21-5316
No. _____

ORIGINAL

In the Supreme Court of the United States

IN RE TARYN CHRISTIAN

Petitioner

On Petition for a Writ of Mandamus
to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF MANDAMUS

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QUESTIONS PRESENTED

This case presents the kind of extraordinary circumstances in which this Court exercises its discretionary authority to issue a writ of mandamus. The justification for considering a writ of mandamus in this context is strengthened by the fact that the unusual circumstances of this case would be unlikely to arise frequently.

This Court held in *McCoy v. Louisiana,* 138 S. Ct. 1500 (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" even if doing so is considered part of counsel's trial strategy. *McCoy,* 138 S. Ct. at 1505.

Petitioner, Taryn Christian, like Robert McCoy, made it clear beyond any doubt, both to his lawyer, 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. Yet, over petitioner's express objection and request to testify before closing argument, trial counsel reversed the defense's position from its opening statement arguing actually innocence, to then, in closing summation, argued petitioner had committed the murder—but had acted in "self-defense."

Upon habeas review, the district court granted relief under *Chambers v. Mississippi,* 410 U.S. 284 (1973), finding petitioner was denied his right to present a defense of a third-party's confession to the crime—holding that the credibility of corroborating "confession" witnesses was for the jury to decide and not the trial court. In denying petitioner's Sixth Amendment [autonomy] claim, the district court attached no constitutional significance to a defendant's protected right to insist that counsel not concede guilt or the "structural" error that resulted from its violation. Applying a narrow reading of *Strickland*, the habeas court held that trial counsel's actions in closing argument was "reasonable" strategy under *Strickland*, on the grounds that the trial court had excluded three witnesses from testifying to a third-party's admissions. The district court's reasoning reflects the conclusion that defense counsel, not the defendant, 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.

A decade later, petitioner filed a timely Rule 60(d)(1) independent action in the district court invoking *McCoy* under the "grave miscarriage of justice" standard in *United States v. Beggerly,* 524 U.S. 38 (1998). The district court transferred the motion to the Court of Appeals as an unauthorized "application" to file an SOS petition. Without relying on precedent, a three-judge panel designated the Rule 60(d)(1) as a successive "application" subject to the constraints of 28 U.S.C. 2244(b)(1). In its decision, the three-judge panel took the unprecedented step to ignore the 2008 habeas judgment altogether, and instead, assumed the district court's role as factfinder in the first instance—to decide "facts" contrary to the record. In this endeavor, the panel held that trial counsel *"never conceded Christian's guilt"* by

reasoning, that *"throughout the trial"* counsel argued *"that Christian was innocent and contested the state's identification of Christian"* as the one who stabbed the victim. *Christian v. Thomas*, No. 19-70036 (9th Circuit December 14, 2020). By substituting its own judgment over that of the district court, the panel improperly engaged in independent fact-finding outside of the record. As the record documents trial counsel admitted identification, and in jaw dropping performance in re-enacting the stabbing, argued that under great duress petitioner had committed the murder in "self-defense."

In deciding that petitioner had failed to make a *prima facie* showing that the "facts" of his case "relies on" *McCoy,* the panel rejected petitioner's argument that *McCoy* announced a new constitutional rule that should be applied retroactively to cases on collateral review. In deciding the Supreme Court had ***not*** made *McCoy* retroactive, the Ninth Circuit disregarded that the California Supreme Court has designated *McCoy* as being retroactive, thereby creating a substantial federal right protected by the Fourteenth Amendment.

Moreover, the Ninth Circuit refused to permit consideration of the exceptional posture of the case which is governed by this Court's decision in *Stewart v. Martinez-Villareal,* 523 U.S. 637 (1998), where, despite petitioner's diligent efforts for over a decade, the district court has failed to rule on his *Brady* claims that were presented in his original habeas application and in subsequent 60(b) motions. For over a decade, petitioner has unsuccessfully argued to the courts below that the prosecutors' withholding of critical eyewitness identifications of the initial suspect in violation of *Brady v. Maryland,* 373 U.S. 83 (1963), is inextricably intertwined with his ineffective assistance of counsel claims under *Strickland.* The Ninth Circuit abused its discretion in refusing to consider the unique posture, because under *Martinez-Villareal,* petitioner's Rule 60(d)(1) independent action cannot be characterized as an unauthorized "application" to file a SOS petition. After manifestly misstating the trial record, the three-judge panel held 28 U.S.C. 2244(b) bars rehearing, leaving in place an erroneous judgment as Ninth Circuit authority involving *McCoy's* application. In sum, petitioner has been denied the right to the Writ, which includes the right to meaningful review.

The questions presented are:

I. Whether the statute of 28 U.S.C. § 2244(b)(3)(E) on its face, as applied here, is unconstitutional.

II. Whether the constitutional right to due process of law and this Court's holding in *Stewart v. Martinez Villareal,* 523 U.S. 637 (1998), require the Ninth Circuit to consider the exceptional posture where a petitioner has been denied a ruling on his *Brady* claims that were presented in his original § 2254 application (and in subsequent motions), when the failure to do so precludes a habeas petitioner from ever receiving an adjudication of his constitutional claims on the merits.

A. Whether the Ninth Circuit abused its discretion in holding a Rule 60(d)(1) independent action constitutes an unauthorized "application" to file a successive habeas corpus petition as a matter of law, in square conflict with decisions of this Court, and other circuits.

III. Whether *McCoy* announced a new rule of constitutional law that should be made retroactive to cases on collateral review, as required to file a successive petition for a writ of habeas corpus under 28 U.S.C. 2244(b)(2)(A).

PARTIES TO THE PROCEEDINGS

The following were parties to the proceedings in the United States Court of Appeals for the Ninth Circuit:

1. Taryn Christian was the Petitioner in the district court and in the Court of Appeals.

2. Todd Thomas was the named Respondent in the district court and in the Court of Appeals.

The following are parties to the proceeding in this Court:

1. Taryn Christian is the Petitioner.

2. The United States Court of Appeals for the Ninth Circuit is the Respondent.

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PETITION FOR A WRIT OF MANDAMUS

Petitioner, Taryn Christian, respectfully petitions for a writ of mandamus to the United States Court of Appeals for the Ninth Circuit.

OPINIONS AND ORDERS BELOW

The order of the Ninth Circuit Court of Appeals' denying an extension of time to petition for rehearing to address the court's error in misstating material facts in the record, essential to its "gatekeeping" function under § 2244(b) entered on December 30, 2020, is attached as Appendix A. The panel's published decision designating petitioner's transferred Fed. R. Civ. P. Rule 60(d)(1) independent action as an "application" to file a "second or successive" habeas petition entered on December 14, 2020, is attached as Appendix B. The district court's transfer order entered on January 4, 2019, is attached as Appendix C. The district court's habeas judgment issued on September 30, 2008, is attached as Appendix D.

STATEMENT OF JURISDICTION

The Ninth Circuit issued its order denying a request for rehearing on December 30, 2020. (Appendix A.) On March 19, 2020, this Court extended the time within which to file any petition for a writ of certiorari due on or after that date to 150 days from the date of the lower court judgment. A petition for a writ of certiorari was filed on May 26, 2021. Per notice from the Court upon receipt of petitioner's amended petition received on June 29, 2021, petitioner submits his petition for a writ of mandamus on July 29, 2021. This Court's jurisdiction is timely invoked under the All Writs Act, 28 U.S.C. § 1651, and Rule 20 of the Rules of the Supreme Court of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves U.S. Const. art. I sec. 9 (Suspension Clause); U.S. Const. amend. V (Due Process Clause); U.S. Const. amend. VI (Sixth Amendment right to counsel); U.S. Const. amend. XIV (Due Process and Equal Protection of Law); Federal Rule of Civil Procedure 60(b); Rules Governing Section 2254 Cases; the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (Apr. 24, 1996); and 28 U.S.C. § 2244. See Attached Appendix E.

INTRODUCTION

In this case, a Ninth Circuit three-judge panel exceeded its authority in its "gatekeeping" function under 28 U.S.C. § 2244(b), and as a direct consequence, created the exceptional circumstances that warrant mandamus review. A court can exceed its jurisdiction by going beyond the bounds of its statutory instructions, not just by engaging in wholly unauthorized activity.

STATEMENT OF THE CASE

A. Trial Proceedings

In 1997, petitioner was convicted in Hawaii state court of second-degree murder and sentenced to life imprisonment. Before trial, petitioner's court appointed lawyer, Anthony Ranken, proffered to the trial court that the defense would call three witnesses to testify that James Burkhart, the initial suspect in the murder, had confessed to committing the fatal stabbing of Vilmar Cabaccang on July 14, 1995. Petitioner's requests for expert examination of critical audio and video recordings and independent DNA testing were denied.

On the morning before trial, Mr. Ranken produced a contractual letter to

petitioner requesting his signed consent authorizing counsel to admit identification and to argue "self-defense" to the charge of murder in the second degree, and attempted theft. Petitioner refused consent, insisting counsel argue his innocence which was supported by evidence that Burkhart had "bragged" to many of his friends that he had fatally stabbed Cabaccang. (App. C: p.69-70 of 151: Ranken's Letter Requesting Signed Consent). In his opening statement, counsel told the jury that petitioner was innocent of the murder, stating *"that there was another man there"* whom the prosecutors had not mentioned—a man known to Cabacang and his girlfriend. (App. C: p.71-80 – Ranken's Opening Statement).

After trial commenced, petitioner informed the trial court that an irreconcilable "conflict of interest" existed with counsel that compelled his immediate withdrawal. The trial court ignored petitioner's concerns. After the state had rested, the trial court held an *in chambers* hearing to examine the corroborating factors involving 3 witnesses proffered to testify that James Burkhart admitted committing the fatal stabbing of Cabaccang, and had implicated Cabaccang's [new] girlfriend, Serena Seidel, in giving him the keys to enter Cabaccang's vehicle. During the hearing, Burkhart asserted his Fifth Amendment privilege, while prosecutors argued that the "confession" witnesses were *"not reliable or trustworthy"* because, *"no witnesses had identified Burkhart from any photographic arrays"* and *"two witnesses"* placed him somewhere else at the time of the crime. Adopting the state's argument, the trial court excluded the corroborating witnesses from testifying for the defense. Before the commencement of closing

argument, petitioner requested to testify as his own witness. His request was denied. The trial court told petitioner that if he spoke up against his attorney, he would be permanently removed from the courtroom and the trial.

In closing argument, Mr. Ranken defied his client, and without petitioner's signed consent reversed the defense's position from his opening statement arguing petitioner's actual innocence—demonstrating a *dire* conflict with petitioner's wishes to maintain his innocence against the state's charges. In a jaw-dropping performance, counsel went to task to accomplish exactly what he acknowledged [in his letter] was against petitioner's wishes. At the outset, trial counsel *admitted* identification, despite that the state's *key* independent witness, Phillip Schmidt, had described the responsible to detectives as having *"long stringy hair in the back"* and despite Schmidt's testimony that Cabaccang acknowledged to him, that the male seen "walking" down the sidewalk was Cabaccang's attacker. Counsel argued: (App. C: p. 87) (emphasis supplied).

> ... *Phil Schmidt saw Taryn leaving the area. We don't dispute that he did see Taryn under street light with the flannel jacket that Taryn wore. He saw Taryn leave the area ...*

Thereafter, counsel went on to *concede* petitioner's guilt by arguing that while under "great duress" after being caught for stealing, petitioner had "stabbed" Cabaccang in "self-defense." (App. C: pp. 96; 98; 100; of 151) (emphasis added).

> ... I've got to move on, and 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, in self-defense, whatever...*
>
> ... He's never been in trouble with the law before, and he's facing

apprehensions. *He is facing the shame of being caught for stealing ... He is facing the fear of going to jail...*

...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 argued by trail counsel was supported by any eyewitness or by petitioner. There were no cuts or wounds on petitioner as counsel 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. (App. C: pp. 111-113; 115; 122-124; 132 of 151).

...And it looks like he was acting in self-defense, never really realizing the harm that he was inflicting 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...*

... And at some point in the struggle, Vilmar was getting the best of Taryn. *Taryn had the knife, and Taryn defended himself.*

... It was reckless. At best it was reckless. At best not intentional. He didn't know that he was doing that. *He didn't know that he was inflicting wounds that would cause someone's death...*

Nearing the end of his closing, counsel, again, admits identification:

... And remember finally what Phil Schmidt said. Phil Schmidt told you that Vilmar was trying to get up...*First he got up to show Phil to look at Taryn -- the man he saw fleeing.*

During his summation, trial counsel 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 petitioner, as counsel, prosecutor and the

trial court, were fully aware that petitioner had requested his right to testify before closing argument. (App. C: p. 136)

> *... 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, counsel's comments as to the irrelevance of his client's testimony was 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, counsel'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. Trial 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 counsel 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 and attempted theft, Mr. Ranken filed a motion for new trial representing a reversal of his position during summation. In his motion, counsel shifts blame to the trial court. (Dkt. 1-2: Exhibit #47-F). Counsel wrote at #1 and #2:

> 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.

In Mr. Ranken's Affidavit, he 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, Mr. Ranken 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 the motion for new trial and the Hawaii Supreme Court upheld petitioner's conviction.

B. Habeas Corpus Proceedings.

Petitioner filed a timely petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254, challenging his 1997 conviction in December 2004. A hearing was held in 2008. Petitioner's § 2254 claims included: 1) the denial of the right to present a defense under *Chambers v. Mississippi*, 410 U.S. 284 (1973); 2) the denial

of the right to testify under *Rock v. Arkansas*, 483 U.S. 44 (1987); 3) ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984); actual innocence under *Schlup v. Delo,* 513 U.S. 298 (1995); and violations of *Brady v. Maryland,* 373 U.S. 83 (1963).

Before the hearing, petitioner's habeas counsel argued in his Brief Regarding Evidentiary Issues on July 19, 2008, that as the case progressed, new evidence directly implicating Burkhart continued to emerge, specifically as it related to the state's withholding of evidence of "prior identifications" by witnesses, Phillip Schmidt and Annie Leong. (Dkt. #122 at p. 2-6) (emphasis added).

> "Presented contemporaneously with this brief is evidence that one of the eyewitnesses, Phillip Schmidt, believes James Hina Burkhart to be the person who he saw running from the scene of the stabbing. In Exhibit B to the affidavits and exhibits filed on July 18, 2008, Schmidt states his belief that the person who had fled was in fact Burkhart. New evidence regarding former Gas Express employee Annie Leong, especially when coupled with prior evidence regarding Schmidt, indicates that withholding of exculpatory evidence of prior identifications prejudiced Christian. Exhibit E to the July 18, 2008 affidavits and Exhibits indicates that Annie Leong identified a photograph of a person she saw come into the Gas Express with an injured hand. Since Leong would have been interviewed a time prior to Christian becoming a suspect, that person undoubtedly was not Christian and that information would have been exculpatory. Since neither the fact of these identifications of another person nor the identity or identities of the persons in the photographs was revealed to the defense, exculpatory evidence was unlawfully withheld to the prejudice of Christian...
>
> The evidence that Leong and Schmidt had previously identified a different person should have been revealed under the principles of *Brady v. Maryland*, 373 U.S. 83 (1963). Again, there appears to be no remedy still available for this issue in state court. *Phillips v. Woodford*, 267 f.3d 966, 974 (9th Cir. 2001)..."

The prosecutors denied the *Brady* allegations, arguing that witness, Phillip Schmidt's 2008 identification of Burkhart was nothing more than a highly

suspicious "recantation" of his initial identification. (Dkt. #125: 15-16) On August 29, 2008, the Magistrate Judge issued her Findings and Recommendations to grant the petition in part and deny in part. In denying petitioner's Six Amendment [autonomy] claim involving trial counsel's change in the defense's position and concession of guilt over petitioner's objection, the magistrate judge concluded that counsel's "strategic decision" to argue self-defense was "objectively reasonable" on the ground the trial court had excluded the Burkhart confession witnesses from testifying. (App. C: pp. 142-147 of 151). The magistrate 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.

The District Court adopted the magistrate's recommendations and granted habeas relief pursuant to *Chambers v. Mississippi,* on September 30, 2008, holding petitioner was denied his constitutional right to present a defense of a third-party's confessions to the murder. The District Court wrote: (App. D at p. 28).

> 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...

C. Ninth Circuit Proceedings.

The state appealed the district court's judgment, arguing that petitioner's case was "materially" distinguishable from *Chambers* on the "facts" as no witnesses had identified [Burkhart] and had only identified petitioner. At oral argument on October 15, 2009, prosecutor, Richard Minatoya, argued: (Transcript: pp. 8-11)

> MR. MINATOYA: "...In this case, the eyewitnesses...*identified the Petitioner, not anybody else.* There's nothing to tie this third party, Mr. Burkhart to the location...There's no corroboration, and that's the main point."

On February 19, 2010, a panel reversed the district court's judgment in *Christian v. Frank*, 595 F.3d. 1076 (9th Cir. 2010), and denied a COA on all remaining claims. *Christian v. Frank*, 365 F. App.'x 877 (9th Cir. 2010).

> The Hawaii Supreme Court noted...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. ...
>
> The Supreme Court denied review. *Christian v. Frank*, 131 S.Ct. 511 (2010).

D. Underlying Rule 60(b) Proceedings in 2011, 2013, and 2017.

In 2011, 2013, and 2017, petitioner filed Rule 60 motions in the district court seeking to reopen his original habeas application arguing after-discovered fraud on the court and underlying *Brady* violations. In 2011 the district court transferred the motion to the Court of Appeals as an unauthorized SOS application which the Ninth Circuit denied without discussion. In 2013, petitioner refiled his Rule 60(d)(3) motion, presenting argument that the district court had subject matter jurisdiction

pursuant to *Gonzalez.* Acknowledging jurisdiction, the district court ordered the state to produce specific *Brady* materials in 2014 and again in 2015. (Dkt's. #294; #318). Respondents contemptuously defied the court's orders.

Then, months after the hearings, for the first time in written closing argument on July 20, 2015, the State reversed its legal position it had argued for two decades. In a judicially binding admission, the state *conceded* that its key witness at trial, Phillip Schmidt, had "initially" identified a photograph of Burkhart after the murder. Advancing the fraudulent representations made during the habeas proceedings—notwithstanding the Ninth Circuit appellate proceedings—the state's attorneys ***falsely*** represented to the Rule 60 court that "all information" of Schmidt's identification of Burkhart was disclosed to the defense at petitioner's trial. Shifting responsibility, the attorneys blamed trial counsel for failing to use Schmidt's identification of Burkhart in petitioner's defense. (Dkt. #391).

The District Court denied relief without holding the state to its burden of proof and without ruling on petitioner's *Brady* claims on December 28, 2015. (Dkt. #406). The Ninth Circuit denied collateral review. In 2016, petitioner moved in the district court under Rule 60(b)(3)(6) to admit new evidence received from trial counsel refuting the state's claim that Schmidt's identification of Burkhart was disclosed to the defense. (Dkt. #434) (Declaration of Anthony Ranken).

> If this critical evidence in favor of Taryn Christian had been produced, it certainly would have changed the manner in which I chose to defend Taryn Christian in this case, and I believe it would have undoubtedly had a significant impact upon the deliberations of the jury, in support of his actual innocence.

Trial counsel's declaration independently corroborated the events and testimony of the trial record, confirming an effort by the state to suppress a key material "fact" from the defense and the trial court which dramatically contradicted the state's theory of the case. The District Court denied relief without addressing the state's reversal of its position after two decades, and without deciding the merits of petitioner's *Brady* claims–consequently, creating an untenable procedural posture in petitioner's case.

On May 14, 2018, the Supreme Court decided *McCoy v. Louisiana*, 584 U.S. __ (2018). Petitioner filed a timely Rule 60(d)(1) independent action in the district court invoking *McCoy* and presenting argument demonstrating 'a grave miscarriage of justice' and exceptional circumstances under the high standard announced in *United States v. Beggerly.* 524 U.S. 38 (1998). The District Court transferred the Rule 60(d)(1) to the Ninth Circuit as an unauthorized successive "application" in January 2019. Twenty-three months later, the Ninth Circuit issued a decision designating the Rule 60(d)(1) motion as an unauthorized "application" and denied relief. However, the panel's decision erred by manifestly misstating the record, fundamental to its *McCoy* analysis in its "gatekeeping" procedure under § 2244(b). Moreover, in a footnote of its decision, the Ninth Circuit arbitrarily disregarded the exceptional posture of the case governed by precedent in *Stewart v. Martinez-Villareal,* 523 U.S. 637 (1998), where petitioner's *Brady* claims have never been adjudicated by the district court. Petitioner's request for rehearing was denied on December 30, 2020.

REASONS FOR GRANTING THE PETITION

The All Writs Act, 28 U.S.C. § 1651, authorizes the Supreme Court to issue extraordinary writs in its discretion. "To justify granting any such writ, the petition must show that the writ will be in aid of the Court's appellate jurisdiction, that exceptional circumstances warrant the exercise of the Court's discretionary powers, and that adequate relief cannot be obtained in any other form or from any other court." Sup. Ct. R. 20.1. See also *U.S. Alkali Export Ass'n v. United States,* 325 U.S. 196, 201-02 (1945); *De Beers Consol. Mines, Ltd. v. United States,* 325 U.S. 212, 217 (1945). The Court may grant a petition for mandamus in its discretion, so long as it has jurisdiction over the matter. As the Court described in *Cheney v. U.S. Dist. Court for the Dist. of Columbia,* 542 U.S. 367, 380 (2004), three conditions must be satisfied before such an extraordinary writ must issue: (1) the party must have no other adequate means to attain the relief he deserves, (2) the party must satisfy the burden of showing that his right to issuance of the writ is clear and indisputable, and (3) the issuing court must be satisfied that the writ is appropriate under the circumstances. Id. at 380-81. Petitioner satisfies the three conditions.

1. **Petitioner Cannot Obtain Relief from Any Other Court or Forum.**

The Court will not grant an extraordinary writ if another avenue of relief remains available. Sup. Ct. R. 20.1. See *Cheney*, 542 U.S. at 380–81. Petitioner lacks a clear procedural vehicle to challenge the Ninth Circuit's order in that court. The relief petitioner seeks, a writ vacating the unlawful panel Order, cannot be granted by any other court.

2. **The Panel in its Decision Exceeded the Scope of its Statutory Authority Under 28 U.S.C. § 2244(b).**

A writ of mandamus is appropriate where a party seeks to enforce an appellate court judgment in a lower court or to prevent a lower court from obstructing the appellate process. See *Will v. United States,* 389 U.S. 90, 95–96 (1967); *United States v. U.S. Dist. Ct. for S.D. of N.Y.,* 334 U.S. 258, 263 (1948).

In this case, the three-judge panel effectively obstructed the appellate process by exceeding its statutory authority in its very limited "gatekeeping" function under 28 U.S.C. § 2244(b). Petitioner submits there is no logical explanation for the court's divergent interpretation of the statute. *First,* the panel defied this Court's precedent in *Gonzalez v. Crosby,* (2005) upon which petitioner's Rule 60(d)(1) relies in distinguishing a Rule 60 motion from that of a SOS habeas petition. *Second,* the panel disregarded the district court's habeas judgment altogether, (the only federal court to decide petitioner's [autonomy] claim), and instead, assumed the district court's role as fact-finder—to then *find* "facts" outside the record—ultimately rendering the habeas judgment meaningless. *Third,* the panel refused to even consider the exceptional procedural posture of the case governed by *Stewart v. Martinez-Villareal,* 523 U.S. 637 (1998). Under *Martinez-Villareal,* petitioner is entitled to an adjudication of his *Brady* claims that were raised in his original habeas application and subsequent Rule 60 motions by the district court in the first instance. Here, the state's *Brady* violations are undeniably *intertwined* with petitioner's Sixth Amendment [autonomy] claim that he seeks to reopen in the district court.

Lastly, the Ninth Circuit denied petitioner's transferred Rule 60(d)(1) independent action on the basis that "the Supreme Court has not made *[McCoy]* retroactively applicable to cases on collateral review." The panel's decision did not consider the fact that California has designated *McCoy* as being retroactive, thereby creating a substantial federal right protected by the Fourteenth Amendment. Petitioner has a "clear and indisputable" right to the requested writ and exceptional circumstances justify its issuance. *Cheney,* 542 U.S. at 380; see SUP. CT. R. 20.1.

3. Mandamus Aids the Court's Appellate Jurisdiction When It Prevents a Lower Court from Exceeding Its Lawful Authority.

Importantly, the panel's construction that a Rule 60(d)(1) independent action constitutes an unauthorized SOS "application" subject to the constraints of 28 U.S.C. §2244(b), warrants review. A petition for a writ of mandamus under 28 U.S.C. § 1651(a) "must show that the writ will be in aid of the Court's appellate jurisdiction... Sup. Ct. R. 20.1. Mandamus aids the Court's appellate jurisdiction when it prevents a lower court from exceeding its lawful authority. "'The traditional use of the writ in aid of appellate jurisdiction both at common law and in the federal courts has been to confine [the court against which mandamus is sought] to a lawful exercise of its prescribed jurisdiction.'" *Cheney*, 542 U.S. at 380 (quoting *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 26 (1943)). This is what happened here.

ARGUMENT

I. THE COURT SHOULD GRANT A WRIT OF MANDAMUS IN THE RARE CIRCUMSTANCE WHERE THE STATUTE OF 28 U.S.C. § 2244(b)(3)(E), ON ITS FACE, AS APPLIED HERE, IS UNCONSTITUTIONAL.

In the circumstances presented, it is illogical that Congress intended that 28

U.S.C. § 2244(b)(3)(E) would bar a court of appeals "the means to correct errors" in its own judgment. The Court has explained that the constitutional scope of the writ "entitles the prisoner to a meaningful opportunity to demonstrate that he is being held pursuant to 'the erroneous application or interpretation' of relevant law." *Boumediene*, 553 U.S. at 779 (quoting *I.N.S. v. St. Cyr,* 533 U.S. 289, 302 (2001)). Without meaningful review, the writ's goals of preserving individual rights cannot be realized. Meaningful review must include "the means to correct errors." *Id.* at 786. In *Gonzalez v. Crosby,* 545 U.S. 524 (2005), this Court adopted a functional approach, focused on the substance of a state prisoner's submission for determining whether a post-judgment submission presented under Federal Rule of Civil Procedure 60(b) constitutes a second or successive habeas application. The panel decision in this case rejected *Gonzalez,* and rests solely on the operation of section 2244(b)'s gatekeeping function.

A. As a *Prima Facie* Matter, Petitioner's Sixth Amendment Claim Argued in his Rule 60(d)(1) Independent Action and Supported by the District Court's 2008 Habeas Judgment Plainly "Relies On" *McCoy.*

As a *prima facie* matter, petitioner's § 2254 Sixth Amendment [autonomy] claim presented in his Rule 60(d)(1) independent action—a decade after the district court denied habeas relief, plainly "relies on" *McCoy.* As the record clearly demonstrates, trial counsel gambled petitioner's fate by overriding his express desire to maintain his innocence against the State's charges. 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.

Under 28 U.S.C. § 2244(b)(3)(C), a state prisoner must file in the appropriate U.S. Court of Appeals an application for authorization to file a SOS habeas petition in the district court. If the application makes a *prima facie* showing of satisfying certain gatekeeping provisions of the AEDPA, the court can grant authorization to allow the district court to hear the claims in the first instance. The Court of Appeals does not, however, examine the merits of the claims in considering whether to grant authorization. Such a motion must be decided "by a three-judge panel of the court of appeals," id. § 2244(b)(3)(B), "not later than 30 days after the filing of the motion," *id.* § 2244(b)(3)(D), and the panel's decision on the motion "shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari," *id.* § 2244(b)(3)(E).

A "prima facie showing" is "a sufficient showing of possible merit to warrant a fuller exploration by the district court." *Woratzeck v. Stewart,* 118 F.3d 648, 650 (9th Cir. 1997) (per curiam) (quoting *Bennett v. United States*, 119 F.3d 468, 469 (7th Cir. 1997)). The court will grant the application "[i]f in light of the documents submitted with the application it appears reasonably likely that the application satisfies the stringent [statutory] requirements for the filing of a second or successive petition." *Id.* (quoting *Bennett,* 119 F.3d at 469). In nearly all cases, this is intended to be the only decision on whether the petitioner may file his successive petition. The Court of Appeals' decision that the petitioner has made a *prima facie*

case that he can meet the criteria, does not establish that he has actually met them. That issue is determined by the district court and subject to review in the usual course of proceedings. See § 2244(b)(4). Instead of the usual decision by the district court and review by the Court of Appeals, this unique statute has the three-judge appellate panel determine the existence of a *prima facie* case as the first step. See § 2244(b)(3)(A)-(C). But by its terms, section 2244(b) imposes on the petitioner only a "light burden." *In re Hoffner,* 870 F.3d 301, 307 (3d Cir. 2017). In *Henry v. Spearman* 899 F3d 703, 705-08 (9th Cir. 2018), the Ninth Circuit held ("[I]t is for the district court to determine whether the new rule extends to the movant's case, not for this court in this proceeding."); *In re Hubbard*, 825 F.3d 225, 231 (4th Cir. 2016). See also *In re Williams,* 759 F.3d 66, 72 (D.C. Cir. 2014) ("[W]hether the new rule... extends to a prisoner like [petitioner] ... goes to the merits of the motion and is for the district court, not the court of appeals.").

Petitioner has met the criteria by showing that pursuant to *McCoy*, the District Court's reasoning in its 2008 judgment that held trial counsel's change in the defense's position from arguing innocence to conceding guilt was "reasonable" under *Strickland, was manifestly wrong.* Plainly, it is wrong because it reflects the district court's erroneous conclusion that defense counsel, not the defendant, 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.

Even if the Court determined that a Rule 60(d)(1) independent action filed

pursuant to *Beggerly*, was also subject to the constraints of § 2244(b), the trial record supported by the habeas judgment demonstrates that petitioner has met his "light burden" and made a *prima-facie* showing that his case "relies on" *McCoy*.

B. **The Ninth Circuit's Decision Creates Exceptional Circumstances Warranting Mandamus:**

The Ninth Circuit decision grossly misstated the material "facts" in the record, and when alerted to its error by petitioner, held that 28 U.S.C. 2244(b) bars rehearing. The court below was wrong, and this Court should reverse.

(i) **The Three-Judge Panel Exceeded its Statutory Authority in its "Gatekeeping" Function by Assuming the Role as Factfinder in the First Instance—To *Find* "Facts" Outside the Record—Ultimately Substituting its Own Judgment and Rendering the Habeas Proceedings Meaningless.**

The doubtful legitimacy of the order issued in this case presents a question of exceptional importance that should be resolved by this Court. Congress intended that appellate courts sit in panels on the theory that three or more judges, acting as a unit, are less likely to make an error in judgment than one judge sitting alone. Structurally, it means that it takes at least two court of appeals judges to overturn a decision of a lower court, signifying that a single court of appeals judge does not have the power to reverse a single trial court judge.

Here, the panel exceeded its statutory authority by disregarding the habeas judgment and instead, took the unprecedented step to ***find*** "facts" outside the record. Assuming the role as factfinder and creating "facts" outside the record, the panel's decision rests on an *illusory* premise that *"throughout the trial"* counsel argued *"Christian was innocent and "contested" the state's identification of*

Christian as the one who stabbed Cabaccang." (App. B at 19). The panel's decision that trial counsel *"contested"* the state's identification of petitioner is contrary to the record, as Mr. Ranken admitted identification throughout his summation. As documented, counsel told the jury that petitioner was the person seen by Schmidt.

> ... *Phil Schmidt saw Taryn leaving the area. We don't dispute that he did see Taryn under street light with the flannel jacket that Taryn wore. He saw Taryn leave the area ...*

Nearing the end of his argument, counsel again admitted identification.

> ... And remember finally what Phil Schmidt said. Phil Schmidt told you that Vilmar was trying to get up... *First he got up to show Phil to look at Taryn -- the man he saw fleeing.*

Indeed, counsel unquestionably relieved the prosecution of its burden when he told the jury that petitioner was, *in fact*, the person Schmidt saw walking away from the scene, despite that petitioner did not match Schmidt's description given to police. Counsel also argued petitioner had unlawfully entered Cabaccang's vehicle with the intention of committing theft. In another instance of counsel's concession that petitioner 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.

A defendant's Sixth Amendment right to control "his defence" is at the heart of *McCoy*. 138 S. Ct. at 1509 (quotation marks omitted). If the defendant decides that his objective is to assert innocence—whatever his basis for doing so might be—that is his objective, and "his lawyer must abide by that objective and may not

override it by conceding guilt." *Id.* Petitioner just as much as McCoy, "ha[d] the right to insist that counsel refrain from admitting guilt." *McCoy,* 138 S. Ct. at 1505. Contrary to the panel's reasoning under *McCoy,* trial 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 in the alternative." (App. B at 21). The panel's decision is in square conflict with *McCoy.* Only after the damage was done, did counsel argue in a motion for new trial that *"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."*

There is no explanation for the panel's divergent course of action in its "gatekeeping" function, particularly, where the courts of appeals' review is limited to the [application] and its supporting documents. *See Bennett,* 119 F.3d at 469. The Court recognized in *Felker v. Turpin*, 518 U.S. 651 (1996), the removal of certiorari jurisdiction did not preclude review by an original habeas writ, on the principle that "[r]epeals by implication are not favored ...." 518 U. S., at 660. On the same basis, § 2244(b)(3)(E) "does not purport ... to limit [this Court's] jurisdiction under the All Writs Act, 28 U. S. C. § 1651." Id., at 666 (Stevens, J., concurring). Indeed, interpretation of the statute to preclude such review would reopen "the question whether the statute exceeded Congress's Exceptions Clause power," *id.,* at 667 (Souter, J., concurring). Clearly, where statutory avenues other than certiorari for reviewing a gatekeeping determination are closed, the question arises is whether the statute exceeded Congress's Exceptions Clause power.

The substantial possibility that a federal court has defied an act of Congress and acted outside its statutory authority, raises a grave question calling for definitive resolution by this Court.

II. THE COURT SHOULD GRANT MANDAMUS WHERE THE DECISION IN *STEWART V. MARINEZ- VILLAREAL,* (1998), CONTROLS THE POSTURE OF THE CASE—WHEN THE FAILURE TO DO SO WILL PRECLUDE PETITIONER FROM EVER RECEIVING A RULING OF HIS CONSTITUTIONAL CLAIMS ON THE MERITS.

A. Pursuant to *Stewart v. Martinez-Villareal*, Petitioner's Rule 60(d)(1) Independent Action Cannot be Designated as an Unauthorized Successive Habeas Corpus Petition.

Petitioner's Rule 60(d)(1) independent action filed in the district court, is analogous to the motion at issue in *Stewart v. Martinez-Villareal,* 523 U.S. 637 (1998), where the Supreme 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.* Discussing the rationale behind *Martinez-Villareal*, the Court in *Panetti v. Quarterman,* 551 U.S. 930 (2007), explained the unusual circumstance

presented by the *Ford* claims: While the later filing "may have been the second time that [the prisoner] had asked the federal courts to provide relief on his *Ford* claim," the Court declined to accept that there were, as a result, "two separate applications, [with] the second ... necessarily subject to § 2244(b)." The Court instead held that, in light of the particular circumstances presented by a *Ford* claim, it would treat the two filings as a single application. The petitioner "was entitled to an adjudication of all of the claims presented in his earlier, undoubtedly reviewable, application for federal habeas relief." 551 U.S. at 944-45 (quoting *Martinez-Villareal*, 523 U.S. at 643). Rather than limiting *Martinez-Villareal* to exempting only those *Ford* claims that were actually brought as (unripe) claims in an initial petition, *Panetti* couched *Martinez-Villareal* in a broader context. The Court concluded that "Congress did not intend the provisions of AEDPA addressing 'second or successive' petitions to govern a filing in the unusual posture presented: a §2254 application raising a *Ford* based incompetency claim filed as soon as that claim is ripe." *Id.* at 945. Thus, the Court created the second-in-time, first-petition exception to ensure that the AEDPA's Section 2244(b) did not infringe upon the constitutional scope of the writ.

Like the *Ford*-based motion in *Martinez-Villareal*, petitioner's *Strickland*-based motion does not raise an entirely new claim. Instead, it seeks to revive an existing Sixth Amendment claim. Relying on *Martinez-Villareal*, petitioner's Rule 60(d)(1) independent action cannot be designated a "second or successive" § 2254 petition requiring authorization, because petitioner's *Strickland*-based [autonomy] claim is inextricably interwoven with his *Brady* claims, which the district court

impeach a key witness is a cardinal *Brady* violation. See *Giglio v. United States*, 405 U.S. 150, 154 (1972). Concealment of impeachment evidence concerning *eyewitnesses* is especially prejudicial because eyewitness identifications are "particularly persuasive" to juries. *Boyette v. Lefevre,* 246 F.3d 76, 92 (2d Cir. 2011). 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 eyewitnesses 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 a conviction resting on the testimony of other eyewitnesses.'" *Agurs,* 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)).

It is therefore incumbent on the state to disclose a witness's original identification that conflicts with his later trial testimony. The fact that the state suppressed identifications of *two* corroborating eyewitnesses makes this case even more worthy of reversal. The state's 'independent' witness's "credibility was not just a major issue; it essentially was the only issue that mattered," *Serv. Deli,* 151 F.3d at 944. Evidence corroborating a third-party's confessions is inestimably more compelling because "no other statement is so much against interest as a confession

to murder." *Donnelly,* 228 U.S. at 278 (Holmes, J., dissenting); accord *Scott,* 303 F.3d at 1232. Petitioner's case, by any legal definition, is extraordinary.

B. The Ninth Circuit Erred in Holding That a Rule 60(d)(1) Independent Action Constitutes an Unauthorized "Second or Successive" Habeas Application as a Matter of Law, in Square Conflict with Decisions of this Court and of Other Circuits.

Invoking *McCoy,* petitioner's Rule 60(d)(1) independent action is proper in the absence of any other remedy at law to afford the district court the opportunity to reopen the original habeas proceeding to address its manifest error in failing to recognize petitioner's right of autonomy by insisting that trial counsel not concede guilt against his express wishes. To obtain relief from a judgment through an independent action, parties must establish equitable requirements: (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. Nowhere in its decision did the panel address the "indispensable elements" required for an independent action.

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"). The 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. In *Solomon v.*

DeKalb County, Georgia, the Eleventh Circuit 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..." See also *Gonzalez,* 545 U.S. ___, 125 S. Ct. at 2648. As the Court has held, a Rule 60(b) motion is not a second or successive habeas petition ("SSHP"). "[T]he difference is explained by the relief that the applicant seeks." *Abdur'Rahman v. Bell,* 537 U.S. 88, 94 (2003) (STEVENS, J., dissenting from dismissal of certiorari as improvidently granted). "[A] motion for relief under Rule 60 of the Federal Rules of Civil Procedure contests the integrity of the proceeding that resulted in the district court's judgment. ...[A] rule 60(b) motion is designed to cure procedural violations in an earlier proceeding—here, a habeas corpus proceeding—that raise questions about that proceeding's integrity." *Abdur'Rahman v. Bell,* 537 U.S. at 95 (STEVENS, J., dissenting) (quoting *Mobley v. Head,* 306 F.3d 1096 (11th Cir. 2002) (Tjoflat, J., dissenting) (vacated panel opinion)).

As applied in the habeas context, the "factual predicate [of a Rule 60(b) motion] deals primarily with some irregularity or procedural defect in the procurement of the judgment denying habeas relief." *Rodwell v. Pepe,* 324 F.3d 66, 70 (1st Cir. 2003). 366 F.3d at 1291-92 (Tjoflat, J., specially concurring in part and dissenting in part, Barkett, Wilson, JJ., joining), JA-89-90. "An SSHP," in contrast, "is a different species [;l]like a first petition for a writ of habeas corpus, an SSHP is a collateral attack upon the applicant's conviction or sentence." *Gonzalez,* 366 F.3d at 1292 (Tjoflat, J., specially concurring in part and dissenting in part, Barkett,

Wilson, JJ., joining).

The Ninth Circuit failed to find this distinction meaningful when it decided that petitioner's Rule 60(d)(1) constituted a "successive" habeas application then applied 28 U.S.C. 2244(b)(1) to jurisdictionally bar the recharacterized motion. As the majority of circuits have held, given that a Rule 60(b) motion is not a SSHP, 28 U.S.C. 2244(b)(1) simply does not apply to restrict filings under the Rule.

The decision below failed to determine that petitioner could not demonstrate that the district court's decision subjected him to a "grave miscarriage of justice," was "manifestly unconscionable," or that his case was one of "unusual and exceptional circumstances." Here, like the situation in *Castro v. United States,* 540 U.S. 375 (2003), petitioner's Rule 60(d)(1) was valid as a procedural matter, and the claim it raised was no weaker on the merits when presented under Rule 60(d)(1) than when presented under §2254. The recharacterization was therefore unquestionably improper and petitioner should be relieved of its consequences.

(i) Failing to Heed the Doctrine of Constitutional Avoidance Raises "Grave and Doubtful Constitutional Questions" Concerning Suspension of the Great Writ and Due Process.

Certainly, the Ninth Circuit's formulation of a categorical rule raises "grave and doubtful constitutional questions" concerning suspension of the Great Writ in violation of U.S. Const. art. I sec. 9 and, in a separate context, denial of Due Process of Law in violation of the Fifth Amendment. This is, of course, a particularly serious matter that arises when a first habeas corpus application is decided without a ruling on a substantial constitutional claim.

S.Ct. 2519, 159 L.Ed. 2d 442 (2004). *Smith* discussed "[i]n deciding retroactivity issues, a court must first find whether the Supreme Court decision in question announced a 'new rule.'" *Smith*, 49 Cal.App.5th 377 citing *Teague v. Lane*, 489 U.S. 288, 300-301 (1989). "If a court determines that a Supreme Court decision announces a new constitutional rule, it must then determine whether that new rule satisfies an exception to the general prohibition against the retroactive application of new rules to cases on collateral review." *Smith*, 49 Cal.App.5th 377, 391 citing *Teague,* 489 U.S. at pp. 305-310. "New substantive rules generally apply retroactively, while new rules of criminal procedure generally do not." *Smith*, 49 Cal.App.5th 377, 391 citing *Schriro*, 542 U.S. at pp. 351-52, 124 S.Ct. 2519.

Finally, if this Court were to conclude that *McCoy's* rule is both new and not substantive, it should hold that it is retroactive as a "watershed" rule, "implicating the fundamental fairness and accuracy of criminal proceedings." *Whorton*, 549 U.S. at 416 (quotation marks omitted). It is a foundational principle of our system of criminal justice that adversarial testing is necessary to prevent an impermissibly large risk of inaccurate conviction. "The very premise of our adversary system ... is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free." *Herring v. New York*, 422 U.S. 853, 862 (1975). When counsel admits guilt against the defendant's express wishes, conviction is virtually guaranteed—irrespective of the defendant's actual guilt or innocence.

CONCLUSION

For the forgoing reasons, the Court should grant the petition for a writ of mandamus to consider the important questions presented by this petition.

Respectfully submitted.

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