No. 19-6096

IN THE
SUPREME COURT OF THE UNITED STATES

JERRY SIMMONS
Plaintiff

V.S.

DARREL VANNOY
Defendants

PETITION FOR WRIT OF CERTIORARI

RESPECTFULLY SUBMITTED

Jerry Simmons #593386
Louisiana State Penitentiary
Angola, La., 70712

QUESTIONS PRESENTED

Whether the decision by the United States Fifth Circuit Court of Appeals contrary to, or involve an unreasonable application of, clearly established Federal Law, as determined by the Supreme Court of the United States in respect to;

1.) Failing To Consider Mr. Simmons' "Constructive Denial Of Assistance Of Counsel" Claim Under The Cronic Standard Opposed To The Strickland Two Prong Test, Where Counsel Provided No Actual Assistance Towards Mr. Simmons' Defense And Maintained Relationship With Victim?

2.) Denial Of Mr. Simmons' Fundamental Right Of Self-Representation At The Critical Pretrial Stages Of The Proceedings?

3.) Not Applying Structural Error Doctrine, Requiring Automatic Reversal In Respect To Claims Of Constructive Denial Of Assistance Of Counsel; Denial Of Self-Representation and Being Tried By A Bias Judge?

4.) The Denial Of Mr. Simmons' Sixth Amendment Right To Present His Defense Including His Accompanying Rights Of Assistance Of Counsel For His Defense, Compulsory Process; His Request To Change His Plea And Combination Defense; And Request For Expert In Field Of Psychiatry Crucial For His Insanity Defense?

5.) Mr. Simmons' Claim Of Being Tried By A Bias Judge, Where Judge Acted As Part Of The Prosecution Team; Denied Indigent's Request For Expert, Informing Him Expert Was Not Available For Him; Ruled On Defendant's Sanity At Time Of The Offense; Misstated Facts And Facts Of Law In Denying Mr. Simmons' Defense And Other Request?

These questions are worthy of this Honorable Court's review, needed to settle disputes as to whether or not Mr. Simmons' fundamental rights as explicitly and/or implicitly determined by the United State's Supreme Court were violated in obtaining his conviction.

PARTIES TO THE PROCEEDING

Petitioner, Jerry Simmons, hereby certifies that the following persons have an interest in the outcome of this case:

Petitioner: Jerry Simmons #593386

Defendant: Darrell Vannoy, Warden.

These representations are being made so that the Judges of this Honorable Court may evaluate possible disqualification or recusal. There are no other parties to this action within the scope of Supreme Court Rule 29.1.

RESPECTFULLY SUBMITTED

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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

JERRY SIMMONS
Plaintiff

VS.

DARREL VANNOY
Defendants

PETITION FOR WRIT OF CERTIORARI

Petition for writ of certiorari to the United States Supreme Court from the Denial from the Court of Appeals for the Fifth Circuit

MEMORANDUM IN SUPPORT

Petitioner, Jerry Simmons, respectfully prays that a writ of certiorari be issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled proceeding on June 26, 2019. In particular, that the Accused Was Constructively Denied Assistance of Counsel for His Defense: Denied His Right of Self-representation and Was Tried by a Bias Judge.

Mr. Simmons' further request collateral review on his claims of Denial of His Right To Present a Defense and Denial of His Right of Compulsory Process.

Mr. Simmons', respectfully prays that a writ of certiorari be issue to determine whether "this particular Conviction" was Obtained in Violation of United State Constitution, entitling him to relief under 28 U.S.C. § 2254(d)(1)

OPINIONS BELOW

1. State v. Simmons, 13 So.3d358, 13-258 La. App. 5 Cir. 2/26/14) Direct Appeal, The Louisiana Supreme Court Denying relief appears at Appendix-A

2. Jerry Simmons v. Darrel Vanoy No.15-KH-763 Application For Post-Conviction Relief The Louisiana Supreme Court Denying relief appears at Appendix-B

3. Jerry Simmons v. Darrel Vannoy, NO: 2:17-CV-12120 Writ of Habeas the United States District Court opinion Denying relief appears at Appendix-C

4. Jerry Simmons v. Darrel Vannoy, NO: 2:17-CV-12120 Certificate of Appealability and the United States Court of Appeals, Fifth Circuit, Denying relief in No: 18-30711 appears at Appendix D

5. Jerry Simmons v. Darrel Vannoy, NO: 2:17-CV-12120 Appeal to the United States Fifth Circuit Court of Appeal denying relief in No. 18-30711 appears at Appendix-E

JURISDICTION

This Honorable United States Supreme Court has jurisdiction to hear this petition under the United States Constitution Article 3 § 2, clause 1: Title 28, U.S.C.A. § 2254(d)(1) and **Hohn v. United States**, 524 U.S. 236, 118 S.Ct. 1969, 141 L.Ed.2d 242 (U.S. Neb. 1998).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The United States Constitution, Amendment VI:

> "In all criminal prosecutions, the accused shall enjoy the right to have the Assistance of Counsel for his defense."

The United States Constitution, Amendment XIV, § 1: in pertinent part:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U.S.C. § 2254(d)(1):

> (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

PROCEDURAL HISTORY

On October 13, 2010. Mr. Simmons was charged by Bill of Information with; one count of Resisting Arrest with Force or Violence, in violation of La. R.S. 14:108.2; one count of Attempted Murder of a Police Officer, in violation La. R.S. 14:27 and one count Disarming a Police Officer, in violation La. R.S. 14:34.6.

On September 6, 2011 this matter proceeded to trial in the 29th Judicial District Court. Mr. Simmons', after denial of multiple request for appointment of substitute counsel, represented himself.

On September 8, 2011, Mr. Simmons' was found guilty on all counts. October 12, 2011, he was sentenced to 22 years imprisonment in the Louisiana Department of Corrections, to run concurrently. Mr. Simmons' moved for Appeal which was granted. On May 29, 2012, after a multibill hearing, the trial court vacated Mr. Simmons' original sentence and imposed concurrent, enhanced, sentence of 75 years imprisonment, without benefit of parole, probation, or suspension of sentence.

Appellate brief was filed on Mr. Simmons' behalf on October 29, 2013 by **Jane L. Beebe, Louisiana Appellate Project, N.O. La. 13-KA-0258**. Mr. Simmons' filing motion to supplement brief, 13-KA-0258. November 12, 2013; order for delivery of transcripts 13-KA-0258. November 13, 2013; Mr. Simmons' Supplemental Brief 13-KA-0258. December 13, 2013: Notice of Judgment 13-KA-258, February 26, 2014. La. 5th Circuit "Affirmed" conviction and sentence on Direct Appeal, **State v. Simmons**, 136 So.3d 358(La. App. 5th Cir. 2014). La. Supreme Court, Affirmed conviction 10/31/2014

Mr. Simmons' submitted his Application for Post Conviction Relief into the trial court. 7/8/2015. 10-0582. Within one year of the affirmation of his conviction and sentence, preserving both his state post conviction rights and the federal habeas deadlines established by the Anti-Terrorism and Effective Death Penalty Act, 28 U.S.C. § 2244. The trial court held Evidentiary Hearing on November 3, 2015, ultimately denying relief.

Mr. Simmons' sought Supervisory Writ with Louisiana 5th Cir. Court, November, 30 2015 under

Docket No: 15-KH-763. A per curium ordered 15-KH-763 December 7, 2015; Per Curium 10-0582 December 29, 2015. Mr. Simmons' response to Per Curium 15-KH-763, 3, 7, 2016. Supervisory Writ 3/23/16. was denied April 26, 2016.

Mr. Simmons' sought Writ to the Louisiana Supreme Court, No: 16-KH-1055 on 5/18/2016, amending writ 6/9/16. The Louisiana Supreme Court denied Mr. Simmons' writ Sept. 22, 2017

Mr. Simmons' timely submitted his Petition for Writ of Habeas Corpus by a person in State Custody and Memorandum in Support under 28 U.S.C. § 2254(d)(1)(2) for trial court consideration, which was denied. He then sought review in the Federal Fifth Circuit court which was denied May 29, 2018. As was Mr. Simmons' request for COA. And his appealed to the Fifth Circuit Court of Appeals, receiving denial dated June 26, 2019.

He now submit his Writ of Certiorari to this Honorable United States Supreme Court by delivering same to the Classification Officer assigned to his unit, receiving receipt for same in accordance with penitentiary rules and procedures and therefore, this application is timely and proper before this Honorable Court for its consideration.

STATEMENT OF THE CASE

During a three week period in 2010, between 8/6/2010 thru 8/23/2010 Mr. Simmons' had been getting stopped once a week by St. Charles Parish Sheriff's Office (SCPSO)

On the night of the offense, 8/23/2010, Mr. Simmons' was once again stopped by SCPSO which resulting in an altercation between Mr. Simmons' and Deputy, which was captured on dash cam video. Mr. Simmons' was arrested and charged with one count of resisting arrest with force or violence, La. R.S. 14:108.2, One count of Disarming a police officer, La. R.S. 14:34.6, and one count of Attempted Murder of a Police Officer, La. R.S. 14:27.

Due to client-counsel conflicts, and trial courts reluctance to appoint substitute counsel in the critical pretrial stages, Mr. Simmons', with no choice left him, filed defense motions on his behalf,

including request for Appointment of New Counsel, psychiatric evaluation, hospital report, and information related to traffic stops in the Parish, which were denied in a blanket ruling after attorney refused to adopt any portion of them. Attorney giving Mr. Simmons' the option to "choose" between being represented or self-representation, before the trial court.

Mr. Simmons', after gaining control of his defense with less than thirty days to prepare for trial, represented himself. Trial judge, misstating facts and facts of law denied all request for continuance, plea and combination defense, and request for experts in the field of clinical psychiatry for his defense. On September 8, 2011 after a jury trial, Mr. Simmons' was found guilty of all charges. He was subsequently sentenced to twenty two years at the Louisiana State Penitentiary at Angola, multi-billed on May 29, 2012 at which time his sentence was enhanced to seventy five years.

ERROR ONE

THE FIFTH CIRCUIT COURT OF APPEALS 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 IN NOT CONSIDERING THE MERITS OF MR. SIMMONS CLAIM OF CONSTRUCTIVE DENIAL ASSISTANCE OF COUNSEL FOR HIS DEFENSE UNDER THE STANDARD ENUNCIATED IN U.S. V. CRONIC, 466 U.S. 648 (1984).

United States Supreme Court Holding:

In **Strickland v. Washington,** 466 U.S. 668, 104 S.Ct. 2052 (1984) the United States Supreme Court enunciated a two prong test when determining ineffective assistance of counsel claims;

> First defendant must show that counsel's performance was deficient, requiring showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed defendant by the Sixth Amendment and, Second, defendant must show that the deficient performance prejudiced the defense by showing that counsel's errors were so serious as to deprive defendant of a fair trial, a trial whose result is reliable

In **U.S. v. Cronic**, 466 U.S. 648 (1984) the United States Supreme Court addressed the Constructive denial of Accused's Sixth Amendment right of assistance of counsel for his defense

> "The Sixth Amendment, however, guarantees more than the appointment of competent counsel, by its terms, one has a right to the assistance of counsel for his defense. Assistance begins with the appointment, it does not end there. In some cases the performance of counsel may be so inadequate that, in effect no assistance of counsel is provided, clearly, in such cases the defendant's Sixth Amendment right to have "assistance of counsel" is denied." U.S. at 654n.2, fn.11.

Where the claim of ineffective assistance of counsel must be evaluated from a federal constitutional basis under the standards set forth in **Strickland**. The constructive denial of counsel analysis, on the other hand, stems from the Supreme Courts decision in **Cronic**.[1]

Courts have concluded that a constructive denial of counsel occurs, in only a very narrow spectrum of cases where the circumstances leading to counsel's ineffectiveness are so egregious that the defendant was in effect denied any meaningful assistance at all", **Craker v. McCotter**, 805 F.2d 538, 542 n.2,3 (C.A. 5 1986)(Citing Cases). "The Supreme Court has dispensed with the Strickland prejudice inquiry in cases of actual or constructive denial of counsel". **Childress v. Johnson**, 103 F.3d 1221, 1228 (CA. 5 1997).

Under both holdings, **Strickland** and **Cronic**, the Claimant is burdened with providing acts and instances of counsel's conduct which supports his claim of "ineffective assistance of counsel" or "constructive denial of assistance of counsel". 28 USC § 2254(e)(1)

In meeting this burden Mr. Simmons' provided acts and instances of counsel's "inadequacies" which worked to "constructive deprive him any meaningful assistance of counsel for his defense whatsoever". This included the May 11, 2011 Preliminary Examination records where attorney informed the trial court, in an argument akin to the prosecutor's objection that "Mr. Simmons' defense request, which he previously refused to fulfill were "ad nauseam" "Excessive to the point of being sickening" **The Merriam-Webster Dictionary** 11th Ed. P. 7), that, he (attorney) will not be arguing or adopting any portion of Mr. Simmons' defense request, and gave Mr. Simmons the ultimatum to choose

1 See Mr. Simmons' C.O.A. Pp. 19-27 Apndx. D

between self-representation or being represented by him. (Ex. 2 May 11, 2011 Pp.32-33, LL 21-11)

The last reviewing court diminished the significance of attorney's decision not to provide any actual assistance towards Mr. Simmons defense, the ultimatum to choose, as well as attorney's "shattering" remarks. Court electing to focus on attorney competence, which, standing alone, do no not satisfy the Sixth Amendment guarantee of "Assistance of counsel for the accused's defense." **Cronic** ("The Sixth Amendment, however, guarantees more than the appointment of competent counsel"). see Writ Denied No 15-KH-763, April 26, 2016.

> "Mr. Marino use of the phrase ad nauseam was made during pretrial hearing to the trial Judge and outside of the presence of the jury, therefore that statement was not defamatory in any way against Mr. Simmons, had no impact on his trial and did not demonstrate Mr. Marino was less than competent counsel". P. 6(a)(emphasis added).

Appendix-B

Contrary to state's opinion these events did impact the trial and prejudice Mr. Simmons. Without counsel assisting in his defense pretrial, Mr. Simmons, unfamiliar with the rules and procedures of court was unable to establish his insisted upon plea and combination defense of insanity at a later date, or able to obtain the basic tools essential for the presentation of his defense on his own. This Court recognizing, "Counsel are the means in which the other rights of the person on trial are secured" **Powell v. Alabama**, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932)

Last reviewing court miss, that during this May 11, 2011 hearing attorney conveyed that he will not be assisting Mr. Simmons with "his" defense; has simultaneously made request for his defense and gave Mr. Simmons the ultimatum to "choose".

In **Plumlee v. Del Papa**, 465 F.3d 910, 920, n.9 (C.A. 9 (Nev.) 2006) the Federal Circuit addressed the very issue of giving the accused the ultimatum to choose see Appnx.- (for argument and quote):*cf*. **Brookhart v. Janis**, 384 U.S. 1, 86 S.Ct. 1245, 16 L.Ed.2d 314 (1966)

QUESTION OF LAW

1.

Whether Trial Court Erred In Not Appointing Substitute Counsel In The Face Of Irreconcilable Client-Counsel Defense Conflict Denying Mr. Simmons' His Right To The Assistance Of Counsel For His Defense?

At the time of Mr. Simmons' arrested in 2010 he had a substantial right to "effective" assistance of counsel at all stages of his criminal prosecution. **McMann v. Richardson**, U.S., at 772, fn. 14. The United States Supreme Court had determined "the right to assistance of counsel to be a fundamental element of due process" **Gideon v. Wainwright**, 372 U.S. 335, 83 S.Ct. 792, 9L.Ed.2d 799 (1963), while recognizing the "Constitutional right to assistance of counsel for his defense attached at, or after the time that the adversarial judicial proceedings have been initiated against him. It is this point that marks the commencement of the criminal prosecution to which alone the explicit guarantees of the Sixth Amendment are applicable" **U.S. v. Ash**, 413 U.S. 300, 322, 93 S. Ct. 2568, 2580, 37 L. Ed 619 (1973) citing; **Kirby v. Illinois**, 406 U.S. 682, 688, 690, 92 S. Ct.1877, 1882, 32 L. Ed 2d 411"

Mr. Simmons' right of "Assistance of Counsel for his defense" and "other" substantial rights were deemed "fundamental to our scheme of ordered liberty" **Duncan v. Louisiana**, 391 U.S.145,149, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968) and "deeply rooted in this Nation's history and tradition" **Washington v. Glucksberg**, 521 U.S. 702, 721, 117 S.Ct. 2302, 138 L.Ed.2d 772 (1997).

Further, Mr. Simmons had a fundamental right to present a defense, his version of events for jury's consideration pursuant to the Sixth and Fourteenth Amendments of the United States Constitution. **Washington V. Texas**, 388 U.S. 14,19 (1967) as recognized in Louisiana's Constitution, and mirrored in it's jurisprudence. **State v. Vigee**, 518 So 2d 501,

> "Both the Sixth Amendment of the United States Constitution and the Louisiana Constitution Art. I § 16 (1974) Provide that a criminal defendant has the right to present a defense (quoting Washington v. Texas, 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967) recognizing this right is a fundamental element of due process" So.2d at 503 n.1

The Court recognized "The counsel provision supplements this design. It speaks of the

"assistance" of counsel, and an assistant, however expert, is still an assistant. The Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants the accused personally the right to make his defense. The right to defend is given directly to the accused for it is he who suffers the consequences if the defense fails". **Faretta v. California**, 422 U.S. 806, 819-20, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975): again see **Ash**, U.S. at 312 n.3.(same)

Mr. Simmons, relying on stare decisis, submits his claims are grounded in these federal determinations, "It is the accused not attorney who is presumed to be master of his defense", **Faretta**, U.S. at 848: **Moore v. Johnson**, 185 F.3d 244, 263 n.9 (Ca. 5 1999): **Clemmons v. Delo**, 124 F.3d 944, 948 (Ca. 8 1997).

At the time of the proceedings, unbeknownst to officers of the Court, Mr. Simmons was in the process of loosing his livelihood. He had recently quit his job due to racial discrimination practices by his than employer, had filed a racial discrimination complaint with the ACLU of New Orleans, and had fallen further behind on his house note and vehicle payment. These stressful life occurrences were compounded by the fact that he had been getting stopped once a week, by St. Charles Parish Sheriffs Office (SCPSO), who would issue him traffic citations; citations he truly believed were being fraudulently issued under the circumstances. On the night of the offense Mr. Simmons was once again stopped and alleged he snapped. cf. (Ex-3. Aug, 24, 2011 P.9 LN. 1-7(Mr. Simmons).

> "What I'm trying to do is let you know from the things that were going on with me prior to being in this incident. You need notification of other things going on in my life, pretty much like harassment by the police officers I was pushed to the point where I pretty much just snapped...The evidence is not, you know exculpatory, but it is capable of my defense."

Mr. Simmons' supported that he conveyed this information to his court appointed attorney (*infra*) and/or trial judge (*supra*) with the expectation and belief that he would be provided copies of his citations, a psychiatric evaluation and other requested evidence crucial for his defense, through his Sixth Amendment right of Compulsory Process. Appendix-B (Evid. Hrng. Nov. 3, 2015 P. 68 ln. 7-11

(Mr. Simmons) "During our initial conversation, during my initial interview, did I inform you that I snapped? That I was not in my right mind?... (Attorney) "You indicated that a number of different occasions that you were not in your right mind[2]...ibid. P.53 Ln. 7. (Attorney) "The defense that he alleged, that he was insisting that I bring forward in the court, regardless of whether that had merit or not" (Emphasis Added)...ibid. P.72 Ln. 24-27(Attorney) "You wanted me to attempt to sell to a jury the fact that you snapped in your mind. I couldn't sell that to a jury. If they saw that video")

Where the right to compulsory process does more than grant subpoena power, requiring admission of relevant evidence offered by the defense in certain circumstances, and is an important part of the Sixth Amendment's assurance of the "right to present a defense." These records show that Mr. Simmons, (relying on "this" Court's precedence on "attorney's duty to assist the Accused in establishing his plea and defense.") conveyed to attorney his insistence upon using Louisiana's combination plea and defense of insanity.

Likewise, where the Accused's rights are personal and cannot be waived by secondary parties. **Brookhart,** U.S., at 7-8. It can be argued, "Attorney" basing his decision on state's version of overwhelming evidence, "If [jury] saw that video", subjectively elected to override, i.e. waive, Mr. Simmons' autonomy to made his own decisions as to the objective his defense, his specific defense request, and by proxy denying him "assistance of counsel for his defense"; fueling distrust as well as a irreconcilable "client-counsel defense conflict"

These records provided reviewing Court(s) with undeniable proof that Mr. Simmons, presumed to be the master of his defense, having intimate and first hand knowledge of events occurring outside of the record, "the mind state of the Accused at the time of the offense and other events", clearly

2 ABA model code of Professional Responsibility 1980; Ethical Consideration EC 7-6; "Often a lawyer is asked to assist his client in developing evidence relevant to the state of mind of the client at a particular time. He may properly assist his client in development and preservation of evidence of existing motives, intent, or desire: Obviously he may not do anything furthering the citation or preservation of false evidence. In many cases a lawyer may not be certain as to the state of mind of his client and in those situations he should resolve reasonable doubt in "favor" of his client".

expressed his desire and insistence upon utilizing the statutorily available defense of "Insanity at time of the offense". A defense requiring the skill, knowledge, training and assistance of an experienced Attorney.

It is worth noting that at no time during any stage of the proceedings, did Mr. Simmons deny his actions; unyieldingly maintaining, that at the time of the unplanned offense he was not in his right mind, could not step back, appreciate his acts, nor distinguish between right and wrong. Repeatedly stressing to attorney (and trial court) his desire to utilize Louisiana's insanity at time of offense defense, requesting a psychiatric evaluation.(Exhibit-9 March 30, 2011 Motion for Discovery/Production)

In **Ake v. Oklahoma**, 470 U.S. 68, 105 S. Ct. 1087, 84 L. Ed 2d 53 (1980) n.6 The Court held:

> "The mental state of an indigent criminal defendant at the time of the offense is a significant factor in his defense, so as to entitle him to the assistance of a court appointed psychiatrist as a matter of due process where (a) the defendant's sole defense is that of insanity...(f) the state recognizes an insanity defense under which the initial burden of producing evidence falls on the defendant" U.S. at 87

State v. Watts 131 So. 729 (1930) "Plea of insanity in criminal prosecution is matter of right not grace" So at 730, n.3; **State v. Toon**, (1931) 172 La. 631, 135 So.7: Art 652.5, "The defendant has the burden of establishing the defense of insanity at time of the offense by a preponderance of evidence".

Where the Third Circuit Court found a constructive denial of counsel "where counsel offered no actual assistance to defendant at plea proceedings" **Appel v. Horn**, 250 F. 3d 203, 212-13 (C.A. 3. 2001) Mr. Simmons' made a strong showing of "re-entering a not guilty plea as ill-advised by attorney, after attorney informed him that he had pulled his 2010 weekly traffic citations to be used in the defense which proved to be untrue. Mr. Simmons' was haled to video traffic court later that same day and plead guilty out of frustration to these allegedly pulled traffic citations." (For this claim see) Apndx.-A (Pet. Supp. Brf. 2013 Pp. 12-13): Apndx.-B (Pet. Supervisory and/or Remedial Writ. 2016-KH-763 P.7 fn.2.); *cf* (Ex. #4 Court Records No. # 588669 **Feb. 9**, 2011 (**Stat. Conf. Set. 2-22-11** at

9:00a.m.)...ibid. **Feb. 22, 2011**(Accused present in court with counsel)); (Ex. #4.1Court records no.#10-0582, **February 22, 2011** (Accused present in court with counsel Mark Marino, Not guilty plea entered); (Ex. #37 Disposition of case # 10-TR-0589590, **February 22, 2011**, Defendant appearing by simultaneous audio-visual transmission from jail, pleads guilty to 10 days time served).

These records support the accuracy if not the veracity of Mr. Simmons' claim of pleading on advice of attorney, including attorney's averment of "Not one of us requested a sanity commission hearing." Apndx.-C (Wirt of Habeas Pp. 13-14 for argument on this being attorney's duty not secondary parties): Apndx.-B (Evid. Tr. P. 57 ln. 18-23)(in respect to attorney failure to fulfill Mr. Simmons' repeated pretrial request for psychiatric evaluation and/or sanity commission)

It was after this **February 22, 2011** date, on May 11, 2011, that 1) Attorney informs trial judge that he (attorney) is unaware of the facts and circumstances of the case. 2) informs the trial judge he will not argue Mr. Simmons defense Motion Request; Mr. Simmons "has to choose" and Mr. Simmons defense request are ad nauseam; 3) **Argues there are some serious issues in respect to Mr. Simmons mental state at time of the offense** and 4) **Make request for continuance and expert for "his" defense** (Exhibit #2, May 11, 2011 P. 23, Ll. 11-32)

Mr. Simmons' emphasize these records, highlighting that attorney, **does not argue and/or inform court there exist the possibility that Mr. Simmons February 22, 2011 plea of not guilty may be changed to one consistent with "his" now argued. "serious issues in respect to Mr. Simmons mental state at time of offense**" Supporting the claim that attorney was not only inadequate in establishing Mr. Simmons' plea and combination defense, but actually "inert" in the defense.

Not evaluating attorney's performance with the distorted effects of hind sight, Mr. Simmons submits these records unequivocally support his claim that at the "critical pretrial stages" (where pleas and defenses may be irretrievably lost) he was without the aid of counsel in any real sense. see, ABA Std. 4-3-6. (Exhibit #2 May 11, 2011 P. 23 Ll29-32)

Mr. Simmons' submitted these records under his **Cronic**, claim, arguing (as couched in **Strickland**,) that attorney was not only ineffective in assisting in the establishing his plea and defense, but its hard to imagine that attorney was "functioning as the counsel guaranteed by the Sixth Amendment", constructively depriving him assistance of counsel for his defense. And although court avers attorney was competent, "Court is not required to condone unreasonable decisions parading under the umbrella of strategy, or to fabricate tactical decisions on behalf of counsel when it appears on the face of the record that counsel made no strategic decision at all" **Moore** F. 3d at, 261 n. 7

Likewise, under **Strickland**'s prejudice prong (which is dispensed with under **Cronic**) Mr. Simmons is not required to "prove" the out come of the trial would have been different, only "that there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceedings would have been different. **State v. Ceasar**, 224 So.3d 1226, 1230 (La. App. 3 Cir. 2017) citing **Strickland.**

Mr. Simmons emphasize "If the circumstances indicate that because of a mental disease or mental defect the offender was incapable of distinguishing between right and wrong with reference to the conduct in question, the offender shall be exempt from criminal responsibility" La. Stat. Ann 14:14, **State v. Silman**, 645 So.2d 810 n.2 (La. App. 3 Cir.1994)(citing **State v. Roy**, 395 So.2d 664 (La. 1981); see **Davis v. U.S.**, 160 U.S. 469, 16 S.Ct.353, 40 L.Ed. 499 (U.S. Ark. 1895)(same): **Leland v. Oregon**, 343 U.S.790, 797 n.6, 72 S.Ct. 1002, 1007, 96 L.Ed. 1302 (U.S.Or.1952)(same).

He has unyieldingly maintains, that at the time of the unplanned offense he was not in his right mind, could not step back, appreciate his acts, nor distinguish between right and wrong." Louisiana Revised Statute, 14:14 and the above United States Supreme Court's determinations defines the exact objective of his defense.

Without doubt had Mr. Simmons been appointed attorney dedicated to assisting in reaching this objective, i.e. actively investigating, making pretrial preparation, and request for existing evidence,

including a psychiatric evaluation to educate the jury to the dynamics and affects of insanity brought on by life's everyday rigors, there exist a probability sufficient that a number of jurors, familiar with life's everyday struggles would conclude, "It's possible that Mr. Simmons, having no warrants for his arrest, and the unplanned offense was exactly what Mr. Simmons alleged; a psychotic episode brought on by the accumulation of a string of random unrelated events, on an already overburdened mind.

Last reviewing court's fabrications further include, "Once defendant began representing himself, he had the opportunity to present his own trial strategy." **Simmons**, so.3d., at 370-71 n. 15.(Apndx.-A) while emphasizing, "The defense, had more than 10 months between defendant's arraignment and the scheduled trial date to prepare for trial." So.3d at 366, n.[2][3].

However the truth of the matter is, "attorney held control of Mr. Simmons' defense for these 10 months," (Oct., 2010-thru-Aug., 2011) in which time he provided no actual assistance towards Mr. Simmons' defense, as previously supported. *cf.* (Exhibit-5. July 6, 2011. P. 5, LL 8-10 [Judge] Mr. Marino is handling your case).

Mr. Simmons gained control of his defense with less than thirty (30) days with no continuances provided by trial court, or any request fulfilled by attorney see (Exhibit-6, Aug. 10, 2011. P. 4, LL 2-5/P. 11. LL25-30 [District Attorney] Mr. Marino refused to adopt those motions)

Claims in State's Fifth Circuit's "opinion" have further been rebutted in trial judge's rulings, which shows denial of any and all request made by Mr. Simmons' for evidence, experts, and plea and defense. (Ex. #2, May 11, 2011 Denied);(Exhibit-7, Sept. 6, 2011 P. 7, Ll. 5-10 (Trial judge) "And once again his real complaint goes to whether or not he has an opportunity to have a psychiatric evaluation, which would go to the insanity defense which I have denied): see, Sept. 7, 2011 1st Day Of Trial, "Mr. Simmons' Opening Statements"; Trial Judge removed jurors and admonished Mr. Simmons for even attempting to raise the issue of "his" mental state, insanity at time of the offense, or the insanity defense for jury consideration.

Based upon this clear and convincing evidence there can be no fair minded disagreement that last court's determination of these facts on the merits was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States in that 1.) Mr. Simmons' right to present his defense was clearly denied by trial court and 2.) that trial court further denied Mr. Simmons' the basic tools essential to the presentation of the defense, including "attorney dedicated to assist in his defense" or psychiatrist; while barring Mr. Simmons from raising the issue of insanity; entitling Mr. Simmons' to relief under 28 U.S.C. § 2254(d)(1),(e)(1) and **Cronic.**

QUESTION OF LAW

2.

Whether Attorney's Decision To Override Mr. Simmons' Decision To Use The Insanity Defense, Constitute An Extenuating Circumstance?

In recognizing accused's fundamental right to present a defense, included the right to present an insanity defense, **Ake.** Mr. Simmons' notes his claim of denial of the right to present a defense has been fairly presented to state court throughout his post conviction proceedings. He has maintained this claims since his conviction, presenting no new legal theories or new factual claims in his federal application. It is fairly presented, supported by the record, and ripe for this Honorable Supreme Court's determination. see Apndx.-A, (Supplement to Appeal, Pp. 1-10): Apndx.-B, (Post-conviction Claim X): Apndx.-C, (Writ Habeas Ground 2, Pp.35-61)

QUESTION OF LAW

3.

Whether The Accused's Right To Present A Complete Defense Encompass The Right To Present A Valid And Meritorious Temporary Insanity Defense?

Although attorney averred a diligent search for Mr. Simmons' weekly traffic citations, the below citations were made public record Feb. 22, 2011, accessible to anyone over the age of majority for view or purchase, merely requiring a formal request to parish clerk of court, located in the same

courthouse in which attorney worked daily and Mr. Simmons' was convicted.

(Exhibit-4 10-TR-0586787 **issued** 8/6/2010. **Disposed** December 13, 2010. *cf.* Apndx.-B, (Evid. Tr. P. 50 ln. 29-30.(Attorney) He [investigator] did some investigation...all of which came to naught").

(Exhibit-4, 10-TR-0586787 **issued** (date not provided) **Disposed** February 22, 2011),*cf.* Apndx.-B (Evid. Tr. P. 55 Ln. 10-20 (Attorney) "We could not find those citations".).

(Exhibit-4, 10-TR-0588669/11-TR-0597949 **issued** 8/23/2010, **Disposed** October 22, 2012: *cf.* Apndx.-B (Evid. Tr. Pg. 81-82 ln. 32-5):(ibid. P. 55, Ll 10-20) (Attorney) "I looked for the citations because he indicated that it was in St. Charles Parish. I could not find it...we could not find the citations at all."

Regardless of attorneys evidentiary hearing averment of a thorough investigation, or states "synthetic" deference ("Mr. Marino was a zealous advocate on behalf of Mr. Simmons in pretrial proceedings that he investigated-more than adequately investigated the claims presented him by his client in pretrial") Apndx.-B, (Apr. 26, 2016, 16-KH-763 Writ Denied p.4). The citations were requested, existed, easily available and material if not crucial to Mr. Simmons defense.

Further, where claims of "Police embarking on a campaign of harassment of individual or group of persons without the knowledge or assistance of the prosecutorial authorities" is not unheard of **Allee v. Medrano**, 416 U.S. 802, 838. The validity of Mr. Simmons defense is strengthened by the fact that after his trial, and subsequent conviction the local media, including *The Times Picayune* newspaper, and local television station ran the story "St. Charles Parish Deputy Issuing Fraudulent Citations" (Ex #8. News Article),[3] further supporting Mr. Simmons' defense, and/or allegations.

The production of these documents cannot be attributed to coincidence, fishing expedition, or some arbitrary pretrial defense request in hopes some news story would later break or some traffic

3 Mr. Simmons' avers this was not an isolated incident or practice

citations bearing his personal information would miraculously surface in Parish.

The same applies to Mr. Simmons' unfulfilled pretrial request to attorney for his records from the ACLU of New Orleans. Mr. Simmons notes the record is void of any formal request by attorney for this complaint or his weekly traffic citations.

Attorney's "inaction" forced Mr. Simmons, in a last chance effort to establish his plea and defense, before it was "irretrievably lost" to make his own discovery and defense preparation through inartistically drafted and mistitled motion. (Exhibit-9 March 30, 2011 Motion for Discovery/Production): (Exhibit-2 May 11, 2011 P. 33, LL 6-11)(Denied)

Based on these records there can be no fair minded disagreement of the accuracy of Mr. Simmons' claim of "constructive denial of counsel". He provided "multiple" instances, supporting attorney was "consistently" inadequate throughout his control over the defense, to the point of him being appointed no counsel at all.

Where counsel is prohibited from making futile motions or frivolous objections see **Johnson v. Cockrell**, 306 F.3d 249, 255 (5th Cir. 2002); **Koch v. Puckett**, 907 F.2d 524, 527 (5th Cir. 1990) On May 11, 2011, attorney having control of the defense for roughly eight (8) months, stands before the court and inform trial judge that he was unaware of the facts and circumstances of the case requesting a continuance, i.e. Mr. Simmons charges included possession of marijuana. Prosecutor, bringing to Judge's attention the unlikelihood of Attorney's argument (Exhibit-2 May 11, 2011 P. 24 LL 26-28) (D.A. Sins) "Your Honor with respect with Mr. Marino not knowing about the marijuana the defendant was arrested for possession of marijuana")(ibid. P. 22 Ll 28-31)

Not only does Mr. Simmons contest attorney's allegation; averring he discussed this "half smoked marijuana cigarette" found in his vehicle with Attorney, but he also provided proof that Attorney actually received charging instruments spelling out the charges, including possession of marijuana (Exhibit-10, October 26, 2010. To Mr. Marino: 1 Count of Poss. Marijuana); Apndx.-C

(Pet.Writ Hab. Pp. 17-18)

Based on attorney's words it does not take great leaps in logic to conclude that attorney 1.) did not take the time to familiarize himself with the facts and circumstances of the case, or 2.) attorney intentionally misstated facts before the court, arguably for the purpose of gaining a continuance. Apndx.-B, (Pet. Supervisory Writ P. 2 for argument.)

Mr. Simmons not only logically asked, "How can attorney develop a defense if he doesn't know the charges?" Apndx.-B, (Evid. Hrng. Tr. P. 42 Ll9-10) but he noted Federal Courts have concluded "counsel must be familiar with the laws and facts of the case in order to provide effective assistance." **U.S. v. Burton**, 575 F. Supp. 1320 (E.D. Texas 1983); **Strickland**.

Where this Court in **Strickland**, determined, "If there is only one plausible line of defense counsel must conduct a reasonably substantial investigation into that line of defense, since there can be no strategic choice that renders such an investigation unnecessary" U.S. at 680-681.Although attorney aver having "no defense no viable defense," on more than one occasion he states, believes or confirms, "It's plausible that someone as you described may very well have snapped" Yet refused to assist. Apndx.-B, (Evid. Hrng. Tr. P. 78, LL 22-23. P. 81, LL22-24): *cf* May 11, 2011 "There are some serious issues in respect to Mr. Simmons' mental state at time of the offense" (Exhibit #2 P. 23 Ll29-32)

Mr. Simmons having supported 1.) Attorney did not take time to familiarize himself with the facts or circumstance surrounding the case. 2.) Attorney did not properly investigate in the early stages or insure the charges were correct and factual, and Accused was aware of possible defenses. 3.) Any advice given by attorney or defense strategy had by attorney cannot be considered "informed" 4.) attorneys decision to not adopt any portion of Mr. Simmons' defense was objectively unreasonable and 5.) **attorney was not functioning as counsel guaranteed Mr. Simmons' by the Sixth Amendment, constructively depriving him of assistance of counsel for his defense whatsoever.**

Likewise, it does not logically follow that counsel would makes an argument for a continuance

for expert, then fail to deliver. However, this is precisely what happened during attorney's control of the defense. (Ex.#11. June 15, 2011 P. 3, LL 14; [Attorney] after arguing the importance of an expert now states, "If we use an expert"): (Ex.#12 July 6, 2011 P.3 LL23-28; [Attorney] I don't have (expert) report at this time.).

Mr. Simmons emphasize, although attorney repeatedly averred having "No defense. No viable defense" and refused to offer the minimum assistance in establishing his defense. Apndx.-B, (Evid.Hrng. Tr. P.48 Ll. 15-22, Pg. 57 Ll. 27-29; P.82 Ll. 11-18; P. 84 Ll. 5-6; P. 93 Ll. 26-27) attorney refused to make any request to withdraw; continually positioning himself between Mr. Simmons and his constitutional guarantees. "Why?"

At the time of Mr. Simmons state criminal prosecution, he had a substantial right to the "assistance of an attorney unhindered by conflict of interest" **Cuyler v. Sullivan**, 446 U.S. 335, 355(1980): **Glasser v. United States**, 315 U.S. 60, 70 n, 9 (1942)(same); **Holloway v. Arkansas**, 435 U.S. 475, 482 (1978)(same)

Mr. Simmons averred, after being repeatedly informed by counsel, (during his pretrial defense request), that he knew the victim[4], he recognized a conflict affecting his right of assistance of counsel unhindered by conflict. Mr. Simmons argued, "attorney was placed in a situation inherently conducive to divided loyalties by having been appointed to defend the individual, who has been charged with a grievous offense of attempted murder, against same said relationship Officer"; Apndx.-B, APC. (Evid. Hrng. P. 53 Ll 17-21 (Attorney) "The arresting officer in this case I thought was beyond reproach. I've known him for many years, but that didn't skew my opinion base on the video")

Mr. Simmons has vigorously maintained that he learned of this relationship pretrial, as a result of attorney repeatedly informing him,"Look I know Tommy"...etc. every time he (Mr. Simmons) would make any defense request, including "**Background on all Officers he had contact with**" see Apndx.-

4 State key witness/victim/officer involved are all one in the same and will be used interchangeably as content requires.

A (Pet. Supp.Appeal Pp. 13-14): Apndx.-B, (Pet. Post P. 3); Apndx.-C, (Pet Writ Hab. Pp. 2-3): (Exhibit-9 March motion discovery)

Mr. Simmons submitted that this "conflict" (defense counsel-state key witness relationship) was the motivation behind attorney's inactions, which also affected his right of confrontation. Attorney refusing to ask victim Mr. Simmons' specific questions, forcing Mr. Simmons to pose his own questions to victim. See (Exhibit #2 May 11, 2011 P.26 Ll 2-3); *cf.* **State v.Cisco**, 861 So.2d 118,126 (La. 2003) Cert. denied 541 U.S. 1003(2004)("defense counsel...isn't being as aggressive as you think she ought to be or isn't pushing as much as she ought... that's what we call conflict.")

This Court in **Davis v. Alaska**, 415 U.S. 308, 318, 94 S.Ct.1105, 1111 (U.S. Alaska 1974) recognizing the fundamental element of confrontation held "Denial of right of effective cross-examination was a constitutional error of the first magnitude so that no amount of showing of want of prejudice could cure it."

Further, where Mr. Simmons requested "Appointment Of New Counsel",(Exhibit-1), no reviewing court has required trial court to provide any documentation which support it's misapplication of precedence, "implying" Mr. Simmons' requested specific named replacement counsel. **Simmons**, 136 So.3d 358, 371 n.16.(La. App. 5th Cir. 2014) "An indigent defendant does not however have the right to have a particular attorney appointed to represent him...Here trial judge did not err in refusing to appoint substitute counsel" Apndx.-A.; See States Answer to Application for Post Conviction. (August 18, 2015 P.5) "Defendant attempts to turn the constitutional right to counsel into a constitutional right to counsel of his choice". Apndx.-B

Based on the record the last court's determination on the merits "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" in that 1.) Mr. Simmons' never requested specific replacement counsel and 2.) absent such a showing the last State and Federal court's determination of the facts on the merits is not worthy

of the presumption of correctness. The last reviewing courts recognized the correct legal governing principal, but nevertheless misapplied it to his case.

QUESTION OF LAW
4.

Whether Counsel In The Face Of Defense Counsel-State Key Witness Relationship (Conflict) Diminished Mr. Simmons' Sixth Amendment Rights, Including His Right Of A Meaningful Cross-Examination?

Any individual, of normal intelligence in Mr. Simmons' position, during attorney's ten (10) month control of the defense would be justified in their belief that "attorney, did not simply make poor strategic or tactical choices, but attorney acted with reckless disregard for his client's best interest, arguably with the intention to weaken his defense". *cf.* **Osborne v. Shillinger,** 861 F.2d 612 n.2 (Ca. 10 1988):

Although attorney "subjectively" alleged, "the relationship with officer didn't skew his opinion base on the video" attorney nevertheless failed to request leave or bring this relationship to judge's attention to assure an "objective" third party inquiry as to "whether the client-counsel conflict was so great that it prevented an adequate defense." before judge denied Mr. Simmons' requests for new counsel; consuming time that could be spent in defense preparation.

Attorney's claim is further compromised by his Evidentiary Hearing testimony in which he made a number of allegations, challenged by Mr. Simmons' and video evidence. "The grand daddy of them all being the video showing Mr. Simmons aiming the weapon at the chest of his good friend"

This allegation is unequivocally refuted by the video, which shows Mr. Simmons, the officer involved, and Mr. Simmons' dog going outside of the field of "video" recording at roughly eleven minutes, leaving only audio to be considered by jury. At this time the gun shot is "heard" as officer shoots Mr. Simmons' dog.

Further, there was conflicting testimony as to who actually possessed the weapon, (Officer or Mr. Simmons), No-one, including video footage, officer involved or other witnesses testified to, or

showed Mr. Simmons aiming any weapon at officer. (see Dash cam dvd of arrest used during trial); see(Officer's May 11, 2011 and Trial Testimony)

The video shows the actors returning to the "video" field of recording, no weapon is possessed by any actor, Mr. Simmons is tazed, subdued and arrested. The lion share of the video is audio only.

What's more disturbing, is where the video unequivocally refute attorneys allegation. Evidentiary Hearing Judge, flat out refused request to view the video, which would expose attorney's egregious and damaging perjury for what it arguably was; "A lie to sabotage Mr. Simmons' evidentiary hearing to assure that the individual who allegedly intended to take the life of his good friend received what he felt he deserved." These events denying Mr. Simmons his Fourteenth Amendment right of due process and equal protection of the law. Apndx.-B (Evid hrng. Trans. Nov. 3, 2015 P. 88, Ll-23-28, Pp. 74-76, Ll, 30-3); (Pet. Supervisory Writ. Pp. 8-9).

Mr. Simmons emphasizing that the damaging affects of attorney's pretrial "performance" was felt well after he gained control of his defense, Aug. 10, 2011. The United States Supreme Court. **Taylor v. Kentucky**, 436 U.S. 478__n.15(1978), has recognized "cumulative errors, while individually harmless, when considered together can prejudice a defendant as much as a single reversible error and violate a defendant's right to due process of law". **U.S. v. Frederick**, 78 F.3d 1370; **Kyles v. Whitley**, 514 U.S. 419.

QUESTION OF LAW

5.

Whether The Fifth Circuit Court Of Appeal Erred In Not Considering Whether The Individual And/Or Cumulative Effects Of Attorney's Actions Worked To Constructively Deny Mr. Simmons' His Sixth Amendment Right Of Assistance Of Counsel For His Defense?

Mr. Simmons' having cataloged for this Honorable Court, documented acts, instances, and attorney's own words which explicitly or implicitly conveyed to Mr. Simmons and trial court that he would be providing no actual assistance towards Mr. Simmons' defense. leave no room for disagreement as to Mr. Simmons' claims.

In **Cronic**, the United States Supreme Court held that an appeals court must reverse a criminal defendant's conviction "without any specific showing of prejudice to defendant when counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceedings" "Such absence of counsel need not be actual but may be constructive." **Penson v. Ohio**, 488 U.S. 75, 88 (1988)(citing **Strickland v. Washington**, 466 U.S. 668, 692 (1984); see **Bell v. Cone**, 535 U.S. 685, 695 (2002)(quoting **Cronic**, 466 U.S., at 658-59, 662)(same)

Mr. Simmons ask that this Court take judicial notice of the structural error doctrine, "a very limited class of errors that effect the framework within which the trial proceeds." **Johnson v. United States**, 520 U.S.461, 466-68 (1997) and are not subject to harmless error analysis or procedural bar and mandate automatic reversal. **Arizona v. Fulminante**, 499 U.S. 279 (1991). They include the denial of, "Assistance of Counsel for Accused's defense, whatsoever" **Gideon**: *cf.* **United States v. Cronic**, 466 U.S. 648 (1984)(constructive denial of Assistance of counsel)

Based upon the "stare decisis" principle, which acts as a restraint against judicial whimsy, while assuring the public at large that anytime this Honorable United States Supreme Court is confronted with a "set of materially indistinguishable set of facts" the out come will be the same. Mr. Simmons notes that although "all" his rights violated are fundamental and/or deeply rooted and are found on the record. Apndx.-B. (Evid. Hrng. Trans. Pp.43-44, Ll, 15-16 (Judge Marcel) "Your allegation are found on the records") No court has granted relief.

QUESTION OF LAW
6.
Whether The Fifth Circuit Court Of Appeal Erred In Not Considering Mr. Simmons' Claim Of Constructive Denial Of Assistance Of Counsel Utilizing The Cronic Standard

Based on Mr. Simmons' showing this Honorable United States Supreme Court should grant certiorari, on the claim of "constructive denial of assistance of counsel for his defense", reversing the decision rendered by the United States Fifth Circuit Court of Appeals.

ERROR TWO

THE FIFTH CIRCUIT COURT OF APPEALS 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 ON THE MERITS OF MR. SIMMONS CLAIM OF DENIAL OF HIS FUNDAMENTAL RIGHT OF SELF-REPRESENTATION AS DETERMINED IN FARETTA V. CALIFORNIA, 422 U.S. 806, 807, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975)

In **Faretta v. California,** 422 U.S. 806, 807, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975) the United States Supreme Court addressed the issue of the "accused" right of self-representation.

> [1]...The question before us now is whether a defendant in a state criminal trial has a constitutional right to proceed without counsel when he voluntarily and intelligently elects to do so. Stated another way, the question is whether a State may constitutionally hale a person into it's criminal courts and there force a lawyer upon him, even when he insist that he wants to conduct his own defense. It is not an easy question, but we have concluded that a State may not constitutionally do so.

Mr. Simmons relying on the above holding makes a showing, that prior to his conviction he had a right of "self-representation" deemed "fundamental" and "deeply rooted."

He further notes, "off the bat," States' Fifth Circuit Court of Appeal's opinion offers two violations of the above **Faretta** holding, justifying any court's granting relief, 1.) Mr. Simmons' fundamental right of self-representation was denied at least twice, and 2.) State Court continued to force unwanted counsel upon him. **State v. Simmons**, 136 So.3d 358, 365 n.1 (La. App. 5th Cir. 2014) **(First the continuance was requested on the eve of trial, one month after trial judge granted defendant's third request to represent himself. Next defendant had been requesting permission to proceed pro se since March 30, 2011 and filed numerous pro se motions while he was represented)** Apndx.-A

This opinion, "standing alone," clearly support that last reviewing court considering this claim on the merits resulted in a decision contrary to or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States in that 1.) Mr. Simmons' had been clearly requesting to exercise his right of self-representation since March 2011and

his request(s) were denied at least twice and 2.) Unwanted counsel was forced upon him.

QUESTION OF LAW

7.

Whether Court's denial of Mr. Simmons' Request To Exercise His Fundamental Right Of Self-Representation At The Critical Pretrial Stages Of His State Criminal Prosecution Resulted In A Decision Contrary To Or Involved A Unreasonable Application Of Clearly Established Law As Determined By The Supreme Court Of The United States?

QUESTION OF LAW

8.

Whether State Court In Forcing Unwanted Counsel Upon Mr. Simmons After The Denial Of His Request Of Self-Representation Resulted In A decision Contrary To Or Involved An Unreasonable Application Of Clearly Established Law As Determined By the Supreme Court Of the United States?

The United States Supreme Court went to great lengths to explain in **Faretta** that, "a criminal defendant's fundamental right of self-representation must be respected, even to his own detriment" U.S., at 835

Since the right of Self-representation is a right that when exercised usually increase the likelihood of a trial outcome unfavorable to the defendant, it's denial is not amendable to "harmless error" analysis. **McKasklev. Wiggins,** 465 U.S. 168, 177, n. 6, 104 S.Ct. 944, 79 L.Ed.2d 122 (U.S. Tex. 1984): **Neder v. United States**, 527 U.S. 1, 7-8, n. 3 (1999)("The denial of accused's fundamental right of self-representation to be Structural Error")[5] **U.S. v. Fant**, 890 F.2d 408, 420, n. 5 (C.A. 11 1989)(citing Strozier, 871 F. 2d., at 997)(violation of either, "assistance of counsel for the accused's defense or denial of right of self-representation are not subject to harmless error analysis.")

Based upon these federal determinations there can be no fair minded disagreement that during Mr. Simmons' 2010-2011 state criminal prosecution his right of self-representation was clearly established, fundamental, deeply rooted, and it's denial is recognized as structural error, requiring automatic reversal.

5 See Structural Error doctrine

State's opinion chronologically place Mr. Simmons' request of self-representation "since March", some five months before his actual trial date of Sept. 7, 2011. In respect to the timeliness of Mr. Simmons' request, "**Faretta** did not establish a bright-line rule for timeliness." The **Faretta** Court explicitly stated that the defendant's request was well before the date of trial," and "weeks before trial." U.S., 807, 835(same as Mr. Simmons')

It then held, "in forcing **Faretta**, 'under these circumstances' to accept against his will a state appointed public defender, the California Courts deprived him of his constitutional right to conduct his own defense" Id., at 835. From this United States Supreme Court determinations, (materially indistinguishable from Mr. Simmons') there can be no fair minded disagreement that last court's determination of these facts on the merits "was contrary to or involved an unreasonably application of clearly established federal law as determined by the Supreme Court of the United States, and not worthy of the presumption of correctness"

This Court in recognizing, "The right to appear pro se exist to affirm the dignity and autonomy of the Accused and to allow the presentation of what at least occasionally be the accused's best possible defense." determined that state court's granting of the right of self-representation exceeds the mere formalities limited to holding a hearing and granting the right at eve of trial (as reflected in this case)

"In determining whether defendant's right to present his defense pro se, has been respected the primary focus must be on whether defendant had a fair chance to present is case in his own way" **McKaskle**, U.S., at 169, n. 4. **This is the core of the Faretta right**. Id., at 178, n.7.

The case Mr. Simmons wished to present to jury was 1.) He had recently filed a racial discrimination complaint against his than employer. 2.) As a direct result of these practices he quit this job and was unemployed. 3.) He was falling further behind on bills, in the process of loosing his home, vehicle, and in dire straits of loosing his livelihood. 4.) Compounding the stress and pressure of these events, the SCPSO had recently begun the weekly practice of issuing him traffic citations, citations he

believed were being fraudulently issued under the circumstance. On the night of the offense he had been drinking and was once again stopped, in a three week period, and snapped.

He wished to present for jury consideration his behavior was the result of not one individual pressure, but to the cumulative effects of all these event, i.e. "He was predisposed to suffer a mental breakdown." Alcohol was merely a contributing factor. This was the core of his insanity defense.

QUESTION OF LAW
9.
Whether Mr. Simmons Had A Legitimately Plausible Insanity Defense Worthy Of A Pretrial Psychiatrist Evaluation

The short answer as to "whether Mr. Simmons had a fair chance to present his case in his own way is a resounding "No." as reflected by the record. (Exhibit-9 March 30, 2011):(Exhibit-2. May 2011 Denied): (Exhibit-7. Sept. 6, 2011 P. 7. Ll. 5-10 (Trial judge) "And once again his real complaint goes to whether or not he has an opportunity to have a psychiatric evaluation, which would go to the insanity defense which I have denied): see Tr. Trans. From, Sept. 7, 2011 1st Day Of Trial, "Mr. Simmons' Opening Statements"; Trial Judge removed jurors and admonished Mr. Simmons for even attempting to raise the issue of "his" mental state, insanity at time of the offense, or the insanity defense for jury consideration[6].

Where judge denied all tools essential to the presentation of the defense; including the denial of a continuances to prepare the defense, and the denial of the plea and combination defense, by no stretch of the imagination can it be said that Mr. Simmons "had a fair chance to present his case in his own way." In Ake, this Court recognized, "The trial is fundamentally unfair when giving an indigent defendant 'his' day in court while denying him the basic tools and/or available resources to adequately defend."

Mr. Simmons had the perfect supportable defense, and although he was appointed "competent"

6 Bias Judge Claim *infra P. 29*

counsel, counsel had no defense, no viable defense; refused to adopt any portions of any defense motions submitted by him; Provide any actual assistance towards his defense and maintained a longstanding relationship with the victim/officer/state key witness in the case. These factors leave the scales delicately posed between 1.) Mr. Simmons' pretrial request for any unnamed replacement counsel opposed to self-representation, was justified and/or valid, or 2.) Mr. Simmons' request for self-representation was justified, and/or valid.

Where Mr. Simmons reluctantly surrendered his fundamental right of assistance of counsel for his defense, court appointed attorney was not even present. Mr. Simmons was merely appointed "stand in" counsel who made no attempts to represent any of his interest, familiar with the facts and circumstances of the case, or events surrounding the waiver. Without, trial judge could not conduct an "in depth and comprehensive inquiry into the facts surrounding the waiver" as determined by this Court in **Von Moltke v. Gilies**, 332 U.S. 704 (1984)[8]

Applying the "materially indistinguishable" standard enunciated by this Court, and the Federal Fifth Circuit Court's holding in **Tucker v. Day**, 969 F. 2d 155 (5th Cir. 1992)("failure of counsel to assist defendant at resentencing hearing was constructive denial of counsel because counsel (1) stated that he was "just standing in" (2) did not know the facts of the case, and (3) made no attempts to represent the interest of the defendant.") Mr. Simmons should be entitled to relief.

2.) Further without attorney being present trial judge was unable to assure no previously noted presumption against waiver still existed, resulting in a disingenuous hearing, and a denial of Mr. Simmons' due process and equal protection of the law. **Von Moltke: Johnson,** U.S., at 464-465:

This Honorable United States Supreme Court recognized, and/or held, "If the accused, however, is not represented by counsel and has not competently and intelligently waived his constitutional right, the Sixth Amendment stands as a jurisdictional bar to a valid conviction and sentence depriving him of

8 See Exhibit-6. Aug. 10, 2011 P. 3 Ll. 6-10 (Mr. Swan) "Mr. Marino was supposed to be handling this matter

his life or his liberty" U.S., at 469

QUESTION OF LAW

10.

Whether The Record Support The Existence Of A Presumption Against Waiver Of Mr. Simmons' Fundamental Right Of Assistance Of Counsel For His Defense, Or In The Alternative, Whether The Record Support The Existence Of A Presumption Against Mr. Simmons' Request To Exercise His Fundamental Right Of Self-Representation?

As to this question of law and mixed question of law and fact, a federal court must defer to the state's court decision on the merits of such a claim, unless that decision was contrary to, or involved an unreasonable application of clearly established federal law, as determined by the Supreme Court of the United States.

Where the District Court, in it's denial of Certificate of Appealability utilizes "Petitioner has not made a substantial showing of the denial of a constitutional right" Apndx.-D. He reiterates "all his allegations are found on the record" Apndx.-B, (Evid. Hrng Pp. 42-44 Ll, 15-16 (Judge Marcel).

There can be no fair minded disagreement that last court's determination of the facts based on the merit to be incorrect and not worthy of the presumption of correctness, in that 1.) Mr. Simmons' fundamental right of self-representation was clearly denied at least twice and 2.) State court continued to force counsel upon unwilling defendant. Mr. Simmons overcoming the burden of proof in 28 USC § 2254 (e)(1) and satisfying (d)(1) standard, avers he is entitled to long overdue relief.

Based upon these supported claims of "his" conviction being obtained in violation of the United States Constitution; clearly established federal law, and United States Supreme Court determination, certiorari should be granted in this particular case.

ERROR THREE

WHETHER THE FIFTH CIRCUIT COURT OF APPEALS 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 ON THE MERITS OF MR. SIMMONS' CLAIM OF BEING ADJUDICATED BY A BIAS JUDGE AS DETERMINED IN CAPERTON v. A.T. MASSEY COAL CO., INC., 566 U.S. 868, 129 S.Ct. 2252, 2255, 173 L.Ed.2d 1208 (U.S. W.Va. 2009)

United States Supreme Court Holding:

In Caperton v. A.T. Massey Coal Co., Inc., 556 U.S. 868, 129 S.Ct. 2252, 2255, 173 L.Ed.2d 1208 (U.S. W.Va. 2009) the United States Supreme Court held in part;

> Because the objective standards implementing the Due Process Clause do not require proof of actual bias, this Court does not question subjective findings of impartiality and propriety and need not determine whether there was actual bias. Rather, the question is whether, "under a realistic appraisal of psychological tendencies and human weakness," the interest "poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented (citing Withrow, 421 U.S., at 47, 95 S.Ct.1456)" see Held (b)

Based on this appearance of bias standard, Mr. Simmons submitted a Motion For Trial Judge's Recusal, on Aug. 30, 2011 for the above and below cited grounds. However, judge "subjectively" found no evidence of "impartiality" on his behalf and denied the motion[9]

Mr. Simmons partially founded his claim on the U.S. Fifth Circuit Court's holding, in Derden v. McNeel, 978 F.2d 1453, 1459 (C.A. 5 1992) "The conduct of a judge can violate due process "only if the judge so favors the prosecution that he 'appears' to predispose the jury towards a finding of guilt or take over the prosecutor's role"

Further where "judicial rulings alone almost never constitute valid basis for bias in and of themselves, apart from surrounding comments or accompanying opinion" Liteky v. United States, 510 U.S. 540, 555 n. 15 (1994) Mr. Simmons provided such. Including supporting his claim that judge ruled solely to prevent a future action by him; openly acting as part of the prosecutorial team, denying him Equal Protection and Due Process of Law.

On March 30, 2011 Mr. Simmons attempted to exercise his fundamental right of Compulsory Process, by requesting among other things his hospital report[10] Judge averred he viewed these request before issuing a blanket denial. (Exhibit-2, May 11, 2011, P. 33. Ll 6-11 (Judge) I reviewed...Denied.)

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9 See Exhibit-13, Motion For Recusal,

10 Exhibit-9, March 30, 2011 Motion for Bill of Particulars and Discovery and Inspection

However, Aug. 24, 2011; some five months later, Prosecutor, who "does not plan on using the hospital report or wish to retry the case again in two years" informs judge of the same.[11] Trial judge who has already denied this request pretrial for favorable due process reasons, i.e. to assist Mr. Simmons with defense witnesses who observed his demeanor immediately after the offense, and cross-examination, now grants prosecutor's request for the sole purpose of elimination Mr. Simmons' grounds for appeal, giving the "appearance" of bias or some partiality towards the prosecution.

Mr. Simmons not trying "to prove that the District Court was necessarily wrong, just that it's resolution of the claim is debatable" submits The United States Supreme Court noted "Partiality" does not refer to all favoritism, but only to such as is, for some reason, wrongful or inappropriate. Liteky U.S., 553, n.10, which is supported by Mr. Simmons' claim.

QUESTION OF LAW
11.
Whether Trial Judge's Granting Of Prosecution's Request For Mr. Simmons' Hospital records To Eliminate His Grounds For Appeal, At Eve Of Trial, After The Denial Of Mr. Simmons' Pretrial Request For Same Hospital Records Give The Appearance Of Bias, Favoritism, Partiality...Etc.?

An objective reading of the record "clearly" supports 1.) Mr. Simmons attempted to establish his defense by submitting an unprofessionally drawn motion in which he specifically requested from the 29th JDC, "A Mental Evaluation."[12] 2.) On May 11, 2011 attorney informed judge in clear and non-ambiguous language, "There are some serious issues here in respect to Mr. Simmons' mental state during the offense. As you know intent...lesser included offenses" going so far as requesting a continuance to consult with expert.[13] After this argument D.A. Sins request that, "he be provided copies of any examinations, mental examinations and stuff."[14] Attorney informs judge, "D.A. has to put that in writing"[15] Trial judge states, "**Okay. And wait, wait, wait, and I'm going to require that you follow**

11 Exhibit-3, Aug. 24, 2011 P. 11, Ll 1-9
12 Supra at fn. 10
13 Exhibit-2, May 11, 2011 P. 23, Ll 11-32
14 Ibid at P. 28, Ll 12-19
15 Ibid Ll., 11-12

it up in writing just like I've done on all the other motions that have been made today, motions to enroll, motions you know for the sanity commission[16]

However, Aug. 24, 2011 after Mr. Simmons had gained control of his defense and attempted to change his plea and defense to "Not guilty. Not guilty by reason of insanity." Judge avers the issue of insanity has never been raised.(Exhibit-3 Aug. 24, 2011 P. 10, Ll 1-15)(Judge; "If there was any indication whatsoever that there was an issue of insanity at time of he offense 'you' have since had time of your arrest to raise that issue and bring that before the court..."); (Exhibit-7 Sept. 6, 2011 P. Ll 6-7 (Judge) "There was no prima facie or threshold showing that in any of Mr. Simmons' prior proceedings, there was never an issue of insanity raised...absolutely nothing to show that this was ever an issue previously")[18]

Mr. Simmons submitted judge's rulings, comments, and accompanying opinions in support of his claim that judge repeatedly misstated facts and/or facts of law, solely to justify his meritless rulings denying a number of legitimate defense request, and are not worthy of the presumption of correctness.

More disturbing is where judge is able to quote Louisiana and Supreme Court precedence in denying Mr. Simmons' plea and combination defense change, going so far as ruling on Mr. Simmons' sanity at time of the offense *infra.* Judge nevertheless, again misstated facts and/or facts of law in informing Mr. Simmons, "Experts witnesses are not available to him at public expense"[19] denying him, an indigent defendant, available state resources, Equal Protection and Due Process of the Law; entitling Mr. Simmons to relief.

Mr. Simmons now aver events not conveyed by the record, i.e. judge making eye contact with him, unceremoniously placing his motion request face down, denying it, strongly conveying the message "the court is not compelled to do anything for you" as reflected in his comments. (Exhibit-7

16 Ibid Pp. 28-29 Ll 25-2)
18 See supra fn. 10, P. 43 Exhibit- March 30, 2011 Motion for Bill of Particulars and Discovery and Inspection
19 Exhibit-7 P. 6, Ll 18-23

Sept. 6, 2011 P. 6. Ll 18-22; (judge) Mr. Simmons is under the court is compelled to provide expert witness at public expense...Denied.): (ibid. P. 5, Ll 9-12 (judge) "Mr. Simmons again making allegations that the court is compelled to change his plea anytime...Denied.)

However where State Fifth Circuit Court of Appeal, the Louisiana Supreme Court, and the Federal Fifth Circuit Court's determination recognize, "A district court may order a mental examination of a defendant at public expense under several statute" **U.S. v. Williams**, 998 F. 2d 258, 262, 264 n. 9. (C.A. 5 1993) they nevertheless overlooked this fairly presented claim during patent error review[20] and *de novo* review[21] resulting in a decision contrary to that of it's own determinations as well as those of this Court. See **Ake**: **Leland**.

Where trial judge must be familiar with the rights of the defendant, has taken an oath or affirmation of office, cites La. C.Cr.P. art 651, comes from a line and/or family of judicial officers, and who is in transition from the 29th JDC to the State's Fifth Circuit Court of Appeal, would surely be familiar with the procedures for establishing the insanity defense (*Supra* Motions for the sanity commission in writing) and that "Funds do exist when specifically authorized by statute or is constitutionally required." La. C.E. art 706 (D): **Ake** U.S., at 87[22]; La. Const. 1974, Ann. Art. I §16 (citing cases): **State v. Brown**, 907 So.2d 1, 27-29, n. 37 (La. 2005): **State v. Carmouche**, 526 So.2d 866 (La. App. 3 Cir. 1988): Criminal Justice Act 18 U.S.C. §§ 3006 A: Insanity Defense Reform Act, 18 U.S.C. §§ 4241, 4242.

Absent some legitimate showing for denial of Mr. Simmons pretrial and eve of trial request for mental evaluation and/or expert, last court's determination on the merits resulted in a decision that was "contrary to, or involved an unreasonable application of clearly established federal law as determined

20 La. C.Cr.P. art 920 on the state level

21 28 U.S.C. § 2254 on federal level

22 The mental state of an indigent criminal defendant at the time of the offense is a significant factor in his defense, as to entitled him to the assistance of a court appointed psychiatrist as a matter of due process where (a) the defendant's sole defense is that of insanity...(f) the state recognizes an insanity defense under which the initial burden of producing evidence falls on the defendant.

by the Supreme Court of the United States" and not worthy of the presumption of correctness, in that judge denied Mr. Simmons, an indigent defendant, access to available state resources and other basic tools essential for the presentation of "his" defense, including "Assistance of Counsel".

In respect to Mr. Simmons' "constructive denial of counsel claim" he argues Judge acting as gatekeeper or linchpin did not require attorney to "submit" or argue motion request. (Exhibit-14. March 30, 2011 P. 6, ll 20-29 (Trial Judge) "but simply because you wish for certain motions to be filed if counsel doesn't believe they're appropriate, than you know I'm not going to require him to pursue or argue those motions[24] This same claim is applicable to Mr. Simmons' insanity defense, that judge has biasly prejudged as "**Wholly unsupported**" (Exhibit-6 Aug. 10, 2011P. 9, Ll23-31 (judge)

> "Okay, well Mr. Simmons, your right to have an attorney appointed to represent you does not extend the right to require that attorney to proceed with any defense that you may wish to have presented, especially if it is one that is wholly unsupported by and in this case there's a video tape of the entire incident. The attorney is not required to present any defense that you may desire that he present."

Mr. Simmons having since provided verification of his weekly traffic citation[25] as well as proof of his claim of fraudulent citations being issued in the Parish[26] has successfully rebutted judge's prejudicial belief and ruling of his defense being "wholly unsupported."

These records easily support the claim that, trial judge, unaware of the psychological tendencies and human weakness attached to a longstanding working relationship with attorney repeatedly display of a clear inability to render fair rulings or judgments in respect to Mr. Simmons' legitimate request.

Although judge Aver "Mr. Simmons 'indicated' he didn't want the service of a Public Defender and/or the Public Defender's Office"[i.e. Assistance of Counsel for His Defense] (Exhibit-7 Sept. 6, 2011 P. 8, Ll 13-15) this is conflicted by the record. (*supra* "First I tried you refused I have to represent myself" Aug. 10, 2011): (Exhibit-1, Motion For New Counsel)

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24 Exhibit-6, Aug. 10, 2011, Mr. Marino refused to adopt those motions P. Ll.
25 Exhibit-4 supra
26 Exhibit-8 supra

Judge gave Mr. Simmons two options, 1.) continue with attorney who is providing no actual assistance towards his defense or 2.) represent yourself. Any "unnamed" replacement public defender, from Public Defender pool, to assist Mr. Simmons in his defense was never an option.

Trial judge's prejudgment of Mr. Simmons' guilt and/or viability of his defense is at war with the commands of the Constitution and this Court's determination, "of a fair trial in a fair tribunal before a judge with no actual bias against him." Id

Not only has this Court already determined the practice of judge requiring attorney to sign off on the defendant's defense must be forbidden if the guarantee of due process is to be adequately implemented,[28] but made clear in **Griffin v. United States**, 366 U.S. 704, 722 (1949) "to make Accused right to present a defense depend upon the mechanical and often illogical variation in the size of the doubt in judge's mind is an invasion of the jury function" Mr. Simmons' claims are founded upon these United States Supreme Court determinations.

Mr. Simmons avers it was judge who actually denied him any actual assistance of counsel for his defense whatsoever. Not only condoning and sanctioning attorney's actions but also in "vouching for attorney" in an attempt to persuade Mr. Simmons of attorney' abilities opposed to conducting a meaningful inquiry into Mr. Simmons' grounds for waiver of fundamental right. **Von Moltke**. (Exhibit-6. Aug. 10, 2011 P. 10, Ll 3-7 "Mr. Marino is a long standing public defender in the division of the court and is very capable and competent of handling matters in this court, including yours"): (Exhibit-7, Sept. 6, 2011 P. 8, Ll 7-12)(same)[29]

Emphasizing the word capable in describing attorney's abilities. Mr. Simmons ask this Court to consider the word "Competent; 1. well qualified; capable; fit..." Webster's New World College

28 Faretta, U.S., at 822-823 "the Star Chamber has for centuries symbolized disregard of basic individual rights. The Star Chamber not merely allowed but required defendants to have counsel. The defendant's answer to an indictment was not accepted unless it was signed by counsel"

29 Code of Judicial Conduct, Canon 2(B); A judge shall not allow family, social, political or other relationship to influence judicial conduct or judgment...A Judge shall not testify voluntarily as a character witness.

Dictionary, Fifth Ed. P. 304. This Court in Cronic made clear, "The Sixth Amendment guarantees more than the appointment of 'competent counsel'" Merely providing defendant with a competent and/or capable attorney does not satisfy the commands of the Constitution. The proper inquiry is whether this competent and/or capable attorney is actually functioning as counsel guaranteed defendant by the Sixth Amendment, which falls within the realm of judge's duty as a detached arbitrator.

Trial Judge failure to conduct a meaningful inquiry into the grounds for Mr. Simmons' request for appointment of new counsel; Mr. Simmons' grounds for request for self-representation, or even requiring "conflicted" attorney, "a long standing [capable] public defender in the division of the court" to be present during Mr. Simmons' "relinquishment" of his fundamental right of "Assistance of Counsel for His Defense" flies in the face of logic.

Mr. Simmons argues, Judge did not make an "objective" and "realistic" appraisal of psychological affects of the working, social, or other relationship between him and attorney at play, or his own prejudged beliefs of Mr. Simmons' guilt and/or viability of his defense, electing to ignore the prevalent signs of client-counsel conflict, attorney's inadequate representation, or the prejudicial affects his rulings, including on Motion to Recuse, would have on Mr. Simmons' ability to muster his defense.

QUESTION OF LAW
12.
Whether Defendant's Waiver Of Fundamental Right To Assistance Of Counsel Constitute A Critical Stage In The Proceeding Requiring "Conflicted Counsel" Presence In Which Trial Judge May Conduct A Meaningful Inquiry As Determined In Gillies?

QUESTION OF LAW
13.
Whether Trial Judge Should Have Recused Himself Or At A Minimum Allowed Another Judge Consider The Motion For His Recusal?

Mr. Simmons avers judge failed to "respect" him as a self-represented litigant, going so far as dispensing with a bench conference rather than allowing Mr. Simmons, a self-represented litigant, input or participation.

On Aug. 24, 2011 after Mr. Simmons had been granted his right of self-representation and entered "his" plea of not guilty by reason of insanity, judge attempted to hold a "collusionistic" bench conference, excluding Mr. Simmons, after D.A. Sins ask, "Wouldn't we have to have a sanity commission now that the plea has been changed to not guilty by insanity?"[33]

It is well understood in Louisiana, insanity at time of the offense is an "affirmative defense which goes towards accused guilt or innocence and to be tried concurrently by jury" La. C.Cr.P. art 651: **State v. Dowdy**, 217 La. 773, 47 So.2d 496 (1950): ALI Code Crim. P §§ 221, 222 **State v. Whisennant**, 1965, 247 La. 987, 175 So.2d 293: **State v. Basco**, 1950, 216 La. 356, 43 So.2d 761: **State v. Cook**, 1949, 215 La. 163, 39 So.2d 898: See **Ake** id, **Leland**. (same): Mr. Simmons attempts to inform judge of these Louisiana precedence fell on deaf ears. (Exhibit-3 Aug. 24, 2011, P. 10, Ll 17-22 (Mr. Simmons) "This is a question for jury"...(judge) "I ruled have a seat")

Judge, fully aware of the pretrial events and his pretrial dispositions, justified his rulings on Mr. Simmons' sanity at time of the offense on "Mr. Simmons failed to make a previous showing of history of mental illness"[34], his ability to assist in his defense[35] and the closeness of trial, eluding to Mr. Simmons' request being dilatory. *cf.* "Issue Of Sanity Never Raised"

Notwithstanding the "foreseeability" the affects judge's ruling would have upon Mr. Simmons' ability to defend himself, but judge's present sense perception of Mr. Simmons, under an extremely different set of circumstances is unreliable. Because Mr. Simmons is not exhibiting some abnormal or psychotic behavior or has acted out; possibly for the sole purpose of convincing judge of his insanity at time of the offense, does not forecloses the possibility that he may have actually snapped or suffered some episode during the offense, exempting him from criminal responsibility.[36]

Judge's requirement of Mr. Simmons making a showing of a prior history of mental illness, i.e.

33 Exhibit-3, Aug. 24, 2011, P, 7, Ll9-12
34 Exhibit-3. Aug. 24, 2011, P. 10, Ll 1-26
35 Exhibit-7 Sept. 6, 2011 P. 7, Ll5-8
36 See State v, George, sup. 1976, 339 So.2d 762

Doctor's care...etc. Not only unjustly shifts the burden of proof to Mr. Simmons, the defendant, which is prohibited[37] it is already settled that, "evidence of prior mental illness does not settle the issue of whether Accused is presently competent to stand trial" **U.S. v. Newfield**, 565 F.2d 203, 206 (2d Cir. 1977) or the alternative that he was sane at the time of the offense. Judge, attempts to establish new standard, one requiring indigent defendants, like Mr. Simmons to make a substantial showing to an entity not even charged with the duty of determining his guilt or innocence.

Insanity at time of the offense and Accused competence to understand the proceedings are controlled by 2 distinctly different determination, because they involve Defendant's mental state at different times and because the ultimate questions differs". **Dusky V. U.S.**, 362 U.S. 402 (1960): **U.S. v. Williams**, 998 F.2d 258 (5th Cir. 1993)

Contrary to this Court's holding in **Ake**, U.S., 87 judge "misstated the facts" construing Mr. Simmons' competency to understand the proceedings as the issue presented to justify his ruling. Mr. Simmons argued judge in utilizing the "competency to understand the proceedings against him and the ability to assist in his defense standard"[38] "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." Judge recognized the correct governing legal standard, but nevertheless misapplied it. *cf.* May 11, 2011 "serious issues in respect to Mr. Simmons' mental state at time of offense"[39]

The denial of Mr. Simmons' plea and combination defense "created an ambiguous stipulation that prevented him from utilizing a statutorily available and meritorious insanity defense, as recognized in **Derden**, F.2d, at 1457 (citing **Guidroz v. Lynaugh**, 852 F.2d 832 (5th Cir. 1988) "fitting U.S. Supreme Court's description of denial of due process" **Lisenba v. California**, 314 U.S. 219, 236.

In Louisiana the defendant begins with the presumption of being sane at the time of the offense,

37 Sandstrom v. Montana,
38 Id.
39 P. 23, Ll 1-2, L 16

and must be allowed to offer evidence if he is to overcome the presumption **Leland**, U.S., at 799 n. 11: La. C.E. §§ 304, 305, 306. Where Mr. Simmons was barred from raising the merits of his insanity defense[40]D.A. and judge are free to raise the issue and/or introduce arguments designed to negate the merits of the insanity defense, enforcing the presumption that Mr. Simmons, who is not even allowed to argue otherwise and who has been denied all requested evidence which would suggest otherwise, was sane at the time of the offense, desiring the outcome of his actions.

Furthermore jury was also instructed they could infer and presume the same from other facts and circumstantial evidence (see Sept. 7, 2011. P. 573 Ll 19-29 (Prosecutor) "Heat of blood...you loose your ability to step back and rethink"): (Exhibit- Sept. 8, 2011, P. 54 Ll 24-26 (Prosecutor) "Intoxication out the window...**ibid** P.65 L 29 "We desire the consequences of our actions...**ibid** Pp. 68-69 Ll 16-13 (Judge) You may infer from the evidence...from the circumstance...**ibid** P. 69 Ll 8-17.

These arguments included that Mr. Simmons was sane at the time of the offense desiring the outcome of his action and the presence of "specific" intent.

Mr. Simmons avers "he must be found guilty of all elements of the crime beyond a reasonable doubt." **In re Winship**, 397 U.S. 358, 364 and court is prohibited from relying on inferences or presumptions from circumstantial evidence **Sandstrom v. Montana**, 442 U.S. 510, n. 2 or shifting the burden of proof, as reflected in Louisiana's jurisprudence. **Miller**, So.2d at 923 n. 2 "does not require Accused to prove his insanity, but requires prosecution to disprove"

It is untenable that judge's individuals and/or cumulative rulings did not affect Mr. Simmons' ability to overcome the presumption he was sane at the time of the offense, defend himself, the outcome of the trial or were harmless beyond a reasonable doubt.

Trial Judge played 2 distinctly different roles 1.) That of a qualified mental health care professional, without opposition to his findings as to Mr. Simmons' sanity at time of the offense, and 2.)

40 Sept. 7, 2011. Pp. 664-665 Judge removed jurors and admonished Mr. Simmons for attempting to raise the issue of insanity for jury's consideration

that of an impartial adjudicator, giving his own findings great weight.

QUESTION OF LAW
14.

Whether Trial Judge Erred In Ruling On Mr. Simmons' Sanity At The Time Of The Offense Deprived Him Of His Constitutional Guarantee To Have His Guilt Determined By A Jury After Considering All Available And Requested Evidence Crucial To Guilt Or Innocence?

Judge's disparity in treatment is also found in his denial of Mr. Simmons' good faith request for a continuance, from a unrealistic trial date" in an effort to salvage his defense.

Without doubt, the record supports that Mr. Simmons was hailed to trial Sept. 7, 2011 (less than thirty days after gaining control of his defense) with none of his pretrial request fulfilled by attorney and that trial judge was aware of the pretrial events, request, client-counsel conflict, and that Mr. Simmons did not receive attorney's file, minus request made to attorney by him, two weeks after gaining control of his defense.[41]

These same records support Mr. Simmons' claim that "attorney" held control of the defense until Aug. 10, 2011received multiple request for continuances and trial judge did not require attorney to submit Mr. Simmons' defense orientated request or assist in his defense; committing "extrinsic [collateral] fraud[42] (Exhibit-9. Motion, Denied): (Exhibit-2 May 11, 2011 Denied): (Exhibit-6, Aug. 10, 2011 P. Ll 25-30 (D.A.) "Mr. Marino refused to adopt those motions");(ibid. Aug. 10, 2011 P. 10, L 3 (Judge) "Mr. Marino is capable"); (Exhibit-7, Sept. 6, 2011 P. 8, Ll 7-18 (Judge) "Mr. Marino longstanding of the division...capable"): (ibid, Sept. 6, 2011. P. 7, ll5-10 (Judge) "And once again his real complaint goes to whether or not he had an opportunity to have a psychiatric evaluation, which would go to the insanity defense which I have denied")...these same records confirms trial judge removes jurors and admonished Mr. Simmons, the first day of trial for even attempting to raise the issue of his mental state, insanity at the time of the offense, for jury consideration. See Sept. 7, 2011,

41 Supra Exhibit-6 Aug. 10, 2011 P. 13, Ll 23-30; Exhibit- Aug. 24, 2011 P. 7 Ll 1-3

42 Fraud that prevents a party from knowing about his rights or defenses or from having a fair opportunity of presenting them at trial or from fully litigating at the trial all the rights or defenses that he was entitled to assert..." Barron's Law Dictionary (Pocket) 6th Ed., Steven H. Gifis P.227: Black's Law Dictionary, Abridged 7th Ed. 2000. P.530 (same)

first day of trial transcripts.

Although trial judge "objectively" maintains his string of "unfavorable" rulings do not indicate bias or prejudice, "only that Mr. Simmons' defense request were not valid" (**ibid**, Sept. 6, 2011 P. 4, Ll 31-32) Apndx.-B, (Pet. Post-conviction, Pp.57-58)(Pervasive Bias Exception **Liteky**) these individual and/or cumulative rulings, comments, and accompanying opinions give the appearance of some bias against Mr. Simmons on part of trial judge.

QUESTION
15.

Whether Trial Judge's Rulings, Comments, And Accompanying Opinions Give The Appearance That Mr. Simmons Was Tried By A Bias Judge

CONCLUSION

In Conclusion Mr. Simmons submits all claims in his prior filings for this Honorable United States Supreme Court consideration including but not limited to his "objection/argument" to last court hearing his claims on the merits, in that 'Mr. Simmons' failed to "object" at the time of the violation Apndx.-B, (Pet. Writ Cert La. S.Ct. Pp. 2-4): Apndx.-A (Original Brief by Jane L. Bebee for argument)

Likewise where United States District Court in it's denial of Certificate of Appealability utilizes "Petitioner has not made a substantial showing of the denial of a constitutional right" Apndx.-D, all Mr. Simmons' "allegations are found on the record" Apndx.-B, (Evid. Hrng Pp. 42-44 Ll, 15-16 (Judge Marcel) overcoming 28 USC § 2254 (e)(1) and satisfying (d)(1) ibid., For the aforementioned reasons this Honorable United States Supreme Court should grant certiorari. Providing long over due relief.

Respectfully Submitted:

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Submitted Sept.24, 2019