IN THE UNITED STATES SUPREME COURT

RICHARD BRUCE DEBENEDETTO,	§	
Petitioner,	§	
	§	
vs.	§	
	§	
BOBBY LUMPKIN, Director,	§	No. _____
Texas Department of Criminal Justice,	§	
Correctional Institutions Division,	§	
Respondent,	§	
	§	
	§	

APPLICATION FOR CERTIFICATE OF APPEALABILITY
AND BRIEF IN SUPPORT

RICHARD BRUCE DEBENEDETTO, petitioner (defendant, prisoner, or applicant), files this Application for a Certificate of Appealability (COA) and Brief in Support to a Circuit Justice (Fifth Circuit) or the Court pursuant to 28 U.S.C. § 2253(c)(1). The Respondent party to the judgement appealed from is: BOBBY LUMPKIN, Director (Respondent), Texas Department of Criminal Justice, Correctional Institutions Division. The Respondent's attorneys are: Charles Arnone and Edward L. Marshall.

The appellant's Notice of Appeal was timely filed pursuant to Rule 4(a) Federal Rules of Appellate Procedure (FRAP) on ____. A Circuit Justice or the entire Court has jurisdiction to hear the applicant's request for a COA. (28 U.S.C. § 2253(c)(1).

The Petitioner (DeBenedetto) is seeking the Court's permission to appeal (to the Fifth Circuit Court) a judgement of the District Court for the Western District of Texas, San Antonio Division, entered in this case on September 17, 2019. **Lead Case: 5:18-CV-0619-XR .** The petitioner has no right to appeal the denial of his habeas claims by the district court unless he first obtains a Certificate of Appealability (COA) from a Circuit Judge or Circuit Justice. (28 U.S.C. § 2253(b)). The district court in its memorandum opinion and order, *sua sponte* denied the petitioner a COA on September 17, 2019. September 1, 2020, in a two page order, the Court of Appeals for the Fifth Circuit denied DeBenedetto's request for permission to appeal.

The Petitioner brings the following issues to the attention of the Court:

Issue 1. (District Judge's Opinion, No. 2 pp 9)

Denial of Counsel at Critical Stages of Criminal Felony Proceedings …(including felony trial)

Issue 2. (District Judge's Opinion, pp 9). The Trial Court and the State Failed to Obtain a Valid Waiver of the Defendant's Sixth Amendment Right to Counsel

1. **Jurisdiction of the Court** - the prisoner raises the question of whether the Court's examination of a prisoner's request of a COA pursuant to at . (28 U.S.C. § 2253(b)). falls within the purview of the Court's non-discretionary jurisdiction. When taken together, the prisoner believes that these combined issues, are a first impression for the Court. (see the petitioner's argument below).

The Petitioner further prays a Circuit Justice or the Court will issue the necessary permission to appeal so that justice may be done.

STATEMENT OF INDIGENCE

The Petitioner has previously filed with the United States District Court an application to proceed *in forma pauperis* (IFP). The application was accepted by the Court. The Petitioner states that he is currently living on a boat without the benefit of potable water (the result of the recent weather-related events). He is currently receiving government assistance in the form of SNAP Food benefits. He will cooperate with the requirements of the Court and file any further applications to proceed IFP as requested by the Court. Supreme Court rule 39.

PRAYER

The Petitioner respectfully prays the Honorable Justice(s) of the Court will issue the Petitioner's request for a Certificate of Appealability and thereby allow the Petitioner's Appeal.

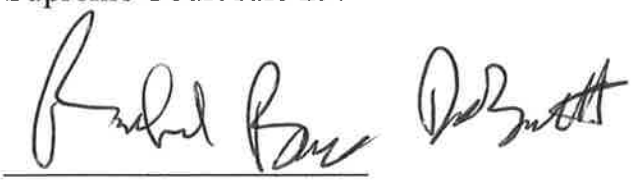
SIGNATURE

Richard Bruce DeBenedetto

Petitioner pros se, P.O. Box 3157, South Padre Island, TX 78597

CERTIFICATE OF SERVICE

The Petitioner certifies that he has served this request for a Certificate of Appealability on the Respondent and Attorney of record on this day March 8, 2021, in accordance Rule 5 and 25 of Texas Rules of Appellate Procedure and Supreme Court rule 29.



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Petitioner

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	§	
	§	

BRIEF IN SUPPORT OF REQUEST
FOR A CERTIFICATE OF APPEALABILITY

This request for a COA and accompanying brief in support, is intended to demonstrate to the Court that: 1) the petitioner's claims – specifically those referenced herein, - represent "a substantial showing of the denial of a constitutional right." (28 U.S.C. § 2253(c)(2)) "[T]hat reasonable jurists could debate whether the petition could have been resolved in a different manner, or that the issues presented 'were adequate to deserve encouragement to proceed further.' " (*Slack v. McDaniel,* 529 U.S.473 at 484 quoting *Barefoot v. Estelle,* 463 U.S.

880, 883 (1983)); and, 3) that this Court (or a Circuit Justice of the Court) is obligated to review this request for a COA using the same standard.

No hearing on the merits was held of any of the applicant's claims.

THE ISSUES ARE INTERWOVEN

As a preliminary matter the claims of denial of counsel and waiver turn on the trial court's observed failure to determine whether the defendant was indigent leading to trial in October, 2014, and, therefore, eligible for the assistance of appointed counsel at felony trial.

Background

There were 2 phases. In phase 1 the petitioner was indicted for prescription fraud (H.S.C. 481.129(c)(1)) in 2011. Phase 1 ended when attorney for the petitioner (Weaver) pointed our certain defects in the state's indictment: resulting in a prolonged delay ~~(cite) length of time ??)~~ Phase II began in early 2014 with reindictment; and, ending several months later in trial 2 (October, 2014). The defendant proceeded to trial pro se. At the start of Phase II, the defendant was neither re-arrested nor re-magistrated pursuant to Texas law. The trial judge removed the petitioner's hired attorney Weaver for non-payment of attorney fees (to Mr. Weaver) and *sua sponte* continued the trial. The defendant testified he was unable to hire counsel. DeBenedetto was without the assistance of hired or appointed counsel from that point forward through all "critical stages," including

final trial in October, 2014. Notwithstanding, the state and the trial court, however, did "borrow" "arrange" or "bargain" with attorney Weaver to represent the defendant intermittently at "critical stages" as required: just not at final trial. Examples of the state and trial court's practice included: arraignment, plea hearing and punishment phase. The defendant was found guilty; Judge Williams (trial judge) sentenced the defendant to 6 years. Shortly thereafter, the same trial court judge appointed an attorney for the indigent prisoner's appeal, again, just not for trial (emphasis added).

Request for COA.

SUBJECT MATTER OF ~~NOTICE OF APPEAL~~

The applicant is requesting the Honorable Court, or a Circuit Justice review the petitioner's request for a Certificate of Appealability (COA) regarding two of the claims brought by the petitioner in his initial application for a writ of habeas corpus pursuant to AEDPA. (28 U.S.C. § 2254).

For purposes of requesting the issuance of a COA DeBenedetto respectfully brings to the Court's attention the following two issues any one of which may represent a "substantial showing of the denial of a constitutional right". (28 U.S.C. § 2253(c)(2)).

1. Issue One. (District Judge's Opinion, No. 2 pp 9)

Denial of Counsel at Counsel at Critical Stages of Criminal Felony Proceedings .. (including trial)

2. **Issue Two.** (District Judge's Opinion, pp 9). The Trial Court and the State Failed to Obtain a Valid Waiver of the Defendant's Sixth/Fourteenth Amendment Right to Counsel
3. **Issue Three** – As a subordinate issue the petitioner brings to the Court's attention whether the Court's appellate jurisdiction authorized by Congress and mandated under 28 U.S.C. § 2253(c) is discretionary.

Standard of Review

The standard of review is in accord with the Anti-Terrorism and Effective Death Penalty Act (AEDPA) (1998), and 28 U.S.C § 2253.

Under federal law, established by the United States Constitution and Supreme Court precedent, an indigent prisoner has a fundamental right to a lawyer *Gideon v. Wainwright*, 372 U.S. 335 (1963). (U.S. Constitution Sixth and Fourteenth Amendment). The accused may proceed to trial without counsel's assistance by waiver of his fundamental right. *Faretta v. California*, 422 U.S. 806 (1975). In order to do so, the waiver must be competent, knowing, voluntary, willing and uncoerced (herein competent). Absent any one of these: the waiver is invalid. That the trial judge followed the precedent as set forth in *Faretta* and warned the prisoner of the dangers of self-representation does not necessarily

guarantee that a waiver is therefore, competent. The "*Faretta*" warning is not a sufficient condition to a competent waiver: but a necessary condition. Absent the warning to the defendant, there can be no guarantee that he understands what he is about to undertake. However, the warning, once performed by the trial court, does not provide a guarantee that he does. The accused must know that in waiving his fundamental right to counsel he is waiving the right to both hired counsel, and appointed counsel. "Clearly established"Federal law as determined by this Court further requires that: 1) "... [T]he judge before whom a defendant appears without counsel to make a thorough inquiry and to take all steps necessary to insure the fullest protection of this constitutional right at every stage of the proceedings." *Von Moltke v. Gilles,* 332 U.S. 708, 722 68 S. Ct. 316, 322, 92 L.Ed.2d 309 (1948). ; and 2) if waived, there must be a record of admonishments to indicate the accused was informed of the dangers and hazards of proceeding on his own. The two procedural issues of waiver and *Faretta* warning are mutually exclusive, and, indeed are not exhaustive of the trial court's protective duty. A trial court judge

may recant the "*Faretta* " warning to the "T" yet fail to recognize incompetency of the defendant's waiver of a fundamental right. "[C]ourts indulge every reasonable presumption against waiver of fundamental rights, …" *Johnson v. Zerbst,* 304 U.S. 458 at 464, (citing *Aetna Insurance Co. v. Kennedy,* 301 U.S. 389, 57 S. Ct. 809-812, 81 L.Ed. 1117. The determination of whether there has been an intelligent waiver or the right to counsel must depend in each case upon the particular facts and circumstances surrounding that case." *Johnson v. Zerbst,* 304 U.S. 458, 464 (1938).

BACKGROUND

On September 17, 2017, The United States Court for the Western District of Texas, San Antonio Division denied the petitioner relief. the Court dismissed Petitioner's petitions stating, " No Certificate of Appealability shall issue in these cases; and all other remaining motions, if any, are denied, and these cases are now closed." In denying the petitioner's claim of indigence the District Court applied the

standard to a hearing on the merits to its denial of the COA. Quote - " For the reasons set forth above, the Court concludes that jurists of reason would not debate the conclusion that Petitioner was not entitled to federal habeas relief. As such a COA will not issue. " The prisoner appealed to the Fifth Circuit for a COA. Circuit Court denied the request on September 1, 2020. Writing for the panel, a justice penned: "DeBenedetto fails to show that reasonable jurists would find the district court's rejection of his claims debatable or wrong Citing *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). On October 9, 2020, the Court of Appeals for the Fifth Circuit denied DeBenedetto's request for reconsideration on the matter of COA. The Court of Appeals ~~reliance~~ relied on an inordinately high bar in its denial of the petitioner's request for a COA The District Court further stated: "for the reasons set forth above,, " "jurists of reason would not debate the conclusion that Petitioner was not entitled to federal habeas relief. As such a COA will not issue." District Court Op pp 31.

ARGUMENT

I would like to open with evidence from the record: from the punishment phase of the second trial in February 26, 2015. This Court's jurisprudence on AEDPA's standards and limitations of review of a request for a COA from a federal court, only requires that the legal issue(s) raised on appeal "be debatable among jurists of reason." *Barefoot v. Estelle,* 463 U.S. at 893 n4. Such a threshold inquiry doesn't "require full consideration of the factual and legal bases adduced ...". *Miller-El v Cockrell*, 123 S. Ct. 1029 (2003). See also *Slack v. McDaniel,* 529 U.S.473 (2000) (citation omitted).

These samples are representative of the petitioner's substantive claim of "debatability of the issues presented. They comprise a small portion of the recorded evidence in support of the petitioner's claim(s). These examples and others seen below, provide a view that occurred over a three-year period: a view of evidence that supports the notion the prisoner may have been indigent, and unwilling to proceed on his own through felony trial without a lawyer's assistance, and did so due to the trial court's and state's threats and formidable failure to

protect the prisoner's fundamental rights. Such a view helps. It helps determine the "debatability" of the petitioner's underlying constitutional clam(s), not the resolution of that debate. *Miller-El v Cockrell* at 1039-1040, 1042. (citation omitted). It helps the Court to decide whether evidence went unrecognized and uncontested by the reviewing courts: and whether jurists of reason might find the district courts assessment debatable or wrong. *Miller-El* at *338.

For three years, on dozens of occasions, comprising nearly 20 hearings , 3 trials, two arraignments and contained in letters to the trial court, the prisoner made known his inability to hire counsel and his unwillingness to represent himself. It was not until the crescendo in the trial court's threats of incarceration for not hiring counsel that the prisoner relented and proceeded pro se. "It is the solemn duty of a … judge before whom a defendant appears without counsel to make a thorough inquiry and to take all steps necessary to insure the fullest protection of this constitutional right at every stage of the proceedings." Von Moltke v. Gillies, 332 U.S. 708, 722, 68 S. Ct. 316, 322, 92 L.Ed. 2d 309 (1948).

"[C]ourts indulge every reasonable presumption against waiver of fundamental rights, … and 'do not presume acquiescence in the loss of fundamental rights.'" Johnson v. Zerbst, 304 U.S. 458, 464 (1938).

The following colloquy is from the petitioners sentencing hearing on February 26, 2015. The Petitioner's remarks to the trial court judge at the sentencing hearing in February, 2015, have gone uncontested and unrebutted by the reviewing courts. Defendant: "I'm not an attorney, never claimed to be an attorney. And I didn't want to represent myself, as I told you in court. But I did." (24RR141:4-6). And from the same punishment phase trial...The trial judge's closing remarks to the defendant suggest his comprehension of the prisoner's indigence: "Okay. Let me tell you...one thing I do believe, I've seen...of all the hearings you've had to ride a bus up to here, ... to your credit ... you've always been present, you've always showed up, either by telephone or by travel up here. Usually by a bus. You couldn't even afford your own ride or whatever. And so you have been reliable in that regard." 24RR163:13-20. Mr. Weaver was

was appointed by a visiting judge and later removed by the trial court. Following Weaver's removal, the prisoner attempted unsuccessfully to hire Weaver. The trial court judge once again released Weaver for failure to pay him (Weaver) what was owed the attorney. Mr. Weaver was subsequently borrowed by the trial court for purposes of arraignment only. The state later enlisted Weaver to assist at the hearings on pleas and punishment: just not at the guilt/innocence phase trial on the merits. Weaver: "He does have a problem with finances...". (23RR 135:18). From evidence from the trial's punishment phase we view the prisoner's testimony: "[D]uring the ongoing trial, it became clearly evident that I needed attorney representation. I had been homeless, living in a tent, riding a bicycle, no job. ....the few months that I was in jail, my Texas medical license expired. And having no money when I got out, I couldn't renew it. It was several hundred dollars." (23RR 82:15-24). The following are the state attorney's arguments from a pre-trial hearing coercing the legally naïve prisoner into the mistaken belief he had two choices: [State]: Judge, I just wanted the record to be clear that he's actually

requesting to represent himself. A couple of times he said, well, I don't want to represent myself but I want to go to trial October 20th. And the only way to do that is if he represents himself or hires an attorney. (From 17RR30:12-17). The district judge's comments on the second arraignment wherein the trial judge removed attorney Weaver and *sua sponte* continued the case: " On February 20, 2014 a hearing was held ... where it was established that petitioner terminated his contract with (attorney) weaver because he did not have the thousand dollars necessary to fulfill the remainder of the contract." (ECF No. 16-24 at 3-15). (pp 10 district court op). "Moreover, this court has independently reviewed the record and finds the evidence clearly indicates Petitioner was not indigent ..." and willingly waived his right to counsel." (district court's op pp 17).

These brief examples of colloquy above - involving mixed issues of fact and law – represent only a portion of the dozens of examples from the recorded evidence, which support the petitioner's claim(s) that he was indigent and unwillingly and perhaps not uncoerced, waived a fundamental right and proceeded

to trial without the assistance of counsel.

In order for DeBenedetto to obtain a COA from a Circuit Judge or Circuit Justice (or the Court) the Court must first look "to the District Court's application of AEDPA to the petitioner's constitutional claims ..." and determine whether the resolution appears "debatable among jurists of reason." *Miller-El v. Cockrell,* at*1039-1040. In *Miller-El v. Cockrell* this Court made clear that the "Barefoot" standard as expressed in the Court's holding in *Slack v. McDaniel* must be something more than "absence of frivolity" before a COA will issue. The Court stopped short of expressing that the standard is an exceedingly difficult one for a petitioner to meet. For example, the Court "[does] not require petitioner to prove, before the issuance of a COA, that some jurists of would grant" or for that matter deny the petition for HC. Yet such an elevated standard is precisely what the district court relied on in its *sua sponte* denial of a COA. See District Court op pp 31. This was too demanding a standard on more than one level. It was incorrect for the district court to deny issuance of a COA for reasons given. (see district court mem Op pp31) (The proper standard "does not require the habeas petitioner

to demonstrate a likelihood that he ultimately will prevail on appeal. " (*Barefoot v. Estelle,* 463 U.S. at 893 n.4.). "In fact, the statute forbids it. " (*Miller-El v. Cockrell* at *336).

In order to see past the Texas Court of Criminal Appeals' thin denial. of DeBenedetto's instant habeas claims, the district court relied on this Court's holding in *Wilson v. Sellers,* 138 S. Ct. 1188, 1191-92 (2018) and "looked through" to Texas' Fourth Court of Appeals unpublished memorandum. (citation) As argument and proof of a competent waiver and indigence, district court relies on the Fourth Court of Appeals' (intermediate court) argument. See district court mem op pp 13.

THE DISTRICT COURT AND INTERMEDIATE COURT'S REASONING

Relying on Texas case law (*Oliver* – see below) the district court writes . "A trial court may not "sit idly by doling out enough legal rope for defendants to participate in impending courtroom suicide; … judges must take an active role …" "The appearance of a … defendant in court without counsel … necessitates … examination by the trial judge to assure that the defendant is actually aware of

his right to retain an attorney and to discover whether he intends to do so." *Oliver v. State* , 872 S.W.2d 713, 715 (Tex. Crim App. 1994). Relying on the intermediate court, the district court writes:" … If after such an inquiry, it appears the defendant has resources sufficient to hire a lawyer, … the judge need not appoint a lawyer for him at government expense." *Id.* The Intermediate court goes on to say: " [F]ailure of the accused to employ a lawyer may be regarded as an abandonment of his right …assuming … he has been given sufficient opportunity to retain one." *Id.* (District Court mem op pp 13).

The question raised by the habeas petitioner's claim is NOT whether the defendant was aware that he had the right to *retain* an attorney. (Emphasis added). That is clear from the record. DeBenedetto tried that tact and failed. DeBenedetto raises a somewhat different issue: whether the waiver of his 14th Amendment right was invalid because the trial court failed its duty to determine and rule – close in to trial, and at "every stage of the proceedings" - including all "critical stages" leading to trial -, whether the defendant "had sufficient resources to hire a lawyer".

(District Court Op pp 13) (*Oliver, supra* at *716). DeBenedetto maintains, and the evidence suggests: he did not. He has already shown – and the district court has confirmed – the petitioner could not even keep his (court-appointed/and then retained) lawyer (Weaver) because he did not have sufficient funds to pay the attorney. (district court op pp 32) (ECF No. 16-23 at 22).

The reviewing courts go on to say: "[i]f after such an inquiry, it appears the defendant has resources sufficient to hire a lawyer, … the judge need not appoint a lawyer for him at government expense." *Id.* The court points to no evidence of such an inquiry and findings of non-indigence. In support of the assertion of DeBenedetto's where-with-all to hire counsel, the court points to a hearing to determine indigence held by the trial court judge in early 2013: a full 18 months before trial. Circumstances can change.

Admittedly, federal courts reviewing a request for a COA are constrained by this Court's standard in *Barefoot v. Estelle* (citation omitted). The "debatability" of DeBenedetto's claim(s) does not require the resolution of that debate. *Barefoot v.*

Estelle, 463 U.S. at 893 n.4. It still inheres that the reviewing courts factual determinations must be accurate. The District court buttresses the intermediate court's factual determinations by stating that deference is owed the intermediate court's review, citing *Collins v. Collins*, 998 F.2d. 269, 276 (5th Cir. 1993). *Collins v. Collins* involved federal habeas corpus appeal of a capital murder conviction on sufficiency of the evidence grounds. The appropriate standard for federal habeas corpus review by an appellate court looking at such a claim is not the same standard for a petitioner requesting a COA. There is no such deference standard in at § 2253. As the petitioner made plain in his brief(s), and again here, the record controverts the intermediate court's claims of property owned by the petitioner. The district court states: "There was evidence the [Petitioner] had two houses … a home he rented, an airplane, and seven motor vehicles." (district court mem Op pp 13-14). At the defendant's second arraignment in February 20, 2014, (a full eight months before trial) judge Williams releases attorney Weaver for non-payment by the petitioner. DeBenedetto states "I don't have a plane, and the only

home I have has been foreclosed on. I have that one house in Lubbock … but there is a lien against the house." Attorney Weaver confirms the defendant's statements to the trial court judge: "I explored that your honor, as part of a possible compensation before, and it was so heavily liened that it wasn't possible …there was any equity in it." (11RR21:19-25 and 11RR22:1). Such testimony casts doubt on the state's claims.

The district court/intermediate court go on to say: "The record shows that after [Petitioner] was re-indicted, the trial court inquired into the [Petitioner's] financial status to exclude indigency …".(district court mem Op pp 15 bottom of page). The following colloquy suggests quite a different set of facts: State: If you don't even have a $1000 to pay Mr. Weaver what you owe him how will you retain a new attorney? Defendant: Immediately, this day, today I can't. (11RR16:24-25 and 11RR17:1-2). DeBenedetto then informs the trial court judge that his medical license is in jeopardy, stating to the court: "and I don't have money for an attorney for that either …". (11RR17:5-16). The "visiting judge" who appointed Mr.

Weaver at a hearing on indigence in early 2012, determined the defendant to be "property poor." Thus, his property was both to encumbered or of such insignificant value that it could not be used to secure the services of an attorney. The district court confirms these findings. ("... [A] visiting judge ...found that, despite the property [Petitioner] was indigent because he was ... 'property poor'". (district court Op at pp 14). The evidence presented by the petitioner above controverts the intermediate court's extravagant claims of property.

If after inquiry it is determined the defendant has sufficient funds, the court should not appoint him one. Well, that reasoning falls flat because as the petitioner is asserting, after removal of atty Weaver in early 2014, - several months before trial - the trial court never made a determination the petitioner had sufficient funds, or that he could hire counsel. During the three years duration of the cases(s), the petitioner repeatedly placed the trial court on notice of his implied indigence. The only example where the petitioner comes close to stating he has sufficient funds is where the trial court judge is threatening to re-incarcerate the prisoner for failing

to call in and "keeping … our case … sitting here lingering." (district court mem Op pp 14).

The defendant :" … I have acquired the funds . (The prisoner then immediately walks back his statement) " I'm almost there I-I would hate to - to be set back by being found guilty of contempt when I'm so close." The trial judge then threatens to jail him.

The district Court's and the intermediate court's argument that this sort of colloquy somehow satisfies the sort of "penetrating and comprehensive examination of all the circumstances under which a waiver of counsel is tendered or satisfies "clearly established federal law" (*Von Motlke* v. *Gilles*) (citation omitted) (*Johnson v.* Zerbst) (citation omitted), is unavailing.

As evidence of non-indigence, the reviewing courts point to the prisoner's brief period of employment in 2013, (nearly two years before trial). The defendant placed the trial court on notice at that May 16, 2013 hearing on indigence that the job that trial court relied upon to remove Mr.Weaver was in jeopardy (see 5RR

30:21-25 and at 24RR 15:17-21 (May 15, 2015 Motions Hearing). As evidence of non-indigence the reviewing courts list a variety of property previously determined by the visiting judge and affirmed by the district court in its opinion at top of pp 14, to be of no value. The prisoner re-stated this at the punishment phase closing remarks above where the trial judge also referred to the prisoner's inability to get around "couldn't even afford a ride whatever ... "Given this extensive record of placing the trial court on notice of his indigence and an unwillingness to proceed pro se, throughout the three-year course of proceedings, it is reasonable to presume "Reasonable jurists could debate whether the petition should have been resolved in a different manner or that issues presented were 'adequate to deserve encouragement to proceed further." *Miller-El* v. *Cockrell,* 537 U.S. at 336 (citation omitted). As further argument that the COA request should not issue the district court at pp 14 of the district court's opinion writes (citing the intermediate court's memorandum): " at no time during that hearing did [petitioner] assert that he was indigent or that he could not otherwise afford an attorney." District court

mem op pp 14. End of first paragraph. The intermediate court goes on to state"[Petitioner's] decision not to hire an attorney was not due to an inability to afford an attorney, but rather his unwillingness to hire one." *Oliver v. State*, 872 S.W.2d 713, 715 (Tex. Crim. App. 1994). *Oliver*, while a state case, is instructive, but not for the reasons the reviewing courts rely on in their denial of the petitioner's claim of invalid waiver, and subsequent denial of a COA by the district court. In *Oliver*, the "Appellant was convicted of unlawfully possessing methamphetamine." *Id* at * 713. The appellant complained that he was denied his right to the assistance of counsel at a pre-indictment hearing in violation of the Constitutions of Texas and the United States, and of article 1.051, Texas Code of Criminal Procedure. The Court of Appeals affirmed, holding that, "although Appellant did have the right to an attorney at the proceeding in question, his failure to request appointment of counsel under article 1.051(c) effectively waived that right". *Oliver v. State,* 813 S.W.2d 762, 764-65 (Tex.App.—Houston [1st Dist.] 1991). The TCCA granted discretionary review to determine the narrow question

whether "at critical stages ..., an accused may be subjected to judicial proceedings without the assistance of counsel unless he affirmatively requests the appointment of an attorney pursuant to ...(article 1.051(c). Citing to the established standard and controlling Federal case in denial of counsel cases *Johnson v Zerbst*, the TCCA stated: "We are not aware of any federal or state decisional law which has since compromised this rule or which might otherwise support a belief that the Sixth Amendment right to counsel is forfeited by a failure to request its implementation in the trial court." *Id* at 715. See *also Carnley v. Cochran*, 369 U.S. 506 (1962) "[I]t is settled that where the assistance of counsel is a constitutional requisite, the right to be furnished counsel does not depend on a request." Id 369 U.S. 506 at *513. See also *Brown v. Wainwright*, 665 F.2d 607,608 (5th Cir.1982).

Thus, the petitioner's rebuttal to the reviewing court's reasoning and application of supporting case law regarding the issue of indigence and waiver, would lead jurists of reason to debate whether the petitioner was not indigent

leading to trial as the district court has concluded. The petitioner bears the burden of proving his indigence (a mixed question of fact and law) at the time of trial, by clear and convincing evidence. This, however, does not obviate the preliminary conclusion that the petitioner has met the requirements of at § 2253 and that a COA should issue. The request for a COA does not require the petitioner to demonstrate a likelihood that he ultimately will prevail on appeal. In fact this tact is disfavored. (*Barefoot v. Estelle* at 463 U.S at 893 n 4). Given this evidentiary and factual background, it is reasonable to believe, that jurists of reason could debate whether the issues presented to the district court and the Fifth Circuit are adequate to deserve encouragement to proceed further. (*Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Or that jurists of reason might find the district courts assessment debatable. (*Miller-El* v.*Cockrell*, at *338).

Jurisdiction issue

According to the plain language of § 2253, and the Court's holdings, the authority to review a request for permission to appeal a denial of an application for

a writ of habeas corpus – although not specifically indicated - may extend to the entire Court as well. *Hohn v United States* at *245. The question then arises: does this Court's appellate jurisdiction to review a petitioner's request for the issuance of a COA pursuant to at § 2253, fall under the court' obligate or discretionary jurisdiction? Put another way does a request for a COA, in order to appeal the district court's denial of the prisoner's habeas claim(s) fall into that extraordinarily narrow category of exceptions to the Supreme Court's duty to adjuticate a controversy properly before it?

A brief tracing of the Court's authority back to Article III of the Constitution conduces the petitioner into the belief: the Supreme Court's "judicial power shall extend to all cases in law and equity, ..." "In all the other cases ... the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as congress shall make.," (Art III); and that, "[t]he appellate powers of the Supreme Court, as granted by the Constitution, are limited and regulated by the acts of Congress, and must be exercised subject to the

exceptions and regulations made by Congress." *ex Parte Vallandigham,* 68 U.S. 243 (1863) 1 Wall. 243.

If Congress invested authority as it did, for a Circuit Justice to address requests for a COA or issues of venue, as a preliminary issue, "the Court's jurisdiction to review the matter and rule is not ousted." *Cf. Hohn v. United States,* 524 U.S. 236 (1998) at *248. According to Congress' mandate at. § 2253(c)(1) Congress made no such jurisdictional distinction when it authorized circuit judges or a circuit justice authority to review requests for a COA under at § 2253. The courts of the United States derive authority to review [extraordinary] writs as distinct from COA requests by congressional legislation and mandate. *cf. Ex Parte Vallandigham* at *249. A request for a COA clearly falls under the latter. It would appear, therefore, the Court has the "strict duty" and the "unflagging obligation ...to exercise the jurisdiction given." *Quackenbush v. Allstate Ins. Co.* 517 U.S. 706, 716 (1996). Nor has Congress indicated that review of an application for a COA is discretionary. Had Congress intended to distinguish this

Court's duty at § 2253 as being distinct and separate from those of the lower federal court's authorized by Congress to review applications for COA, it would have done so. Congress' wording when describing federal court's authority under § 2253 is unambiguous. (See also *Autry v. Estelle*, 464 U.S. 1301, 1302 (1983) (White, J., in chambers) (Concluding that habeas petitioner had raised "substantial question" that did not "lack substance," "I am *compelled* to issue a certificate of probable cause to appeal, as I am authorized to do under § 2253.") (emphasis added).

Had Congress intended to designate three disparate avenues of judicial review of COA requests such that each federal court had a separate jurisdiction – one discretionary and the other non-discretionary; one appellate but discretionary; and the other appellate and non-discretionary -- it would have indicated such. That it did not is significant. Nowhere in at § 2253 or Article III can it be found that congress has authorized in the Supreme Court original jurisdiction to examine or to decide by certiorari requests for COA. For the reasons given it is believed that this

Court possesses non-discretionary jurisdiction over requests for COA by a prisoner whose request falls under at § 2253 and whose conviction is governed by 28 U.S.C. § 2254. For reasons given, the prisoner respectfully submits to the Court, that the intendment of the petitioner's application for a Certificate of Appealability to the Court, is not to appeal a judgement of a lower court that is subject to discretionary review by the Supreme Court. The request for a COA must be evaluated using the standard elucidated in the Court's own related jurisprudence. "The Court (or at least a single Circuit Justice) appears obligated to apply the substantive *Barefoot* standard in the same manner in which a district court or a Circuit judge is obligated to apply that standard. There appears to be no principled basis for the exercise of certiorari-type discretion over COA applications." Brent E. Newton, Applications for Certificates of Appealability and the Supreme Court's "Obligatory" Jurisdiction , 5 J. App.Prac. & Process 177 (2003) (at * 183-184).

IN CONCLUSION

The district court also interjected the requirements of a decision on the merits into

the court's COA inquiry by stating that" for the reasons set forth above, the Court concludes that jurists of reason would not debate the conclusion that Petitioner was not entitled to federal habeas relief. As such, a COA will not issue." District Court Op pp 31. Applying this framework to petitioner's COA application, the Court concluded that the district court's findings are not to debatable This was too demanding a standard. It is not unreasonable to conclude the Fifth Circuit gave "weighty consideration" to the district court's prior denial of a COA. *Nowakoski v Maroney,* 386 U.S. 542, 543 (1967) (per curiam).

Richard DeBenedetto Petitioner P.O. Box 3157 Santa Rosa Island TX 78596

March 8, 2021

United States Court of Appeals for the Fifth Circuit

No. 19-50973

RICHARD BRUCE DEBENEDETTO,

Petitioner—Appellant,

versus

BOBBY LUMPKIN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent—Appellee.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 5:18-CV-619

ORDER:

Richard Bruce DeBenedetto, Texas prisoner # 2118553, moves for a certificate of appealability (COA) from the dismissal of a 28 U.S.C. § 2254 petition in which he challenged six convictions and sentences for prescription fraud. After a trial in which DeBenedetto represented himself, a jury convicted him on one count of prescription fraud. He later pleaded "no contest" to five more counts.

DeBenedetto contends that he was denied "magistration" at his second arraignment and that he was thus deprived of his right to seek appointment of trial counsel under Texas procedural rules. In addition, he

contends that the trial court did not obtain a valid waiver of counsel from him and that the court unreasonably concluded that he was not indigent. However, DeBenedetto fails to show that reasonable jurists would find the district court's rejection of his claims debatable or wrong. *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

DeBenedetto fails to make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Accordingly, his motion for a COA is DENIED.

/s/ Leslie H. Southwick
LESLIE H. SOUTHWICK
United States Circuit Judge

A True Copy
Certified order issued Sep 01, 2020

Jyle W. Cayce
Clerk, U.S. Court of Appeals, Fifth Circuit