

The Supreme Court of the United States

Richard Richard

Cause No. 17-7481

vs

The State of Texas

MOTION FOR REHEARING

To the Honorable Justices of the Supreme Court :

COMES NOW, Richard Richard petitioner pro se in the above enumerated cause Writ of Certiorari and moves the court to consider this Motion for Rehearing pursuant to Rule 44 of Supreme Court rules and would respectfully show unto the Court :

I.

The grounds are limited to intervening circumstances of a substantial or controlling effect or to other grounds not previously presented and not intended to inhibit or delay judicial process or proceedings.

II.

The petitioner filed a Writ of Certiorari with this Court on December 18, 2017 which was denied on March 26, 2018. The petitioner received notice on April 3, 2018. This petition is timely filed. The petitioner is incarcerated in TDCJ Lynaugh unit Texas.

III.

The proceeding grounds have a United States Constitutional 5th,

IV. GROUNDS

Ground I: The petitioner was deprived of constitutionally effective appellate counsel and appeal whereas in Texas an appellate attorney is unable to provide effective representation due to systemic deficiencies present in appellate procedure.

The Texas appellate procedural framework, design and operation makes it virtually impossible to raise a significant ineffective assistance of trial counsel claim on direct review.

Texas does not appoint counsel for collateral review proceedings as there is no constitutional guarantee to counsel on collateral review.

Ground II: The aforementioned appellate procedure and law forces the petitioner to raise a significant ineffective assistance claim on collateral review habeas corpus without the assistance of counsel. This renders the appellate process ineffectual.

Ground III: The States failure to provide the appellant an opportunity to present a significant ineffective assistance of trial counsel complaint [eg; failure to provide a defense] on direct review where counsel is appointed and forcing him to do so on collateral review without counsel denied him his right to effective representation on appeal and due process of law.

V.

This Court held and recognized the foregoing constitutional issues to exist in the Texas appellate and collateral review process in *Trevino v Thaler*, 133 S.Ct. 1911. However, no meaningful solution was decided to resolve the constitutional shortcomings apparent in the Texas appellate procedural framework and rules as this was not the focus of this Court's opinion at that time.

The petitioner requests this Court address this matter presently.

VI.

In the case at bar Texas State rules prohibit the 6th amendment effective assistance of counsel review, thus the well established Strickland Standard cannot be met in State review proceedings.

This Court held in *Trevino* that a State [Arizona] that denies permission to raise an IATC claim on direct review and a State [Texas] that permits it but as a matter of procedural design and systemic operation denies a meaningful opportunity to do so is a distinction without a difference.

But there is one critical difference between the two, unlike Arizona, Texas does not appoint counsel for collateral review.

Shouldn't Texas, so as to meet constitutional standards automatically appoint counsel for collateral review proceedings as Arizona does?

VII.

FACTS SUPPORTING GROUNDS

Texas law does not on its face require a defendant initially to raise an ineffective assistance of trial counsel claim in State collateral review proceeding. Rather, that law appears at first glance to permit (but not require) the defendant initially to raise a claim of IATC on direct appeal. The structure and design of the Texas system in actual operation, however, make it "virtually impossible" for an ineffective assistance claim to be presented on direct review. See *Robinson v State* 16 SW3d 808, 810-811 (Tex. Crim. App. 2000) *Trevino v Thaler* 133 S.Ct 1911 (2013).

This Court in deciding if a lack of counsel on collateral review might excuse a state law procedural default held in *Trevino v Thaler* 133 S.Ct. 1911. "What the Arizona law prohibited by explicit terms, Texas law precludes as a matter of course." Regarding an appellant's opportunity to raise an IATC claim on direct review.

Thus, for present purposes, a distinction between (1) a state that that denies permission to raise the claim on direct appeal and (2) a state that in theory grants permission but, as a matter of procedural design and systemic operation, denies a meaningful opportunity to do so is a distinction without a difference.

In saying this we do not (any more than we did in *Martinez*) seek to encourage States to tailor direct appeals so that they provide a

fuller opportunity to raise IATC claims. That is a matter for the States to decide. And, as we have said, there are often good reasons for hearing the claim initially on collateral proceedings. See Trevino at 1921.

While the foregoing may be true, the petitioner does not argue or disagree with this Court's holdings regarding same. The issue at hand and that should be resolved is that Texas does not provide a meaningful opportunity to raise an IATC claim on direct review and does not appoint counsel for collateral review proceedings.

The fact that Texas law does not provide/appoint counsel for collateral proceedings combined with an appellate attorneys inability to effectively raise IATC complaint on direct review deprived the petitioner of his constitutional right to effective counsel on appeal.

When a State has afforded a right to appeal, the due process and equal protection clauses of the United States Constitution require that an appellant have the effective assistance of an attorney to appeal his case. A party whose counsel is unable to provide effective representation is in no better position than one who has no counsel at all. See *Evitts v Lucey* 105 S.Ct. 830 (1985)

The petitioner realizes this Court meant the foregoing figuratively but "no counsel at all" to raise IATC claim appears to be the literal truth. This is the position the petitioner finds himself in.

VIII.

FACTS RELEVANT TO TEXAS APPELLATE PROCEDURE

In Trevino this Court determined, "As the Texas Court of Criminal Appeals itself has pointed out, "the inherent nature of most ineffective assistance" of trial counsel "claims" means that the trial court record will often fail to contain the information necessary to substantiate "the claim. Ex Parte Torres 943 S.W.2d 469, 475 (1997) en banc.

As the Court of Criminal Appeals has also noted, a convicted defendant may make a motion in the trial court for a new trial in order to develop the record on appeal. See *Reyes v State* 849 S.W.2d 812, 816 (1993)

And in principle, the trial court could, in connection with that motion, allow a defendant some additional time to develop a further record. *Id.* But that motion for new trial "vehicle is often inadequate because of time constraints and because the trial record has generally not been transcribed at this point," *Torres supra* at 475. See *Tex. Rule App. Proc.* 21.4 (2013) (motion for new trial must be made within 30 days of sentencing) Rule 21.8(a)(c) (trial court must dispose of motion within 75 days of sentencing). Rule 35.2(b), 35.3(c) (transcript must be prepared within 120 days of sentencing where a motion for new trial is filed and this deadline may be extended)

Thus the Court of Criminal Appeals has concluded, in Texas "a writ of habeas corpus" issued in state collateral proceeding ordinarily "is essential to gathering the facts necessary to evaluate IATC claims." *Torres supra* at 475. <Trevino 133 S.Ct. 1919>

See *Robinson supra* at 810-811 (noting that there is "not generally a realistic opportunity to adequately develop the record for appeal in post trial motions" and that the time requirements for filing and presenting a motion for new trial would have made it virtually impossible for appellate counsel to adequately present an ineffective assistance claim to the trial court")

See also *Thompson v State* 9SW3d 808, 813-814 (Tex. Crim. App. 1999) ("In the vast majority of cases, the under developed record on direct appeal will be insufficient for an appellant to satisfy the dual prongs of *Strickland*"..... (explaining that "often the requirement that a claim of IATC be supported by a record containing direct evidence of why counsel acted as he did" will require that the claim be raised in post conviction habeas proceedings where a full record on the matter can be raised."))

★ The foregoing facts fully and clearly demonstrate why counsel should automatically be appointed for collateral habeas corpus review in Texas as there is simply no reasonable opportunity to present an IATC claim on direct appeal.

PRAYER

The petitioner respectfully prays this court resolve the 6th amendment and relevant due process violation of Texas law that requires an appellant to present his initial IATC complaint on collateral habeas review without the assistance of appointed counsel.

Furthermore, the petitioner request this court remand his case to trial court for appointment of habeas counsel, thereby providing a meaningful opportunity to raise and bring an initial IATC complaint to the courts attention for review. with the assistance of counsel. [Failure to discuss and provide a defense]

Respectfully, Submitted

Richard Richard