

18-9173 ORIGINAL  
NO. \_\_\_\_\_

Supreme Court of the  
United States  
APR 17 1968

OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

PAUL H. POSEY, SR. -- PETITIONER

VS.

THE STATE OF TEXAS -- RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO  
THE COURT OF CRIMINAL APPEALS OF TEXAS

PETITION FOR WRIT OF CERTIORARI

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Petitioner, Pro 'se

## QUESTIONS PRESENTED

- Should the Sixth Amendment's constitutional guarantee to counsel on appeal, extend to habeas corpus when habeas corpus is the first opportunity to review an ineffective assistance of trial counsel claim?
- Should the equal protection clause of the Fourteenth Amendment apply to all litigants in a habeas corpus proceeding so as to effectuate a meaningful review of the Sixth Amendment guarantee?
- Does the habeas corpus review scheme rise to the level of a substantive Due Process violation if undertaken without the aid of an attorney?
- Whether the Court of Criminal Appeals has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by it's review scheme as to call for the exercise of the Supreme Courts power of supervision?

LIST OF PARTIES

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

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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

The opinion of the highest State court to review the merits appears at Appendix A to the petition and is unpublished.

JURISDICTION

The date on which the highest State court decided my case was February 2, 2019. A copy of that decision appears at Appendix C.

A timely petition for rehearing was thereafter denied on the following date: February 28, 2019, and a copy of the order denying rehearing appears at Appendix A.

There has been no request to extend time to file a petition for writ of certiorari nor is any requested.

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

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

### ARTICLE XIV

Section 1. 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 to any person within its jurisdiction the equal protection of the law.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State,

to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given and or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave, but all such debts, obligations and claims shall be held illegal and void.

## ARTICLE VI

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 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 defense.

## SUMMARY OF THE CASE

Petitioner Paul H Posey, Sr. was indicted in State Court on the allegation of aggravated assault with a deadly weapon in connection with an altercation with a neighbor in Ector County, Texas. Posey was appointed representation for the matter which proceeded to trial before a jury.

Defense called no witnesses and moved for a directed verdict and then a jury instruction on self defense. The trial court denied both requests and Posey was convicted and sentenced to a 35 year term of confinement.

Appellate counsel was then appointed who argued Posey was entitled to a self defense instruction. The Court of Appeals for the 11th Judicial District of Texas upheld the trial courts judgment.

Posey, indigent, then filed a State writ of habeas corpus Pro'se raising grounds he received ineffective assistance of trial and appellate counsel. The Court of Criminal Appeals determined a colorful claim existed and remanded to the trial court for development of the record.

During the habeas court proceedings, Posey was not appointed counsel to assist in developing the evidentiary basis to support the claim. When Posey learned the findings of the habeas court denied relief, Posey then attempted to bring to the habeas court and Court of Criminal Appeals attention, he needed assistance to resolve the writ. When this was denied, Posey sought to dismiss the habeas application or seek an alternative manner to resolve same. App. E. This crossed in the mail with the Court of Criminal Appeals denial of the writ. App C.

Posey then sought rehearing urging remand and appointment of an attorney so as to create the evidentiary basis in support of the writ. App B. The rehearing/reconsideration was denied/dismissed. App A.

Posey now files this Petition for Writ of Certiorari.

## REASONS FOR GRANTING THE PETITION

### A. Conflict with Constitutional guarantee

An effectual review of the VI Amendment guarantee of the assistance of counsel in Texas and some States is inadequate for an indigent habeas corpus Petitioner. See i.e., *Ex Parte McGuin*, 492 S.W.3d 733 (Tex Crim App 2016); *Ex Parte Pointer*, 492 S.W.3d 318 (Tex Crim App 2016); *Ex Parte Garcia*, 486 S.W.3d 565 (Tex Crim App 2016). This Court has already determined "without the effective assistance of counsel in an initial review collateral proceeding, a prisoner's ability to litigate his ineffective assistance of trial counsel claim [will] be significantly diminished." *Martinez v Ryan*, 132 S. Ct. 1309, 1318 (2012); *Trevino v Thaler*, 133 S. Ct. 1911 (2013); see also *Robison v State*, 16 S.W.3d 808, 810 (Tex Crim App 2000).

### B. Importance of the questions presented

This case presents a substantive due process issue wherein the State of Texas and other States have crafted a procedural review scheme of the VI Amendment guarantee which shocks the conscious or interferes with rights implicit in the concept of ordered liberty. *Rochin v California*, 72 S. Ct. 205, 209-210 (1954).

The questions presented are of great public importance because it affects the dignity and integrity of the judicial system in all of the States. In view of the large amount of prison litigation in the habeas corpus context, guidance on the questions is of significant importance to those wrongfully confined because it affects their ability to receive a "fair and effectual" review of the effective assistance of counsel in the habeas court which may result in months or years of either additional or shortened confinement.

The issues importance is enhanced by the fact the Courts below are not being vigilant and independent in reviewing petitions for the writ of habeas corpus in defiance of the observation made in *Harrington v Ritcher*, 131 S. Ct. 770 (2010). This Court noted the Judges must be vigilant in reviewing habeas corpus petitions which entails substantial judicial resources which are largely being misspent. This has the effect of undermining the respect for the judiciary, public confidence in the courts, and time spent in the higher courts for those advancing the habeas corpus due to the inadequacies of review in the State court clogging the Federal Court system.

The common sense understanding is that if the collateral proceeding is the States initial review of ineffective assistance of counsel claims against trial counsel, then to meet the herculean standard of review detailed in *Strickland v Washington*, 104 S. Ct. 2052 (1985), requires an attorney.

In the concept of fairness in a judicial proceeding, when the State has moved the review of the adequacy of counsel to a collateral proceeding, then this in effect is the prisoner's one and only appeal as to an ineffective claim and that an indigent prisoner, untrained in the science of law, and completely unable to develop an adequate record for meeting the review standard set forth, then the State should appoint counsel. See i.e., *Martinez*, 132 S.Ct. 1309. wherein Arizona law forbids raising ineffective claims on direct appeal and instead to a collateral proceeding with the State providing appointment for an indigent.

The questions presented are significant due to the dismal record of effective representation noted by the courts below and legal publications. One Federal Appeals Justice noted, "...more than half the [legal] profession is below average." *Ludwig v US*, 162 F3d 456, 459 (CA 6th Cir 1998). In a review of Louisiana

proceedings, it was discovered that of the 155 death penalty cases which were investigated, 127 were resolved with a reversal of the sentence which reflected an 82 % showing of ineffective assistance. The article further exposed this average in 10 % higher than the national average. Criminal Legal News, October 2018, "Louisiana Death Sentences Reversed," pg 48.

These cases can only be overturned with legal assistance. A showing of what occurs without same is the Texas average. In fiscal year 2015, there were 4,698 habeas applications which resulted in 388 remands to the habeas court for record development and 184 obtaining relief. Annual Statistical Report for the Texas Judiciary Fiscal Year 2015, Court of Criminal Appeals Activity Report Detail 4. To believe Texas attorney's are far more competent and effectual then their national counterparts is error. As noted by a Texas Appellate Judge, "...[we have] an appointment system that seems to attract lawyers with marginal competence and a standard of review that insulates these lawyers mistakes from review." Gomez v State, 9 S.W.3d 189, 194-195 (Tex App - San Antonio, 1999).

The importance of the questions presented are far and wide in the public sector at the National and State levels. The cost of confining a Texas prisoner is \$50.79 per day. Sunset Commission 2013 Fiscal Report. The average duration to exhaust all appellate remedies through United States Supreme Court certiorari is approximately 3 years equating to a yearly cost of \$ 18,538.35 or \$ 55,615.05 to exhaustion of remedies before collateral proceedings. These costs are funded by Federal and State taxpayers.

Using only 50 percent as the incompetent ratio and that same number of wrongly confined and recognizing that Texas has confined at any given moment between 165,000 to 200,000 prisoners (numbers include all prisoners counted in

TDCJ and same transfer facilities and county jails) brings the cost of confinement yearly to those convicted in violation of the United States Constitution to \$ 1,853,835,000.00 and reaching \$ 5,561,505,000.00 at resolution of the appellate process. These numbers are incomprehensible and unacceptable simply due to an inadequate review scheme and marginal effectiveness of the legal profession.

The Mississippi Supreme Court has recognized that "the effective assistance of counsel is a fundamental right requiring a meaningful and realistic opportunity to assert that right and because it is unreasonable for the trial lawyer to raise the issue of his own ineffectiveness at trial, the defendant must be provided a means to raise this issue post trial." *Read v State*, 430 So2d 832, 837 (Miss 1983). While habeas corpus is a vehicle used to raise a claim, a fair and meaningful manner for an indigent is for the most part, a meaningless paper transaction maintaining the conviction.

The questions presented are critical to a "fair, meaningful, and impartial" review of an indigent's conviction which through the promulgation of rules of review and opinions, have had the effect of denying an indigent "fairness" in his quest to obtain relief from an unconstitutional judgment and his "one and only bite" at the habeas apple. There can be no reason why the government would intrude on constitutional protections but rather, defend the United States Constitution's Bill of Rights.

Without this Court giving guidance on the questions presented, as the Court below has noted, "the bedrock principle that a defendant is entitled to an effective trial attorney will remain a theoretical concept in Texas rather than a constitutional guarantee." *Ex Parte Garcia*, 486 S.W.3d 583.

CONCLUSION

For the foregoing reasons, certiorari should be granted in this case.

Respectfully submitted,

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Date

2/16/19