

No. 17-958

IN THE
Supreme Court of the United States

LINWOOD A. WILLIAMS, JR.,
Petitioner,

v.

COURT SERVICES AND
OFFENDER SUPERVISION AGENCY, NANCY WARE,
PAUL QUANDER, ADRIENNE POTEAT, MCKINLEY RUSH,
AND WILLIAM ASHE,
Respondents.

**On Petition for a Writ of Certiorari to the
United States Court of Appeals for the
District of Columbia Circuit**

PETITION FOR REHEARING

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PETITION FOR REHEARING

Pursuant to Rule 44.1, Petitioner respectfully petitions the Court for rehearing. This petition for rehearing is filed timely.

OPINIONS BELOW

The circuits are divided on the question. Rather than address the question presented directly, petitioner expands the question's scope so that it can assert a growing consensus in the circuit courts that does not exist. The question presented is whether denial of appointment counsel under the Civil Rights Act of 1964 (42 U.S.C. §§ 2000a-3(a) & 2000e-5) is immediately appealable under the collateral order doctrine. Courts have correctly engaged in independent analysis of denials of appointment of counsel under civil rights statutes—while denials of counsel under the indigence statute are not immediately appealable, denials of counsel in civil rights cases are immediately appealable. When limited to the question, the circuit courts are closely divided. The Third, Fifth, Eighth, and Ninth Circuits have held that denials of counsel under the Civil Rights Act of 1964 are appealable, while the First Circuit here joined the Sixth, Seventh, Eleventh, and District of Columbia Circuits in holding that they are not.

The undeniable division in the circuit courts focuses on the merits—and Williams agrees the Court should address the merits of the case, but on full briefing. This is an important issue on which four of nine circuits (a 4-5 split) have decided the issues disagree with the courts' analysis. Notably, the courts do not even address the petition's discussion of how important this issue is. Access to courts is critical—particularly in civil rights litigation. And in nearly

every case, denial of counsel is outcome-determinative. The Court should resolve the division in the circuits.

REASON FOR GRANTING THE PETITION

This is a straightforward case to grant *certiorari*. The nationwide public safety Questions interests of this federal city case are too important to leave unsettled with a non-descript denial of materially disputable facts. They are guaranteed to recur in the absence of a definitive ruling from this Court. Williams argues this Court should have been offended rather than complicit, regarding respondent's malfeasance and nefarious practices and loss of life for travelers of this national capital city inclusive Article I, Section 10 of the Constitution supports The Interstate Compact for Adult Offender Supervision. Petitioner respectfully requests the Court rehear this case, considering this case is no spontaneous petition, it is over a decade. "When man will commit a crime, God will find a witness." We have nine here and this Court is the final arbiter.

STATEMENT OF THE CASE

This case illustrates reasons for that long standing practice in the likeness of *Hedrick v. Fed. Bureau of Investigations*, No. 15-CV-0648 (KBJ), 2016 WL 6208361, at *6 (D.D.C. Oct. 24, 2016). This Court did not acknowledge the District of Columbia Circuit's lack of clarity to the legal principles of its complicated question about the Circuit's lack of uniformity, arbitrariness, capriciousness and the likelihood of error—the equivalent of legal waterboarding.

The Questions presented here are of profound national importance shrouded in public safety and inherent in the failed supervision of tens of respondents' murdering offenders,¹ their maligning of comparative evidence (Pet. App. I.111a) and retaliation against their solitary whistleblowing manager (*Whistleblower Protection Act*, 5 U.S.C. § 2302(b)(8)), a derivatively and cascading debacle, which is probative of the agency leaders' states of mind, personalities and dispositions.

This case directly raises the continuing vitality of this Court's decision in *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (emphasizing that "[a] document filed *pro se* is 'to be liberally construed'"). Only this Court can resolve the pressing constitutional question *Erickson's*, and the likeness of petitioner's. The substantial questions this Court identified in *Erickson* should not go unresolved when the Court has a pending case that would enable it to conclusively answer them.

¹ Editorial Board, *D.C.'s 'beyond broken' criminal-justice system is an outrage*, The Post's View, Wash. Post, December 30, 2016; Mark Segraves and Andrea Swalec, *DC Murder Suspect Claimed Victim Killed Herself: Court Docs*, NBC News 7, San Diego, (December 29, 2016, 9:35 a.m.), <https://www.nbcsandiego.com/news/national-international/Suspect-in-Yoga-Instructors-Death-Gives-Grim-Account-of-Ordeal-408544035.html>; Amy Brittain, *He says he robbed 100 people in D.C. Could he have been stopped before he killed*, Wash. Post, December 21, 2016; Amy Brittain, *How an accused rapist kept getting second chances from the D.C. justice system*, Wash. Post, May 14, 2016; *Man Gets 9 Years in Carjacking of Sen. Corker's Daughter*, NBC4 Washington (July 20, 2010), <https://www.nbcwashington.com/news/local/Man-Gets-9-Years-in-Carjacking-of-Sen-Corkers-Daughter-98881869.html>; Dan Morse, *Man Found Guilty of Killing Girl, Father*, Wash. Post, August 5, 2008; Keith L. Alexander, *Two Men Sentenced in '06 Georgetown Slaying*, Wash. Post, August 25, 2007.

**I. THE CIRCUITS ARE DIVIDED ON
WHETHER ORDERS DENYING COUNSEL
IN CIVIL RIGHTS CASES ARE IMMEDI-
ATELY APPEALABLE**

It is undisputable the laws in four circuits have decided the issue is orders denying appointment of counsel in civil rights cases are immediately appealable. The courts do not even address the law in the Fifth and Ninth Circuits, conceding the law is settled in those circuits. With respect to the Third and Eighth Circuits, it engages in unsupportable speculation they will reverse course sometime in the future. Several circuit courts have recognized a completely different question from whether they are immediately appealable in civil rights cases. *Bradshaw v. Zoological Society of San Diego*, 662 F.2d 1301, 1322 n.4 (9th Cir. 1981).

The Eighth Circuit, the court has since followed, and two judges of the court have expressed disagreement with it as well as a desire to review it en banc. This only highlights how close a question this has been for the courts of appeals and it wholly ignores the fact the circuit's ruling that orders denying appointment of counsel in civil rights cases have not been unanimous. And they, too, may reverse course if their precedents are reviewed en banc.

The Seventh Circuit ruled orders denying appointment of counsel in civil rights cases are not immediately appealable in *Randle v. Victor Welding Supply Co.*, 664 F.2d 1064 (7th Cir. 1981), Judge Swygert vigorously dissented from the per curiam opinion, id. at 1067. Similarly, when the Sixth Circuit ruled en banc in *Henry v. Detroit Manpower Dep't*, 763 F.2d 757 (6th Cir. 1985), Judge Krupansky filed a dissent recognized that an appeal of denial of appointed counsel after the district court determines the merits

is tantamount to no appeal at all. *Id.* at 768. There is no dispute—nor can there be—this question has divided the circuits and caused divisions among the judges within the circuits. This Court should take the issue up and finally determine whether orders denying appointment of counsel in civil rights cases are immediately appealable, so there is a uniform rule throughout the country that fairly allows the most vulnerable litigants to obtain appellate review before they have irreparably harmed their claims as *pro se* litigants. The nine circuits have decided this issue are divided as evenly as is possible—4–5.

Challenged with undeniable division among the circuits, the D.C. Circuit recycled its opposition defending its decision on the merits. Petitioner, as well as, the opinions of the four circuits disagreeing with the respondents, refutes those arguments, which should be decided only after plenary briefing. The collateral order doctrine establishes appellate jurisdiction under 28 U.S.C. § 1291 for district court orders before final judgment is entered if the orders, as a category:

- (1) “conclusively determine the disputed question;” (2) “resolve an important issue completely separate from the merits of the action;” and (3) are “effectively unreviewable on appeal from a final judgment.” *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 368 (1978) (listing the *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949) factors).

An order denying appointment of counsel closes the door on proper litigation, particularly given the complexity of civil rights cases and the vulnerability of the plaintiffs. *Robbins v. Maggio*, 750 F.2d 405, 412 (5th Cir. 1985). Here, petitioner focused on the language referencing a method of interpretation of

Judge's Roberts and Lambert, both Honors attempt to focus on the plain meaning of the text of code sections, ". . . following factors guide the exercise of courts' discretion. . . No. 1:08-CV-01538 (RWR)(RCL), 2012 WL 110 F. Supp.3d. 111, 878 F. Supp. 2d 263 (D.D.C. July 23, 2012) at *40, (Local Civ. Rule 83.11(b)(3)." Yet, each avoided "If a case will involve conflicting or complex testimony, or difficult legal issues, representation by counsel may be essential." *Poindexter v. FBI*, 737 F.2d 1173, 1189 (D.D.C. 1984). Justas importantly, Williams repeatedly requested appointment of counsel, as his litigation moved through the court to no avail, which petitioner argues the likeness of *Halbert*, *Hedrick* and *Erickson*.

Fed. R. Civ. P. 54. For instance, a district court always can revisit an order denying qualified immunity based on new information, but that does not render an order denying qualified immunity inconclusive; when the district court revisits the order, the damage already will have been done. *See* (R. Pet. Appx. A., Add. Pet. A 2a. and App. D. 9a). The circuits that disagree with the D.C. Circuit have recognized that a question is conclusively determined if the order has repercussions that cannot be repaired by later reconsideration of the order. (citing *Robbins*, 750 F.2d at 412); *see also Spanos v. Penn Cent. Transp. Co.*, 470 F.2d 806, 807 n.3 (3d Cir. 1972). By the time a district court revisits an order denying counsel in civil rights litigation, the plaintiff already will have waived arguments, confused the record, and provided binding discovery responses without the aid of counsel (Judge Lambert's waiving respondent's agreed upon facts responses and not considering the numerous attorneys' initial consultation fees).

These circuits disagree with the D.C. Circuit's assessment of the second *Coopers & Lybrand* factor. In *Bradshaw*, the Ninth Circuit recognized the second factor does not bar any overlap between appellate analysis of the collateral order and the merits of the case. 662 F.2d at 1307. Otherwise, an order denying qualified immunity would not be collateral. It only means the court must not become "enmeshed" in the merits. *Id.* Determining a claim is not frivolous is far from becoming "enmeshed" in the merits—when a district court determines the underlying claim has "some merit," as required in most circuits for appointment of counsel in civil rights cases, the court does not need to decide the merits of the action. *Id.* at 1308. And the decision on whether to appoint counsel will not bind the court "or in any way affect the district court's determination on the merits 'of the cause itself.'" *Id.* (quoting *Cohen v. Benefi Industrial Loan Corp.*, 337 U.S. 541, 546 (1949)).

Orders denying appointment of counsel also meet the third *Coopers & Lybrand* factor, as the harm they cause is "irreparable" on appeal. *Hudak v. Curators of Univ. of Missouri*, 586 F.2d 105, 106 (8th Cir. 1978) (per curiam). The Fifth Circuit recognized in *Robbins* the third factor is not about a "theoretical existence of the right to proceed" with an appeal, but rather, the likelihood a litigant will be able to prosecute his claim after a successful appeal. 750 F.2d at 412. So the key is not whether an appeal may be had procedurally, but whether a successful appeal will provide meaningful relief. *Id.* In the context of a *pro se* litigant in a civil rights case, it will not. Once the plaintiff has gone through discovery, motions for summary judgment, and potentially, a trial, the opportunities for waiver and a sloppy record are so great that one could never expect a litigant to return to the trial court in the same

position he or she would have been had the court of appeals held appointed counsel was warranted before all the waivers, misstatements, and failures to elicit critical information in discovery and at trial. *Id.* See also *Bradshaw*, 662 F.2d at 1310 (noting that “inevitable prejudicial errors” would irreparably harm the few *pro se* litigants who continued their claims after being denied counsel).

In four circuits to decide the issue, orders denying appointment of counsel in civil rights cases already are part of that mindfulness, and plaintiffs “fortunate” enough to have their civil rights violated in states encompassed in those circuits have the opportunity for meaningful review of orders denying them appointed counsel.

The circuits are intractably divided on whether the courts of appeals may immediately review orders denying appointed counsel in civil rights cases. The Court should grant *certiorari* so that the parties may fully brief the merits of whether denying appointment of counsel in civil rights cases. The Third, Fifth, Eighth, and Ninth Circuits have correctly ruled the orders are appealable after thorough and reasoned review of the *Coopers & Lybrand* factors, and this Court should join them after plenary briefing on the merits.

Rather than defer this resolution in some future case, the best and more efficient course of action would be to hold the case for a majority ruling. The Court is familiar with aspects of the record case and has expended resources digesting the petitions. Importantly, the respondents will suffer no prejudice from reinstatement of a case of such national importance.

This Court denied *certiorari* on the three questions. See (Pet. (i)). Impartiality has been the underpinning of this case, petitioner was granted *in forma pauperis* status in the lower courts and the conflating of the issues; although he opted against a Rule 39 request here, considering the probability of failure.

II. THIS IS AN EXCELLENT OPPORTUNITY TO RESOLVE THE QUESTIONS PRESENTED

This case illustrates the reason for that longstanding comprehensive practice benign to laypersons. Given the leniency typically afforded *pro se* litigants, that unfortunate series of events should not deprive petitioner of his day in this Court. As the Court has recognized on several occasions, “[n]avigating the appellate process without a lawyer’s assistance is a perilous endeavor for a layperson.” The Questions Presented here are of profound nationwide importance. This case directly raises the continuing vitality of this Court decision in *Halbert v. Michigan*, 545 U.S. 605, 621 (2005); see also, e.g., *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (emphasizing that “[a] document filed *pro se* is ‘to be liberally construed’”); *Estelle v. Gamble*, 429 U.S. 97, 106 (1976) (same). *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972) (same). Accordingly, this Court can and should excuse inadvertent failures to comply with the Court’s rules when they result from the difficulties inherent in proceeding *pro se*. Cf. *Schacht v. United States*, 398 U.S. 58, 64 (1970) (“The procedural rules adopted by the Court for the orderly transaction of its business . . . can be relaxed by the Court in the exercise of its discretion when the ends of justice so require.”).

There is no reason not to do so here. Any concerns the Court may have about petitioner's ability to comply to its rules in the future should be obviated by his impending retention of experienced Supreme Court counsels, which changes the calculus. Respondents will suffer no prejudice from reinstatement of a case that the Court has familiarity. The Court need not worry that excusing petitioner's inadvertent failure to comply with its expectations of "pincites" (Pet. App. E. 10a-11a) will set any kind of precedent for future cases, that failure will not repeat.

III. THIS CASE PRESENTS A QUESTION OF EXCEPTIONAL IMPORTANCE

The respondents have no substantive reply to Williams' discussion of how important this case is to the most sacrificing petitioners. Denying appointed counsel shuts the door on parties with civil rights claims, and thus, this case directly raises a critical issue regarding access to courts. Litigation—particularly civil rights litigation—is a complex web of rules and standards that requires the expertise acquired after graduate level education and experience. *See* Am. Bar Ass'n, Report to the House of Delegates (Aug. 7, 2006).² In light of scarce resources, district courts deny counsel in frivolous cases, but this determination of access to justice should not be plainly unreviewable, as it is in the five circuits that have denied appellate review of orders denying access to counsel in civil rights litigation.

The injustices stemming from inability to obtain counsel in civil rights cases are myriad, particularly

² Available at http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_resolution_06a112a.authcheckdam.pdf

given these claims' natural tendency to pit parties of vastly unequal strength against each other (Pet. App. E. 10a-11a) (Pet. App. F. 12a-16a). The courts do not disagree. Petitioner; a tenured pretrial, probation and parole manager for nearly twenty-years has been denied equitable legal advocacy and he has been denied the ability to challenge that decision on petition. He has been the rare *pro se* litigant to continue to pursue his claims at the losses of his parenting rights, residential properties and gainful employment—opportunity costs. Williams has been challenged to prosecute his case shrouded in respondents' nefarious performance ratings-bonuses and failed public safety practices against the most traveled nationwide District.

There is no reason not to remand this case and every reason to do so. Convincing this Court to accept this case and review is no easy feat for any petitioner. It would be both unfortunate and inequitable to deny one of the few petitioners to navigate a case *in forma pauperis*. Access to justice is a serious issue and with great specificity to increasing a core obligation of judges to appoint counsel is a good solution. Indeed, there is an access to justice commission in the District weighing these issues.

This Court already has recognized great need for competent counsel in civil rights cases (*Kay v. Ehrler*, 499 U.S. 432, 438 (1991)), an impetus beating back the culture of difference. Filing claims in these cases without counsel, and then being forced to pursue them to final judgment without counsel before having the opportunity to challenge the district court's refusal to appoint counsel amounts to no effective access to the courts at all.

CONCLUSION

For the foregoing, the Court should grant the petition for rehearing, vacate the previous opinion and remanded for further proceedings.

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April 18, 2018

CERTIFICATE OF COUNSEL

I, Linwood A. Williams, Jr., *pro se* believe this petition for rehearing to be meritorious and hereby certify that this petition is presented in good faith and not for purposes of delay.

Respectfully submitted,

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