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No. 23-10401

IN THE UNITED STATES SUPREME COURT OF THE UNITED STATES

_____.

JIMMIE LEE WALTON,
Defendant-Appellant,

v.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

_____.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

_____.

PETITION FOR WRIT OF CERTIORARI

_____.

BRIEF FOR APPELLANT

_____.

Jimmie Lee Walton # 07582-510
F.C.I. El Reno
P.O. BOX 1500
El Reno, Oklahoma 73036

QUESTIONS PRESENTED FOR REVIEW

Question 1: Did Walton receive effective assistance of counsel?

Question 2: Did the Court of Appeals abuse its discretion in affirming the District Courts denial of the motion for acquittal?

Question 3: Did the Court of Appeals abuse it's discretion in affirming use of the Allen charge?

JUDGMENTS TO BE REVIEWED.

The parties judgments that are to be reviewed are construed with case number 23-10401 in the United States Court of Appeals for the fifth Circuit. Such parties are as followed: Circuit Judges- KING, HAYNES, AND GRAVES.

CORPORATE DISCLOSURE STATEMENT

No corporate disclosure statement is necessary in this case.

RELATED CASES PURSUANT TO CASE

This case derives from the United States District Court for the Northern District of Texas Dallas Division. The case number for the District Court case is 3:22-CR-273-1. The appeal from the District Court case is also related to this case which derives from the United States Court of Appeals for the Fifth Circuit. The case number for such appeal in the Fifth Circuit is 23-10401.

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OPINIONS OF LOWER COURT

The citation to the decision of the United States Court of appeals for the Fifth Circuit is United States v. Walton, No. 23-10401 (5th Cir. Jan. 9, 2024). The judgment was affirmed in part and dismissed in part. It s disclosed that the opinion is not designated for publication in accordance with with 5th Cir. R. 47.5.

STATEMENT OF JURISDICTION

The judgment of the United States Court of appeals for the Fifth Circuit took place on January 9, 2024. Thereby jurisdiction in this justice Court is properly asserted in accordance with 28 U.S.C. 1254(1).

PROVISIONS RELIED UPON

(1): SIXTH AMENDMENT U.S. CONSTITUTION

In all criminal prosecutions, the accused shall enjoy the right to a speedy trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

(2): FEDERAL RULES OF CRIMINAL PROCEDURE 29

(3):FEDERAL RULES OF CRIMINAL PROCEDURE 33

(a) **Defendant's Motion**. Upon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires. If the case was tried without a jury, the court may take additional testimony and enter a new judgment.

(b) **Time to File**.

(1) *Newly Discovered Evidence*. Any motion for a new trial grounded on newly discovered evidence must be filed within 3 years after the verdict or finding of guilty. If an appeal is pending, the court may not grant a motion for a new trial until the appellate court remands the case.

(2) *Other Grounds*. Any motion for a new trial grounded on any reason other than newly discovered evidence must be filed within14 days after the verdict or finding of guilty.

STATEMENT OF CASE

On 12/20/22 Walton went to trial for 1 count of 18 U.S.C. 2113(a) is which Bank Robbery. The government produced three witnesses. Two which worked at the bank and 1 which was a detective who was in charge the investigation into the alleged bank robbery. Upon the testimony given by witnesses at most only 2 of the points were proven by the government that were needed in order to secure a plea of guilty when in fact 3 were needed. The video surveillance failed to show conduct that was conducive to that of bank robbery and jurors were deadlocked when it came to the conviction of Walton. After 2 Notes being given in the jury deliberations the Court issued a Allen charge and returned the jury to continue deliberations. A short time after the Allen charge was given the jurors came back with a verdict of Guilty against Walton.

A motion for acquittal and a motion for new trial was filed by counsel. Counsel, however, failed to retrieve the transcripts in order to properly file the motion for acquittal and motion for new trial. Further, evidence that was key to proving Walton innocent was also neglected to be produced by defense counsel for Wilson which led to the denial of the motion for acquittal and motion for new trial.

On 4/13/23 Walton was sentenced by the District Court to a term of 84 months in the B.O.P., 3 years of supervised release, $100.00 MSA, and $1,650.00 in restitution.

Walton filed a timely notice of appeal to the Fifth Circuit Court Of Appeals on 4/13/23. Upon review by the Circuit Court 3 issues were considered which were (1) the magistrate judge erred when she granted his appointed counsel's motion to withdraw due to a conflict of interest; (2) the district court erred when it gave an Allen charge instead of declaring a mistrial after the jury indicated it was deadlocked; and (3) the district court erred when it denied his motion for judgment of acquittal under Rule 29 of the Federal Rules of Criminal Procedure because the evidence was legally insufficient to support his conviction.

The Circuit Court DISMISSED IN PART in accordance with issue 1 and AFFIRMED IN PART in accordance with issues 2 and 3 on 1/9/24.

ARGUMENT

Question 1: **Did Walton receive effective assistance of counsel ?**

STANDARD OF REVIEW

In United States v. Chronic, 466 U.S. 648 (1984), it was explained that special value of the right to the assistance of counsel explains why "[i]t has long been recognized that the right to counsel is the right to the effective assistance of counsel." Id; McMann v. Richardson, 397 U.S. 759, 771, n.14 (1970). The text of the Sixth Amendment itself suggests as much. The Amendment requires not merely the provision of counsel to the accused, but "Assistance," which is to be "for his defence." Thus, "the core purpose of the counsel guarantee was to assure 'Assistance' at trial, when the accused was confronted with both the intricacies of the law and the advocacy of the public prosecutor." Id; United States v. Ash, 413 U.S. 300, 309 (1973). If no actual "Assistance" "for" the accused's "defense" is provided, then the constitutional guarantee has been violated. Id.

The substance of the Constitution's guarantee of the effective assistance of counsel is illuminated by reference to its underlying purpose. "[T]ruth," Lord Eldon said.", "is best discovered by powerful statements on both sides of the question." Cronic, 466 U.S. at 655. This dictum describes the unique stregnth of our system of criminal justice. "The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free." Id; Herring v. New York, 422 U.S. 853, 862 (1975). It is that "very premise" that underlies and gives meaning to the Sixth Amendment. It is meant to assure fairness in the adversary criminal process." Id.; United States v. Morrison, 449 U.S.

361, 364 (1981). Unless the accused receives the effective assistance of counsel, "a serious risk of injustice infects the trial itself." Id. At 656; Cuyler v. Sullivan, 446 U.S., at 343.

A. Counsel did not render effective assistance in the trial proceeding.

Counsel in a trial proceeding is to provide a rigorous and meaningful adversarial testing of the governments facts and evidence. Thus, the Sixth Amendment requires that the accused have "counsel acting in the role of an advocate." Anders v. California, 386 U.S. 738, 743 (1967). The first element that is paramount to attack is the jurisdiction to try the defendant in this case which would require the government to show that First Conveinence Bank in fact was a federally insured bank which the record reflects was not proven by the government. See 3:22-CR-00273-M Doc. 82. More importantly the government called no witness to prove the bank was in fact federally insured and had no witnesses on the witness list to prove this fact for purposes of meeting the burden of proof regarding such element. See 3:22-CR-00273-M Doc. 25. Thus, counsel who did not challenge the jurisdiction to bring the charge against Walton did not provide "adequate legal assistance." See Cuyler v. Sullivan, 446 U.S. 335, 344 (1980). Jurisdiction is the paramount avenue to prove if a defendant can be tried before a Court of competent jurisdiction and if no jurisdiction exist the case must be dismissed. See Old Wayne Mut. L. Assoc. v. McDonough, 204 U.S. 8, 27 S. Ct. 236 (1907)("A court cannot confer jurisdiction where none existed and cannot make a void proceeding valid. It is clear and well established law that a void order can be challenged in any Court.")

Next counsel was to provide a meaningful adversarial approach to show that Walton did not intentionally take money from the person or presence of another. The most accurate way to do so would be to provide evidence that Walton had a legitimate reason for being at the bank. However, the record reflects that counsel provided no evidence to show such facts although such existed in the discovery.

See Gov. Doc. 249 and 250. Walton in fact told the police that he owed the bank a debt which the record reflects. See 3:22-CR-00273-M Doc. 82 P. 137:

Q. What was the Defendant's explanation for going to the bank?

A. That he had an overdue account that he believed he owed money on. He was going to try to talk them about a payment plan for that overdue account.

The importance of Gov. Doc. 249 and 250 is that it is the check that bounced that caused the account to be closed due to funds that Walton owed the bank. Thereby, Walton's presence at the bank and his conduct of pulling money out of his back pocket reflect the story that he told officers and is reflected in the video footage and the record. See # 3:22-CR-00273-M Doc. 82 P158:

Q. So when I go to a bank and I've had an account there in the past, they'll have records of it, right?

A. Generally, yes.

Q. So generally if I need to go ahead and settle some affairs or something, I can go there and I can bring in paperwork or ask for paperwork or something like that; right?

A. Yes.

Q. If I owed money to a bank, do you think it would be reasonable for me to approach a teller with cash?

A. Yes.

Q. That's what Jimmie did, didn't he?

A. He eventually pulled some cash out of his pocket, yes.

Q. Actually that's right. He later pulled cash out of his pocket. When he first approached, he had nothing in his hands; right?

A. Correct.

Next after effective counsel showed that Walton had a legitimate purpose for being at the bank and displaying conduct of "intent" to pay a debt counsel was to show that Walton had no gun on his person which the record reflects was shown. See 3:22-CR-00273-M Doc. 82 P. 69-70:

Q. Do you recognize this area?

A. That's the entrance of Kroger, yes.

Q. So in order to get to your bank, you have to go through there; right?

A. Yes, correct.

Q. And Jimmie—You see Jimmie, right?

A. Yes.

Q. He looks like he's leaving, right?

A. Yes.

Q. He looks like he's basically wearing the same clothes, right?

A. Yes.

Q. It looks like it's on the same day, right?

A. Yes.

Q. Do you see, if we can focus in on Exhibit 29 on his waist area, do you see that little bit of silver right there?

A. I do see it.

Q. It looks a lot like a belt buckle, doesn't it?

A. It does look like a belt, yes.

Q. Do you see a gun there?

A. But he had it on the right side.

Q. But my question was: Did you see a gun in this picture Government's Exhibit 29?

A. I don't see a gun, yes.

Q. Okay. And you can see his waist, right?

A. Yes.

As the McMann Court stated the accused is entitled to "a reasonably competent attorney." See 397 U.S., at 770. However, counsel cannot be seen as competent when the paramount prima facie evidence known as Gov. Doc. 249 and 250 that places Walton at the bank with a legitimate reason and shows proof that an account existed in his name was not presented for the jury to see. Without such prima facie evidence "a serious risk of injustice infects the trial itself. See Cuyler v. Sullivan, 446 U.S., at 343. Such evidence not being provided further prejudiced Walton of effective counsel in that it was disclosed that such account if closed was due to a debt could be retrieved from the banks records. See 3:22-CR-00273-M Doc. 82 P. 57:

Q. Okay. Now in terms of a closed account, sometimes people had accounts with your bank in the past; right?

A. Yes.

Q. They close them for different reasons, but the bank still has some records on them; right?

A. Yes.

Q. So if I come to your bank and I say, "Hey, I had an account here six months ago; I'd like to get some information on it, "can you still give me that, if I can provide paperwork or something?

A. It all depends on the situation. If you owe the bank, we still have your information, but if you closed your account because you wanted to close your account, we don't have your information anymore.

Q. So if I owe the bank, you'll keep it open just in case I come pay it; right?

A. Yes. We still have your information.

Q. Okay, good to know.

At the point Calixto testified to such facts concerning the workings of the closed account such checks provided from Gov. Doc. 249 and 250 were to be shown to Calixto to verify the authenticity of such belonging to the bank. Further, Calixto was to be provided with the reason that Walton was at the bank followed by the conduct of Walton pulling money from his pocket for a purpose which conflicts with that of a person "intending" to rob a bank. Further, it drives home the point that the money was given to Walton by mistake and at such point due to Calixto being fairly new to the job. See 3:22-CR-00273-M Doc. 82 P. 39:

Q. Ms. Calixto, when all this happened, how long had you been a bank teller?

A. When that ---

Q. Back in June, yeah.

A.Yes. I was – worked for two months.

The only person who benifitted from the truth is Walton because if it was found that she made a mistake it would be her that would be either fired or prosecuted as the record reflects. See 3:22-CR-00273-M Doc. P. 70-73:

Q (By Mr Lund) You testified earlier this is a teller cash audit form, right?

A. Yes.

Q. So this is done in order to make sure that the money from the bank is accounted for, right?

A. If you're short, yes.

Q. So at the beginning of each shift, your given a certain amount of cash in your top drawer, right?

A. We balance the night before how much we have in our drawer.

Q. Okay. So in that drawer to start the day, the bank knows how much money is there ; right?

A. Yes.

Q. It's usually not more than 4,000, right?

A. There's no more than 8,000.

Qno more than 8,000 thank you. So what you do is; if you're short – And by "short," you mean not as much money in that drawer as should be there; right? Correct?

A. Correct, yea.

Q. That means that there's an audit process that needs to be done, right?

A. Yes.

Q. Because there's an explanation that needs to be given to the bank, right?

A. Yes.

Q. Because if the bank's money is missing, the bank wants to know about it; right?

A. Yes, correct.

Q. Now sometimes there are shortages that happen for legitimate reasons, right?

A. Correct.

Q. And sometimes there are shortages that happen for robberies, right?

A. Yes, correct.

Q. And sometimes shortages just happen because accidents happen, right?

A. Correct.

Q. And so that's why the bank wants to know which one was this, right?

A. Yes.

Q. Okay. And so if a teller has less money than she should and there's not a good reason for it, tat teller can get in trouble; right?

A. Yes.

Q. You could have your pay docked, right?

A. Well, they can take your drawer and do a whole investigation why you're short, yes.

Q. And that investigation could lead you to losing pay?

A. Yes. You can get fired if you're short.

Q. It could also lead you to getting fired?

A. Yes.

Q. It could, in theory, lead you to getting prosecuted; right?

A. Yes.

Q. Banks got to go ahead and know why that money is not there, correct?

A. Correct.

Q. And if not, someone can get in trouble; right?

A. Yes.

Q. But if someone's robbed, they're not in trouble anymore, are they?

A. No.

Q. No more mistake if it's a robbery, right? A person's not in trouble anymore as long as it's a robbery, right?

A. Yes, correct.

"The right to the effective assistance of counsel" is "the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing." United States v. Cronic, 466 U.S. 648, 656. However, without the check provided in Gov. Doc. 249 and 250 no meaningful adversarial testing could be applied because without a legitimate purpose for Walton to be solidified at the bank counsels strategy amounted to nothing but sporadic points being made which construes as the denial of effective counsel. Seen United States v. Decoster, 199 U.S. App. D.C. 359, 382, (1979)("The Sixth Amendment, however guarantees more than the appointment of competent counsel. By its terms, one has a right to 'Assistance of Counsel [for] his defense.' Assistance begins with the appointment of counsel, it does not end there. In some cases the performance of counsel may be so inadequate that, in

effect, no assistance of counsel is provided. Clearly, in such cases, the defendant's Sixth Amendment right to 'have Assistance of Counsel' is denied."). Thus, due to counsel failing to provide actual assistance of effective counsel in mounting an adversarial test for the jurisdiction of the charges to be brought and providing prima facie evidence that would have proved Walton had a legitimate purpose for being at the bank as well as having an account with the bank. It stands that "if no actual "assistance" for "the accused's "defence" is provided, then the constitutional guarantee has been violated. See Wainwright v. Sykes, 433 U.S. 72, 99 (1977); see also United States v. Cronic, 466 U.S. 648, 655 (1984).

B. Counsel did not render effective assistance of counsel in motion for acquittal.

"It has been long recognized that the right to counsel is the right to the effective assistance of counsel." See McMann v. Richardson, 397 U.S. 759, 771, n. 14 (1970). The trial transcripts are paramount in providing facts to mount an effective assistance of counsel in a motion for acquittal which counsel failed to retrieve as the record reflects. See CRIMINAL DOCKET FOR CASE 3:22-cr-00273-M-1. "The core purpose of the counsel guarantee was to assure 'Assistance at trial, when the accused was confronted with the intricacies of the law and the advocacy of the public prosecutor." See United States v. Ash, 413 U.S. 300, 309 (1973). Such intricacies of law in this instance were to counsel's favor in that the record reflects that the prosecution in fact never proved that jurisdiction was never proven to exist against Walton who was to have proof shown that the bank in question was federally insured which the record would show and the witness list would provide prima facie evidence of such fact not being proven by a expert witness. In a long and venerable line of cases this Court has held that, without proper jurisdiction, a court cannot proceed at all, but can only note the jurisdictional defect and dismiss the suit. See Capron v. Van Noorden, 2 Cranch 126; Arizonians for Official English v. Arizona, 520 U.S. 43 (1997); Bell v. Hood, supra; National Railroad Passenger Corp. v. National Assn. Of Railroad Passengers, 414 U.S. 453, 456, n. 13; Norton v. Mathews, 427 U.S. 524, 531;

Secretary of Navy v. Aurech, 418 U.S. 676, 678 (per curiam); United States v. Augeablick, 393 U.S. 348; Philbrook v. Glodgett, 421 U.S. 707, 721; and Chandler v. Judicial Council of Tenth Circuit, 398 U.S. 74, 86-88. With the counsel not providing such a defense in specificity when the fact of the prosecution not proving such fact existed on the record as well as by prima facie evidence it must be seen that "the constitutional guarantee has been violated" due to "no actual "Assistance" being provided." See United States v. Decoster, 624 F.2d 196, 219 (1976).

The record was paramount to further show that the inferences regarding the guilt of Walton were just as likely or more in his favor to prove his innocence because the trial judge "has a duty to grant the motion for judgment of acquittal when the evidence, viewed in the light most favorable to the government, is so scant that the jury could only speculate as to defendant's guilt." United States v. Herberman, 583 F.2d 222, 231 (5th Cir. 1978). The facts reflected in the record show that (1) no firearm was shown to be on Walton's person. See Case No. 3:22-CR-00273-M Doc. 82 P. 69-70; (2) The record reflects that an account could be verified if a client had a previous account where money was owed to the bank. See Case No. 3:22-CR-00273-M Doc. 82 P. 56-57; (3) Gov. Doc. 249 and 250 provide prima facie evidence that Walton in fact had a check that bounced thereby reflecting a debt that was in the banks records. See Case No. 3:22-CR-00273-M Gov. Doc. 249 and 250; (4) The record reflects that Walton disclosed to officers that he in fact had a debt with the bank and further pulled money out his pocket for the purpose of making a payment but when he could not be helped by Calixto he then sought to talk to the women next to her which was Karla. See Case No. 3:22-CR-00273-M Doc. 82 P. 157-159. (5) The record further reflects that first Walton was taking with Calixto and then to Karla. See Case No. 3:22-CR-00273-M Doc. 82 P. 32-35; (6) The record reflects Calixto confirms that if she disclosed that a robbery had transpired then nobody would be in trouble when the Teller Cash audit form was filled out. See Case No. 3:22-CR-00273-M Doc. 82 P. 70-73; and (7) The record reflects that Karla would back the story of Calixto. See Case No. 3:22-CR-00273-M Doc. 82 P. 109-110. Thus, with the camera

footage not disclosing any verified proof of the inferences disclosed by both Calixto and Karla and the facts readily being confirmed in Walton's actions that he was at the bank to pay a debt counsel not providing the actual checks that verify Walton's placement at the bank or the transcripts to show in specificity that his story was just as likely as the witnesses he cannot be seen as "counsel acting in the role of an advocate" for the adversarial process. See Anders v. California, 422 U.S. 853, 862 (1975).

Counsel was well aware that "a trial judge has the duty to grant the motion for judgment of acquittal when the evidence, viewed in the light most favorable to the government, is so scant that the jury could only speculate as to the defendant's guilt." See United States v. Herberman, 583 F.2d 222, 230 (1978). It was thus necessary to present specific facts and in order to provide effective assistance of counsel because the Sixth Amendment "requires not merely the provision of counsel to the accused, but "Assistance," which is to be "for his defence." See United States v. Cronic, 466 U.S. 648, 654 (1984). With the motion by counsel not providing actual assistance construed with specific facts and verifying evidence to support the story of innocence that would be equally or greater on his Waltons behalf "no actual assistance" has been rendered and the "constitutional guarantee has been violated." See Case No. 3:22-CR-00273-M Doc. 54; see also United States v. Cronic, 466 U.S. 648, 654 (1984).

C. Counsel did not provide effective assistance of counsel in the Rule 33 Motion for New Trial.

Counsel for Walton was tasked with providing effective assistance in filing a motion for new trial because "[i]t has been long recognized that the right to counsel is the right to the effective assistance of counsel." See United States v. Cronic, 466 U.S. 648, 654 (1984); see also McMann v. Richardson, 397 U.S. 759, 771, n. 14 (1970). However, in filing such motion an attorney providing effective assistance is to provide facts that "the evidence preponderates heavily against the verdict." United States v. Sinclair, 438 F.2d 50, 51 n.1 (5th Cir.1971). In such respect Walton was prejudiced first in that counsel did not file for the sentencing transcripts in order to prepare to show that the such

evidence preponderates heavily against the verdict which construes as "no actual "Assistance"" in this instance because counsel could not disclose in specificity how such evidence preponderates heavily against the verdict. See CRIMINAL DOCKET FOR CASE #: 3:22-cr-00273-M-1; United States v. Cronic, 466 U.S. 648, 654 (1984).As the McMann Court disclosed the accused is entitled to "a reasonably competent attorney." See 397 U.S., at 770.

Here the attorney for Walton did not provide competence due to such record reflecting in the transcripts that (1) Walton never had a gun on his person as disclosed by witness Calixto. See Case No. 3:22-CR-00273-M Doc. 82 P. 69-70; and (2) The record further reflects Walton disclosed that he was at the bank for purposes of paying a debt which conduct can be readily seen by Walton pulling money out of his pocket and talking to Calixto and then to Karla as he described to officers which does not reflect that of a person intending to rob a bank. See Case No. 3:22-CR-00273-M Doc. 82 P. 157-159. However , counsel did not provide evidence for the jury to see that the checks which created the debt were in fact available to show Walton in fact had a debt at the bank which would've given Walton a legitimate reason to be placed at the bank and thereby prejudiced Walton from receiving a new trial on grounds of new evidence not seen by the jury. See Gov. Doc. 249 and 250. As this Court recognized "the burden is on the accused to demonstrate a constitutional error." See Matthews v. United States, 518 F.2d 1245, 1246 (CA7 1975). However, in this instance where counsel failed to provide such checks for purposes of new evidence it construes as "circumstances that re so likely to prejudice the accused that the cost of litigating t567heir effect in a particular case is unjustified. See Flanagan v. United States, 465 U.S. 259, 267-268 (1984); Estelle v. Williams, 425 U.S. 501, 504 (1976); Murphy v. Florida, 421 U.S. 794 (1975); Bruton v. United States, 391 U.S. 123, 136-137 (1968); Sheppard v. Maxwell, 384 U.S. 333, 351-352 (1966); Jackson v. Denno, 378 U.S. 368, 389-391 (1964); Payne v. Arkansas, 356 U.S. 560, 567-568 (1958); In re Murchinson, 349 U.S. 133, 136 (1955).

Further, the "most obvious, of course, is the complete denial of counsel." See United States v. Cronic, 466 U.S. 648, 659 (1984). "The, presumption that counsel's assistance is essential requires us to conclude that a trial is unfair if the accused is denied counsel at a critical stage of his trial." Id; See also Geders v. United States, 425 U.S. 80 (1976). "Similarly, if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable. No specific showing of prejudice"is required in such circumstances. Id.; See also Davis v. Alaska, 415 U.S. 308 (1974). In this circumstance the record reflects that the government never proved that the bank in question was federally insured which is a essential element that is required to be proven for Walton to be convicted . See Case No. 3:22-CR-00273-M Doc. 82 P. 10. Further, the record reflects that no expert witness testified to thebfact of the bank being federally insured See Case No. 3:22-CR-00273-M Doc. 25. With no such testimony of the bank being federally insured counsel failed in the effective assistance to disclose to the Court that the government never in fact proved this point in trial and thus it is paramount that a new trial take place for purposes of not meeting the burden of proof standard in regards to such argument because without such fact being met the government lack jurisdiction against Walton. See Melo v. United States, 505 F.2d 1036 (1974)(Once jurisdiction is challenged, the Court lacks jurisdiction, the Court has no authority to reach merits, but rather should dismiss the action.); see also Old Wayne Mut. L. Assoc. v. McDonough, 204 U.S. 8 (1907)(A court cannot confer jurisdiction where none existed and cannot make a void proceeding valid. It is clear and well established law that a void order can be challenged in any Court.). Thus, as stated before "if no actual "Assistance" "for" "the accused's "defence" is provided, then the constitutional guarantee has been violated. See United States v. Decoster, 624 F.2d 196, 219 (1976).

Question 2: **Did the Court of Appeals abuse its discretion in affirming the District Courts denial of the motion for acquittal?**

A. Standard of Review.

The standard to be employed by a trial judge in ruling on a Rule 29 motion for judgment of acquittal is the same as that employed by an appellate court in determining legal sufficiency of the evidence. United States v. Hernandez-Bautista, 293 F.3d 845, 852-53 (5th Cir. 2002). The trial court must determine whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L.Ed.2d 560 (1979)(emphasis in original); United States v. Harris, 420 F.3d 467, 470 (5th Cir. 2005); United States v. Hernandez-Bautista, supra. In doing so a court must consider all of the evidence in the light most favorable to the government by drawing all reasonable inferences in support of the verdict. Id.; United States v. Ortega Reyna, 148 F.3d 3d 540, 543 (5th Cir. 1998). A conviction must be reversed if the evidence is such that a reasonably minded jury must have a reasonable doubt as to the existence of any element of the crime, or the evidence gives equal or nearly equal circumstantial support to a theory of guilt as to a theory of innocence of the crime charged. United States v. Harris, supra at 471; United States v. Jaramillo, 42 F.3d 920, 923 (5th Cir. 1995); United States v. Hernandez-Bautista, supra at 853.

In ruling on a motion for acquittal the role of the district judge is not to weigh evidence or consider the credibility of the witnesses, but rather to determine whether the government has presented evidence on each element sufficient to support a jury verdict. United States v. Chavez, 230 F.3d 1089, 1091 (8th Cir. 2000). The court must view the evidence as a whole, and is not limited to drawing inferences from the evidence in favor of the verdict, but must consider whether the evidence supports a theory of innocence. United Sates v. Schuchmann, 84 F.3d 752, 754 (5th Cir 1996); United States v. Belt, 574 F.2d 1234, 1239 (5th Cir. 1978); United States v. Harris, supra. If the evidence viewednin the light most favorable to the prosecution "gives equal or nearly equal circumstanial support to a theory of guilt and a theory of innocence, the conviction should be reversed." See e.g., United States v. Schuchumann, 84 F.3d 752, 754 (5th Cir. 1996)(quoting United States v. Pennington, 20 F.3d 593, 597

(5th Cir. 1994)). In fact, the Court viewing the evidence under the above standard is required to grant a motion for acquittal "when the evidence viewed in the light most favorable to the Government is so scant that the jury could only speculate as to Defendant's guilt. The test is whether a reasonably minded jury must have had a reasonable doubt as to the existence of any of the essential elements of the crime..." United States v. Herberman, 583 F.2d 222, 231 (5th Cir. 1978).

B. The court abused its discretion in affirming denial of the motion for acquittal.

In this trial the District Court was to prove three elements beyond a reasonable doubt which are: (1) The defendant intentionally took from the person or the presence of another money; (2) That the money belonged to or was in the possession of a federally insured bank at the time of the taking; and (3) That the defendant took the money by means of intimidation. See Case No. 3:22-CR-00273-M Doc. 82 P. 10. To begin we start with the second element due it being the easiest to dispose of in that the prosecution provided no testimony from an expert witness to provide that the bank in question was a federally insured bank at the time of the alleged robbery which can be proven by the record and witness list. See Case No. 3:22-CR-00273-M Doc. 25 and 82. Without this fact being proved beyond a reasonable doubt there is no possible way "any reasonable trier of fact could have found that the evidence established the essential elements of the crime beyond a reasonable doubt." See United States v. Ortega Reyna, 148 F.3d 540, 543 (5th Cir. 1988); see also United States v. Alix, 86 F.3d. 429, 435 (5th Cir. 1996).

We then turn to the first and third elements that Walton took money intentionally from the person or presence of another and that money was taken by means of intimidation. The testimony of the police was that Walton told them that he was there to pay a debt at the bank in question and when talking to Calixto she could not help him so he then talked to Karla who was working next to her. Further, Walton was seen pulling money out of his pocket that was not the banks. See Case No. 3:22-

CR-00273-M Doc. 82 P. 157-159. It must be also be noted that Calixto only worked at the bank for only two months which accounts for Walton's reason as to why Calixto could not help him. See Case No. 3:22-CR-00273-M Doc. 82 P. 39. Walton at first had a COVID mask on when he approached Calixto and she said she could not see his face. See Case No. 3:22-CR-00273-M Doc. 82 P. 51. However, Walton lowered the mask so that Calixto could see him which is not the conduct of person robbing a bank. See Case No. 3:22-CR-00273-M Doc. 82 P. 55. Calixto discloses that Walton raised his shirt up and on the right side of his waist there was a gun there. However, when the footage was played and a picture as well as the footage was placed side by side there was no gun present but a silver and black belt buckle. See 3:22-CR-00273-M Doc. 82 P. 69-70. Further, Walton left the bank walking and never ran or sought to evade officers at anytime and went to a bus stop which does not have the conduct of a person who committed a crime. See Case No. 3:22-CR-00273-M Doc. 82 P. 154-155. It is more likely that Calixto made a mistake and tried to avoid the consequences from such mistake which would cause her to be fired or prosecuted which Calixto confirmed that this would be the case if she made a mistake and also confirmed that if a robbery had taken place then nobody would get in trouble at the bank. See Case No. 3:22-CR-00273-M Doc. 82 P. 70-73. As disclosed before and as we see here we have a case where "evidence viewed in the light most favorable to the prosecution gives equal or nearly equal circumstantial support to a theory of guilt and a theory of innocence of the crime charged," thereby the Appellate Court was to reverse the conviction. See Clark v. Procunier, 755 F.2d 394, 396 (5th Cir. 1985)(quoting Cosby v. Jones, 682 F.2d 1373, 1383 (11th Cir. 1982)(as quoted in United States v. Fortenberry, 919 F.2d 923, 926 (5th Cir. 1990)).

However, in viewing the evidence in the light most favorable to the government it is impossible to come to a conclusion that the government proved all the elements beyond a reasonable doubt seeing that they failed to prove one of the elements completely which this court need look no further when reviewing "sufficiency-of-the-evidence challenges to determine whether any rational trier of fact could

have found the essential elements of the crime beyond a reasonable doubt." United States v. Smith, 930 F.2d 1081, 1085 (5th Cir. 1991). The Circuit Court was to not to wiegh evidence or consider the credibility of the witnesses, but to determine whether the government has presented evidence on each element sufficient to support a jury verdict. See United States v. Chavez, 230 F.3d. 1089, 1091 (8th Cir. 2000). With no evidence being provided for the bank being federally insured the Appellate Court abused its discretion. The Court was to view the evidence as a whole, and is not limited to drawing inferences from the evidence in favor of the verdict, but must consider whether the evidence supports a theory of innocence. United States v. Schuchmann, 84 F.3d 752, 754 (5th Cir. 1996). However, the Appellate Court failed to see all the facts reflected above even "when the evidence viewed in the light most favorable to the Government is so scant that the jury could only speculate as to Defendant's guilt." United States v. Herberman, 583 F.2d 222, 231 (5th Cir. 1978). Further, evidence that the evidence was so scant could be seen in the jury disclosing that they were undecided and strong in that position which was supposed to be a mistrial. See Case No. 3:22-CR-00273-M Doc. 83 P. 48-49:

THE COURT: Be seated, please.
The court has received Jury Note No. 2, signed by the foreperson. It reads as follows: "The verdict is undecided. Very strong in decision."

Thus, District Court had to provide an Allen charge in order for the jurors to come to a decision. See Case No. 3:22-CR-00273-M Doc. 83 P. 49-51. With no facts other than the testimony of witnesses in regards to elements 1 and 3 and none in element 2 although video surveillance and photos were presented and nearly equal circumstantial support to a theory of guilt and innocence taking place. The Appellate Court abused its discretion in determining 3 grounds for its decision which were (1) testimonial evidence from the robbed bank teller and her coworker, (2) testimonial evidence from a

Dallas Police Department detective, and (3) surveillance footage from the bank and surrounding businesses. See Case No. 23-10401 Doc. 61-1 P. 3-4.

Question 3: **Did the Court of Appeals abuse it's discretion in affirming use of the Allen charge?**

A. Standard of review?

The relevant inquiry on appeal is whether: (1) any semantic deviation from approved Allen-charge language was so prejudicial that it requires reversal and (2) the circumstances surrounding the use of the charge were coercive. United States v. Winters, 105 F.3d 200, 203 (5th Cir. 1997). Generally, a Circuit Court reviews the use of an Allen charge for abuse of discretion. Id. Where defendant does not object to its use, review is for plain error. United States v. Hitt, 473 F.3d 146, 153 (5th Cir. 2006). "A party must raise a claim of error with the district court in such a manner so that the district court may correct itself and thus, obviate the need for our review." United States v. Guiterrez, 635 F.3d 148, 152 (5th Cir. 2011). (internal quotation marks and footnote omitted)." [T]he touchstone is whether the objection was specific enough to allow the trial court to take testimony, receive argument, or otherwise explore the issue raised." United States v. Burton, 126 F.3d 666, 673 (5th Cir. 1997).

B. The court abused its discretion in affirming use of the Allen charge.

The Court upon finding that the jury could not reach a verdict disclosed that it would give an Allen charge. See Case No. 3:22-CR-00273-M Doc. 83 P. 48-49. The Allen charge read as follows: Case No. 3:22-CR-00273-M Doc. 83 P. 49-50:

"Members of the Jury:

"I'm going to ask that you continue your deliberations in an effort to agree upona verdict and dispose of this case. And I have a few additional comments I would like for you to consider as you do so.

This is an important case. The trial has taken time and effort from both the Defense and the prosecution. If you should fail to agree on a verdict, the case is left open and must be tried again. There is no reason to believe that the case can be tried again by either side better or more – better than it has been tried before you. Any future jury must selected in the same manner and from the same source as you were chosen. There is no reason to believe that the case could ever be submitted to 12 men and women more conscientious, more impartial or more competent to decide it or that more or clearer evidence could be produced.

Those of you who believe that the Government has proved the defendant guilty beyond a reasonable doubt should stop and ask yourselves if the evidence is really convincing enough, given that other members of the jury are not convinced. And those of you who believe that the Government has proved the defendant guilty beyond a reasonable doubt should stop and ask yourselves if the doubt you have is a reasonable one, given that other members of the jury do not share your doubt.

Remember at all times that no juror is expected to yield a conscientious conviction he or she may have as to the weight or effect of the evidence but remember, also, that after full deliberation and consideration of the evidence in the case, it is your duty to agree upon a verdict if you can do so without surrendering your conscientious conviction. I emphasize, however, that if the evidence in the case fails to establish guilt beyond a reasonable doubt, you must return a verdict of "not guilty".

Upon such notice that the Allen charge was to be given Walton's counsel objected to the use of the Allen charge being given for the folowing reasons. See Case No. 3:22-00273-M Doc. 83 P. 51-52: Mr Lund: Yes, Your Honor, if I may.

The defense objects to the Court providing the jury an Allen charge at this point. The jury has now deliberated for more hours than the evidence was in this trial. Clearly, they have done their best to

try and wrestle with these issues as evidenced by their note an hour ago. The Defense would ask the Court to declare a mistrial at this point and feels that it is appropriate.

The defendant objects to the Court providing the charge itself. The defendant objects to the Court providing the charge at this juncture. The Defendant objects to the language of the charge itself as being unduly prejudicial.

Finally, the Defendant objects to the undue pressure that the Court is now putting on the jurors who are in the minority. An Allen charge has been referred to by other courts as the "dynamite charge," given it's powerful effect on a jury.

I would cite to Spears versus Greiner, 459 F3d 200, Second Circuit (2006), and United States versus Flannery, 451 F2d 880, First Circuit (1971).

This jury does not need to be handed a dynamite charge. They should be thanked for their service and dismissed, and this court should declare a mistrial.

Due to defense counsel for Walton objecting to the Allen charge such review by the Appeals Court and this justice Court is for abuse of discretion. See United States v. Miles, 360 F.3d 472, 482 (5th Cir. 2004). Although the District Court has broad discretion to give Allen charges the judge may not give a modified version of the Allen charge that is "coercive" and "prejudicial". See United States v. McClatchy, 249 F.3d 348, 359 (5th Cir. 2001). The very language in this Allen charge is in fact the "prejudicial" because the Court gives its opinion as to the state of the case by disclosing the wording, " there is no reason to believe that the case can be tried again by either side better or more – better that it has been tried before you." See Case No. 3:22-CR-00273-M Doc. 83 P. 49; see also United States v. Clayton, 172 F.3d 347, 352 (5th Cir. 1999). The definition of an opinion is as followed. Opinion- Blacks Law Dictionary, Eighth Edition (A court's written statement explaining its decision in a given case, usu. Including the statement of facts, points of law, rationale, and dicta.-- Abbr. op.-- Also termed *judicial*

opinion); see also advisory opinion- Blacks Law Dictionary Eighth Edition (A non binding statement by a court of its interpretation of the law on a matter submitted for that purpose.[Federal courts are constitutionally prohibited from issuing advisory opinions by the case-or-controversy requirement}).

However, the opinion of the Court becomes coercive due to the wording that appears before the previous opinion of the Court which discloses, "This is an important case. The trial has taken time and effort from both the Defense and the prosecution. If you should fail to agree on a verdict, the case is left open and must be tried again." See Case No. 3:22-CR-00273-M Doc. 83 P. 49. The Court further becomes coercive in the use of its wording when it comes to issuing another opinion while at the same time complimenting the jury so as to give a stature which they should hold themselves to or which would be disappointing by disclosing, "There is no reason to believe that the case could ever be submitted to 12 men and women more conscientious, more impartial or more competent to decide it or that more or clearer evidence could be produced." See Case No. 3:22-CR-00273-M Doc. 83 P. 49. Defense Counsel was correct in its assertion in that of the "dynamite charge" which is reflective of the case law disclosed to the court See 3:22-CR-00273-M Doc. 83 P. 51; see also Spears v. Greiner, 459 F.3d 200 (2nd Cir. 2006); and United States v. Flannery, 451 F.2d 880 (5th Cir. 1971).

In explaining the effects that took place on the jury it is also explained why the Allen charge has been abolished in California. In People v. Gainer, 19 Cal. 3D 835, 566 P. 2d 997, 999, 139 Cal. Rptr. 861, 863 (1977), Robert Gainer Jr's murder trial lasted fifteen days, with more than thirty witnesses testifying. 1.The case went to the jury on the morning of the thirteenth day. Four times during the day the jury asked to review portions of the testimony. Near the end of the second day of unsuccessful deliberations, the trial judge, upon request, 2 was informed that the jury was divided nine to three. On the morning of the third day of deliberations the jury was still deadlocked, but only eleven to one. 3 Two hours and fifty-five minutes later the jury returned a guilty verdict. 4 On Gainer's appeal the California Supreme Court in 1. People v. Gainer, 19 Cal. 3D 835(1977). 2. id. In Brasfield v. United

States, 272 U.S. 448, 450 (1926), the Supreme Court held it reversible error for a trial judge to inquire into the numerical split of the jury prior to delivering an Allen instruction. If the trial judge is aware of the division of the jury, his subsequent Allen charge will have a more coercive effect upon the minority because the minority will be made to feel the charge is directed at them.

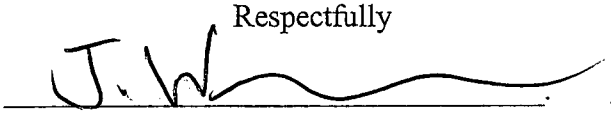
The record reflects this very fact that Defense counsel explained such pressure that would be placed on the minority by disclosing, "Finally, the Defendant objects to the undue pressure that the Court is now putting on the jurors who are in the minority. An Allen charge has been referred to by other courts as the "dynamite charge," given it's powerful effect on a jury." See Case No. 3:22-CR-00273-M Doc. 83 P. 51; see also Brasfield v. United States, 272 U.S. 448, 450 (1926). Thus, for such reasoning given by way of the judges opinion and division regarding the minority of jurors the court has hereby abused its discretion by issuing instructions that were prejudicial and that were coercive. See United States v. Winters, 105 F.3d 200, 203 (5th Cir. 1997).

CONCLUSION

This Court should vacate and remand for a new trial or set aside in accordance with Question 1. This Court should vacate and set aside in accordance with Question 2. This Court should vacate and remand for new trial in accordance with Question 3. Walton hereby requests the following or whatever the Court may think is best in the interest of justice.

Date: 4-5-24

Respectfully



Pro Se: JIMMIE LEE WALTON #07582-510
F.C.I. EL RENO
P.O. BOX 1500
EL RENO, OK 73036