

No. 19-6213

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IN THE  
SUPREME COURT OF THE UNITED STATES

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MARCUS BARTHOLOMEW BOOKER,  
Petitioner,  
v.

THE STATE OF TEXAS,  
Respondent.

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On Petition for Writ of Certiorari to the  
Texas Court of Criminal Appeals

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RESPONDENT'S BRIEF IN OPPOSITION

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## **QUESTION PRESENTED**

Petitioner claims the Texas Court of Criminal Appeals denied his request for a free record of his trial. Based on this denial, Petitioner now asks this Court to determine whether an indigent criminal defendant has a constitutional right to a free record so that he may pursue claims of ineffective assistance of counsel in state post-conviction habeas proceedings.

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## **BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI**

The Court should deny this petition for writ of certiorari because it fails to meet any of the requirements for the Court's review.

Petitioner, Marcus Bartholomew Booker (hereinafter, "Booker"), fails to advance a compelling reason for the Court to review his claim. Texas defendants are not barred from raising an ineffective-assistance-of-trial-counsel claim on direct appeal, and Texas law provides an indigent criminal defendant with a path to obtain a free record for use in pursuing state post-conviction habeas relief. In this case, Booker failed to follow the proper procedure for obtaining a free record. Moreover, Booker may still avail himself of the Texas procedure for obtaining a free record and therefore, he has an adequate alternative to certiorari review.

For these reasons, this Court should deny the instant petition for writ of certiorari.

### **STATEMENT OF THE CASE**

In June 2017, a Dallas County jury convicted Booker of aggravated robbery and assessed his punishment at seventy-five years' confinement. *See Booker v. State*, No. 05-17-01207-CR, 2018 WL 6187603 (Tex. App.—Dallas Nov. 27, 2018, pet. ref'd) (mem. op., not designated for

publication). From that conviction, Booker filed a direct appeal to the Dallas Court of Appeals. *Id.*

In his direct appeal, Booker raised three points of error through court-appointed appellate counsel: (1) the evidence is insufficient to support his conviction; (2) the trial court erred in denying Booker's request for a jury instruction on the lesser-included offense of robbery; and (3) the trial court erred in overruling Booker's objection to the admission of physical evidence. *Id.* at \*1–4. Having found all of Booker's claims to be without merit, the Dallas Court of Appeals affirmed Booker's conviction and sentence in an unpublished opinion on November 27, 2018. *Id.*

On December 21, 2018, Booker filed a motion for extension of time to file a petition for discretionary review to the Court of Criminal Appeals, which was granted on December 28, 2018. *See* Texas Judicial Branch, <http://www.search.txcourts.gov/Case.aspx?cn=PD-1400-18&coa=coscca> (last visited Jan. 27, 2020). The Court of Criminal Appeals also received a copy of the appellate record from the Dallas Court of Appeals on December 28, 2018. *Id.*

On February 1, 2019, Booker filed a *pro se* petition for discretionary

review to the Texas Court of Criminal Appeals. *Id.* The petition was refused on March 20, 2019. *Id.* Pursuant to Rule 69.4(a) of the Texas Rules of Appellate Procedure, the appellate record was returned to the Dallas Court of Appeals on April 17, 2019. *Id.* On April 24, 2019, the mandate was issued by the Dallas Court of Appeals. *See* Texas Judicial Branch, <http://www.search.txcourts.gov/Case.aspx?cn=05-17-01207-CR&coa=coa05> (last visited Jan. 27, 2020).

On April 30, 2019, Booker filed a motion in the Dallas County District Clerk's Office asking the Court of Criminal Appeals to order the court clerk and court reporter to provide him with a free copy of the clerk's record and court reporter's record. (App. to Pet. Cert. B). Subsequently, on July 23, 2019, Booker filed the same motion in the Court of Criminal Appeals. *See* Texas Judicial Branch, <http://www.search.txcourts.gov/Case.aspx?cn=PD-1400-18&coa=coscca> (last visited Jan. 27, 2020). The Court of Criminal Appeals denied Booker's motion, without written order, on that same day. *Id.*

On October 2, 2019, Booker petitioned this Court for certiorari review of the Court of Criminal Appeals' denial of his motion for a free



copy of the appellate record.<sup>1</sup>

The State files this brief opposing Booker's petition.

### ARGUMENT

Rule 10 of the Rules of the Supreme Court provides that review on writ of certiorari is not a matter of right, but of judicial discretion, and will only be granted for "compelling reasons." *See* SUP. CT. R. 10. Booker fails to advance a compelling reason for this Court to review his claim, and none exists. The question of whether an indigent criminal defendant has a constitutional right to a free record for purposes of pursuing claims in state post-conviction habeas proceedings is arguably an important one. But Booker did not present his request for the record to the appropriate court and did not obtain a ruling from the appropriate court. The question, therefore, is not ripe for review.

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<sup>1</sup> In his petition, Booker states that the instant petition for writ of certiorari stems from a habeas proceeding in the Court of Criminal Appeals. Booker, however, has not filed a habeas application in state court. Post-conviction writs of habeas corpus are governed by Article 11 of the Texas Code of Criminal Procedure, and are to be filed using the form application provided by the Court of Criminal Appeals in the trial court in which the conviction was obtained, and made returnable to the Court of Criminal Appeals. *See* Tex. Code Crim. Proc. Ann. art. 11.07, § 3; Tex. R. App. P. 73.1(a). Booker has not filed such an application, and his motion for access to a free record did not initiate a habeas proceeding. *See generally* Tex. Code Crim. Proc. Ann. art. 11.07; Tex. R. App. P. 73.

Moreover, Texas law provides an avenue for an indigent criminal defendant to obtain a free record of his trial by requesting the record from the convicting court. Booker did not follow this procedure, but this procedure is still available to him. Booker, therefore, has an adequate alternative to certiorari review.

Finally, Booker is mistaken in his claim that the State has limited ineffective-assistance-of-counsel claims to state post-conviction habeas proceedings. Although habeas corpus is often the better vehicle for pursuing claims of ineffective assistance, no state law prohibits defendants from raising claims of ineffective assistance on direct appeal.

**I. Because Booker did not follow Texas procedure for obtaining a free record, the question presented is not ripe for review.**

Federal statutory law provides indigent prisoners with access to a free record under certain circumstances. *See Eubanks v. Mullin*, 909 S.W.2d 574, 576–77 (Tex. App.—Fort Worth 1995, no pet.) (referring to 28 U.S.C.S. § 753(f), which provides indigent criminal defendants with a free record if the trial judge or a circuit judge certifies that the suit or appeal is not frivolous and that the transcript is needed to decide the issue presented by the suit or appeal). Texas does not have an equivalent statute. *Id.* This, however, does not mean that indigent criminal

defendants in Texas are without a mechanism for obtaining a free clerk's record and court reporter's record in order to pursue state post-conviction habeas relief.

In Texas, an indigent criminal defendant does not have the right to a free trial record to assist him in preparing a collateral attack of his conviction, absent some compelling reason. *See In re Bonilla*, 424 S.W.3d 528, 532 (Tex. Crim. App. 2014); *In re Alvarez*, 582 S.W.3d 553, 555 (Tex. App.—Waco 2019, pet. denied) (orig. proceeding); *In re Trevino*, 79 S.W.3d 794, 796 (Tex. App.—Corpus Christi 2002, no pet.) (orig. proceeding). Indigent criminal defendants are not entitled, either as a matter of equal protection or of due process, to obtain a free clerk's record or reporter's record for use in pursuing post-conviction habeas relief. *See Alvarez*, 582 S.W.3d at 555; *Trevino*, 79 S.W.3d at 796; *In re Coronado*, 980 S.W.2d 691, 693 (Tex. App.—San Antonio 1998, no pet.) (orig. proceeding); *Eubanks*, 909 S.W.2d at 576–77; *Escobar v. State*, 880 S.W.2d 782, 783 (Tex. App.—Houston [1st Dist.] 1993, no pet.).

Nevertheless, the trial court has the discretion to grant a request for a free record for use in preparing a post-conviction habeas application. *See Bonilla*, 424 S.W.3d at 532; *Alvarez*, 582 S.W.3d at 555. The trial

court may grant access to a free record if the indigent defendant makes a showing in the trial court that the habeas action is not frivolous and that there is a specific need for the trial records that are sought. *See Alvarez*, 582 S.W.3d at 555; *Coronado*, 980 S.W.2d at 693; *Eubanks*, 909 S.W.2d at 576–77. Indigent criminal defendants are not entitled to a free record merely to search for errors on which to base a post-conviction collateral attack. *Eubanks*, 909 S.W.2d at 576–77.

Here, Booker’s motion for a free record was directed to the Court of Criminal Appeals, not the trial court. Although the motion to the Court of Criminal Appeals was also filed in the trial court, there is no record of a ruling from the trial court and no indication that the motion was even considered by the trial court. The State acknowledges that the question of whether an indigent criminal defendant has a constitutional right to a free record for purposes of pursuing claims in a state post-conviction habeas proceeding is an important one. But because Booker did not present his request to the proper court, the question presented to this Court is not yet ripe for review. *See generally Thomas v. Union Carbide Agr. Products Co.*, 473 U.S. 568, 580 (1985) (explaining that the rationale behind the ripeness doctrine is to prevent the courts, through premature

adjudication, from entangling themselves in abstract disagreements); *Wheeler v. Barrera*, 417 U.S. 402, 426–27 (1974) (explaining that a federal court “does not sit to render a decision on hypothetical facts”).

**II. Booker has an adequate alternative for obtaining a free record.**

Further, there is no need for this Court to grant Booker’s petition because he still has the ability to use the Texas mechanism for obtaining a free record. As explained above, the trial court, in this case the 291st Judicial District Court of Dallas County, not the Court of Criminal Appeals, is the proper venue for Booker’s request. There is nothing to prevent Booker from filing a motion requesting a free record in the trial court.

**III. Texas law does not prohibit a criminal defendant from raising an ineffective-assistance-of-counsel claim on direct appeal.**

Finally, Booker asks this Court to grant certiorari review because Texas law prohibits criminal defendants from raising ineffective assistance of counsel claims on direct appeal; instead, consigning such claims to state post-conviction habeas proceedings. Booker argues that because Texas has relegated ineffective-assistance-of-counsel claims to state habeas proceedings, he should be entitled to a free clerk’s record and court reporter’s record.

Contrary to Booker's assertions, no Texas law prohibits a criminal defendant from raising an ineffective-assistance-of-counsel claim on direct appeal. A post-conviction writ of habeas corpus is often the better vehicle for litigating claims of ineffective assistance. *See Mitchell v. State*, 68 S.W.3d 640, 642 (Tex. Crim. App. 2002); *see, e.g., Scheanette v. State*, 144 S.W.3d 503, 510 (Tex. Crim. App. 2004); *Rylander v. State*, 101 S.W.3d 107, 110–11 (Tex. Crim. App. 2003); *Bone v. State*, 77 S.W.3d 828, 835 (Tex. Crim. App. 2002). But no authority prohibits claims of ineffective assistance on direct appeal, and such claims are often raised on direct appeal. *See, e.g., Menefield v. State*, 363 S.W.3d 591 (Tex. Crim. App. 2012); *Andrews v. State*, 159 S.W.3d 98 (Tex. Crim. App. 2005); *Thompson v. State*, 9 S.W.3d 808 (Tex. Crim. App. 1999); *Rivera v. State*, 123 S.W.3d 21 (Tex. App.—Houston [1st Dist.] 2003, pet. ref'd).

For the foregoing reasons, no compelling reason exists for the granting of certiorari review in this case.

## CONCLUSION

Because Booker has failed to show a compelling reason for certiorari review, the State of Texas respectfully asks this Court to deny Marcus Bartholomew Booker's petition for writ of certiorari.

Respectfully submitted,



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