

No. _____

In the Supreme Court of the United States

October Term 2023

MILTON DWAYNE GOBERT,

Petitioner,

v.

BOBBY LUMPKIN, Director,
Texas Department of Criminal
Justice, Correctional Institutions
Division

Respondent.

On Petition for Writ of Certiorari
To the United States Court of Appeals for the Fifth Circuit

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

MAUREEN FRANCO
Federal Public Defender
Western District of Texas

TIVON SCHARDL
Chief, Capital Habeas Unit
DONNA F. COLTHARP*
AMY FLY
Assistant Federal Public Defenders
919 Congress Avenue, Suite 950
Austin, Texas 78701
(737) 207-3008
donna_coltharp@fd.org
*Counsel of Record

Petitioner, Milton Gobert, seeks leave to file the attached Petition for Writ of Certiorari without prepayment of costs and to proceed *in forma pauperis* in accordance with Supreme Court Rule 39, and Title 18, U.S.C. § 3006A(d)(6).

On January 26, 2015, the United States District Court for the Western District of Texas appointed Seth Kretzer and Mr. Carlo D'Angelo as Mr. Gobert's counsel pursuant to 18 U.S.C. § 3599(a)(2). On May 3, 2022, by order of the court, Mr. Kretzer and Mr. D'Angelo were permitted to withdraw as attorneys of record. The same court then appointed the Federal Public Defender for the Western District of Texas as attorney of record, pursuant to the same provision of law on May 3, 2022.

The filing of this petition is the continuation of counsel's representation of Mr. Gobert under the 18 U.S.C. § 3599(a)(2) appointment. *See* 18 U.S.C. § 3599(e) ("[e]ach attorney so appointed shall represent the defendant throughout every subsequent stage of available judicial proceedings, including...applications for writ of certiorari to the Supreme Court of the United States"). In accordance with Supreme Court Rule 39, no affidavit declaring Mr. Gobert's indigency is required.

WHEREFORE, Petitioner, Milton Dwayne Gobert, seeks leave to proceed *in forma pauperis*.

Respectfully submitted this 27th day of November 2023,

/s/ Donna Coltharp
DONNA COLTHARP
Assistant Federal Public Defender
Counsel of Record for Petitioner
Member of Supreme Court Bar

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

MILTON DWAYNE GOBERT,

Petitioner,

VS.

WILLIAM STEPHENS, Director Texas
Department of Criminal Justice,
Institutional Division,

Respondent.

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1-15-CV-042 RP

ORDER

Before the Court is Petitioner Milton Dwayne Gobert's Motion and Brief for Appointment as Counsel, filed January 21, 2015 (Clerk's Dkt. #1).

Petitioner is a state prisoner subject to a sentence of death for capital murder. He requests appointment of counsel for the purpose of filing a federal petition for writ of habeas corpus under 28 U.S.C. § 2254. Petitioner is indigent and the Court previously granted him leave to proceed in forma pauperis in this action. Petitioner is, therefore, entitled to appointment of counsel under 21 U.S.C. § 848(q)(4)(B).

By way of the motion, counsel for Petitioner in the state post-conviction proceedings, John Stickels, seeks leave to represent Petitioner. In light of the Supreme Court's decision in *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), the undersigned declines to appoint Mr. Stickels and appoints Seth Kretzer instead. The Court finds Seth Kretzer possesses the background, knowledge, and experience to enable him to represent Petitioner with due consideration to the seriousness of the possible penalty and the unique and complex nature of the litigation, and is qualified and willing to accept this appointment as lead counsel. Additionally, the Court finds appointment of co-counsel Carlo D'Angelo is warranted and appropriate in this action.

Accordingly, the Motion and Brief for Appointment of Counsel(Clerk's Dkt. #1) is GRANTED

to the extent Seth Kretzer and Carlo D'Angelo are appointed to represent Petitioner in this action.

A copy of this order and form CJA 30 shall be provided to appointed counsel at the following addresses:

Seth Kretzer
Law Offices of Seth Kretzer
The Lyric Center
440 Louisiana
Suite 200
Houston, Texas 77002

Carlo D'Angelo
Carlos D'Angelo PC
100 East Ferguson
Suite 1210
Tyler, Texas 75702

SIGNED on January 26, 2015.

A handwritten signature in blue ink, appearing to read "Robert L. Pitman", with a long horizontal flourish extending to the right.

ROBERT L. PITMAN
UNITED STATES DISTRICT JUDGE

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION**

**MILTON DWAYNE GOBERT,
TDCJ No. 999554,**

Petitioner,

V.

**BOBBY LUMPKIN, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division,**

Respondent.

Civil No. 1:15-CV-42-RP

*** DEATH PENALTY CASE ***

ORDER GRANTING MOTION TO WITHDRAW

Before the Court is a Motion to Withdraw filed by Petitioner Milton Gobert's appointed counsel, Seth Kretzer and Carlo D'Angelo. (ECF No. 74). Citing their client's total lack of trust in their representation, counsel request permission to withdraw and that new counsel be appointed to represent Petitioner in appealing this Court's recent denial of federal habeas corpus relief. After careful consideration, the Court will grant counsels' request.

Background

Mr. Kretzer and Mr. D'Angelo were appointed as Petitioner's federal habeas counsel in January 2015. (ECF Nos. 6, 7). Since that time, counsel have represented Petitioner ably in these proceedings, having filed several lengthy and well-researched pleadings on Petitioner's behalf. (ECF Nos. 15, 21, 22, and 42). Following the State's filing of its response to counsels' amended petition in November 2016 (ECF No. 32), Petitioner began filing *pro se* motions with the Court requesting new counsel. (ECF Nos. 33, 34, 36, and 37). The Court denied these motions because Petitioner did not establish an irreconcilable conflict or a complete breakdown in communications, but rather cited only general disagreements with the federal petition counsel

filed on his behalf. (ECF No. 41). For the same reasons, the Court denied counsels' sparsely-worded motion to withdraw in February 2018. (ECF Nos. 45, 47).

Despite being warned that he had no right to submit pleadings on his own behalf simply because he was unhappy with his appointed counsel, Petitioner continued to file *pro se* pleadings requesting the appointment of new counsel. (ECF Nos. 44, 48, 58, 59, 63, 64, 68, 71). Because Petitioner had no right to proceed before this Court through hybrid representation, his pleadings were struck. *Id.*

On March 30, 2022, the Court issued a Memorandum Opinion and Order denying Petitioner federal habeas corpus relief. (ECF No. 72). Shortly thereafter, citing their client's "total lack of trust" in his court-appointed counsel, counsel filed the instant motion requesting permission to withdraw and the appointment of new counsel to represent Petitioner. (ECF No. 74). Counsels' motion is not opposed by Respondent.

On April 22, 2022, the Court held a teleconference hearing on the motion at which Mr. Kretzer, Mr. D'Angelo, and Petitioner appeared. Petitioner reiterated his concerns about counsels' failure to raise certain allegations in the federal petition and that he no longer trusts counsel to represent his best interests. Counsel agreed that a "cloud of distrust" hangs over their representation and asks for new counsel to be appointed to represent Petitioner in his upcoming appeal. Both counsel and Petitioner suggest the appointment of Tivon Schardl, the supervising attorney for the Capital Habeas Unit (CHU) of the Federal Public Defender for the Western District of Texas.¹

¹ Despite lacking any official connection to these proceedings, Mr. Schardl apparently has some familiarity with this case. Mr. Schardl filed a motion for reconsideration on Petitioner's behalf in March 2018 and, according to Petitioner, has advised him in the past on several issues. Counsel indicated that Mr. Schardl is available and willing to step in as appointed counsel in this case.

Legal Standard

Under 18 U.S.C. § 3599(e), counsel appointed to represent a capital defendant are obligated to continue representing their client “throughout every subsequent stage of available judicial proceedings,” including “all available post-conviction process, together with applications for stays of execution and other appropriate motions and procedures,” as well as “competency proceedings and proceedings for executive or other clemency.” This obligation continues until a court of competent jurisdiction grants a motion to withdraw. *See Wilkins v. Davis*, 832 F.3d 547, 557-58 (5th Cir. 2016) (“[C]ounsel is authorized—and indeed obligated—to continue representing the defendant until the court permits him to withdraw.”).

In evaluating motions to withdraw as counsel under § 3599, the appropriate standard is the “interest of justice” standard set forth in *Martel v. Clair*, 565 U.S. 648, 658 (2012). *Battaglia v. Stephens*, 824 F.3d 470, 472 (5th Cir. 2016). This “context-specific inquiry” involves several relevant considerations, including “the timeliness of the motion; the adequacy of the district court’s inquiry into the defendant’s complaint; and the asserted cause for that complaint, including the extent of the conflict or breakdown in communication between lawyer and client (and the client’s own responsibility, if any, for that conflict).” *Id.* “The withdrawal of an attorney in a given case is a matter entrusted to the sound discretion of the court.” *United States v. Conlan*, 786 F.3d 380, 390 (5th Cir. 2015) (internal quotation marks omitted).

Analysis

Based on the Court’s discussions with Mr. Kretzer, Mr. D’Angelo, and Petitioner during the April 22nd hearing, the Court does not find that substitution of counsel is constitutionally required. While counsels’ motion indicates a “total breakdown in the attorney-client relationship” has occurred, the hearing makes clear that this breakdown is almost entirely one-

sided. In short, Petitioner believes that counsel should have investigated certain allegations further and included them in his petition for federal habeas corpus relief, and no longer trusts counsel to represent his best interests due to their alleged failure to do so. But mistrust and dislike of appointed counsel is generally insufficient to warrant the substitution of counsel. *United States v. Romans*, 823 F.3d 299, 312 (5th Cir. 2016). Indeed, a defendant does not have a constitutional right to have his appointed counsel raise every non-frivolous argument requested by the client. *See Jones v. Barnes*, 463 U.S. 745, 751 (1983). Nor is he entitled to an attorney “who will docilely do as he is told.” *United States v. Moore*, 706 F.2d 538, 540 (5th Cir. 1983).

Here, the breakdown in communication appears to stem mostly from Petitioner’s unwillingness to speak with counsel due to his perception that counsel are untrustworthy, not from any actual neglect on the part of counsel. However, a breakdown in communication “caused by a defendant’s unwillingness to cooperate or communicate with [his] attorney generally does not justify appointment of new counsel.” *United States v. Simpson*, 645 F.3d 300, 307-08 (5th Cir. 2011); *see also United States v. Gentry*, 941 F.3d 767, 777 (5th Cir. 2019) (observing that substitution of court-appointed counsel “is inappropriate when the breakdown [in communication] can be attributed to the defendant’s intransigence, and not to the neglect of defense counsel or the trial court.”).

Nevertheless, despite counsels’ failure to show that a withdrawal is required in this case, the Court finds that the interests of justice would best be served if appointed counsel is allowed to withdraw and new counsel appointed to represent Petitioner. Although counsel have represented Petitioner diligently in this case and would undoubtedly continue to do so if required, it appears the attorney-client relationship between counsel and Petitioner has broken down to such an extent that the Court finds, in its discretion, that new counsel is warranted.

Further, while Petitioner is not entitled to appointed counsel of his choice, but rather only to appointed counsel capable of rendering competent, meaningful assistance, the Court agrees that the appointment of Mr. Schardl would best serve the interests of justice in this case. Mr. Schardl is imminently qualified to represent Petitioner “throughout every subsequent stage of available judicial proceedings,” and his familiarity with Petitioner’s case should not unduly disrupt or delay these proceedings.

Conclusion

Having reviewed the motion, the Court finds that the interests of justice warrant the appointment of new counsel for Petitioner. The Court further finds that Tivon Schardl possesses the background, knowledge, and experience that would enable him to represent Petitioner with due consideration to the seriousness of the possible penalty and the unique and complex nature of the litigation. Mr. Schardl is both qualified and willing to accept this appointment as counsel.

Accordingly, it is hereby **ORDERED** that counsels’ Motion to Withdraw (ECF No. 74) is **GRANTED**. Petitioner Gobert’s appointed counsel, Seth Kretzer and Carlo D’Angelo, are **WITHDRAWN** as counsel of record for Petitioner in the instant proceeding.

It is further **ORDERED** that Attorney **Tivon Schardl**, Supervising Assistant Federal Public Defender for the Western District of Texas CHU, 504 Lavaca Street, Suite 960, Austin, TX 78701, tel. (512) 916-5025, is appointed lead counsel of record for Petitioner herein.

Finally, the Clerk of the Court is **ORDERED** to transmit a copy of this order to Petitioner Gobert as well as to counsel of record (new and old) for each respective party.

SIGNED this the 3rd day of May, 2022.



ROBERT PITMAN
UNITED STATES DISTRICT JUDGE