

No. _____

IN THE
SUPREME COURT OF
THE UNITED STATES OF AMERICA

TRACY LANE BEATTY,
Petitioner

v.

LORIE DAVIS, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
INSTITUTIONAL DIVISION,
Respondent

**PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF APPEALS FOR THE FIFTH CIRCUIT**

MOTION TO PROCEED *IN FORMA PAUPERIS*

TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

COMES NOW, Tracy Lane Beatty, Petitioner, files this his Motion to Proceed *In Forma Pauperis*, pursuant to Supreme Court Rule 39, and would show the Court as follows:

1. The United States District Court for the Eastern District of Texas previously appointed the undersigned counsel under the Criminal Justice Act of 1964. Also, that court has granted Petitioner leave to proceed *in forma pauperis*. A copy of that order is attached. Since that time, Petitioner has been continuously incarcerated on death row and his financial condition has not improved.

WHEREFORE, PREMISES CONSIDERED, Tracy Lane Beatty, Petitioner, prays that the Court grant this Motion and allow him to proceed with the filing of his Petition for Writ of Certiorari and all other proceedings before this Honorable Court, *in forma pauperis*.

Respectfully submitted,

/s/ Thomas Scott Smith

By: _____

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

TRACY LANE BEATTY,
Petitioner,

v.

DIRECTOR, TDCJ-CID,
Respondent.

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CIVIL ACTION NO. 4:09-cv-225

O R D E R

Comes now for consideration, Petitioner Tracy Lane Beatty's Rule 59(e) motion for reconsideration (docket entry #31), motion to appoint counsel for appeal (docket entry #33) and motion for leave to appeal *in forma pauperis* (docket entry #34). Counsel is asking the court to reconsider an order denying his motion to withdraw as counsel and to appoint substitute counsel. The order in question was implicitly included in the Memorandum Opinion and Order of Dismissal in a provision that specified that all motions not previously ruled were denied. The motion for reconsideration is the product of the Supreme Court's recent decision in *Trevino v. Thaler*, 133 S.Ct. 1911 (2013). *Trevino* concerns the application of the cause and prejudice exception to a procedural default, as established in *Coleman v. Thompson*, 501U.S. 722, 750 (1991). In *Trevino*, the Supreme Court held that "a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance of counsel at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective." 133 S.Ct. at 1921. The rule applies to Texas. *Id.* Counsel in the present case was also Beatty's attorney during the state habeas corpus proceedings. He argues that "if there would be any claims of ineffective assistance of counsel of state habeas, these claims should be addressed by successor counsel."

The Fifth Circuit recently applied *Trevino* as follows:

To succeed in establishing cause to excuse the procedural default of his ineffective assistance of trial counsel claims, [petitioner] must show that (1) his underlying claims of ineffective assistance of counsel are "substantial," meaning that he must demonstrate that the claims have some merit, and (2) his initial state habeas counsel was ineffective in failing to present those claims in his first state habeas application.

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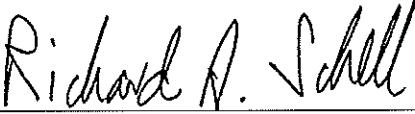
Preyor v. Stephens, ___ Fed. Appx. ___, 2013 WL 3830160 at *8 (5th Cir. July 25, 2013) (internal citations and punctuation marks omitted). In the present case, *Trevino* is potentially relevant only with respect to Beatty's second ground for relief. Beatty argued in his petition that his trial attorney was ineffective for failing to show that the killing was murder rather than capital murder. Counsel, however, failed to raise the ground for relief in the state habeas corpus proceedings. The Director thus argued that the ground for relief was procedurally defaulted as unexhausted. In reviewing the ground for relief, the court found that it was procedurally defaulted and that it lacked merit. Since the underlying ineffective assistance of trial counsel claim lacks merit and is not substantial, Beatty cannot satisfy the cause and prejudice exception recognized in *Trevino*. Relief based on *Trevino* is unavailable. Consequently, there was no reason to substitute a new attorney for counsel at the district court level. On the other hand, for purposes of an appeal, it would be prudent for a different attorney to present the claim to the United States Court of Appeals for the Fifth Circuit. It is accordingly

ORDERED that Beatty's Rule 59(e) motion for reconsideration (docket entry #31) is **DENIED**. It is further

ORDERED that Beatty's motion to appoint counsel for appeal (docket entry #33) is **GRANTED** and Mr. Thomas Scott Smith, 120 South Crockett, P. O. Box 354, Sherman, TX 75091-0354 is appointed to represent Beatty on appeal. It is finally

ORDERED that Beatty's motion for leave to appeal *in forma pauperis* (docket entry #34) is **GRANTED**. Fed. R. App. P. 24(a)(3).

SIGNED this the 30th day of August, 2013.



RICHARD A. SCHELL
UNITED STATES DISTRICT JUDGE