US 750, 90 L Ed 1557, 66 S Ct 1239. The result of a case in which essential rights of a party were disregarded or denied. People v Musumeci, 133Cal App2d 354, 284 P2d 168.

B. Petitioner's Independent Action Satisfies the Equitable Requirements For Relief.

To obtain relief from a judgment through an independent action, parties must establish equitable requirements. The independent action prerequisites are often stated as follows: (1) a judgment which ought not, in equity and good conscience, 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 defendant; and (5) the absence of any remedy at law.

(i) Petitioner Satisfies McCoy's Core Requirement Where His Trial Counsel Conceded Guilt Over His Express Objection.

Petitioner, like McCoy, repeatedly and unequivocally instructed his attorney to pursue an innocence-based defense at trial, an instruction that counsel deliberately disregarded. By doing so, Ranken's pursuit of a defense strategy fundamentally incompatible with that selected by his client, resulted in a constructive denial of counsel

and a divided defense. But when the defense is divided, the defendant's own attorney, not the prosecutor, becomes his chief adversary. See United States v. Williamson, 53 F.3d 1500, 1511 (10th Cir. 1995) ("admission by counsel of his client's guilt to the jury" is a "paradigmatic example of the sort of breakdown in the adversarial process that triggers a presumption of prejudice").

In accord with Supreme Court precedent in McCoy v. Louisiana, Petitioner has satisfied that he was denied his protected constitutional right of autonomy to serve as the master of his own defense—a Sixth Amendment 'structural' violation that was not recognized or correctly decided by the federal habeas court, resulting in a §2254 judgment, which ought not, in equity and good conscience, be enforced.

(ii) The District Court Egregiously Misunderstood the Constitutional Significance of Petitioner's Right of Autonomy to Assert An Innocence-Based Defense at Trial and the 'Structural' Error That Resulted From its Violation.

In denying habeas relief, the District Court clearly misunderstood the Constitutional significance of Petitioner's protected rights under the Sixth Amendment. Although a lawyer may make tactical decisions concerning the means used to pursue his client's objectives, the decision over whether to assert innocence at trial rests with the defendant. It has long been recognized that where a criminal defendant exercises his constitutional right to plead "not guilty," as Petitioner did, his lawyer has an obligation to "structure the trial of the case around his client's plea." Wiley v. Sowders, 647 F.2d 642, 560 (6th Cir. 1981). This Mr. Ranken clearly *failed* to do.

When a lawyer admits his client's guilt and relieves the prosecution of its burden

of proof over the client's express objection, the defendant suffers a structural error that is "so intrinsically harmful as to require automatic reversal (i.e., 'affect substantial rights') without regard to [its] effect on the outcome." Neder v. United States, 527 U.S. 1, 7 (1999) (quoting Fed. R. Crim. P. 52(a)). That is because the "constitutional deprivation" is not "simply an error in the trial process," but "affect[s] the framework within which the trial proceeds." Arizona v. Fulminante, 499 U.S. 279, 310 (1991) (quoting Rose v. Clark, 478 U.S. 570, 577-578 (1986)).

The District Court failed to recognize this long established and most fundamental tradition that under no circumstances, may counsel ignore the instructions and concede guilt. Where counsel refuses to withdraw and remaines on the case, he may never go against the client's instruction to present a defense of not guilty. This balance of power is reflected both in case law and professional conduct regulations.

(iii) Petitioner's Independent Action is Proper in the Absence of Any Other Remedy at Law to Afford the District Court to Correct Error.

In light of the Supreme Court's decision in McCoy v. Louisiana, which controls the specific circumstances of Petitioner's case, an 'independent action' in equity is proper in the absence of any other remedy at law to afford the District Court the opportunity to correct clear error in the face of a grave miscarriage of justice.

(iv) Extraordinary Circumstances Warranting Equitable Relief Exist Where Petitioner Received an Erroneous/ Inconsistent Application of the Law by the Federal Court.

The federal courts have repeatedly concluded that when a party to federal litigation receives an inconsistent application of the law which deprives him of a right

accorded to other similarly situated parties, "extraordinary circumstances" exist which warrant post-judgment relief. See e.g., Gondeck v. Pan American World Airways, 382 U.S. 25, 27 (1965)(granting post-judgment relief on rehearing to prevent inconsistent application of the law); Pierce v. Cook & Co., 518 F.2d 720 (10th Cir. 1975)(en banc) (granting 60(b) relief after finding extraordinary circumstances where, as a result of erroneous application of law by federal court, litigant received different treatment from similarly situated party); Cincinnati Insurance Co. v. Byers, 151 F.3d 574 (6th Cir.1998) (extraordinary circumstances existed where there was intervening change in the law); Overbee v. Van Waters, *765 F.2d 578 (6th Cir. 1985)(finding extraordinary circumstances* and granting relief from judgment based on intervening decision of Ohio Supreme Court); Jackson v. Sok, 65 Fed.Appx. 46 (6th Cir. 2003) (per curiam), (upholding grant of 60(b) relief based on intervening state supreme court decisions).

Rare is the case where the district court's errors are so grave as to "seriously impair[] the fairness, integrity, or public reputation of judicial proceedings." C.B., 769 F.3d at 1019 (quoting Diaz-Fonseca, 451 F.3d at 36). In law, almost invariably applied to the act, fault, or omission of a court, as distinguished from that of an individual. See Holton v. Olcott, 58 N. H. 598; Fraud is always the result of contrivance and deception; injustice may be done by the negligence, mistake, or omission of the court itself. Silvey v. U. S., 7 Ct CI. 324. In re Moulton, 50 N. H. 532. "Fraud" is deception practiced by the party; "injustice" is the fault or error of the court.

The Supreme Court's decision in McCoy confirms that manifest "injustice" has resulted here, from fault or error of the federal court and the Court of Appeals' failure to

recognize the ethical obligations of Counsel under the Sixth Amendment.

II. PURSUANT TO MCCOY'S PRECEDENT—THE DISTRICT COURT HAS A FUNDAMENTAL INTEREST AND A DUTY TO SEE THAT JUSTICE IS DONE IN PETITIONER'S CASE—WARRANTING THE REOPENING OF PETITIONER'S HABEAS ACTION TO RECTIFY A GRAVE MISCARRIAGE OF JUSTICE.

In denying Petitioner's Sixth Amendment claim, the District Court applied a very narrow reading of Strickland to justify Ranken's complete reversal of Petitioner's defense in his closing summation. The Court maintained that counsel's conduct was "reasonable" on the grounds the State had argued there was insufficient corroborating evidence to bringing in the Burkhart confession testimony before the jury. The District Court's framing elides the fundamental interest at issue. Nothing in Strickland—or anywhere else—suggests that a lawyer may admit his client's guilt against his consent.

It is well established law that defense counsel may not override the defendant's decision and thereby try "his case against his client." Anders v. California, 386 U.S. 738, 745 (1967). If he does so, he is no longer acting as the client's agent, and the defense is "stripped of the personal character upon which the [Sixth] Amendment insists." Faretta, 422 U.S. at 820. "[T]he dignity and autonomy of the accused" turn on his right to make these deeply personal decisions. McKaskle, 465 U.S. at 177.

The District Court demonstrably erred in concluding that Ranken's admission of guilt was "reasonable" defense strategy which predictably resulted in a divided defense before the jury. When the defense is divided, the defendant's own attorney, not the prosecutor, becomes his chief adversary. See United States v. Williamson, 53 F.3d 1500, 1511 (10th Cir. 1995) ("admission by counsel of his client's guilt to the jury" is a

"paradigmatic example of the sort of breakdown in the adversarial process that triggers a presumption of prejudice"). Ranken's actions completely undermined Petitioner's stated objective for the representation and denied his right to present a defense.

The constitutional right against self-incrimination would be hollow if the accused had no right to prevent his incrimination by his own counsel. Here, Ranken conducted himself more as a prosecutor than as Petitioner's advocate. The result was not merely a "breakdown in the adversarial process," Cronic, 466 U.S. at 662, but the evisceration of each of those "particular guarantee[s] of fairness" the Constitution deems essential to a fair trial, Gonzalez-Lopez, 548 U.S. at 146. For a lawyer to override his client's wishes on such a matter is to "den[y] [him] the right to conduct his defense." State v Carter, 14 P.3d 1138, 1148 (Kan. 2000). Moreover, a lawyer who concedes his client's guilt against his will violates the spirit, if not the letter, of Rule 1.2(a), which provides that a "lawyer shall abide by his client's decision ... as to a plea to be entered." See Hawaii Rules of Prof'l Conduct, r. 1.2(a); see also Carter, 14 P.3d 1138 at 1148 (finding that defense counsel's decision to concede guilt at trial over his client's objection "was [] equivalent to entering a plea of guilty" without his client's consent).

Ranken had no ethical duty or authority to override Petitioner's decision to put the prosecution to its burden of proof rather than admit guilt. To the contrary, applicable ethics rules and standards of professional conduct require defense counsel to follow the client's direction as to whether to admit guilt or not, consistent with the Constitution's recognition that the decision to admit guilt is the defendant's—not the lawyer's—to make.

A. <u>In All Common Law Jurisdictions Counsel May Not Concede Guilt Against Instructions from the Client.</u>

Long settled precedent forbids counsel from conceding guilt and abandoning his client's defense—such is the law in the United States. The same law and practice is adhered to by all common law jurisdictions of the world which include: England and Wales; Australia and New-Zealand; Scotland and Ireland; Canada, the Caribbean; the West Indies; South Africa and Kenya. The common law tradition, developed over centuries across the English-speaking world, mandates that if the client gives clear instruction that his defense is to be "not guilty", defense counsel is required to honor that instruction and is *forbidden* to argue his client is guilty.

In England and Wales, statements of guilt must be made in person by the accused and, in the case of submissions, by counsel in accordance with the client's wishes. <u>R. v. Ellis,</u> (1973) 57 Cr. App. R. 571 (Eng.). Barristers must not put forward any case inconsistent with their client's instructions. In <u>R. v. Clinton</u> (1993) 1 W.L.R. 1181 (1993) 2 All E.R. 998 (Eng.), the Court of Appeal considered the question of departure from instructions: ("Conversely.... where a decision was taken "either in defiance of or without proper instructions," the situation is reversed. Then, the conviction is unsafe. Id. at 1187-88.")

In Australia, long settled precedent forbids counsel from conceding guilt and abandoning his [client's] defense. See <u>Tuckiar v. The King</u>, (1934) HCA 49, (1934) 52 CLR 335, (Austl.). The Australian rule is well stated in the textbook by Dal Pont, Lawyers' Professional Responsibility 604 (5th ed. 2012).

> Having accepted a brief, a defence lawyer is duty bound to defend the accused irrespective of any belief or opinion he or she may have formed as to the accused's guilt or innocence. Assessment of guilt or innocence is for the court, not counsel. In the well-known words of Bramwell, B: "A client is entitled to say to his counsel, 'I want your advocacy and not your judgment; I prefer that of the court.'"

In New Zealand, defense counsel is not entitled to disregard the instructions of the defendant with respect to the nature of the defense. R. v. McLoughlin [1985] 1 NZLR 106 (CA). In New Zealand, departure from a client's instructed plea is also a violation of the rules of professional conduct. The practice is the same in Scotland. It is for the accused to decide whether he wishes to plead guilty and defense counsel, referred to as an advocate, must follow the client's instructions regarding the defense. The courts there have confirmed that when an advocate advances a defense against the client's clear instructions, the conviction must be reversed. Anderson v. H. M. Advocate, (1996) J.C. 39 (Scot.). In Ireland, the duty of counsel to adhere to the defendant's choice of defense is found in the canons of ethics. The ethical duties of the barrister provide that it will be a breach to concede the guilt of a client who maintains their innocence. "Where the client maintains innocence, defence lawyers are obliged to attempt to expose weaknesses in the prosecution case." Section 10.14 of the Code of Conduct for the Bar of Ireland.

In Canada, the accused has the autonomy to determine the fundamental objectives of the defense, as well as the decision of how to plead, and counsel is obligated to follow the client's instructions. R. v. Szostak, (2012), 111 O.R. 3d 241 (Can. Ont. C.A.). In Canada, departure from a client's instructed plea is a violation of the rules of professional conduct. As the court held in R. v. G.D.B., (2000) 15 C.R. 520 (Can.) "there are decisions

such as whether or not to plead guilty, or whether or not to testify that defence counsel are ethically bound to discuss with the client and regarding which they must obtain instructions." Id. at 533.

In South Africa, counsel must follow the client's instructions and cannot make fatal concessions that harm his client's defense. In S v. Mofokeng 2004 (1) SACR 349 (W), Louw AJ said:

> Counsel also is not the judge. He does not have, nor should he have, the distance to adjudicate on the strength and weaknesses of his client's cause. He must, of course, advise his client on the probable findings of the court but he must fearlessly argue his client's case even if he, himself, does not believe that the case is right or just. Whilst he is an officer of the court, he is a representative of a litigant and he does not have the luxury to distance himself from his client's instructions and to condemn his client by making fatal concessions. In the final analysis, he is but a representative of his client, a mandatory. It is his duty to carry out his mandate and to take all reasonable steps to accomplish his aim. He must perform his obligations in accordance with the terms and limitations of his mandate. If he does not do so, he is no representative.
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> * * *
>
> [W]ithin the four corners of the ethics which bind each defence advocate, counsel is not free to make submissions designed to destroy his client's case, or which may have that effect. He is, of course, in control of the presentation of the defence case... and he may otherwise bind his client through "vicarious admissions"... but where he, to the knowledge of the court, refutes his instructions, he fails to act as a representative.
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> Id. at ¶ at 35g-i, 357f-g (emphasis supplied).

In his commentary on South African law, *Étienne du Toit, et al., Commentary on the Criminal Procedure Act* ¶¶ 11-42E (1987), Étienne du Toit writes that:

> "Grave incompetence, resulting in a fatal irregularity, is present where a legal representative ... does not establish the defence of his client..."

Thus, South African law goes further than the rule sought by Petitioner. In S. v.

Mafu and Others, 2008 (2) ALL SA 657 (W) (S.Afr.) at ¶15, for example, counsel's failure to put an affirmative alibi defense was held to breach "the very rudimentary duties of counsel when defending an accused." An authoritative treatise on Caribbean practice emphasizes "the necessity on the part of defence counsel to take written instructions and to act on those instructions. If counsel finds that he cannot do so, he must so indicate and seek leave to withdraw from the defence." Seetahal, *Commonwealth Caribbean: Criminal Practice and Procedure* 230.

In Kenya, a Kenyan advocate must follow the client's legal instructions in accord with the Code of Ethics and Conduct for Advocates.

The Supreme Court's precedent in McCoy confirms that both the District Court's 2008 judgment and the Court of Appeals refusal to grant a COA on this constitutional ground were wrongly decided. In these circumstances, Petitioner has been erroneously left without a proper adjudication of the merits of his Sixth Amendment claim due to an extraordinary confluence of errors of law.

III. EXCEPTIONAL CIRCUMSTANCES ARE DEMONSTRATED WHERE JUSTICES OF THE SUPREME COURT OPINED THE DESCRIBED SIXTH AMENDMENT VIOLATION AS "RARE" AND "UNLIKELY TO RECUR".

The extraordinary and exceptional nature of this case is confirmed by the Supreme Court Justices in their dissenting opinion in McCoy. The Honorable, Justice Alito, joined by Justice Thomas and Justice Gorsuch, described the conflict between McCoy and his lawyer as "rare" and "unlikely to recur." Post, at 2, 5–7, and n. 2. The dissent concluded, that "a criminal defendant's right to insist that his attorney contest his guilt with respect

to all charged offenses—is like a rare plant that blooms every decade or so. Having made its first appearance today, the right is unlikely to figure in another case for many years to come." The Justices went on to reason, "... if counsel is appointed, and unreasonably insists on admitting guilt over the defendant's objection, a capable trial judge will almost certainly grant a timely request to appoint substitute counsel. And if such a request is denied, the ruling may be vulnerable on appeal." Id.

Here, Petitioner's Sixth Amendment violation, "rare" as it may be according to the Justices of the Supreme Court, has yet to be properly adjudicated and corrected under well-established principles of law and common law tradition developed over centuries across the English-speaking world—thus, demonstrating exceptional circumstances.

CONCLUSION

In conclusion, neither Taryn Christian, the State of Hawaii, nor the federal courts have any legitimate interest in enforcing a federal judgment allowing a "structural" error of a Sixth Amendment violation to stand, when that federal judgment is patently in error, and no one can deny otherwise. The District Court has a fundamental interest and duty to see that justice is done in this case, warranting the re-opening of the habeas action for the Court to rectify its error in judgment which was foreclosed from appellate review.

Respectfully submitted,

/s/ Gary A. Modafferi

GARY A. MODAFFERI, ESQ.

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of October, 2018, the forgoing Independent Action and Appendices was filed with the Clerk of the Court for the U.S. District Court for the District of Hawaii, to be served by operation of the Court's electronic filing system upon the following:

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Additional material from this filing is available in the Clerk's Office.