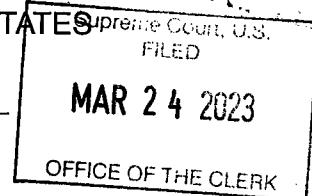


No. \_\_\_\_\_

22-7195

IN THE

SUPREME COURT OF THE UNITED STATES



JERRY LYNN MCGAVITT — PETITIONER  
(Your Name)

vs.

STATE OF TEXAS — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

TEXAS COURT OF CRIMINAL APPEALS

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Jerry Lynn McGavitt #2146489  
(Your Name)

12071 F.M. 3522  
(Address)

Abilene, Texas 79601  
(City, State, Zip Code)

N/A  
(Phone Number)

## QUESTION(S) PRESENTED

1. Whether a prisoner has a right to effective counsel in collateral proceedings which provide the first occasion to raise a claim of ineffective assistance at trial?
2. Whether the 14th Amendment is violated when a Texas habeas applicant is denied habeas relief in a manner that is unauthorized by the Texas Constitution?
3. Whether the Confrontation Clause is violated when a surrogate expert testifies as to the results of a lab report and said report is admitted into evidence?

## **LIST OF PARTIES**

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

All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

## **RELATED CASES**

N/A

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### OTHER

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**

For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix \_\_\_\_\_ to the petition and is

reported at \_\_\_\_\_; or,  
 has been designated for publication but is not yet reported; or,  
 is unpublished.

The opinion of the United States district court appears at Appendix \_\_\_\_\_ to the petition and is

reported at \_\_\_\_\_; or,  
 has been designated for publication but is not yet reported; or,  
 is unpublished.

For cases from **state courts**:

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

reported at \_\_\_\_\_; or,  
 has been designated for publication but is not yet reported; or,  
 is unpublished.

The opinion of the \_\_\_\_\_ court appears at Appendix \_\_\_\_\_ to the petition and is

reported at \_\_\_\_\_; or,  
 has been designated for publication but is not yet reported; or,  
 is unpublished.

## JURISDICTION

For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was \_\_\_\_\_.

No petition for rehearing was timely filed in my case.

A timely petition for rehearing was denied by the United States Court of Appeals on the following date: \_\_\_\_\_, and a copy of the order denying rehearing appears at Appendix \_\_\_\_\_.

An extension of time to file the petition for a writ of certiorari was granted to and including \_\_\_\_\_ (date) on \_\_\_\_\_ (date) in Application No.   A  .

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

For cases from **state courts**:

The date on which the highest state court decided my case was \_\_\_\_\_. A copy of that decision appears at Appendix \_\_\_\_\_.

A timely petition for rehearing was thereafter denied on the following date: 25<sup>th</sup> January 2023, and a copy of the order denying rehearing appears at Appendix   B  .

An extension of time to file the petition for a writ of certiorari was granted to and including \_\_\_\_\_ (date) on \_\_\_\_\_ (date) in Application No.   A  .

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

## **CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

14th Amendment - Due Process and Equal Protection Clauses

6th Amendment - Confrontation Clause

## **STATEMENT OF THE CASE**

In Texas, Habeas Corpus is the designated "initial-review collateral proceeding" for ineffective assistance of trial counsel claims. Petitioner did NOT have the appointment of habeas counsel during this proceeding.

During trial the state introduced Exhibits 121 and 122. These exhibits were lab reports conducted by Ms. Ceniceros. However during trial Mr. Nicolas Ronquillo testified as a surrogate for Ms. Ceniceros because she was allegedly away in training. It came to be proven that Ms. Ceniceros was not in training but at an optional conference.

Mr. Ronquillo testified on behalf of Ms. Ceniceros as a surrogate expert witness. Counsel did not object to this testimony under the Confrontation Clause.

## REASONS FOR GRANTING THE PETITION

1. Whether a prisoner has a right to effective counsel in collateral proceedings which provide the first occasion to raise a claim of ineffective assistance at trial?

This case seeks to vindicate the Constitutional Right to Habeas Counsel in initial-review collateral proceedings.

It calls for an answer to the question expressly "left open" in Coleman v. Thompson, 111 S.Ct. 2546 (1990), and touched on by Martinez v. Ryan, 132 S.Ct. 1309 (2012), and Trevino v. Thaler, 133 S.Ct. 1911 (2013).

The Texas Court of Criminal Appeals has decided an important question of federal law that has not been, but should be, settled by this Court [Rule 10(c)]. Although the Supreme Court has never resolved the question at hand, the Texas Court of Criminal Appeals has held that a state prisoner does NOT have a Constitutionally protected right to Habeas Counsel in initial-review collateral proceedings. See, Ex parte Graves, 70 S.W.3d 103 (Tex. Crim. App. 2002) [Holding: "There is no constitutional right to effective assistance of counsel on a writ of habeas corpus"]; see also, Ex parte Sledge, 391 S.W.3d 104 (Tex. Crim. App. 2013).

Petitioner avers that the Texas Court of Criminal Appeals holding is contrary to the Supreme Court precedents of Douglas v. California, 83 S.Ct. 814 (1963); Evitts v. Lucey, 105 S.Ct. 830 (1985); Halbert v. Michigan, 125 S.Ct. 2582 (2005); and the rationales of Martinez and Trevino [Rule 10 (b)].

Although the holding in Martinez was equitable and does not apply to state courts, the rationale highlighted a significant risk of injustice when a prisoner is not afforded counsel in an initial-review collateral proceeding.

After the scathing criticism in Trevino, which articulated how the Texas procedural system fails to provide an adequate vehicle by which prisoners may effectively challenge the effectiveness of trial counsel's performance, the State of Texas has refused to correct the clear flaws in

its system. This has created a violation of Constitutional magnitude which affects every indigent prisoner in Texas. All indigent Texas prisoners will continue to receive inadequate Habeas review in violation of the Fourteenth Amendment until the Supreme Court answers this question. Therefore, the question presented is of great public importance.

Petitioner avers that to satisfy the Fourteenth Amendment, an indigent prisoner has a Right to the appointment of appellate counsel in collateral proceedings which provide the first occasion to raise a claim of ineffective assistance of trial counsel. In Texas, Habeas Corpus is such a collateral proceeding.

The answer to this question is framed by two Supreme Court precedents concerning state-funded appellate counsel - Douglas v. California, 83 S.Ct. 814 (1963), and Ross v. Moffitt, 94 S.Ct. 2437 (1974).

In Douglas this Court held that "where the merits of the one and only appeal an indigent has of right are decided without benefit of counsel, an unconstitutional line is drawn between rich and poor which violates the Fourteenth Amendment" - Douglas thus established that as a matter of constitutional law, adequate appellate review is impossible unless counsel has been appointed to indigent prisoners.

Later, in Ross, this Court held that a state need not appoint counsel to aid a poor person seeking to pursue a second-tier discretionary appeal.

The question presented by Petitioner is essentially one of classification: Which of these two precedents provides the controlling instruction?

Presently Texas has bracketed the Right to Counsel on Habeas Corpus with Ross because it is a state post-conviction proceeding / collateral review.

This has been premised on Coleman v. Thompson, 111 S.Ct. 2546 (1991) which broadly stated that "there is no constitutional right to attorney in state postconviction proceeding". See also, Ex parte Graves, 70 S.W.3d 103 (Tex. Crim. App. 2002).

HOWEVER, in Martinez, this Court clarified that Coleman expressly "left open" the question of "whether a prisoner has a right to effective counsel in collateral proceedings which provide the first occasion to raise a claim of ineffective assistance at trial" See, Martinez, at 1315. This is precisely the question presented to this Court.

Furthermore, in a subsequent ruling, Trevino, this Court held that Texas procedure made it "virtually impossible" for appellate counsel to present an adequate ineffective assistance claim on direct appeal. See, Trevino, at 1918.

Consequently, the better and prescribed procedural mechanism for pursuing such a claim is almost always through Writ of Habeas Corpus proceedings. See also, Freeman v. State, 125 S.W.3d 505, 506 (Tex. Crim. App. 2003).

This makes Habeas Corpus the "initial-review collateral proceeding" for ineffective assistance claims in Texas and is the equivalent of a prisoners Direct Appeal as to such claims. See, Ex parte Puck, 418 S.W.3d 98, 109 (Tex. Crim. App. 2013).

Petitioner avers that this distinction should put the answer to this question squarely under Douglas. This is because:

- a. Habeas Corpus is a WRIT OF RIGHT. See, Tex. Const. 1, §12; Tex. Code Crim. Proc., art 1.08.
- b. Habeas Corpus is the designated FIRST-TIER and "INITIAL-REVIEW COLLATERAL PROCEEDING" for ineffective assistance claims in Texas.
- c. Habeas Corpus decides the claims merits and no other court has addressed the ineffective assistance claims.
- d. Error-correction is the Habeas proceedings prime function.
- e. Habeas Corpus is NOT a discretionary review.
- f. Habeas Corpus is a prisoners "one and only appeal" as to an ineffective assistance claim.

g. Prisoners are generally ill equipt to represent themselves because they have no brief or court opinion to guide them; the inherent restrictions of their confinement places them in no position to develop the evidentiary basis of a claim of ineffective assistance at trial; and navigating the appellate process is a perious endeavor.

For these reasons, it is of great public importance that this Court GRANT Certiorari to address this unanswered question.

2. Whether the 14th Amendment is violated when a Texas habeas applicant is denied habeas relief in a manner that is unauthorized by the Texas Constitution?

The Texas Court of Criminal Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power [Rule 10 (a)].

The Texas Constitution governs the manner in which the Texas Court of Criminal Appeals must convene to decide it's cases. It mandates that a quorum of judges decide whether habeas relief should be denied - either a panel of THREE judges or by the en banc court. Tex. Const. art. V, §4.

HOWEVER, as exposed in Ex parte Dawson, 2016 Tex. Crim. App. LEXIS 1440, the Texas Court of Criminal Appeals' internal administrative procedures effectively act as a standing order permitting an individual judge to act as a PROXY FOR A QUORUM of the judges on the court on the basis of a prevote on a category of cases that are never actually seen by any judge other than the proxy judge.

There is no doubt this violates the plain text of the Texas Constitution, but there is the greater question as to whether it also violates the Federal Constitution's guarantee of Due Process and Equal protection.

If this question continues to go unanswered THOUSANDS of Texas prisoners will have their habeas applications denied in a manner that is clearly unauthorized by teh Texas Constitution.

For these reasons, it is of great public importance that this Court GRANT Certiorari to address this unanswered question.

3. Whether the Confrontation Clause is violated when a surrogate expert testifies as to the results of a lab report and said report is admitted into evidence?

Petitioner asserts that the state court has decided an important federal question in a way that conflicts with relevant decisions of this Court. To wit, Bullcoming v. New Mexico, 131 S.Ct. 2705 (2011).

In the case at hand, Petitioner asserts that the Confrontation Clause was violated when a surrogate expert testified as to the results of the lab report and said report was admitted into evidence. He further asserts that failure to object to such an error constitutes ineffective assistance of trial counsel.

Counsel proved deficient in not objecting pursuant to the Confrontation Clause to the admittance of State's Exhibit 121 and 122. These exhibits were lab reports conducted by Ms. Ceniceros. However during trial Mr. Nicolas Ronquillo testified as a surrogate for Ms. Ceniceros because she was allegedly away in training (4 R.R. 115). It came to be proven that Ms. Ceniceros was not in training but at an optional conference (4 R.R. 118).

The lab reports were testimonial and the surrogate testimony of Mr. Ronquillo did not satisfy the defendant's Confrontation Clause rights.

The U.S. Supreme Court has been unequivocally clear on this matter. In Bullcoming v. New Mexico, 131 S.Ct. 2705, 2716 (2011), the Court explained that the law does not "tolerate dispensing with Confrontation simply because the Court believes that questioning one witness about another's testimonial statements provides a fair enough opportunity for cross-examination".

The Court held that, because a report is a testimonial statement of the analyst who performed the test, it could not be offered into evidence through the testimony of a different "surrogate" witness. *Id.*, at 2710.

This is exactly what happened in Petitioner's case. The state court has thus decided that in Petitioner's case the mandates of the Confrontational Clause do not apply. This conflicts this this Courts opinion in Bullcoming v. New Mexico.

For these reasons, this Court should grant Certiorari and provide additional guidance to the lower courts in honoring the Confrontational Rights established by the Constitution.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

John McEntee

Date: 23 March 2023