

THE LAW OFFICES OF SETH KRETZER

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October 9, 2015

Supreme Court of the United States
ATTN: Scott S. Harris, Clerk of Court
1 First Street, NE
Washington, DC 20543

Re: 15-6282; Robert Roberson, III v. William Stephens, Director, Texas Department of Criminal Justice, Correctional Institutions Division

Mr. Harris:

We are the longtime lawyers for Mr. Roberson, having been appointed by a federal district judge in Texas under the Criminal Justice Act. We write to apprise the Court of an alarming “Certiorari Petition” filed September 28 by a trio of lawyers who do not actually represent Mr. Roberson, have never represented Mr. Roberson, and have repeatedly and explicitly stated that they do not intend to represent Mr. Roberson. The Fifth Circuit rejected this ruse when it was attempted during the pendency of Mr. Roberson’s appeal in that Court.

The Fifth Circuit denied our petition for *en banc* rehearing on September 9; we are working diligently on the certiorari petition due in December. Our immediate concern upon receiving the ersatz filing on September 28 was that the

trio of lawyers had waived Mr. Roberson's merits arguments since they did not raise any claim other than one they manufactured. By this letter, we seek to confirm your office's representation to us that the September 28 filing does not waive the arguments we are professionally tasked with advancing for Roberson in this Court.

INTRODUCTION

The Texas Court of Criminal Appeals denied Roberson's direct appeal June 20, 2007, and his state habeas petition September 16, 2009. *Ex parte Roberson*, 2009 Tex. Crim. App. Unpub. LEXIS 571 (Sept. 16, 2009); *Roberson v. State*, 2007 Tex. Crim. App. Unpub. LEXIS 1175 (Tex. Crim. App. June 20, 2007).

Roberson's petition for writ of *certiorari* from his direct appeal was denied by this Court April 14, 2008. *Roberson v. Texas*, 552 U.S. 1314 (2008).

Roberson filed his federal writ petition September 14, 2010, and a supplemental petition September 16, 2011.

The assigned Magistrate entered his Report and Recommendation ("R&R") August 20, 2014, recommending denial of relief. Roberson timely objected to the R&R. The U.S. District Court adopted the R&R September 30, 2014.

On May 27, 2015, the Fifth Circuit granted certificate of appealability ("COA") as to one claim and denied the remaining two claims. *Roberson v. Stephens*, 2015 U.S. App. LEXIS 8778 (5th Cir. May 27, 2015). On August 10,

2015, a panel of the Fifth Circuit denied relief. *Roberson v. Stephens*, 2015 U.S. App. LEXIS 14146 (5th Cir. August 10, 2015). Roberson's petition for rehearing *en banc* was filed on August 26, 2015, and denied September 9, 2015, without poll.

Roberson's petition for writ of *certiorari* is therefore due December 9, 2015.

During these proceedings, Mr. Roberson was represented on his state and federal habeas corpus applications by court appointed counsel, James W. Volberding, Texas, and on his federal habeas corpus application by court appointed counsel, Seth Kretzer, also from Texas. Both were appointed by the U.S. District Court under the Criminal Justice Act. They continue to represent Mr. Roberson and will soon file his petition for writ of *certiorari*.

A. The attorneys who recently filed a petition for writ of *certiorari* do not represent Roberson, never have represented him, or even sought to do so.

On September 28, three attorneys, two from Texas and one from Maryland, filed a petition for writ of *certiorari* on Roberson's behalf. None of these attorneys represent, or have ever represented, Mr. Roberson. None have filed a notice of appearance in any state or federal court on his behalf. None have sought to file a motion to substitute counsel for Mr. Volberding and Mr. Kretzer. None have sought leave for appointment or substitution under the Criminal Justice Act.

These three attorneys came to light in May 2015, when they evidently responded to a letter from Mr. Roberson, and began a series of meetings and

correspondence with him, without informing his attorneys. They told Roberson he was being poorly represented by incompetent and conflicted attorneys. Evidently, they prompted Mr. Roberson to file a *pro se* motion to remove Mr. Volberding and Mr. Kretzer and for “additional, independent counsel” to be appointed by the District Court. The letter is reproduced below; Paragraph (5) reads, “Mr. Seth Kretzer (lead counsel) refuses to receive help from other to defend me properly and fairly.” The conclusion reads, “and remand my case back to the district court to appoint new independent counsel to properly defend me” This language appears to have been drafted for him by these lawyers.

Mr. Robert L. Roberson NTL #999442
Polunsky Unit
3872 E. M. 350 South
Livingston, Texas ~~77351-88~~ 77351-88

United States District Court
For the Fifth Circuit -
Mr. Lyle W. Coyce - Clerk
600 S. Maestri Plaza
New Orleans, LA 70130-3408



"Dear Sir"

Could please remove my Court Appointed Attorneys, Mr. Seth Kretzer and Mr. James W. Volberding from my case and Appeals. I would like to be appointed Pro Se, and to represent myself, because ???

① Because ineffective assistance of counsel. Because Lead Federal Attorney at first was my State Habeas Attorney. Then now my Lead Attorney becomes co-counsel, and my co-counsel becomes my Lead Counsel (Attorney). This is not right because this attorney is still on my case, whether Lead or co-counsel. He's still involved, and new Lead Counsel refuses to file on my co-counsel for ineffective assistance of counsel.

② Then my new Lead Counsel is biased against me and my type of case. Because my case involves a child victim, and I was falsely accused of a sexual assault that never was proven.

③ Then there's a communication breakdown between attorneys and client (me). Because my attorneys refuse to communicate properly to be able to defend me properly on my Appeals (case).

④ Then there's irreconcilable conflict, because we are not able to get along and to agree with one another what does need to be filed, etc.

- ⑤ Then Mr. Seth Kretzer (Lead Counsel) refuses to receive help from others to defend me properly and fairly,
- ⑥ Then the Both of my Attorneys refuses to file my "Actual Innocence" claims. Failure to investigate properly,
- ⑦ Failure to properly investigate that mental illness does run in my family, relatives, and as well as me,
- ⑧ Failure to investigate all my head injuries properly, caused by car wrecks, being hit in the head multiple times, head butting brick walls, etc.

Conclusion

For the foregoing reasons, Robert Leslie Roberson's motion to "Stay of Obedience" these proceedings and remand my case back to the district court to appoint new additional, independent counsel to properly defend me should be granted.

Respectfully submitted,

Robert L. Roberson III

Robert Leslie Roberson III
TDCJ # 999442 - Polunsky Unit
3872 Elm, 350 South
Livingston, Texas 77351

On May 5, the Fifth Circuit instructed counsel to respond to this letter. Counsels did so May 6. On May 22, the Fifth Circuit rejected Roberson's request as follows:

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 14-70033

ROBERT LESLIE ROBERSON, III,

Petitioner - Appellant

v.

WILLIAM STEPHENS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL
JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent - Appellee

Appeal from the United States District Court for the
Eastern District of Texas, Marshall

ORDER:

Petitioner-Appellant Robert Leslie Roberson, III, has moved pro se to relieve appointed counsel and for appointment of substitute counsel. Roberson alleges that new counsel should be appointed, on the grounds that: his attorneys are biased against him because he was charged with sexual assault; there is a communication breakdown between him and his attorneys; his lead counsel refuses to receive help from others to defend him properly and fairly; and his attorneys refuse to file his actual innocence claims and have failed to investigate his family history of mental illness and his personal history of head injuries. Roberson also argues that he is entitled to the appointment of

substitute counsel because one of his attorneys, James Volberding, represented Roberson during the state habeas corpus process and therefore has a conflict of interest due to the Supreme Court's decisions in *Martinez v. Ryan*, --- U.S. ---, 132 S. Ct. 1309 (2012), and *Trevino v. Thaler*, --- U.S. ---, 133 S. Ct. 1911 (2013).

Appointed counsel may be relieved "upon a showing that there is a conflict of interest or other most pressing circumstances or that the interests of justice otherwise require relief of counsel." FIFTH CIRCUIT PLAN FOR REPRESENTATION ON APPEAL UNDER THE CRIMINAL JUSTICE ACT, § 5(B); *see also* 18 U.S.C. § 3006A(c). Roberson has not made the required showing. With specific regard to Roberson's *Martinez-Trevino* arguments, Roberson has the benefit of supplemental counsel, Seth Kretzer, who did not represent him in the state habeas corpus proceedings. Mr. Kretzer has filed a response with this court indicating that he was "very cognizant of any potential *Martinez/Trevino* issues, and found none." As such, Roberson has already received the benefit of independent, conflict-free counsel to investigate potential *Martinez-Trevino* issues. *See Speer v. Stephens*, 781 F.3d 784, 786 (5th Cir. 2015). Accordingly, the motion is DENIED.


CAROLYN DINEEN KING
UNITED STATES CIRCUIT JUDGE

On May 27, the Fifth Circuit granted COA and established a briefing schedule with a due date of June 22. But while Roberson's legitimately appointed attorneys were working diligently on this merits brief, these three attorneys, again,

one from Maryland and two from Texas, who had never before surfaced in this case, filed a five-page letter June 12, asking for leave to appear for the limited purpose of seeking to remove Mr. Volberding and Mr. Kretzer, asserting incompetence and conflicts, but not seeking to represent Roberson themselves. **In other words, these three attorneys filed a motion accusing Kretzer and Volberding of incompetence and conflicts, but did nothing to assume responsibility for the merits brief due a mere ten days later.**

The Fifth Circuit ignored the letter. Kretzer and Volberding filed their brief on June 22. On June 30 the Fifth Circuit entered an order rejecting the three attorneys' contentions *in seriatim*. See Exhibit "A".

The most salient aspect of the June 12 letter is its repeated insistence that the three attorney signatories did not actually intend to ever represent Roberson:

OFFICE OF THE CLERK

c/o Monica Washington
Capital Case Clerk
United States Court of Appeals for the Fifth Circuit
600 S. Maestri Place
New Orleans, Louisiana 70130-3408

cc: Seth Kretzer, James Volberding

Re: *Roberson v. Stephens*, No. 14-70033


To The Court:



This Letter, sent pursuant to instructions from the Clerk's office, formally requests that the Court recognize and grant electronic filing privileges to undersigned counsel, Lee B. Kovarsky, who will enter a *pro bono* appearance for the limited purpose of seeking the relief described herein.

4.02(d) permits. In connection with this matter, TDS does not seek appointment as Supplemental Counsel, and therefore has no pecuniary interest in a favorable resolution of any request for the appointment of such counsel.

If at all possible, please let undersigned counsel know of the Court's decision by phone or by electronic mail, as Mr. Kovarsky will be traveling and away from the office for some time.



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Attorneys for Petitioner-Appellant

In its June 30 order, the Fifth Circuit rejected the attorneys' attempt to intervene in this case even for the limited purpose of "making a motion" for some unnamed new lawyer from outside Texas Defender Services. *See* Exhibit "B".

The Circuit noted the attorneys did not seek to represent Roberson on the case: "The TDS states in its letter that it will only represent Roberson in seeking a new lawyer to investigate potential *Martinez/Trevino* arguments; they will not represent him for purposes of making the actual arguments themselves." Order of Jun. 30, 2015, No. 14-70033, at 3 n.1; Exhibit A.

On August 12, the three attorneys tried to file a longer version of their previously rejected motion, explaining that since merits relief had been denied, his *certiorari* petition could be filed:

Because Mr. Roberson may now pursue a petition for writ of certiorari in the United States Supreme Court on *all issues on appeal*—including his right to conflict-free counsel—Mr. Roberson files this Advisory and Proffer to perfect the record regarding his request for conflict-free, supplemental counsel.

Aug. 12, Kovarsky, “Advice and Proffer” at 3 (emphasis added.).

B. The attorneys have never undertaken any actual representation of Roberson.

The conduct of the attorneys has never touched the merits of Roberson’s arguments on appeal but were instead designed only to interfere with the ongoing habeas litigation and Roberson’s relationship with his attorneys. Had the attorneys actually undertaken any actual role in Roberson’s case, they would surely have made an appearance and authored the merits briefing which was due and pending at the time the attorneys filed their motion for appointment of an unknown third lawyer. The attorneys never moved to strike or substitute Kretzer’s or Volberding’s appointment, because they evidently have no faith in the underlying argument they are making. Were the attorneys to believe otherwise, they could easily have undertaken the work themselves, *pro bono* if necessary, rather than simply asking for a third lawyer to come in and do some indeterminate parallel investigation.

C. Your office has represented to the CJA lawyers that the September 28 filing will not be construed to waive merits-based arguments from Roberson's loss in the Fifth Circuit

On September 29, the Court has sent a correspondence letter to the Fifth Circuit stating that the cert petition has been filed already:

**Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001**

September 29, 2015

Scott S. Harris
Clerk of the Court
(202) 479-3011

Clerk
United States Court of Appeals for the Fifth Circuit
600 S. Maestri Place
New Orleans, LA 70130

Re: **Robert Leslie Roberson, III**
v. William Stephens, Director, Texas Department of Criminal
Justice, Correctional Institutions Division
No. 15-6282
(Your No. 14-70033)

Dear Clerk:

The petition for a writ of certiorari in the above entitled case was filed on September 28, 2015 and placed on the docket September 29, 2015 as No. 15-6282.

Sincerely,

Scott S. Harris, Clerk

by

Michael Duggan
Case Analyst

There is no qualification in this letter that the September 28 filing was limited to the Fifth Circuit's June 30 order. It is for this reason that we perceived a grave risk that Roberson will be found to have waived his arguments in this Court

germane to the issues on which he sought COA and the subset on which he was denied merits relief.

D. In their September 28 petition, the attorneys misrepresented several aspects of this case and their role.

As the petition states, Mr. Kretzer was appointed as Roberson's co-counsel by the federal district judge on March 5, 2012. Petition, at 9. In their footnote 5 on page 9, and in their assertion on page 19, the attorneys make an assertion that is rather misleading, that the Fifth Circuit is "to require sufficient experience," Petition, at 19. In fact, Mr. Kretzer had all the requisite qualifications at the time of his appointment.¹ Mr. Volberding does as well.²

The three attorneys assert, "Mr. Kretzer has a financial and professional interest in avoiding adversity with Mr. Volberding." Petition, at p. 38. Quite to the contrary, Kretzer and Volberding have never shared any legal fee, have never shared any operating expense, have no referral arrangement, live in different cities,

¹ Mr. Kretzer served a law clerk on the Fifth Circuit from 2005-06, for the Hon. Judge Tom Reavley. He previously clerked for the Hon. Judge David Folsom, Eastern District of Texas. He has presented oral argument in more than thirty appeals. He secured a unanimous reversal in a Federal Death Penalty Act prosecution, *United States v. Williams*, 610 F.3d 271 (5th Cir. 2010), on grounds of both insufficient evidence and jury instructional error.

² Mr. Volberding served as a law clerk for the late Hon. Judge William M. Steger, Eastern District of Texas, 1993-95. He is double board certified in criminal law and has represented a number of death row clients. He holds the rank of Lieutenant Colonel in the U.S. Army Reserve, Judge Advocate General's Corps, and serves currently as the Staff Judge Advocate for a command of 12,300 soldiers.

and have no access to one another's client files. It appears the attorneys withheld this information from the Court and their designated experts.

Pertaining to the *Martinez/Trevino* issues, the three attorneys assert that Kretzer ignored this doctrine entirely. This is another misrepresentation. The attorneys fail to inform the Court that the Fifth Circuit addressed this contention in its June 30 order:

It is true that the district court found Claim 38 to be procedurally defaulted due to the failure to raise the claim in the state habeas corpus proceeding. **But the district court also addressed a *Martinez/Trevino* argument apparently made by Kretzer that would have excused the procedural default.**

Order of Jun. 30, 2015, No. 14-70033, at 4; Exhibit A (emphasis added).

Thank you for your consideration of this matter. We will submit the merits-based petition for writ of *certiorari* before the December 8 deadline. Please let me know if there are any questions or concerns at all. We will serve a copy of this letter on the Texas Attorney General today. We have spoken with the assigned Assistant Attorney General. He has no objection to our requests in this letter.

Respectfully submitted,

James W. Volberding

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Court-Appointed Attorneys for Appellant / Petitioner,
Robert L. Roberson, III

Seth Kretzer

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LEAD COUNSEL

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(713) 224-2815 (fax)

Appendix A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 14-70033

ROBERT LESLIE ROBERSON, III,

Petitioner - Appellant

v.

WILLIAM STEPHENS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL
JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent - Appellee

Appeal from the United States District Court for the
Eastern District of Texas, Marshall

Before KING, JOLLY, and HAYNES, Circuit Judges.

O R D E R:

Petitioner–Appellant Robert Leslie Roberson, III, moves this court for leave for his limited-purpose, pro bono counsel, the Texas Defender Service (“TDS”), to file a second motion on his behalf for the appointment of new counsel under the Criminal Justice Act. In a letter to the court, the TDS states that it represents Roberson “solely for the purpose of enforcing his right to conflict-free counsel under [the Criminal Justice Act].” The TDS argues in its letter that both of Roberson’s present attorneys, James Volberding and Seth

Kretzer, have a conflict of interest under the Supreme Court's decisions in *Martinez v. Ryan*, --- U.S. ---, 132 S. Ct. 1309 (2012), and *Trevino v. Thaler*, --- U.S. ---, 133 S. Ct. 1911 (2013).

Volberding represented Roberson during his state habeas corpus proceedings. Kretzer was appointed to replace Volberding's prior co-counsel part way through the federal proceedings. In the federal habeas corpus proceedings, the district court denied relief on all of Roberson's claims and also declined to grant a certificate of appealability ("COA"). Roberson filed his motion for a COA with this court in February. While the motion for a COA was pending, Roberson filed a pro se motion to remove Volberding and Kretzer and to have new counsel appointed in May on the grounds that they were conflicted in raising *Martinez–Trevino* arguments. In response to that motion, Kretzer filed a letter with this court in which he stated that he was not conflicted in raising *Martinez–Trevino* arguments, as he was not one of Roberson's lawyers during the state habeas proceedings. Kretzer then stated, *inter alia*:

Mr. Kretzer warrants to this Court that he was very cognizant of any potential *Martinez/Trevino* issues, and found none. To be clear, Mr. Kretzer reviewed the entire state and federal appellate record, and all state and federal pleadings, and found no claim or potential claim that was not raised, or raised incorrectly, by Mr. Volberding.

We denied Roberson's motion, holding that "Roberson has the benefit of supplemental counsel, Seth Kretzer, who did not represent [Roberson] in the state habeas corpus proceedings." We also cited Kretzer's representations to this court and ruled that "Roberson has already received the benefit of independent, conflict-free counsel to investigate potential *Martinez–Trevino* issues." After denying his motion for supplemental counsel, we granted in part and denied in part Roberson's motion for a COA. The briefing schedule for the

issue on which we granted a COA has been set, and we have at this point received Roberson's opening brief on the merits.

Roberson now moves the court again for the appointment of a third attorney under the CJA to investigate potential *Martinez–Trevino* issues and bring claims the procedural default of which the *Martinez–Trevino* doctrine would excuse.¹ Roberson's motion does not acknowledge the procedural context outlined above. Roberson raises three arguments that Kretzer is conflicted. None has merit.

First, Roberson argues that Kretzer was not appointed as supplemental counsel within the meaning of this court's opinions in *Mendoza v. Stephens*, 783 F.3d 203 (5th Cir. 2015), and *Speer v. Stephens*, 781 F.3d 784 (5th Cir. 2015). As such, Roberson argues that "[e]xploring a *Martinez* issue would require [Kretzer] to become adverse to Mr. Volberding while the two attorneys are supposed to be jointly representing Mr. Roberson." But the fact that Kretzer was not appointed specifically and solely as "supplemental counsel" to investigate *Martinez–Trevino* issues is irrelevant so long as he served that purpose. Under Roberson's reasoning, any time the district court appointed two lawyers as co-counsel, one of whom was an attorney in the state proceedings, a third lawyer would automatically be required. Further, the result for which Roberson advocates would have a curious consequence. If a district court retained the state habeas attorney and appointed a second attorney who, in addition to investigating *Martinez–Trevino* claims, also provided full legal representation to the indigent petitioner, the CJA would not be satisfied. If, however, the district court retained the state habeas attorney and appointed only a limited, "supplemental" attorney whose sole and limited

¹ The TDS states in its letter that it will only represent Roberson in seeking a new lawyer to investigate potential *Martinez–Trevino* arguments; they will not represent him for purposes of making the actual arguments themselves.

charge was to address *Martinez–Trevino* issues, the CJA would be satisfied. We decline to subscribe to this reasoning. *Cf. Speer*, 781 F.3d at 786 (“In a case like this one, where present counsel has been actively engaged in this litigation for several years, and moves only late in the process for new counsel, that second appointment in the discretion of the district court may be of counsel who, while independent[] counsel, would benefit from the often rich resource of the counsel who has been brought through the state habeas process and who has prosecuted the federal habeas action with no hint of inability.”).

Second, Roberson argues that because Kretzer has co-counseled extensively with Volberding in the past he is “adversely limited.” That argument lacks merit.

Third, Roberson argues that Kretzer would have to reconcile any “advocacy for a *Martinez–Trevino* excuse” with his representations that there were no such issues before this court. Roberson’s argument appears to be that, if Kretzer in the future realized that there were *Martinez–Trevino* issues that he failed to raise, then he would be conflicted in raising them, because he had earlier represented to this court that there were no such issues, and as such Roberson is presently entitled to supplemental counsel. We cannot adopt this reasoning. The mere possibility of a future conflict does not justify the present appointment of supplemental counsel. Roberson also argues that Kretzer’s representation to this court was “inaccurate,” as Volberding did not raise Claim 38 in the Federal habeas corpus petition in state court, procedurally defaulting it. It is true that the district court found Claim 38 to be procedurally defaulted due to failure to raise the claim in the state habeas corpus proceedings. But the district court also addressed a *Martinez–Trevino* argument apparently made by Kretzer that would have excused the procedural default. The court ultimately found that Roberson “failed to satisfy the requirements of

Martinez/Trevino in order to excuse the procedural default,” but alternatively rejected Claim 38 on the merits, which the court spent the majority of its opinion as to Claim 38 discussing. Further, that another lawyer may disagree with Kretzer’s assessment of a potential *Martinez–Trevino* issue is not probative. One lawyer may well find unmeritorious an argument that another lawyer may have pursued. A difference of opinion is not grounds for finding a conflict of interest or for appointing a third lawyer.

Insofar as the present proceedings before this court are concerned, Kretzer suffices as conflict-free counsel for purposes of reviewing *Martinez–Trevino* issues, a function he has represented to this court that he has performed. Roberson does not explain what the supplemental counsel he requests would be able to do in this court. Any *Martinez–Trevino* issues his requested supplemental counsel would find would have to be raised in the first instance in the district court. Relief in this court, at this stage in the proceedings, is not warranted.

Roberson’s motion is DENIED.

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE
NEW ORLEANS, LA 70130

June 30, 2015

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 14-70033 Robert Roberson, III v. William Stephens,
Director
USDC No. 2:09-CV-327

Enclosed is an order entered in this case.

Sincerely,

LYLE W. CAYCE, Clerk



By: _____
Monica R. Washington, Deputy Clerk
504-310-7705

Ms. Katherine Cooper Black
Ms. Burke Morley Butler
Mr. Matthew Hamilton Frederick
Mr. Lee Benjamin Kovarsky
Mr. Seth Kretzer
Mr. James Wesley Volberding