NO. 22-6229

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

In re STEVEN B. TURNER - PETITIONER

ON PETITION FOR A WRIT OF HABEAS CORPUS

TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF HABEAS CORPUS

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QUESTIONS PRESENTED

(1) Whether application of 28 U.S.C. 2244(b)(1) and (2) in this case violates U.S. Const. Art. I, Sec. 9, cl. 2, where the adjudication of a federal claim for relief in a first habeas petition by a state prisoner is contrary to a subsequent holding by this Court; the error remains uncorrected; and there is no other remedy available?

(2) Whether transfer to the district court for hearing and determination is warranted in the exceptional circumstances where a subsequent holding by this Court affects the previous adjudication of a federal claim by a state court, and subsequently by a federal district court in a first habeas petition pursuant to 28 U.S.C. 2254; the erroneous adjudication remains uncorrected; the petitioner is serving a life sentence without parole or probation as opposed to twenty-five years absent the error; and there is no other remedy available?

LIST OF PARTIES

This petition stems from a habeas corpus proceeding in which petitioner, Mr. Steven B. Turner, was the movant before the United States Court of Appeals for the Eighth Circuit. Mr. Turner is a prisoner sentenced to Life Imprisonment without the possibility for probation or parole and in the custody of Chris Brewer, Warden of the Crossroads Correctional Center, 1115 E. Pence Road, Cameron, Missouri 64429.

Mr. Eric Schmitt, Attorney General of Missouri, P.O. Box 899, Jefferson City, Missouri 65102, is the attorney for the Respondent.

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OTHER

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF HABEAS CORPUS

Petitioner, Steven B. Turner, respectfully prays that this Court transfer for hearing and determination his application for habeas corpus to the district court in accordance with its authority under 28 U.S.C. 2241(b).

OPINION BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit denying Petitioner's motion for permission to file a habeas corpus petition in the district court was entered on _____. This Court has jurisdiction to entertain this matter under 28 U.S.C. 2241, 2254(a), and 1651.

JURISDICTION

The Order of the Court of Appeals denying authorization to file a successive petition was entered on _____. This Court's jurisdiction is invoked pursuant to 28 U.S.C. 2241(a), 2254(a), and 1651(a); U.S. Const. Art. III, Sec. 2, cl. 2.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

Article I, Section 9, clause 2 of the Constitution provides:

> "The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it."

Article III, Section 2, clause 2 provides in relevant part:

> "In all other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make."

The Sixth Amendment provides in relevant part:

> "... and to have the assistance of counsel for his defense."

The Fourteenth Amendment provides in relevant part:

> "no state shall deprive any person of life, liberty or property, without due process of law."

28 U.S.C. 2241 provides in relevant part:

> "(a) Writ of habeas corpus may be granted by the Supreme Court, and justice thereof, the district courts, and any circuit judge within their respective jurisdictions."
>
> "(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it."

28 U.S.C. 2244(b) provides in relevant part:

> "(1) A claim presented in a second or successive habeas corpus application under Section 2254 that was presented in a prior application shall be dismissed."

"(2) A claim presented in a second or successive habeas corpus application under Section 2255 that was not presented in a proper application shall be dismissed unless -

"(A) the applicant show that the claim relied on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court that was previously unavailable."

STATEMENT OF THE CASE

In May of 1999, a grand jury indicted Mr. Steven B. Turner ("Petitioner" hereinafter) for first degree murder and armed criminal action in connection with the April 23, 1999, stabbing death of his cousin, Deborah Boldridge. Trial Transcript (hereinafter "T.T.") at pg. 15. Appendix ("Appx") "F."

After it was revealed that foreign influences by a veniremember had contaminated the venire, a mistrial was declared and the second trial commenced on November 14, 2000. Appx. "G." Mr. Turner was convicted of first degree murder and armed criminal action. Appx. "H." The trial court overruled the motion for new trial and sentenced Mr. Turner to concurrent terms of life imprisonment without parole for first degree murder and to ten years for armed criminal action. Appx. "I." The Missouri Court of Appeals, Western District, affirmed the convictions and sentences on direct appeal in State v. Turner, 90 S.W.3d 86 (Mo.App. W.D. 2002). Appx. "B" at pgs. 2-5 (summarizing the facts).

Thereafter, Mr. Turner timely sought state postconviction relief pursuant to Missouri Rule 29.15. In his amended 29.15 motion, Mr. Turner alleged, in relevant part, that his trial attorney was ineffective for advising him to reject the state's offer to plead guilty to a reduced charge of second degree murder and armed criminal action in exchange for concurrent twenty-five year prison sentences. See Appx. "J" (amended motion at pgs. 32, 38-41).

An evidentiary hearing was ordered and on that hearing, Mr. Turner testified that trial counsel advised him that there was "no evidence that substantiates ... Murder One. This is a simple manslaughter case." Postconviction transcript ("PCR Tr.") at pg. 77; Appx. "K." Because Mr. Turner "didn't know nothing about the criminal law," he "depended on (his) lawyers." Appx. "K" at pg. 78.

Mr. Turner testified that on the morning of the first day of the second trial he was in a room with trial counsel preparing for voir dire when Page Bellamy (the prosecutor) stuck his head through the door and said, "I offer your client twenty-five years right now." Appx. "K" at pg. 89. Trial counsel, Mr. John Osgood, said "no," and Mr. Bellamy shut the door and left. Appx. "K" at pg. 89.

While Mr. Turner admitted that trial counsel told him there was a "slight chance" he could be convicted for first degree murder, the chance was "slim" and "from the beginning to the end" counsel's "expert opinion" was that the evidence "never merited" more than a manslaughter conviction and "maximum, second degree 'murder.'" Appx. "K" at pgs. 86, 90. Mr. Turner testified that he trusted counsel's advice and relied on his "expert opinion" when deciding to reject the twenty-five year plea offer. Appx. "K" at pgs. 78, 86.

While Mr. Turner acknowledged that twenty-five years was beyond the fifteen year sentence he was hoping for, when asked whether he would have accepted the twenty-five year plea offer if counsel had advised him to do so, Mr. Turner replied: "I would have went with whatever he suggested to me at the time." Appx. "K" at pgs. 90-91.

Mr. Bellamy testified that on the morning of the second trial, he extended the twenty-five year plea offer on the reduced charge of second degree murder. Appx. "K" at pg. 23. He explained that because a less favorable plea offer (life on second degree murder and thirty years on armed criminal action) had previously been rejected, he was not confident that the final, more favorable twenty-five year offer would be accepted but he "made (the) plea proposal to resolve the case and end the case for the victim's family and everyone involved." Appx. "K" at pg. 16. Mr. Bellamy had also testified that "the interest of justice" and "the economics of justice" also factored into his decision to extent the plea proposals. Appx. "K" at pgs. 9-10.

Mr. Bellamy testified that the fact that Ms. Boldridge had been disarmed and then stabbed nineteen times was powerful evidence that the homicide "was a vile, inhumane, and malicious act," that there was substantial evidence of "deliberation," and the state has a strong case for first degree murder against the Petitioner. Appx. "K" at pgs. 8-9, 21.

Trial counsel testified that he was a federal prosecutor for twenty-five years and at the time of Mr. Turner's trial, he had been a criminal defense attorney for six years. Appx. "K" at pg. 25. In trial counsel's view, the case was "overcharged" and "the worst that would happen 'at trial' would be a second degree murder conviction." Appx. "K" at pgs. 27-28, 33-34, 45-46, 60, 71. He testified that he believed the murder was committed "during a heated state of passion" and "it was borderline as far as a jury concerned between voluntary manslaughter ... and second degree murder." Appx. "K" at pg. 27. Counsel explained he was "hopeful 'he' would get a self defense instruction" and "that would make it more palatable for the jury ... to bring back a compromised verdict if they didn't agree that it wasn't self-defense." Appx. "K" at pgs. 27-28.

Counsel thought the jury would "either hang ... or come back with voluntary or involuntary manslaughter, which (he was) trying to get" as "the fact were not good in terms of getting an acquittal." Appx. "K" at pg. 28. Counsel testified that "the case was tried smoothly" and he "got to present 'the' defense the way 'he' wanted to." Appx. "K" at pg. 30.

Counsel stated that because Mr. Turner was "genuinely remorseful ... he didn't really intend to kill Ms. Boldridge ... not in the sense of premeditated murder, and ... not in terms of second degree murder" and, thus, counsel "just didn't see the necessary mens rea there to support 'either' conviction." Appx. "K" at pg. 30.

Counsel stated that he was "realistic" that Mr. Turner was going to prison, but Mr. Turner wanted to see his twelve year old son graduate from high school and it was "not unrealistic" for Mr. Turner to hope for such a result. Appx. "K" at pgs. 31-32. Counsel testified that he "told Mr. Turner that if he went to trial and he was convicted of second degree murder what the consequences were going to be," but counsel "thought 'he' had a shot at doing something better than that, particularly if 'he' got the self-defense instruction." Appx. "K" at pg. 44.

Counsel reasoned "that as long as the offer wasn't any better than the worst case scenario ... that 'he' felt was going to be second degree murder, 'Mr. Turner' might as well take his chances." Appx. "K" at pgs. 45-46. Counsel testified that, under the circumstances, a twenty-five year prison sentence would have been the same as a sentence of life without parole. Appx. "K" at pgs. 46, 60.

In denying relief, the 29.15 motion court found that on the morning of the second trial, the prosecutor did make the twenty-five year offer, but that trial counsel rejected the offer "and Mr. Turner agreed with that decision" because Mr. Turner's lawyers believed this "was a second degree murder case with a hope of manslaughter." Appx. "K" at pg. 71. The Motion court concluded that while "hindsight tells us all that a plea to second degree murder would have given Turner a chance for parole — whatever the number of years of the sentence," trial counsel "properly advised" Mr. Turner of the risks at trial, thus, counsel was not ineffective for advising Mr. Turner to reject the plea offer. Appx. "K" at pg. 71. Mr. Turner appealed.

In his brief to the appeals court, Mr. Turner argued that, in light of the evidence against him, trial counsel was ineffective for advising him to reject the State's offer of twenty-five years, and that he was prejudiced, because there is a reasonable probability that, if aided by competent counsel, he would have accepted the plea offer instead of going to trial where he was found guilty of first degree murder and sentenced to life imprisonment without parole.

In rejecting Mr. Turner's claim, the appeals court relied extensively on the decisions in Rowland v. State, 129 S.W.3d 507 (Mo.App. S.D. 2004), and Bryan v. State, 134 S.W.3d 795 (Mo.App. S.D. 2004). The court stated:

> Unless and until a plea agreement is reached and embodied in the judgment of a court, nothing has occurred that is of constitutional significance ... It is an ensuing plea of guilty that implicates the constitution ... refusing a plea based on a misunderstanding is not a basis for challenging the conviction and sentence under Rule 29.15 ... A defendant in a criminal case has no right to a plea agreement.

Turner v. State, Mo.App. W.D. No. WD65733, Slip Op. at pg. 3 (citing Rowland, 129 S.W.3d at 510-511). Appx. "C" (Turner v. State, Slip Opinion).

The Court concluded:

> The purpose of a Rule 29.15 motion is for the Court to determine whether ineffective assistance prevented the defendant from receiving a fair trial ... a defendant is entitled only to one fair trial. Turner cannot assert a constitutional claim related to his failure to plead guilty when he had a fair trial ... Rowland and Bryan govern this case. Thus, Turner has no cognizable challenge to his decision to go to trial.

Id. at 4 (citing Bryan, 134 S.W.3d at 803-804)(citing Strickland v. Washington, 466 U.S. 668, 684 (1984)).

Deferring to the motion court's findings, the appellate court held that "Turner rejected the plea offer for reasons that had nothing to do with counsel's advice." Id. at 4. However, the record establishes otherwise. Trial counsel repeatedly told Mr. Turner that there was "no evidence that substantiates ... Murder One. This is a simple manslaughter case." Appx. "K" at pgs. 27-28, 30, 33-34, 44-46, 60, 71, 77, 86, 89-91.

Because Mr. Turner "didn't know nothing about the criminal law," he trusted trial counsel's "expert opinion" regarding the evidence and was convinced by counsel that this was a "manslaughter case" and, at worst, "second degree (murder)." Appx. "K" at pgs. 78, 86, 89-90.

While Mr. Turner wished for a lesser sentence, the notion that he could receive such sentence at trial clearly stemmed from trial counsel's advice. Unfortunately, and to Mr. Turner's detriment, counsel's advice was based on a gross underestimation of the evidence and an incredible theory of self-defense doomed from the outset. Appx. "K" at pgs. 27-28, 30-32, 44; Appx. "L" (T.T. 890-894); (Slip Opinion at pgs. 5-8). The appeals court also found that --- and concluded --- that Mr. Turner's testimony, that he "did not know" whether he would have accepted the plea offer, undermined his claim of prejudice. (PCR Slip Opinion at pgs. 4-5; Appx. "C").

While Mr. Turner testified that he could not say whether he would have accepted the plea offer, he 'immediately qualified that statement,' and added: "if 'trial counsel' felt strongly that I was gonna get Murder One 'at trial' and that this 'twenty-five year bargain' is the best offer we can get ... 'in counsel's' expert opinion, I would have went with whatever he suggested to me at the time." Appx. "K" at pgs. 90-91.

This testimony is substantiated by the fact that Mr. Turner did, in fact, follow counsel's suggestion and rejected the plea offer. The appellate court took the statement out of context and failed to acknowledge the complete text of Mr. Turner's testimony on this critical point. The record conclusively reflects and demonstrates that: (1) Mr. Turner relied on trial counsel's advice and "expert opinion" regarding the decision to reject the twenty-five year plea; and (2) Mr. Turner "would have" accepted the plea offer if so advised by counsel. Appx. "K" at pgs. 90-91.

Trial counsel was hoping to get a "self defense" instruction ... in addition to one on "mental disease or defect." At trial, however, the only evidence "to support" the giving of these instructions --- which according to him "would make it more palatable for the jury ... to bring back a compromised verdict if they didn't agree that it was self defense," which he was trying to get "as the facts were not good in terms of getting an acquittal;" or cause the jury to "either hang ... or come back with voluntary manslaughter" — was the testimony of Mr. Turner that "he had mental problems;" "had attempted suicide;" "been hospitalized in a mental hospital;" and "suffered from "black-outs," which the prosecutor's relentless cross-examination, without a doubt, swayed the jury to overlook or ignore, since there was nothing presented by trial counsel that would have called into question the very matter being challenged by the prosecutor. Cf. PCR Tr. Appx. "K", at pgs. 25, 27-30, 33-34, 45-46, 60, 71, with Appx. "M", at T.T. pgs. 827-866, 871-878, 883-911, 943-952.

Hence, the vital issues, as to whether or not Mr. Turner was trying to manipulate the jury, was the focus of the prosecutor who, craftily, alluded that Mr. Turner's allegations of not being able "to remember" the specifics of how the crime occurred, and that "he had blacked-out" were simply efforts by Mr. Turner to avoid telling what really occurred, manipulate the jury to avoid responsibility for what he did. In that regard ... nothing was presented by trial counsel to support the testimony of Mr. Turner, to show ... that in fact, and as medically established, there are circumstances or events which, in fact, exposure to them may result in the very phenomenon of memory repression, dissossiative amnesia, and black out, just as Mr. Turner had testified that he had experienced, and continues to experience (in relation to the crime); and, that those experiences are not limited to instances involving victims of abuse, but also the perpetrators of violent crimes, and as a result thereof, to the extent that such individuals

— in criminal contexts, have a reduced capacity to cooperate intelligently in their own defense. See, e.g., United States v. Robertson, 2015 U.S. Dist. LEXIS 15299. Also, Cf. T.T. at pgs. 827-866, 871-877, with T.T. 897-911, 943-952 (Appx. "M").

As far as people that work in the field, those clinicians working with people that have trauma, dissociation is not disputed. See Medical Literature discussing evidence that tends to support the validity of the phenomenon of "memory repression," including fMRI studies that have shed light on the neural mechanisms involved in voluntary memory suppression (Kikuchi, et al), 22(3) J'Cognitive Neuroscience, Memory Repression: Brain Mechanisms Underlying Dissociative Amnesia; Dissociate Amnesia is also included and discussed in depth in the 2013 Diagnostic and Statistical Manual of the American Psychiatric Association (APA), the official diagnostic manual of the American Psychiatric Association (the "DSM5").

The absence in the record of experts to provide a full defense for Mr. Turner, to the extent that there was scientific evidence which would have corroborated the fact that suffering from black outs and dissociative amnesia — consistent with the testimony of Mr. Turner — is consistent with being the results of having endured a traumatic experience, provides that trial counsel's advice to reject the prosecutor's plea bargain was not based on reasonable grounds; moreover, an expert testifying on behalf of Mr. Turner's defense would have concluded that, in light of the above-mentioned scientific basis, Mr. Turner indeed may have been experiencing fearing for his life, to the extent that such tragic experience may have forced him to react in a serious, defensive fashion — which culminated in the stabbing death of his cousin, Deborah — but as to which he, even now, has no recollection. Cf. Appx. "M", at pgs. 858 (line 23), 865-866, 871-872, with Brown v. United States, 256 U.S. 335 (1921) (Noting that "the person attacked" is the one who "has sufficient reason to believe that is in imminent

danger of death or harm from his assailant"): Mr. Turner never tried to avoid, evade or escape responsibility and, his inability to remember may, in fact, have reduced his capacity to cooperate intelligently in his defense. Such evidence would have been admissible had trial counsel procured and have available and ready to present ... but did not, to the detriment of Mr. Turner. See, Daubert v. Marrell Dow Pharmas. Inc., 509 U.S. 579, 592 (1993); and Frye v. United States, (1923) (A principle must be generally accepted in the scientific community to render expert testimony admissible).

Having exhausted his claims for relief in state court therefore, on June 15, 2006, Mr. Turner timely filed his pro se habeas corpus petition in the U.S. District Court for the Western District of Missouri, pursuant to 28 U.S.C. 2254, seeking to challenge his convictions and sentences for first degree murder and armed criminal action entered in the circuit court of Lafayette County, Missouri. In relevant part, Mr. Turner alleged that his trial attorney was ineffective for advising him to reject the State's offer to plead guilty to a reduced charge of second degree murder and armed criminal action in exchange for concurrent twenty-five year prison sentences, as this claim was presented and exhausted in the state courts, as noted above.

In denying this claim, however, the district court quoted — verbatim, the reasoning relied on by the Missouri Court of Appeals, and concluded by finding that "the resolution of ... 'the' ground for relief" did not offend 28 U.S.C. 2254(d)(1) and (2) as defined by Terry Williams v. John Taylor; nor Strickland's standard. See, Appx. "D" at pgs. 2-5.

Ten years after the affirmance of Mr. Turner's convictions by the Missouri Court of Appeals, and six years after its rejection of his ineffective assistance of counsel claim based on the advice to reject the twenty-five year plea offer extended by the prosecution, this Court decided Lafler v. Cooper, 132 S.Ct. 1376

(2012), in which it held, contrary to the adjudications by the Missouri Court of Appeals and the U.S. District Court, that "the Sixth Amendment ... is not so narrow in its reach," and it "requires effective assistance of counsel at critical stages of the criminal proceedings" including "plea bargain." Id. at 1386. Lafler, therefore, established that Mr. Turner had, in fact, stated an actionable Sixth Amendment claim; and, moreover, that according to the application of the Strickland test as applied under the holding of Lafler, Mr. Turner was entitled to relief. Id. at 1384-1385 (and citing Missouri v. Frye, 132 S.Ct. 1399, 1407-'1409.').

Accordingly, and consistent with the procedures provided to correct a wrong in Missouri, Mr. Turner filed a "Motion to Recall the Mandate" with the Missouri Court of Appeals in light of the decision in Lafler. See, Appx. "N" (Motion to Recall the Mandate). However, without explanation, the appeals court denied the motion. See, Appx. "N" (recall mandate at pgs. 1-3).

Consequently, on 8-25-2017, Mr. Turner filed his Rule 60(b) with the United States District Court requesting relief from the adjudication of his claim of ineffective assistance of counsel in relation to the advice to reject a plea offer, and in light of Lafler. On 12-19-2017, the district court entered its "ORDER(1) denying 'Mr. Turner's' motion pursuant to Rule 60(b)(Doc. 21) 'for the reasons set forth in Respondent's response thereto.'" See, Appx. "O" (Respondent's Response at pgs. 1-4); and Appx. "E" at pg. 4 of 4.

Finally, on _____, Mr. Turner filed his "Motion for Leave to File Second or Successive Habeas Corpus Application Under Section 2254" pursuant to, and as required by 28 U.S.C. 2244(b)(3)(A), and asserting that the basis for the "application does not offend, but, in fact, satisfies the requirements of the Anti-Terrorism and Effective Death Penalty Act," and that as such, he "should be granted permission to file a successive 2254 petition before the District

Court." Appx. "P."

On _____, however, the United States Court of Appeals for the Eighth Circuit denied the "Motion for Leave to File Second or Successive Habeas Corpus" to Mr. Turner. See, Appx. "A."

The present action ensued.

REASONS FOR GRANTING THE WRIT

It is clearly established that the power of this Court to grant an extraordinary writ is very broad, but reserved for exceptional cases in which "appeal is clearly inadequate remedy." Ex parte Fahey, 332 U.S. 258, 260 (1947). Although 28 U.S.C. 2244(b)(3)(E) prevents review by this Court of the order by the court of appeals denying Mr. Turner's request for leave to file a second habeas petition by either appeal or writ of certiorari, that provision, however, does not repeal this Court's authority to entertain original habeas petitions, Felker v. Turpin, 518 U.S. 651 (1996), nor prohibit this Court from "transferring the application for hearing and determination" to the district court pursuant to 28 U.S.C. 2241(b).

Further, this Court's Rule 20 requires a petitioner seeking a writ of habeas corpus to demonstrate that (1) "adequate relief cannot be obtained in any other form or in any other court;" (2) "exceptional circumstances warrant the exercise of this power;" and (3) "the writ will be in aid of the Court's appellate jurisdiction." Additionally, this Court's authority to grant relief is limited by 28 U.S.C. 2254, and any considerations of a second petition must be "inform'ed'" by 28 U.S.C. 2244(b). See, Felker, 518 U.S. at 662-663.

Mr. Turner is serving a sentence of life without the possibility for parole, as opposed to a sentence of twenty-five years because the adjudication of his claim for relief by the State, and later by the U.S. District Court, was made contrary to clearly established federal law as defined by this Court. No court, state or federal as of yet, has determined Mr. Turner's claim under the correct standards of review and, being this Court his last hope for hearing and determination of his claim for relief, his case warrants, due to these exceptional circumstances, the exercise of this Court's discretionary powers.

I. STATEMENT OF REASONS FOR NOT FILING IN THE DISTRICT COURT

As required by Rule 20.4 and 28 U.S.C. 2241 and 2242, Mr. Turner states that he has not applied to the district court because the circuit court prohibited such application. See, Appx. "A." Mr. Turner exhausted his state remedies for his claim of ineffective assistance of counsel, as it was later modified due to the intervening holding by this Court in Lafler v. Cooper, supra, when the Missouri Court of Appeals, Western District, denied his "motion to recall the mandate." See, Appx. "N." Since Mr. Turner has exhausted his state remedies, and further efforts to correct the adjudication of "the claim" in federal court were also denied, including his "motion for leave to file a second or successive habeas corpus," he cannot obtain relief in any other form or any other court. See, Appx. "A"; "B"; "C"; "D"; and "E" at pg. 4 of 4.

II. THE EXCEPTIONAL CIRCUMSTANCES OF THIS CASE WARRANT THE EXERCISE OF THIS COURT'S JURISDICTION

There is absolutely no doubt that Lafler v. Cooper contradicted the adjudication of Mr. Turner's claim by the Missouri Court of Appeals, initially, and subsequently by the U.S. District Court during the initial habeas corpus action by Mr. Turner pursuant to 28 U.S.C. 2254. Although Mr. Turner requested the correction of the adjudications by those courts through a "motion to recall the mandate" in the state court initially, and later through a "Rule 60(b)" motion, the state court simply denied the request altogether and without a reason; and, the district court did it based on the reasoning by the State of Missouri's attorney. However, it is clear that Mr. Turner not only had an actionable Sixth Amendment complaint, but also was entitled to relief on the merits. The district court in that regard overlooked or ignored that Mr. Turner should have received habeas relief during his initial federal habeas action: 28 U.S.C. 2254(d)(1) and (2).

The failure to correct the error by state and federal courts has left Mr. Turner serving a sentence of Life without the possibility for probation or parole, as opposed to a sentence of 25 years. This is significant because Mr. Turner has already served about the entire length of a twenty-five year sentence and could have been returning to his family soon; but, as it stands, he would be required by the State to die in prison. Further, Mr. Page Bellamy, the prosecutor in Mr. Turner's case, testified during postconviction proceedings that the State would have been satisfied with Mr. Turner serving twenty-five years when 'he' testified that "the interest of justice, and the economics of justice" also the "justice for the family of the victim," factored into his decision to extend the plea(s) and proposal(s). (PCR Tr.) at Appx. "K" at pgs. 9-10, 16.

In Lafler, this Court held that "the fact that 'defendant' is guilty does not mean that he is not entitled by the Sixth Amendment to effective assistance or that he suffered no prejudice from his attorney's deficient performance during plea bargain." Id. at 1386. Moreover, one other fact that the State, and Federal Courts also overlooked is that, Life without parole sentences, "share some characteristics with death sentences that are shared by no other sentences" as this Court held. See, Graham v. Florida, 130 S.Ct. 2011, 2027 (2010).

III. APPLICATION OF 28 U.S.C. 2244(b)(1) AND (2) IN THIS CASE WOULD VIOLATE U.S. CONST. ART. I, SEC. 9, CL. 2 (QUESTION 1)

The Eighth Circuit Court of Appeals denied Mr. Turner permission to file a second habeas corpus petition. Although the procedural requirements of 28 U.S.C. 2244(b)(1) and (2) are recognized as a modified res judicata, a restraint on what in habeas corpus practice is called an "abuse of the writ," this Court has also recognized that "the doctrine of abuse of the writ refers to a complex and evolving body of 'equitable principles informed and controlled by historical usage, statutory developments, and judicial decisions.'" McClesky v. Zant, 499 U.S. 467 (1991).

As such, interpretations of 2244 that "would produce troublesome results, create procedural anomalies and close our doors to a class of habeas petitioners seeking review without any clear indication that such was the intent of Congress," Panetti v. Quarterman, 127 S.Ct. 2842, 2854 (2007), have always been resisted by this Court, even in cases where the petitioner's guilt was not in question. Id. at 127 S.Ct. '2854.' This is clearly so because, first, the two historically critical features of the Court's constitutional function: (1) the crucial role of the "Supreme Court" in the exposition of the meaning of the Constitution; and (2) the Court's long entrenched function of determining whether constitutionally valid norms have been applied to persons deprived of their liberty; and second, because the writ of habeas corpus is "aptly described as the highest safeguard of liberty." Lonchar v. Thomas, 116 S.Ct. 1293, 1298 (1996) (quoting Smith v. Bennett, 365 U.S. 708, 712 (1961)).

Hence, just as the appellate/original jurisdiction of this Court in relation to habeas corpus cannot be abolished, Felker v. Turpin, supra, without directly calling into question the congressional power to do so, neither can 28 U.S.C. 2244(b)(1) and (2) be interpreted to abolish the privilege of the writ without calling into question the same congressional power to do so. U.S. Const., Art. I, Sec. 9, cl. 2.

In this case, Lafler conclusively demonstrates, when applied, that Mr. Turner was correct; he had in fact stated an actionable Sixth Amendment claim of ineffective assistance of counsel based on counsel's advice to reject the prosecutor's plea offer of twenty-five years; and, insofar as the Missouri Court of Appeals — and later the U.S. district court during Mr. Turner's first 2254 habeas action, had concluded to the contrary, both had adjudicated the claim "contrary to ... and involving an unreasonable application of clearly established federal law," as determined by this Court. 28 U.S.C. 2254(d)(1).

Contrary to the holdings of the state and federal court in this case, this Court stated that "the Sixth Amendment ... is not so narrow in its reach"; "The Sixth Amendment requires effective assistance of counsel at critical stages of the criminal proceedings"; "while defendants have no right to be offered a plea ... if a plea bargain has been offered, a defendant has the right to effective assistance of counsel in considering whether to accept it. If that right is denied, prejudice can be shown if loss of the plea opportunity led to a trial resulting in a conviction on more serious charges or the imposition of a more severe sentence." Lafler, 132 S.Ct. at 1385-1387. That is exactly what happened to Mr. Turner. Under 28 U.S.C. 2254(d)(1), the district court should have granted Mr. Turner's initial habeas petition. Moreover, on the merits of Mr. Turner's claim, and, pursuant to 2254(d)(2), Mr. Turner was also entitled to habeas relief.

This Court stated in Lafler that, in the context of plea bargains, a defendant must show the outcome of the plea process would have been different with competent advice. Id. at 1384 (citing Missouri v. Frye, 132 S.Ct. 1399, 1409 (2012)). This requires the defendant to show a "reasonable probability" that: (1) he would have accepted the earlier plea offer had he been aided by competent counsel; (2) the plea offer would not have been withdrawn by the prosecutor and would have been accepted by the trial court; and (3) the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed. Lafler, 132 S.Ct. at 1385; Frye, 132 S.Ct. at 1409.

As pointed out to the State's court of appeals, trial counsel's performance was deficient, Appx. "N," at pgs. 1-21 (citing PCR Tr.), even to the extent that he could have obtained and presented expert testimony to support the testimony of Mr. Turner, as pointed out above in the "Statement of the Case" portion, but he failed to do so and as a result, rendering his advice to Mr. Turner unreasonable

and incompetent, in light of the prosecution's evidence.

Under both 28 U.S.C. 2254(d)(1) and (2), the district court was required to grant Mr. Turner's initial habeas corpus application based on his ineffective assistance of counsel claim, but it did not. When an individual suffers a severe deprivation of liberty and asserts a claim that he is being confined pursuant to rulings and practices that violate the Constitution of the United States, such claim cannot be wholly withdrawn from the cognizance of a federal court -- much less this Court -- and refused to be corrected -- as the state's court of appeals did when it denied Mr. Turner's "motion to recall the mandate"; and later by the district court based on "the Respondent's response thereto."

As Lonchar v. Thomas, supra, noted: Dismissal of a first federal habeas petition is a particularly serious matter, for that dismissal denies the petitioner the protections of the Great Writ entirely, risking injury to an important interest in human liberty. See, Ex parte Yerger, 8 Wall. 85, 95 (1869) (The writ "has been for centuries esteemed the best and only sufficient defense of personal freedom"); Withrow v. Williams, 507 U.S. 680, 700 (O'Connor, J., concurring in part and dissenting in part) (decisions involving limitations of habeas relief "warrant resrtaint").

Even in the context of "second and successive" petitions -- which pose a greater threat to the State's interest in "finality" and are less likely to lead to the discovery of unconstitutional punishments -- this Court has created careful rules for dismissal of petitions for "abuse of the writ."

Although it appears that 28 U.S.C. 2244(b)(1) has no exceptions, such interpretation, under the circumstances of this case, 'would' create procedural anomalies, produce troublesome results and close the doors of the federal courts -- including this Court, to a class of habeas petitioners in the position of Mr. Turner, who are seeking review in regard to improper legal standards applied by

lower federal courts in the adjudication of claims for relief when there are no other remedies available, and correction of a wrong is refused. As such, application of 2244(b)(1) in this case, for the reasons stated above, would violate U.S. Const., Art. I, Sec. 9, cl. 2, and should not be applied to deny Mr. Turner to re-present his ineffective assistance of counsel claim regarding the advice to reject the prosecutor's plea offer of twenty-five years, under the holding of Lafler.

In relation to 28 U.S.C. 2244(b)(2), Lafler is not simply the provision of a new argument in support of the same constitutional claim previously presented (see, Thompson v. Nixon, 272 F.3d 1098 (8th Cir. 2001)), but rather, the clarification regarding the unreasonable application of the reach of the Sixth Amendment, coupled with the unreasonable determination of facts derived from such unreasonableness in light of previously unavailable, but retroactively applicable rule to cases on collateral review. See, e.g., People v. Delgado, 442 P.3d 1021 (Colo.App.Ct. 2019) (citing Lafler to overrule Carmichael v. People, 206 P.3d 800 (Colo. 2009); but cf. with Williams v. United States, 705 F.3d 293 (8th Cir. 2013). See also, Tyler v. Cain, 533 U.S. 656 (2001) (Stating that "the Court can make 'a new rule retroactive through multiple holdings that logically dictate the retroactivity of the new rule.'"); see also, Lee v. United States, 137 S.Ct. 1958 (2017).

In "In re Davis, 557 U.S. 952 (2009)" counsel for petitioner argued that interpreting 2244(b)(2)(B)(ii) to require a technical constitutional error in addition to innocence would turn 2244(b)(2)(B)(ii) on its head because such 'strict construction' was unwarranted. See, In re Davis, 2009 U.S. S.Ct. Briefs LEXIS 2112 at *39-40. Even though the statute did in fact appear to require what counsel had argued against, the Court agreed and transferred the case to the district court. No different than In re Davis, Mr. Turner submits that application of

28 U.S.C. 2241(B)(1)(and (2) to deny him access to the Great Writ does, indeed, violate U.S. Const., Art. I, Sec. 9, cl. 2, for — and due to, the exceptional circumstances of this case as stated above.

IV. TRANSFER TO THE DISTRICT COURT FOR HEARING AND DETERMINATION IS WARRANTED UNDER THE EXCEPTIONAL CIRCUMSTANCES OF THIS CASE (QUESTION 2)

As it is presented above, this case is about the adjudication of Mr. Turner's ineffective assistance of counsel claim — regarding counsel's unreasonable advice to reject the prosecutor's plea offer of twenty-five years — by the Missouri Court of Appeals, initially; and subsequently by the United States District Court, which, as a result, culminated in a criminal conviction after trial of a more serious charge, 'and' the imposition of a more severe sentence.

In adjudicating Mr. Turner's claim, the state court of appeals, citing to two other opinions by the Southern District of that court, held that Mr. Turner had "no cognizable challenge to his decision to go to trial." See, Appx. "C," at pg. 4. And, deferring to the motion court's findings, the appeals court held that "Turner rejected the plea offer for reasons that had nothing to do with counsel's advice." See, Appx. "C," at pg. Id. After exhaustion of his claims for relief, Mr. Turner, petitioned the U.S. District Court for federal habeas corpus relief pursuant to 28 U.S.C. 2254.

In relevant part, Mr. Turner presented the exhausted claim of ineffective assistance to the district court who, in turn, denied it holding that the resolution of the claim by the state court was not offensive to 28 U.S.C. 2254(d)(1) and (2); and further, that applying "the Strickland" standard of review ... counsel was not ineffective. See, Appx. "D," at pg. 5.

Ten years after Mr. Turner's convictions were affirmed on direct appeal, and six years after this claim was initially denied by the Missouri court of

appeals, this Court decided Lafler v. Cooper, which, not only contradicted the adjudication of the claim by both, the state, and federal district court, but also conclusively demonstrated that Mr. Turner, not only was correct, i.e., he had in fact stated an actionable Sixth Amendment claim of ineffective assistance of counsel; but also, that on the merits of his claim, Mr. Turner was entitled to relief.

However, although he petitioned the state and federal courts for the correction of the adjudication they have rendered on the claim, and based on Lafler, those attempts were futile and Mr. Turner now, with no other avenue to request relief, remains in prison serving a sentence of Life without parole rather than serving 'the last two or three years of the twenty-five year sentence' the prosecutor offered him in exchange for a guilty plea to the lesser charge of second degree murder which, according to the prosecutor, "in the interest of justice, the economics of justice, and justice for the victim's family, it would have been acceptable for everyone involved." See, Appx. "N," at pgs. 1-28; "E," at pgs 1-4; and "K" (PCR Tr. at pgs 9-10, 16, 23).

A. The Circumstances of this Case are Rare, Exceptional and Extraordinary

As an initial matter, it should be noted that the adjudication of Mr. Turner's ineffective assistance of counsel claim, on the merits, was not made in the context as instructed in Lafler applying the Strickland v. Washington two prong test, by the state courts. First, as previously noted, in the context of pleas, this Court stated in Lafler that a defendant must show the outcome of the plea process would have been different with competent advice, i.e., "he would have accepted the earlier plea offer has he been aided by competent counsel"; "the plea offer would not have been withdrawn by the prosecutor and would have been accepted by the trial court"; and, "that the conviction and sentence, or both, under the offer's terms would have been less severe than under the judgment

and sentence that in fact were imposed." Lafler, 132 S.Ct. at 1385; Frye, 132 S.Ct. at 1409.

On the issue of prejudice, it is not a close question that trial counsel was ineffective for failing to advise Mr. Turner to accept the twenty-five year plea bargain in light of the fact that he subsequently received a sentence of life without parole. It is uncontroverted from the record that Mr. Turner would have accepted the plea of twenty-five years had trial counsel assisted him competently in such advice. See, Appx. "K," at pgs. 90-91. Had Mr. Turner accepted the plea offer he would have become eligible for parole in August of 2019 (a little over three (3) years ago). See, Sections 556.061(8) (2000), and Section 558.019.3 (2000) of the Revised Statutes of Missouri (RSMo.), respectively.

It is evident that trial counsel's performance was deficient. Trial counsel "repeatedly assured" Mr. Turner that the evidence in this case only supported a manslaughter conviction and at the worst he would receive after trial was a second degree murder conviction. See, Appx. "K," at pgs. 27-28, 30, 3334, 44-46, 60, 71, 77, 86, 89-90.

Mr. Turner relied on trial counsel's "expert opinion" of the evidence -- without knowing the significance of the deficiencies in trial counsel's defense, because he did not know anything about the criminal law, when making the significant decision to reject the twenty-five year plea offer. See, Appx. "K," at pgs. 78, 86.

Trial counsel's belief that Mr. Turner could be convicted of manslaughter at trial because he'll be "entitled" to instructions on "self defense" and "diminished capacity" (temporary insanity) is unreasonable, see, Appx. "M," at pgs. 890-892; and for that reason, accordingly, the trial court refused to give the instructions. See, Appx. "M," at pgs. 892-894. And, these rulings were affirmed on direct appeal. See, Appx. "B," at pgs. 5-8. Moreover, the court's

opinion shows that Missouri law on this point was clearly established at this time of trial, and a reasonably competent attorney would have researched this point and quickly been informed that instructions were precluded by the evidence in this case. See also, supra, at pgs. 11-13.

Although Mr. Turner was advised by trial counsel of the consequences of being convicted at trial "for second degree murder," Mr. Turner was charged with first degree murder and trial counsel did not competently and accurately inform Mr. Turner that the "worst case scenario" at trial could be a conviction for murder in the first degree and a sentence of life without parole. See, Appx. "K," at pgs. 27-28, 33, 45-46, 60, 71, 86, 89.

Mr. Turner had no valid defense to a first degree murder charge. Consistent to the relevant considerations noted by this Court is Lafler, though, is worthy to observe that Mr. Turner expressed willingness, and never attempted to avoid, but rather always accepted responsibility for his actions; and, no information ... since the time of the trial, has surfaced to refute Mr. Turner's acceptance nor his trial testimony. Lafler, 132 S.Ct. at *172.

Furthermore, trial counsel's "all-in" attitude that Mr. Turner "might as well take his chances" at trial, shows the reckless and inappropriate disregard for his client's interests, Appx. "K," at pgs. 45-46; and his assertion that a twenty-five year prison sentence would have been the same as a life without parole is absurd: This Court has recognized that Life without parole sentences "share some characteristics with death sentences that are shared by 'no other sentences.'" Graham v. Florida, 130 S.Ct. 2011, 2027 (2010). It appears that counsel probably based his opinion on the fact that Mr. Turner was in his 40's when he was charged. Although he is now in his mid 60's, Mr. Turner, once again, had he received twenty-five years, would have become eligible for parole in 2019.

It is clear by the fact that the state court held that Mr. Turner had no cognizable Sixth Amendment claim, that such adjudication just as that of the U.S. district court supporting it, is contrary to clearly established federal law as determined by this Court. Lafler, 132 S.Ct. at 1389 (citing Frye, at 144, 132 S.Ct. 1399; Padilla v. Kentucky, 559 U.S. 759 (2010); Hill v. Lockhart, 106 S.Ct. 366; McMann v. Richardson, 397 U.S. 759 (1970); and Strickland v. Washington, 466 U.S. at 688).

And, that although the State's appeals court (as did the postconviction court below) cited to Strickland in their conclusions -- as also did the district court, those were not made in the context of a rejection of a guilty plea due to the inadequate advice to counsel, and as such the claim has not yet been adjudicated under correct application of the two-prong test of Strickland, and has remained like that for almost three (3) decades.

In discussing "equitable considerations," the Eighth Circuit Court of Appeals observed: "we cannot ignore the fact that lifetime imprisonmet under a mistaken legal ruling is a "quintessential miscarriage of justice." See, Cornell v. Nix, 119 F.3d 1329, 1333 (8th Cir. 1997) (quoting Schlup v. Delo, 115 S.Ct. 851, 865-866 (1995)). Mr. Turner was entitled to further proceedings, and relief thereafter, during his first petition for habeas corpus but was denied. See, 28 U.S.C. 2254(d)(1) and (2).

Even assuming that Mr. Turner is barred by 2244(b)(1) and (2), these procedural requirements, although "inform" this Court's consideration of original habeas petitions, the Court has not decided whether it is bound by them. See, Felker, 518 U.S. at 663 (noting the question of whether the Court is bound by 2244(b)(1) and (2) finding that the provisions "informs" 'its decision.'). In Lafler, the Court found instructive the prejudice analysis in Lockhart v. Fretwell, 506 U.S. 364 (1993) and Nix v. Whiteside, 475 U.S. 157 (1986) in that they

demonstrate "situations in which it would be unjust to characterize the likelihood of a different outcome as legitimate prejudice because defendants would receive a windfall as a result of the application of an incorrect legal principle or a defense strategy outside the law.

Here, as the Court also found in Lafler, however, the injured client seeks relief from counsel's failure to meet a valid legal standard, not from counsel's refusal to violate it; in implementing a remedy, the fact should be considered that the denial of Mr. Turner's initial petition for a federal writ of habeas corpus, in light of the obstacles erected by Congress, and the fact that relief should have been granted, has left Mr. Turner without any other available avenue to obtain relief, either in state court that he should be aware of, or in federal court.

Therefore, he is being denied a meaningful avenue to avoid a manifest injustice; to avoid the violation of his Sixth Amendment right; and to avoid a violation of his due process right as guaranteed by the Fourteenth Amendment to the United States Constitution. This Court's authority to grant relief is limited by 28 U.S.C. 2254, and any considerations of a "second petition" must be "informed" by 28 U.S.C. 2244(b)(1) and (2). As such, having shown that Mr. Turner was entitled, but did not receive habeas relief in his initial 2254 habeas action, as an "equitable manner," and for all the reasons stated above, his case presents exceptional circumstances that warrant the exercise of this Court's discretionary powers.

In addition, if an "evidentiary" hearing was necessary in this case, 28 U.S.C. 2254(e)(2) would not bar Mr. Turner from being entitled to it, since during his initial 2254 Lafler had not yet been decided, and the application of Strickland's prejudice test where ineffective assistance results in a rejection of the plea offer and the defendant is convicted at the ensuing trial not yet

intimately held by this Court.

The Court's longstanding authority to issue "original" writs of habeas corpus is currently codified in 28 U.S.C. 2241(a). As the Court recognized, and as noted above, the power to award the writ by any court of the United States must be given by written law, Ex parte Bollman, supra; and judgments about the proper scope of the writ are "normally for Congress to make." Lonchar v. Thomas, supra. But, the Court has also recognized that habeas law involves "an interplay between statutory language, and judicially managed equitable considerations." Schlup, 513 U.S. at 319 n. 35 (1995).

As such, even in cases where petitioner's guilt was not in question, the Court has resisted interpretations of 28 U.S.C. 2244 that "would produce troublesome results, create procedural anomalies, and close our doors to a class of habeas petitioners" -- like Mr. Turner, for the purpose of the case at bar, seeking review as to whether valid norms have been applied in adjudicating the constitutional claims of these individuals deprived of liberty, or not.

The power to grant relief in this case by the Court is limited, but found, in 28 U.S.C. 2254. According to 2254(d)(1) and (2), habeas relief should be granted -- and should have been granted earlier by the district court during Mr. Turner's initial 2254 petition action, but the Court "may decline to entertain 'this' application" and, instead, "may transfer the application for hearing and determination to the district court having jurisdiction to entertain it." 2241(a) and (b).

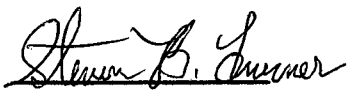
To the extent that the prosecutor in Mr. Turner's case, on behalf of the family of the victim; the State; and in the interests of justice -- as well as the trial court who would have accepted the plea offer -- was satisfied with Mr. Turner serving a twenty-five year sentence; the fact that no court has addressed adequately the claim for relief; and this Court's authority to provide such avenue,

would appear to diminish, if not resolve the issue of Art. I, Sec. 9, cl. 2 if a transfer is granted, such would be consistent with the holdings and authorities above.

CONCLUSION

Since Mr. Turner has a Sixth Amendment claim for relief which has not, as of yet, been adequately adjudicated by either the state courts, or the U.S. district court subsequently; and, because this Court may decline to entertain this application, the Court should transfer the application for hearing and determination to the United States District Court for the Western District of Missouri. 28 U.S.C. 2241(a) and (b).

Respectfully submitted,



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