No. 091143

In The

Supreme Court of the United States

LEE O. WILSON, JR., PETITIONER,

v.

GENE M. JOHNSON, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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MARCH 22, 2010

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QUESTION PRESENTED

Section 1915(e)(1) of Title 28 authorizes district courts to appoint counsel in a civil case for parties who cannot afford counsel. All thirteen courts of appeals have addressed whether the denial of the appointment of counsel is an immediately appealable order. Nine courts of appeals have held that they are without jurisdiction to immediately review such orders; three have held that they possess jurisdiction to immediately review such orders; and one court of appeals has held that appellate jurisdiction depends upon the type of claim presented. The question presented is:

Whether the denial of the appointment of counsel in a civil case is an order that is immediately appealable.

PARTIES TO THE PROCEEDING

Petitioner is Lee O. Wilson, Jr.

Respondents are Gene M. Johnson, Director, Virginia Department of Corrections; Doris Ewing, Supervisor, Court and Legal Services; Edward Meeks, Superintendant, Cold Springs Work Center.

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PETITION FOR A WRIT OF CERTIORARI

Lee O. Wilson, Jr., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-2a) is unreported. The order of the district court denying the appointment of counsel (App., *infra*, 3a-5a) is unreported.

JURISDICTION

On June 29, 2009, the United States District Court for the Eastern District of Virginia denied petitioner's request for appointed counsel. App., *infra*, 3a-5a. On appeal, the Fourth Circuit dismissed the case, holding that it lacked appellate jurisdiction. App., *infra*, 2a. The court of appeals entered its judgment on November 24, 2009. On February 16, 2010, Chief Justice Roberts granted an extension of time within which to file a petition for a writ of certiorari to and including March 24, 2010.

For the reasons explained below, the Fourth Circuit had jurisdiction pursuant to 28 U.S.C. § 1291. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1), and exists whether or not the court of appeals had appellate jurisdiction. *See Nixon v. Fitzgerald*, 457 U.S. 731, 741-743 & n.23 (1982).

STATUTORY PROVISIONS INVOLVED

Section 1915 of Title 28 of the United States Code provides in relevant part:

> (e)(1) The court may request an attorney to represent any person unable to afford counsel.

Section 1291 of Title 28 of the United States Code provides:

> The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

INTRODUCTION

This case presents the question whether a pro se party who cannot afford counsel, and who is denied appointed counsel by a district court, can appeal immediately, or whether (as the court below held) he must go through the entire district court case without an attorney—with only the prospect of appellate review of the denial of counsel after final judgment is entered. In the meantime, under the approach of the

court below, he must hope that his unfamiliarity with law and procedure do not irrevocably prejudice the merits of the case, such that any subsequent appellate review of the denial of counsel lacks meaning. All thirteen courts of appeals have addressed the question whether the denial of the appointment of counsel is an immediately appealable order. Nine courts of appeals, including the court below, have held that they are without jurisdiction to immediately review such orders; three have held that they possess jurisdiction to immediately review such orders; and the Ninth Circuit has held that it depends upon the type of claim presented.

If petitioner's case fell within the jurisdiction of the Fifth, Eighth, or Federal Circuits, he would have had a right to immediately appeal the denial of his request for appointed counsel. But because his case is pending within the Fourth Circuit, he must proceed alone to final judgment on the merits of his case, without the benefit of counsel, before he can challenge the denial of his request.

This divergent treatment in the courts of appeals will not be resolved without this Court's intervention, and this petition presents the Court with an opportunity to address an issue that has long evaded review.

STATEMENT OF THE CASE

A. Statutory Framework

1. Congress has given district courts the authority to appoint counsel in civil lawsuits when a person is unable to afford an attorney, as well as in a swath of civil rights lawsuits. *See, e.g.*, 28 U.S.C. § 1915(e)(1) ("The court may request an attorney to represent any person unable to afford counsel."); 42 U.S.C. §§ 2000a-3(a) ("the court may appoint an attorney" for a complainant seeking an injunction under the civil rights laws); 2000e-5(f)(1)(B) ("the court may appoint an attorney" for a Title VII complainant). In enacting these provisions, Congress understood that lawsuits often involve parties of "unequal strength and resources" in which one party "has at his disposal a vast array of resources and legal talent." H.R. Rep. No. 92-238, at 12 (1971). By authorizing the appointment of counsel in such circumstances, Congress created a means for the court to place the parties on more equal footing in the appropriate case.

2. Title 28 U.S.C. § 1291 grants jurisdiction to the courts of appeals over "all final decisions of the district courts." This statute has been interpreted to provide that "a party must ordinarily raise all claims of error in a single appeal following final judgment on the merits." *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 374 (1981).

For more than a half-century, however, this Court has recognized that a "practical construction" of the

final judgment rule permits immediate appellate review over a "small class" of orders "which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review." *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949); *see also Coopers & Lybrand v. Livesay*, 437 U.S. 463, 471 (1978). To fit within this class, an "order must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand*, 437 U.S. at 468.

B. Factual Background And Proceedings Below

1. Petitioner, an individual proceeding pro se, filed an action in the United States District Court for the Eastern District of Virginia seeking damages against certain state officials under 42 U.S.C. § 1983. Petitioner alleged that respondents unconstitutionally caused him to spend an extra five months in prison based on their misreading of his state court sentencing order, which was the result of a plea bargain. At the time petitioner filed this suit, he already had served the entirety of that prison sentence (including what he alleged to be the unwarranted five months), although he had returned to prison for a separate offense. App., *infra*, 8a-9a & n.2.

On February 27, 2007, seven days after the complaint was filed and before any additional filings were made in the case, the district court sua sponte

dismissed the case. The court held that petitioner could not maintain a Section 1983 damages claim until after he successfully challenged his confinement in a habeas petition under 28 U.S.C. § 2254. Petitioner appealed.

2. On appeal, and after informal briefs were filed, the Fourth Circuit appointed counsel to represent petitioner for the purposes of the appeal. App., *infra*, 3a-4a.

In a published opinion, the court of appeals reversed and remanded to the district court. The court of appeals held that petitioner's Section 1983 claim for unconstitutional imprisonment was the appropriate means to seek relief. App., *infra*, 18a-20a. Because petitioner's sentence had expired, the court of appeals recognized that a Section 1983 claim was petitioner's only avenue to relief and explained that it did "not believe that a habeas ineligible former prisoner seeking redress for denial of his most precious right—freedom—should be left without access to a federal court." App., *infra*, 19a.

Respondents sought rehearing en banc, which the court of appeals denied. Respondents did not seek review from this Court.

3. On remand, petitioner again proceeded pro se, because the Fourth Circuit's appointment of appellate counsel did not extend to the district court.

On December 1, 2008, petitioner filed a motion requesting to proceed in forma pauperis and, on

February 23, 2009, petitioner filed a motion requesting the appointment of counsel. App., *infra*, 3a. On April 23, 2009, the district court granted petitioner's motion to proceed in forma pauperis, but did not act on his request for the appointment of counsel. Petitioner renewed his motion for the appointment of counsel on June 19, 2009.

On June 23, 2009, respondents filed an answer to the complaint in which they asserted fourteen defenses, and filed a motion for summary judgment supported by a 17-page legal memorandum and a number of exhibits. Three days later, petitioner opposed the motion for summary judgment pro se.

On June 29, 2009, the district court denied petitioner's original and renewed motions for appointment of counsel. App., *infra*, 3a-5a. The court recognized that pursuant to 28 U.S.C. § 1915(e)(1), a "court may request an attorney to represent an indigent plaintiff proceeding *in forma pauperis*." App., *infra*, 3a-4a. The court nevertheless found that the appointment of counsel was limited to cases where "exceptional circumstances" exist, and found that petitioner had made no showing that exceptional circumstances existed to warrant the appointment of counsel. App., *infra*, 4a. Notwithstanding the appointment of counsel in the court of appeals and the reversal in a published opinion of the district court's prior sua sponte dismissal of the case, the district court explained that the appointment of counsel was unnecessary because petitioner "ably filed his pleadings and replied to the various orders, as well as

demonstrated comprehension of the procedures and laws of this Court." App., *infra*, 4a.

4. Petitioner appealed the denial of appointment of counsel, but the court of appeals dismissed the appeal. Consistent with its past holdings, the Fourth Circuit held that it lacked appellate jurisdiction over the appeal because an order denying appointment of counsel "is neither a final order nor an appealable interlocutory or collateral order." App., *infra*, 2a.

The district court has not yet ruled on the merits of petitioner's case.

REASONS FOR GRANTING THE PETITION

THE COURTS OF APPEALS ARE SHARPLY DIVIDED ON THE IMPORTANT ISSUE OF WHETHER THE DENIAL OF APPOINTMENT OF COUNSEL IN A CIVIL CASE IS AN IMMEDIATELY APPEALABLE ORDER

This is the rare instance in which the question presented has been addressed by *every* federal court of appeals, those courts are divided, and there is no indication that the courts of appeals will come to a single result absent this Court's intervention. On that basis alone, certiorari should be granted. But the question in this case also is a significant one—one that members of this Court have in the past urged the Court to address and that the leading treatise on federal practice and procedure has explained is in need of resolution by this Court. The issue is important to the nation's system of justice, as it touches

upon the core question of when a party who cannot afford an attorney should be appointed one by the court. The denial of counsel unquestionably affects every subsequent litigation decision in a case. After final judgment, it is virtually impossible to distinguish on review between missteps caused by the lack of counsel and any inherent weaknesses in the merits of a case. And, because this issue involves pro se litigants navigating trial and appellate courts, this is an issue that evades review by this Court. This petition likely presents one of the few opportunities this Court will have to address the question presented.

A. This Case Squarely Implicates A Circuit Conflict Involving Every Court Of Appeals That Will Not Be Resolved Absent This Court's Intervention

1. Three courts of appeals permit immediate appeals of orders denying the appointment of counsel

In conflict with the ruling below, the Fifth, Eighth, and Federal Circuits all have held for more than 20 years that a party denied the appointment of counsel in a civil case can immediately appeal that order. *See Lariscey v. United States*, 861 F.2d 1267, 1270 (Fed. Cir. 1988); *Robbins v. Maggio*, 750 F.2d 405, 407 (5th Cir. 1985); *Slaughter v. City of Maplewood*, 731 F.2d 587, 588 (8th Cir. 1984).

Unlike the Fourth Circuit rule governing this case, the Fifth Circuit has held that the denial of an

appointment of counsel is an immediately appealable order under the collateral order doctrine. *Robbins*, 750 F.2d at 407. The court explained that a denial of appointment of counsel "conclusively determine[s]" whether a defendant must litigate "without the assistance of appointed counsel." *Id.* at 412. The denial also is collateral to the case, because "[t]he factors examined in reviewing an order denying appointment of counsel" are different from those governing the merits of a case. *Ibid.* And the court of appeals concluded that the denial of the appointment of counsel is effectively unreviewable because there is a "great risk" that a civil rights plaintiff denied counsel "may abandon a claim or accept an unreasonable settlement in light of his own perceived inability to proceed with the merits of his case." *Ibid.*; *see also Caston v. Sears, Roebuck & Co.*, 556 F.2d 1305, 1308 (5th Cir. 1977) (explaining that "a layman unschooled in the law in an area as complicated as the civil rights field * * * likely has little hope of successfully prosecuting his case to a final resolution on the merits").

The Eighth Circuit also has had "little hesitation in concluding that" an order denying appointment of counsel is immediately appealable. The court of appeals explained that an order denying appointment "conclusively determines the disputed question, resolves an important issue completely separate from the merits of the action, and [would] be effectively unreviewable on appeal from a final judgment." *Slaughter*, 731 F.2d at 588 (quoting *Coopers &*

Lybrand, 437 U.S. at 468); *see also Hudak v. Curators of Univ. of Mo.*, 586 F.2d 105, 106 (8th Cir. 1978) ("We have held that denial of appointment of counsel is appealable under 28 U.S.C. § 1291 as a final collateral order on the basis that the harm it may cause can be irreparable on appeal of the final judgment."), cert. denied, 440 U.S. 985 (1979).

Like the Fifth and Eighth Circuits, the Federal Circuit has held "that denial of the request for appointment of counsel [in a civil case] is immediately reviewable on appeal." *Lariscey*, 861 F.2d at 1270. In so concluding, the Federal Circuit recognized the existence of "a split among the regional circuits" on the issue. *Id.* at 1269. The court explained that a district court's denial of the appointment of counsel conclusively determines an issue that is entirely distinct from the merits of the underlying case—i.e., that it is not "necessary to resolve any issues on the [case's] merits in order to consider the question of appointment of counsel." *Id.* at 1270. And the court of appeals explained that the appointment of counsel issue was effectively unreviewable because "it is far from clear that once the merits had been decided, the absence of counsel would so readily be held harmful." *Ibid.* The court reasoned that if the case appeared on appeal "to have been reasonably presented, the appellate court may never know whether a different or better case could have been presented that would have turned the tide in the indigent litigant's favor." *Ibid.*

These courts of appeals, in conflict with the ruling below, continue to adhere to their precedent permitting immediate appellate review of an order denying the appointment of counsel. *See, e.g.*, *Sanchez v. Chapman*, No. 08-11082, 2009 WL 3731891, at *2 (5th Cir. Nov. 9, 2009); *Swackhamer v. Scott*, 276 Fed. App'x 544, 545 (8th Cir. 2008); *Medrano v. Thomas*, 99 Fed. App'x 521, 522 (5th Cir. 2004). And on a number of occasions, those courts have concluded that the denial by the district court of the appointment of counsel was in error. *See, e.g.*, *Medrano*, 99 Fed. App'x at 522; *Sanchez*, 2009 WL 3731891 at *2; *Lane v. Astrue*, 279 Fed. App'x 421, 422 (8th Cir. 2008) (per curiam).

2. Nine courts of appeals have held there is no appellate jurisdiction to immediately review the denial of the appointment of counsel, although they disagree on the rationale

On the other side of this rift in the courts of appeals, the Fourth Circuit below is joined by the First, Second, Third, Sixth, Seventh, Tenth, Eleventh, and D.C. Circuits, all of which have held that the denial of appointment of counsel is not an immediately appealable order. *See Ficken v. Alvarez*, 146 F.3d 978, 981-982 (D.C. Cir. 1998); *Holt v. Ford*, 862 F.2d 850, 852-854 (11th Cir. 1989) (en banc); *Miller v. Simmons*, 814 F.2d 962, 965-967 (4th Cir.), cert. denied, 484 U.S. 903 (1987); *Henry v. City of Detroit Manpower Dep't*, 763 F.2d 757, 761-762 (6th Cir.) (en banc), cert. denied, 474 U.S. 1036 (1985); *Smith-Bey*

v. Petsock, 741 F.2d 22, 24-26 (3d Cir. 1984); *Appleby v. Meachum*, 696 F.2d 145, 146 (1st Cir. 1983); *Randle v. Victor Welding Supply Co.*, 664 F.2d 1064, 1066 (7th Cir. 1981); *Cotner v. Mason*, 657 F.2d 1390, 1392 (10th Cir. 1981); *Miller v. Pleasure*, 425 F.2d 1205, 1206 (2d Cir.) (per curiam), cert. denied, 400 U.S. 880 (1970). While these courts agree as to the result, they are significantly divided as to the reasoning for it.

a. Several courts of appeals have held that an order denying the appointment of counsel, while conclusively determining a collateral issue in the proceeding, is nevertheless not an appealable order because it would be reviewable on final judgment. The Tenth Circuit, for example, has held that such an order is reviewable at the end of the case because it "can be fully remedied by a post-judgment reversal and a new trial." *Cotner*, 657 F.2d at 1392. The First and Seventh Circuits also have adopted this rationale in denying immediate appellate review of appointment of counsel orders. *See Appleby*, 696 F.2d at 146 (First Circuit); *Randle*, 664 F.2d at 1066 (Seventh Circuit).

b. In contrast, the Fourth, Sixth, and Eleventh Circuits have adopted a different basis for holding that the denial of the appointment of counsel is not an appealable collateral order. These courts have all ruled that such an order fails to satisfy *any* of the requirements under the collateral order doctrine.

When establishing the governing rule applicable to this case, the Fourth Circuit held that the denial of

the appointment of counsel is not a conclusive ruling because "the district court can reconsider, at a later time, in the exercise of its discretionary authority, the appointment of counsel as a viable option, if in fact such is determined to be necessary." *Miller*, 814 F.2d at 966. Moreover, the court of appeals reasoned that the issue was not collateral to the merits of the case because the "ultimate effect" of the denial of the appointment of counsel "cannot be fairly and adequately assessed until the substance of the entire case is known" and a plaintiff can subsequently show "that the absence of appointed counsel was so prejudicial that the denial amounted to a denial of fundamental fairness." *Ibid.* The court further concluded that the denial of the appointment of counsel is not effectively unreviewable in a final judgment because "[e]xperience teaches that a *pro se* litigant will raise on appeal each and every issue resulting from an unfavorable ruling" and, if prejudicial error is shown, the "judgment can be vacated and remedial measures can be ordered." *Id.* at 967.

Divided en banc rulings from the Sixth and Eleventh Circuits are in accord with the Fourth Circuit's reasoning. In both cases, those courts of appeals concluded that an order denying the appointment of counsel does not meet any of the requirements of the collateral order doctrine. *See Henry*, 763 F.2d at 761-762 (Sixth Circuit); *Holt*, 862 F.2d at 852 (Eleventh Circuit). Four judges in each of these circuits, however, dissented from their respective court's rulings.

In the Sixth Circuit, the dissent explained that the majority's reasoning was based upon an "unsupported conclusory hypothesis that dispositions of motions to appoint counsel are 'inherently tentative' since trial judges may reconsider their ruling as the *pro se* complainant develops the evidence during trial." *Henry*, 763 F.2d at 765 (Krupansky, J., dissenting). According to the dissent, the issue was collateral to the merits of the case because it involved only "a minimal and incidental inquiry by the Court which in no way enmeshes it in the underlying cause of action itself." *Id.* at 767. Finally, the dissent explained that the majority had unnecessarily "equate[d]" the requirement that the collateral order be effectively unreviewable with it being "jurisdictional[ly] unreviewable." *Id.* at 768.

Likewise, the dissent for four judges in the Eleventh Circuit explained that the denial of a motion for the appointment of counsel was conclusive because the district court "*denied* the motion" and "did not indicate that its order was tentative." *Holt*, 862 F.2d at 856 (Vance, J., dissenting). And the issue was collateral to the merits of the case because "[s]uch rulings merely require courts to determine whether the underlying claim has *some* merit." *Id.* at 857. Finally, the dissent explained that the majority lost sight of the fact that the inquiry "is not whether a claim becomes jurisdictionally unreviewable, but whether it becomes *effectively* unreviewable." *Ibid.* The dissent explained that after a final judgment "where a district court has denied a civil rights

plaintiff appointed counsel, the record on appeal probably will not be sufficient to reveal what the plaintiff could have proved if counsel had been appointed." *Id.* at 858.

c. Finally, three other courts of appeals have each emphasized different bases for determining that there is no appellate jurisdiction to review a district court's order denying the appointment of counsel. The Second Circuit has held that such a "determination whether the district judge abused his discretion requires considerable exploration of the merits" of the case. *Pleasure*, 425 F.2d at 1206. A divided Third Circuit has held that the denial of the appointment of counsel is not immediately appealable because it required examination of "issues 'enmeshed' in the plaintiff's cause of action" and was reviewable at the end of the case. *Smith-Bey*, 741 F.2d at 24-26. And the D.C. Circuit, which ironically appointed amicus counsel to argue the appeal along with the pro se litigant, recognized this division in the circuits. In finding a lack of appellate jurisdiction for an immediate appeal, it reasoned that the denial of counsel does not conclusively determine the issue because the district court can always reconsider its prior ruling and did not "render impossible any review whatsoever." *Ficken*, 146 F.3d at 982 (quoting *Firestone*, 449 U.S. at 376).

3. The Ninth Circuit has held that its appellate jurisdiction depends upon the claim being raised

In conflict with every other circuit to consider the issue, the Ninth Circuit has staked out its own ground, holding that the appealability of a denial of appointment of counsel depends upon the claim being raised.

In *Bradshaw v. Zoological Society of San Diego*, 662 F.2d 1301 (9th Cir. 1981), the court of appeals held that "orders denying appointment of counsel in Title VII suits are [immediately] appealable under Section 1291." *Id.* at 1305. But the Ninth Circuit has held that the denial of appointment of counsel is not immediately appealable in a habeas proceeding, *Weygandt v. Look*, 718 F.2d 952, 954 (9th Cir. 1983), or in a proceeding brought under Section 1983, *Kuster v. Block*, 773 F.2d 1048, 1049 (9th Cir. 1985); *Wilborn v. Escalderon*, 789 F.2d 1328, 1330 (9th Cir. 1986) (concluding that such orders require a court to enmesh itself in the merits of the case). In explaining its divergent treatment of such cases, the court noted that in Title VII suits, unlike those brought under Section 1983, "Congress has made explicit findings that Title VII litigants are presumptively incapable of handling properly the complexities involved in Title VII cases." *Wilborn*, 789 F.2d at 1330 n.2.

B. Review Is Necessary Because The Question Whether Counsel Should Be Appointed Is A Crucial Threshhold Issue That, When Incorrectly Determined And Left Unreviewed, Adversely Affects All Subsequent Litigation Decisions

Although the division in the courts of appeals alone justifies this Court's review, certiorari should be granted because the question presented is exceptionally important. Whether a pro se party who cannot afford a lawyer, but is erroneously denied one, can seek immediate appellate relief could be case dispositive. Under the approach of the court below, and eight other courts of appeals, such a party must go through the entire district court proceeding without counsel, with only the hope that his unfamiliarity with law and procedure does not irreparably prejudice the merits of his case, such that any eventual review of the denial of counsel is effectively meaningless.

The importance of ensuring that a party entitled under the law to counsel receives one at the earliest opportunity should be beyond dispute. This Court has recognized that a pro se litigant is at a severe, and at many times almost insurmountable, disadvantage in civil litigation against a counseled adversary. *See Brotherhood of R.R. Trainmen v. Virginia*, 377 U.S. 1, 7 (1964) ("Laymen cannot be expected to know how to protect their rights when dealing with practiced and carefully counseled adversaries * * * ."). Counsel are needed to execute basic advocacy

functions: to delineate the issue, investigate and conduct discovery, present factual contentions in an orderly manner, cross-examine witnesses, make objections and preserve a record for appeal. Pro se litigants normally cannot adequately perform any of these tasks. *See* Am. Bar Ass'n, *Report to the House of Delegates* 9 (2006) (noting that counsel is required to navigate the "inevitably adversarial and complex" nature of our judicial system), *available at* http://www.abanet.org/legalservices/sclaid/downloads/06A112A.pdf (last visited Mar. 19, 2010).

Indeed, the entire adversary process can be distorted by the failure to appoint counsel in the proper case. The pro se litigant may accidentally or deliberately drop a claim, fail to prosecute the case from ignorance or inability, inadvertently disclose previously privileged material, settle on disadvantageous terms, or fail on a technicality to perfect an appeal. *See Bradshaw*, 662 F.2d at 1310-1311 (detailing harms that a pro se litigant may suffer without immediate review of an order denying appointment of counsel); 15B Charles A. Wright, Arthur R. Miller & Edward H. Cooper, FEDERAL PRACTICE AND PROCEDURE § 3914.21, at 106-107 & 112 n.47 (2d ed. 1992) (same). In short, "it is not realistic to expect that effective relief can be given on appeal from the final judgment." Wright & Miller, *supra*, at 106. The decision whether to appoint counsel can thus be viewed as virtually outcome determinative in many cases: empirical studies show that legal representation is an important factor in whether a party wins a case. *See*,

e.g., Carol Seron et al., *The Impact of Legal Counsel on Outcomes for Poor Tenants in New York City's Housing Court: Results of a Randomized Experiment*, 35 LAW & SOC'Y REV. 419, 419 (2001); Barbara Bezdek, *Silence in the Court: Participation and Subordination of Poor Tenants' Voices in Legal Process*, 20 HOFSTRA L. REV. 533, 553-554 (1992).

This Court has granted interlocutory review for a myriad of important rights like those implicated in this case. *See, e.g., Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 144 (1993) (order denying State's claim to Eleventh Amendment immunity); *Abney v. United States*, 431 U.S. 651, 659 (1977) (order rejecting double jeopardy claim); *Stack v. Boyle*, 342 U.S. 1, 6 (1951) (order denying motion to reduce bail); *Roberts v. United States Dist. Court for the N. Dist. of Cal.*, 339 U.S. 844, 845 (1950) (order denying in forma pauperis status). Whether a pro se litigant is entitled to immediate appellate review of the denial of counsel is a similarly significant issue, which at the very least is too important to be subject to the divergent treatment in the courts of appeals that now exists.

C. This Case Presents An Ideal Opportunity To Address An Issue That Typically Evades Review

Although the question presented has long divided the circuits, the question is neither stale nor often denied by this Court. This Court has been afforded few opportunities to address the question presented,

and this case provides a unique opportunity to address a circuit conflict that involves every federal court of appeals.

1. There are obvious reasons why the question presented often evades this Court's review. On the one hand, cases arising in those jurisdictions in which immediate appeals from orders denying counsel are permitted will rarely, if ever, reach this Court on the appellate jurisdiction issue. Pro se litigants in those cases are able to appeal denials, and thus have no reason to ask for this Court's intervention on that issue. And the only injury suffered by opposing parties in those cases is the interlocutory appeal on whether a pro se litigant is entitled to representation, which is an issue on which the opposing party is unlikely to seek this Court's review.

Moreover, cases arising in those jurisdictions that do not permit immediate appeals from these orders often will likewise evade this Court's review. The party aggrieved in those cases is the pro se litigant, who is unlikely to realize that the court of appeals' dismissal for lack of appellate jurisdiction is itself reviewable by this Court.

This petition is one of those few instances in which a case that squarely presents this question is before the Court. The Fourth Circuit decided the precise question presented in this petition, and a determination by this Court about whether orders denying appointment of counsel are immediately appealable will be dispositive of that issue in this case. And,

although not critical to the jurisdictional question before the Court, the underlying issues in this case—which involve the intersection between civil rights suits and federal habeas corpus—are precisely the type that would benefit from the appointment of counsel. Indeed, the Fourth Circuit thought as much when it appointed appellate counsel to review, and ultimately reverse, the district court's prior sua sponte dismissal of the case.

2. In 1987, members of this Court recognized "[t]he continued split amongst the Circuits on this issue" and thought it warranted this Court's review. *Miller v. Simmons*, 484 U.S. 903, 904 (1987) (White, J., dissenting from denial of cert., joined by Blackmun, J.). Five years later, the leading treatise on federal practice and procedure recognized that the circuits were split over this issue and observed that this Court should intervene once sufficient time had passed to gauge whether these types of interlocutory appeals burdened the judiciary. Wright & Miller, *supra*, at 114.

In the intervening span of nearly two decades, no evidence has developed that permitting these types of interlocutory appeals would result in a deluge of appeals. And decisions from those courts of appeals that permit immediate appeals demonstrate that there are instances where district courts err in refusing to appoint counsel. *See, e.g.*, *Medrano*, 99 Fed. App'x at 522; *Sanchez*, 2009 WL 3731891 at *2; *Lane*, 279 Fed. App'x at 422.

The time is now right for this Court to review this important issue.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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