

No. 17-8225

ATTN: CLERK OF THE COURT

Please Find Enclosed Petition for Rehearing
in Light of the Court's Recent Decision
in McCoy v. Louisiana, No. 16-8255

and
in light of the Court's Order
in Deutsche Bank Trust Company Americas v.
Robert R. McCormick Foundation, No. 16-317.

This Petition for Rehearing is mailed within 25 days
of the Court's order pursuant to the Rule

RECEIVED

JUN 26 2018

OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 17-8225

IN THE
SUPREME COURT OF THE UNITED STATES

IN RE TARYN CHRISTIAN — PETITIONER
(Your Name)

VS.

— RESPONDENT(S)

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

The petitioner asks leave to file the attached petition for a writ of certiorari without prepayment of costs and to proceed *in forma pauperis*.

Please check the appropriate boxes:

☒ Petitioner has previously been granted leave to proceed *in forma pauperis* in the following court(s):

UNITED STATES SUPREME COURT

UNITED STATES DISTRICT COURT

☐ Petitioner has **not** previously been granted leave to proceed *in forma pauperis* in any other court.

☐ Petitioner's affidavit or declaration in support of this motion is attached hereto.

☐ Petitioner's affidavit or declaration is **not** attached because the court below appointed counsel in the current proceeding, and:

☐ The appointment was made under the following provision of law: _____, or

☐ a copy of the order of appointment is appended.

Taryn Christian
(Signature)

**AFFIDAVIT OR DECLARATION
IN SUPPORT OF MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS***

I, TARYN CHRISTIAN, am the petitioner in the above-entitled case. In support of my motion to proceed *in forma pauperis*, I state that because of my poverty I am unable to pay the costs of this case or to give security therefor; and I believe I am entitled to redress.

1. For both you and your spouse estimate the average amount of money received from each of the following sources during the past 12 months. Adjust any amount that was received weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate. Use gross amounts, that is, amounts before any deductions for taxes or otherwise.

Income source	Average monthly amount during the past 12 months		Amount expected next month	
	You	Spouse	You	Spouse
Employment	\$ <u>N/A</u>	\$ _____	\$ _____	\$ _____
Self-employment	\$ _____	\$ _____	\$ _____	\$ _____
Income from real property (such as rental income)	\$ _____	\$ _____	\$ _____	\$ _____
Interest and dividends	\$ _____	\$ _____	\$ _____	\$ _____
Gifts	\$ _____	\$ _____	\$ _____	\$ _____
Alimony	\$ _____	\$ _____	\$ _____	\$ _____
Child Support	\$ _____	\$ _____	\$ _____	\$ _____
Retirement (such as social security, pensions, annuities, insurance)	\$ _____	\$ _____	\$ _____	\$ _____
Disability (such as social security, insurance payments)	\$ _____	\$ _____	\$ _____	\$ _____
Unemployment payments	\$ _____	\$ _____	\$ _____	\$ _____
Public-assistance (such as welfare)	\$ _____	\$ _____	\$ _____	\$ _____
Other (specify): _____	\$ _____	\$ _____	\$ _____	\$ _____
Total monthly income:	\$ _____	\$ _____	\$ _____	\$ _____

2. List your employment history for the past two years, most recent first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
N/A			\$
			\$
			\$

3. List your spouse's employment history for the past two years, most recent employer first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
N/A			\$
			\$
			\$

4. How much cash do you and your spouse have? \$
Below, state any money you or your spouse have in bank accounts or in any other financial institution.

Financial institution	Type of account	Amount you have	Amount your spouse has
N/A		\$	\$
		\$	\$
		\$	\$

5. List the assets, and their values, which you own or your spouse owns. Do not list clothing and ordinary household furnishings.

☐ Home
Value

☐ Other real estate
Value

☐ Motor Vehicle #1
Year, make & model
Value

☐ Motor Vehicle #2
Year, make & model
Value

☐ Other assets
Description
Value

6. State every person, business, or organization owing you or your spouse money, and the amount owed.

Person owing you or your spouse money	Amount owed to you	Amount owed to your spouse
N/A	\$ _____	\$ _____
	\$ _____	\$ _____
	\$ _____	\$ _____

7. State the persons who rely on you or your spouse for support.

Name	Relationship	Age
N/A		

8. Estimate the average monthly expenses of you and your family. Show separately the amounts paid by your spouse. Adjust any payments that are made weekly, biweekly, quarterly, or annually to show the monthly rate.

	You	Your spouse
Rent or home-mortgage payment (include lot rented for mobile home)	\$ N/A	\$ _____
Are real estate taxes included? ☐ Yes ☐ No		
Is property insurance included? ☐ Yes ☐ No		
Utilities (electricity, heating fuel, water, sewer, and telephone)	\$ _____	\$ _____
Home maintenance (repairs and upkeep)	\$ _____	\$ _____
Food	\$ _____	\$ _____
Clothing	\$ _____	\$ _____
Laundry and dry-cleaning	\$ _____	\$ _____
Medical and dental expenses	\$ _____	\$ _____

	You	Your spouse
Transportation (not including motor vehicle payments)	\$ <u>N/A</u>	\$ _____
Recreation, entertainment, newspapers, magazines, etc.	\$ _____	\$ _____
Insurance (not deducted from wages or included in mortgage payments)		
Homeowner's or renter's	\$ _____	\$ _____
Life	\$ _____	\$ _____
Health	\$ _____	\$ _____
Motor Vehicle	\$ _____	\$ _____
Other: _____	\$ _____	\$ _____
Taxes (not deducted from wages or included in mortgage payments)		
(specify): _____	\$ _____	\$ _____
Installment payments		
Motor Vehicle	\$ _____	\$ _____
Credit card(s)	\$ _____	\$ _____
Department store(s)	\$ _____	\$ _____
Other: _____	\$ _____	\$ _____
Alimony, maintenance, and support paid to others	\$ _____	\$ _____
Regular expenses for operation of business, profession, or farm (attach detailed statement)	\$ _____	\$ _____
Other (specify): _____	\$ _____	\$ _____
Total monthly expenses:	\$ _____	\$ _____

9. Do you expect any major changes to your monthly income or expenses or in your assets or liabilities during the next 12 months?

☐ Yes ☒ No If yes, describe on an attached sheet.

10. Have you paid – or will you be paying – an attorney any money for services in connection with this case, including the completion of this form? ☐ Yes ☒ No

If yes, how much? _____

If yes, state the attorney's name, address, and telephone number:

11. Have you paid—or will you be paying—anyone other than an attorney (such as a paralegal or a typist) any money for services in connection with this case, including the completion of this form?

☐ Yes ☒ No

If yes, how much? _____

If yes, state the person's name, address, and telephone number:

12. Provide any other information that will help explain why you cannot pay the costs of this case.

I AM INCARCERATED

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: June 13, 2018

Jarlyn Christian
(Signature)

No. 17-8225

IN THE SUPREME COURT OF THE UNITED STATES

IN RE TARYN CHRISTIAN,

Petitioner,

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

PETITION FOR REHEARING

TARYN CHRISTIAN
Petitioner *Pro Se*
Saguro Correctional Center
A4004046 LC-05
1252 E. Arica Road
Eloy, AZ. 85131

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
PETITION FOR REHEARING.....	1
GROUNDS FOR REHEARING.....	1
RELEVANT FACTS AND BACKGROUND.....	6
ARGUMENT.....	11
I. REHEARING IS APPROPRIATE IN LIGHT OF THE COURT'S RECENT ORDER IN <u>DEUTSCHE BANK</u> BY JUSTICES KENNEDY AND THOMAS—GIVING DIRECTIVE THAT THE COURT OF APPEALS PROVIDE REDRESS THROUGH PROCEDURE OF A MOTION TO RECALL THE MANDATE OR FOR THE DISTRICT COURT TO ENTERTAIN A RULE 60 MOTION TO VACATE THE EARLIER JUDGMENT.	
REHEARING IS APPROPRIATE FOR THIS COURT TO ENSURE THAT THE SAME RULE AND PRINCIPLES APPLY TO THE NINTH CIRCUIT COURT OF APPEALS WHEREBY AVOIDING ARBITRARILY DISPARATE TREATMENT WITHIN THE CIRCUITS.....	11
II. REHEARING SHOULD BE GRANTED IN LIGHT OF THE COURT'S DECISION IN <u>MCCOY V. LOUISIANA</u> WHICH STRIKES AT THE HEART OF PETITIONER'S CASE— DEMONSTRATING THE IMPACT THE <u>BRADY</u> VIOLATIONS HAD ON TRIAL COUNSEL'S DECISION TO CONCEED GUILT OVER PETITIONER'S EXPRESS OBJECTION IN VIOLATION OF THE SIXTH AMENDMENT.....	13
CONCLUSION.....	15
CERTIFICATE OF PETITIONER.....	16
PROOF OF SERVICE.....	17

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<u>Brady v. Maryland</u> , 373 U.S. 83 (1963).....	2,5,11
<u>Calderon v. Thompson</u> , 523 U.S. 538 (1998).....	3,12
<u>Chambers v. Mississippi</u> , 410 U.S. 284 (1973).....	4
<u>Christian v. Frank</u> , 595 F.3d. 1076 (9th Cir. 2010).....	4
<u>Deutsche Bank Trust Company Americas v. Robert R. McCormick Foundation</u> , No. 16-317.....	1,11,12-15
<u>Faretta v. California</u> , 422 U.S. 806, 821 (1975).....	15
<u>Hawkins v. United States</u> , 543 U.S. 1097 (2005).....	1
<u>Hazel-Atlas Glass CO. v. Hartford-Empire Co.</u> , 322 U.S. 238, 249—250 (1944).....	3, 13
<u>Jones v. Barnes</u> , 463 U.S. 745, 756 n.1 (1983).....	13
<u>Lauersen v. United States</u> , 543 U.S. 1097 (2005).....	1
<u>Lawrence v. Chater</u> , 516 U.S. 163, 166 (1996)	3
<u>McCoy v. Louisiana</u> , No. 16-8255.....	2,5,13-15
<u>Melson v. Allen</u> , No. 09- 5373 (June 21, 2010).....	1

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<u>Merit Management Group, LP v. FTI Consulting, Inc.</u> , 583 U.S. ____ (2018).....	1,12
<u>Ornelas v. United States</u> , 517 U.S. 690 (1996).....	13
<u>Sierra Pacific Industries, Inc., v. United States</u> , No. 17-1153.....	3
<u>Strickland v. Washington</u> , 466 U.S. at 690 (1984).....	10
<u>United states v. Swanson</u> , 943 F.3d 1070, 1074 (9 th Cir. 1991).....	15
<u>Webster v. Cooper</u> , 130 S. Ct. 456, 456 (2009).....	4
<u>Williams v. Taylor</u> , 529 U.S. 362, 390-91 (2000).....	15

STATUTES AND RULES

28 U.S.C. § 2106.....	4
Fed. R. Crim. P. 52(a).....	2
Rule 60 Rule 60(b)(d)(3).....	2

OTHER AUTHORITIES

E. GRESSMAN ET AL., SUPREME COURT PRACTICE § 15.1, at 807 n.5, § 15.6(b) at 819 (9th ed. 2007).....	1
E. GRESSMAN ET AL., <i>supra</i> , § 5.12(b) at 345-49.....	4

PETITION FOR REHEARING

Pursuant to this Court's Rule 44, Petitioner, Taryn Christian, respectfully petitions for rehearing of the Court's order denying a writ of mandamus in this case, entered on May 29, 2018.¹ In re Taryn Christian, No. 17- 8225. This petition is mailed within 25 days of the Court's order.

GROUND FOR REHEARING

It is unusual for this Court to grant rehearing and grant plenary review, but it is far more common for this Court to grant rehearing and then grant certiorari/or mandamus, and remand (a "GVR order") for consideration of an intervening decision of this Court. E.g., Melson v. Allen, No. 09- 5373 (June 21, 2010); Hawkins v. United States, 543 U.S. 1097 (2005); Lauersen v. United States, 543 U.S. 1097 (2005). See generally E. GRESSMAN ET AL., SUPREME COURT PRACTICE § 15.1, at 807 n.5, § 15.6(b) at 819 (9th ed. 2007) (citing additional cases). That would be the appropriate disposition in this case.

On April 03, 2018, this Court entered an order in Deutsche Bank Trust Company Americas v. Robert R. McCormick Foundation, No. 16-317, respecting a petition for certiorari. In a statement by Justice Kennedy and Justice Thomas, the Court suggested that the Court of Appeals provide redress of the case through the procedure of a 'motion to recall the mandate' or for the district court to entertain a Rule 60(b) motion to vacate the earlier judgment, in light of its opinion in Merit

¹ Attorney, Gary A. Modafferi Esquire., represented Petitioner in the district court and in the Ninth Circuit Court of Appeals. Whereas Mr. Modafferi is not a member of the bar of the Supreme Court and Petitioner's application for an extension of time within to file the petition to secure counsel of the bar was denied, Petitioner was obligated to proceed *pro se* before the Court. See No.17A400.

Management, 583 U.S. (2018). On May 14, 2018, while Petitioner's mandamus petition was pending, this Court issued its decision in McCoy v. Louisiana, No. 16-8255, holding that a Sixth Amendment violation occurs where a defendant's trial counsel admits an accused's guilt to the jury over the defendant's express objection.

The Court's decision in McCoy v. Louisiana strikes at the heart of Petitioner's case and his constitutional claims, demonstrating the *dire* consequences of the government's suppression of Brady evidence—which is proven to have resulted in a breakdown of the adversarial process and pitted trial counsel against his client.

As discussed in the mandamus petition, the District Court, inexplicably failed to address and rule upon 'after-discovered' fraud on the [habeas] court and the State's underlying Brady violations central to the Rule 60(b)(d)(3) litigation—which fatally impacted Petitioner's constitutional claims raised in his §2254 petition.

There can be no debate that the District Court's flat out refusal to properly adjudicate Petitioner's valid Rule 60(b)(d)(3) motion after entering *multiple* orders for the State's production of Brady materials proven to exist—would lead a reasonable observer to question the judge's impartiality and an obvious disabling conflict—where at the outset of the proceedings, he acknowledged: (Dkt. #286)

**Petitioner asserts that Respondent has withheld Brady materials...
These allegations are relevant to whether a fraud has been perpetrated
on the Court....**

Compounding error resulted where the District Court, all together failed to make the essential factual findings and separate conclusions of law required under F.R.C.P. 52(a), which governs appellate review of facts tried to the bench. Without a

ruling on the merits of what the District Court referenced was a valid Rule 60(b) motion and not a prohibited “second or successive” habeas petition, Petitioner was deprived of his right to procedural due process of law by the U.S. District Court for the District of Hawaii.

In the petition for a writ of mandamus, Petitioner respectfully argued that this case presents the kind of exceptional circumstances in which this Court exercises its supervisory authority to issue a writ of mandamus to preserve its certiorari jurisdiction, where the Ninth Circuit Court of Appeals—without entering a decision—has categorically *refused* to provide Petitioner (represented by counsel) redress of after-discovered fraud directed at the Court of Appeals through the procedure of a ‘motion to recall the mandate’ as held by this Court’s decision in Calderon v. Thompson, 523 U.S. 538 (1998). See also Hazel-Atlas Glass CO. v. Hartford-Empire Co., 322 U.S. 238, 249—250 (1944). By taking the extraordinary steps to avoid redress of new developments, the Ninth Circuit openly thwarted this Court’s certiorari jurisdiction, depriving Petitioner due process of law.

Also relevant to the facts of Petitioner’s case involving the lower court’s struggle in defining ‘after-discovered fraud on the court’ pursuant this Court’s landmark decision in Hazel-Atlas Glass Co. v. Hartford-Empire, 322 U.S. 238 (1944), is whether this Court will grant certiorari and address the questions presented in the pending petition for writ of certiorari to the Court of Appeals for the Ninth Circuit in Sierra Pacific Industries, Inc., v. United States, No. 17-1153.

This Court’s “broad power to GVR” (Lawrence v. Chater, 516 U.S. 163, 166

(1996) (per curiam)) is derived from 28 U.S.C. § 2106, which authorizes this Court to “vacate * * * any judgment,” “remand the cause,” and “require such further proceedings * * * as may be just under the circumstances.” A GVR order is appropriate “[w]here [(i)] intervening developments * * * reveal a *reasonable probability* that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and [(ii)] * * * it appears that such a redetermination may determine the ultimate outcome of the litigation.” Chater, 516 U.S. at 167 (emphasis added).¹

There is more than a “*reasonable probability*” that on remand the Ninth Circuit would acknowledge that its 2010 decision denying habeas relief rests on a premise that the Court of Appeals would reject in light of McCoy v. Louisiana, which is inextricably intertwined with its application of this Court’s holding in Chambers v. Mississippi, 410 U.S. 284 (1973). See Christian v. Frank, 595 F.3d. 1076 (9th Cir. 2010).

Likewise, there is more than a “*reasonable probability*” that on remand the District Court would acknowledge that its 2017 decision denying Petitioner’s Motion to Vacate and Disqualify for failure to properly adjudicate Petitioner’s Brady claims which impacted all constitutional claims raised, rests on a premise that the court would reject in light of McCoy v. Louisiana. Indeed, in denying Petitioner’s Six Amendment claim, the District Court adopted reasoning of the Magistrate Judge

¹ Even those Justices who have objected to certain GVRs have acknowledged that such relief is appropriate “where an intervening factor has arisen [such as new legislation or a recent decision of this Court] that has a legal bearing on the decision.” Webster v. Cooper, 130 S. Ct. 456, 456 (2009) (Scalia, J., dissenting) See generally E. GRESSMAN ET AL., *supra*, § 5.12(b) at 345-49.

that where the trial court had excluded the witnesses from testifying that a third-party had confessed to the killing, trial counsel's "strategic decision" to argue Petitioner committed the murder in self-defense was "objectively reasonable." (Dkt # 146: at pp. 60-61).

The District Court's disregard for the impact the State's Brady violations had upon trial counsel's concession of guilt over Petitioner's express objection, is further evidenced by the court's dismissal of trial counsel's 2017 Declaration in which Mr. Ranken stated, in part. (Dkt. #436 at 3; 4; & 8.) (emphasis supplied).

3. I am now aware that during Mr. Christian's Rule 60 proceeding in the District Court for the District of Hawaii, the State's attorneys represented to the federal judge that "all information" of Phillip Schmidt's original identification of James Burkhart was disclosed to the defense during Mr. Christian's trial. That representation is categorically untrue.
4. The State's inference and the district court's perception that I chose not to use this exculpatory evidence in favor of Mr. Christian's defense, while having knowledge that Burkhart had been identified by the State's key prosecution witness, is patently false.
8. If this critical evidence in favor of Taryn Christian had been produced, it certainly would have changed the manner in which I chose to defend Taryn Christian in this case, and I believe it would have undoubtedly had a significant impact upon the deliberation of the jury, in support of his actual innocence.

The substantial question this Court identified in McCoy v. Louisiana should not go unresolved in Petitioner's case where the facts supporting innocence are more compelling than those discussed in McCoy. Accordingly, this Court should grant rehearing, vacate its order denying a writ of mandamus, and enter a GVR order so that the Ninth Circuit Court of Appeals, or the District Court, may consider McCoy's impact in the first instance.

RELEVANT FACTS AND BACKGROUND

On August 17, 1995, Petitioner was arrested without warrant or grand jury indictment and held without bail. On the morning of trial, appointed counsel, Anthony Ranken, produced a letter to Petitioner requiring his signed authority to argue self-defense and attempted theft to a charge of murder in the second degree. Petitioner refused consent, insisting counsel argue his innocence—supported by evidence that the initial suspect had confessed to committing the murder.

In his opening statement to the jury, Mr. Ranken indicated that Petitioner did not commit the homicide, stating “that there was another man there” whom the prosecutor had not mentioned—a man known to the decedent and his girlfriend. In the midst of trial, the trial court held an *in chambers* hearing and ruled to exclude the testimony of three witnesses that were proffered to testify that a third party, James Burkhart, had confessed and “bragged” to killing Cabaccang. During the hearing, while Burkhart asserted his Fifth Amendment privilege, the prosecutors argued to the trial court that the confession witnesses were “not reliable or trustworthy” because “no witnesses had identified Burkhart from any photographic arrays” and “two witnesses” placed him *within* their residence at the time of the crime. Petitioner was also denied his request to testify as his own witness, where Mr. Ranken sided with the prosecution and argued to the trial court:

“I’ve informed him that we’re beyond that stage of the trial and advised him not engage in any further outburst in front of the jury because I believe it will only hurt his case...”

Then, in closing argument over Petitioner’s expressed objection, Mr. Ranken

suggested Petitioner had acted in self-defense, reversing the defense's position which was paramount to him changing his client's plea and argued:

(Exhibit #47 – Closing Argument at pp. 40; 55; 56) (emphasis supplied).

“... I’m going to explore with you what really happened that night... But I have to admit to you I don’t really know what happened... I’ve got to move on, and you know it’s this is the hardest thing for a lawyer to do because now you’re going to say well, Mr. Ranken, you are contradicting yourself. You just told us that Taryn didn’t do it, and now you’re talking about well he did it, its self-defense, whatever. There’s no way around it, ladies and gentlemen, I’m-I don’t know what happened... So, yes, I’m going to assume now for the sake of argument that Taryn was the one that inflicted these wounds despite everything I said... Lets try to reconstruct how this fight happened....Mr. Cabaccang tackles Taryn. His shirt -Taryn’s shirt conies up enough to expose his belly or Vilmar pushes the shirt up to get his knife hand under against Taryn’s flesh. Taryn’s lying face down on the pavement...with this larger, heavier, stronger man on top of him...pinning him down and cutting him with a knife...There was after that–after Taryn felt the pain of his own blood being drawn, after he felt the knife against his belly that he grabbed that knife only to again - I submit to you it was then that Taryn, the terrified teenager, took his own knife out of its sheath to defend himself...”

None of this information was supported by any eyewitness or by Petitioner.

Petition had no cuts or wound(s) as Mr. Ranken described. Plainly, counsel lied to the jury. Earlier, Mr. Ranken represented that he did not know what happened. Yet he provided details not supported by any documentation, providing a theory that was substantially similar to that of the prosecution, and in effect, testified for the prosecution. (Refer at pp. 70-72; 74; 80-86).

“... So then how did Vilmar get stabbed? The way Vilmar got stabbed is obviously Taryn from that position, if Taryn was the one who did it, managed to get up his knife without seeing what he was doing, just thrust blindly behind him and up where Vilmar was sitting on him...And it looks like he was acting in self-defense, never really realizing the harm that he was inflicting because he could not see the harm he was inflicting. He did not know where that knife was landing... Blindly, without being able to see, just

stabbing behind his own back...He was tackled, and that's how he ended up face down. And there was a struggle, Vilmar was getting the best of Taryn. Taryn had the knife, and Taryn defended himself."

"...What was Taryn's intent that night? ... Taryn never intended to kill anyone. Taryn never knowingly killed anyone... Taryn didn't want this fight to happen. He didn't intend this fight to happen, and he didn't intend for Vilmar to end up dead."

As the record supports, Mr. Ranken in his closing, profoundly separated himself from his client when he stated to the jury, "I don't really know what happened." This was undoubtedly against the best interests of his client, as counsel, prosecutor and the court, were fully aware that Petitioner had requested the trial court grant him his constitutional right to testify before closing argument.

"... Now, my client's asked me, won't the jury hold it against me if I don't testify? My client's asked me, won't they think I'm hiding something? But when I'm handling a case this serious, I ask myself if I do put my client on the stand, are you going to believe him anyway? If someone's facing a charge this serious, are you going to believe whatever he says, or are you going to figure that he'll say whatever he needs to say to try get acquitted. I figure there's not much point in putting him on the stand."

After telling the jury that he didn't really know what happened that night, Mr. Ranken's comments as to the irrelevance of his client's testimony were profoundly prejudicial and cannot be considered harmless error. His concession to the jury that while Petitioner was pinned down under the weight of Cabaccang, he was just, "blindly, without being able to see, just stabbing behind his own back" does not demonstrate mere negligence in the presentation of his client's case or a "strategy" to gain a favorable result that misfired. Instead, Mr. Ranken's statements lessened the government's burden of persuading the jury that his client was indeed the person who had stabbed Cabaccang. In yet another instance of

counsel's concession to the jury of his client being the perpetrator he states:

"He's never been in trouble...He's facing shame of being caught for stealing..."

Again, when counsel made this claim to the jury implying and confirming for them that his client was a thief and had unlawfully entered Cabaccang's vehicle, he ceased to function as defense counsel. Counsel's conduct cannot be considered a tactical admission in order to persuade the jury to focus on a defense, such as the one of self-defense. When counsel abandoned his duty of loyalty to his client and effectively joined the state in their effort to attain a conviction, he suffered an obvious conflict of interest. Thus, when Mr. Ranken failed to subject the prosecution's case to meaningful adversarial testing, there was a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable. After Petitioner was found guilty of all charges, Mr. Ranken filed a motion for new trial and a supplemental memorandum representing a reversal of his position during the trial. (Dkt. 1-2: Exhibit #47-F). Counsel then argued:

1. When Defendant Requested a New Attorney in the Middle of The Trial, the Court Failed to Conduct the Required "Penetrating and Comprehensive Examination" of the Defendant to Determine the Basis of His Request.
2. When Defendant Informed the Court Before Closing Arguments That He Wished to Testify Before the Jury, the Court Should Have Reopened the Evidentiary Portion of The Trial to Allow Defendant to Testify.

* * *

Mr. Ranken attached to his 'Supplement for New Trial,' an 'Affidavit of Anthony Ranken' and stated: (Dkt. # 1-2: Exhibit # 52-A) (emphasis supplied).

3. If allowed to testify, Defendant would have denied being the person who stabbed Vilmar Cabaccang and would have told the jury about the presence of a third man at the scene of the stabbing.

In his affidavit, counsel concedes that his representation of Petitioner at trial and his closing argument was inconsistent with what his client would have testified to under oath. The Hawai'i Supreme Court upheld the conviction. On December 22, 2004, Petitioner filed a timely petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. On August 29, 2008, the Magistrate Judge issued her findings and recommendations to grant the Petition in part and deny it in part. In denying Petitioner's Six Amendment claim regarding trial counsel's concession of guilt, the Magistrate Judge reasoned that where the trial court had excluded witnesses from testifying that Burkhart had confessed to the killing, trial counsel's "strategic decision" to argue self-defense was "objectively reasonable". (Dkt # 146: pp. 60-61).

At the outset of trial, the defense's strategy was to establish that Petitioner did not kill Cabaccang. By the time of closing arguments, however, trial counsel apparently altered the defense's strategy and presented self-defense and extreme emotional disturbance as alternative arguments. This Court finds that, under the circumstances of the trial, this decision was within "the wide range of professionally competent assistance." See Strickland, 466 U.S. at 690. As discussed, *supra*, Burkhart invoked the Fifth Amendment when called as a defense witness and the trial court excluded the witnesses who would have testified that Burkhart confessed to killing Cabaccang. These events certainly hurt the defense's ability to establish that another person, namely Burkhart, killed Cabaccang. Trial counsel's strategic decision to also argue self-defense and extreme emotional disturbance was objectively reasonable under the circumstances.

On September 30, 2008, the District Court entered its judgment and adopted the Magistrate's findings and recommendations regarding trial counsel's concession of guilt. ("Habeas Order" – Dkt. #153 at p. 28). The District Court wrote in part:

This Court also finds on a de novo review that a change of the theory of defense did not fall below an objective standard of reasonableness. As the main theory of defense that Burkhart committed the killing was not supported by strong evidence, it was within the wide range of competence

and trial strategy to argue that in the event the jury believed the prosecution, it should consider that the stabbing was in self-defense...

On December 28, 2015, the district court denied Rule 60(b)(d)(3) relief to reopen the § 2254 proceeding without ruling on the merits of the Brady violations central to the litigation or addressing the impact the withheld Brady evidence had on Petitioner's constitutional claims, despite reasoning in its July 10, 2013 order:

Petitioner asserts that Respondent has withheld Brady materials...
These allegations are relevant to whether a fraud has been perpetrated on the Court....

* * *

Only this Court can resolve the pressing constitutional question of Petitioner's current procedural status—which is why the intervening decisions of the Court warrant rehearing in this case where rehearing is an important device to help correct mistakes and ensure that justice is served. The Court has granted rehearing and GVR'd on a number of occasions when a judgment of a lower court has been called into question by a subsequent decision of the Supreme Court.

ARGUMENT

- I. REHEARING IS APPROPRIATE IN LIGHT OF THE COURT'S RECENT ORDER IN DEUTSCHE BANK BY JUSTICES KENNEDY AND THOMAS—GIVING DIRECTIVE THAT THE COURT OF APPEALS PROVIDE REDRESS THROUGH PROCEDURE OF A MOTION TO RECALL THE MANDATE OR FOR THE DISTRICT COURT TO ENTERTAIN A RULE 60 MOTION TO VACATE THE EARLIER JUDGMENT.

REHEARING IS APPROPRIATE FOR THIS COURT TO ENSURE THAT THE SAME RULE AND PRINCIPLES APPLY TO THE NINTH CIRCUIT COURT OF APPEALS WHEREBY AVOIDING ARBITRARILY DISPARATE TREATMENT WITHIN THE CIRCUITS.

The power to grant rehearing implicates a number of traditional procedural values such as accuracy, repose, equal treatment, and judicial economy. Equality

plays an important but complicated role in the rehearing context. On the one hand, part of the reason for granting rehearing is to ensure that the same rule applies to all litigants who are similarly situated-similar, that is, except for the fact that one case became final before the other.

In late February, the Supreme Court handed down Merit Management Group LP v. FTI Consulting Inc., 138 S. Ct. 883, 200 L. Ed. 2d 183, 86 U.S.L.W. 4088 (Sup. Ct. Feb. 27, 2018), ruling that the so-called safe harbor under Section 546(e) only applies to “the transfer that the trustee seeks to avoid.” That was among the issues in a *certiorari* petition pending simultaneously in the Supreme Court, Deutsche Bank Trust Co. Americas v. Robert R. McCormick Foundation, 16-317 (Sup. Ct.). Then on April 3, 2018, Justices Anthony M. Kennedy and Clarence Thomas entered a “Statement” on the Deutsche Bank docket. In its entirety, the statement said:

The parties are advised that consideration of the petition for *certiorari* will be deferred for an additional period of time. This will allow the Court of Appeals or the District Court to consider whether to recall the mandate, entertain a Federal Rule of Civil Procedure 60(b) motion to vacate the earlier judgment, or provide any other available relief in light of this Court’s decision in Merit Management Group, LP v. FTI Consulting, Inc., 583 U.S. ____ (2018). The petition for *certiorari* in this case was pending when the Court decided Merit Management. The Court of Appeals or the District Court could decide whether relief from judgment is appropriate given the possibility that there might not be a quorum in this Court. *See* 28 U.S.C. § 2109.

Accordingly, on April 10, 2018, creditors in Deutsche Bank filed a motion to recall the mandate with the Second Circuit Court of Appeals requesting the relief, relying on this Court’s holding in Calderon v. Thompson, 523 U.S. 538, 549 (1998), that Courts of Appeal “have an inherent power to recall their mandates.” In Calderon v. Thompson, this Court established a demanding standard for a litigant

to meet for a Court of Appeals to recall its mandate. This Court held that apart from a case of “fraud upon the court, calling into question the very legitimacy of the judgment,” Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238 (1944), “the court abuses its discretion unless it acts to avoid a miscarriage of justice.”

Rehearing is appropriate for this Court to review the Ninth Circuit’s untenable act to insulate an arguably unconstitutional decision procured by fraud, both because it results in the inconsistent application of the law, cf. Ornelas v. United States, 517 U.S. 690 (1996) (in Fourth Amendment context, “[i]ndependent review is therefore necessary if appellate courts are to maintain control of, and to clarify, the legal principles”), and because it increases arbitrariness and the likelihood of error. See Jones v. Barnes, 463 U.S. 745, 756 n.1 (1983) (Brennan, J., joined by Marshall, J., dissenting) (“There are few, if any situations in our system of justice in which a single judge is given unreviewable discretion over matters concerning a person’s liberty or property....”).

In light of this Court’s order suggesting that the Second Circuit Court of Appeals provide redress to Deutsche Bank through the procedure of a ‘motion to recall the mandate’ or the district court through Rule 60, rehearing is warranted to maintain the circuits’ consistent application of the law under this Court’s precedent.

II. REHEARING SHOULD BE GRANTED IN LIGHT OF THE COURT’S DECISION IN MCCOY V. LOUISIANA WHICH STRIKES AT THE HEART OF PETITIONER’S CASE—DEMONSTRATING THE IMPACT THE BRADY VIOLATIONS HAD ON TRIAL COUNSEL’S DECISION TO CONCEED GUILT OVER PETITIONER’S EXPRESS OBJECTION IN VIOLATION OF THE SIXTH AMENDMENT.

In a 6–3 decision authored by Justice Ruth Bader Ginsburg in McCoy v.

Louisiana, No. 16-8255 issued on May 14, 2018, the Court affirmed that criminal defendants have a constitutional right to maintain their innocence at trial. The Court found that McCoy's right to autonomy had been violated and that the Sixth Amendment guarantees criminal defendants the "autonomy to decide ... to assert innocence" as their defense. When a client decides to maintain his innocence, Justice Ginsburg concluded, "his lawyer must abide by that objective and may not override it by conceding guilt." The Court overturned McCoy's convictions and ordered that McCoy be given a new trial.

Justice Alito wrote the dissenting opinion joined by Justice Thomas and Justice Gorsuch. Justice Alito wrote that while McCoy's attorney had argued that McCoy had killed the victims, he did not plead McCoy guilty of first-degree murder, thus consistent with McCoy's request. Justice Alito also considered the evidence against McCoy overwhelming, such that a retrial would unlikely find a different result. The dissenting Justices concluded, "a criminal defendant's right to insist that his attorney contest his guilt with respect to all charged offenses—is like a rare plant that blooms every decade or so. Having made its first appearance today, the right is unlikely to figure in another case for many years to come." The Justices went on to reason, "... if counsel is appointed, and unreasonably insists on admitting guilt over the defendant's objection, a capable trial judge will almost certainly grant a timely request to appoint substitute counsel. And if such a request is denied, the ruling may be vulnerable on appeal." Respectfully, Petitioner submits that none of these safeguards imagined by the Justices saved Petitioner, whereas,

Petitioner has now served 23 years of a 40-year minimum sentence for a murder he did not commit. Moreover, the Justices conclusion that “It is hard to imagine a situation in which a competent attorney might take that approach” is demonstrated all too plainly in Petitioner’s case. Counsel’s actions prejudiced Petitioner because there is more than a “*reasonable probability*” that the outcome would be different if it were not for counsel’s unprofessional errors. Williams v. Taylor, 529 U.S. 362, 390-91 (2000). Mr. Ranken, in his 2017 declaration admitted as much. A defense attorney who abandons his duty of loyalty to his client, like unwanted counsel, “represents’ the defendant only through a tenuous and unacceptable legal fiction. Faretta v. California, 422 U.S. 806, 821 (1975). In fact, an attorney who is burdened by a conflict between his client’s interest and his own sympathies to the prosecution’s position is considerably worse than an attorney with loyalty to other defendants, because the interest of the state and the defendant are necessary in opposition. See also United states v. Swanson, 943 F.3d 1070, 1074 (9th Cir. 1991).

CONCLUSION

Petitioner has been denied redress despite a showing of ‘after-discovered fraud on the court’ and in the face of a grave miscarriage of justice—which, is why this Court’s recent decision in Deutsche Bank and in McCoy warrants rehearing in this case, where rehearing is an important device to help correct mistakes and ensure that justice is served and to protect this Court’s certiorari jurisdiction.

For the foregoing reasons, the petition for rehearing should be granted.

Respectfully submitted.

Respectfully submitted.

Taryn Christian
Petitioner, Taryn Christian.

CERTIFICATE OF PETITIONER

I hereby certify that this petition for rehearing is presented in good faith and not for delay, and that it is restricted to the grounds specified in Supreme Court Rule 44.2, namely intervening circumstances of substantial or controlling effect and substantial grounds not previously presented.



Petitioner, Taryn Christian.