ORIGINAL

No. 19-6701

In The
Supreme Court of the United States
_____ Term, _____

CARL LABAT v. DARREL VANNOY, Warden

On Petition for a Writ of Certiorari to

U.S. FIFTH CIRCUIT COURT OF APPEALS

Carl Labat #592090
MPEY/Spruce-3
Louisiana State Penitentiary
Angola, Louisiana 70712-9818

November 11, 2019

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QUESTIONS PRESENTED

1. **Reasonable jurists would determine that Mr. Labat was denied effective assistance of counsel on Appeal for: (a) Failure to Exhaust State Remedies; (b) failure to seek Supervisory Writs: and, (c) Inadequate argument presentation.**

INTERESTED PARTIES

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Darrel Vannoy, Warden
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TABLE OF CONTENTS: Page

INDEX OF AUTHORITIES: Page

U.S. CONSTITUTION:

FEDERAL CASES:

LA. CONSTITUTION:

STATUTORY PROVISIONS:

STATE CASES:

MISCELLANEOUS:

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No.: _____

CARL LABAT v. DARREL VANNOY, Warden

Petition for Writ of Certiorari to the U.S. Fifth Circuit Court of Appeal

Pro Se Petitioner, Carl Labat respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the U.S. Fifth Circuit Court of Appeal (Docket No.: 19-30179), entered in the above entitled proceeding on October 2, 2019; that the issues presented to the Federal Courts were: (1) Reasonable jurists would conclude that the State obtained Mr. Labat's conviction with insufficient evidence; (2) Jurists of reason would determine that Mr. Labat was denied a constitutionally fair and impartial decision by the State Court's denial of relief concerning the abuse of discretion in the improper Voir Dire; (3) Reasonable jurists would determine that Mr. Labat was denied a fair and impartial trial with the State Courts denial concerning hearsay testimony; and, (4) Reasonable jurists would conclude that Mr. Labat was denied effective assistance of counsel during trial and Appeal.

NOTICE OF PRO-SE FILING

Mr. Labat requests that this Honorable Court view these Claims in accordance with the rulings of *Haines v. Kerner*, 404 U.S. 519, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972). Mr. Labat is a layman of the law and untrained in the ways of filings and proceedings of formal pleadings in this Court. Therefore, he should not be held to the same stringent standards as those of a trained attorney.

Mr. Labat has remained in continued custody since his arrest, and is currently an inmate at Louisiana State Penitentiary at Angola, Louisiana, Darrel Vannoy, Warden. Mr. Labat requests that his *Pro-Se* efforts herein be liberally construed as he has made a good faith effort to follow form. See, *United States v. Glinsey*, 209 F.3d 386, 392 (5th Cir. 2000).

OPINIONS BELOW

The opinion(s) of the U.S. Fifth Circuit Court of Appeal Docket No.: 19-30179.

JURISDICTION

The judgment of the U.S. Fifth Circuit Court of Appeal, was entered on October 2, 2019. This Court's Certiorari jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

STATEMENT OF THE CASE

Mr. Carl Labat was indicted by the Grand Jury for the Parish of Orleans on June 24, 2010. Mr. Labat was indicted for a violation of LSA-R.S. 14:30.1, relative to Second Degree Murder. Also indicted in connection with this matter, was Ms. Sheena Edwards.

Mr. Labat was arraigned on August 20, 2010, and entered a plea of not guilty. Mr. Labat was represented throughout these proceedings by Mr. John Fuller. Pre-Trial motions in this matter were heard on September 9, 2010, and denied on September 24, 2010.

Trial commenced on August 23, 2011, which lasted until August 26, 2011, and resulted in a verdict of guilty of Second Degree Murder.

Mr. Labat was sentenced on December 14, 2011. During the sentencing hearing, the Court noted that a Motion for New Trial did not appear on the record. A Motion for Judgment Notwithstanding the verdict does not appear to have been filed.

Mr. Labat was sentenced to life imprisonment without the benefit of Probation, Parole, or Suspension of Sentence. Mr. Labat subsequently retained Ms. Tanzanika Ruffin, Esp., for the purpose of Appeal, which was filed to the Louisiana Fourth Circuit Court of Appeals, Docket No.: 2012-KA-1210. Mr. Labat's Appeal was denied April 24, 2013.

From a review of the Record, Ms. Ruffin failed to advance the Appeal Issues to the Louisiana Supreme Court. Further, an investigation has determined that upon information and belief, not only was

there no Application for Writs filed to the Supreme Court, but it does not appear that Mr. Labat was given a reasonable opportunity to seek Pro-Se Application for Writs to the Louisiana Supreme Court.

An Application for Post-Conviction Relief was filed in the Criminal District Court for the Parish of Orleans. On October 7, 2015, the Honorable Judge Camile Buras denied the Application for Post-Conviction Relief. A formal objection was noted with a Notice of Intent for Writs of Certiorari, Mandamus and Prohibition, which was denied on February 23, 2016.

On March 23, 2016, Mr. Labat, through retained counsel, filed his Application for Writs of Certiorari, Mandamus and Prohibition, which was denied on May 12, 2017. Mr. Labat now proceeds in a Pro-Se capacity in pleading his case to the federal courts.

On August 3, 2017, Mr. Labat filed his Original Petition for Federal Corpus Relief. On December 11, 2017 (received by Mr. Labat on December 20, 2017), the State filed its Response, which was Traversed by Mr. Labat on January 2, 2017. On June 28, 2018 (received by Mr. Labat on July 2, 2018), the Honorable Karen Wells Roby filed the Magistrate's Report and Recommendation to Mr. Labat's Habeas Corpus, which was objected to on July 9, 2018.

On February 13, 2019, Judge Jane Milazzo adopted the Magistrate's Report and Recommendation, denying relief.

Mr. Labat filed for Certificate of Appealability with the U.S. Fifth Circuit Court of Appeal on March 28, 2019, which was denied on October 2, 2019.

Mr. Labat now timely seeks Writ of Certiorari to this Honorable Court, humbly requesting that this Honorable Court invoke its Supervisory Authority of Jurisdiction over the lower courts, and after a thorough review, find that his Claims are deemed good and proper, and determine that relief can be granted for the following reasons to wit:

STATEMENT OF THE FACTS

After Voir Dire, testimony in this matter began on August 24, 2011, with Ms. Nicole Anderson (the sister of the decedent), who had provided background information.

Officer Robert King responded to the shooting at the IHOP restaurant, which was located on the I-10 service road, and located the decedent in the parking lot (Tr.p. 8).

Detective Ryan Aucoin of the NOPD Homicide division was the main case agent in this investigation; and, Detective Anthony Pardo, supervised the collection of the evidence from the crime scene at the IHOP. Det. Pardo also discussed the video evidence which was presented recovered in the case (Tr.p. 30). On cross-examination, Det. Pardo testified as to "threats" made against Mr. Labat.

Technician Carl Palmer, sketched the crime scene (Tr.p. 69) and collected casings from the crime scene. It was noted that a live round from a weapon was recovered (other than Mr. Labat's weapon that used during this incident)(Tr.p. 81).

Ms. Monica Edgar testified as to an argument between Mr. Labat and the victim at a local establishment. The following day, Sheena Edwards arrived at an apartment where the witness was located and several individuals were threatened. Thirty minutes later, Travis Anderson was shot.

On cross-examination, it was determined from the testimony that Travis Anderson (the victim) wanted to fight Mr. Labat that night. Furthermore, that Rio (Sandifer) and Mr. Labat, had been involved in a prior argument, and that Rio and Anderson (the victim) had threatened to kill Sheena Edwards, Carl Labat, and Sheena Edwards' parents (Tr.p. 140).

An incident had also taken place prior to the shooting, at Club Passion, where Ms. Monica Edgar worked as a dancer. During that incident, Rio Sandifer removed a gun from Travis Anderson's vehicle and was laying in wait for Mr. Labat (Tr.pp. 140-41).

Alexis Sandifer identified herself as Rio Sandifer's sister as well as a friend of Sunny Anderson and Travis Anderson. She testified that on April 17, 2011, an argument had taken place at Passions

nightclub where she was working. The verbal argument took place Mr. Labat and Mr. Anderson. *Id.* (Tr.p. 10). A second argument took place the following day between the witness (Ms. Sandifer), Sheena Edwards, and Rio Sandifer. Mr. Labat was also present. Roughly thirty (30) minutes after this argument, the shooting occurred.

On cross-examination, Ms. Sandifer acknowledged that Rio Sandifer possessed a sawed-off shotgun. *Id.* (Tr.p. 22). With respect to Mr. Anderson, he was observed arguing with Mr. Labat and Sheena Edwards prior to the actual shooting. *Id.*, (Tr.p. 31). Mr. Anderson apparently wanted to fight, at which time Rio Sandifer brandished a shotgun. *Id.*, (Tr.p. 32). Mr. Labat and Sheena Edwards were then observed exiting the scene, while Rio Sandifer was holding the shotgun.

On re-direct examination, the State introduced a CD which contained a video taken outside the IHOP about the time of the shooting. *Id.* (Tr.p. 50). An objection based on late discovery was made on Mr. Labat's behalf. *Id.* (Tr.pp. 49-51). The Court overruled the objected of trial counsel. It does not appear that this Issue was raised on Appeal.

Ms. Isone Anderson (victim's sister) testified that Travis Anderson was upset with Mr. Labat, because Mr. Labat had allegedly slapped Mr. Anderson's girlfriend, Stephanie (Tr.p. 70). On cross-examination, Mr. Labat attempted to introduce impeachment evidence (Defense Exhibit No. 6). However, and objection by the State was sustained (Tr.p. 84). Ms. Anderson denied that her brother ever threatened to kill Mr. Labat (Tr.p. 70).

Defense counsel attempted to call Kenneth Leary (NOPD Firearm Examiner) as a witness, but Mr. Leary was not available. Mr. Labat was then called to testify. Mr. Leary was never subsequently called by the defense. This issue of the failure to call Kenneth Leary was not raised on Appeal.

Mr. Labat denied that he had gotten into arguments with Rio Sandifer, Travis Anderson or "Stephanie" (Tr.p. 59). Mr. Labat told the jury that he did not make any threats as described by the previous State witnesses (Tr.p. 61). He was confronted by Mr. Anderson who stated, "I should've killed

you last night" (Tr.pp. 65-6). This confrontation took place that night just before the shooting. Once Mr. Anderson said that, Mr. Labat tried to leave. But, at that point, Mr. Anderson reached for something (Tr.p. 66). Mr. Labat told the jury, "as he reached, I reached." A video from the incident was played for the jury. The video was also played during the cross-examination (Tr.p. 88).

Mr. Glen Woods, Attorney at Law, was the next defense witness. The district court prohibited Mr. Woods, who was representing Sheena Edwards from testifying (Tr.pp. 103-9). This erroneous ruling from the district court was not raised on Appeal. There was no rebuttal case presented by the State (Tr.p. 117).

Mr. Labat then appeared for sentencing on December 14, 2011. It was noted by the Court that there was no Motion for a New Trial located. It also appears that there was no Motion for Post-Verdict Judgment of Acquittal filed by the defense. Yet, these issues were not discussed on Appeal.

This case was not subject to review by the Louisiana Supreme Court, due to the apparent omission of seeking appellate review to the Louisiana Supreme Court. Procedurally, Mr. Labat's former retained appellate counsel had 30 days from the date of the denial of the Direct Appeal (2012-KA-1210, La. App. 4th Cir. 2013) to seek and Application for Writs to the Louisiana Supreme Court. That Application was never filed. Hence, Mr. Labat who is serving a mandatory life sentence was denied his right of appellate review.

DUE DILIGENCE/EQUITABLE TOLLING

When the Louisiana Fourth Circuit Court of Appeals affirmed his conviction and sentence in Docket Number 2012-KA-1210, on April 24, 2013, retained counsel, Ms. Tanzanika Ruffin failed to inform him of the Court's decision in his case. Furthermore, Ms. Ruffin had failed to file Writs to the Louisiana Supreme Court concerning the Issue which she had filed on Appeal.

Had Ms. Ruffin timely informed Mr. Labat of the Court's decision, and of the fact that she had not proceeded to the Louisiana Supreme Court with his Issue, Mr. Labat would have requested for

assistance from an Offender Counsel Substitute at the Louisiana State Penitentiary to assist him to file such.

Sadly, this is not the case concerning Mr. Labat due to the fact that Ms. Ruffin had "abandoned" Mr. Labat at a critical stage of these proceedings. Although Mr. Labat diligently contacted his retained counsel at all time, Mr. Labat, while researching, was informed by the Offender Counsel that his Appeal decision was already on the Westlaw. At that time, eighteen (18) months had elapsed from the date of the ruling.

Mr. Labat has obtained the Privileged Mail printout from the Legal Mail Department at the Louisiana State Penitentiary (See: Exhibit "E"). On April 30, 2013, Mr. Labat received two (2) boxes of trial transcript from Ms. Ruffin. On August 22, 2013, Mr. Labat received the Brief that Ms. Ruffin had filed in his behalf to the Court of Appeals. These are the **only** Legal Mail that Mr. Labat received in 2013; and a notation at the bottom of the page informs Mr. Labat that he had received no Legal Mail in 2014.

Mr. Labat had also written retained counsel on numerous occasions in an attempt to determine the status of his case, with no response from Ms. Ruffin (See: Exhibit "C"). Mr. Labat then had his aunt attempt to contact Ms. Ruffin to ascertain the status of his case, with the same results (See: Exhibit "D," Affidavit from Claudia Washington).

As Mr. Labat is a layman of the law, he relied solely on the professionalism of his counsel, and his counsels duty according to the Rules of Professional Conduct; specifically Standard 4-3.8, which states in pertinent part:

Standard 4-3.8: Duty to keep client informed:

(A) Defense counsel should keep the client informed of the development in the case and the progress of preparing the defense and should promptly comply with reasonable requests for information.

(B) Defense counsel should explain developments in the case to the extent reasonably necessary to permit the client to make informed decisions regarding the presentation.

During the course of the Habeas proceedings, Mr. Labat had Exhibitized correspondences to Ms. Ruffin and the printout from the Legal Programs Department (See: Exhibit "C"). which proves that Mr. Labat *did not* receive a copy of the Court of Appeal's ruling from either the Court or his retained counsel. Mr. Labat cannot be held responsible under the provisions of *Maples v. Thomas*, 132 S.Ct. 912, 181 L.Ed.2d 807 (1/18/11).

In *Holland v. Florida*, 560 U.S. ___, 130 S.Ct. 2549 (2010), the Supreme Court ruled that the lower federal courts should not apply AEDPA's one-year time limitation too rigidly to State prisoners seeking federal habeas relief. To say Mr. Labat claims are procedurally barred, due to this attorney's inability to understand and apply AEDPA's one year limitation period would be to say that the general rule trumps Mr. Labat' constitutional right that have been violated, as well as his right to judicial review by way of his initial habeas corpus.

This case is similar to the one that the United States Supreme Court recently ruled on concerning procedural default. In *Maples v. Thomas*, 132 S.Ct. 912, 181 L.Ed.2d 807 (1/18/11), the Court held that, "The Supreme Court, Justice Ginsburg, held that cause existed for procedural default of habeas claim" due to the attorney's "abandonment" of the client.

The Court further noted that, "For purposes of determining whether a habeas Petitioner has procedurally defaulted a Claim, under agency principles, a client cannot be charged with the acts or omissions of an attorney who has abandoned him, and neither can a client be faulted for failing to act on his own behalf when he lacks reason to believe his attorneys of record, in fact, or not representing him."

Mr. Labat contends that Ms. Ruffin (retained appellate counsel) had "abandoned" him during the course of the Appeal. Although Ms. Ruffin was retained for the purpose of a "complete" Appeal (including filing Writs to the Louisiana Supreme Court if needed), this Court **MUST** find that she had

completed "half" of the work she was retained for.

REASONS FOR GRANTING THE WRIT

In accordance with this Court's *Rule X, § (b) and (c)*, Mr. Labat presents for his reasons for granting this writ application that:

Review on a Writ of Certiorari is not a matter of right, but of judicial discretion. A petition for a Writ of Certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers.

A state court of last resort (Louisiana Supreme Court) has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States Court of Appeals.

A United States Court of Appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court or U.S. Court of Appeals.

The Courts have failed to properly allow Mr. Labat Equitable Tolling due to his attorney's "Abandonment" during the course of the Direct Appeal. Mr. Labat has informed the Courts that when the Louisiana Fourth Circuit Court of Appeals affirmed his conviction and sentence in Docket Number 2012-KA-1210, on April 24, 2013, retained counsel, Ms. Tanzanika Ruffin failed to inform him of the Court's decision in his case. Furthermore, Ms. Ruffin had failed to file Writs to the Louisiana Supreme Court concerning the Issue which she had filed on Appeal.

Had Ms. Ruffin timely informed Mr. Labat of the Court's decision, and of the fact that she had not proceeded to the Louisiana Supreme Court with his Issue, Mr. Labat would have requested for assistance from an Offender Counsel Substitute at the Louisiana State Penitentiary to assist him to file such.

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IV. Specific Issue(s).

Reasonable jurists would conclude that Mr. Labat was denied effective assistance of counsel during Appeal; and should have been afforded Equitable Tolling due to counsel's ineffectiveness;

LAW AND ARGUMENT

CLAIM 1

Reasonable jurists would conclude that Mr. Labat was denied effective assistance of counsel for: (a) Failure to Exhaust State Remedies; (b) failure to seek Supervisory Writs: and, (c) Inadequate argument presentation. *Strickland v. Washington*; Sixth and Fourteenth Amendments to the United States Constitution.

(a) Failure to Exhaust State Remedies:

From a review of the Record in this matter, it appears that this case was the subject of a Direct Appeal (4th Cir. #2012-KA-1210). The Appeal was filed with the Louisiana Fourth Circuit Court of Appeals. The 4th Circuit denied Mr. Labat's Appeal in April of 2013. Mr. Labat's former attorney, however, did not seek an Application for Writs to the Louisiana Supreme Court after the April 23, 2013 denial by the Court of Appeals. That Application would have been necessary to review the decision of

the Court of Appeals.

It is clear that the former appellate counsel failed to seek Writs to the Louisiana Supreme Court. As a result, Mr. Labat failed to properly exhaust his State remedies and complete appellate review. As it is well known, the Appellate process at the State level is not completed until an Application for Writs is ruled upon by the Louisiana Supreme Court.

The test outlined in jurisprudence concerning the effectiveness of counsel, stems from ***Strickland v. Washington***, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); ***State ex rel. Busby v. Butler***, 538 So.2d 164 (La. 1988).

As it is discussed in ***State v. Ball***, 554 So.2d 114 (La. App. 2nd Cir. 1989) it was stated:

> "The test for effectiveness of counsel is two-pronged. First, the defendant must show that the counsel's performance was deficient, that counsel made errors so serious that he was not functioning as the counsel guaranteed by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense, by showing that the counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. ***Strickland v. Washington***, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), ***State ex rel. Busby v. Butler***, 538 So.2d 164 (La. 1988). Therefore, the benchmark for judging any such claim is whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial court cannot be relied on as having produced a just result. ***Strickland***, 466 U.S., at 686, 104 S.Ct., at 2063, ***State ex rel. Busby v. Butler***, at 167. Only if Petitioner shows both error and prejudice will his conviction be found and set aside."

(554 So.2d 115, 116).

It was submitted that the former retained appellate counsel had a responsibility to Mr. Labat to provide for his Right of Appeal by filing an Application for Writs to the Louisiana Supreme Court. If for any reason, counsel decided that she was not going to seek Writs, Mr. Labat should have been informed in a timely manner.

Appellate Rules and Procedures are quite strict. In this matter, any citizen in Louisiana has only 30 days to seek review to the Louisiana Supreme Court when they are denied on Direct Appeal.

As of this date, Mr. Labat has been unable to find any such Application to the Louisiana Supreme Court, and the impact on Mr. Labat is significant.

First, by not filing for Writs in the Louisiana Supreme Court, Mr. Labat is now **permanently barred in Federal Court**, from any legal action to review this conviction.

U.S.C. 2254 (b)(1)(A), provides that an Application for Habeas Corpus shall not be granted, unless it appears that the Applicant has exhausted the remedies available in the Courts of the State. U.S.C. 2254 (b)(1)(A). Previous litigation has established that a habeas petition must be dismissed if any issue has not been exhausted in the state courts. *Rose v. Lundy*, 455 U.S. 509, 102 S.Ct. 1198, 71 L.Ed.2d 379 (1982); *Ex Parte Royall*, 117 U.S. 241, 6 S.Ct. 734, 29 L.Ed. 868 (1886); *Thomas v. Collins*, 919 F.2d 333, 334 (5th Cir. 1990). For a claim to have been exhausted, it must have been presented to the highest state court in a procedurally proper manner. *Rose v. Lundy*, supra, 102 S.Ct. 1202; *Dupuy v. Butler*, 837 F.2d 699, 702 (5th Cir. 1988), citing, *Carter v. Estelle*, 677 F.2d 427, 442 n. 10 (5th Cir. 1982)(citations omitted).

To exhaust his state remedies, a habeas Petitioner must fairly present the substances of his claim to the state courts. *Finely v. Johnson*, 243 F.3d 216 (C.A. 5 Tex. 3/08/2001), citing *Picard v. Connor*, 404 U.S. 270, 275-76, 92 S.Ct. 509, 30 L.Ed.2d 438 (1971). The exhaustion requirement is not met if the Petitioner presents new legal theories or factual claims in his federal habeas petition. *Id*, citing *Anderson v. Harless*, 459 U.S. 4, 6-7, 103 S.Ct. 276, 76 L.Ed.2d 3 (1982).

The finality of a judgment of appeal is determined by La.C.Cr.P. Art. 922, which provides in pertinent part, that a conviction is final (A) within fourteen (14) days of rendering judgment by any appellate court or the Supreme Court, a party may apply for rehearing; (B) a judgment becomes final when the delay for applying for a rehearing has expired without Application being made; (C) when a timely filed Application for Rehearing has been made, a judgment becomes final when the Application is denied; (D) if an Application for a Writ of Review is timely filed with the Supreme Court, the appellate court judgment becomes final when the Supreme Court denies the Writ.

It does not appear that any Motion for Rehearing was filed at the Fourth Circuit Court of Appeals

on behalf of Mr. Carl Labat. Nor does it appear that retained counsel had filed Motion to Withdraw from Mr. Labat's case.

By failing to exhaust his state remedies, failing to pursue Mr. Labat's Appeal to the Louisiana Supreme Court, Mr. Labat will **never be able to raise any of the Issue found in Direct Appeal** to a federal tribunal. Nor was Mr. Labat provided with Supreme Court review. His constitutional right to Appeal has been totally compromised. The problem is further complicated by the time limitations, which exists as for a Post-Conviction Relief are concerned.

La.C.Cr.P. Art. 930.4 prohibits the re-litigation on Post-Conviction Relief issues which were raised on Direct Appeal. In addition, any errors regarding sentencing are prohibited from consideration on Post-Conviction Relief. *State ex rel. Meline v. State*, 665 So.2d 1172 (La. 1996).

Therefore, at this point following developments occurred by the failure here to file an Application for Supervisory Writs to the Louisiana Supreme Court:

1) Mr. Labat is prevented from litigating any issue presented on Direct Appeal via federal habeas corpus;
2) All issues regarding sentencing are unable to be discussed per Post-Conviction Relief are deemed final (per Article 922) by the decision of the Louisiana Fourth Circuit Court of Appeals; and,
3) All other assignments of error raised on Direct Appeal may not be raised on Post-Conviction Relief (per Article 930.4) and may be viewed as "final," final by their determination in the Court of Appeals.

In its judgment, the district court found that these Claims to be "speculative" in nature. Respectfully, there is nothing speculative about being denied the Right to Appeal or being shut out of federal court. Former counsel should have fulfilled their responsibility to Mr. Labat for multiple reasons.

First, the Record in this case is quite large. Appellate records such as this require considerable time to read and digest (even for a retained counsel) in order to get the Writ Application filed within the time limitations.

Second, a defendant only has thirty (30) days from the **date of the decision** to file for an Application for Writs to the Louisiana Supreme Court. It would be almost impossible to take a case "ice cold" and provide proper appellate representation in such a short time period; except by the person(s) who have filed the Original Brief on Appeal. It is well known that with Writ Applications to the Louisiana Supreme Court, no extensions are allowed.

Third, a Motion to Withdraw was not located in the Record. But, even assuming *arguendo* that appellate counsel filed a Motion to Withdraw and a discharge letter was sent to Mr. Labat, such would be pointless. How can any Appellant prepare a proper Application for Writs to the Louisiana Supreme Court and have it timely filed. Nor could any attorney be located, contracted and do the necessary paperwork given the limited time involved. Rather, retained counsel should have finished the work they were contracted for (See: Exhibit "B" copy of contract enclosed).

Fourth, since there are issues (both briefed and not briefed) that have merit, those issues deserve consideration in the Louisiana Supreme Court and the federal courts on habeas.

Fifth, the Code of Ethics for the legal professional in Louisiana requires zealous representation for all clients.

The Louisiana Supreme Court never heard this case and the federal courts will never hear it either. Mr. Labat was denied effective assistance of counsel. Likewise, with issues regarding evidence, mistrial denials and any other possible Assignment of Errors, will not be subject to further review unless a new Appeal is granted. This is what is being requested; a finding that Carl Labat was denied effective assistance of counsel on Appeal. This would allow for full and complete litigation of all issues involved in this Second Degree Murder conviction.

There are valid issues regarding sentencing, the denial of the motion for mistrial and other issues to be discussed herein. In this matter, Mr. Labat is serving a life sentence and was constitutionally entitled to the Right of Appeal. That right was not honored by his **retained** counsel.

When an appellate counsel makes errors so serious that counsel was not functioning as "counsel" guaranteed by the Sixth Amendment, then appellate counsel would be deemed to be ineffective. Counsel's deficient performance will have prejudiced the defendant, if it is shown that the errors were so serious as to deprive him of a fair trial (or a full appellate review). ***Strickland v. Washington***, supra; ***State v. Ball***, supra.

As stated under our Constitution, Mr. Labat was entitled to a full Appeal as a matter of right. Under any concepts of Due Process, Mr. Labat's appeal process should have been brought to completion. It is submitted that the failure to pursue an Application for Writs to the Louisiana Supreme Court was serious error. In fact, it was error so serious as to deprive Mr. Labat of "counsel" as guaranteed by the Sixth Amendment to the United States Constitution. The omission being so serious as to deprive Mr. Labat a fair result (of a complete appellate review) and preservation of his Due Process rights.

This Honorable Court should find merit in this Claim and grant Mr. Labat the opportunity to seek a full meaningful Appeal of his criminal conviction in this case. The decision of the district court is in error for multiple reasons.

First on Appeal, counsel for Mr. Labat cited only one Assignment of Error, insufficient evidence. It is submitted that the argument made is just inadequate (Copy of Appeal Brief attached).

After a general discussion, counsel on Appeal wrote:

> "... there is a great deal of evidence that supports Mr. Labat's version of events. For example, video surveillance footage documents an associate of the victim, Theo Jackson bending over the victim in a manner that supports Defendant-Appellants assertion that Mr. Jackson removed the victim's firearm from the crime scene." (Brief of the Defendant, p. 8)

The **entire factual argument of this case comprised of one paragraph**. Given the fact that Mr. Labat was sentenced to life imprisonment for Second Degree Murder, one would argue that he deserves more than a one paragraph discussion. The Brief is inadequate in substance and argument.

What is equally distressing is that this one paragraph argument is the final statement on Mr. Labat's case due to the fact that his State remedies were never exhausted. Again, the Exhaustion Doctrine as

codified in 28 U.S.C. 2254 (b) and (c), requires that a State prisoner's entire Federal Habeas Petition be dismissed unless his State remedies have been exhausted as to all Claims raised in the Federal Petition. *Graham v. Johnson*, 94 F.3d 958 (5th Cir. 1996). See also: *Alexander v. Johnson*, 163 F.3d 908 (5th Cir. 1998), which held that a habeas petition containing both exhausted and non-exhausted claims is a "mixed petition" which is subject to dismissal. Generally, the exhaustion requirement is satisfied only when the specific constitutional grounds urged in a Federal Habeas Petition were fairly presented to the State's highest Court. *Mercandel v. Cain*, 179 F.3d 271 (5th Cir. 1999).

From the failure to file an Application for Writs to the Louisiana Supreme Court, Mr. Labat has been denied the opportunity to seek federal relief forever. Had a Louisiana Supreme Court Writ Application been filed, Mr. Labat would have had 90 days to seek relief from the United States Supreme Court in the event of a denial. That is in addition to Federal collateral review (28 U.S.C. § 2254).

Therefore, it is submitted that ineffective assistance of counsel in this matter was committed by the failure of former **retained** counsel to perfect an Application for Writs to the Louisiana Supreme Court, or inform Mr. Labat of the decision of the Louisiana Fourth Circuit Court of Appeals in order to allow Mr. Labat to attempt to file his Writ Application. In order to succeed under *Strickland* it must be established that:

1) Former counsel's performance was deficient; and, 2) Counsel's deficient performance actually prejudiced Mr. Labat.

To prove deficient performance, Mr. Labat has demonstrated that former counsel's performance "fell below an objective standard of reasonableness" under "prevailing professional norms. In evaluating appellate counsel's performance, the Supreme Court has long referred to the American Bar Association (ABA) Standards for Criminal Justice. A simple review of what was previously submitted to the Court supports that Claim.

To demonstrate the prejudice prong, Mr. Labat "must show that there is a reasonable probability" that but for counsel's unprofessional errors, the result of the proceedings would have been different. One simply has to demonstrate to a preponderance that the result of the proceeding would have been different.

It is quite apparent that Mr. Labat's Right to Appeal as guaranteed by the Louisiana Constitution, was violated by the omissions of appellate counsel. Clearly, Mr. Labat had met his burden concerning ineffective assistance of counsel in this case. The district court erred in the denial of the Application for Post-Conviction Relief.

A copy of the original contract has been located. It indicates a fee for an "Appeal on Carl Labat." What it **does not say** is the fee for "one-half of the Appeal" or "Appeal to Fourth Circuit Court of Appeals" only.

Respectfully, it is submitted that under any reading of the Rules of Professional Conduct, Mr. Labat was entitled to a "Full Appeal" through the **entire** State Court system. Moreover, the one paragraph *Jackson* argument raised s quite insufficient under any objective standard.

Not only did Mr. Labat deserve an Appeal which went through the entire procedural steps, but he (like anyone) deserves an Appeal that was properly prepared and raised all issues to the fullest. This leads to the next Claim.

(b) Failure to Raise Viable Issues on Appeal:

As previously noted, the Appeal which was *only* filed to the Louisiana Fourth Circuit Court of Appeals consisted of one argument regarding the sufficiency under *Jackson v. Virginia*, 443 U.S. 307. Upon review of the Record and transcripts, there were significant additional Assignment of Errors that should have been raised on Appeal.

Discovery:

The first issue involves a CD based on a video from the IHOP restaurant (Tr. 8/25/11. pp. 49-51).

At that time, the defense objected based on **late disclosure** of the CD in such a short time prior to the commencement of trial. That objection was based on La.C.Cr.P. Art. 729.5, which states:

> **Art. 729.5. Failure to Comply; Sanctions.**
>
> A. If at any time during the course of the proceedings it is brought to the attention of the Court that a party has failed to comply with this Chapter or with an order issued pursuant to this Chapter, the court may order such party to permit the discovery or inspection, grant a continuance, order a mistrial on motion of the defendant, prohibit the party from introducing into evidence the subject matter not disclosed, or enter such other order, other than dismissal, as may be appropriate.
>
> B. In addition to the sanctions authorized in Part A hereof, if at any time prior or subsequent to final disposition the court finds that either the state through the district attorney or assistant district attorney or the defendant or his counsel has willfully failed to comply with this Chapter or with an order issued pursuant to this Chapter, such failure shall be deemed to be a constructive contempt of court. (Added by Acts 1977, No. 515 § 1).

Of course Art. 729.3 places upon all parties the continuing duty to properly disclose relevant evidence to be used at trial. As noted:

> **La.C.Cr.P. Art. 729.3. Continuing duty to disclose:**
>
> "If, subsequent to compliance with an order issued pursuant to this Chapter and prior to or during trial, a party discovers additional evidence or decides to use additional evidence and such evidence is or may be, subject to discovery or inspection under the order issued, he shall promptly notify the other party and the court of the existence of the additional evidence, so that the court may modify its previous order or allow the other party to make an appropriate motion for additional discovery or inspection." (Added by Acts 1977, No. 515 § 1).

In this matter, the defense did comply with La.C.Cr.P. Art. 841, regarding the lodging of a proper objection. The defense did make its argument regarding untimely disclosure and clearly opposed admission of the video. The trial court overruled the objection and allowed the video to be presented to the jury. However, this issue was not raised in the Brief filed at the 4th Circuit. The defense at trial certainly had insufficient time to prepare for the video. Again, this issue should have been raised on Direct Appeal, but was not.

Glen Woods:

Mr. Glen Woods, Esq., was called as a defense witness at trial. Mr. Woods represented the co-defendant, Ms. Sheena Edwards. On September 6, 2011, Ms. Edwards plead guilty to Accessory After

the Fact and was sentenced to 18 months in the Louisiana Department of Public Safety and Correction.

The defense sought to provide an explanation for why it could not call Ms. Edwards as a witness. This could have been easily done by having Mr. Woods identify himself as Ms. Edwards' counsel and describing that Ms. Edwards is unavailable. Such a declaration **would not** require informing the jury that Ms. Edwards had invoked her Fifth Amendment privilege. By simply stating that she was "unavailable," it would answer the logical question in the jury's mind of why Ms. Edwards (a direct witness to this entire incident) is not being presented to the defense. It would be unlikely to assume that the average juror has an understanding of Fifth Amendment Constitutional law.

As with other issues, arguments as to Mr. Woods were made with an objection being noted to the prohibition of Mr. Woods testifying. Again, this issue was not the subject of the Appeal filed with the Louisiana Fourth Circuit Court of Appeals. This is another issue that should have been briefed and argued both to the Court of Appeals and the Louisiana Supreme Court.

Deputy Richard Smith:

The relevance of Sheena Edwards being unavailable to testify involves Deputy Richard Smith. Deputy Smith worked for the Jefferson Parish Sheriff's Office and has handled an incident, prior to this shooting which involved Sheena Edwards and Mr. Labat as the victims. The complaint, made by Ms. Edwards, regarded harassing telephone calls which were revealed to be death threats. An objection as to hearsay was lodged by the State and sustained. This deprived Mr. Labat of the ability to present a complete defense.

This was reversible error, as Mr. Labat had the constitutional right to present a defense. Sixth Amendment to the United States Constitution; Louisiana Constitution of 1974, Art. I, § 16; *Washington v. Texas*, 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019; *State v. Gremillion*, 542 So.2d 1074 (La. 1989); *State v. Vigee*, 518 So.2d 501 (La. 1988); *State v. Van Winkle*, 658 So.2d 198 (La. 1995); *State v. Andrew Harper*, 646 So.2d 338 (La. 11/30/94). It is difficult to imagine rights more

inextricably linked to the concept of a fair trial.

As noted by the Louisiana Supreme Court in *Van Winkle*, at 202:

> "Evidentiary rules may not supersede the fundamental right to present a defense. In *State v. Gremillion*, supra, the defendant attempted to introduce evidence that third parties, rather than the defendant, had killed the victim. The evidence consisted of a statement that the victim made to the sheriff's deputy who investigated the crime. The statement was that he had been attacked and beaten by three white males. The trial court and the Court of Appeal both held the statement was inadmissible hearsay. We agreed that the statement was hearsay and that it did not meet any applicable exception (res gestae, dying declaration, business record). However, we concluded that normally inadmissible hearsay may be admitted if it is reliable, trustworthy and relevant, and if to exclude it would compromise the defendant's right to present a defense. See: *Chambers v. Mississippi*, 401 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973). Exclusion of the statement in *Gremillion* impermissibly impaired the defendant's fundamental right. 542 So.2d 1079, citing, *State v. Washington*, 386 So.2d 1368 (La. 1980)."

Similarly, in *State v. Vigee*, supra, the Court held that hearsay evidence supporting the defendant's theory of the case and undermining the State's lead witness was relevant; excluding it mandated reversal. The defendant may always assert that someone else committed the crime. *Chambers v. Mississippi*, supra; *State v. Ludwig*, 423 So.2d 1073 (La. 1982).

The defense at trial was that of self-defense. This is evident from a review of the Record. As such, the threats made to Ms. Edwards and Mr. Labat by the victim and his associates were relevant and probative to the defense of self-defense. The hearsay objection made was trumped by Mr. Labat's constitutional right to present a complete defense. However, since none of these issues were raised on Direct Appeal, the logical/factual determination of their validity was never made.

The test outlined in jurisprudence concerning the effectiveness of counsel, as previously noted stems from *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State ex rel. Busby v. Butler*, 538 So.2d 164 (La. 1988).

As our jurisprudence has noted in *State v. Ball*, 554 So.2d 114 (La. 1989), as to the test regarding ineffective assistance of counsel:

> "As to ineffective assistance of counsel the test has been outline in jurisprudence concerning the effectiveness of counsel stems from *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State ex rel. Busby v. Butler*, 538 So.2d 164 (La. 1988). Therefore, the

benchmark for judging, any such claim is whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial court cannot be relied as having produced a just result. *Strickland*, 466 U.S., at 686, 104 S.Ct., at p. 2063; *State ex rel. Busby v. Butler*, at p. 167. Only if Petitioner shows both error and prejudice will conviction be found unreliable and set aside." (554 So.2d 115, 116).

In this argument, the issue is whether the defendant received effective assistance of counsel by raising issues that were quite apparent. Of course, the *Strickland* standard which governs applies to appellate counsel. *Gray v. Greer*, 800 F.2d 644 (7th Cir. 1986).

An excellent discussion of the *Strickland* standard as it applies to Appeals is found in *Mayo v. Henderson*, 13 F.3d 528 (5th Cir. 1994).

"In order to prevail on a claim of ineffective assistance of counsel within the framework established by the Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 ("*Strickland*"), a habeas Petitioner must satisfy a two-part test. First, he must show that his attorney's performance "fell below an objective standard of reasonableness," *Id*, at 688, 104 S.Ct., at 2064, and second, he must show that there is a "reasonable probability" that but for counsel's error, the outcome would have been different, *Id*, at 694, 104 S.Ct., at 2068. Although the *Strickland* test was formulated in the context of evaluating a claim of ineffective assistance of trial counsel, the same test is used with respect to appellate counsel. See: *Claudio v. Scully*, 982 F.2d 798, 802 (2nd Cir. 1992), *cert denied*, ___ U.S. ___, 113 S.Ct. 2347, 124 L.Ed.2d 256 (1993); *Abdurrahman v. Henderson*, 897 F.2d 71, 74 (2nd Cir. 1990).

In attempting to demonstrate that appellate counsel's failure to raise a state claim constitutes deficient performance, it is not sufficient for a habeas Petitioner to show merely that counsel omitted a non-frivolous argument, for counsel does not have a duty to advance every non-frivolous argument that could be made. See: *Jones v. Barnes*, 463 U.S. 745, 754, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983).

However, a Petitioner may establish constitutionally inadequate performance if he shows that counsel omitted significant and obvious reasons while pursuing issues hat were clearly and significantly weaker. As the Seventh Circuit has held:

When a claim of ineffective assistance of counsel is based on failure to raise viable issues, the district court must examine the trial court record to determine whether appellate counsel failed to present sufficient and obvious issues on appeal. Significant issues which cold have been raised should then be compared to those which were raised. Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome. *Gray v. Greer*, 800 F.2d 644, 646 (7th Cir. 1985). See also: *Fagan v. Washington*, 942 F.2d 1155, 1157 (7th Cir. 1991)("His lawyer failed to raise either claim, instead raising weaker claims ... No tactical reason ... no reason other than oversight or incompetence – has been or can be assigned for the lawyer's failure to raise the only substantial

claims that [defendant] had"). *Matire v. Wainwright*, 811 F.2d 1430, 1438 (11th Cir. 1987)(iac when appellate counsel ignored "a substantial, meritorious Fifth Amendment issue," raising instead a "weak issue). The claim whose omission forms the basis of an ineffective assistance of counsel claim may be either a federal-law or a state-law claim, so long as the assistance claim, so long as "failure to raise the state ... claim fell 'outside the wide range of professional competent assistance.'" *Claudio*, 982 F.2d at 805 (quoting *Strickland*, 466 U.S., at 690, 104 S.Ct., at 2066).

In assessing the attorney's performance, a reviewing court must judge his conduct on the basis of the facts of the particular case, "viewed as of the time of counsel's conduct," *Strickland*, 466 U.S., at 690, 104 S.Ct., at 2066, and may not use hindsight to second-guess his strategy choices. See: *Lockhart v. Fretwell*, 113 S.Ct. 838, 844, 122 L.Ed.2d 180 (1993). Counsel is not required to forecast changes in the governing law. See: e.g., *Horne v. Trickey*, 895 F.2d 497, 500 (8th Cir. 1990)(ineffectiveness not established by claim that "counsel should have realized that the Supreme Court was planning a significant change in the existing law, and that the failure to anticipate this change rises to the level of constitutional ineffectiveness"). However, the attorney's omission of a meritorious claim cannot be excused simply because an intermediate appellate court would have rejected it. In *Claudio*, we ruled that, "[n]o reasonably competent attorney should have missed" the omitted claim, "even though the Appellate Division ultimately rejected it." 982 F.2d at 805; see also: *Orazio v. Dugger*, 876 F.2d 1508, 1513-14 (11th Cir. 1989)(counsel's failure to raise claim on Appeal constituted ineffective assistance of counsel despite the fact that three Florida Appellate Court decision has rejected the precise claim at issue").

Clearly, there were multiple arguments that were omitted from the Appeal filed. Given the length of the efficiency argument and the Fourth Circuit Court of Appeals response, the arguments listed here are certainly more persuasive. They should not have been omitted on Appeal. The failure to argue these Assignments based on the applicable jurisprudence in support of them, can only be considered within the confines of *Strickland*.

What exists as far as Mr. Labat is concerned are issues which were ignored issues that were

inadequately briefed and Briefs (Writs) that were never filed. Mr. Labat deserves a true Appeal, with all viable issues raised.

Counsel's failure to pursue Mr. Labat's State Appeal in a competent fashion, constitutes ineffective assistance of counsel on Appeal. *United States v. Snitz*, 342 F.3d 11154 (10th Cir. 2003). As noted in *Edwards v. United States*, 246 F.Supp.2d 911, 915 (E.D. Tenn. 2003) an attorney would be deemed legally ineffective for failing to prosecute Petitioner's requested Direct Appeal due to a money dispute. In such circumstances, prejudice is presumed. See also: *Benoit v. Bock*, 237 F.Supp.2d 804, 810 (E.D. Mich. 2003).

The circumstances here, are similar to those in *McHale v. U.S.*, 175 F.3d 115 (2nd Cir. 1999). There, counsel's abandonment of a filed appeal which resulted in the appeal being dismissed for failure to perfect appeal, constituted ineffective assistance of counsel. In *McHale*, the appeal was ordered to be reinstated. That same request is made here.

Additionally, the failure to raise clear Assignment of Errors supported by adequate jurisprudence places this matter in the *Strickland* category. Here multiple additional Assignment of Errors and should have been raised and were not.

In summary, Mr. Labat's Appeal was abandoned. Even if there were some fee dispute, counsel had a responsibility to finish the task that they were retained for. Specifically, to write a Full Appeal with all known issues and if necessary, seek review to the Louisiana Supreme Court. In the alternative, retained counsel **SHOULD HAVE** informed Mr. Labat of the denial in the Fourth Circuit Court of Appeals in a timely manner.

SUMMARY OF ARGUMENT

Carl Labat's Constitutional rights to due process and equal protection has been violated where he was denied effective assistance of counsel and where the retained appellate counsel failed to seek Writs to the Louisiana Supreme Court. Furthermore, retained appellate counsel failed to inform Mr. Labat of

the Louisiana Fourth Circuit Court of Appeals affirmation of his conviction and sentence. Had counsel timely informed Mr. Labat of such, Mr. Labat could have filed Pro-Se Writ to the Louisiana Supreme Court. Mr. Labat proffers that as such, he should be given the opportunity to file Writs to the Louisiana Supreme Court and be allowed collateral estoppel due to his retained counsel's "abandonment" at a crucial time. *Maples* and *Holland*, supras.

Alternatively, Mr. Labat asserts that this Honorable Court grant him habeas corpus relief, order an evidentiary hearing in regards to the claims presented herein and enable Mr. Labat to give testimony and/or other evidence to support his claims presented.

CONCLUSION

After a review of the Record in this case, Mr. Labat this Honorable Court must determine that Mr. Labat was "Abandoned" by his counsel during a critical stage of the proceedings. Furthermore, had counsel determined that she would not be filing Writs on the Court of Appeal's Ruling, at a minimum, she should have informed Mr. Labat of her decision. As it stands, Mr. Labat was not informed of the Ruling from the Court, and was not given the opportunity to file Writs Pro-Se.

WHEREFORE, after a careful review of the merits of these Claims, Mr. Labat contends that this Honorable Court will find that reasonable jurists would not allow these convictions to stand.

Respectfully submitted this 11th day of November, 2019.

Carl Labat #592090

VERIFICATION

I, Carl Labat, hereby verify that I have read and understand the statements made in the above and foregoing and that the statements made are true and correct to the best of my knowledge, belief, and information under the penalties of perjury.

Carl Labat