No. 22-7054

ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

JAMAR LASHAWN TRAVILLION,

Petitioner,

v.

MARK GARMAN (Superintendent for the State Correctional Institution at Rockview); STEPHEN A. ZAPPALA (District Attorney for Allegheny County, Pennsylvania); ATTORNEY GENERAL OF THE COMMONWEALTH OF PENNSYLVANIA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

JAMAR LASHAWN TRAVILLION
Petitioner*

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*Pro se

QUESTIONS PRESENTED FOR REVIEW

I. Could reasonable jurists disagree with the District Court's rejection of Petitioner's claim that the State Courts' determination that he forfeited his right to counsel is not a "decision contrary to, or involving an unreasonable application of," clearly established federal law under 28 U.S.C. § 2254 (d)(1) for want of a decision by this Court addressing the issue of "forfeiture" as opposed to "waiver" of the right to counsel and, if so, did the Court of Appeals err in denying a certificate of appealability on Petitioner's right to counsel claim?

II. Could reasonable jurists disagree with the District Court's finding that a State appellate court's determination that Petitioner's right to counsel was violated does not make a "substantial showing of the denial of a constitutional right" under § 2253 (c)(2) and, if so, did the Court of Appeals err in determining that Petitioner has failed to make a substantial showing that his right to counsel was violated by denying a certificate of appealability on his right to counsel claim?

III. Could reasonable jurists disagree with the District Court's finding that 28 U.S.C. § 2254 (e) and this Court's decision in Cullen v. Pinholster bars consideration of materials proffered pursuant to Rule 7 of the Rules Governing Section 2254 Habeas Corpus Case to reconstruct the State court record and show that the State Courts' factual findings are unreasonable in light of the evidence presented in the State court proceedings and incorrect by clear and convincing evidence and, if so, did the Court of Appeals err in denying a certificate of appealability of this issue?

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- Commonwealth v. Travillion, No. 443 WDA 2008 in the Superior Court of Pennsylvania. Judgment entered October 13, 2010.

- Commonwealth v. Travillion, No. 562 WAL 2010 in the Supreme Court of Pennsylvania. Judgement entered April 29, 2011.

- Travillion v. Pennsylvania, No. 11-6697 in the Supreme Court of the United States. Certiorari denied November 14, 2011.

- Commonwealth v. Travillion, CC Nos. 200303767; 200307963; 200308353 in the Court of Common Pleas for Allegheny County, Pennsylvania. Judgment entered January 8, 2015.

- Commonwealth v. Travillion, No. 73 WDA 2015 in the Superior Court of Pennsylvania. Judgment entered March 10, 2016.

- Commonwealth v. Travillion, No. 266 WAL 2016 in the Supreme Court of Pennsylvania. Allowance of Appeal denied December 6, 2016.

- Travillion v. Garman, et al., No. 17-515 in the United States District Court for the Western District of Pennsylvania. Judgment entered March 24, 2022.

- Travillion v. Superintendent Rockview SCI, et al., No. 22-1624 in the United States Court of Appeals for the Third Circuit. Certificate of Appealability denied September 27, 2022.

No. _____

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JAMAR LASHAWN TRAVILLION,

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MARK GARMAN (Superintendent for the State Correctional Institution at Rockview); STEPHEN A. ZAPPALA (District Attorney for Allegheny County, Pennsylvania); ATTORNEY GENERAL OF THE COMMONWEALTH OF PENNSYLVANIA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner, Jamar Lashawn Travillion, respectfully petitions this Honorable Court, pro se, to issue a Write of Certiorari to review the judgment of the United States Court of Appeals for the Third Circuit, entered September 27, 2022. See Appendix A.

OPINIONS BELOW

Federal Habeas Corpus Decisions

The decision of the United States Court of Appeals for the Third Circuit in Travillion v. Superintendent Rockview SCI, et al., No. 22-1624, entered September 27, 2022, denying a Certificate of Appealability is not yet reported.

That decision is appended hereto at Appendix A. The unpublished Memorandum Order of the District Court in Travillion v. Garman, et al., No. 17-515, dated March 24, 2022, denying the Petition for a Writ of Habeas Corpus, is appended hereto at Appendix B. The unpublished Amended Report and Recommendation, dated July 12, 2021, recommending that the Petition for a Writ of Habeas Corpus be denied, is appended hereto at Appendix C. The unpublished District Court Order, dated May 19, 2021, conditionally granting Petitioner's Rule 7 Motion to Expand the Record, is appended hereto at Appendix D. The unpublished Report and Recommendation, dated December 26, 2019, recommending that the Petition for a Writ of Habeas Corpus be denied, is appended hereto at Appendix E. The Order of the United States Court of Appeals, entered December 16, 2022, denying Petitioner's Petition for Rehearing, is appended hereto at Appendix F.

State Collateral Review Decisions

The Per Curiam Order of the Pennsylvania Supreme Court in Commonwealth v. Travillion, No. 266 WAL 2016, dated December 6, 2016, denying Allowance of Appeal, is reported at 163 A.3d 401 (Pa. 2016). That Per Curiam Order is appended hereto at Appendix G. The Memorandum Order of the Pennsylvania Superior Court in Commonwealth v. Travillion, No. 73 WDA 2015, dated March 10, 2016, affirming the Post-Conviction Trial Court's denial of post-conviction relief, is reported at 144 A.3d 196 (Pa. Super. 2016). That Memorandum Order is attached hereto at Appendix H. The unpublished Post-Conviction Trial Court's Opinion in Commonwealth v. Travillion, CC Nos. 200303767;200307963;200308353, dated March 10, 2015, determining that post-conviction relief should be denied, is appended hereto at Appendix I.

Direct Appeal Decisions

The Per Curiam Order of the Pennsylvania Supreme Court in Commonwealth v. Travillion, No. 562 WAL 2010, dated April 29, 2011, granting Allowance of Appeal, Reversing the Judgment of the Superior Court, and Reinstating the Judgment of Sentence, is reported at 17 A.3d 1247. That Per Curiam Order is appended hereto at Appendix J. The Memorandum Order of the Pennsylvania Superior Court in Commonwealth v. Travillion, No. 443 WDA 2008, dated October 13, 2010, Reversing the Judgment of Sentence and Remanding for a New Trial, is reported at 15 A.3d 525 (Pa. Super. 2010). That Memorandum Order is appended hereto at Appendix K. The unpublished Trial Court Addendum to Opinion in Commonwealth v. Travillion, CC Nos. 200303767;200307963;200308353, dated July 20, 2009, determining that Petitioner Forfeited his Right to Counsel, is appended hereto at Appendix L. The unpublished Trial Court Opinion, dated July 6, 2009, determining, among other things, that Petitioner Waived his Right to Counsel, is appended hereto at Appendix M.

JURISDICTION

The judgment of the United States Court of Appeals denying Petitioner's Application for a Certificate of Appealability was entered on September 27, 2022. See Appendix A. An Application for Extension of Time to file a Petition for Rehearing from that decision was filed and granted. A Petition for Rehearing was filed within the allotted time. The Petition for Rehearing was appropriately acted upon by the Court of Appeals and denied. See Appendix F. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1), Petitioner asserting a depravation of his rights secured by the Constitution of the United States.

CONSTITUTIONAL PROVISIONS INVOLVED

This petition invokes the Sixth and Fourteenth Amendments to the United States Constitution:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by a impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence. U.S. Const. Amend. VI.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. 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 any person within its jurisdiction to equal protection of the laws. U.S. Const. Amend. XIV §1.

STATUTORY PROVISIONS INVOLVED

Title 28 of the United States Code Section 2253 provides, in pertinent part, that:

> (c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from-
>
> > (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court....

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

Title 28 of the United States Code Section 2254 provides, in pertinent part, that:

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim-

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)(1) In a proceeding instituted by an application for writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that-

(A) the claim relies on-

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

RULES GOVERNING SECTION 2254 CASES INVOLVED

Habeas Corpus Rule 7 of the Rules Governing Section 2254 Cases in the United States District Courts provides that:

(a) **In General.** If the petition is not dismissed, the judge may direct the parties to expand the record by submitting additional materials relating to the petition. The judge may require that these materials be authenticated.

(b) **Type of Materials.** The materials that may be required included letters predating the filing of the petition, documents, exhibits, and answers under oath to written interrogatories propounded by the judge. Affidavits may also be submitted and considered as part of the record.

(c) **Review by the Opposing Party.** The judge must give the party against whom the additional materials are offered an opportunity to admit or deny their correctness.

Local Rule 2254 G in the United States District Court for the Western District of Pennsylvania provides that:

G. **Expanding the Record.** If either party intends to rely on any document(s) that are not a part of the state Court record, such party must include those documents is a separate appendix attached to the pleading by which those documents are being submitted. In addition, that party should address, in its documents filed with the Court, why reliance on those documents is proper under the federal habeas statute and Federal 2254 Rule 7.

STATEMENT OF THE CASE

A. The Trial

Petitioner, Jamar Lashawn Travillion ("Mr. Travillion") is serving, among other judgments of sentence, a term of life without the possibility of parole following his conviction and sentencing on charges of second degree murder, robbery, attempted murder, and weapons offenses procured by the State without the assistance of counsel for his defense.

I. December 1, 2004

Mr. Travillion retained William H. Difenderfer, Esq. ("Attorney Difenderfer") as his defense counsel after the case was held for trial. Attorney Difenderfer opened the pretrial proceedings with a motion for the trial judge to recuse himself from the case. HT 2-3.[1] The Commonwealth attorney objected to the motion arguing that there were no witnesses to the event that gave rise to the motion. HT 3-4. Attorney Difenderfer told the court Mr. Travillion wanted to make an address regarding the motion. HT 4:6-7. That request and the motion were denied. HT 4:8-16. Mr. Travillion then spoke-out and stated that he was being intimidated and that his constitutional rights were being violated. HT 4-5. The court told Mr. Travillion that they were going to proceed with his suppression motion with or without him in the courtroom. HT 5:6-11.

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[1] Numerals preceded by "HT" references pages of the state court motions proceeding transcript dated December 1-6, 2004. Numerals proceeded by a colon in this sequence references line numbers.

The suppression hearing witnesses and evidence were then introduced without interruption. HT 5-157. At the close of the hearing Attorney Difenderfer told the court Mr. Travillion still wanted to make an address. The court told Attorney Difenderfer that he had to remove him as counsel for that. HT 157:17-25. Mr. Travillion personally objected and said his constitutional rights were being violated. HT 158:6-8. The court told Attorney Difenderfer to put forth his clients concerns. Attorney Difenderfer raised the recusal issue again, and Mr. Travillion spoke-out again and said that he had not waived his right to remain silent. HT 158:9-19. The proceedings were then recessed so Attorney Difenderfer could go over Mr. Travillion's concerns with him in private. HT 158-159.

II. December 2, 2004

The proceedings were reconvened. Attorney Difenderfer told the court Mr. Travillion wanted to make an address despite it's instruction that he must do so through him. HT 160:8-19. The court then asked if Mr. Travillion was firing him. HT 160:20-21. Attorney Difenderfer requested a recess so Mr. Travillion could address him outside the courtroom. HT 160-161.[2] Following that recess the proceedings went back on record and Attorney Difenderfer told the court Mr. Travillion had a number of concerns and began to explain his understanding of them. HT 161-163. Mr. Travillion interrupted him, and at that time was removed from the courtroom. HT 163-164.

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[2] During this recess it is claimed, as argued infra, that Mr. Travillion and Attorney Difenderfer discussed the terms of his potential firing and that Attorney Difenderfer promised to refund at least half (½) of the retainer if he was fired. Dkt. 31-1 at ¶.16 (Appendix T).

Attorney Difenderfer continued his address and concluded with a motion to withdraw his appearance based on his belief that he could not be effective for Mr. Travillion. HT 164-166. The Commonwealth attorney objected to that motion, and after further discussion the motion to withdraw was operatively denied. HT 168-177.

The proceedings moved to jury selection. Attorney Difenderfer told the court that he assumed Mr. Travillion would not participate in jury selection. HT 182:6-10. The court told Attorney Difenderfer so be it. HT 182:16-17. Mr. Travillion spoke-out and said that he did want to participate in jury selection but was being forced out of participation. HT 182:18-20. The court then decided he had waived his right to participate in jury selection. HT 182-183. The proceedings were conducted for the remainder of the day with Mr. Travillion in absentia.

III. December 3, 2004

The proceeding went on record that afternoon. Attorney Difenderfer told the court he'd been conducting jury selection all morning, and was told by the sheriff's deputy a short time ago that Mr. Travillion was in the bullpen demanding to see him. And that when they met he was fired. HT 186-187. The court then decided that Mr. Travillion would be representing himself. HT 187:5-6.

The court called on Mr. Travillion, and after voicing some concerns regarding the preparation of his defense, he was ordered to go finish picking the jury. HT 187-188. He objected and said he was not prepared to move forward with the case. HT 188:23-25. The court said that was not it's problem and again ordered him to go finish picking the jury. HT 189:1-2. Mr. Travillion requested that the court order Attorney Difenderfer to return all funds he paid him. HT 189:3-4. The

court told him that that was a civil division matter, not a criminal matter, and again ordered him to go finish picking the jury. HT 189:5-6. Mr. Travillion objected and said that he was not competent to represent himself. HT 189-190. HT 189-190. Attorney Difenderfer was dismissed by the court. HT 190:17-20. Mr. Travillion spent the remainder of the days proceeding selecting the jury pro se.

IV. December 6, 2004

Following weekend break the proceedings went on record. During jury selection Mr. Travillion told the court he wanted to invoke his right to counsel. HT 191. Following an extensive discussion involving the court, Mr. Travillion, Attorney Difenderfer, the Commonwealth attorney and a sheriff's deputy concerning the events leading up to that moment, the case was postponed through January 2006 so Mr. Travillion could hire replacement counsel. HT 192-208.

V. The Intermission

After the case was postponed Attorney Difenderfer refused to refund any of the retainer Mr. Travillion paid him. He wrote the court on August 24, 2005 to inform it of that fact and the fact that despite his efforts to retain counsel since the postponement he was unable to because he did not have the money and was being held in solitary confinement virtually incommunicado. Dkt. 58 at Attachment #4, #4-48 through #4-49. See Appendix S at 469-470, ¶¶. 4-9.[3]

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[3] It is beyond reasonable debate at this point that the Judicial/Prosecutorial Misconduct Complaint is part of the State Court record. Dkt. 81 at 4. See Appendix B at 6.

In response to that letter the court issued an order on August 31, 2005 determining that:

> AND NOW, to-wit, this 31st day of August, 2005, in accordance with the Public Defender act of 1968, December 2, P.L.1144, 16 P.S. 9960.7, it appearing to the Court that the above-named Defendant is unable to hire private legal counsel to represent him at the above-numbered matter, it is hereby ORDERED, ADJUDICATED and DECREED that the Public Defender of Allegheny County be and hereby is appointed to represent the Defendant in the capacity of Standby Counsel.

Dkt. 21-2 at 42; Dkt. 31 at Attachment #15. See Appendix T at 617.

Mr. Travillion followed by filing a document date September 1, 2005 titled "Objection of Order" complaining that his current and past relations with the Public Defenders Office raised a conflict of interest and requested that the court appoint him counsel able and willing to assist him in his defense at trial. Dkt. 58 at Attachment #4, Att. #4-51 through Att. #4-52. See Appendix S at 472-474. No response followed.

Mr. Travillion therefore wrote the court again on October 11, 2005 explaining his understanding that it had earlier agreed not to appoint the Public Defenders Office to represent him in any of his pending cases. He pointed out that the court had, in fact, appointed the Office of Conflict Counsel to represent him in his other two cases in recognition of a conflict between he and the Public Defenders Office the same day it appointed that office to represent him as standby counsel in this case. Dkt. 58 at Attachment #4, Att. #4-54 through Att. #4-56, ¶¶. 1-5. See Appendix S at 475-477. Compare Dkt. 31 at Attachment #16. See Appendix T at 619.

Again nothing followed. Mr. Travillion was never advised as to whether a substitution would be made, and the Public Defenders Office never entered or

made an appearance on his behalf in this case in any capacity whatsoever.

VI. The Final Trial Date & Sentencing Proceedings

Trial began on February 9, 2006. The Commonwealth attorney requested an instruction to the jury stating that the court has made every attempt to provide Mr. Travillion counsel if he told them he was being forced to represent himself and wanted a lawyer. TT 8-9.[4] Mr. Travillion responded to that request arguing that he was being forced to represent himself and needed a lawyer, and requested that the court give no such instruct when he told that to the jury. TT 9:3-12.

The court told Mr. Travillion that should he make any such statement the history of this proceeding would be explained to the jury so they knew exactly how his self-representation came to be. TT 10:19-22. Mr. Travillion argued that the only attempt the Public Defender made to contact him (which was obstructed by his solitary confinement) was 23 days before trial, and that he believed he had a right to counsel to assist him in his defense. TT 11:1-18.

The court told Mr. Travillion that he could have a seat. TT 11:19. Thereby ushering in a two week murder trial comprised of dozens of witnesses and other evidence arrayed against Mr. Travillion by the Commonwealth, with no assistance of counsel of any type or description for his defense.

On February 21, 2006 Mr. Travillion was convicted on all counts. Dkt. 21-2 at 47-49. On May 15, 2006 he was sentenced to, among other terms of sentence, life without the possibility of parole. Dkt. 21-2 at 51-54.

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[4] Numerals preceded by "TT" references pages of the state court transcript of trial proceedings date February 9 - 21, 2006 collected in Volumes I through VII. Numerals proceeded by a colon in this sequence references line numbers.

B. Direct Appeal Proceedings

I. In The PA Superior Court

Mr. Travillion appealed to the Superior Court from the judgment of sentence entered by the Trial Court. Thomas N. Farrell, Esq. ("Attorney Farrell") was appointed to represent him on appeal. Attorney Farrell filed a 1925 (b) Statement of Errors Complained of on Appeal asserting, among other claims, the violation of Mr. Travillion's Sixth Amendment right to counsel.

The Trial Court issued an Opinion determining, among other things, that Mr. Travillion waived his right to counsel and was not, therefore, improperly denied the right to counsel. Dkt. 21-3 at 6-34. See Appendix M. In a subsequent Addendum to Opinion, however, the Trial Court determined that Mr. Travillion forfeited his right to counsel. Dkt. 21-3 at 35-36. See Appendix L.

On October 13, 2010 the Superior Court issued a Memorandum Order determining that Mr. Travillion neither waived nor forfeited his right to counsel, and was therefore improperly denied his constitutional right to counsel at trial. Dkt. 21-5 at 1-22. See Appendix K. The court revered the judgment of sentence entered by the Trial Court and remanded the case for a new trial. id. at 1-11. Judge Allen filed a Dissenting Memorandum. id. at 12-22.

II. In The PA Supreme Court

The Commonwealth filed a Petition for Allowance of Appeal in the Supreme Court from the Superior Court's judgment. Dkt. 21-6 at 6-42. On April 29, 2011 the Supreme Court issued a Per Curiam Order granting allowance of appeal. Dkt. 21-6 at 38-42. See Appendix J. The court reversed the judgment of the Superior Court and reinstated the judgment of sentence entered by the Trial Court without

briefs or argument. id. at 38-40. Mr. Justice Saylor filed a Dissenting Statement. id. at 41-42.

III. In The United States Supreme Court

Mr. Travillion filed a timely pro se Petition for a Writ of Certiorari to the PA Supreme Court in this Court at Travillion v. Pennsylvania, No. 11-6697. Dkt. 21-7 at 1-37 (w/o Appendix). On November 14, 2011 certiorari was denied. Dkt. 21-7 at 39.

C. State Collateral Review Proceedings

I. In The Post-Conviction Trial Court

Mr. Travillion filed a timely Post-Conviction Relief Act ("PCRA") Petition with the Trial Court asserting, among other claims, that Attorney Difenderfer was ineffective for breaking his promise to refund the retainer fee and causing his inability to hire replacement counsel for trial; that Attorney Farrell was ineffective for failing to argue his claims of being denied the right to testify and present witnesses in his defense despite assigning those claims of error for direct review and; that Attorney Farrell was ineffective for failing to respond to the Commonwealth's Petition for Allowance of Appeal in the Supreme Court on direct review. Dkt. 21-8 at 1-20.

Robert S. Carey, Jr., Esq. ("Attorney Carey") was appointed to represent Mr. Travillion on post-conviction review. Attorney Carey filed an Amended PCRA Petition omitting all Mr. Travillion's original claims except those regarding Attorney Farrell's ineffective assistance on direct appeal. Dkt. 21-8 at 21-44. A hearing was held on the Amended PCRA Petition. On January 8, 2015 post-

conviction relief was denied. Dkt. 21-8 at 67.

II. In The PA Superior Court

Attorney Carey filed an appeal to the Superior Court on Mr. Travillion's behalf from the denial of post-conviction relief. The Post-Conviction Trial Court issued an Opinion on March 10, 2015 determining that all relief sought on appeal should be denied. Dkt. 21-9 at 5-17. See Appendix I.

On March 10, 2016 the Superior Court issued a Memorandum Order affirming the Post-Conviction Trial Court's denial of post-conviction relief. Dkt. 21-10 at 1-11. See Appendix H.

III. In The PA Supreme Court

Attorney Carey filed a Petition for Allowance of Appeal in the Supreme Court on Mr. Travillion's behalf from the Superior Court's judgment. Dkt. 21-11 at 4-26. On December 6, 2016 allowance of appeal was denied. Dkt. 21-11 at 28. See Appendix G.

D. Federal Habeas Corpus Proceedings

I. In The District Court

Mr. Travillion filed a timely pro se Petition for a Writ of Habeas Corpus in the District Court claiming that: (1) Attorney Difenderfer was ineffective for breaking his promise to refund the retainer fee and causing his inability to hire replacement counsel; (2) he was denied the constitutional right to counsel

at trial; (3) he was denied the constitutional right to testify in his own defense; (4) he was denied the constitutional right to present witnesses in his defense; (5) Attorney Farrell was ineffective for failing to argue his claims of being denied the rights to testify and present witnesses in his defense despite assigning those claims of error for review on direct appeal, and for failing to respond to the Commonwealth's Petition for Allowance of Appeal and; (6) Attorney Carey was ineffective for causing the procedural default of his claim of Attorney Difenderfer's ineffective assistance on initial post-conviction review. Dkt. 4. See Appendix U (w/o Attachments).

The Commonwealth filed an Answer. Dkt. 21.

Mr. Travillion filed a Declaration in Support of the Habeas Corpus Petition. Dkt. 31. See Appendix T. Attached to the Declaration is a Sworn Affidavit by Jamar Lashawn Travillion proffering 16 documents and facts Mr. Travillion claims to be pertinent to Ground One and Ground Two of the Habeas Corpus Petition. id.

On December 26, 2019 the Honorable Maureen P. Kelly issued a Report & Recommendation recommending that the Habeas Corpus Petition be denied and that a certificate of appealability likewise be denied. Dkt. 32. See Appendix F. As to the materials proffered by Mr. Travillion's Declaration and Affidavit, the court determined it was prohibited under 28 U.S.C. §2245 (e)(1) from consider those documents "[u]nless and until Petitioner can show where in the state court record of his criminal case, the evidence exists that supports his assertions and contentions in his Declaration and his Affidavit." Dkt. 32 at 18-21.

Mr. Travillion filed Objections to the Report and Recommendation. Dkt. 44. He also filed a Motion to Expand the Record under Rule 7 of the Rules Governing Section 2254 Habeas Corpus Proceedings requesting that the materials proffered by his Declaration and Affidavit be considered in the court's adjudication of the Habeas Corpus Petition. Dkt. 45. See Appendix R.

The Commonwealth filed an Answer to the Motion to Expand the Record. Dkt. 55. See Appendix Q. Mr. Travillion filed Amended Objections to the Report & Recommendation. Dkt. 58. See Appendix S.

On May 19, 2020 the Honorable Mark R. Hornak issued an Order of Court granting the Motion to Expand the Record. Dkt. 72. See Appendix E. The court further authorized the Magistrate Judge to "[t]ake any action resulting from the consideration of those 'supplemental materials' as are just and proper under the law." id.

On July 12, 2021 the Honorable Maureen P. Kelly issued an Amended Report & Recommendation recommending that the Habeas Corpus Petition be denied and that a certificate of appealability likewise be denied. Dkt. 74. See Appendix D. As to the supplemental materials, the court concluded that Mr. Travillion had failed to meet his burden of showing they were contained in the state court record, and determined that their consideration was therefore prohibited under 28 U.S.C. §2254 (e)(1)-(2) and various cases. id. at 13-21.

The court states that it nevertheless reviewed the supplemental materials in preparation of the Amended Report & Recommendation, and determined that habeas relief would still not be warranted even if the law allowed their consideration. id. at 21. Save for fleeting references to their existence, however, the court makes no specific findings as to how the materials would not rebut the factual findings of the state courts' and still make him ineligible for habeas relief if they were considered as Mr. Travillion avers.

Mr. Travillion filed Objections to the Amended Report & Recommendation. Dkt. 77. See Appendix P.

On March 24, 2022 the Honorable Mark R. Hornak issued a Memorandum Order denying the Habeas Corpus Petition and furthermore denying a certificate of appealability. Dkt. 81. See Appendix C. As to the supplemental materials, the

court determined the Amended Report & Recommendation's finding that the Judicial/Prosecutorial Misconduct Complaint attached to Mr. Travillion's Amended Objections is not part of the state court record was incorrect. id. at 4. The court otherwise adopted the Amended Report & Recommendation's factual findings and legal conclusions on the matter and essentially concluded that consideration of Mr. Travillion's Declaration and Affidavit are prohibited by this Court's decision in Cullen v. Pinholster notwithstanding Rule 7 of the Rules Governing Section 2254 Cases. id. at 4-5.

With regard to Mr. Travillion's claim of being eligible for habeas relief under 28 U.S.C. §2254 (d)(1) based on the violation of his right to counsel, the court determined that the Third Circuit Court of Appeals' decision in Fischetti v. Johnson demonstrated he could not obtain relief on that claim because it found this Court had never "expressly dealt with the matter of forfeiture of counsel," but it's case law provides a basis for stripping a defendant of his right to counsel "if necessary to permit a trial to go forward in an orderly fashion." id. at 9-10.

As to Mr. Travillion's claim to habeas eligibility under §2254 (d)(2) for the violation of his right to counsel, the court determined that the Third Circuit Court of Appeals' decision in Wilkerson v. Klem suggested that such relief was unavailable because that decision held:

> [N]o clear forfeiture standard has been articulated by the Supreme Court....It is not sufficient [to warrant habeas relief] to say that [the petitioner's] actions did not rise to the level of conduct that has constituted forfeiture in the past; the issue is whether the state court's application of forfeiture to [the petitioner's] case was precluded by Supreme Court precedent.

id. at 10-11. The Memorandum Order does not address Mr. Travillion's argument that the key factual findings made by the state courts' to determine he

forfeited his right to counsel are unsupported and clearly contradicted by the state court record.

Mr. Travillion filed a timely Notice of Appeal from that decision. Dkt. 1. See Appendix O. That was followed by an Application for a Certificate of Appealability. Dkt. 18. Mr. Travillion later filed an Amended Application for a Certificate of Appealability. Dkt. 22. See Appendix N.

On September 27, 2022 the United States Court of Appeals for the Third Circuit issued an Order on Mr. Travillion's Certificate of Appealability, as amended, determining that:

> Appellant's motion to file an amended application for a certificate of appealability and to exceed the page limit are granted. Appellant's request for a certificate of appealability, as amended, is denied. See 28 U.S.C. §2253 (c); Slack v. McDaniel, 529 U.S. 473, 484 (2000). For substantially the same reasons provided by the District Court, jurists of reason would agree, without debate, that Appellant's claims are either meritless, see Strickland v. Washington, 466 U.S. 558, 687 (1984); Wilkerson v. Klem, 412 F.3d 449, 453-56 (3d Cir. 2005), Fischetti v. Johnson, 384 F.3d 140, 148-53 (3d Cir. 2004); Cullen v. Pinholster, 563 U.S. 170, 181 (2011), or procedurally defaulted, without grounds for excusing the default, see Gibson v. Scheidemantel, 805 F.2d 135, 138 (3d Cir. 1986); Rolan v. Coleman, 680 F.3d 311, 317 (3d Cir. 2012), or non-cognizable on federal review, Ross v. Moffitt, 417 U.S. 600, 610-11 (1974); Wainwright v. Torna, 455 U.S. 586, 587-88 (1982).

Dkt. 23. See Appendix A.

Mr. Travillion filed a Petition for Panel Rehearing and/or Rehearing En Banc from that decision. Dkt. 26. On December 16, 2022 the Court of Appeals issued an Order denying panel rehearing and rehearing en banc. Dkt. 27. See Appendix F.

This Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit follows.

HOW THE CONSTITUTIONAL QUESTION WAS RAISED BELOW

The question as to whether Mr. Travillion's Sixth Amendment right to counsel has been violated was raised on direct appeal. The Superior Court determined that it has and reversed the judgment of sentence and remanded this case for a new trial. Dkt. 21-5 at 1-22. See Appendix K. The Commonwealth petitioned for allocatur from that judgment. The Supreme Court granted permission to appeal, reversed the Superior Court judgment, and reinstated the judgment of sentence without briefs or argument. Dkt. 21-6 at 38-42. See Appendix J. Following the conclusion of PCRA proceedings on other issues, the question as to whether Mr. Travillion's right to counsel has been violated was raised again on federal habeas review in the District Court. Habeas relief was denied. Dkt. 81 at 8-12. See Appendix B. Mr. Travillion filed an Application for a Certificate of Appealability in the Court of Appeals from that decision. The Third Circuit Court of Appeals determined that the claim was "meritless" and denied the application. Dkt. 23. See Appendix A.

REASONS WHY CERTIORARI SHOULD BE GRANTED

This Court has reaffirmed time and again that a criminal defendant put on trial and placed in jeopardy of incarceration or death must be afforded the assistance of counsel unless a voluntary and intelligent waiver of that right is made and duly accepted by the court. **Powell v. Alabama**, 287 U.S. 45, 71-72 (1932); **Johnson v. Zerbst**, 304 U.S. 458, 467-68 (1938); **Gideon v. Wainwright**, 372 U.S. 335, 343-44 (1963); **Faretta v. California**, 422 U.S. 806, 807 (1975); **Martinez v. Ct. of App. of Cal.**, 528 U.S. 152, 154 (2000); **McCoy v. Louisiana**, 138 S.Ct. 1500, 1507-08 (U.S. 2018). Indeed, representation by counsel is the

standard, not the exception. **Martinez**, 528 U.S. at 161. That is evidently so because the assistance of counsel at trial is necessary and essential to securing the other rights an accused has. **United States v. Cronic**, 466 U.S. 648, 653-54 (1984). This Court's commitment to fundamental fairness rings hollow where, as here, an accused may be denied the assistance of counsel based on arbitrary and subjective "forfeiture" factors counteracting the Constitution's clearly established guarantee to that protection. This Court's intervention is necessary to prevent the degradation of the most substantive safeguard to fundamental fairness known to American criminal justice jurisprudence.

ARGUMENT

I. The Third Circuit's Denial Of A COA On Mr. Travillion's Sixth Amendment Right To Counsel Claim Blatantly Disregards This Court's Instruction That A Court Of Appeals Must Limit Its Examination At The COA Stage To The Threshold Inquiry Into The Underlying Merit Of The Claim And Ask Only If The District Court's Decision Is Debatable.

Title 28 of the United States Code Section 2253 (c) requires a habeas petitioner to obtain a COA before an appeal may be taken from a district court's final judgment denying habeas relief. A COA should issue where the petitioner makes a "substantial showing of the denial of a constitutional right." 28 U.S.C. §2253 (c). When a COA seeks to address a district court's procedural ruling, the petitioner must show "that [the] procedural ruling barring relief is itself debatable among jurists of reason...." **Buck v. Davis**, 137 S.Ct. 759 (2017); **Slack v. McDaniel**, 529 U.S. 473, 484 (2000). As this Court explained in Buck, the COA inquiry "is not coextensive with a merits analysis" because the only question is whether the applicant has shown that "jurists of reason could disagree with the district court's resolution of his constitutional claims or

that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." **Buck**, 137 S.Ct. at 773 (quoting **Miller-El v. Cockrell**, 537 U.S. 322, 336 (2003)). That question should be decided "without full consideration of the factual or legal bases adduced in support of the claims." **id.** Mr. Travillion has clearly met the standard for obtaining a COA by showing, among other things, that jurists of reason could obviously disagree with the habeas outcome of his right to counsel claim being that the Superior Court majority decision determined not only that his right to counsel was violated, but also that the key facts relied upon by the Trial Court to reach it's determination he forfeited that right are not supported by the record.

A. The Third Circuit's Decision In Fischetti v. Johnson Does Not Foreclose Debate On Whether The State Courts' Extension Of The Forfeiture Doctrine To Mr. Travillion's Sixth Amendment Right To Counsel Resulted In A "Decision That Was Contrary To, Or Involved An Unreasonable Application Of," Clearly Established Federal Law And Violated His Right To Counsel.

Mr. Travillion seeks habeas relief arguing that the state courts' extension of the forfeiture doctrine to his right to counsel resulted in a "decision contrary to, [and] involving an unreasonable application of," clearly established Federal law under §2254 (d)(1). This Court has never ordained even a notion that a rule of forfeiture is extendable to the right to counsel context. To the contrary, it has dogmatically decreed time and time again that a trial court's failure to secure the assistance of counsel for the accused is a bar to any valid conviction and sentence unless the right is objectively waived:

> See **Gideon**, 372 U.S. at 343 (right to counsel is fundamental); **Johnson**, 304 U.S. at 464, 468 (this Court does not "presume acquiescence in the loss of fundamental rights." .... courts failure to secure counsel is jurisdictional bar to valid conviction and sentence for "failure to complete the court");

Faretta, 422 U.S. at 81 (the accused must "knowingly and intelligently" relinquish the right to counsel). See also **Williams v. Taylor**, 529 U.S. 362, 407-08 (2000) ("extension of legal principle" may be analyzed under §2254 (d)(1)'s "unreasonable application" clause although the "classification comes with some problems of precision."); **Wilkerson v. Klem**, 412 F.3d 449, 457-58 (3d Cir. 2005) (Ambro, J., dissenting) (recognizing that virtually every circuit finds the "extension of legal principle" prong a viable mode of analysis under §2254 (d)(1)'s "unreasonable application" clause (collecting cases)).

The forfeiture doctrine extended to this case derives from the decision of this Court in **Illinois v. Allen**, 397 U.S. 337 (1970). In that case, the Court agreed that a criminal defendant's disruptive and aggressive behavior, **id.** at 339-41, overtly confessed by him to be his design to sabotage his trial, **id.** at 340, justified his removal from the courtroom and the consequential forfeiture of some of the procedural protections afforded under the Confrontation Clause. The Court found the trial court's action proper due to the "extreme and aggravated nature" of respondent Allen's behavior, **id.** at 346, but cautioned against rigid application of the practice, **id.** at 343, and defined it as "[d]eplorable" even when its exercise is warranted. **id.** at 347.

The right to counsel is a substantive constitutional protection this Court would never, under even the widest circumstances, allow a forfeiture exception to attach to. This is evident for many reasons. Chief among them being that that doctrine inherently carries with it the idea that an accused may forfeit their right to fundamental fairness, including the right to be heard itself. **Johnson**, 304 U.S. at 462-63; **Cronic**, 466 U.S. at 654 (right to counsel is "by far" the most "pervasive" right of the accused).

Extension of the forfeiture doctrine to this right would theoretically condone scenarios as extreme as "judicial murder" of not only the poor and

disadvantaged members of our society, **Powell**, 287 U.S. at 72, but anyone (rich or poor, astute or feeble minded) who is haled before a court with the State and all it's power arrayed against them without the "necessit[y]" of counsel for their defense, **Gideon**, 372 U.S. at 344. **Cronic**, 466 U.S. at 653. To suggest that the validity of a judgment to incarceration or death could crux upon arbitrary and subjective forfeiture theories and conclusions is too cruel to be true. The right may at times be given away, but it can never be taken.

The legality of an extension of the forfeiture doctrine to the right to counsel is debatable amongst jurists of reason notwithstanding the Third Circuit's holding in **Fischetti v. Johnson**, 384 F.3d 140 (3d Cir. 2005), or any other federal or state court decision deeming the doctrine applicable to that context. That truth is aptly illustrated by this Court's holding in Williams. In that case, the Virginia Supreme Court applied the decision announced in **Lockhart v. Fretwell**, 506 U.S. 364 (1993) as if it somehow modified or supplanted the clearly established law for adjudicating ineffective assistance of counsel claims under **Strickland v. Washington**, 466 U.S. 668 (1984). **Williams**, 529 U.S. at 391. As to petitioner Williams' claim of error, the government argued that the unanimous understanding of the lower courts holding that Fretwell "required a separate inquiry into fundamental fairness" to show "prejudice" under Strickland made the state court's decision "objectively reasonable." Brief of Respondent in **Williams v. Taylor**, 1998 U.S. Briefs LEXIS 8384, at *39 n.28. But this Court flat-out rejected that idea, and found that the Virginia Supreme Court's application of Fretwell to Williams' case was a "decision that was contrary to, or involved an unreasonable application of, clearly established Federal law" as defined by Strickland. **Williams**, 529 U.S. at 399.

The question here is not whether jurists of reason have previously decided that forfeiture is applicable to the right to counsel context as the District

Court makes it out to be (Dkt. 81 at 9-10; Appendix B at 11-12), but whether the procedural posture and particular facts of this case prove that extension of that doctrine to Mr. Travillion's case was objectively mistaken and produced an unconstitutional result:

> See **McCambridge v. Hall**, 303 F.3d 24, 36 (1st Cir. 2002) (en banc) (the fact that one or more courts applied precedent in the same manner to close facts does not make a state court decision reasonable); **Cotto v. Herbert**, 331 F.3d 217, 251 (2d Cir. 2003) ("'the lack of Supreme Court precedent' addressing forfeiture of a particular constitutional right does not mean that 'any determination that such a fundamental right has been forfeited ... would survive habeas review.'") (quoting **Gilchrist v. O'Keefe**, 260 F.3d 87, 97 (2d Cir. 2001). See also **Denny v. Gudmanson**, 252 F.3d 896, 900 (7th Cir. 2001) (courts must review §2254 (d)(1) cases de novo to determine what the clearly established law is and whether the state court decision is "contrary to" it).

The Trial Court's refusal to secure counsel for Mr. Travillion after it determined he was unable to do so himself (Dkt. 21-2 at 42; Appendix T at 617) resulted in a "decision contrary to, [and] involved an unreasonable application of," the clearly established law of the land governing an accused's right to the assistance of counsel. **Powell**, 287 U.S. at 71-72; **Johnson**, 304 U.S. at 465; **Gideon**, 372 U.S. at 344-45.

Any machinations by a criminal defendant to disrupt or maliciously delay the orderly administration of justice in his case is clearly to be dealt with by suppressing him and his antics, not suppression of the fundamental fairness due to all. **Allen**, 397 U.S. at 343-44; **Faretta**, 422 U.S. at 835 n.46. Everyone has the right to challenge an indictment and the governments proof, **Powell**, 287 U.S. at 68-69. The basic fundamental rights of the accused are not secured without the assistance of counsel.

B. The Third Circuit's Decision In Wilkerson v. Klem Does Not Foreclose Debate On Whether The State Courts' Application Of A Forfeiture Sanction To Mr. Travillion's Sixth Amendment Right To Counsel Was Objectively Unreasonable And Violated His Right To The Assistance Of Counsel.

Arguing, hypothetically, that this Court does find the forfeiture doctrine extendable to the right to counsel context, whether Mr. Travillion is eligible for habeas relief based on the state courts' application of the forfeiture doctrine to the facts of this case was objectively unreasonable under § 2254 (d)(1) remains debatable amongst jurists of reason. **Williams**, 529 U.S. at 407.

Although this Court has never addressed forfeiture in the right to counsel context, it has clearly established a strict balance between an individual's rights and the courts interest in the administration of justice to be considered before the taking of any rights will pass constitutional muster. This principle was summed-up by the Allen Court as follows:

> Although mindful that courts must indulge every reasonable presumption against the loss of constitutional rights, Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461 (1938), we explicitly hold today that a defendant can loss his right to be present at trial if, after he has been warned by the judge that he will be removed if he continues his disruptive behavior, he nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom. Once lost, the right to be present can, of course, be reclaimed as soon as the defendant is willing to conduct himself consistently with the decorum and respect inherent in the concept of courts and judicial proceeding.

Allen, 397 U.S. at 343 (footnote omitted).

Contrary to the District Court's finding that it is not (Dkt. 81 at 11-12; Appendix B at 13-14), whether Mr. Travillion's behavior was serious enough to

warrant so drastic a sanction as forfeiture of his right to counsel is an issue that must be considered in determining if the state courts' application of that sanction was unreasonable. The "serious nature" of the defendant's conduct is inextricably intertwined with the forfeiture analysis:

> See **Allen**, 397 U.S. at 346 ("Allen's behavior was clearly of such an extreme and aggravated nature as to justify [the loss of his constitutional rights]"); **United States v. Goldberg**, 67 F.3d 1092, 1101-02 (3d Cir. 1995) (forfeiture of right to counsel "requires extremely serious misconduct"); **United States v. McLeod**, 53 F.3d 322, 325-26 (11th Cir. 1995) ("behavior toward his counsel was repeatedly abusive, threatening, and coercive."); **Wilkerson**, 412 F.3d at 460-61 (Ambro, J., dissenting) (collecting cases). See also **O'Laughlin v. O'Brien**, 568 F.3d 287, 304-05 (1st Cir. 2009) (decisions of federal courts below the Supreme Court provide a valuable reference point when considering the reasonableness of a state court's application of Supreme Court precedent to a particular set of facts); **Travillion v. Superintendent Rockview SCI**, 982 F.3d 896, 901-02 (3d Cir. 2020) (same).

It is unequivocally conceded that Mr. Travillion's behavior during the pretrial proceedings was disruptive. It is also true, however, that there was nothing objectively disruptive or dilatory about his conduct following the postponement of trial to justify application of a permanent forfeiture to his right to counsel. The Trial Court's findings as to the merit of Mr. Travillion's grievances concerning Attorney Difenderfer's representation (Dkt. 21-3 at 21-25; Appendix M at 177-181), and related forfeiture determination (Dkt. 21-3 at 36; Appendix L at 162), are undermined by the fact it released Attorney Difenderfer from the case and postponed trial although it was required to do neither under the purported circumstances. **United States v. Meeks**, 987 F.2d 575, 579 (9th Cir. 1993) (the court controls whether defendant continues to be represented by counsel). Compare Pennsylvania Rules of Criminal Procedure Rule 121 (B)(1) ("Counsel for a defendant may not withdraw his or her appearance

except by leave of court.").

Mr. Travillion wrote the Trial Court after that postponement and explained he could not afford to hire replacement counsel because Attorney Difenderfer unexpectedly refused to refund his retainer. He went on to explain that the conditions of his pretrial confinement made it impossible for him to communicate with prospective counsel, and requested the court's help in obtaining that assistance. Dkt. 58 at Attachment #4, Att. #4-48 through Att. #4-49; Appendix S at 469-470, ¶¶. 4-9.

The Trial Court appointed the Public Defender in the capacity of Standby Counsel. Dkt. 21-2 at 42; Dkt. 31 at Attachment #15; Appendix T at 617. Mr. Travillion file an objection to that appointment alleging a "conflict of interests" and requested the appointment of "other counsel" able and willing to meaningfully assist him in his defense. Dkt. 58 at Attachment #4, Att. #4-51 through Att. #4-53, Appendix S at 472-474, ¶. 2. But no inquiry or action was taken on those objections by the Trial Court.

Rather, Mr. Travillion was put on trial with neither counsel nor standby counsel available to assist him in his defense. The proceedings opened with the following exchange:

> [The Commonwealth]: [T]he Commonwealth is going to request that the [c]ourt instruct the jury, if [Mr. Travillion] says to the jury that he wants an attorney and that he is being forced to represent himself, then at that point I am going to ask the [c]ourt for an instruction to the jury just basically letting the jury know that [Mr. Travillion] has had over a year to obtain counsel. The [c]ourt has made every attempt to provide him counsel, and at this point, they are to ignore his comments regarding the fact he wants counsel.
>
> [Mr. Travillion]: If I may respond, Your Honor. I have not had over a year to obtain counsel. I am being forced to go pro se. I am not able to represent

myself, and I do intend to tell the jury that I am being forced to represent myself, Your Honor.

As I have said, I have been locked in solitary confinement for various reasons which I have already presented to the [c]ourt. I need a lawyer. I need someone to help me.

TT 8-9.

The Trial Court responded to Mr. Travillion's plea as follows:

[The Trial Court]: Mr. Travillion, should you make such a statement, I will explain the history of this particular proceeding to the jury so that they know exactly how this case came about.

TT 10:19-22.

Mr. Travillion's made multiple pleas and requests for the assistance of counsel throughout the trial. Including one for Attorney Difenderfer's assistance (who was present spectating the trial). TT 746-749. And another for the assistance of his court appointed counsel in a separate case (whom appeared at trial willing to assist him in presenting his own testimony). TT 935-937. Every plea and request for counsel's assistance made throughout the entire two weeks of trial was discarded or sternly rebuked by the Trial Court. But in an ironic juxtaposition the Trial Court made an immediate appointment of counsel to defense witness Raymont Geeter to advise him on his rights against self-incrimination after he took the stand and gave potentially incriminating testimony. TT 948-960. There's no reason why an immediate appointment of counsel could not have been made for Mr. Travillion too.

The Supreme Court's determination that "[s]ome measure of deference must be shown to the trial court" (Dkt. 21-6 at 39; Appendix J at 136) in lieu of

conducting a rigorous review of the facts and evidence supporting it's forfeiture application was objectively unreasonable and is due no deference in this habeas proceeding. **Wiggins v. Smith**, 539 U.S. 510, 527-28 (2003) (state court's viewing of Strickland's "strategic choices" facet to justify "deference to counsel's strategic decisions" resulted in an unreasonable application of ineffective assistance of counsel standard); **Panetti v. Quarterman**, 127 S.Ct. 2842, 2858 (U.S. 2007) (declining to apply AEDPA deference when state court made unreasonable determination of law under § 2254 (d)(1)). That is especially true here were, as argued below, the key factual forfeiture findings deferred to are not supported by the state court record.

II. The Third Circuit's Conclusion That Mr. Travillion Has Failed To Make A Substantial Showing Of The Denial Of A Constitutional Right Is In Blatant Disregard To This Court's Commitment To Fundamental Fairness In The Criminal Justice System.

Perhaps the most vociferous display of the Third Circuit's disregard to this Court's instruction concerning review of COA applications is it's denial of the certificate on Mr. Travillion's claim of the state courts' forfeiture determination being based on an objectively unreasonable determination of the facts under § 2254 (d)(2).

This Court has made it abundantly clear that AEDPA deference to state court determinations is not a license for lower federal courts to abandon or abdicate their responsibilities on habeas review. **Miller-El v. Cockrell**, 537 U.S. 322, 336-38 (2003); **Tennard v. Dretke**, 542 U.S. 274, 276, 282 (2004); **Buck**, 137 S.Ct. at 773-75; **Tharpe v. Sellers**, 138 S.Ct. 545, 546-47 (U.S. 2018) (per curiam). "A federal court can disagree with a state court's credibility determination and, when guided by the AEDPA, conclude the decision was unreasonable or that the

factual premise was incorrect by clear and convincing evidence." **Miller-El**, 537 U.S. at 340. The Third Circuit's abdication of it's duty to review the state courts' factual determinations in this case to determine whether the District Court was correct in concluding Mr. Travillion is not eligible for habeas relief under § 2254 (d)(2) is too remarkable to be ignored.

A. The Third Circuit's Conclusion That Mr. Travillion Is Not Eligible For Habeas Corpus Relief Based On The State Courts' Determination That He Forfeited His Right To Counsel Being Founded Upon An Unreasonable Determination Of The Facts Is Clearly Debatable Amongst Jurists Of Reason.

This case reached the District Court on habeas review presenting a conflict between the state appellate courts on the question of whether the Trial Court's forfeiture determination violated Mr. Travillion's Sixth Amendment right to counsel. More specifically, preceding the Supreme Court's summary adjudication of that claim on direct review, the Superior Court made the following findings of fact when it reversed Mr. Travillion's judgment of sentence and remanded this case for a new trial:

> After reviewing the record, we agree with the trial court that Travillion discharged his counsel on the eve of trial and his conduct up to that point was clearly disruptive. Despite Travillion's conduct, it appears, however, the trial court interpreted and treated Travillion's discharge of his privately retained counsel as a waiver of counsel for purposes of that hearing, even though it did not conduct a Pa.R.Crim.P. 121 colloquy.
>
> Next, the trial court found Travillion refused to hire new counsel. T.C.O. II at 2. Specifically, the trial court found "[d]espite giving Travillion more than a year to hire a new lawyer, he did not do so and [the trial court], on its own motion, appointed the Public Defender's Office to assist him and/or to represent him." T.C.O. I at 16.

A review of the record reveals a letter dated August 24, 2005, from Travillion to the trial judge, apparently in response to an inquiry made by the court asking about the status of his search for counsel. It is not clear from the record how or when the trial court contacted Travillion. However, in his response, Travillion explained that he had been unable to hire a private attorney because previous counsel refused to refund to him money he paid as a retainer, he had been in the disciplinary unit of the prison for an extended period of time, and those attorneys who he was able to contact either did not respond to him or declined to represent him.

The trial court, presumably in light of Travillion's response of August 24, 2005, concluded that Travillion was "unable to hire private legal counsel to represent him," and appointed the Public Defender of Allegheny County to represent him as standby counsel. Order, 8/31/05, at 1.

In the meantime, in a pro se "Notice" addressed to the Allegheny County Clerk of Courts, Travillion asked the Clerk to accept his pro se filings until he found counsel.

After Travillion learned the trial court had appointed the Allegheny County Public Defender's Office as standby counsel, Travillion filed an objection to the appointment of the Office in any capacity because of an alleged conflict of interest. Objection of Order, 9/9/05, at 1. Travillion, however, also clearly asked the trial court to "appoint counsel" while he was seeking private representation.

Therefore, there is no evidence in the record to support the conclusion Travillion refused to hire new counsel. The record only establishes Travillion was unable to hire private counsel because he did not have the opportunity and financial ability to do so.

Finally, the trial court found Travillion refused to cooperate and meet with appointed counsel. T.C.O. II at 2...

....

> **The trial court's conclusion Travillion refused to meet and cooperate with counsel, and therefore forfeited his right to counsel, is simply not supported by the record.** In addition, while it is obviously true Travillion did not obtain counsel in the year after he discharged his original counsel, the mere passage of time, standing alone, is not sufficient to support the trial court's conclusion he has forfeited his right to counsel. To support a finding Travillion had forfeited his right to counsel, there must be facts in the record to demonstrate he had chosen to "unreasonably clog the machinery of justice or hamper and delay the state's efforts to effectively administer justice." Lucarelli, 601 Pa. at 194, 971 A.2d at 1179 (citation omitted). He certainly may have chosen to do that, but this record does not establish it.
>
> Travillion has presented difficult and patience trying problems for the trial court. Nevertheless, there is nothing in the record from which we can conclude that the trial court either held a sufficient Pa.R.Crim.P. 121 waiver of counsel hearing, or from which we can conclude Travillion had forfeited his right to counsel. Since a defendant is entitled to counsel unless he either waives counsel or forfeits counsel, and since this record does not establish that he has done either, we are constrained to reverse the judgment of sentence and remand for a new trial.

Dkt. 21-5 at 6-11; Appendix K at 145-150 (footnotes omitted) (bold type added).

The Third Circuit's conclusion that Mr. Travillion has failed to make a substantial showing of the denial of his constitutional right to counsel in the face of this decision and the evidence presented in the state court proceedings is incredible. It is also in conflict with other Court of Appeals decisions and the reasoned opinions of other federal jurists, including members of this Honorable Court, concluding that such appellate court divides on a constitutional question satisfy the demands of § 2253 (c)(2) for purposes of issuing a COA on the constitutional question:

> See **Jones v. Basinger**, 635 F.3d 1030, 1040 (7th Cir. 2011) ("When state appellate court is divided on the merits of the constitutional question,

issuance of a [COA] should ordinarily be routine." The COA could only be denied "in the unlikely event that the views of the dissenting judge(s) are erroneous beyond any reasonable debate.") (citing **Slack v. McDaniel**, 529 U.S. 473, 484 (2000)); **Rhoades v. Davis**, 852 F.3d 422, 429 (5th Cir. 2017) (same). See also **Jordan v. Fisher**, 575 U.S. 1071, 1076 (2015) (Sotomayor, J., dissenting) (judge's dissent shows that claim "is susceptible [to] more than one reasonable interpretation."); **Ragan v. Horn**, 598 F.Supp.2d 677, 687 & n.12 (E.D.Pa. 2009); **McMullan v. Booker**, 2012 U.S. Dist. LEXIS 23603, at *8-9 (E.D.Mich. Feb. 24, 2012); **Lee v. Warden**, 2019 U.S. Dist. LEXIS 46041, at *6 (S.D.Ga. Mar. 20, 2019); **Pierce v. Brown**, 2022 U.S. Dist. LEXIS 102155, at *5, 7 (S.D.Ind. June 7, 2022); **Metcalfe v. Howard**, 2022 U.S. Dist. LEXIS 61217, at *8 (E.D.Mich. Mar. 31, 2022).

But this case offers a more weightier circumstance than those cited above in that the divide presents a unique situation where its not merely the dissenting views of a judge on a court that ultimately affirmed a conviction and judgment of sentence causing the divide. The judgment of sentence here was reversed on the constitutional question, and to suggest that that determination does not make a substantial showing of the denial of a constitutional right defies reason.

The Superior Court determined based on a thorough review of the record that Mr. Travillion did not hire private counsel "because he did not have the opportunity and financial ability to do so." Dkt. 21-5 at 8; Appendix K at 147. Furthermore, neither of the two attorneys the Trial Court alleges he refused to meet and cooperate with testified or offered any information to suggest that that is true. No one from the Public Defenders Office even entered an appearance of any type or description for Mr. Travillion in this case at all. The only claim of him refusing to meet or cooperate with appointed counsel comes from the Trial Court's post hoc determination of the facts rendered more than three years after Mr. Travillion was sentenced following his trial and conviction in this case. Dkt. 21-3 at 21; Appendix M at 177.

A criminal defendant's loss of the right to counsel may not be presumed from a silent record. **Carnley v. Cochran**, 369 U.S. 506, 516 (1962). The state courts' baseless assertions that Mr. Travillion refused to hire new counsel or to meet and cooperate with appointed counsel is objectively unreasonable and due no deference in this habeas proceeding. **Jones v. Walker**, 540 F.3d 1277, 1288 & n.5 (11th Cir. 2008) (state supreme court's finding that counsel testified to warning defendant about dangers of self-representation when counsel never testified to those facts was objectively unreasonable and it's factual findings were due no deference under AEDPA).

B. The Third Circuit's Conclusion That Consideration Of The Supplemental Materials Proffered By Mr. Travillion's Declaration And Affidavit Are Barred By Section 2254 (e) And This Court's Decision In Cullen v. Pinholster Is Debatable Among Jurists Of Reason And The Issues Presented Are Adequate To Deserve Encouragement To Proceed Further.

Mr. Travillion filed his Declaration and Affidavit in this habeas proceeding seeking consideration of the supplemental materials pursuant to Rule 7 of the Rules Governing Section 2254 Habeas Corpus Cases. Habeas Corpus Rule 7. That Rule predates the enactment of § 2254 (e) and "affords the district court substantial discretion in the conduct of a case once an answer has been filed...to facilitate disposition on the merits without the need for an evidentiary hearing." **Lonchar v. Thomas**, 116 S.Ct. 1293, 1300 (U.S. 1996). The enactment of § 2254 (e) has modified the federal courts authority under the rule, but has not annihilated it:

> See **Owens v. Franks**, 394 F.3d 490, 498 (7th Cir. 2005) ("Rule 7 explains that 'affidavits may be submitted and considered as part of the record.'"). See also **McNair v. Haley**, 97 F.Supp.2d 1270, 1284 (M.D.Ala. 2000) ("Rule 7 has not been supplanted but was instead left intact to function as it always has

alongside the revised § 2254"); **Ashworth v. Bagley**, 2002 U.S. Dist. LEXIS 27219, at *37 (S.D.Ohio Mar. 28, 2002) ("Congress expressly modified § 2254 (e)(2); Congress did not modify Rule 7").

The Third Circuit's conclusion that Mr. Travillion's Habeas Corpus Rule 7 argument is meritless in light of this Court's decision in Cullen v. Pinholster (Appendix A at 1-2) is questionable for a least two reasons. First, the supplemental materials are not "new evidence" as contemplated by § 2254 (e). Second, the objectives to be accomplished by this Court's decision in Pinholster are not threatened by consideration of those materials in this habeas proceeding.

Take for example the Judicial/Prosecutorial Misconduct Complaint (Dkt. 58 at Attachment #4; Appendix S at 422-485) the Amended Report & Recommendation initially decided could not be considered because it was not part of the state court record (Dkt. 74 at 16-17; Appendix C at 40-41) but was ultimately overruled by the District Court's Memorandum (Dkt. 81 at 4; Appendix B at 6) in that determination. Attached to that complaint is the August 24, 2005 letter referenced by the Superior Court (Dkt. 21-5 at 7; Appendix K at 146) when it determined Mr. Travillion's Sixth Amendment right to counsel was violated and reversed the judgment of sentence and remanded this case for a new trial. Dkt. 58 at Attachment #4, Att. #4-47 through Att. #4-50; Appendix S at 468-471.

In that letter, Mr. Travillion clearly detailed the efforts he'd undertaken to secure counsel following the postponement of trial. Including his efforts to retain David B. Cercone, Esq. and his attempts to gain the assistance of the Allegheny County Bar Association's Lawyer Referral Service in securing the assistance of counsel for trial. id. at ¶. 9. The May 9, 2005 letter from Attorney Cercone (Dkt. 31 at Attachment #11; Appendix T at 555) responding to Mr. Travillion's inquiry for assistance and the June 13, 2005 letter from the

ACBA Lawyer Referral Service (Dkt. 31 at Attachment #12; Appendix T at 557) responding to his communication to them do nothing more than reconstruct what the Trial Court knew about his efforts to secure counsel at the time it determined he forfeited the right to that assistance.

The gravaman behind this Court's decision in Pinholster is to prevent "habeas-by-sandbaging." and the promotion of comity, finality, and federalism through ensuring that the state courts consideration of the constitutional claims is the "main-event" rather than a "tryout on the road" to federal court. **Cullen v. Pinholster**, 131 S.Ct. 1388, 1398-1401 (U.S. 2011). Those concerns are not implicated by the supplemental materials proffered by Mr. Travillion in this habeas proceeding. Especially not by the letters from Attorney Cercone and the ACBA's Lawyer Referral Service which clearly show that the Trial Court was incorrect in it's determination that he "refused to hire counsel."

The Third Circuit's conclusion that the supplemental materials are barred by this Court's decision in Pinholster is debatable among jurists of reason. **Jamerson v. Runnels**, 713 F.3d 1218, 1226-27 (9th Cir. 2013) (evidence that merely reconstructs what the state court knew and did with the facts before it at the time it's decision was made do not implicate Pinholster concerns); **Higgins v. Cain**, 720 F.3d 255, 262-63 (5th Cir. 2013) (same).

The supplemental materials, at a minimum, clearly show that the state courts' were wrong in their factual finding that Mr. Travillion "refused to hire counsel." and whether the Third Circuit's reliance on the District Court's assessment of the Habeas Corpus Rule 7 materials was correct is an issue that deserves encouragement to proceed further so that a COA should have been granted in this case. **Slack v. McDanial**, 529, U.S. 473, 484 (2000).

CONCLUSION

Reasonable jurists could debate whether the state courts' determination that Mr. Travillion forfeited his right to counsel violated his Sixth Amendment right to the assistance of counsel. Mr. Travillion has clearly made a substantial show of the denial of his constitutional right to counsel and the Third Circuit's COA inquiry placed too heavy a burden on him in obtain the certificate in this case. **Miller-El**, 537 U.S. at 341-42; **Buck**, 137 S.Ct. at 773-74. WHEREFORE, it is respectfully requested that this Petition for a Writ of Certiorari be granted in the interest of protecting the integrity of fundamental fairness in the American Criminal Justice System.

Respectfully submitted,

Date: 03.03.23

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