No. 18-7531

IN THE

SUPREME COURT OF THE UNITED STATES

ORIGINAL

JOHN PAUL GALBRAITH — PETITIONER
(Your Name)

vs.

LORIE DAVIS, DIRECTOR TDCJ-ID — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

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

PETITION FOR WRIT OF CERTIORARI

JOHN PAUL GALBRAITH #1473442
(Your Name)
ELLIS UNIT
1697 FM 980
(Address)

HUNTSVILLE, TEXAS 77320-3314
(City, State, Zip Code)

NONE
(Phone Number)

QUESTION(S) PRESENTED

The following questions effect prisoner's nationally:

1. Whether, after an indigent prisoner is granted appeal, a circuit justice has the descretion to deny request for appointment of counsel in the meaning of the Criminal Justice Act of 1964, 18 U.S.C. §3006A?

2. Whether states, such as in Texas, that an order for evidentiary hearing by affidavit violates an indigent prisoner's due process in not allowing him to participate in the evidentiary proceedings to develop the facts of his claims, and if such a hearing is ordered by the court, should the prisoner have the right to counsel in the meaning of 28 foll. §2254, Rule 8?

LIST OF PARTIES

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

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

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

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

OPINIONS BELOW

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

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

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

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

[X] reported at 2015 US DIST. LEXIS 42455; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

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

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

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

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

The date on which the United States Court of Appeals decided my case was MAY 18, 2018.

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

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

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

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

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

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

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

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

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

18 U.S.C.§3006A (b) Appointment of Counsel. Counsel furnishing representation under the plan shall be selected from a panel of attorneys designated or approved by the court, or from a bar association, legal aid agency, or defender organization furnishing representation pursuant to the plan. In every case in which a person entitled to representation under a plan approved under subsection (a) appears without counsel, the United States magistrate judge or the court shall advise the person that he has the right to be represented by counsel and that counsel will be appointed to represent him if he is financially unable to obtain counsel. Unless the person waives representation by counsel, the United States magistrate judge or the court, if satisfied after appropriate inquiry that the person is financially unable to obtain counsel, shall appoint counsel to represent him. Such appointment may be made retroactive to include any representation furnished pursuant to the plan prior to appointment. The United States magistrate judge or the court shall appoint separate counsel for persons having interests that cannot properly be represented by the same counsel, or when other good cause is shown.

28 U.S.C.§2253 (c)(2). A certificate of appealability may iisue under paragraph (1) only if the applicant has made a substantial showing of denial of a constitutional right.

28 foll. §2254 (c). If an evidentairy hearing is warranted, the judge must appoint an attorney to represent a petitioner who qualifies to have counsel appointed under 18 U.S.C. §3006A. The judge must conduct the hearing as soon as practicable after giving the attorney's adequate time to investigate and prepare. These rules do not limit the appointment of counsel under §3006A at any stage of the proceeding.

28 foll. § 2255 (c). Same as 28 foll. §2254 (c).

28 U.S.C. §3599 (a)(2). In any post conviction proceeding under Section 2254 or 2255 of title 28, United States Code, seeking to vacate or set aside a death sentence, any defendant who is or becomes financially unable to obtain adequate representation or investigatvie expert, or other reasonably necessary service shall be entitled to the appointment of one or more attorneys, and the furnishing of such other service in accordance with subsection (b) through (f).

Federal Civil Judicial Procedures and Rule 28 U.S.C. §2101(e). An application to the Sumpreme Court for a writ of certiorari to review a case before judgment has been rendered in the court of appeals may be made of any time before judgment.

Federal Rules Appellate Procedure 22(b). A request addressed to the court of appeals may be considered by a circuit judge, or dudge, as the court prescribes. If no express request for a certificate is filed, the notice of appeal constitutes a request addressed to the judge of the court of appeals.

Rules of the Supreme Court of the United States, Rule 39.7. In a case which a certiorari has been granted...this Court may appoint counsel to represent a party financially unbable to afford an attorney to the extent authorized by the Criminal Justice Act of 1964, 18 U.S.C. §3006A, or by any other applicable federal statute.

Texas Code of Criminal Procedures Article 11.07 §3(d). If the convicting court decides that there are controverted, previously unresolved facts which are material to the legality of the applicant's confinement, it shall enter an order within 20 days of the

expiration of the time allowed for the state to reply, designating the issues of fact to be resolved. To resolve those issues thecourt may order affidavits, despositions, interrogatories, additional forensic testing, andhearings, as well as using personal recollection...The convicting court may appoint an attorney or a magistrate to hold a hearing and make findings of fact.

STATEMENT OF THE CASE

The Court of Appeals had granted Galbraith's appeal in issuing a certificate of appealability and he motioned the court to appoint counsel. Justice Graves granted Galbraith's in forma pauperis but denied request for appointment of counsel.

In the clerk's instruction memorandum under the heading: Appellant's Brief Required by Fed. R. App. P. and 5th Cir. R. 28, it reads, "the court usually does not appoint counsel to represent pro-se parties in [this type of case], although it may do so when there are exceptional circumstances. If the court [thinks] you are entitled to an appointed lawyer, it will appoint one." See Appendix F.

Galbraith argues that the Court of Appeals is in violation of the Criminal Justice Act of 1964, 18 U.S.C. §3006A, and he has a right as an indigent defendant to appointment of counsel once the court grants his appeal by issuing a certificate of appealability to hear the merits in adjudicating habeas relief on 28 U.S.C. §2254.

In state court, Galbraith discovered after reading his trial transcripts that his trial counsel was ineffective for not challenging a seating juror's biased statements in voir dire. While his direct appeal was still pending on other unrelated issues, Galbraith filed a pro-se motion with a letter in support to the trial court asking for a new trial on the ineffective assistance claim, on February 4, 2009. The motion went ignored.

Once the direct appeal was affirmed, Galbraith filed a state writ habeas corpus challenging several issues, including ineffective assistance of counsel for failure to challenge a seating juror's biased statements in voir dire. The state habeas court ordered designated issues (ODI) on September 9, 2010 on all issues except the ineffective assistance of counsel claim for not challenging a juror's biased statements in voir dire. Galbraith motioned the court on October 8, 2010 for a live evidentiary hearing to develop the facts of his ineffective assistance claim. The motion went ignored. Galbraith filed a second motion for a live evidentiary hearing on November 30, 2010 and the habeas judge denied the motion on December 5, 2010.

The state presented their findings of facts and conclusions of law with the state's answer to the application of writ of habeas corpus on June 3, 2011 stating Galbraith's ineffective assistance claim for failing to challenge a seating juror's bias statements in voir dire (Ground One) failed to: 1. Demonstrate ineffective assistance of counsel; 2. Galbraith's ineffective assistance claim is not cognizable on application for writ of habeas corpus; 3. Galbraith makes bare claims to errors rendering his counsel ineffective will not support on habeas corpus; 4. Galbraith did not demonstrate ineffective assistance of counsel; 5. Galbraith makes bare, conclusionary assertions in his memorandum, without argument or raising them as actual grounds for review in his application; and 6. Galbraith did not show that the state court proceeding 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 that the decision was based on an unreasonable determination of facts in light of the evidence presented in state court proceedings. See Federal District Court's Memorandum Opinion and Order, pp. 6-7.

The habeas court never ordered in the ODI for the trial counsel to explain why he was ineffective for not challenging a juror's bias statements in voir dire, and the court only tied the claim to other ineffective assistance of counsel claims to avoid addressing the issue.

The Texas Court of Criminal Appeals adopted the state's findings and facts and denied Galbraith's writ without a written order on October 28, 2011.

In the federal writ of habeas corpus §2254, Galbraith raised ineffective assistance of counsel for failing to challenge a seating juror's bias statements in voir dire. Galbraith motioned the federal district court for a live evidentiary hearing to develop the facts of his ineffective assistance claim on September 14, 2012, and the magistrate denied the motion on March 19, 2013. See SARS Cause No. 4:11-CV-756. The federal district court adopted the state court's findings and facts denying relief.

In the Court of Appeals, Galbraith once again raised ineffective assistance of counsel for failure to challenge a seating juror's bias statements in voir dire.

Certificate of appealability was granted, and appointment of counsel by request for an indigent prisoner was denied on July 26, 2017. Without counsel for appeal, or one appointed for an evidentiary hearing to develop the claim for ineffective assistance of counsel in not challenging a juror's biased statements in voir dire, the Court of Appeals denied relief and chastised Galbraith for not [developing] the facts to his ineffective assistance claim stating: 1. Galbraith speculated the juror was unable to set aside her leaning and consider the case impartially; 2. Galbraith presented no clear and convincing evidence that juror was unable to lay aside her impressions or opinions and render a verdict based on the evidence presented in court; 3. Galbraith failed to overcome the presumption that the Texas Court of Criminal Appeals' finding of no bias was correct; 4. Galbraith failed to show that the Texas Court of Criminal Appeals was not objectively unreasonable; 5. Galbraith ineffective assistance appellate counsel for not raising ineffective assistance of trial counsel on direct review was frivolous; and 6. Galbraith did not include any discussion of the district court's determination that federal habeas review of the claim is barred by procedural default doctrine and Galbraith did not show the Texas Court of Criminal Appeals' decision was not contrary to, or an unreasonable application of federal law.

The Second Court of Appeals, Fort Worth, Texas affirmed Galbraith's conviction on November 6, 2008 in Galbraith v. State, No. 02-08-00024-CR

The Texas Court of Appeals refused petition for discretionary review on September 16, 2009, in In re Galbraith, PD-0272-09.

The Texas Court of Criminal Appeals denied application for state writ of habeas corpus without written order based on the findings of the trial court on October 26, 2011, in Ex parte Galbraith, Application No. WR-75,459.

The United States District Court, Eastern District of Texas, Sherman Division ORDERED that writ of habeas corpus §2254 is DENIED and the case DISMISSED with prejudice on April 1, 2015, in Galbraith v. Director, TDCJ-ID, No. 4:11-CV-756.

The Court of Appeals for the Fifth Circuit GRANTED certificate of Appealability

on June 13, 2017, GRANTED in forma pauperis on September 28, 2017, DENIED appointment of counsel to an indigent prisoner on July 26, 2017, and DENIED relief on May 18, 2018.

REASONS FOR GRANTING THE PETITION

I.

WHETHER, AFTER AN INDIGENT PRISONER IS GRANTED APPEAL, A CIRCUIT JUSTICE HAS THE DISCRETION TO DENY REQUEST FOR APPOINTMENT OF COUNSEL IN THE MEANING OF THE CRIMINAL JUSTICE ACT OF 1964, 18 U.S.C. §3006A?

A.

ARGUMENT AND AUTHORITIES

The United States Supreme Court held that an indigent defendant has the right to appointed counsel on appeal if the appeal is granted as of right. Penson v. Ohio, 488 U.S. 75, 85 (1985). But the right to appointed counsel for indigent defendants do not apply to discretionary appeals or collateral attacks on a defendant's conviction. Pa. v. Finley, 181 U.S. 551, 555 (1987). Once the right to appeal is granted, the equal protection and due process clause command that an indigent defendant has a right to appointed counsel. Douglas v. California, 372 U.S. 353 (1963). See Griffin v. Illinois, 351 U.S. 12, 18 (1996)(although appeal not constitutionally mandate, once allowed, due process and equal protection clause protects against invidious discrimination); Cox v. Nelson, 397 U.S. 1007 (1970)(states not required to grant appeal, but once right granted, must give equal access and unqualified right to counsel); U.S. v. Gillis, 773 F.2d 549, 559 (4th Cir. 1998)(once the right to appeal is granted, "Equal Protection and Due Process" clauses command that an indigent defendant has the right to appointed counsel and access to the courts).

A. Why Galbraith has a right to appointed counsel on appeal

In comparing an evidentiary hearing to a certificate of appealability, an indigent petitioner seeking a discretionary evidentiary hearing has no constitutional right to appointed counsel, but once the court orders the petitioner to review an evidentiary hearing then there is an absolute right for appointment of counsel to vacate a sentence on the merits. 28 foll. §2254 8(c) and 28 foll. 2255 8(c)(mandates that judge shall appoint counsel for indigent defendant).

Likewise, Galbraith does not have a right to appointed counsel seeking a certificate of appealability, but once the Court of Appeals orders him to receive a certificate of appealability to adjudicate his claims on appeal, then Galbraith should be afforded the same absolute right to appointment of counsel to vacate or remand his sentence where both evidentiary hearing and certificate of appealability yields an adjudication on the merits. 18 U.S.C. §3006A(b) and (c)(right to appointed counsel in criminal appeals).

Compared to capital cases, an indigent §2255 petitioner seeking to vacate or set aside his death sentence on the merits has a statutory right to appointed counsel, even multiple counsels, an expert and investigative service whether pursuing a federal writ of habeas corpus, an evidentiary hearing, or a certificate of appealability. 18 U.S.C. §3599(a)(2). The Supreme Court held that courts should make no destinction between capital and noncapital cases when addressing an indigent defendant's right to appoint counsel in post-conviction proceedings. See Murrary v. Giarrantano, 492 U.S. 1, 10 (1998)(Finely [rule] should apply no differently to capital cases than noncapital cases). Therefore, Galbraith should be afforded the same rights as to an indigent §2255 capital case petitioner.

A certificate of appealability compared to a writ of certiorari, "In a case which a certiorari has been granted...this Court [may] appoint counsel to represent a party financially unable to afford an attorney to the extent authorized by the Criminal Justice Act of 1964, 18 U.S.C. §3006A, or by any other applicable federal statute." Rules of the Supreme Court of the United States, Rule 39.7. In dozen of cases, courts have held "may" to be synonymous with "shall" or "must" usually in an effect to effieciate legislature intent. Black's Law Dictionary, 9th Edition, pp. 1068.

A petition for writ of certiorari is to review a case pending in the United States Court of Appeals and will only be granted a showing that the case is of such public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court. See 28 U.S.C. §2101(e). Likewise, a certificate of appealability is an appeal from the denial of federal habeas corpus relief issued by

a United States circuit judge certifying that a petitioner showed that a constitutional right may have been denied. If the certificate is not issued, no appeal is possible. 28 U.S.C. §2253(c)(2); Fed. R. App. P. 22(b); See Miller-El v. Cockrell, 537 U.S. 322 (2003). In both instances, if a writ of certiorari or a certificate of appealability are granted for appeal, an indigent petitioner that is granted a certificate of appealability, should also be required appointment of counsel under 18 U.S.C. §3006A.

In Martinez, the Supreme Court recognizes that pro-se applicants are unaware of the legal standard and evidentiary requirements necessary to establish his claim. Prisoners are unlearned in the law and may not comply with the state's procedural rules or may misapprehend the substantive details of federal constitution law. Moreover, the Supreme Court observed that prisoners, while confined to prison, are in no position to develop the evidentory bases for a claim which often turns on evidence outside of the record. In light of all these considerations, the Supreme Court concluded that, in order to present a claim in accordence with state and federal procedures, a prisoner likely needs an effective attorney. Without the assistance of effective appointed counsel, the Supreme Court recognized that such a proceeding may not be sufficient to ensure that proper consideration is given to a substantial claim. This, it explained, was of particular concern given that the right at stake, the right to the effective assistance of counsel, is a bedrock principle in our justice system, and without which the very fairness and accuracy of the underlying criminal proceeding cannot be guaranteed. Martinez v. Ryan, 132 S.Ct. 1309, 1317-1319 (2012).

B. Conclusion

In the instant case, Galbraith made a deligent effort to motion the Court of Appeals for appointment of counsel. In granting an appeal to an indigent prisoner and then denying him the right to appointment of counsel is in violation of the Criminal Justice Act of 1964, and the Court of Appeals has entered a decision that has so far departed from accepted and usual course of judicial proceedings as to call for an exercise of the Supreme Court's supervisory power.

II.

WHETHER STATES, SUCH AS IN TEXAS, THAT AN ORDER FOR EVIDENTIARY HEARING BY AFFIDAVIT VIOLATES AN INDIGENT PRISONER'S DUE PROCESS IN NOT ALLOWING HIM TO PARTICIPATE IN THE EVIDENTIARY PROCEEDINGS TO DEVELOP THE FACTS OF HIS CLAIMS, AND IF SUCH A HERING IS ORDERED BY THE COURT, SHOULD THE PRISONER HAVE THE RIGHT TO COUNSEL IN THE MEANING OF 28 FOLL. §2254, RULE 8?

B.

ARGUMENT AND AUTHORITIES

The Texas Code of Criminal Procedures Article 11.07 Section 3(d) states: If the convicting court decides that there are controverted, previously unresolved facts which are material to the legality of the applicant's confinement, it shall enter an order within 20 days of the expiration of the time allowed for the state to reply, designating the issues of fact to be resolved. To resolve those issues the court may order affidavits, depositions, interrogatories, additional forensic testing, and hearings, as well as using personal recollection...The convicting court may appoint an attorney or a magistrate to hold a hearing and make findings of fact.

A. Why Galbraith has a right to an evidentiary hearing to develop his claims

The Texas state habeas court ordered an evidentiary hearing by affidavit where Galbraith was not allowed to participat in the hearing proceedings. An order designated issues (ODI) is prejudicially biased being only one sided where the trial counsel and state prosecutor are afforded to defend their trial actions without ever being questioned by an evidentiary counsel in a live evidentiary hearing. An ODI violates a prisoner's due process where he is not allowed any opportunity to develop his claims on appeal, or cross examine his adversaries trial actions, or unable to question any juror members in a hearing to uncover and prove actual bias for trial counsel's ineffectiveness not challenging bias statements in voir dire. The remedy for allegations of juror bias is a hearing at which the defendant has the opportunity to [prove] actual bias. Smith v. Phillips, 455 U.S. 209, 215 (1982). Not doing so, both the state and federal courts denied Galbraith's guaranteed Sixth and Fourteenth Amendment. Id. at 217.

What makes an ODI even more uncostitutional is the state habeas court, who is also the presiding judge over Galbraith's trial, is not a neutral party having a personal interest defending his colleagues with record statements like, "trial court has known Applicant's trial counsel, Derek Adame, professionally for many years now and finds him to be highly competent and thorough attorney. The court finds that none of Applicant's allegations of failure to investigate or call witnesses credible" and "the court finds credible the affidavits of Applicant's trial counsel, Derek Adame, and further finds the [witnesses] affidavits presented by Applicant not credible." See Federal District Court's Memorandum Opinion and Order p. 37, Point 26 and p. 36, Point 22. As for the state prosecutor, the trial counsel defends her by stating, "the trial counsel has known the prosecutor, Karen Anders, professionally for several years and knows her to be consummate professional who does not resort to such tactics as Applicant alleges." Id. at p 26, Point 15.

An ODI is a no win situation for a prisoner where the state and federal court held Galbraith "[Failed] to show deficient performance and he [failed] to rebut the presumption of correctness to which the state finds are entitled." Id. at p. 59. Even the Court of Appeals weighed in stating Galbraith [failed] to show his trial counsel was ineffective, Galbraith [failed] to show the juror member was biased, and Galbraith [failed] to show the state court was unreasonable. See Court of Appeals Summary Order Opinion.

The only reason Galbraith "failed" was because the habeas court ordered a one sided evidentiary hearing by affidavit that prevented him to participate and develop the facts of his claims. More importantly, Galbraith was not appointed counsel once the habeas court ordered a hearing to adjudicate on the merits, which counsel is mandatory, is an unreasonable application of federal law and a violation of due process. At least at a minimum, an appointed counsel can file reply affidavits on the prisoner's behalf and submit evidentiary affidavits from witnesses, such as the juror to prove actual bias.

Galbraith diligently attempted three times to obtain a live evidentiary hearing

in both the state and federal court to develop his ineffective assistance of counsel claim for not challenging a seating juror's bias statements in voir dire. The Supreme Court held that diligence requires, "at a minimum seek[ing] an evidentiary hearing in state court." Williams v. Taylor, 529 U.S. 420, 437 (2000). The state improperly denied Galbraith's request for a live evidentiary hearing on his claims of juror bias, and Galbraith made a reasonable attempt to investigate and pursue the claim in state and federal courts, but did not receive a [full] and fair hearing on his claim. See Hall v. Quarterman, 534 F.3d 365 (5th Cir. 2008)(District court abuses its discretion in not holding an evidentiary hearing only if the state court failed to provide a full and fair hearing).

An ODI is not a full and fair hearing and the Texas state statute is biased and unconstitutional where it effects all Texas prisoners. It is always one sided in the state's favor not allowing the prisoner to develop or challenge the facts in his claims for appeal.

B. Conclusion

Because how the Texas statute is designed in violating a prisoner's due process right to a full and fair evidentiary hearing, the Supreme Court needs to intervene and exercise its superviory power.

The petition for writ of certirari should be granted.

Respectfully submitted,

John Paul Galbraith, pro-se

July 26, 2018