No. 19-936

In The

Supreme Court of the United States

TERRY TRENTACOSTA,

Petitioner,

v.

LORIE DAVIS, DIRECTOR, TDCJ-CID,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

TERRY TRENTACOSTA
TDCJ No. 1535183
Allred Unit
2101 F.M. 369
Iowa Park, Texas 76367

QUESTIONS PRESENTED

Should a state prisoner take a separate, direct appeal of the denial of an evidentiary hearing in a federal habeas case when no "certificate of appealability" is needed for such appeal?

Did the United States District Court and/or United States Court of Appeals below err by failing to grant Petitioner a "certificate of appealability" for his habeas corpus appeal, under 28 U.S.C. §2253(c) and the "modest showing" required by *Slack v. McDaniel*, 529 U.S. 473 (2000)?

Did the United States District Court and/or United States Court of Appeals below err by failing to grant Petitioner's request for an evidentiary hearing?

PARTIES TO THE PROCEEDING

Terry Trentacosta, #1535183
Allred Unit, TDCJ-CID
2101 F.M. 369
Iowa Park, Texas 76367
(Petitioner)

Lorie Davis, Director
Texas Department of Criminal Justice,
Correctional Institutions Division
Post Office Box 99
Huntsville, Texas 77340
(Respondent)

Cara Hannah
Assistant Attorney General
Post Office Box 12548
Austin, Texas 78711-2548
(Counsel for Respondent)

RELATED CASES

Trentacosta v. Davis, No. 5:18-cv-00892-FB, U.S. District Court for the Western District of Texas, San Antonio Division, Judgment entered January 17, 2019

Trentacosta v. Davis, No. 19-50222, U.S. Court of Appeals for the Fifth Circuit, Order entered October 25, 2019

Ex Parte Terry Trentacosta, No. WR-87,874 02. Court of Criminal Appeals of Texas, Order entered July 18, 2018

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES:

TABLE OF AUTHORITIES – Continued

PETITION FOR A WRIT OF CERTIORARI

Petitioner Terry Trentacosta respectfully submits this petition for a writ of certiorari.

OPINIONS BELOW

On October 25, 2019, the United States Court of Appeals for the Fifth Circuit issued its Order and opinion. Appendix A.

On January 17, 2019, the United States District Court for the Western District of Texas, San Antonio Division, issued its Order of Dismissal and Final Judgment, denying Petitioner habeas corpus relief and denying Petitioner a "Certificate of Appealability." Appendix B.

On February 7, 2019, the United States District Court for the Western District of Texas, San Antonio Division, issued its order denying Petitioner's motion for reconsideration under Rule 59(e), Fed. R. Civ. Proc. Appendix C.

JURISDICTION

The United States Court of Appeals for the Fifth Circuit issued its memorandum order and opinion on October 25, 2019. In accordance with Rule 13.1 of the Rules of the Supreme Court of the United States, this Petition has been timely filed. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). The United

States District Court below had jurisdiction under 28 U.S.C. §2254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides that: "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."

28 U.S.C. §2253, provides in pertinent part:

> (c)
>
> (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from –
>
> (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a state court, or
>
> (B) the final order in a proceeding under section 2255.

> (2) A certificate of appealability may issue under paragraph (1) only if the applicant makes a substantial showing of the denial of a constitutional right.
>
> (3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

28 U.S.C. §2254(e)(2) provides that if an applicant has failed to develop the factual basis of a claim in state court proceedings the federal court shall not hold an evidentiary hearing on a claim.

28 U.S.C. §1291 confers appellate jurisdiction on United States Courts of Appeals.

STATEMENT OF THE CASE

During October 2008, Appellant was convicted in a jury trial of five counts of aggravated sexual assault of a child and two counts of indecency with a child by sexual contact, and was sentenced to forty years' imprisonment on each count of the aggravated sexual assault and twenty years imprisonment for both counts of indecency with a child. The complainant in all the cases was A.W., the teenage daughter of Appellant's live-in girlfriend, Lori Worswick. The case was tried in a state district court in Bexar County, San Antonio, Texas.

Attorney Brent de la Paz, who had been hired as Appellant's defense counsel, failed to show up for the jury trial. He sent word that he had other business that day. Attorney Fernando Cortez, who had been hired strictly for jury selection only, showed up instead and demanded $5,000.00 for him to proceed. Mr. Cortez knew nothing substantive about the case, had conducted no pretrial investigation, and had to be informed of the complainant's correct name. Mr. Cortez proceeded to 'defend' Applicant at the trial with Petitioner advising Mr. Cortez regarding facts of the case as the trial proceeded.

The Judgments of conviction were affirmed on a state direct appeal, on September 9, 2009, in Trentacosta v. State, No. 04-08-00805-CR, 2008 WL 2883024 (Tex. App.—San Antonio, pet. ref'd). The Court of Criminal Appeals refused Appellant 'petition for discretionary review'. No. PD-0010-10. On February 8, 2012 Appellant filed a motion for forensic DNA testing in the trial court pursuant to Chapter 64 of the Texas Code of Criminal Procedure. The motion was denied by the trial court, on March 13, 2013, which denial was affirmed by the San Antonio state court of appeals on February 19, 2014.

Petitioner filed a state 'application' for writ of habeas corpus on September 30, 2017. The 'application' itself was in proper form. However, the Court of Criminal Appeals, who had discretion under state appellate rules, dismissed the 'application' as noncompliant, on January 10, 2018, because Appellant had neglected to include a 'word count' on a separate, accompanying

'memorandum of law'. The Court of Criminal Appeals declined to exercise its discretion to allow a correction to the memorandum of law, to add the word count. Some ten days later Appellant filed a second state application for writ of habeas corpus challenging the convictions and sentences, which was denied by the Court of Criminal Appeals of Texas without written order on July 18, 2018. *Ex Parte Trentacosta*, No. 87,874-02. The state trial, or habeas court, had denied Petitioner an evidentiary hearing.

Petitioner filed his federal 'petition' for a writ of habeas corpus on August 29, 2018. The District Court below dismissed Appellant's 'petition', without reaching the merits of his Constitutional claims, without conducting a requested hearing on Appellant's request for the application of tolling of the time-limitations statute for filing a federal habeas 'petition', or with regard to newly presented evidence obtained by Appellant since the time of the original trial. Appendix B. The federal district court denied a certificate of appealability, sua sponte, and denied all other pending motions, which included Petitioner's request for an evidentiary hearing. Appendix B.

Petitioner filed a motion for reconsideration, or to alter or amend the judgment under Rule 59(e) of the federal rules of civil procedure on January 19, 2019. The motion was denied on February 7, 2019. Appendix C.

Petitioner timely appealed of the denial of the certificate of appealability and denial of an evidentiary

hearing to the United States Court of Appeals for the Fifth Circuit. On October 25, 2019, the Court of Appeals issued its opinion in its cause number 19-50222. Appendix A. The Court of Appeals denied Petitioner's request for a certificate of appealability and affirmed the District Court's denial of an evidentiary hearing. Appendix A. The affidavits that are included in the separate Appendices filed in this Honorable Court were filed in the Fifth Circuit Court of Appeals as an Appendix.

Petitioner's Sixth Amendment claim, his actual innocence claim and affidavits, his request for an evidentiary hearing, were all presented to the state courts by way of a post-conviction application for habeas corpus relief. Relief was denied by the state trial (habeas) court and by the Court of Criminal Appeals of Texas, who also denied the request for evidentiary hearing.

REASONS FOR GRANTING THE PETITION

1. This Honorable Court should decide whether a state prisoner should file a separate, direct appeal of the denial of an evidentiary hearing by a United States District Court, when no certificate of appealability is needed. This is a question that Petitioner believes had not been, but should be, addressed by this Honorable Court.

2. Petitioner presents issues which are of importance to jurisprudence under the AEDPA, 28 U.S.C. §2254, et seq. where credible, newly presented evidence is

presented to a United States District Court impacting the Petitioner's innocence, evidence the Petitioner was not allowed to develop at a state habeas evidentiary hearing, and where a federal district court summarily dismisses the impact of the new evidence, without a hearing, with one line in an opinion stating the evidence does not meet the applicable standard. Appendix B, at p. 6, L15-16.

In reviewing the conviction on the state direct appeal, Petitioner challenged the sufficiency of the evidence. In affirming the conviction, the state court of appeals stated that "the jurors chose to believe the complainant's testimony," and the state court of appeals would not disturb that credibility determination on direct appeal. *See Trentacosta v. State*, No. 04-08-00805-CR (Tex. App.—San Antonio, decided September 9, 2009) (opinion at p. 4).

In denying a "COA" the federal Court of Appeals below, stated that the victim's testimony was 'corroborated' with physical evidence. Appendix A, at p. 2. The Court of Appeals did not state what evidence it was referring to, but pointed to the state direct appeal opinion in a footnote. *Id.*

A reading of the state appeals' opinion reflects that the 'physical evidence' the federal Court of Appeals was referring to was on one of two identical bedspreads taken from Petitioner's home, and evidence found on that bedspread. However, as stated in Petitioner's instant federal habeas petition and argued in his memorandum, two identical bedspreads were

taken from the home of Petitioner, and it was unclear as to which bedspread was taken from which bed in which bedroom. The state had tested only one of the identical bedspreads. Petitioner's trial defense counsel failed to obtain the services of an independent DNA expert to test both bedspreads. Petitioner was not allowed to testify in his own behalf, by the defense attorney, regarding the matter of the bedspreads, one of which came from the bedroom in which Petitioner and his live-in girlfriend slept. The testing that was done by the prosecution did not test for trace evidence on the bedspread it did have tested. In state post-conviction proceedings Petitioner was denied a motion for DNA testing on the two bedspreads. Consequently, the federal court of appeals should not have relied on alleged corroborating evidence when that evidence is being challenged in the underlying federal habeas proceeding.

CERTIFICATE OF APPEALABILITY

3. In order to appeal the denial or dismissal of a state prisoner's federal habeas corpus petition, the prisoner must obtain a certificate of appealability. To obtain the "COA" a petitioner must make "a substantial showing of the denial of a Constitutional right. 28 U.S.C. §2253(c)(2). In determining whether to grant a "COA" the Court of Appeals looks to the District Court's application of AEDPA to Appellant's constitutional claims and asks whether that resolution was debatable among jurists of reason. *Miller-El v. Cockrell*,

537 U.S. 322, 336, 123 S.Ct. 1029, 1039 (2003). However, where a procedural ruling is involved, as in Appellant's case, this Court asks whether jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that those jurists would find it debatable whether the District Court was correct in its procedural ruling. *Slack v. McDaniel*, 429 U.S. 473, 484 (2000). In Petitioner's case a 'procedural ruling' was dispositive, as the federal District Court held that Petitioner's instant federal habeas petition is time-barred, under the AEDPA. Appendix B.

In *Slack*, at 483, the Supreme Court recognized that Congress codified the prior judicial certificate of probable cause ("CPC") standard, announced in *Barefoot v. Estelle*, 463 U.S. 880 (1983), for determining what constitutes the requisite showing. Under the controlling standard, a petitioner must show that reasonable jurists could debate (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further'. 529 U.S. at 484. A petitioner seeking a "COA" must prove something more than the absence of frivolity, or the existence of mere 'good faith' on his part. *Barefoot*, at 893. But it is not required that a petitioner prove, before the issuance of a COA, that some jurists would grant the petition for habeas corpus. Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case received full consideration, that a petitioner will not prevail.

4. As stated by the federal District Court below Petitioner's instant federal habeas petition, his first federal petition, was filed several years beyond the normal time limitations for filing a federal petition under the AEDPA, 28 U.S.C. §2244(d). Appendix B.

It is Appellant's position, however, that an exception to the normal time limitations under 28 U.S.C. §2244(d) should allow consideration of the merits of Appellant's underlying Constitutional claims challenging his state convictions in light of the Supreme Court's ruling in *McQuiggin v. Perkins*, 569 U.S. 383 (2013). In *McQuiggin* the Supreme Court held that a state prisoner whose federal habeas petition may ordinarily be time-barred under 28 U.S.C. §2244(d) may have his Constitutional claims considered by a federal district court if that petition demonstrates that 'new evidence' which shows that is more likely than not that no reasonable juror would have convicted the petitioner. It is an actual innocence showing, which if proved can remedy a continued imprisonment due to a manifestly unjust conviction. In *McQuiggin*, for example, the Petitioner in *McQuiggin* filed his federal petition eleven years after his conviction became final, which the Supreme Court found not to be controlling if new evidence demonstrated actual innocence.

The Supreme Court's decision in *McQuiggin* is not based on a finding of 'extraordinary circumstances' to justify the late filing of a federal habeas petition, as is the case in *Holland v. Florida*, 130 S.Ct. 2549 (2010). The *McQuiggin* decision is based on an equitable exception of actual innocence, manifest injustice due to a

wrongful conviction. Under *McQuiggin* federal courts do not count unjustifiable in filing a federal petition as a barrier to relief, which requires the showing of an exceptional circumstance. Courts may consider such delays as a factor in determining whether actual innocence has been shown. The Supreme Court in *McQuiggin* rejected the state's argument in that case, that a habeas petitioner who asserts actual innocence must prove diligence to cross a federal court's threshold. Indeed, a state prisoner likely has no control over 'when' a missing witness or other fact witness may be willing to provide an affidavit going to newly obtained evidence going to actual innocence. Some people may wait for years before they decided to provide affidavits.

NEWLY PRESENTED EVIDENCE

5. Petitioner supports his claim of actual innocence, under the *McQuiggin* exception to the normal operation of the AEDPA time bar, with newly presented evidence. *See* Appendix D, affidavits of Jo Ann Joslin, David Millspaugh, and Karen DeCarlo, which challenge the credibility of the complaining witness, who had a motive to fabricate. These affidavits were before the Court of Appeals below, in an appendix, and are before this Honorable Court as well. The affidavits were filed in the United States District Court, found at docket entries 10-4 and 15 of the federal district court. Petitioner's due process rights under the Fourteenth Amendment to the United States Constitution are impacted by the newly presented evidence and

Petitioner's actual innocence. The complaining witness in fact discussed with a friend how best to get rid of a step-father, prior to the filing of the charges. Information in the record in the federal District Court below demonstrates that the complaining witness repeatedly contacted Petitioner by phone after the charges had been filed. The affidavit of Dr. Harry Bonnell states that certain testimony elicited from a state witness was unreliable. The federal District Court below dismissed the prima facie showing of newly presented evidence impacting Petitioner's innocence with a cursory, one sentence dismissal of the evidence out-of-hand, and the Court of Appeals stated the newly presented evidence was cursory and unpersuasive. Appendix B. An evidentiary hearing would have been in order to allow Petitioner to develop the evidence, with witnesses before the federal district court to judge credibility. *Cf. Laws v. Lamarque*, 351 F.3d 919 (9th Cir. 2003) (Propriety of evidentiary hearing).

6. Petitioner's instant federal habeas petition reflects that in addition to his claim of actual innocence he presents a ground for relief of the ineffective assistance of counsel prior to and during his state trial. David Millspaugh, who attended the state trial, describes the representation afforded to Petitioner as a sham. Appendix D (affidavit of David Millspaugh). In his federal habeas petition the Petitioner faults his defense counsels in the following respects:

> a. Failure to file a motion to suppress a search and seizure which occurred in Petitioner's home;

b. Failure to call several witnesses for the defense whose testimonies would have impeached the credibility of the complaining witness and regarding a motive the complainant had for bringing the charges against Petitioner;

c. Overriding Petitioner's desire to testify in his own behalf during the guilt or innocence stage of the trial, informing Petitioner there was no need for him to testify;

d. Failure to obtain the services of an independent DNA expert for the defense, to test the two bedspreads mentioned above in this petition. Petitioner notes that the prosecution failed to introduce any lab report of the single bedspread that was tested by the prosecution team;

e. A failure to subpoena cell phone records of the complaining witness, A.W., to demonstrate before the jury that the complainant called Petitioner on several occasions, after the charges were filed;

f. A failure to obtain the services of a medical expert for the defense, whose testimony could have impeached the testimony of a state witness. Appendix D (affidavit of Dr. Harry J. Bonnell).

Petitioner's pleaded grounds for relief are stated at pages 6, 6-A of his federal habeas petition.

Objectively, Petitioner has stated grounds for relief under the United States Constitution in his federal

petition, which is proved true, would entitle him to federal habeas corpus relief.

An accused is entitled under the Sixth Amendment to the United States Constitution to the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668 (1984). Ordinarily, a habeas application must demonstrate that defense counsel's performance, or lack thereof, violated accepted norms of attorney performance, and that the applicant was prejudiced by his defense counsel's negligence. If how an attorney representing an accused fails to subject the prosecution's case to 'meaningful' adversarial testing, prejudice to the defense is presumed. *United States v. Cronic*, 466 U.S. 648 (1984). That is what occurred in Petitioner's case. As stated above in this petition, Mr. Cortez, the attorney who represented Petitioner at the state trial was standing in for Mr. De la Paz, who failed to appear for trial. Mr. Cortez had no substantive knowledge of either the Petitioner's defense or the prosecution's case. The trial proceeding was a sham, from a defense perspective. Appendix D, affidavit of David Millspaugh. The complained acts and omissions of defense counsel De la Paz, were objectively unreasonable as well.

A reasonably effective defense attorney is expected to conduct a reasonable amount of pretrial investigation, under the *Strickland* standard. Defense counsel(s) had conducted none, certainly Mr. Cortez had conducted none. When indigent an accused is entitled to funds in order to retain a defense expert for the defense, under *Ake v. Oklahoma*, 470 U.S. 68 (1985). The failure of defense counsel to call witnesses

for impeachment purposes of prosecution witnesses can result in ineffective assistance of counsel. *United States v. Orr*, 636 F.3d 944 (8th Cir. 2011); *Moore v. Marr*, 254 F.3d 1235 (10th Cir. 2001); *Lopez v. State*, 86 S.W.3d 228, 230 (Tex. Crim. App. 2002); *Alexander v. McCotter*, 775 F.2d 595, 602 (5th Cir. 1985). An accused has a Sixth Amendment right to testify in his own defense, and it is the accused's decision. *Rock v. Arkansas*, 483 U.S. 44 (1982); *United States v. Mullins*, 315 F.3d 449, 452 (5th Cir. 2002). The failure of a defense counsel to file a motion to suppress evidence can result in ineffective assistance. *United States v. Martin*, No. 96-60110 (5th Cir., Decided November 1, 1996).

The grounds raised in Appellant's federal habeas petition demonstrate that he was denied the effective assistance of counsel for his defense, with circumstances further showing that the 'stand-in' trial counsel, Mr. Cortez, failed to subject the prosecution's case to meaningful adversarial testing, under *United States v. Cronic.* No specific prejudice must be shown when a defense counsel fails to subject the prosecution's case to meaningful adversarial testing. *Id.*

Under *Slack v. McDaniel*, *supra*, Petitioner demonstrated to the United States Court of Appeals below that his underlying grounds for relief have merit, are debatable among jurists of reason, and that the District Court's dismissal of his federal petition as time barred is a procedural ruling that is debatable among jurists of reason.

DENIAL OF AN EVIDENTIARY HEARING

7. Petitioner requested an evidentiary hearing during the state post-conviction habeas corpus proceeding and was denied such hearing. During proceedings in the federal District Court below Petitioner filed a memorandum of law contemporaneously with his federal habeas petition. *See* federal civil docket, at entries 1 and 2. In that memorandum Petitioner requested a federal evidentiary hearing, one purpose of which was to give Petitioner an opportunity to substantiate or prove his claim of actual innocence in order that the federal District Court could consider his belated filed federal habeas petition, under *McQuiggin*, *supra*. *See* federal civil docket, at entry 2. In ruling that Petitioner's federal petition is time barred, the District Court stated that all pending motions are denied. Appendix A. The United States Court of Appeals denied Petitioner's request for an evidentiary hearing, construing Petitioner's COA motion as a 'direct appeal' from the denial of an evidentiary hearing. Appendix A, at p. 3, note 7.

28 U.S.C. §1291 confers jurisdiction on Courts of Appeals from final decisions of United States District Courts. Is the ruling of the Court of Appeals below correct? Is the denial of a federal evidentiary hearing not within the scope of the requirement that a state prisoner obtain a certificate of appealability from the denial or dismissal of a federal habeas petition? If no "COA" is required to appeal the denial of an evidentiary hearing then it would seem to require a separate notice of appeal and full briefing on that issue in a

federal court of appeals. By comparison, a federal Court of Appeals reviews the denial of a federal evidentiary hearing in the case of a federal prisoner, proceeding under 28 U.S.C. §2255 under an abuse of discretion standard. *United States v. Gutierrez*, 343 F.3d 415, 421 (5th Cir. 2003); *United States v. Cervantes*, 132 F.3d 1106, 1110 (5th Cir. 1998) (denial of a §2255 petition without holding an evidentiary hearing is an abuse of discretion).

8. For a state prisoner proceeding under 28 U.S.C. §2254 in a United States District Court, a federal evidentiary hearing is not precluded under 28 U.S.C. §2254(e)(2) unless the Petitioner was at fault for a failure to develop the facts underlying his claims. *Williams v. Taylor*, 529 U.S. 420, 432 (2000); *Smith v. Cain*, 708 F.3d 628, 635 (5th Cir. 2013). In *Smith v. Cain* the United States Court of Appeals held that the state courts failed to provide the petitioner the opportunity to develop the factual basis of his claim through its misapplication of the governing federal standard in that case. The Court of Appeals concluded that the decision to conduct a federal evidentiary hearing was committed to the sound discretion of the federal district court, under Rule 8(a) of the Rules Governing Section 2254 Cases.

Under *Harris v. Nelson*, 394 U.S. 286 (1969), where specific allegations show reason to believe that Petitioner may, if facts are fully developed, be entitled to relief, it is the duty of the federal district court to provide necessary facilities and procedures for an adequate inquiry. During the state habeas proceedings

Petitioner requested, but was denied, requests for an evidentiary hearing during the state post-conviction habeas proceedings. Petitioner was denied an evidentiary through no fault of his own, both in the state courts and in the United States District Court below. In the federal District Court Petitioner requested an evidentiary hearing in the memorandum he filed contemporaneously with his federal habeas petition, Docket Entry No. 2, in response to the Respondent's reply to the petition, Docket Entry No. 12, and raises the denial as an issue in his "COA" motion filed in the United States Court of Appeals. An evidentiary hearing enables a state prisoner-petitioner to prove the factual allegations contained in his federal petition, which if true would entitle the petitioner to federal habeas relief, and in Petitioner's case demonstrate the merits of his newly presented evidence claim which impacts his actual innocence. *See, e.g., Laws v. Lamarque*, 351 F.3d 919 (9th Cir. 2003) (evidentiary hearing on issues including equitable tolling in a state prisoner's federal habeas case); *Schriro v. Landrigan*, 550 U.S. 465 (2007).

Thus, the District Court erred in denying Petitioner's request for a federal evidentiary hearing, without even analyzing the issue, Appendix B, and the United States Court of Appeals also dismissed the issue summarily without any discussion or analysis of the issue. Appendix A.

CONCLUSION

Petitioner presents new evidence demonstrating a prima facie case for actual innocence, and which will allow him to proceed with his present federal habeas petition under this court's decision in *McQuiggin v. Perkins*, *supra.*

Petitioner should be granted an evidentiary hearing in the United States District Court below because through no fault of his own he was denied such hearing in the state court habeas proceedings; and Petitioner alleges facts, which if true, will entitle him to habeas relief. The hearing will also permit Petitioner to develop his claim of actual innocence and entitlement to proceed under the actual innocence to the AEDPA time bar under *McQuiggin v. Perkins*, *supra.*

Petitioner was denied the effective assistance of counsel for his defense at his original state trial, in violation of his Sixth Amendment Right.

This Honorable Court should decide whether a separate appeal is required to a United States District Court when the prisoner-petitioner is denied an evidentiary hearing.

Petitioner prays the writ of certiorari be granted.

Respectfully submitted,

TERRY TRENTACOSTA, #1535183
Allred Unit, TDCJ-CID
2101 F.M. 369
Iowa Park, Texas 76367