No._____

IN THE

SUPREME COURT OF THE UNITED STATES

ROY PARKER -- PETITIONER

vs.

BURL CAIN, WARDEN – RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES FIFTH CIRCUIT COURT OF APPEALS
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR CERTIORARI

ROY PARKER #569364
CAMP C – JAGUAR UNIT
LOUISIANA STATE PRISON
ANGOLA, LOUISIANA 70712

QUESTION(S) PRESENTED

1). Did Petitioner receive the effective assistance of counsel as guaranteed by the 6th Amendment to the United States Constitution when trial counsel allowed the court to proceed without a ruling on the Petitioner's competency being established?

2). If trial counsel acting within the effectiveness of assistance of counsel when he does not afford his client an opportunity to testify, when the client has an absolute right to testify and wants to?

3). Can trial counsel be effective to his client when there is an actual conflict of interest existing between the counsel and client?

4). Was Petitioner effectively denied the right to prove that ineffective assistance of counsel existed when the Courts continuously denied an evidentiary hearing?

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES CITED

CASES PAGE NUMBER

STATUTES AND RULES

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS

[X] For cases from **federal courts:**

The opinion of the United States court of appeals appears at Appendix D to the petition and is

[X] reported at **Docket Number 17-30774**; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

[X] reported at **U.S.D.C. No. 2:15-cv-00065-NJB**; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[X] For cases from **state courts:**

The opinion of the highest state court to review the merits appears at Appendix A attached to the petition and is

[X] reported at **Louisiana Supreme Court No. 2013-KP-245**; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

The opinion of the **Fourth Circuit Court of Appeal** court appears at Appendix A attached to the petition and is

[X] reported at **No. 2013-KP-0811**; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

JURISDICTION

[X] For cases from **federal courts:**

The date on which the United States Court of Appeals decided my case was **July 2, 2018**.

[ ] No petition for rehearing was timely filed in my case.

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

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____(date) on _____(date) in Application No. __A_____.

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

[X] For cases from **state courts:**

The date on which the highest state court decided my case was **October 10, 2014**. A copy of that decision appears at Appendix A attached.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____(date) on _____(date) in Application No. __A____.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

ISSUE ONE

Whether Petitioner Sixth's Amendment Right to Effective Representation of Counsel was violated by the deficient and prejudicial performance of trial counsel who allowed trial to proceed notwithstanding that Petitioner competency had been challenged and no ruling thereon had been made.

ISSUE TWO

Whether Petitioner's Sixth Amendment Right to Effective Representation of Counsel was violated by the deficient and prejudicial performance of trial counsel who refused to permit Petitioner to testify in his own defense and whether Petitioner was entitled to a federal evidentiary hearing to substantiate this claim.

ISSUE THREE

Whether Petitioner Sixth Amendment Right to Effective Representation of Counsel was violated by the deficient and prejudicial performance of trial counsel who operated at trial under an actual conflict of interest.

STATEMENT OF THE CASE

Petitioner is serving life in prison for the early-morning May 2, 2009 shooting death of his wife, Veronica Parker, and wounding of her male companion Brian Davis.

Petitioner entered a plea of Not Guilty and Not Guilty by Reason of Insanity on February 5, 2010. More than one (1) month later, on March 29, 2010, his trial attorneys moved to test Petitioner's mental competency to proceed as well as his sanity at the time of the commission of the crime. Although a sanity hearing was scheduled for the following day, it was never held there remains no finding by the Court regarding Petitioner's competency.

On April 6, 2010, Petitioner withdrew his formerly tendered plea of *Not Guilty* and *Not Guilty by Reason of Insanity* and approximately three (3) days later, on April 9, 2010, Petitioner was found *Guilty* as charged on both counts.

Petitioner's conviction was affirmed by the Louisiana Fourth Circuit Court of Appeal on September 21, 2011. *State v. Parker*, 76 So.3d 55 (La. App. 4th Cir. 2011). The Louisiana Supreme Court denied writs on March 9, 2012. See *State v. Parker*, 84 So.3d 551 (La. 2012). The Louisiana Supreme Court denied Petitioner's separately filed *pro se* Application for Certiorari on July 27, 2012. See *State ex rel Parker v. State*, 93 So.3d 586 (La. 2012).

Petitioner thereafter timely for state post-conviction relief. His collateral attack concluded upon the Louisiana Supreme Court's October 10, 2014 denial of writs. See *State v. Parker*, 150 So.3d 891 (La. 2014).

Petitioner filed his Habeas Petition on or about January 12, 2015. EROA.6-12; 23-56. On or about November 13, 2015, the U.S. Magistrate Court recommended dismissal of the Petition. EROA.152-201. The District Court adopted the Magistrate's reasoning on September 13, 2017 ordering the dismissal of Petitioner's Petition with prejudice. EROA.275.

Petitioner filed a Certificate of Appealability (COA) to the United States Court of Appeals for the Fifth Circuit. On July 2, 2018, United States Circuit Judge, James C. Ho, denied the motion for COA.

REASONS FOR GRANTING THE PETITION

Although Petitioner's state collateral attack and District Court Habeas proceedings may have been admittedly rich in speculation and minimal in substance, several of Petitioner's Habeas claims deserve closer scrutiny from this Court and, further, demand relief from his state conviction. Petitioner's mental competency to stand trial was placed at issue before the state district court, not merely his sanity at the time of the commission of the offense. Both the Magistrate Court and the District Court ignored, or possibly misunderstood, this salient face. Under U.S. Supreme Court jurisprudence the trial of an incompetent defendant is a violation of the Constitution writ large. Additionally, Petitioner was denied an opportunity to testify on his own behalf. While Petitioner concedes that the state court record does not contain sufficient evidence to support this claim in federal proceedings, Petitioner counters that this belongs to one of the limited factual circumstances calling for a federal evidentiary hearing, which the District Court denied. Finally, while both the Magistrate and the District Court Judge concluded that Petitioner's trial counsel's conflict of interest did not demonstrate adequate prejudice, Petitioner avers that counsel's personal involvement with a friend of the victim rendered an "actual conflict of interest" that completely deprived Petitioner of counsel's assistance during his trial. Such a conflict presumes prejudice and, thus, reasonable jurors can differ on the District Court's judgment.

For all of the above reasons, as further detailed and explicated below, Petitioner is entitled to the Constitutional relief guaranteed by the United States Constitution.

ARGUMENTS AND AUTHORITIES

CLAIM 1.

Reasonable Jurists Could Debate Whether Petitioner Was Afforded Effective Assistance Of Counsel As Guaranteed By The Sixth Amendment Where Counsel Permitted Trial To Commence Notwithstanding A Pending, Unresolved Competency Review

The following facts are undisputed: Petitioner entered a crowded bar in the early-morning hours of May 2, 2009 and opened fire, killing his estranged wife and injuring her male friend. Petitioner later contended that an "evil spirit" guided his hand during the fatal encounter. On February 5, 2010, Petitioner, through counsel, entered a plea of Not Guilty to Not Guilty and Not Guilty by Reason of Insanity. Petitioner did not request a sanity commission at this time. Approximately six (6) weeks later, Petitioner, again through counsel, moved for the appointment of a sanity commission, a move, consistent with the practice and procedure of the Orleans Parish Criminal District Court, that signaled Petitioner's competency to stand trial was also at issue. The commission was set to meet the following day, March 30, 2010.[1] There was no sanity hearing ever conducted in this matter.

The law regarding competency is well-settled. A defendant has a constitutional right not to be tried while legally incompetent. *Pate v. Robinson*, 383 U.S. 375, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966); *State v. Carmouche*, 872 So.2d 1020 (La. 2003). In Louisiana, "[m]ental incapacity to proceed exists when, as a result of mental disease or defect, a defendant presently lacks the capacity to understand the proceedings against him or to assist in his defense." La. C.Cr.P. Art. 641. Although Louisiana law utilizes a legal presumption of competence, the trial court is required to order a mental examination when there are reasonable grounds to doubt the

1 In the Memorandum in Support of the Certificate of Appealability, this date was incorrectly noted as March 30, 2017. It is corrected here to reflect the proper date.

defendant's mental capacity to proceed. See ***Carmouche***, *supra*; see also La. R.S. 15:432; ***State ex rel. Seals v. State***, 831 So.2d at 832 see also La. C.Cr.P. Art. 643. The term "reasonable grounds" encompasses circumstances where there exists reasonably doubt that the defendant has the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense. *Ibid.*

The procedures for determining competence are set out in articles 642, *et seq.* of the Criminal Code. Article 642 permits "[t]he defendant's mental incapacity to proceed [to] be raised at any time by the defense, the district attorney, or the court." La. C.Cr.P. Art. 642. Crucially, article 642 also mandates that once "the question of the defendant's mental incapacity to proceed is raised, *there shall be no further steps in the criminal prosecution . . . until the defendant is found to have the mental capacity to proceed* [emphasis added]." *Ibid.* Once competency has been raised, "[t]he court shall order a mental examination of the defendant when it has reasonable ground to doubt the defendant's mental capacity to proceed." La. C.Cr.P. Art. 643. Once the defendant's mental incapacity has been properly raised, the proceedings can only continue after the court holds a contradictory hearing and decides the issue of the defendant's mental capacity to proceed. La. C.Cr.P. Art. 647. "Where there is a bona fide question raised regarding a defendant's capacity, the failure to observe procedures, to protect a defendant's right not to be tried or convicted while incompetent to stand trial, deprives him of his due process right to a fair trial." *Seals*, 831 So.2d at 832-33.

A *bona fide* issue of Petitioner's competency existed on March 29, 2010, thus triggering the trial court's direction for the assembly of a sanity commission the following day. The Court evidently harbored sufficient "reasonable grounds to doubt the defendant's mental capacity to

proceed, article 642 proscribes any "further steps in the criminal prosecution . . . until the defendant is found to have the mental capacity to proceed." Moreover, pursuant to Article 647, the defendant cannot be "found to have the mental capacity to proceed" until the Court conducts a contradictory hearing, not merely resolves the issue in a status conference without written or verbal reasons on the record.

Neither the Magistrate court not the District Court appeared to recognize the distinction between Petitioner's competency to proceed at trial and assist his attorneys and his sanity at the time of the commission of the offense. The latter was initiated at the time the Not Guilty by Reason of Insanity plea was entered on Petitioner's behalf and dispensed with when the plea was withdrawn on the morning of trial. Petitioner's *competency*, on the other hand, was raised on March 29, 2010, when a sanity commission was appointed to examine him. Despite the moniker, the commission's primary purpose in Orleans Parish is to examine defendants for mental competency to proceed to trial and assist in their own defense. Orleans Parish judges do not routinely appoint medical experts to opine regarding a defendant's sanity at the time of the commission of the offense, a burden that must fall exclusively on the defendant and his trial team. Petitioner's mental competency to proceed was never resolved and remains outstanding to this day.

The Magistrate Court held: "Parker has not established a reasonable basis on which his trial counsel might have pursued an insanity defense of appointment of a sanity commission." EROA. 175. The District Court likewise found that Petitioner did not "identif[y] any basis upon which his attorneys could have pursued an insanity defense." EROA. 244-245. Neither court addressed the violation of Petitioner's procedural due process rights by the invocation of a

competency issue, the order for a hearing, and the subsequent surrender of this claim without resolution. Such a failure subjects Petitioner to the prospect of a criminal jury trial while incompetent. *Bouchillon v. Collins*, 907 F.2d 589 (5th Cir. 1990). Consequently, Petitioner is entitled to the issuance of a Certificate of Appealability.

CLAIM 2.

Reasonable Jurists Could Debate Whether Petitioner Was Afforded Effective Assistance Of Counsel As Guaranteed By The Sixth Amendment Where Counsel Refused To Permit Petitioner To Testify In His Own Defense And Whether Petitioner Was Entitled To A Federal Evidentiary Hearing To Substantiate This Claim

In recommending dismissal of Petitioner's failure-to-testify claim, the Magistrate Court noted that the claim was unsupported by the record: "There is nothing in this record sufficient to prove an actual violation of [Petitioner's] right to testify." EROA. 181. The District Court likewise held that "Petitioner's assertion that his counsel advised against his testimony is insufficient" and that "Petitioner has not established that counsel's advice that Petitioner not testify was unreasonable." Petitioner does not dispute the want of supporting evidence corroborating his instant claim of ineffectiveness, but respectfully avers that the District Court erred in failing to permit Petitioner the opportunity to supplement the state court record with an evidentiary hearing.

The preeminent authority on federal Habeas evidentiary hearings is *Cullen v. Pinholster*, 131 S.Ct.1388, 179 L.Ed.2d 557 (2011). Justice Thomas, writing for the *Cullen* majority held that "evidence introduced in federal court has no bearing on § 2254(d)(1) review. If a claim has been adjudicated on the merits by a state court, a federal habeas petitioner must overcome the limitation of § 2254(d)(1) on the record that was before that state court." *Cullen*, 131 S.Ct. at

1400. Justice Thomas' "limitation of § 2254" is a reference to the operative language found in this subsection that states:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall bot be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim -
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.

28 U.S.C. § 2254(d)(1). The majority held that the "backwards-looking" words: "resulted in" and "involved" implied that the focus for such retrospection must naturally be the state court's previous factual findings and not an evidentiary hearing at the federal level.

As Justice Sotomayor noted in her dissent, the majority's reasoning could find no basis in the language of the statute. The dissent noted that the qualifying phrase "in light of the evidence presented in the State court proceeding" appeared in 2254(d)(2) thus making no amends as it regards Congress' intentions. If, as the majority held, the past-tense verbs found in 2254(d)(1) create a textual limitation on the federal court's ability to hold an evidentiary hearing then the more-emphatic language found in 2254(d)(2) is mere superfluity. "The majority's construction of § 2254(d)(1) fails to give meaning to Congress' decision to include language referring to the evidence presented to the state court in § 2254(d)(2)." ***Cullen***, 131 S.Ct. at 1415 (Sotomayer, J. dissenting.)

Notwithstanding the above, the application of the ***Cullen*** standard is activated only by adjudication on the merits at the state court level. The availability of a full and fair hearing is the benchmark of our American system of substantial justice. See *e.g.*, ***Daniels v. united States***, 532 U.S. 374, 386-87, 121 S.Ct. 1578, 149 L.Ed.2d 590 (2001) (recognizing that due process requires

a procedurally adequate forum in which to contest constitutional claims bearing on one's sentence); See also *Wright v. West*, 505 U.S. 277, 112 S.Ct. 2482, 120 L.Ed.2d 225 (1992); *Case v. Nebraska*, 381 U.S. 336, 85 S.Ct. 1486, 14 L.Ed.2d 422 (1965). The U.S. Supreme Court has long recognized that not all state prisoners are given adequate opportunities to develop their factual contentions before the state courts. See *e.g. Townsend v. Sain*, 372 U.S. 293, 313, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963). The *Cullen* Court did not proscribe a federal court's discretion to grant a state inmate a federal evidentiary hearing where the petitioner was denied a full and fair hearing at the state level. "[N]ot all federal habeas claims by state prisoners fall within the scope of § 2254(d), which applies only to claims "adjudicated on the merits in State court proceedings [emphasis added]." *Cullen*, 131 S.Ct. at 1401; see also *Williams v. Taylor*, 529 U.S. 420, 120 S.Ct. 1479, 146 L.Ed.2d 435 (2000).

Petitioner's state post-conviction application was summarily denied and the record is devoid of any rational basis for the trial court's dismissal. Consequently, it cannot be determined that the Court was guided by principles of justice rather than capriciousness. This is not "adjudicated on the merits" within the meaning of § 2254(d)(1) and the Supreme Court's holding in *Cullen* simply does not apply.

Moreover, grounds also exist for a federal evidentiary hearing where a state prisoner, such as Petitioner, is denied effective representation on post-conviction necessary to ensure that the state procedures, including a full and fair adjudication of the facts and law relative to a petitioner's claims, are adequately followed. *Maples v. Thomas*, 565 U.S. ___, 132 S.Ct. 912, 181 L.Ed.2d 807 (2012); *Martinez v. Ryan*, 566 U.S. 1, ___, 132 S.Ct. 1309, 182 L.Ed.2d 272 (2012). Where, previously, missteps in the litigation of state court claims would inexorably bar a

petitioner from litigating those claims in federal court, the Supreme Court's twin decisions in *Maples* and *Martinez* provided that deficient performance by state post-conviction counsel can overcome procedural default at the federal level and permit a petitioner to litigate defaulted claims on the merits in federal habeas.

> When a State requires a prisoner to raise an ineffective assistance of trial counsel claim in a collateral proceeding, a prisoner may establish cause for a default of an ineffective assistance claim in two circumstances. The first is where the state courts did not appoint counsel in the initial-review collateral proceeding for a claim of ineffective assistance at trial. The second is where appointed counsel in the initial-review collateral proceeding, where the claim should have been raised, was ineffective under the standards of *Strickland*.

Martinez, *supra*, 132 S.Ct. at 1318.

These decision are particular relevant to Petitioner herein. Both the Magistrate and the District Court derided post-conviction counsel's "lackluster," "rambling," "stream of consciousness" writing and repeatedly described Petitioner's state proceedings as "unsubstantiated" and "speculative." The Magistrate noted that after "review[ing] each of [the state court] pleadings ...it is difficult to identify the particular arguments counsel asserted." EROA.159. Counsel appeared out of his depth in constructing a cohesive collateral attack, setting fourth with specificity and a minimum of editorializing the issues Petitioner was raising, and giving a clear, concise call for relief. As a result, Petitioner's state post-conviction application was summary denied at all levels of review and no full or fair hearing was conducted.

Against the backdrop, *Maples* and *Martinez*, the High Court's ruling in *Cullen* must be rad to allow a gateway through 2254(d) for petitioners who were effectively prohibited from obtaining a full and fair hearing of their post-conviction claims to the want of effective representation during state collateral proceedings. The logical implication of these ruling results

in an exception to the *Cullen* Court's draconian proscriptions in cases where a state petitioner was effectively prevented from obtaining a full and fair adjudication due to the ineffectiveness of his post-conviction counsel. To do otherwise than to read these decisions together is to eviscerate with one broad swath the protections afforded by *Maples* and *Martinez*, a result that was clearly neither intended not anticipated by the *Cullen* majority. Consequently, Petitioner was entitled to an evidentiary hearing in order to expand the record on this issue.

CLAIM 3.

Reasonable Jurists Could Debate Whether Petitioner Was Afforded Effective Assistance Of Counsel As Guaranteed By The Sixth Amendment Where Counsel Operated Under An Actual Conflict Of Interest

A claim of ineffectiveness of counsel is assessed by the two-part "*Strickland* test," set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 67 (1984). Under *Strickland*, a defendant claiming ineffective assistance of counsel must show that his "counsel's performance was deficient" and that "the deficient performance prejudiced the defense." *Ibid.* However, "[w]hen an actual conflict adversely affects counsel's performance, prejudice is presumed." *Gallow v. Cooper*, No. 10-30861, 2012 U.S. App. LEXIS 17976, at *23 (5th Cir. Aug. 24, 2012), *citing Cuyler v. Sullivan*, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980).

> In *Cuyler*, the Court held that prejudice is presumed when counsel is burdened by an actual conflict of interest. In those circumstances, counsel breaches the duty of loyalty, perhaps the most basic of counsel's duties. Moreover, it is difficult to measure the precise effect on the defense of representation corrupted by conflicting interests. Given the obligation of counsel to avoid conflicts of interest and the ability of trial courts to make early inquiry in certain situations likely to give rise to conflicts, see, e.g., Fed. R. Crim. Proc. 44(c), it is reasonable for the criminal justice system to maintain a fairly rigid rule of presumed prejudice for conflicts of interest [internal citations omitted].

Strickland, 466 U.S. at 692.

Just prior to trial, Petitioner's trial counsel, Andrew Duffy, notified the Court of a "personal problem": Counsel's close, personal friend had just texted counsel advising him that he (the friend) had been personally acquainted with the victim and several of the State's witnesses. Counsel exhorted the judge for a withdrawal noting that his relationship with his "best friend" and the additional information he received therefrom created an actual conflict of interest. The trial court, however, denied counsel's requests.

Federal courts have held that an attorney laboring under an actual conflict of interest cannot render effective legal assistance to a defendant whom he is representing. An "actual conflict of interest" occurs:

> [W]hen a defense attorney places himself in a situation inherently conducive to divided loyalties. If a defense attorney owes duties to a party whose interests are adverse to those of the defendant, than an actual conflict exists. The interest of the other client and the defendant are sufficiently adverse if it is shown that the attorney owes a duty to the defendant to take some action that could be detrimental to his other client.

Zucker v. Alabama, 588 F.2d 436, 439 (5th Cir. 1979). Moreover, "*prejudice is presumed* when counsel is burdened by an actual conflict of interest," *Strickland*, 466 U.S. at 692. Although the petitioner must nonetheless show that the conflict adversely affected his counsel's performance in order to avail himself of the presumption. *Ibid.*

In denying Petitioner's Petition, both the Magistrate and the District Court were guided by the Fifth Circuit's holding in *Beets v. Scott*, 56 F.3d 1258 (5th Cir. 1995). In *Beets*, this Court narrowly held that "*Strickland* more appropriately gauges an attorney's conflict of interest that springs not from multiple client representation but from a conflict between the attorney's personal interest and that of his client." *Beets*, 65 F.3d at 1260. Accordingly, while a defendant alleging an actual conflict of interest relative to divided loyalties between his counsel's active

clients would only have to demonstrate an actual conflict of interest and those of her client, would have no such benefit, instead having to establish both deficient performance and actual prejudice.

However, the *Beets* Court erred in reading a particular example of *Cuyler* analysis being the exclusive instance. Though only in the multiple-client context had the Supreme Court dispensed with the prejudice prong of *Strickland* it does not stand to reason that the Supreme Court choose to affirmatively limit *Cuyler*'s application to those scenarios. The Supreme Court's holding in *Mickens v. Taylor*, 535 U.S. 162, 122 S.Ct. 1237, 152 L.Ed.2d 291 (2002) makes this abundantly clear.

In *Mickens*, the High Court acknowledged that a number of circuits applied *Cuyler* to alleged attorney ethical conflicts where representation of the defendant implicated counsel's personal or financial interests. The Supreme Court noted that "the language in *Sullivan* itself does not clearly establish, or indeed even support, such expansive application" but stops short of issuing an admonition regarding its use in cases involving trial counsel's ethical lapses. *Ibid.* Instead, the Court clarifies the rationale behind the *Cuyler* ruling:

> This is not to suggest that one ethical duty is more or less important than another. The purpose of out *Holloway* and *Sullivan* exceptions from the ordinary requirements of *Strickland*, however, is not to enforce the Canons of Legal Ethics, but to apply needed prophylaxis in situation where *Strickland* itself is evidently inadequately to assure vindication of the defendant's Sixth Amendment right to counsel.

Mickens, 535 U.S. at 176. In applying the "actual conflict/adversely affect" reasoning to multiple-defendant conflicts, in nodding in the direction of conflicts between present and former clients – the central holding in *Mickens* – and in acknowledging the circuit courts' use in a variety of contexts without overruling them expressly or impliedly, the Supreme Court clearly

recognized that the *Cuyler* reasoning is an open question of law and not restricted, as this Court held in *Beets*, to cases of conflicts generated by representation of multiple pending clients.

In *Beets*, this Court attempted to divine the Supreme Court's intentions in *Cuyler* and held that the phrase "actively represented" necessarily expressed the High Court's intention to limit *Cuyler* to multi-defendant representations. In *Mickens*, while the Supreme Court did not overrule *Beets* it did implicitly undermined the *Beets* Court's reasoning by holding that *Cuyler* was not limited to multiple defendant conflicts but could feasibly be extended to any situation where "*Strickland* itself is evidently inadequate." In other words, without extending specifically the *Cuyler* holding, the Supreme Court did affirmatively state that *Cuyler* was not limited to actual conflicts arising from multiple-defendant representations and thereby negated the Fifth Circuit's restrictive reading of the Supreme Court's holding.

Petitioner's counsel operated under an actual conflict of interest that adversely affected his performance. In the midst of a mandatory life without parole second Degree Murder case, counsel learns for the first time that an intimate acquaintance – his "best friend"- was also familiar with the victim and seemingly urged counsel not to be involved in defending the victim's murdered, a pressure counsel felt raised to such a level that only withdrawal could salvage Petitioner's trial.

The District Court erred in following this Court's ruling in *Beets* which relied on a reading of *Cuyler* that has now been revealed to have been in error. The U.S. Supreme Court's ruling in *Cuyler*, as further clarified and qualified by the High Court in *Strickland* and more recently in *Mickens* does not limit the *Cuyler* standard to multiple representation cases as held by *Beets* but acknowledges that this more sympathetic standard is necessary wherever and

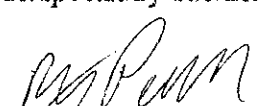
whenever "*Strickland* itself is evidently inadequate to assure vindication of the defendant's Sixth Amendment right to counsel." *Mickens*, 535 U.S. at 176.

The actual or constructive denial of counsel caused by an actual conflict of interest that adversely affects counsel's representation requires only a showing of adverse effect on counsel's performance, not prejudice to Petitioner's trial defense. Unless this Court is willing to accept the precept that a criminal defendant facing a life sentence is not entitled to representation throughout his entire trial, unless the Sixth Amendment can tolerate a reasonable degree of actual conflict of interests, Petitioner is entitled to Habeas Corpus relief and the issuance of a Certificate of Appealability.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



ROY PARKER #569364

Date: September 24, 2018

No._____

IN THE

SUPREME COURT OF THE UNITED STATES

ROY PARKER -- PETITIONER

vs.

BURL CAIN, WARDEN -- RESPONDENT(S)

PROOF OF SERVICE

I, **ROY PARKER**, do swear or declare that on this date, September 24, 2018, as required by Supreme Court Rule 29, I have served the enclosed MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERS* and PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing and envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid, or by delivery to a third-party commercial carrier for delivery within 3 calendar days.

The names and addresses of those served are as follows:

Leon A. Cannizzaro, Jr., D.A.
District Attorney's Office
Parish of Orleans
619 S. White St.
New Orleans, Louisiana 70119

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

Executed on September 24, 2018.

(Signature) Roy Parker

ROY PARKER #569364

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 17-30774

ROY PARKER,

Petitioner-Appellant

v.

DARREL VANNOY, WARDEN, LOUISIANA STATE PENITENTIARY,

Respondent-Appellee

Appeals from the United States District Court
for the Eastern District of Louisiana

O R D E R:

Roy Parker, Louisiana prisoner # 569364, seeks a certificate of appealability (COA) to appeal the district court's denial of his 28 U.S.C. § 2254 petition, which challenged his convictions for murder and attempted murder. In support of his COA motion, he argues that (1) the district court overlooked his argument that he was tried without his competency being established, (2) he was entitled to a federal evidentiary hearing on his claim that his counsel prevented him from testifying at trial, and (3) the district court erroneously applied *Beets v. Scott*, 65 F.3d 1258, 1260 (5th Cir. 1995), in rejecting that he benefited from presumed prejudice as to his claim that trial counsel maintained an actual conflict of interest.

This court may issue a COA only if Parker has "made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Where,

as here, the district court has denied the claims on the merits, "[t]he petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong" or that "the issues presented were adequate to deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (internal quotation marks and citation omitted).

To the extent that Parker has reframed the first issue from a claim of ineffective assistance of counsel to a due process claim, we will not consider it. *Henderson v. Cockrell*, 333 F.3d 592, 605 (5th Cir. 2003). To the extent Parker's briefing otherwise was adequate, *see United States v. Scroggins*, 599 F.3d 433, 446 (5th Cir. 2010), Parker has not made the required showing, *see Slack*, 529 U.S. at 484. Therefore, his motion for a COA is DENIED.

JAMES C. HO
UNITED STATES CIRCUIT JUDGE