NO. 23-7524

IN THE

SUPREME COURT OF THE UNITED STATES

ANTOINNE LEE WASHINGTON - PETITIONER

VS.

UNITED STATES OF AMERICA - RESPONDENT

On Petition For Writ Of Certiorari

To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

Antoinne Lee Washington

Pro-se Petitioner

Reg. No. 18267-030

P.O. Box 1000

Talladega, AL 35160

QUESTION(S) PRESENTED

I

DID THE PANEL OF THE EIGHTH CIRCUIT ERR BY DECIDING THE MERIT OF AN APPEAL NOT PROPERLY BEFORE THE COURT TO JUSTIFY THE DENIAL OF A CERTIFICATE OF APPEALABILITY

II

DID THE PETITIONER MAKE A SUBSTANTIAL SHOWING THAT HIS CONSTITUTIONAL RIGHTS WERE VIOLATED

LIST OF PARTIES

All parties do not appear in the caption of the cover page. A list of all parties to the proceeding in the Court whose judgment is the subject of this petition is as follows:

Amy L. Jennings
110 East Court Avenue, Suite 286
Des Moines, IA 50309

DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

Pursuant to Supreme Court Rule 29.6, Antoinne Lee Washington, makes the following disclosure:

1) Mr. Washington is not a subsidiary or affiliation of a publicly owned corporation.
2) There is no publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome of this case.

By: Antoinne Lee Washington
Pro-se Petitioner
Reg. No. 18267-030
P.O. Box 1000
Talladega, AL 35160

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES

CASES:

STATUTES:

RULES:

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a Writ Of Certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the United States Court of Appeals appears at Appendix A to the petition and is unpublished.

The opinion of the United States District Court appears at Appendix B to the petition and is unpublished.

JURISDICTION

The date on which the United States Court of Appeals decided Mr. Washington's case was March 29, 2024.

A timely petition for rehearing was denied by the United States Court of Appeals on the following date: April 24, 2024, and a copy of the order denying rehearing appears at Appendix D.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

18 U.S.C. §1591:

(Sex Trafficking By Force, Fraud, Or Coercion)

(a) Whoever Knowingly -

(1) in or affecting interstate or foreign commerce, or with the special maritime and territorial jurisdiction of the United States, recruits, entices, harbors, transports, provides, obtains, advertises, maintains, patronizes, or solicits by any means a person;

Knowingly, or, except a where the act constituting the violation of paragraph (1) is advertising, in reckless disregard of the fact that means of force, threats of force, fraud, coercion, or any combination of such means will be used to cause the person to engage in a commercial sex act.

18 U.S.C. §2421:

(Transportation With The Intent To Engage In Prostitution)

(a) Whoever knowingly transports any individual in interstate foreign commerce, or in any Territory or Possession of the United States, with the intent that such individual engage in prostitution, or any sexual activity for which a person can be charged with a criminal offense, or attempts to do so, shall be fined under this title or imprisoned not more than 10 years both.

22 U.S.C. §7101:

(Trafficking Victims Protection Act)

Purpose and findings.

(a) **Purposes.** The purpose of this division are to combat trafficking in persons, a contemporary manifestation of slavery whose victims are predominately women and children, to ensure just and effective punishment of traffickers, and to protect their victims.

(b) **Findings.** Congress find that:

(3) Trafficking in persons is not limited to the sex industry. This growing transnational crime also includes forced labor and involves significant violations of labor, public health, and human rights standards worldwide.

(7) Traffickers often make representations ton victims that physical harm may occur to them or others should the victim escape or attempt to escape. Such representations can have a coercive effect on victims as direct threats to inflict such harm.

(9) Trafficking includes all the element of forcible rape when it involves the involuntary participation of another person in a sex act by any means of force, fraud, or coercion.

2253(c)(2):

(Certificate Of Appealability)

A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

STATEMENT OF THE CASE

On or about December 17, 2020, Antoinne Lee Washington (hereinafter referred to as Mr. Washington), submitted an instant motion seeking post-conviction relief pursuant to 28 U.S.C. §2255. His primary claims-although poorly particularized because of his ignorance of law - were based on: 1) Prosecutorial Misconduct; 2) Insufficient Evidence; and 3) Ineffective Assistance of Trial and Appellate Counsel; which are particularized in his §2255.

After thirty-six (36) months of delay and several request for judgment, the District Court denied Mr. Washington's request for relief, under §2255, based on a misapplication of Supreme Court precedent, see the Court's memorandum opinion issued by the District Court on January 3, 2024, and made part of the corresponding appendix-App.B

In addition to the Courts January, 3 2024 memorandum, it issued an order that denied Mr. Washington a certificate of appealability on the same day, which is n made a part of the corresponding appendix-App.-B.

On or about January 17, 2024, Mr. Washington filed a notice of appeal from the District Courts denial of a certificate of appealability, made part of the corresponding appendix-App.-C.

On or about January 18, 2024, Mr. Washington filed his "Motion for Issuance of a Certificate of Appealability", in the United States Court Of Appeals for The Eighth Circuit. Within his motion to the Court of Appeals. Mr. Washington notified the Court that

the Supreme Court has long standing precedent in Crawford v. Washington, 541 U.S. 36, 68, 124 S. Ct. 1354, 158 L.Ed 2d 177 (2004); Napue v. Illinois, 360 U.S. 264, 269, 271-72, 79 S. Ct. 1173, 3 L.Ed 2d 1217 (1959); Berger v. United States, 295 U.S. 78, 89, 55 S. Ct. 629, 79 L.Ed 2d 1314 (1935); Strickland v. Washington, 466 U.S. 668, 684-85, 80 L.Ed 2d 674, 104 S. Ct. 2052 (1984); and United States v. Cronic, 466 U.S. 648, 654, 104 S. Ct. 2039, 80 L.Ed 657 (1984); which is in uniformity with precedent in the Eighth Circuit, in United States v. Bordeaux, 400 F.3d 548, 552 (8th Cir. 1991); Lewis v. Erickson, 946 F.2d 1361, 1362 (8th Cir. 1991); and United States v. Johnson, 968 F.2d 768, 770 (8th Cir. 1992); but was not applied in Mr. Washington's case.

On or about February 29, 2024, the Eighth Circuit Court of Appeals denied Mr. Washington's application for certificate of appealability, made part of the corresponding appendix-Appx.-A

On or about April 3, 2024, Mr. Washington filed a timely petition for rehearing.

On or about April 24, 2024, the Eighth Circuit Court of Appeals denied Mr. Washington's petition for rehearing, made part of the corresponding appendix-App.-D.

Now Mr. Washington questions if the Eighth Circuit Court of Appeals sidestepped the C.O.A. process by first deciding the merit of Mr. Washington's appeal, and then justifying its denial based on its adjudication of the actual merits.

REASONS TO GRANT THE WRIT

I. Did the panel of the Eighth Circuit err by deciding the merit of an appeal not properly before the Court to justify the denial of a certificate of appealability ?

A. The panel improperly sidestepped the C.O.A. process by denying relief based on its view of the merits.

Mr. Washington is ignorant of the procedures and business of the law, and request that this Court liberally construe his court filings. "A document filed pro se is to be liberally construed." Erickson v. Pardus, 551 U.S. 89, 94, 127 S. Ct. 2197, 167 L.Ed 2d 108 (2007).

In reviewing the facts and circumstances of Mr. Washington's case, the Eighth Circuit panel "paid lip service to the principles guiding issuance of a C.O.A." Tennard v. Dretke, 542 U.S. 274, 283, 159 L.Ed 2d 384, 124 S. Ct. 2562 (2004), but in actuality the panel held Mr. Washington to a far more stringent standard. Specifically the Eighth Circuit panel "sidestepped the threshold C.O.A. process by first deciding the merits of [Mr. Washington's] appeal, and then justifying its denial of C.O.A. based on its adjudication of the actual merits, thereby "in essence deciding an appeal without jurisdiction." Miller-EL v.

Cockrell, 537 U.S. 322, 336-37, 154 L. Ed 2d 931, 123 S. Ct. 1029 (2003).

As the Supreme Court held on Miller-EL, the threshold inquiry "would mean very little if appellate review were denied because the prisoner did not convince a judge, or, for that matter, three judges, that he or she would prevail." Miller-EL, 537 U.S. 322 at 337. In Mr. Washington's case that is exactly what the panel did. Mr. Washington filed a motion in the Eighth Circuit seeking a certificate of appealabilty, so that he may appeal the District Court's denial of his §2255 motion. The panel however, departed "from limited COA inquiry without even full briefing or oral argument, and instead opine[d] on the merits of [Mr. Washington's] appeal without jurisdiction." Buck v. Davis, 580 U.S. 100, 115, 137 S. Ct. 759, 197 L.Ed 2d 1 (2017).

The panel impermissibly sidestepped the C.O.A. inquiry in this matter by denying relief because the subsequent appeal was meritless. "The statue establishes a procedural rule and requires a threshold inquiry... " Slack v. McDaniel, 529 U.S. 473, 482, 146 L.Ed 2d 542, 120 S. Ct. 1595 (2000). "This threshold inquiry does not require full considered... the statute forbids it. "Miller-EL, 537 U.S. 322 at 336. The panel assessment could not possibly resolve the merits of the appeal based solely on a motion seeking a certificate of appealability. Moreover, without the issuance of a C.O.A., the panel was without jurisdiction to determine the merits of the appeal.

II. Did the Petitioner make a substantial showing that his constitutional rights were violated?

A. The Petitioner presented issues that were adequate to deserve encouragement to proceed further.

Mr. Washington presented the following claims to the Eighth Circuit Court of Appeals in his certificate of appealability: (1) Insufficient Evidence, which is a denial of Mr. Washington's Fourteenth Amendment rights; (2) Prosecutorial Misconduct, which is a denial of Mr. Washington's Fifth and Fourteenth Amendment rights; (3) Confrontation Clause, which is a denial of Mr. Washington's Sixth Amendment rights; and (4) Ineffectiive Assistance of Counsel, which is a denial of Mr. Washington's Sixth Amendment rights.

INSUFFICIENT EVIDENCE:

Mr. Washington asserts that he is actually innocent, and that his conviction is constitutionally invalid. The District Court's statutory interpretation of 18 U.S.C. §1591 (COUNT ONE) is unreasonable. Here, the government failed to prove the elements of sex trafficking by force, fraud, or coercion, beyond a reasonable doubt. In Mr. Washington's, case the government must prove "force", "fraud", or "coercion".

Examining the facts from "C'erra Selman's" (C.S.) own testimony, C.S. testified that "she" coerced and attempted to recruit Mr. Washington:

" [Washington] made it very clear it was something he wasn't interested in... I was very adamant about doing it... I actively asked [Washington] on a daily basis, multiple times a day, to you know, do this or show me how to do it. He denied me. He ignored me and steered clear of that." (Tr. 195-96).

In its opinion, the District Court held that because C.S. testified to alleged incidents of domestic violence, she was forced to engage in prostitution. However C.S. testified that:

"[She's] always done it by free will..." "[She] actively pursued [Washington]..." "It was her choice..." (Tr. 299). "[She's] never felt any fear of retaliation or anything like that." (Tr. 347). The prosecutor even asked C.S., what would happen if you left [Washington]:

"Nothing would happen..." "[She's] done it a few times..." "[Washington] never contacted [her]..." "[She] contacted [Washington]..." (Tr. 346-47).

Here, C.S. **never** testified that she was compelled to perform, or continue performing, to avoid incurring harm. C.S. **never** testified that she was forced by violence to engage in a sex act. C.S. **never** testified about any false promises, misrepresentations, or any form of deception. To the contrary, C.S. testified:

"[She's] always done it by free will" (Tr. 299), and that she was not being forced to do anything (Tr. 367).

"It is clear that a state prisoner who alleges that the evidence

in support of his state conviction cannot be fairly characterized as sufficient to have led a rational trier of fact to find beyond a reasonable doubt has stated a federal constitutional claim." Jackson v. Virginia, 443 U.S. 307, 321, 99 S. Ct. 2781, 61 L.Ed 560 (1979).

Congress did not intend for 18 U.S.C. §1591 to apply to willingly recruited prostitutes. Congress intended for §1591 to apply to the "involuntary participation" of another person. See 22 U.S.C. §7101(b)(1); (b)(7); and (b)(9).

"A conviction obtained without proof beyond a reasonable doubt is constitutionally invalid." Evans v. Luebbers, 371 F.3d 438, 442 (8th Cir. 2004).

Here, the evidence was insufficient to convict Mr. Washington, as to COUNT ONE of this indictment.

In regards to COUNT TWO (18 U.S.C. §2421), the government failed to prove the elements of 18 U.S.C. §2421 - Transportation with the intent to engage in prostitution, beyond a reasonable doubt.

The vehicle involved in this indictment, was registered to C.S. (Tr. 147, 369). Mr. Washington did not have a driver's license, however C.S. did. C.S. testified that "she" made all the travel arrangements at her own expense (Tr. 365), without Mr. Washington (Tr. 255; 362; 372-74). C.S. even testified that she caused herself to engage in prostitution (Tr. 360). C.S. satisfied the requirements to be the supervisor of criminal activity. See United States v. Evans, 272 F.3d 1069, 1075 (8th Cir. 2001). Now "if you abandon the illusion, that the woman is always the victim, [C.S.] would be guilty under the law." See United States v. Holte, 236 U.S. 140, 145, 59 L.Ed 504 (1915).

Examining the facts from C.S.'s own testimony, C.S. procured her own transportation. See Twitchell v. United States, 330 F.2d 759, 760-61 (9th Cir. 1964). Here, the governments application of 18 U.S.C. §2421, is prejudice, bias, and unconstitutional. Because of Mr. Washington's mere presence, the government charged Mr. Washington with C.S.'s admissions of her own illegal conduct, and did not charge C.S.. The evidence as to COUNT TWO of this indictment, is also insufficient to convict Mr. Washington.

PROSECUTORIAL MISCONDUCT:

A. Confrontation Clause:

Under the Sixth Amendment, the prosecution may not admit the testimonial statements of an unavailable witness. See Crawford v. Washington, 541 U.S. 36, 68, 124 S. Ct. 1354, 158 L.Ed 2d 177 (2004); United States v. Bordeaux, 400 F.3d 548, 552 (8th Cir. 2005).

In Mr. Washington's case, that is exactly what the prosecutor did. Here, in opening statements, the prosecutor layed the the foundation for the use of hearsay testimony:

"You will hear from Marcella..." "She is going to tell you..." "Marcella is also going to tell you..." (Tr. 26); "He drove Marcella to different states for prostitution." (Tr. 21-22).

In its opinion, the District Court held that opening statements is not evidence. However, in United States v. Johnson, 968 F.3d 768, 772 (8th Cir. 1992), the Eighth Circuit rejected the governments argument that opening statements is not evidence.

Precedent in this Court, and the Eighth Circuit has held:

"Statements elicited during police interrogations lie at the core of testimonial." Bordeaux, 400 F.3d at 555-56; Crawford, 541 U.S. at 52.

"Statements taken in the course of interrogations, where the primary purpose is to establish or prove past events relevant to later prosecution are testimonial." United States v. Holmes, 620 F.2d 836, 841 (8th Cir. 2010); Bobadilla v. Carlson, 575 F.3d 785, 791 (8th Cir. 2009); Davis v. Washington, 547 U.S. 813, 821-22, 126 S. Ct. 2266 , 165 L.Ed 2d 224 (2006).

Hearsay testimony was also elicited from C.S., who testified about out-of-court statements made to her by M.Z.("Marcella"), about alleged sex trafficking, which were inadmissible, and could not come in under Fed.R.Evid. 801(d)(1)(B). For 801(d)(1)(B) to apply, the declarant, M.Z. in this instance, must be subject to cross-examination. See Bordeaux 400 F.3d at 557.

Furthermore, photographs, a state idetification card, and additional hearsay statements were used to corroborate opening statements. Because the improper statements were communicated during opening statements (Tr. 21-22; 26), as well as through the testimony of C.S. (Tr. 319-30), the cumulative effect of these improper statements prejudicially affected Mr. Washington's substantial rights and worked to deprive him of a fair trial. See United States v. Conrad, 320 F.3d 851, 857 (8th Cir. 2003).

In this case, the government introduced testimonial statements of M.Z., to prove Mr. Washington caused M.Z. to engage in prostitution. M.Z. did not appear during trial, was considered a victim, and was awarded restitution [ECF-4](Dist. No. 4:17-cr-

00198). In its opinion the District Court held that none of Mr. Washington's grounds constituted "testimonial statements", which is a misapplication of Supreme Court precedent, and precedent in the Eighth Circuit.

Here, the government admitted testimonial statements against Mr. Washington, despite the fact that he had no opportunity to cross-examine M.Z.. That alone is sufficient to make out a violation of the Sixth Amendment.

B. The Prosecutor Knowingly Used Perjured Testimony:

"It is well established that a prosecutor's knowing use of perjured testimony violates the due process clause of the Fourteenth Amendment." Giglio v United States, 405 U.S. 153, 92 S. Ct. 763, 31 L.Ed 2d 104 (1972); Napue v. Illinois, 360 U.S. 264, 271-72, 79 S. Ct. 1173, 3 L.Ed 2d 1217 (1959).

A deliberate introduction of perjured testimony is perhaps the most flagrant example of misconduct. Here the government offered the testimony of "C'erra Selman" (C.S.), who prior to trial recanted her grand jury testimony and the statements that she made to F.B.I. Agents. C.S. was arested as a material witness. To assure her cooperation she was required to wear an ankle bracelet, even during appearance at trial, with conditions, "pending the verdict" (Tr. 183-85). C.S. did not testify willingly or truthfully.

The Eighth Circuit has held:

" Recanted testimony, however is grounds for relief from a

conviction when it bears on a witness's credibility or directly on the defendant's guilt." Lewis v. Erickson, 946 F.2d 1361, 1362 (8th Cir. 1991); (quoting Napue v. Illinois, 360 U.S. at 269).

At the point at which the prosecutor learned of the perjury before the grand jury, the prosecuting attorney was under a duty to notify the Court and the grand jury to correct the cancer of justice, especially when jeopardy had not attached at the time the prosecutor learned of the perjured testimony. "The due process clause of the fifth amendment is violated when a defendant has to stand trial on a indictment, which the government knows is based on perjured testimony, when the perjured testimony is material." United States v. Basurto, 497 f.2d 781, 785-86 (9th Cir. 1974).

At the begining of her testimony, C.S. deliberately lied about the text messages she received from the F.B.I., regarding the reason why she recanted (Tr. 184-85). The government's only explanation to why C.S. recanted, was that she was threatened by the other alleged victim (M.Z.) in this case. There are a few problems with this theory; (1) evidence of the threats was evidence that the defense could have used to impeach the testimony of C.S., but the government failed to disclose this information, which violates due process and falls under the "Brady Doctrine"; (2) tampering with a witness, or victim is a violation of 18 U.S.C. §1512(b), did the government investigate and indict M.Z.. This would create a reasonable probabilty to undermine the confidence in the outcome of the trial, because of the government failure to disclose "Brady Material". See United States v. O'conner, 64 F.3d 355, 358 (8th Cir. 1993).

" A lie is a lie, no matter what its subject, and if it is in any way relevant to the case, the district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth..." Napue 360 U.S. at 270.

Not only did C.S. recant, C.S. perjured herself throughout her entire testimony, admitted to making numerous false police reports, and demonstrated to the court, that she had always been untruthful when communicating with law enforcement (Tr. 251; 299-300; 307-10; 363-64).

"All perjury pollutes a trial, making it hard for jurors to see the truth. United States v. Lapage, 231 F.3d 488, 492 (9th Cir. 2000). In Mr. Washington's case, the District Court held that it was the duty of the jury as the fact finder, however the Supreme Court has held that the prosecutor also has a duty to correct testimony which is known to be false, which is exactly what Mr. Washington is alleging in his claims. See Napue, 360 U.S. at 269. Absent C.S.'s perjured testimony, this indictment would have been dismissed.

Furthermore, Detective Don Vestal, of the Urbandale Police Department, perjured himself about a material issue, stating that he seen "abrasions" on the face of C.S., at the time of Mr. Washington's arrest on this indictment (Tr. 118). The prosecutor knew this statement was false and had a duty to correct it. Officer's Alicia Nuvolini, and Shane Taylor both testified that C.S. did not have any visible facial injuries (Tr. 107; 391-92). The prosecutor specifically asked Officer Nuvolini, why did she photograph C.S.'s face if there were no facial injuries (Tr. 391_92) (Exhibit 46).

"The same result obtains when the state, although not soliciting false evidence, allows it to go uncorrected" "A state may not knowingly use false evidence to obtain a tainted conviction." Napue, 360 U.S. at 269.

Detective Vestal's testimony essentially invited the jury to believe that Mr. Washington assaulted C.S., which was the cause of this indictment. There was impeachment evidence available, however Mr. Washington's trial counsel refused to admit the body cam footage, which would have proved that C.S. was not assaulted by Mr. Washington.

[2017.09.20._23.17.23._WOLFCOM_006976_UPD_WSPLCEWN7024_BODY.MP4]

[2017.09.20._23.15.36._WOLFCOM_003145_UPD_WSPLCEWN7021_BODY.MP4]

The false testimony used by the prosecutor in securing the conviction of Mr. Washington, had an effect on the outcome this trial, which requires reversal of this conviction.

C. Expert Testimony:

"Trial courts must reject expert testimony concerning a specific victims credibility." Gabaree v. Steele, 792 F.3d 991, 998 (8th Cir. 2015).

In Mr. Washington's case, the District Court abused its discretion in allowing erroneously admitted believability opinion. In its opinion, the District Court held that Mr. Washington's trial counsel raised this issue prior to trial, in a motion in limine, which was a misstatement of the record, and the issues Mr. Washington raised in his §2255 motion. Mr. Washington is challenging the improper portions of the expert testimony.

However, trial counsel, prior to trial, moved the Court to eliminate the expert testimony in its entirety, which is not what Mr. Washington presented in his claims.

Mr. Washington's conviction dependant solely on the testimony and credibility of "C'erra Selman" (C.S.). Credibility was a material issue, it was improper for Agent Carrie Landau to testify regarding "credibility" of sex trafficking victims (Tr. 84-86).

"An expert may not go so far as to usurp the exclusive function of the jury to weigh the evidence and determine credibility." "Some expert testimony may be helpful but putting an impressively qualified expert's stamp of truthfulness on a witnesses story goes to far..." "The jury may have relied on expert opinion and surrendered their own common sense in weighing testimony." United States v. Azure, 801 F.3d 336, 340-41 (8th Cir. 1986).

Agent Landau's testimony stepped well past the fine but critical line between expert testimony concerning methods of operation unique to the pimp/prostitution business and testimony comparing a defendants conduct to the generic profile of a pimp/prostitute (Tr. 60-86). The Eighth Circuit has previously disallowed the introduction of drug courier profiles as substantive evidence. See United States v. Hernandez-Cuartas, 717 F.2d 552, 555 (8th Cir. 1983). "Drug Courier profiles are not to be admitted as substantive evidence of guilt." United States v. Carter, 901 F.2d 683, 684-85 (8th Cir. 1990).

The prosecutor also made improper comments, in regards to expert testimony, during closing arguments, by referring to the experts testimony, and linking the "profile roles" (characteristics) to

the defendant (Tr. 518). "The ultimate responsibility of linking a defendants conduct with the typical characteristics of drug trafficking must be left to the jurors..." "If the profile itself makes that connection, then it crosses the forbidden territory in which testimony with the expert imprimatur is allowed to opine on the ultimate issue of guilt which is for the trier of fact alone." United States v. Sosa, 897 F.3d 615, 619 (5th Cir. 2018).

D. Improper Comments:

"It is well established that prosecutorial misconduct in closing arguments may result in the reversal of a conviction." United States v. Johnson, 968 F.2d 768, 770 (8th Cir. 1992); Berger v. United States v. 295 U.S. 78, 89, 55 S. Ct. 629, 79 L.Ed 2d 1314 (1935).

Here, throughout summation, the prosecutor deliberately misstated the record, used improper insinuations, injected its own opinion, and continuously referred to pre-indictment alleged conduct (Tr. 507-519). In one statement, which was highly inflammatory, and extremely damaging, the prosecutor stated: "He raped her" (Tr. 511), implying that Mr. Washington sexually assaulted "C'erra Selman" (C.S.). C.S. **never** testified that Mr. Washington raped her. However C.S. testified "We had sex" (Tr. 306).

C.S. **did not** testify that she had been threatened or placed in fear by Mr. Washington to have sex. C.S. **did not** testify that she was physically incapable. C.S. **did not** testify that she communicated unwillingness. C.S. testified "We had sex". The

prosecutor's comments were improper, and did not reflect the record, nor did the record reflect the elements of sexual abuse/assault. This statement alone prejudiced Mr. Washington, which requires reversal.

"Prejudice sufficient to warrant reversal may result from the cumulative effect of repeated improper comments by the prosecutor... However a single misstep on the part of the prosecutor may be so destructive of the right to a fair trial that reversal is mandated." Johnson, 968 F.2d at 771.

"A prosecutor must refrain from using methods calculated to produce a wrongful conviction." United States v. Cannon, 88 F.3d 1495, 1502 (1996).

In this case, the District Court held that none of the prosecutor's comments were improper. However, in United States v. Cannon, 88 F.3d 1502, the Eighth Circuit held that the prosecutors comments, referring to the defendant's as bad people, were improper and warranted reversal of the conviction. In Mr. Washington case, the prosecutor's comments, referring to Mr. Washington as a rapist was far more prejudicial, which requires reversal, in uniformity with Eighth Circuit precedent.

E. Jury Instructions:

In Mr. Washington's case the prosecutor constructively amended the jury instructions. The prosecutor altered the jury instructions, which lowered the burden of proof. COUNT ONE (18 U.S.C. §1591) states: "The government need not to show..." "Nor does the government need to prove..." Rather in considering

whether force, fraud, or coercion would be sufficient to cause a person to engage in a... sex act you may consider..." [ECF-59 p.8-9] (Dist. No. 4:17-cr-00198).

COUNT TWO (18 U.S.C. §2421), instructs the jury to the elements of "Iowa State Law". [ECF-59 p.12-13]. Here both counts were substantially altered, which allowed proof of an essential element on an alternative basis. See United States v. Phea, 953 F.3d 838, 842 (5th Cir. 2020). The District Court failed to address this issue.

- - -

The right to a fair trial is guaranteed to criminal defendants by the due process clause of the Fourteenth Amendment. The United States Attorney is the representative of a sovereignty whose obligation in a criminal prosecution is not that it shall win a case but that justice shall be done. See Berger v. United States, 295 U.S. 78, 88, 79 L.Ed 1314 (1935).

In Mr. Washington's case the prosecutor's misconduct was pronounced and persistent with a cumulative effect which cannot be disregarded as inconsequential. This conviction must be reversed.

INEFFECTIVE ASSISTANCE OF COUNSEL:

A. Joseph Herrold (Trial Counsel)

This Court has recognized that "the Sixth Amendment right to

counsel exist, and is needed, in order to protect the fundamental right to a fair trial. The constitution guarantees a fair trial through the due process clauses." Strickland v. Washington, 466 U.S. 668, 684-85, 104 S. Ct. 2052, 80 L.Ed 2d 674 (1984).

"The denial of counsel is properly characterized as an ineffective assistance of counsel claim." "The Sixth Amendment requires not merely the provision of counsel to the accused, but 'assistance' at trial..." "If no actual assistance 'for' the accused's 'defense' is provided then the constitutional guarantee has been violated. To hold otherwise could convert the appointment of counsel into a sham..." United States v. Cronic, 466 U.S. 648, 654, 80 L.Ed 2d 657, 104 S. Ct. 2039 (1984).

The government may want you to believe that Mr. Washington's trial counsel, Joseph Herrold, actions during trial were justified as "strategic decisions", However, in order to make a strategic decision, you must have a strategy. Here, Mr. Washington's trial counsel did not have a strategy, and was highly ineffective.

Mr. Herrold was in possesion of impeachment evidence, [ECF-6 p.3](Dist. No. 4:22-cv-00216), which was body cam footage that would prove that "C'erra Selman" (C.S.), initially made a false police report, which was the cause of this indictment. In his affidavit [ECF-6 p.13-14], Mr. Herrold stated that introducing snippets of body cam footage was not likely to be permitted. To the contrary, the prosecutor repeatedly introduced "snippets" of body cam footage throughout this trial. Mr. Herrold was also in possession of multiple interviews of C.S., who prior to trial recanted. In his affidavit [ECF-6 p.14], Mr. Herrold stated that,

letting the jury listen to C.S. say that she was not forced or manipulated would have been more harmful to the defense. However COUNT ONE of this indictment is, sex trafficking by force, fraud, or coercion. Allowing the jury to listen to C.S. say that she was not forced or manipulated, would have invited the jury to acquitt Mr. Washington on COUNT ONE. Mr. Herrold failed to present this evidence , or any evidence at all.

"A person who happens to be a lawyer is present at trial alongside the accused, however is not enough to satisfy the constitutional command." Strickland, 466 U.S. at 685.

Mr. Washington's conviction was based solely on the testimony of C.S.. However, C.S. damaged her credibility prior to trial, and even during trial, any "competent" lawyer would have presented "available" impeachment evidence to the jury. Mr. Herrold's failure to present impeachment evidence, affected the outcome of this trial, and caused Mr. Washington prejudice.

Counsels failure to uncover or present evidence moreover, "cannot be justified as a tactical decision." Andrus v. Texas, 590 U.S. ___ , 207 L.Ed 2d 335, 140 S. Ct. 1875, 1883 (2020).

Prior to trial, Mr. Herrold went six months without communicating with Mr. Washington ([ECF-68] Crim. No. 4:17-cr-00198). Mr. Washington also prior to trial, instructed Mr. Herrold to request a depositions hearing, but Mr. Herrold refused to do so [ECF-6 p.2]. In this case, C.S. recanted prior to trial, a depositions hearing would have preserved C.S.'s statements, stating that "she lied about this whole case" (Tr. 183-85), which would have caused this indictment to be dismissed. Mr. Herrold also failed to move the Court to dismiss the indictment, because

C.S. recanted. Mr. Herrold's failure to act, and refusing to act, at the direction of Mr. Washington caused prejudice.

"A trial is if the accused is denied counsel at a critical stage of his trial." Cronic 466 U.S. at 659.

"Counsel, however, can also deprive a defendant of the right to effective assistance, simply by failing to render adequate legal assistance." Strickland, 466 U.S. at 686.

In Mr. Washington case, counsel was not functioning as the counsel guaranteed by the Sixth Amendment. The question here is, "what effective assistance did Mr. Washington recieve." Mr. Herrold failed to communicate, refused to file pretrial motions, did not call any witnesses, did not present a defense, and spent very little time cross-examining C.S. and other government witnesses.

In his affidavit, Mr. Herrold stated that, because Mr. Washington would not admit guilt on COUNT TWO (18 U.S.C. §2421), Mr. Herrold's only strategic choice", was not to present a defense at all. No defense completely denied Mr. Washington counsel at trial. Under Supreme Court precedent, the right to present a defense in a criminal trial is guaranteed by the Sixth Amendments due process clause. See Washington v. Texas, 308 U.S. 14, 19, 87 S.Ct 1920, 18 L.Ed 2d 1019 (1967).

Here, Mr. Washington plead not guilty and proceeded to trial, therefore Mr. Washington's objective was to maintain his innocence.

"It is the defendant prerogative not counsel's, to decide on the objective of his defense." McCoy v. Louisiana, 138 S. Ct. 1500. 1505, 200 L.Ed 2d 821 (2018).

"When a client expressively asserts that the objective of his defense is to maintain innocence... his lawyer must abide by that objective..." McCoy, 138 S. Ct. at 1509.

Furthermore, Mr. Herrold stated in his affidavit [ECF-6 p.4], that he was aware that the alleged victim, M.Z., was used against Mr. Washington during trial, and did not appear, but he did not recall any testimonial statements of M.Z. through any witnesses. Here, multiple testimonial statements of M.Z. were introduced during trial (Tr.26; 21-22; 319-30; 461-64), and M.Z. was awarded restitution. Mr. Herrold was deficient for failing to argue that the confrontation clause precluded the admission of an unavailable witnesses statements. See United States v. Williams, 268 Fed. Appx. 563, 565 (9th Cir. 2008).

Mr. Herrold, was deficient for not objecting to an obvious constructive amendment in the jury instructions (Tr. 420-21). See United States v. Phea, 953 F.3d 838, 842 (5th Cir. 2020); United States v. Davis, 854 F.3d 601, 606 (9th Cir. 2017); and Mr. Herrold was also deficient for failing to object to improper expert testimony (Tr. 50; 60-86). See Gabaree v. Steele, 792 F.3d 991, 998, 1000 (8th Cir. 2014); Olsen v. Class, 164 F.3d 1096, 1102 (8th Cir. 1999).

In Mr. Washington case, Mr. Herrold entirely failed to subject the prosecution's case to meaningful adversarial testing, therefore there has been a denial of Sixth Amendment rights that makes the adversarial process itself presumptively unreliable.

Mr. Herrold not only provided ineffective assisitance, but conceded to doing so, which deprived Mr. Washington due process and the right to a fair trial. In his affidavit [ECF-6], Mr.

Herrold concedes that he did not present "available" evidence to the jury, and suggested that the jury, during deliberations, should have gone on a "scavenger hunt" to discover the evidence that he failed to present. Mr. Herrold also withdrew from counsel immediately after the jury found Mr. Washington guilty.

The aforementioned facts, arguments, and authorities, stand for the proposition that the first and second prong of Strickland was met. Here, Mr. Washington has been completely denied counsel at critical stages of this trial, which is an error that contaminated the entire proceedings.

"A significant conflict of interest arises when an attorney's interest in avoiding damage to his own reputation is at odds with his clients strongest arguments." Christenson v. Roper, 574 U.S. 373, 135 S. Ct. 891, 190 L.Ed 2d 763 (2015).

There is no question, that if Mr. Washington would have been provided with "effective assistance", this trial would have resulted in a judgment of acquittal, a mistrial, or in the alternative this indictment would have been dismissed prior to trial. Mr. Washington's Sixth Amendment rights were violated and this conviction must be reversed.

"A persuasive denial of counsel cast such doubt on the fairness of the trial process, that it can never be considered harmless error." Penson v. Ohio, 488 U.S. 75, 88, 109 S. Ct. 346, 102 L.Ed 300 (1988)

B. Paul Rosenberg:

Mr. Washington's appellate counsel, Paul Rosenberg, was also

ineffective. The District Court concluded that Mr. Rosenberg's failure to file a motion for a judgment of acquittal, at Mr. Washington's request, was a "strategic decision". Mr. Washington expressed his intentions of challenging his conviction to the trial Court, without counsel, and specifically stated he was concerned about the 14 day deadline ([ECF-68] Crim. No. 4:17-cr-00198). The Supreme Court has long held: "A lawyer who disregards specific instructions from the defendant to file a notice of appeal acts in a manner that is professionally unreasonable. "Roe v. Flores-Ortega, 528 U.S. 470, 477, 120 S. Ct. 1029, 145 L.Ed 2d 985 (2000); United States v. Watson, 493 F.3d 960, 962 (8th Cir. 2007).

Mr. Rosenberg also refused to raise obvious constituional claims on direct appeal, even after Mr. Washington directed him to do so. "If the procedural default is the result of ineffective assistiance... the sixth amendment itself requires that responsibility for the default be imputed to the state..." Murray v. Carrier, 477 U.S. 478, 106 S. Ct. 2639, 91 L. Ed 2d 397 (1986). Mr. Rosenberg did not submit a counter affidavit, and therefore conceded to the claims against him.

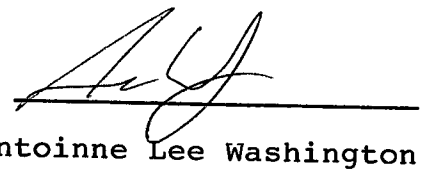
CONCLUSION

This C.O.A. petition should have been resolved in a different manner, the Petitioner presented issues that were adequate to deserve encouragement to proceed further. It is beyond question that Mr. Washington's habeas claims are reasonably debatable.

Therefore Mr. Washington humbly request that this Court GRANT

his Petition for Writ of Certiorari and permit briefing and argument on the issues contained herein.

Respectfully submitted on this 14 day of May, 2024.

X 

Antoinne Lee Washington
Pro-se Petitioner
Reg. No. 18267-030
P.O. Box 1000
Talladega, AL 35160

CERTIFICATE OF COMPLIANCE

As required by Supreme Court Rule 33(2), I certify that the Petition for a Writ of Certiorari contains 29 pages, excluding the parts of the petition that are exempted by Supreme Court Rule 33.1(d).

I declare under the penalty of perjury that the foregoing is true and correct pursuant to 28 U.S.C. §1746.

Executed on May 14, 2024.

X _____

Antoinne Lee Washington
Pro-se Plaintiff
Reg. No. 18267-030
P.O. Box 1000
Talladega, AL 35160