

APPEAL NO:

IN THE SUPREME COURT
OF THE UNITED STATES

IN RE: DION WILLIAMS
Petitioner

-VS-

UNITED STATES OF AMERICA
Respondent

ON WRIT OF PROHIBITION UNDER
28 U.S.C. § 1651(a) TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF SUBMITTED TO CHIEF JUSTICE JOHN
ROBERTS BY REASON OF EXTRAORDINARY
CIRCUMSTANCES PURSUANT TO RULE 22-1

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QUESTIONS PRESENTED

WHETHER PETITIONER'S INVOCATION OF THE CAUSE AND PREJUDICE DOCTRINE, ALLIED WITH AN ACTUAL INNOCENCE CLAIM, ENTITLES HIM TO A MERITS DETERMINATION BY THE COURT OF APPEALS ON HIS CLAIMS.

WHETHER THE PANEL'S UNAPPEALABLE JUDGMENT IS A THINLY VEILED RES JUDICATA, CHOOSING THE PATH OF FINALITY OF JUDGMENT OVER FAIRNESS IN THE CRIMINAL CONTEXT, AMOUNTING TO A CLEAR MISCARRIAGE OF JUSTICE.

LIST OF PARTIES

In re: Dion Williams

-VS-

United States of America

The names of all parties appear in the caption of the case on the cover page. There are no additional parties.

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APPENDIX

DOCUMENT DESCRIPTION:

EXHIBIT:

Order Denying Dion Williams Petition for Rehearing En banc
Dated August 22, 2017.
.....EXHIBIT 1

Judgment and Commitment for Dion Williams.
.....EXHIBIT 2

STATEMENT OF JURISDICTION

The Supreme Court of the United States has original jurisdiction over three categories of cases. First, the Supreme Court can exercise original jurisdiction over "actions proceedings to which ambassadors, other public ministers, consuls, or vice consuls of foreign states are parties." See, e.g. Maryland v. Louisiana, 451 U.S. 725, 737 (1981). Second, the Supreme Court also possesses original jurisdiction for "(all) controversies between the United States and a state." 28 U.S.C. Section 1251(b)(2). Finally, Section 1251 provides for original jurisdiction in the Supreme Court, for "(all) actions or proceedings by a state against the citizens of another state or against aliens." See, e.g. Oregon v. Mitchell, 400 U.S. 112 (1970), United States v. Louisiana, 339 U.S. 699 (1955), United States v. California, 332 U.S. 19 (1947).

The statutes defining the Supreme Court's jurisdiction between "appeal" and "certiorari" as vehicles for appellate review of the decisions of state and lower federal courts. Where the statute provides for "appeal" to the Supreme Court, the Court is obligated to take and decide the case when appellate review is requested. Where the state provides for review by "writ of certiorari," the Court has complete discretion to hear the matter, the Court takes the case if there are four votes to grant certiorari. Effective September 25, 1988, the distinction between appeal and certiorari as a vehicle for Supreme Court review was virtually entirely eliminated. Now almost all cases

come to the Supreme Court by writ of certiorari. Pub.L. No. 100-352, 102 Stat. 662 (1988). The date on which the United States Court of Appeals decided my case was August of 2017.

WRIT OF PROHIBITION PURSUANT TO 28 U.S.C. SECTION 1651 IN AND OF THE SUPREME COURT'S JURISDICTION.

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule may be issued by a justice (Chief Justice Roberts) to whom an application to a writ of Prohibition is submitted may refer it to the Court for determination.

STATEMENT OF ADJUDICATIVE FACTS PURSUANT TO RULE 201 FEDERAL RULES OF EVIDENCE.

A criminal defendant had a constitutional right to be tried in the district where the offense was allegedly committed, unless a statute of the Federal Rules of Criminal Procedure provide otherwise. See, U.S. Const. III, §2, cl. 3; U.S. Const. Amend. VI; Fed.R.Crim.P. 18. The Government bears the burden of proving by a preponderance of the evidence that venue is proper with respect to each count of a criminal indictment. See United States v. Robinson, 275 F.3d 371, 378 (4th Cir. 2001); United States v. Bowens, 224 F.3d 302, 308 (4th Cir. 2000). It is well-settled that "venue on a conspiracy charge may be laid in any district in which a conspirator performs an overt act in furtherance of the conspiracy or performs acts that effectuate the object of the conspiracy, even if the defendant charged with the conspiracy never entered the district." United States v. Smallwood, 293 F.Supp.2d 631, 637 (E.D. Va. 2003)(citing Hyde v. United States, 225 U.S. 347, 356-57 (1912); United States v. Mitchell, 70 Fed.Appx. 707, 711 (4th Cir. 2003))(internal quotations omitted). "In determining venue not only is the conduct of the defendant himself considered, but the conduct of anyone with whom he shares liability as a principal is as well." Bowens, 224 F.3d at 311 n.4; See United States v. Al-Talib, 55 F.3d 923, 928 (4th Cir. 1995)(holding that one co-conspirator's acts in the Eastern District of Virginia can be attributed to all the members of the conspiracy, thus establishing venue for all defendants). Further, "a defendant who is charged as an aider or abettor is subject to venue

in any place where the principle could be tried." Bowens, 224
F.3d at 311 n.4.

STATEMENT OF CASE
(AS RECITED BY THE GOVERNMENT)

This case relates to Torry Von Zenon's involvement in a multi-state drug trafficking conspiracy where he participated in the attempted purchase of 100 kilograms of cocaine. The conspiracy began in January of 2012, when Hiram Alvarez contacted a Cooperating Source (CS) in California about supplying 100 kilograms of cocaine for a proposed drug transaction. At the time, Alvarez told the CS that the buyer (who was later identified as Dion Williams) was located in Richmond, Virginia and would pay over \$2,000,000 for the purchase.

Preparations began for the proposed drug transaction, which was scheduled to take place during the week of January 23, 2012. As the date drew near, Alvarez told the CS that one of Alvarez's associates (who was charged as Coconspirator #3) would accompany the CS to Virginia, in order to act as the representative for Alvarez and his wife during the transaction. Alvarez also revealed that the transaction would actually take place in Baltimore, Maryland, but that the CS and Coconspirator #3 would still travel through Richmond, Virginia in order to avoid the pervasive law enforcement efforts at the Washington, D.C. and Baltimore, Maryland airports.

On January 26, 2012, the SC, Coconspirator #3 and another cooperator flew from California to Richmond, Virginia. Once in Richmond, the three men rented a Chevrolet Malibu in Richmond, which they used to travel to Owings Mills, Maryland that same night. All of these Richmond-based events are charged as overt

acts in the pending indictment, as is Alvarez's initial travel plan to avoid the interdiction efforts.

On the morning of January 27, 2012, Coconspirator #3 and the cooperating sources met with Dion Williams at the Hyatt Hotel located at 4730 Painters Mill Road in Owings Mills, Maryland. After the meeting with Williams, the three men followed Williams to an apartment located at 4658 Riverstone Drive, Owings Mills, Maryland. Inside Apartment 201 (which was registered to Torry Zenon), the CS and Williams discussed arrangements for Williams' proposed purchase of 100 kilograms of cocaine. At the time, Williams told the CS that he had a portion of the purchase money available, and he was in the process of gathering additional funds to meet the \$2.4 million purchase price. DEA investigators watched the apartment complex at the time of the meeting and observed Torry Zenon conducting counter-surveillance around the area.

The CS, Coconspirator #3 and the other cooperatör left the apartment, with plans to return later that same day allowing Williams time to gather additional funds for the proposed purchase. The CS discussed with Williams that once the funds were verified, he would arrange for the cocaine to be brought up from Richmond, Virginia for the exchange.

Around 6:30 p.m. on January 27, 2012, investigators observed Zenon pull a pickup into the garage connected to Apartment 201. Zenon retrieved a plastic bag from the backseat and placed it in the garage. He then backed up the pickup truck out of the garage and parked it in a spot across from the garage door.

Zenon then exited the vehicle, entered the garage, and closed the door. Shortly thereafter, the cooperating sources, Coconspirator #3, and Williams arrived at the location. Those individuals and others met inside the apartment where they used money counters to verify the funds (almost \$1.5 million) that had been gathered by Williams up to that point.

Around 9:00p.m. on January 27, the cooperating sources and Coconspirator #3 left the complex with the understanding that Williams would gather the remaining funds for the cocaine purchase. Williams and Coconspirator #3, in turn, believed that the cocaine was located in Richmond, Virginia and would be brought up on the following day for the exchange. Later that same night, law enforcement officers executed a federal search warrant at 4658 Riverstone Drive, Apartment 201. At the time of the search, investigators encountered Williams, Zenon, and another individual inside the apartment. All three were arrested on state charges, with federal investigators being careful not to reveal the involvement of the cooperating sources or the existence of the larger federal investigation. The search yielded \$1,499,377.00 in United States currency, two royal Sovereign money counters, two handguns, and other items.

Alvarez and his wife believed that Williams was responsible for bringing law enforcement into the transaction on January 27, so they continued to negotiate with the CS. In February 2012, the Alvarezes told the CS that they had another customer (later identified as Topeka Sam - Defendant No. 6) who wanted to purchase 25 kilograms of cocaine for a second buyer in Maryland. This

time, the Alvarezes arranged for the customer (Sam) to meet the CS in Richmond on March 6, 2012 to discuss the proposed transaction.

On March 6 and 7, 2012, the corresponding sources flew to Richmond, Virginia to meet with Sam. On the morning of March 7, 2012, Sam and Susan Smallwood (charged as Defendant No. 7) met the sources and an undercover agent at a Hooter's Restaurant located at 7912 West Broad Street in Richmond, Virginia. Once there, Sam discussed the proposed transaction with the three men, believing that the undercover agent was the actual drug supplier. To provide legitimacy to the transaction, the cooperating sources and undercover agent took Sam to a storage unit where DEA had stored an undercover "trap" vehicle loaded with over 50 kilograms of cocaine. After inspecting the cocaine, Sam agreed to meet with the sources the following day at 4413 Powells Run Road, Randallstown, Maryland (Smallwoods's house) to verify the funds and complete the transaction.

On March 7, 2012, the cooperating sources had two separate meetings with Sam, Smallwood, and the proposed buyers at Smallwood's residence. During the first meeting, Percy Robinson (Defendant No. 8) met with the group and produced over \$250,000 for the proposed 25 kilogram purchase. Robinson later left, agreeing to produce more money the following day for the transaction. Following the meeting, officers conducted a traffic stop and seized over \$250,000 from the defendant. Robinson was released following the traffic stop. Later the same day, Reginald Marshall (defendant No. 9) met with Sam, Smallwood, and the cooperating

sources. He produced over \$80,000 for the transaction, then left a short time later with Sam to gather more funds for the transaction. Another traffic stop was conducted, and investigators seized over \$89,000 from Sam and Marshall. Both were released following that traffic stop.

Undeterred by their previous brushes with the law on March 8, 2012, Sam and Robinson traveled from New Jersey area to Richmond, Virginia on April 24, 2012. On this occasion, the two met with the undercover agent to discuss Robinson's proposed purchase of over 30 kilograms of cocaine. Following that meeting, both were arrested in the pending indictment.

PROCEDURAL HISTORY
(AS RECITED BY THE GOVERNMENT)

In total, nine conspirators have been charged in this case with Conspiracy to Possess With Intent to Distribute Over Five kilograms of Cocaine, in violation of 21 U.S.C. § 846 (Count One), and Attempted Possession With Intent to Distribute Over Five Kilograms of Cocaine, in violation of 21 U.S.C. § 841(a)(1) and 841(b)(1)(A) (Counts Two and Three). Of the nine charged, eight defendants are in custody. Six of those defendants have pleaded guilty and are awaiting sentencing in the upcoming months. Zenon and Williams are the only two defendants still pending trial, which is currently scheduled for December 17, 2012.

REASONS FOR GRANTING

Petitioner seeks a grant of the Writ of Prohibition primarily because, following the denial of Petitioner's Petition for Rehearing with suggestions rendered without findings of fact and conclusions of law. It essentially deprives Petitioner of his claims being adjudicated because the decision based on the whims that, "the Circuit Judges were polled" and none felt compelled to vote for a rehearing. Petitioner as a consequence is without other means of redress for the thinly disguised res judicata, Petitioner's claims have been thrust in. The action Petitioner seeks by application for the Writ of Prohibition, directed to Chief Justice John Roberts by reason of his Supervisory Control vested by Rule 22-1, is judicial in nature, for which irreparable prejudice would be averted. See, 208 S.W. 835, 839.

Petitioner therefore seeks leave of this Honorable Court to direct the United States Court of Appeals to rule on Petitioner's Petition for Rehearing with Suggestions for Rehearing En banc, so that further litigation should proceed on its merits.

It is settled that the "nature of the crime alleged and the location of the act or acts constituting it." United States v. Anderson, 328 U.S. 699, 703 (1946). When Congress has not expressly provided where venue is appropriate, the court must decide based upon the statutory language;

"When --- the statute defining the substantive offense
"does not indicate where Congress considered the place

of committing the crime to be, the locus delicti must be determined from the nature of the act or acts constituting it." United States v. Anderson, 328 U.S. 699, 703, 66 S.Ct. 1213, 1216, 90 L.Ed 1529 (1946)(citations omitted). In determining the act or acts constituting the crime, we have commonly focused on the verbs employed in the statute defining the offense."

United States v. Blecker, 657 F.2d 629, 632 (4th Cir. 1981), As the Supreme Court has instructed, "(i)n performing this inquiry, a court must identify the conduct constituting the offense (the nature of the crime) and then discern the location of the commission of the criminal acts." United States v. Rodriguez-Moreno, 526 U.S. 275, 279 (1999); see also United States v. Smith, 452 F.3d 323, 334-35 (4th Cir. 2006)(finding that venue determination is two-fold inquiry), United States v. Bowens, 224 F.3d 302, 311 (4th Cir. 2000)(holding "that the place where a criminal offense is committed is determined solely by the essential conduct elements of that offense."). Venue is limited to the place "where the criminal act is done." United States v. Bowens, 224 F.3d 202 (4th Cir. 2000); Anderson, 328 U.S. at 705; United States v. Cabrales, 524 U.S. 1, 7-8 (1998).

The government bears the burden of proving venue by a preponderance of the evidence that the crime occurred in the district where prosecuted. See, United States v. Barsauti, 943 F.2d 428, 434 (4th Cir. 1991).

Separate from the issue of venue, the Court of Appeals

abused its discretion in denying Petitioner's Petition for Rehearing with Suggestions for Rehearing En banc, because judicial precedent flatly prohibits such a departure from the procedure proscribed by 28 U.S.C. Section 2253. The Panel of the Court of Appeals departed from the procedure proscribed by 28 U.S.C. Section 2253.

When a Court of Appeals properly applies the certificate of appealability (COA) standard and determines that a prisoner's claim is not even debatable, that necessarily means the prisoner has failed to show that his claim is meritorious. But the converse is not true. Thus, when a reviewing court inverts the statutory order of operations and first decides the merits of an appeal, then justifies its denial of a COA based on its adjudication of the actual merits, it has placed too heavy a burden on the prisoner at the COA stage. Judicial precedent flatly prohibits such a departure from the procedure proscribed by 28 U.S.C. Section 2253, (Roberts, Ch.J., joined by Kennedy, Ginsburg, Breyer, Sotomayor, and Kagan J.J.).

WHETHER PETITIONER'S INVOCATION OF THE CAUSE AND PREJUDICE DOCTRINE,
ALLIED WITH AN ACTUAL INNOCENCE CLAIM, ENTITLES HIM TO A MERITS
DETERMINATION BY THE COURT OF APPEALS ON HIS CLAIMS.

The Supreme Court has emphasized that both cause and prejudice must be demonstrated to permit a defendant to raise on habeas corpus matters not presented in state court. See, Murray v. Carrier, 477 U.S. at 496. An illustration of the need to prove both cause and prejudice is Strickler v. Greene, 527 U.S. 263 (1999). The Court found that the failure of the prosecution to disclose information under Brady v. Maryland, 373 U.S. 83 (1963), even inadvertently, was sufficient cause for the federal court to hear a habeas petition.

The principles of res judicata and collateral estoppel generally preclude a party from relitigating a matter already presented to a court and decided upon. Brown v. Allen, decided in 1953, created an important exception to collateral estoppel and res judicata for habeas petitioners. 344 U.S. 443 (1953).

In fact, the Warren Court so valued the importance of the opportunity to relitigate constitutional issues to ensure correct decisions that it held that a petitioner convicted by a federal court also may raise issues on habeas that had been presented and decided at trial. Kaufman v. United States, 394 U.S. 217 (1969). The court concluded that "provision of federal collateral remedies rests --- fundamentally upon a recognition that adequate protection of constitutional rights --- requires the continuing availability of a mechanism rule that the final judgment in a habeas case, such as his, may not be re-opened by a recall

of mandate, unless the demanding standard that applies is met. One exception is that the mandate may be recalled to correct a clerical error in the judgment. *Id.* at 557, 118 S.Ct. at 1501. The other exception is that the mandate may be recalled where there was "fraud on the court, calling into question the very legitimacy of the judgment." See *Id.* at 557, 118 S.Ct. at 1501-02. The latter applies to the case at bar.

In two decisions decided the day, Murray v. Carrier, 477 U.S. 478 (1986) and Smith v. Murray, 477 U.S. 527 (1986), the Supreme Court had held that as an alternative to demonstrating cause, as habeas Petitioner may raise matters hitherto not raised by demonstrating he is probably innocent of the charges.

Petitioner can show cause for the procedural default by not reviewing the claim or for that matter, filing a direct appeal where pursuant to Fed.R.Crim.P. 21(B) failure of the district court to transfer the action to the District of Maryland for the convenience of the parties and witnesses, or in the alternative, Motion to Dismiss Count Two for improper venue.

The issue in Murray v. Carrier, was whether a habeas petitioner could show cause for a procedural default by demonstrating that Defense Counsel inadvertantly failed to raise an issue. Justice O'Connor, writing for the majority stated, "so long as a defendant is represented by counsel whose performance is not constitutionally ineffective under the standard established in Strickland v. Washington, we discern no inequity in requiring him to bear the risk of attorney error that results in a procedural default. Murray v. Carrier, 477 U.S. at 488.

Further, as applied to Petitioner, he contends he can demonstrate cause, by "showing that the factual and legal basis for the claims were not reasonably available to counsel," as in Reed v. Ross, or that "some interference by state officials" made compliance impracticable - (or that) the procedural default is the result of ineffective assistance of counsel. In Amadeo v. Zant, 486 U.S. 214 (1988), the court found that a prosecutor's concealing of a memorandum detailing deliberate racial bias in jury selection constituted cause for failure to object at trial. Justice O'Connor emphasized that, "ineffective assistance of counsel, then is cause for a procedural default." Murray v. Carrier, 477 U.S. at 468.

PETITIONER'S PROFFER OF ACTUAL INNOCENCE

In four cases, the Court elaborated on the meaning of actual innocence. In Sawyer v. Whitley, the issue was what actual innocence meant in the context of challenging a sentence.

Petitioner further invokes Herrera v. Collins, for the proposition that "actual innocence itself is not a constitutional claim, but a gateway through which a habeas petitioner, must pass to have his otherwise barred constitutional claims considered on the merits." 506 U.S. 390, 404 (1993).

To reiterate, proper venue is a criminal prosecution is a constitutional right. A defendant in a criminal case has a constitutional right to be tried in a proper venue. See United States v. Johnson, 323 U.S. 273, 275 (1944)(noting that two

constitutional provisions, Article III, § 2, cl. 3³ and the Sixth Amendment both provide a right to trial in the state where the crime is committed), see also Fed.R.Crim.P. 18 ("Except as otherwise permitted by statute or these rules, the prosecution shall be had in a district in which the offense was committed."). These constitutional safeguards are meant to "protect the defendant from bias, disadvantage, and inconvenience in the adjudication of the charges against him." United States v. Ebersole, 411 F.3d 517, 524 (4th Cir, 2005)(emphasis added). Following Herrera v. Collins, the Court decided Schlup v. Delo, that to prove actual innocence, a habeas petitioner must show there was a constitutional violation that "probably resulted" in the conviction of one who is actually innocent, 513 U.S. 298, 327 (1995), as in the case at bar.

In House v. Bell, the Supreme Court found that the requirements for showing actual innocence were met to allow a procedurally defaulted claim of ineffective assistance of counsel to be raised. 547 U.S. 518 (2006).

Thus, Petitioner contends, he was prejudiced pursuant to United States v. Frady, where the Supreme Court indicated that "prejudice" could be demonstrated by showing that the results in the case likely would have been different absent the complained of violation of the constitution or federal laws, 456 U.S. 1523 (1982).

A demonstration of prejudice likely will require a showing that the alleged constitutional violation affected the outcome of the trial or the appeal - that the results probably would have been different but for the violation of federal law.

WHETHER THE PANEL'S UNAPPEALABLE JUDGMENT IS A THINLY VEILED RES JUDICATA, CHOOSING THE PATH OF FINALITY OF JUDGMENT OVER FAIRNESS IN THE CRIMINAL CONTEXT, AMOUNTING TO A CLEAR MISCARRIAGE OF JUSTICE.

Traditionally, efficiency and finality have carried less weight than fairness in the criminal context because criminal sanctions may result in imprisonment and greater social stigma than civil sanctions. See, Stacey & Dayton, *supra* note 2 at 137 ("As our --- commitment to the availability of habeas corpus, finality and efficiency concerns carry relatively less sway in criminal cases than they do in civil cases - a product of a criminal defendant's countervailing liberty interest")(footnote omitted).

The category of errors known as trial errors can be harmless if the government can show beyond a reasonable doubt that they did not contribute to the verdict. See *Id* at 24, see also Sullivan v. Louisiana, 508 U.S. 275, 279 (1993)(stressing that the test for harmlessness "is not whether, in a trial that occurred without the error a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error").

The Supreme Court has recognized a narrow set of rights that, if denied are structural errors: the rights to counsel, see Gideon v. Wainwright, 372 U.S. 335, 343-45 (1963) and to counsel of choice, see United States v. Gonzalez-Lopez, 548 U.S. 140, 150 (2006)(deeming deprivation of counsel of choice a structural error); the right of self-representation, see, McKaskle v. Wiggins, 465 U.S. 168, 177 n.8 (1984)(finding harmless

error analysis inapplicable to deprivation of the right to self-representation because exercising the right increases the chance of a guilty verdict; the right to an impartial judge, See, Tunney v. Ohio, 273 U.S. 510, 534 (1927)(holding that trial before a biased judge "necessarily involves a lack of due process"); freedom from racial discriminatory grand jury selection undermined "the objectivity of those charged with bringing a defendant to judgment; the right to a public trial, See Waller v. Georgia, 467 U.S. 39, 49 (1984)("The defendant should not be required to prove specific prejudice in order to obtain relief for a violation of the public-trial guarantee"), and the right to accurate reasonable-doubt instruction, See, Sullivan v. Louisiana, 508 U.S. 275, 280 (1993)(finding that because of an inadequate reasonable-doubt instruction, no actual jury verdict had been rendered and the court could thus not apply harmless error analysis to determine whether the error affected the verdict.

By contrast, the list of trial errors is extensive. See, Arizona v. Fulminante, 499 U.S. 279, 306-07 (1991)(declaring that "most constitutional errors can be harmless," and naming sixteen examples of trial error. While the list of structural errors have remained consistent, the Supreme Court's methods of distinguishing between trial and structural error have fluctuated. The prejudicial impact of these constitutional errors is assessed by asking whether the error had "a substantial and injurious effect or influence in determining the jury's verdict. Brecht v. Abrahamson, 507 U.S. 619, 623, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993), see also Fry v. Pliler, 551 U.S. 112, 119-120

127 S.Ct. 2321, 168 L.Ed.2d 16 (2007)(holding that the Brecht Standard applies whether or not the state court recognized the error and reviewed it for harmlessness!).

CONCLUSION

Petitioner avers that, given the totality of the circumstances of his case, an analysis of the constitutional violations he has argued before the courts in his briefs, point clearly to what the Supreme Court has repeatedly affirmed that "(s)ome constitutional violations --- by their very nature cast so much doubt on the fairness of the trial process that, as a matter of law, they can never be considered harmless." Safferwhite v. Texas, 486 U.S. 249, 256 (1988); accord Neder v. United States, 527 U.S. 1, 7 (1999)("(W)e have recognized a limited class of fundamental constitutional errors that "defy analysis by "harmless error" standards --- Errors of this type are so intrinsically harmful as to require automatic reversal (i.e. affect substantial rights) without regard to their effect on the outcome") Sullivan v. Louisiana, 508 U.S. 275, 279 (1993)("Although most constitutional errors have been held to harmless error analysis, some will always invalidate the conviction." (Citations omitted); Id at 283 (Rehnquist, C.J. concurring); United States v. Olano, 507 U.S. 725, 735 (1993); Rose v. Clark, 478 U.S. 570, 577-78 (1986) ("some constitutional errors require reversal without regard to the evidence in the particular case --- (because they) render a trial fundamentally unfair"), Vasquez v. Hillary, 474 U.S. 254, 263-264 (1986); Chapman v. California, 386 U.S. 18, 23 (1967)("there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error.

Because Petitioner did not undergo the trial process as opposed to his alleged unintelligently and unknowingly made plea agreement, some commentators in analysis constitutional errors have treated harmless-error jurisprudence as establishing a strict dichotomy between trial error, which is subject to harmless-error analysis, and structural error, which is per se reversible. See, Twenty-Fourth Annual Review of Criminal Procedure, 83 Georgetown L.J. 665, 1365 (96 F.3d 1144) (March - April 1995). The case law does not appeal to establish such a rigid dichotomy, however. In its recent Brecht decision, the Supreme Court characterized the divergence between trial and structural errors as a "spectrum of constitutional errors" rather than a rigid dichotomy. Brecht, ___ U.S. at ___, 113 S.Ct. at 1717 (emphasis added).

It is clear from the issues raised by Petitioner in his petition that the structural errors he raised are structural, because they are "defects in the constitution of the trial mechanism, which defy analysis by harmless-error standards." Id at 309 (emphasis added).

Most if not all of Petitioner's constitutional claims arise from failure of Counsel to "subject the Government's case to strict adversarial testing" as enunciated by Strickland v. Washington, (citations omitted). The law related to structural error as it relates to the denial of the Sixth Amendment right to effective counsel is very clear. The Right to Effective Assistance of Counsel. See, Kyles v. Whitley, 514 U.S. at 435-436, United States v. Cronin, 466 U.S. 648, 654-57 (1984), Hill v. Lockhart,

28 F.2d 832, 839 (8th Cir. 1994)("it is unnecessary to add a separate layer of harmless-error analysis to an evaluation of whether a petitioner in a habeas case has presented a constitutionally significant claim for ineffective assistance of counsel").

Petitioner contends, included in the definition of structural error, is the right to an impartial judge, or panel of judges, i.e. the right to a judge or judges who follow the Constitution and Supreme Court precedent and uphold their oath of office. To paraphrase Chief Justice Roberts, in taking his oath of office, reaffirmed the doctrine that the Supreme Court was not going to have the government as a client. To drive home this notion of impartiality, see, e.g. Neder v. United States, 527 U.S. at 8 ("biased trial judge is structural error.").

Date: November 21st, 2017

Respectfully Submitted,



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