

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2018

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ALEX PAPPILLION -- PETITIONER, PRO SE

VS.

DARREL VANNY WARDEN
STATE OF LOUISIANA, -- RESPONDENT

=====

ON PETITION FOR WRIT OF CERTIORARI TO:
U.S. FIFTH CIRCUIT COURT OF APPEAL

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PETITION FOR WRIT OF CERTIORARI

=====

Respectfully submitted,

Alex P. Pappillion #182589

Alex Pappillion
DOC# 182389, Oak 4
Louisiana State Penitentiary
Angola, La. 70712

QUESTIONS PRESENTED

Question 1: Whether The Lower Courts Erred Finding Petitioner Failed To State A Constitutional Claim Where Petitioner's Sixth Amendment Right to Effective Representation of Counsel was Violated by the Actual Denial and Deprivation of Counsel during a Critical Stage of Petitioner's Post-Verdict Proceedings and Prior to Sentencing.

LIST OF PARTIES

☐ All parties appear in the caption of the case on the cover page.

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

John DeRosier, District Attorney
1000 Ryan Street
P.O. Box 3206
Lake Charles, LA 70602-3206

There are no other parties to this action within the scope of Supreme Court Rule 29.1.

Alex Pappillion #182589
Alex Pappillion
OAK-4

TABLE OF CONTENTS

QUESTIONS PRESENTED.....	i
LIST OF PARTIES.....	ii
TABLE OF CONTENTS.....	iii
INDEX TO APPENDICES.....	iii
TABLE OF AUTHORITIES.....	v
QUESTIONS PRESENTED.....	i
CERTIFICATE OF INTERESTED PERSONS.....	vi
REQUEST FOR ORAL ARGUMENTS.....	vii
OPINIONS BELOW	1.
JURISDICTION.....	2.
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.....	3.
STATEMENT OF THE CASE.....	3.
STATEMENT OF THE FACTS.....	6.
SUMMARY OF ARGUMENT.....	7.
REASONS FOR GRANTING THE PETITION.....	7.
CONCLUSION.....	18.
CERTIFICATE OF SERVICE.....	20.

INDEX TO APPENDICES

Appendix A: 11-14-17	The U.S. Fifth Circuit Court of Appeal denied COA, Alex Pappillion v. Darrel Vannoy, 5th Cir. No: 17-30028, U.S.D.C. 2:15-CV-273.
Appendix B: 12/05/16	U. S. District Court, Western District of Louisiana, Judgment and order adopting the Magistrate's recommendation and denying federal habeas relief. USDC No. 2:15-CV-273.
Appendix C: 10/18/16	Judge Kathleen Kay, Magistrate Report and recommendation.
Appendix D: 2/14/17	U. S. District Court, Western District of Louisiana, denying COA.
Appendix E: 2/26/16	La. Supreme Court denied writ, <i>State ex Rel. Alex Pappillion v. State of Louisiana</i> , 184 So.3d 1274, 2015-0793 (La.2/26/16).
Appendix F: 3/18/15	La. Court of Appeal, denying writ on Post Conviction Relief <i>State of Louisiana v. Alex P. Pappillion</i> , No. KH 14-00945 (La. App. 3 Cir. 3/18/15); and No. KH 15 00202 (La. App. 3 Cir. 5/5/15).
Appendix G: 8/8/14	Louisiana District Court Denied Post Conviction Relief.

Appendix H: 5/4/11)	Louisiana Court of Appeal, Third Circuit denying direct appeal <i>State v. Papillion</i> , 63 So.3d 414, 2010-1317 (La. App. 3 Cir. 5/4/11).
Appendix I: 11/18/11	La. Supreme Court denied certiorari on direct appeal <i>State v. Papillion</i> , 75So.3d 447, 2011-1149 (La.11/18/11).
Appendix I: 4/29/10	Transcript "Refixing of Arraignment and Sentencing" colloquy <i>pro se</i> motion for new trial.
Appendix J: 5/10/10	Minutes plea on Habitual Offender Bill
Appendix K: 6/28/10	Minutes HFC Hearing, Motion to withdraw, and Motion for new trial argued by defendant.
Appendix L: 6/28/10	Transcript "Filing Of Habitual Offender Bill By State (Omitted), Motion to Withdraw by Mr. Clemens, and Motion For New Trial By Defendant."
Appendix M: 7/6/10	Minutes court denies <i>pro se</i> motions.
Appendix N: 5/2/17	Motion for Certificate of Appealability in Incorporated Brief in Support filed In U.S. Fifth Circuit Court of Appeal.
Appendix O: 12/2/16	Motion For Certificate Of Appealability, filed in Western District of Louisiana.
Appendix P: 2/27/16	Memorandum In Support Of Application For Habeas Corpus.
Appendix Q: 11/7/16	Petitioners Traverse And Objection To Magistrate Report And Recommendation.

TABLE OF AUTHORITIES

Page Number

Case Citation

State v. Papillion, 63 So.3d 414 (La.App. 3 Cir. 2011).....	3
State v. Papillion, 75 So.3d 447 (La. 2011).....	3
State ex. Rel. Papillion v. State, 140 So.3d 1183 (La. 2014).....	4
State ex. Rel. Papillion v. State, No. 2015-0793, 184 So.3d 1274 (La. 2016).....	4
McConnell v. Rhay, 393 U.S. 2, 89 S.Ct. 32, 21 L.Ed.2d 2 (1968).....	9
Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975).....	9
Miller-El v. Cockrell, 537 U.S. 322, 123 S.Ct. 1027, 154 L.Ed.2d 931 (2003).....	10
Slack v. McDaniel, 529 U.S. 473 at 481, 146 L.Ed.2d, 120 S.Ct. 1595 (2000).....	10
Miller-El v. Cockrell, No. 01-7662, 537 U.S. at 326, 123 S.Ct. 1029 (02/25/2003).....	11
Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).....	11
Montejo v. Louisiana, 556 U.S. 778, 786; 129 S.Ct. 2079; 173 L.Ed.2d 955 (2009).....	11
United States v. Wade, 388 U.S. 218, 227-228; 87 S.Ct. 1926; 18 L.Ed.2d 1149 (1967). 12	
Brewer v. Williams, 430 U.S. 387, 398; 97 S.Ct. 1232; 51 L.Ed.2d 424 (1977).....	12
Powell v. Alabama, 287 U.S. 45, 57; 77 L.Ed. 158 (1932).....	12
Gardner v. Florida, 430 U.S. 349, 358; 97 S.Ct. 1197; 51 L.Ed.2d 393 (1977).....	12
Mempa v. Rhay, 389 U.S. 128, 88 S.Ct. 254, 19 L.Ed.2d 336 (1967).....	12
Boardman v. Estelle, 957 F.2d 1523, 1525 (9th Cir. 1992).....	12
United States v. Fogel, 829 F.2d 77 (D.C. Cir. 1987).....	12
McAfee v. Thaler, 630 F.3d 383 (5th Cir. 2011).....	12
United States v. Cronin, 466 U.S. 648, 659; 104 S.Ct. 2039; 80 L.Ed.2d 657 (1984).....	13
Cuyler v. Sullivan, 446 U.S. 335, 350; 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980).....	16
United States v. Weathersby, No: 10-265, 2015 U.S. Dist. LEXIS 127558, at *12 (E.D. La. Sept. 23, 2015).....	16
Mayo v. Cockrell, 287 F.3d 336, 340 n.3 (5th Cir. 2002).....	17
Burdine v. Johnson, 262 F.3d 336, 344 n.4 (5th Cir. 2001).....	17

CONSTITUTION CITED

U.S.C. Sixth Amendment.....	7, 9, 11, 12, 16
U.S.C. Fourteenth Amendment.....	7, 9, 11, 12, 16

Codes & Statutes

28 U.S.C. § 1254(1) & 1257.....	2
Supreme Court Rule 9, 17.1(b), and 22.....	2
28 U.S.C. § 2253(c)(2).....	10

IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR A WRIT OF CERTIORARI

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

OPINIONS BELOW

For cases from federal courts:

The opinion(s) of the United States Fifth Circuit Court of Appeal appear at **Appendix A** to the petition and is unpublished.

The opinion(s) of the United States District Court, Western District of Louisiana, appear at **Appendix B** and is unpublished.

The Magistrates Report and recommendation in the U.S. Western District Court, appear at **Appendix C** of the petition and is unpublished.

The opinion of the United States District Court, Western District of Louisiana, Denying COA appear at **Appendix D** to the petition and is unpublished.

For cases from state courts:

The opinion of the highest state court to review the merits appears at **Appendix E** to the petition and is published. La. Supreme Court denied writ, *State ex Rel. Alex Pappillion v. State of Louisiana*, 184 So.3d 1274, 2015-0793 (La. 2/26/16).

The opinion(s) of the Louisiana Court of Appeal, Third Circuit denying writ on Post Conviction Relief appears at **Appendix F** to the petition and is unpublished, *State of Louisiana v. Alex P. Papillion*, No. KH 14-00945 (La. App. 3 Cir. 3/18/15) and No. KH 15-00202 (La. App. 3 Cir. 5/5/15).

The opinion of the Louisiana 14th Judicial District Court Denying Post Conviction Relief appears at **Appendix G** of the petition and is unpublished.

The opinion of the highest state court to review the merits on direct appeal appears at **Appendix H** to the petition and is published, *State v. Papillion*, 63 So.3d 414, 2010-1317 (La. App. 3 Cir. 5/4/11).

The opinion of the Louisiana Supreme Court denying certiorari on direct appeal appears at **Appendix I** to the petition and is published. *State v. Papillion*, 75 So.3d 447, 2011-1149 (La. 11/18/11).

JURISDICTION

☒ For cases from federal courts:

The date on which the United States Court of Appeal decided my case was November 14, 2017, a copy of that decision appears at Appendix A.

☒ No petition for rehearing was timely filed in my case.

The jurisdiction of this Court is invoked under U.S.C.A. Const. Art. 3 § 2, cl. 2; 28 U.S.C. § 1254(1); Supreme Court Rule 9, 17.1(b), and 22.

☒ For cases from state courts:

The date on which the highest state court decided my case was February 2, 2016. A copy of that decision appears at Appendix E.

The jurisdiction of this Court is invoked under U.S.C.A. Const. Art. 3 § 2, cl. 2; 28 U.S.C. § 1254(1) & 1257(a); Supreme Court Rule 9, 17.1(b), and 22.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The United States Constitution, **AMENDMENT V** provides in pertinent part:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be take for public use, without just compensation.

The United States Constitution, **Amendment VI** provides in pertinent part:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by 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 defense.

The United States Constitution, **Amendment XIV, § I** provides in pertinent part:

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

(I). STATEMENT OF THE CASE

Petitioner is presently serving a life sentence at the Louisiana State Penitentiary at Angola, Louisiana for his March 12, 2010 conviction for (1) count of theft over \$500; one (1) count attempted disarming of a police officer; and one (1) count simple battery. Petitioner's conviction and sentence was affirmed by the Louisiana Third Circuit Court of Appeal on May 4, 2011. *See State v. Papillion*, 63 So.3d 414 (La.App. 3 Cir. 2011) (App. H). The Louisiana Supreme Court denied writs on November 18, 2011. *State v. Papillion*, 75 So.3d 447 (La. 2011)(App. I).

Petitioner filed a *pro se* state Application for Post-Conviction Relief on February 15, 2013, one (1) day before the expiration of Petitioner's one-year time limit under 28 U.S.C. § 2244. Petitioner's *pro se* Application alleged, *inter alia*, that Petitioner's conviction and sentence violated the Fifth, Sixth, Eighth, and Fourteenth Amendments of the U.S. Constitution as it was initiated by a bill of information and, further, that trial and appellate counsel were ineffective. Petitioner's previously-retained private counsel submitted a supplement to Petitioner's *pro se* Application on or about February 22, 2013.

Petitioner's *pro se* Application and counseled supplement traversed the state courts in one form or another until they were finally and fully disposed of by the Louisiana Supreme Court: the former on June 13, 2014 (*see State ex. Rel. Papillion v. State*, 140 So.3d 1183 (La. 2014)); the latter on February 26, 2016. *See State ex. Rel. Papillion v. State*, No. 2015-0793, 184 So.3d 1274 (La. 2016)(App. E).

At issue herein is Petitioner's first and only Habeas Petition filed February 27, 2016. (App. Q). Petitioner alleged numerous counts of ineffective assistance of counsel, including, *inter alia*, that Petitioner's trial counsel operated under an actual conflict of interest, that counsel was physically absent from the courtroom during Petitioner's crucial post-verdict motions—which Petitioner labored to argue inexpertly on his own—and that counsel failed to object to the seemingly negligent elimination of several lesser included verdicts.

Further, petitioner averred that his constitutional right to effective representation of counsel was violated, when the trial court permitted Petitioner's trial attorney to

“provisionally” withdraw from representation, holding counsel responsible for representation at sentencing but permitting counsel to physically absent himself during Petitioner's post-verdict motions—including a Motion for New Trial and Motion to Quash the Multiple Bill of Information—compelling Petitioner to represent himself *pro se*, a task he did not request and was woefully under-prepared for.

On October 18, 2016, the U.S. Magistrate Court recommended dismissal of the Petition. (App. C). Petitioners Traverse and Objection to Magistrate Report and Recommendation was filed November 7, 2016 (App. R). Of the five (5) allegations of ineffectiveness asserted in Petitioner's Habeas Petition, the Magistrate Court addressed only four (4) total and only two (2)--counsel's *pro temp* appointment and the breakdown of the parties' relationship—using the prejudice-presumed analysis provided by *Cronic*, *Strickland*, and their progeny. The Magistrate Court was utterly silent on the actual and absolute denial of counsel during post-trial motions, a time when Petitioner was compelled to argue his own Motion for New Trial without counsel's assistance because Petitioner's *pro se* Motion argued ineffective assistance of counsel and the Court would neither appoint substitute counsel nor force trial counsel to argue his own ineffectiveness. *Ibid.*

On December 5, 2016, the U.S. District Court entered judgment and order Denying Petition on the merits (App. B). Motion For Certificate Of Appealability, filed in Western District of Louisiana December 20, 2016 (App. P). The District Court denied Petitioner's Application for a COA on February 14, 2017 (App. D). Petitioner timely

noticed his intent to appeal. The Fifth Circuit Court of Appeal had jurisdiction to determine whether or not to grant Petitioner a Certificate of Appealability pursuant to 28 U.S.C. § 2253(c) and FED.R.App.P. 22(b). On March 20, 2017, the Fifth Circuit court of appeal issued a "BR 7 Letter" setting a deadline of May 1, 2017 for the filing of the Application for COA. Motion for Certificate of Appealability in Incorporated Brief in Support filed in U.S. Fifth Circuit Court of Appeal May 2, 2017 (App. O). The Court of Appeal denied COA November 14, 2018 based on failure to State a Constitutional Claim. (App. A).

STATEMENT OF THE FACTS

In affirming Petitioner's conviction, the Third Circuit gave the following recitation of the facts and history of this matter:

On the evening of December 8, 2006, between 7:45 and 8:00 p.m., Defendant attempted to steal a car parked at a corner gas station. He then fled on foot to a neighboring apartment complex where he successfully stole a vehicle.

Following a high-speed chase with the police, Defendant crashed the vehicle into a tree. He exited the vehicle, and a foot chase ensued through a nearby apartment complex. The pursuit ended at the top of a flight of stairs where Defendant indicated to a pursuing female officer that he surrendered. As the officer was about to handcuff Defendant, he went for her gun. After the officer broke Defendant's grip from her gun, he pushed her, causing her to fall backwards down the stairs. Defendant descended the stairs continued to struggle with the officer in an attempt to get her gun. When a second officer arrived on the scene, Defendant was apprehended with the assistance of a canine.

On February 9, 2007, Defendant was charged by bill of information as follows: Counts 1 and 2 – theft of over \$500.00, violations of La.R.S. 14:67; Count 3 – attempted disarming of a police officer, a violation of La.R.S. 14:34.6 and 14:27; and Count 4 – second degree battery, a violation

of La.R.S. 14:34.1. On March 9, 2010 Count 1 was *nolle prosequied*, and the matter proceeded to trial. On March 12, 2010, Defendant was found guilty as charged on Counts 2 and 3 and also found guilty via responsive verdict of simple battery on Count 4.

Papillion, 63 So.3d at 417.

SUMMARY OF ARGUMENT

By the close of trial, Petitioner's relationship with his trial counsel had devolved to one of open acrimony. Petitioner intended to include among his post-trial motions, claims that counsel had been less than effective in failing to call numerous witnesses, failing to fully investigate the case (because he was appointed by the Louisiana Supreme Court as a Pro ad Hoc Judge in the 14th JDC), failing to involve Petitioner in plea negotiations or to convey the content of the same to him. Counsel, concerned that he could not ethically argue his own ineffectiveness, sought to withdraw—if not from the remainder of Petitioner's case, at least during Petitioner's post-verdict motions. The trial court consented, allowing counsel to attend to other matters outside the courtroom while obligating Petitioner to litigate his post-verdict motions without the assistance or guiding hand of counsel. Such an actual, complete, and certifiable denial of counsel during a critical stage of Petitioner's case arises to the level of a violation of Petitioner's Sixth Amendment rights for which prejudice is presumed. Reasonable jurists can debate the District Court's denial of Habeas Corpus relief, and the Court Of Appeal erred denying COA finding petitioner failed to state the denial of a constitutional right.

REASONS FOR GRANTING THE PETITION

The lower courts erred in denying COA finding that he failed to state a

constitutional claim.

Papillion ask his retained Counsel to file a motion for "New Trial" based on trial issues pertaining to perjury by trial witnesses, the state's failure to produce the surveillance tape from the store and the camera video from the police units. Also, based on the state's failure to produce officer Jeffery Atkins police report which the state claimed it was lost. Counsel refused to file the motion for new trial unless Papillion paid him an additional fifteen thousand dollars. Pappillion complained of these tactics to the court and because he did not have any more money to pay the lawyer, he asked for appointment of counsel. Further, counsel filed a motion to be relieved as counsel. At the Habitual Offender arraignment hearing (without counsel present) the court advised Papillion without *Faretta* warnings that he (Papillion) could file his own pro se motion. (See April 29, 2010 hearing tr. p. 6) Papillion filed his own uncounselled motion complaining of ineffective assistance of counsel based on counsel's failure to address the above errors in a motion for new trial.

On June 28, 2010 a hearing was held on counsel's motion to be relieved as counsel and the pro se motion for new trial. The retainer agreement clearly states counsel agreed to represent defendant through trial and sentencing, and the court deferred counsel's motion until after sentencing. The court then allowed counsel to leave the courtroom based on the fact Counsel did not adopt the pro se motion, and left Papillion to argue his motion without the advice of counsel.

The lower courts deflected the claim that the defendant was constructively denied

the right to counsel at a critical stage in the proceeding (filing of motion for new trial and prior to sentencing).

This court has long held "A defendant has the right to counsel at every critical stage of the proceedings against him, including sentencing. *McConnell v. Rhy*, 393 U.S. 2, 89 S.Ct. 32, 21 L.Ed.2d 2 (1968). Also, the Sixth Amendment to the United States Constitution gives a defendant in a criminal prosecution the right to represent himself. However, because an accused managing his own defense relinquishes many of the traditional benefits associated with the right to counsel, he must knowingly and intelligently forego those benefits in order to represent himself. *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). The choice of self-representation can only be made after the defendant has been made aware of the dangers and disadvantages of self-representation so that the record will establish he made his choice with "eyes wide open." *Faretta, supra* at 95 S.Ct. 2541.

The record supports Papillion did not waive counsel and did not want to file or represent himself in his motion for new trial.

Mr. Papillion's family hired counsel Cate L. Bartholomew to assist him in seeking Post Conviction relief. (HH-1-3). After Mrs. Bartholomew was hired, she came to Angola and received the record from Mr. Papillion. At that time she stated she would review the record and advise him within 30 days of the possible claims. Due to misfortunes in Mrs. Bartholomew's personal life, her father died, her mother developed health issues, Mrs. Bartholomew left and went to Florida and abandoned petitioner's case. Mrs.

Bartholomew describes this abandonment as a conflict. Due to Mrs. Bartholomew's abandonment and failure to respond to his letters, and with the one year federal AEDPA time was running out, Mr. Papillion was forced to file a pro se Application for Post Conviction Relief to stop his federal time from running.¹ Mrs. Bartholomew filed the supplement several days after the federal one year AEDPA time had elapsed, albeit within the states time limitation.

The standard of review is cited as follows:

In *Miller-El v. Cockrell*, 537 U.S. 322, 123 S.Ct. 1027, 154 L.Ed.2d 931 (2003), the issue of Certificate of Appealability (COA) was addressed. When a habeas applicant seeks a COA, the court should limit its examination to a threshold inquiry into the underlying merits of the claim; e.g., *Slack v. McDaniel*, 529 U.S. 473 at 481, 146 L.Ed.2d, 120 S.Ct. 1595 (2000). This inquiry does not require full consideration of the factual or legal bases supporting the claims. Consistent with the Court's precedent and the statutory test, the prisoner need only demonstrate a "substantial showing of the denial of a constitutional right." U.S.C. 28 § 2253(c)(2). He satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his case, or that the issues presented were adequate to deserve encouragement to proceed further. He need not convince a judge, or, for that matter, a panel of three judges, that he will prevail, but must demonstrate that reasonable jurists would find the district court's

¹The AEDPA one year began after the 90 days to file to the U.S. Supreme Court expired. The La. Supreme Court denied cert. November 18, 2011. He had one year and 90 days or until February 16, 2013 to file his state APCR to stop the federal time. The pro se APCR was filed under the "mailbox rule" by placing the application in the hands of the prison classification officer to be mailed February 15, 2013. (See App. B). Counsel filed the supplemental application February 22, 2013. (After the AEDPA time expired). (See App. C).

assessment of the constitutional claims debatable or wrong; *Miller-El v. Cockrell*, No. 01-7662, 537 U.S. at 326, 123 S.Ct. 1029 (02/25/2003). Accordingly, a court should not decline the application for COA merely because it believes the appellant will not demonstrate an entitlement to relief.

Appealable Issue No. 1: Reasonable Jurists Could Debate Whether the District Court Erred in Finding that Petitioner Did Not Suffer the Actual Denial of Counsel During a Critical Stage of his State Court Proceedings in Violation of the 5th, 6th, and 14th Amendments to the Constitution.

In most circumstances, this Court's ruling in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) necessitates a two-tiered analysis establishing professional deficiency and actual prejudice. The defendant must first show that counsel's performance was deficient. This requires a showing that counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment of the U.S. Constitution." *Strickland*, 466 U.S. at 686. Next, the complainant must show that the deficient performance prejudiced his or her defense. This can be accomplished upon a "showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Ibid*. However, in certain albeit limited exceptions, *Strickland's* prejudice prong can be dispensed with as the scope of counsel's error so vitiates the defendant's Sixth Amendment protections that no degree of a want of prejudice can cure the violation. This includes the actual denial or deprivation of counsel during "critical stages" of a defendant's prosecution.

"The Sixth Amendment guarantees a defendant the right to have counsel present at all 'critical' stages of the criminal proceedings." *Montejo v. Louisiana*, 556 U.S. 778, 786;

129 S.Ct. 2079; 173 L.Ed.2d 955 (2009), *quoting United States v. Wade*, 388 U.S. 218, 227-228; 87 S.Ct. 1926; 18 L.Ed.2d 1149 (1967). Critical stages including pre-trial investigation and motion practice (*see, e.g., Brewer v. Williams*, 430 U.S. 387, 398; 97 S.Ct. 1232; 51 L.Ed.2d 424 (1977) (“a person is entitled to the help of a lawyer at or after the time that judicial proceedings have been initiated against him--‘whether by way of formal charge, preliminary hearing, indictment, information, or arraignment’”); *see also Powell v. Alabama*, 287 U.S. 45, 57; 77 L.Ed. 158 (1932) (“[The] most critical period of the proceedings against these defendants” was “from the time of their arraignment until the beginning of their trial”)) through sentencing. *See e.g., Gardner v. Florida*, 430 U.S. 349, 358; 97 S.Ct. 1197; 51 L.Ed.2d 393 (1977) (“The Sixth Amendment right to counsel extends to all critical phases of a criminal proceeding, including a sentencing hearing”); *Mempa v. Rhay*, 389 U.S. 128, 88 S.Ct. 254, 19 L.Ed.2d 336 (1967) (“The time of sentencing is a critical stage in a criminal case”); *Boardman v. Estelle*, 957 F.2d 1523, 1525 (9th Cir. 1992) (“Sentencing is a critical stage of the criminal process”); *United States v. Fogel*, 829 F.2d 77 (D.C. Cir. 1987) (“It cannot be said often enough that sentencing is a critical phase of the criminal justice process.”)

Post-trial, pre-appeal motion practice is also a critical stage. *McAfee v. Thaler*, 630 F.3d 383 (5th Cir. 2011) (joining “every federal circuit to consider the issue” and holding that “settled Supreme court precedent” establishes “that the motion for new trial, during the post-trial, pre-appeal period, is a critical stage.”)

When there has been an actual or constructive denial of the assistance of counsel

altogether during a critical stage of the proceedings prejudice is presumed. "The presumption that counsel's assistance is essential requires the court to conclude that a trial is unfair if the accused is denied counsel at a critical stage of his trial . . . No specific showing of prejudice is required because the petitioner has been denied the right of effective cross-examination which would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it." *United States v. Cronie*, 466 U.S. 648, 659; 104 S.Ct. 2039; 80 L.Ed.2d 657 (1984). "Actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice." *Strickland v. Washington*, 466 U.S. at 692. "Prejudice in these circumstances is so likely that case-by-case inquiry into prejudice is not worth the cost." *Ibid*.

Petitioner was found guilty as charged on March 12, 2010. On April 29, 2010, Petitioner was brought to court for arraignment on a Multiple Offender Bill of Information. (App. J). He was unrepresented by counsel. *Ibid*. Petitioner indicated to the Court that his trial attorney "was suppose [sic] to come talk to me this week for the purpose of filing a Motion for New Trial" but that he had failed to do so. The Court commiserated, stating "Hopefully, he'll come and see you in the meantime," (Rp.1578). and instructed Petitioner that "if he doesn't, then you're welcome to file [a *pro se* Motion for New Trial.]" (Rp.1579). Petitioner explained: "I don't really know what I'm doing, but I'm trying." (App. J. Rp.1579, l. 11-15).

On June 28, 2010, Petitioner returned to Court for a hearing on the State's Multiple Bill. (App. L & M). Apparently having nothing better to do, his trial attorney was in

attendance. Petitioner's counsel had filed a Motion to Withdraw; Petitioner had filed several *pro se* Motions, including a Motion to Quash the Multiple Offender Bill of Information and a Motion for a New Trial. (App. K). Counsel refused to adopt Petitioner's *pro se* filings (App. M, R.p. 1631, l. 23-26) and Petitioner was advised by the trial court: "Mr. Papillion, it will be up to you to argue any of those motions that you filed *pro se*." *Ibid*.

At the close of the proceedings, Petitioner was adjudicated a multiple offender with sentencing to follow accordingly. Counsel again reiterated that he would not be present to represent Petitioner during argument or allocution of Petitioner's Motion for New Trial. (App. M, pp. 1631). "I just want to know do you object to him withdrawing as your attorney?" the Court inquired. (App. M, pp. 1634). Petitioner responded: "Of course, Your Honor. I thought he was with me all the way through . . . but I mean . . ." *Ibid*.

MR. CLEMONS: Okay. Judge, that's why I made it clear in my motion that that was part of my retention to represent him through sentencing. Just on things that transpired since that time I felt and I still feel it's in his best interest to have somebody who could advocate from this point going forward on his behalf and also because Mr. Papillion is indigent, and at some point hopefully the Court is going to appoint someone to take over this matter moving forward. I just thought this would be a good transition period to do that, Your Honor, but I have no problem with staying on until he gets sentenced.

THE COURT: Well, since that is in part of the motion, I think I would be probably jumping the gun, so to speak, as to sign the Motion to Withdraw at this point.

MR. CLEMONS: No problem, Judge. As far as withdrawing for today – I mean leaving for today to go to my office?

THE COURT: I understand you have not adopted the *pro se* motions that

were filed by the defendant, therefore you may leave if you so desire.

MR. CLEMONS: Thank you, Judge.

(Mr. Clemons exits courtroom)

(App. M, pp. 1634-1636).

With this, Petitioner was instructed to move into counsel's chair and proceed with his argument on his own behalf. He was not appointed counsel to assist him. He was not even questioned regarding whether he wished to proceed *pro se*, whether he could afford counsel, or whether he could adequately represent himself. Petitioner did not have a copy of his *pro se* Motion for New Trial and had to rely upon a copy provided to him by the Court. (App. M, pp. 1639). Petitioner complained that he was "at a disadvantage" (App. M, pp. 1640); he asked the Court to "please make me understand" (App. M, pp. 1659). and stated: "I do not understand everything that is going on here." (App. M, pp. 1649). The trial court refused to entertain Petitioner's argument that his counsel was ineffective, directing the unrepresented Petitioner to "file the appropriate motion" and then proceeded to admonish Petitioner, stating: "Well, [counsel is] still representing you on sentencing. He's still representing you on habitual offender [sic.] I doubt very seriously you want to alienate while he's your attorney. You haven't discharged him. He has asked to be withdrawn but he is under contract until sentencing." (App. M, pp. 1668-1669). In one particularly deflated exchange, Petitioner stated: "I don't know what else to say because of the fact that I feel like I'm losing my argument here today because of the fact that I've asked my attorney to do a number of things." (App. M, pp. 1663).

At the close of the proceedings, the Court denied Petitioner's Motion for New Trial. "Your Honor," Petitioner inquired, "do I need to respectfully object to that?"

"You do," the Court advised.

"Okay," Petitioner said. (App. M, pp. 1675).

In *Strickland*, the U.S. Supreme Court identified three (3) categories of ineffectiveness claims and the corresponding standards. First, the Court held that "in certain Sixth Amendment contexts, prejudice is presumed [such as a]ctual or constructive denial of the assistance of counsel altogether." *Strickland*, 466 U.S. at 692; citing *Cronic*, 466 U.S. at 659. Second, the Court held that "when counsel is burdened by an actual conflict of interest" then a "similar, though more limited, presumption of prejudice" should apply. *Ibid.* at 692. There, the Court held that prejudice is presumed where "the defendant demonstrates that counsel 'actively represented conflicting interests' and that 'an actual conflict of interest adversely affected his lawyer's performance.'" *Ibid.*; citing *Cuyler v. Sullivan*, 446 U.S. 335, 350; 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980) "Actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice." See e.g., *United States v. Weathersby*, No: 10-265, 2015 U.S. Dist. LEXIS 127558, at *12 (E.D. La. Sept. 23, 2015) A "constructive" denial can occur even when an attorney – unlike Petitioner's counsel herein – condescends to be physically present in the courtroom during a critical stage in the defendant's defense. "That a person who happens to be a lawyer is present . . . is not enough to satisfy the constitutional command." *Strickland*, 466 U.S. at 687.

Although counsel's absence from the courtroom during post-trial motions is not a conflict of interest, *per se*, it nonetheless implicates the same constitutional principles put forth in Petitioner's Habeas Petition and argued thoroughly throughout these proceedings. The actual or constructive deprivation of counsel – like an “actual conflict of interest” where counsel is physically present but unable, due to conflict, to advocate fully on behalf of his or her client – triggers the lowest rung of *Strickland* analysis, the prejudice-presumed standard. A “constructive” denial of counsel can occur when counsel labors under an “actual conflict of interest” or where counsel, though formally retained or appointed, is physically absent. *Mayo v. Cockrell*, 287 F.3d 336, 340 n.3 (5th Cir. 2002); *Burdine v. Johnson*, 262 F.3d 336, 344 n.4 (5th Cir. 2001).

It is true enough that the trial court did not permit trial counsel to voluntarily resign, but the court refused to appoint substitute counsel for post-trial motions as well. While the trial court still refused to grant counsel's withdrawal, it did kindly permit counsel to leave the courtroom forcing Petitioner to represent himself on his pro se post-trial motions. (App.M, pp. 1634-1635). The prospect of a represented defendant arguing pro se post-trial motions while his attorney attends to more pressing matters elsewhere and where the trial court strenuously advises the unrepresented defendant not to push too hard on the defendant's ineffective assistance of counsel claims lest he “alienate” his absent attorney and further injure himself at sentencing is precisely the type of prejudice-presumed situation that are called upon in “actual conflict” and “actual denial” situations.

Reasonable jurists cannot only debate the District Court's merit denial of

Petitioner's ineffective assistance/actual conflict/actual denial of counsel claim; seasoned and sober jurist must almost universally be appalled by it. While Petitioner initially clothed his attorney's absence in the language of an "actual conflict of interest," Petitioner did vividly describe, and the trial record reflects, counsel's actual absence during post-trial motions. Whether we term it a conflict of interest that counsel felt his other duties intruded on Petitioner's right to effective representation or we call it the actual denial of counsel, the standard is the same and the same result should follow: The lower courts erred finding petitioner failed to state a constitutional claim and Petitioner should be issued a Certificate of Appealability.

CONCLUSION

It is immaterial whether Petitioner adequately represented himself before the trial court judge during his post-trial motions (he didn't) or whether, in more capable hands, his post-trial motions would have been successful (they would); prejudice is presumed when so great a violation of a defendant's constitutional rights occurs as happened here. Petitioner's trial counsel was permitted to leave the courtroom and the courthouse while Petitioner was tasked with his own representation. The trial court did not inform the defendant of the dangers and disadvantages of self-representation so that the record will establish he made his choice with "eyes wide open." *Faretta, supra* at 95 S.Ct. 2541. Nor did the court inquire whether Petitioner could or intended to retain an attorney. The Court did not offer to appoint even titular representation or a public defender to second-chair and supervise Petitioner's motions. The sight of an unintentionally unrepresented indigent

defendant struggling to comprehend and navigate the legal system during a critical stage of his proceedings is a scene that should not be tolerated in any American court of law. Reasonable jurist could thus debate the District Court's holding that Petitioner did not suffer an actual denial or deprivation of counsel during his critical post-trial motions. For all of these reasons and any others appearing to this honorable Court, Petitioner was entitled to a Certificate of Appealability.

The constitutional claims were not fully and fairly adjudicated and reasonable jurists would find the Court of Appeal's assessment of the constitutional claims debatable or wrong. Petitioner suggests he has presented questions of constitutional substance that adequately deserve encouragement to proceed further. 28 U.S.C.A. §2253(c)(2).

WHEREFORE the lower courts erred denying COA, this Honorable court may grant certiorari or remand to the U.S. Fifth Circuit for further proceedings.

Respectfully submitted on this 12th day of February, 2018.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2018

No. _____

ALEX PAPPILLION -- PETITIONER

VS.

STATE OF LOUISIANA, -- RESPONDENT

APPENDICES

INDEX TO APPENDICES

Appendix A: 11-14-17	The U.S. Fifth Circuit Court of Appeal denied COA, Alex Pappillion v. Darrel Vannoy, 5th Cir. No: 17-30028, U.S.D.C. 2:15-CV-273.
Appendix B: 12/05/16	U. S. District Court, Western District of Louisiana, Judgment and order adopting the Magistrate's recommendation and denying federal habeas relief. USDC No. 2:15-CV-273.
Appendix C: 10/18/16	Judge Kathleen Kay, Magistrate Report and recommendation.
Appendix D: 2/14/17	U. S. District Court, Western District of La., denying COA.
Appendix E: 2/26/16	La. Supreme Court denied writ, <i>State ex Rel. Alex Pappillion v. State of Louisiana</i> , 184 So.3d 1274, 2015-0793 (La. 2/26/16).
Appendix F: 3/18/15	La. Court of Appeal, denying writ on Post Conviction Relief <i>State of Louisiana v. Alex P. Papillion</i> , No. 14-00945 (La. App. 3 Cir. 3/18/15); & No. 15-00202 (La.App. 3 Cir. 5/5/15).
Appendix G: 8/8/14	Louisiana District Court Denied Post Conviction Relief.
Appendix H: 5/4/11)	Louisiana Court of Appeal, Third Circuit denying <u>direct appeal</u> <i>State v. Papillion</i> , 63 So.3d 414, 2010-1317 (La. App. 3 Cir. 5/4/11).

Appendix I: 11/18/11	La. Supreme Court denied certiorari on <u>direct appeal</u> <i>State v. Papillion</i> , 75 So.3d 447, 2011-1149 (La. 11/18/11).
Appendix J: 4/29/10	Transcript "Refixing of Arraignment and Sentencing" colloque pro se motion for new trial.
Appendix K: 5/10/10	Minutes plea on Habitual Offender Bill
Appendix L: 6/28/10	Minutes HFC Hearing, Motion to withdraw, and Motion for new trial argued by defendant.
Appendix M: 6/28/10	Transcript "Filing Of Habitual Offender Bill By State (Omitted), Motion To Withdraw By Mr. Clemens, And Motion For New Trial By Defendant."
Appendix N: 7/6/10	Minutes court denies pro se motions.
Appendix O 5/2/17	Motion for Certificate of Appealability in Incorporated Brief in Support filed In U.S. Fifth Circuit Court of Appeal.
Appendix P: 12/2/16	Motion For Certificate Of Appealability, filed in Western District of Louisiana.
Appendix Q: 2/27/16	Memorandum In Support Of Application For Habeas Corpus.
Appendix R: 11/7/16	Petitioners Traverse And Objection To Magistrate Report And Recommendation.