NO. _____

In The
UNITED STATES SUPREME COURT

ROBERTO MORENO RAMOS,
Petitioner,

versus

WILLIAM STEPHENS, 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

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PETITION FOR A WRIT OF CERTIORARI

*****CAPITAL CASE*****
EXECUTION SCHEDULED FOR WEDNESDAY NOVEMBER 14, 2018

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November 12, 2018

QUESTION PRESENTED

Given that Petitioner Moreno Ramos requested the circuit court recall its mandate solely to address a defect in the integrity of his habeas proceeding—namely, that his §3599-appointed counsel labored under a conflict of interest—did the Fifth Circuit err when it applied the "miscarriage of justice" standard of *Calderon v. Thompson*, 523 U.S. 538 (1998) and demanded that movant show by clear and convincing evidence that no reasonable juror would have found him eligible for the death penalty?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner ROBERTO MORENO RAMOS, by and through undersigned counsel, petitions the Court for a writ of certiorari to review the judgment of the Court of Appeals for the Fifth Circuit in his case. *Ramos v. Cockrell*, No. 00-40633 (11/10/2018)(per curium unpublished opinion).

OPINIONS BELOW

The Fifth Circuit Court of Appeals denied Mr. Moreno Ramos's Application for Certificate of Appeal from the District Court's denial of his initial §2254 Petition on February 14, 2002. Exhibit 1, *Ramos v. Cockrell*, 2002 U.S. App. LEXIS 28961 (5th Cir. 2002). The Fifth Circuit subsequently denied Mr. Moreno Ramos's Motion to Recall the Mandate on November 10, 2018. Exhibit 2, Opinion .

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves a state criminal defendant's constitutional rights under the Sixth, Eighth, and Fourteenth Amendments.

The Sixth Amendment provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right to . . . have the assistance of counsel for his defense.

The Eighth Amendment provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.
>
> The Fourteenth Amendment provides in relevant part:
>
> . . . nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Mr. Moreno Ramos is scheduled to die today despite the fact that from the moment of his 1992 arrest to the present, no judge, no juror, no fact-finder and no tribunal in the U.S. has considered or given effect to the plethora of mitigating evidence—including serious mental illness, brain damage, and horrific childhood abuse—that could have provided a basis for a sentence less than death.

This case represents the complete and catastrophic failure of every safeguard in place at county, state, and federal levels for the protection of the rights of capital defendants and condemned prisoners.

The decision to take Mr. Moreno Ramos's life was made and has since been repeatedly accepted without any decision-maker at any stage ever engaging in the "constitutionally indispensable"[1] process of considering powerfully mitigating evidence of his cognitive impairment, brain dysfunction, debilitating symptoms of

1 "[I]n capital cases the fundamental respect for humanity underlying the eighth Amendment requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death" *Woodson v. North Carolina*, 428 U.S. 280 (1976).

severe life-long mental illness and childhood characterized by shocking brutality and desperate poverty.

Mr. Moreno Ramos was sentenced to die in a one day penalty phase during which his attorney made no opening statement, cross-examined only one of the state's three witnesses, offered no evidence, presented no witnesses, and made an incomprehensible closing argument in which he never mentioned Mr. Moreno Ramos, never asked the jury to spare his client's life or gave them a single reason to do so.

Subsequent investigation has revealed a compelling and undeniably mitigating life history of the sort this Court has repeatedly found sufficient to establish prejudice under prevailing constitutional norms.

However, by the time this evidence was investigated and developed, it could not be presented to either the state or federal courts through an ineffectiveness claim because it had been previously defaulted by the inexperienced attorney appointed to represent him – over his repeated objections – in both state post-conviction and federal habeas proceedings. Thus, although he has continuously and diligently sought a merits determination on his ineffectiveness claim, Mr. Moreno Ramos's compelling life history has never been considered in deciding the fairness of his death sentence.

In light of his habeas counsel's conflict of interest, Mr. Moreno Ramos

asked the Fifth Circuit to recall its prior mandate to remedy the violation of his statutory right to counsel. *Christeson v. Roper*, 135 S.Ct. 891 (2015); *Tabler v. Stephens*, 591 Fed. Appx. 281 (5th Cir. 2015). *See Martel v. Clair*, ——U.S. ——, 132 S.Ct. 1276, 1286, 182 L.Ed.2d 135 (2012) (under § 3599, courts "have to ensure that the defendant's statutory right to counsel was satisfied throughout the litigation," and, "if the first lawyer developed a conflict," "the court would have to appoint new counsel").

Instead, the Fifth Circuit applied *Calderon v. Thompson*, 523 U.S. 538 (1998), a case addressing recall of a mandate where considerable merits review had actually occurred, and found that he could not meet the miscarriage of justice standard because "mitigating evidence cannot meet the miscarriage of justice standard."

Mr. Moreno Ramos now asks this Court to grant a writ of *certiorari* to clarify whether the *Calderon* standard applies to a non-merits based motion that addresses only the integrity of the habeas proceedings. In the alternative, Mr. Moreno Ramos respectfully requests that the Court summarily reverse and remand his case to the Fifth Circuit for proper analysis of the content of his Motion to Recall the Mandate.

STATEMENT OF FACTS

In March of 1993, Mr. Moreno Ramos was convicted and sentenced to death for the 1992 murders of his wife and two children.

Mr. Moreno Ramos was sentenced to die in a one (1) day penalty phase during which the state presented three (3) witnesses and the defense presented none. His trial counsel had conducted no life history investigation whatsoever. At penalty phase, trial counsel made no opening statement, cross-examined only one of the state's witnesses, offered no evidence and made an almost incomprehensible five page closing argument in which he failed to offer even one reason to oppose a death sentence and never once asked the jury to spare his client's life. Tr. Vol. 84, pp. 76-80. The jury burdened with deciding whether Mr. Moreno Ramos should live or die knew absolutely nothing about the life they were asked to take.

After his direct appeal was denied, he requested, pursuant to then-Article 11.071§ 2(e) of the Texas Code of Criminal Procedure, that one of his current lawyers, Joe Connors, remain on his case for state habeas. Despite the request and favorable findings of fact on the issue by the state district court, the Texas Court of Criminal Appeals (CCA) rejected the request and appointed Kyle B. Welch.

David Schulman, one of Mr. Moreno Ramos's direct appeal lawyers who was heavily involved in the Texas defense bar and knew that Mr. Welch had no experience doing post-conviction work, wrote to the CCA encouraging them to

reconsider, pointing out that Mr. Connors was qualified and more familiar with the case. Exhibit 3, Motion to Reconsider Appointment of Joe Connors.

There was no process for capital certification of counsel at the time and Mr. Welch does not recall how the CCA came to appoint him. He had no experience in capital post-conviction cases. Exhibit 5, Declaration of Kyle Welch. A solo practitioner, Mr. Welch never sought funding for investigative or expert services and never conducted any investigation on his own.

> I did not seek funding for any investigative or expert assistance. I did not have a mitigation specialist, fact investigator, or co-counsel. I did not have any mental health evaluation of Mr. Moreno Ramos. I spoke with the trial counsel in the case but did not conduct any other investigation or interviews. I believe that I met Mr. Moreno Ramos twice, but do not recall the dates or if it was before or after filing the initial state PCR writ application. I did not meet any of Mr. Moreno Ramos's family nor collect primary records regarding his life history and family background.

Exhibit 5, Declaration of Kyle Welch. Mr. Welch developed no extra-record claims because he "did not have the experience, training, assistance, resources or time to do what [was] necessary." He "was simply not equipped to handle this case the way it should have been handled." *Id.*

As Mr. Welch observes:

> I don't know what my understanding was at the time regarding the use of post-conviction litigation to prepare and present extra-record claims. I don't know if the lack of extra-record investigation was because I didn't know it was necessary or because I didn't have the time or resources. I think it must have been a combination of both. But, I do know that the lack of extra-record investigation was not a

> strategic choice on my part. There was no factual or legal reason to avoid investigation of the crime or of Mr. Moreno Ramos's life history. There was no factual or legal reason to avoid conducting a mental health evaluation.

Id.

After missing the first deadline for filing Mr. Moreno Ramos's state habeas application, Mr. Welch sought and was granted an additional ninety days, missed that deadline by two days, and finally filed a twelve (12) page 11.071 Application for Post-Conviction Relief, raising eight (8) entirely record-based claims, none of which were even cognizable in post-conviction and five (5) of which had already been denied on direct appeal. He offered no extra-record evidence.

The CCA issued a fractured opinion holding, for the first time, that the CCA had the authority to excuse a late filing despite the lack of a provision in state statutes. *Ex parte Ramos*, 977 S.W.2d 616 (Tex. Crim. App. 1998). The Court excused counsel's multiple failures to meet filing deadlines, but needed only a few lines to swat this petition away:

> Five claims involving jury selection and a claim involving the court's charge to the jury at the guilt stage of the trial have already been raised and rejected on the direct appeal from this conviction. See *Ramos v. State*, 943 S.W. 2d 358 (Tex.Cr.App. 1996). They will not be addressed on habeas corpus. Two claims concern the court's charge to the jury at the punishment stage of the trial. These claims should have been, but were not, raised on the appeal. Habeas corpus will not lie as a substitute for appeal. *See Ex Parte Gardner*, 959 S.W.2d 189, 198-200 (Tex. Cr. App. 1998). The claims will not be addressed. The application is denied.

977 S.W.2d at 616-17.

In federal district court, Mr. Welch was again appointed as Mr. Moreno Ramos's counsel for habeas and filed a §2254 petition on April 2, 1999. This time, the habeas petition was 15 pages long but it raised the exact same eight claims raised in the state habeas petition, albeit arranged in a different order. All of the claims were record-based, and no investigation had been conducted. On May 2, 2000, District Judge Filemon Vela adopted the report and recommendations of the magistrate and denied relief. *Ramos v. Johnson*, No. M-99-134 (S.D. Tex.) (Doc. 15).

Upon denial of COA in the district court, Mr. Welch sought a COA from the Fifth Circuit. After briefing was complete but before argument or resolution, Mr. Welch accepted a position in the Office of the Federal Defender and filed a motion to withdraw. Larry Warner and David K. Sergi were appointed as co-counsel to replace Mr. Welch on May 31, 2001. *Ramos v. Johnson*, No. M-99-134 (S.D. Tex.) (Doc. 20).

Within 90 days of their appointment, Sergi and Warner had identified a problem in the appointment of Welch, secured sealed documents from the CCA via a Motion to Compel and, during oral argument in the Fifth Circuit on the COA application filed by Welch before his withdrawal, raised their concerns. The Fifth Circuit ordered them to file a post-argument brief. In that Letter Brief, Sergi and

Warner counsel asked the Fifth Circuit to remand the case back to the District Court to determine whether Mr. Moreno Ramos's original counsel of choice, Joe Connors from his direct appeal team, would have raised additional claims not raised by Mr. Welch. Exhibit 4, Post-Argument Letter Brief (08/31/2001).

The Fifth Circuit denied the request and the application for COA was denied. *Ramos v. Cockrell*, No. 00-40633 (5th Cir. Feb. 14, 2002) (per curiam).

At this point, Mr. Moreno Ramos had been in custody for over a decade, had at least three sets of lawyers, and still no one had conducted any life history investigation. From the date trial counsel was appointed through the Fifth Circuit's denial of a certificate of appealability in Mr. Moreno Ramos's first federal habeas proceedings, no attorney collected any life history records or evidence, interviewed family or friends, or consulted with any potential penalty phase experts on Mr. Moreno Ramos's behalf.

Having no mechanism for raising additional claims, Mres. Warner and Sergi sought a writ of *certiorari* to this Court in which they included a question regarding the CCA process of appointing Mr. Welch. Pet. For Certiorari, No. 02-5315, filed May 14, 2002.

In early 2003, the Government of Mexico initiated the *Avena* case in the International Court of Justice on behalf of 54 Mexican nationals who had been sentenced to death in state criminal proceedings in the United States. As part of

that litigation, Mexico investigated Mr. Moreno Ramos's social history and consulted experts about his mental health. This investigation revealed a wealth of mitigating evidence including neglect, physical and emotional abuse, trauma, the diagnosis of a debilitating major mood disorder (bipolar), and organic brain damage.

Although at the time there was no procedural vehicle available to raise a freestanding Sixth Amendment claim of ineffective assistance of trial counsel (due to Welch's failure to raise it in the initial state habeas proceeding), Mr. Moreno Ramos, in litigating his *Avena* issue, alerted every court at every stage about the failures of his trial counsel and that he had suffered catastrophic prejudice as a result.

The prejudice arising from the VCCR violation was described as denying Mexico the opportunity to assist by "ensuring that trial counsel was effective", relying upon *Williams v. Taylor*, 529 U.S. 362, 396 (2000); *Wiggins v. Smith*, 539 U.S. 510 (2000); *Lewis v. Dretke*, 355 F.3d 364, at 368 (5th Cir. 2003) to apply the prejudice analysis used in ineffectiveness of capital trial counsel to the VCCR violation; and supported by the same compelling mitigation case set out here. *Subsequent Petition for Writ of Habeas Corpus*, (Doc. 1) 7:07-cv-00059 (SDTX, 03/15/2007) at 42-47.

Mr. Moreno Ramos provided every court in which he was able to urge his

Avena claim with an offer of proof of that prejudice. Repeatedly, Mr. Moreno Ramos put state and federal courts on notice of these same facts – that his trial counsel presented no penalty phase case; that significant mitigation existed which could have been developed; and that evidence would have made a difference. *Subsequent Petition for Writ of Habeas Corpus*, (Doc. 1) 7:07-cv-00059 (SDTX, 03/15/2007); Brief of Appellant, No 08-70044 (5th Cir. 2009); *Amended Petition For Writ of Habeas Corpus*, (Doc. 24), 7:07-CV-00059 (SDTX, June 29, 2010).

And at every juncture the State of Texas urged those courts to disregard the unfolding tragedy and refuse to consider the merits. Over and over, Texas argued that no court should review the merits of Mr. Moreno Ramos's claims or conduct any analysis of the prejudice he suffered as a result of having no defense in the penalty phase of his capital trial when so much mitigating evidence was readily available.

This is particularly disturbing given that the state assured Mr. Moreno Ramos and this Court that he would receive such review, and also made such representations to this Court in opposing federal review of defaulted claims:

> This recommendation is consistent with the State of Texas's pledge to the United States Supreme Court that, in federal habeas proceedings brought by defendants subject to *Avena* who have not already received "review and reconsideration" of their claims that they were prejudiced by violations of the Vienna Convention, **the State will join such defendants in requesting that courts provide merits review of those claims.** See Medellin v. Texas, Nos. 08-5573, 08A98, Respondent's Brief in Opposition, at 20-21 ("[a]s an act of comity, if

> any such individual should seek review in a future federal habeas proceeding, the State of Texas will not only refrain from objecting, but will join the defense in asking the reviewing court to address the claim of prejudice on the merits, as courts have done for Medellin").

Brief of Respondent-Appellee, *Ramos v. Thaler*, 08-70044 at 14-15 (emphasis added).

But after thus inducing Mr. Moreno Ramos to seek a Stay of Proceedings in the Fifth Circuit so he could obtain that promised review, *Unopposed Motion to Reopen Judgment Pursuant to Fed. R. Civ. Pro. 60(B)*, 7:07-CV-00059 (Doc. 19), Respondent reversed course upon return to the District Court, asserting that "the *Avena* bar to applying procedural defaulted rules to Article 36 claims does not apply to 28 U.S.C. § 2244(b)(3). A court of appeals' authorization to file a successive federal petition is a jurisdictional requirement that cannot be waived and does not concern exhaustion of local remedies. Without Fifth Circuit authorization, this Court cannot hear this case." Motion to Dismiss, 09/19/2007, TXSD 7:07-cv-0059.

Mr. Moreno Ramos's non-successive, second-in-time petition (raising the international law issues) was still pending in federal district court in 2013 when this Court decided *Trevino v. Thaler*, 569 U.S. 413 (2013). Within **two days**, Mr. Moreno Ramos had filed a proposed amendment attaching all the mitigating evidence that had been discovered and requesting leave to Amend. Motion for Leave to Amend (Doc. 38) and Amended Petition (Doc. 39), 7:07-CV-00059

(SDTX, 2013).

Because the State had represented to the Supreme Court that *Trevino*-type subsequent applications could be heard by the CCA (arguing federal oversight unnecessary because Texas courts "have proven willing to forgive or ignore procedural defaults in response to developments in federal-habeas doctrine." Brief for the Respondent, *Trevino v. Thaler*, No. 11-10189, 2013 WL 179940 at *59 (Jan. 14, 2013)), Mr. Moreno Ramos sought leave to return to state court for merits determination of his claim. The State opposed and the District Court denied this request. On appeal, those same facts, arguments and exhibits were presented to the Fifth Circuit. *Application for a Certificate of Appealability and Brief in Support,* Doc. 00513283469 at pp. 37-45, *Ramos v. Davis*, No. 08-70044 (5th Cir. 11/23/2015). Mr. Moreno Ramos was denied COA, *Ramos v. Davis*, No. 08-70044 (5th Cir. 11/23/2015) Doc. 00513575680, and this Court denied certiorari on May 15, 2017.

In the past week, Mr. Moreno Ramos has filed a Motion to Recall the Mandate and Motion to Stay the Execution the Fifth Circuit (the subject of this Petition), as well as an Application for Post-Conviction Writ of Habeas Corpus, a Suggestion that the Court on its Own Motion Reopen the Case, and a Motion to Stay the Execution in the Texas Court of Criminal Appeals. Each of those requests was denied. *Ex parte Roberto Moreno Ramos,* Tex. Crim. App. No. WR-35,938-

03 (orders filed Nov. 11, 2013).

Thus, as observed by Judge Elsa Alcala of the Texas Court of Criminal Appeals, Mr. Moreno Ramos has "a potentially meritorious claim concerning the violation of [his] Sixth Amendment right to counsel has never been reviewed on its merits by any court". *Id.* dissenting opinion of Judge Alcala, at 10.

Mr. Moreno Ramos has a compelling constitutional claim that has gone unheard and unresolved for want of a procedural vehicle, not for lack of diligence on his part.

In light of these "extraordinary circumstances", Mr. Moreno Ramos asked the Fifth Circuit to exercise its inherent authority to recall its mandate to "prevent injustice". *U.S. v. Emeary*, 794 F.3d 526 at 528 (5th Cir. 2015) (quoting *Goodwin v. Johnson*, 224 F.3d 450, 459 (5th Cir. 2000)). Rather than conduct the analysis required by Fifth Circuit's rules for inquiries that do not revisit the merits of the case, *see* 5th Cir. R. 41.2, instead the panel applied this Court's holding in *Calderon v. Thompson*, 523 U.S. 538 (1998). According to the Fifth Circuit, although Mr. Moreno Ramos raised a challenge to the integrity of the process and did not seek to revisit any merits determination, the Fifth Circuit required that he meet the "miscarriage of justice" standard by showing "'by clear and convincing evidence' that no reasonable juror would have found him eligible for the death penalty.'" (citing *Calderon* at 559-60 (quoting *Sawyer v. Whitley*, 505 U.S. 333, 348 (1992))).

The panel further relied upon this Court's holding in *Bell v. Thompson*, 545 U.S. 794, 812 (2005) to conclude that mitigating evidence can never meet that standard.

REASONS FOR GRANTING THE WRIT

The Fifth Circuit's application of *Calderon* in Mr. Moreno Ramos's case is in direct conflict with this Court's holdings in *Calderon* and *Gonzales v. Crosby*, 545 U.S. 524 (2005), as is readily apparent from the opinion below. If let stand, the Circuit Court's improper interpretation of *Calderon* would result in incongruous results among similarly situated defendants. Allowing Mr. Moreno Ramos to go to his death without any decision-maker having ever engaged in individualized sentencing and without ever having received any merits consideration of his substantial claim of ineffective assistance of trial counsel undermines the reliability of the death penalty and the public's confidence in the fair application of the ultimate punishment. Quite simply – this isn't supposed to happen.

The significance of the questions presented today is not even whether the mitigating circumstances of Mr. Moreno Ramos's life should prohibit his execution, but whether at least someone along the way should have the evidence in support of those circumstances squarely in front of them to consider without procedural obstacles blocking their view. Mr. Moreno Ramos is not asking for his second or third bite at the apple; he's still waiting for his first.

As this Court has recognized, a "prisoner's inability to present a claim of trial error is of particular concern when the claim is one of ineffective assistance of counsel. The right to the effective assistance of counsel at trial is a bedrock principle in our justice system." *Martinez v. Ryan*, 566 U.S. 1, 12 (2012). And where the facts are as egregious of these, review is the most crucial.

The Fifth Circuit Erred in Applying *Calderon.*

The circuit courts of appeals have an inherent power to recall their mandates. *See Hazel-Atlas Glass Co. v Hartford-Empire Co.,* 322 U.S. 238 (1944). This broad power can only be exercised in extraordinary circumstances and, in habeas cases, is circumscribed by the AEDPA. *Calderon v. Thompson*, 523 U.S. 538 (1998).

This does not mean, however, that the *Calderon* "miscarriage of justice" standard should be blindly applied to any request seeking to recall the mandate as the Fifth Circuit did below. Rather than properly examine the request to determine whether the motion was inconsistent with the policies advanced by the AEDPA, the Fifth Circuit merely noted that it involved the recall of the mandate and declared the *Calderon* standard must apply.

Mr. Moreno Ramos's request was not of the sort prohibited in *Calderon.* Not only did it confine itself to the first federal habeas petition, but it also was directed to a nonmerits aspect of the first federal habeas proceeding. Nothing in *Calderon*

suggests that such a filing contravened the AEDPA. If that conclusion were not clear enough from the *Calderon* opinion itself, this Court's subsequent decision in *Gonzalez v. Crosby*, 545 U.S. 524 (2005) removed any doubt. Although that case examined a Rule 60(b) motion, this Court addressed its previous holding in *Calderon:*

> [C]ompliance with the actual text of AEDPA's successive-petition provision was not at issue in *Calderon*-because the Court of Appeals considered only the claims and evidence presented in Thompson's first federal habeas petition. *Calderon* did state, however, that "a prisoner's motion to recall the mandate *on the basis of the merits* of the underlying decision can be regarded as a second or successive application." But that is entirely consonant with the proposition that a Rule 60(b) motion that seeks to revisit the federal court's denial *on the merits* of a claim for relief should be treated as a successive habeas petition. The problem for respondent is that this case does not present a revisitation *of the merits.* The motion here, like some other Rule 60(b) motions in §2254 cases, confines itself not only to the first federal habeas petition, but to a nonmerits aspect of the first federal habeas proceeding. Nothing in *Calderon* suggests that entertaining such a filing is "inconsistent with" AEDPA.

Gonzalez v. Crosby, at 533–34 (internal citations omitted).

Mr. Moreno Ramos's motion is not the equivalent of a successive habeas petition. He asked the Circuit Court to recall the mandate not because the merits of the case were wrongly decided as in *Calderon*, but because the conflict of appointed counsel undermined the very process by which that determination was made. His argument is not rearguing the merits; it is "calling into question the very legitimacy of the judgment" of this Court. *Calderon v. Thompson*, 538 U.S.

538, 557 (1998). A motion that "attacks, not the substance of the federal court's resolution of a claim on the merits, but some defect in the integrity of the federal habeas proceedings, "does not contravene the strictures of the AEDPA and is not subject to a heightened gate-keeping requirement." *Gonzalez*, 545 U.S. at 532.

The considerations outlined by this Court in *Calderon* as "necessitating a strong showing of actual innocence" *id.* at 557, do not apply here. It is not the case that Mr. Moreno Ramos had "already had extensive review of his claims in federal and state courts." *Calderon* at 557 (citing *Murray v. Carrier* 477 U.S. 478 at 496 (1986)).

Mr. Moreno Ramos requested that the circuit recall its mandate to correct a defect in the integrity of the proceedings: the fact that he was represented by conflicted counsel. His request did not raise a new claim nor did it seek redetermination on the merits of an old one; it merely sought to remedy a defect in the integrity of the § 2254 proceeding. The Fifth Circuit's ruling plainly and directly contradicts this Court's precedent.

Recall of a mandate is appropriate to remedy violations of the Criminal Justice Act and to ameliorate conflicts of interest.

Where a court-appointed attorney's failure results in the deprivation of the client's statutory right to assistance, a court of appeals should recall the mandate to "ensure that lawyers appointed to aid indigents discharge their responsibilities fairly…" *Wilkins v. United States*, 441 U.S. 468, 470 (1979). In other words, recall

of a mandate is appropriate because "Court of Appeals should make appropriate relief available so that defendants are not disadvantaged by the failures in representation by CJA counsel." *Taylor v. United States,* 822 F.3d 84, 92 (2d. Cir. 2016) (quoting *Nnebe v. United States*, 534 F.3d 87 (2d Cir. 2008)).

Furthermore, even in non-CJA cases, recall of a mandate is warranted where a party's counsel was laboring under a conflict of interest. *See e.g. Calloway v. Marvel Entertainment Group*, 854 F.2d 1452, 1475-76 (2d Cir. 1988) (holding that because a party was represented by an attorney with a conflict of interest, the "danger of a manifest injustice therefore exists and we recall the mandate…"), reversed on other grounds at 110 S.Ct. 456 (1989).

Mr. Moreno Ramos's initial § 2554 proceedings were comprised because he was deprived his statutory right to conflict-free counsel under 18 U.S.C. § 3599. There is no question that Mr. Moreno Ramos's habeas attorney labored under a conflict of interest during his representation of Mr. Moreno Ramos. Because such a conflict irreparably damages the integrity of the proceedings the Fifth Circuit should have recalled the mandate and allowed remedial action.

Denying Mr. Moreno Ramos Representation by Unconflicted Counsel Would Result In Incongruent Results Among Similarly Situated Defendants.

Courts have long recognized that a mandate should be recalled "where there is a danger of incongruent cases pending at the same time." *United States v.*

Tolliver, 116 F.3d 120 (5th Cir. 1997) (citing *American Iron & Steel Inst. v. Environmental Protection Agency*, 560 F.2d 589, 594 (3d Cir. 1977) and *Greater Boston Television Corp. v. F.C.C.*, 463 F.2d 268, 278 (D.C. Cir. 1971)). Although many cases (such as *Tolliver*) involve disparate treatment of codefendants, the rule has much broader application and has been used to "avoid any injustice due to intracircuit conflict." *Greater Boston*, 463 at 279. It is therefore appropriate in a case like Mr. Moreno Ramos's to recall the mandate to "achieve the like treatment of defendants in like situations." 16 Wright & Miller § 3938, p 880.

Should this Court decline to address the injustice in Mr. Moreno Ramos's case, he will likely be the only current Texas death row inmate who was deprived the benefit of his statutory right to conflict-free counsel. Capital petitioners who are currently pending in federal habeas or who have not yet sought § 2254 relief are now guaranteed to have at least one conflict-free counsel in federal habeas proceedings. In the few cases where relief had already been denied in district court, this Court provided a remedy. *See Tabler v. Stephens*, 591 Fed. Appx. 281 (5th Cir. 2015) ("Because Tabler's attorneys for his state habeas proceedings were also his attorneys for his federal habeas proceedings, they faced a conflict of interest that could have prevented them from arguing that their performance in Tabler's competency hearing was deficient, and, accordingly, Tabler's statutory right to counsel was violated….We hereby VACATE IN PART the district court's

judgment and REMAND the case to the district court…"); *Mendoza v. Stephens,* 783 F.3d 203 (5th Cir. 2015) (appointing new counsel and remanding for further proceedings); *Speer v. Stephens,* 781 F.3d 784 (5th Cir. 2015) (appointing supplemental counsel and remanding).

Other circuits have also appointed independent counsel in federal habeas even after a district court denial. *See e.g. Juniper v. Davis,* 737 F.3d 288 (4th Cir.2013); *Gray v. Pearson,* 526 Fed.Appx. 331 (4th Cir.2013).

Mr. Moreno Ramos was deprived his right to conflict-free counsel in his initial federal habeas proceedings. Like *Tabler*, *Speer*, and *Mendoza*, Mr. Ramos's § 2254 was litigated solely by an attorney with an indisputable conflict of interest. Should this Court refuse to intervene, he will be executed despite the fact that every other similarly-situated Texas death row inmate was treated differently.

Contrary to the Panel's Description, Mr. Moreno Ramos Only Obtained Conflict-Free Counsel Just Before Argument on COA in the Fifth Circuit. They Immediately Tried to Add the IAC Claim But Were Rebuffed.

The panel points out that Mr. Moreno Ramos sought remedies pursuant to *Trevino/Martinez* and *Speer/Mendoza* and that "[w]hen these cases were decided, however, [Mr. Moreno] Ramos was in fact represented by conflict-free counsel" Opinion at 3. It is unclear exactly what the panel meant by this assertion, but if the implication is that Mr. Moreno Ramos should have taken advantage of *Trevino/Martinez* but did not, that is incorrect. As set out above, he sought leave

to amend his second-in-time non-successive application then pending before the district court just two days after this Court handed down its ruling in *Trevino*. If the panel meant to suggest that substitute counsel could have raised his trial ineffectiveness claim when appointed in 2001, that is incorrect as the district court had already ruled and the Application for COA had already been submitted in the Fifth Circuit when unconflicted counsel as appointed. If the panel meant to suggest that substitute counsel did not attempt to remedy the situation, that is also not true as – despite the procedural barriers in his way – substitute counsel did ask the Fifth Circuit to remand specifically to determine if another counsel would have raised additional claims in the 2254 petition and the Fifth Circuit denied that request. Exh. 4, *Letter brief* (08/31/2001).

This motion could not have been made previously. Judge Owen explained this well in *Mendoza v. Stephens*, 783 F.3d 203 (5th Cir. 2015)*:*

> Clearly, Mendoza bears no responsibility for the fact that his appointed federal habeas counsel also served as his state habeas counsel…At the time [habeas counsel] was appointed, the Supreme Court's decision in *Coleman v. Thompson* governed…[U]ntil the Supreme Court issued its opinion in *Martinez,* this circuit had consistently held that ineffective assistance of state habeas counsel could not establish such cause…However, our Circuit held thereafter in *Ibarra v. Thaler,* and other cases that *Martinez* did not apply to Texas habeas proceedings. Had Mendoza filed a motion for additional counsel in federal district court, that court would have been required by then-extant Fifth Circuit precedent to deny the motion. That was the state of the law in this circuit [until May 28, 2013].

*Id.*at 209 (Owen, Circuit Judge, concurring).

But, in fact, substitute counsel tried anyway, and in less than 90 days had provided this court with documentation of the same facts set out in the Motion to Recall at 6 (that Mr. Moreno Ramos requested that direct appeal counsel Joe Connors remain counsel for post-conviction but the CCA appointed Mr. Welch over his objection, that David Shulman sought reconsideration and the CCA denied it), complained that the removal of Mr. Connors violated Mr. Moreno Ramos's Sixth Amendment rights; alleged that Mr. Connors "would have done many things differently and raised issues not raised by Mr. Welch"; and sought remand for an evidentiary hearing. Exhibit 4, *Letter Brief* (8/31/2001), at 5.

Given the state of the law at the time, counsel focused primarily on the allegation that the state court violated the Sixth Amendment by refusing to continue the appointment of Mr. Connors and their belief that certain documents were unavailable to them. Nonetheless, they also cited constitutional provisions and caselaw supporting the rights later recognized in *Trevino*. *See Id.* (asserting a Sixth Amendment violation where that guarantee includes "four rights 1. Right to counsel; 2. Right to effective assistance of counsel; 3. Right to preparation sufficient to ensure a minimal level of quality of counsel; and 4. Right to be represented by counsel of one's own choice."; Motion to Reconsider Remand (7/25/2001) (citing *Martinez v. Johnson*, 255 F.3d 229, 239 (5th Cir. 2001), a case where the Fifth Circuit was asked to decide whether a defaulted IAC claim could

be excused by "state habeas counsel's damaging ineffectiveness, which precluded him from demonstrating his trial counsel's ineffectiveness at the punishment stage…").

Counsel requested the very remedy later recognized by the Fifth Circuit in *Tabler*. *See* Exh. 4 *Letter Brief* (8/31/2001) ("in light of the constitutional violations that have occurred, Mr. Ramos must be given the opportunity to start anew in state court, or alternatively, this Court appoint Mr. Connors to now raise state habeas issues which are otherwise barred in this federal habeas matter.")

The record before the Fifth Circuit at the time would have supported the same result as in *Tabler:*

- the Court knew that Mr. Moreno Ramos was represented in federal habeas by the same lawyer appointed in state habeas; and
- the Court had before it the Texas court's opinion wherein the CCA explicitly stated that counsel had raised no cognizable claims and that they would not address the application.

In light of current law, Mr. Moreno Ramos would be entitled to appointment of unconflicted counsel and a remand. *United States v. Coleman*, 997 F.2d 1101, 1104 (5th Cir. 1993) ("The district court had the authority and duty to inquire *sua sponte* into whether counsel should not serve because of a conflict with another client."). Mr. Moreno Ramos merely requests fairness: to be treated like similarly-situated petitioners.

Like the movant in *Mendoza*, Mr. Moreno Ramos is not asking the Court to

"decid[e] at this juncture whether there is cause to excuse a default of a potentially legitimate ineffective assistance of trial counsel claim. [Movant] argues only that he is entitled to conflict-free counsel to determine whether there is such a claim." *Id*. at 209 (Owen, Circuit Judge, concurring).

Mr. Moreno Ramos Has Substantial Claim Of Trial IAC That Will Never Get Review.

Because Mr. Moreno Ramos did not have conflict-free federal habeas counsel, the very basis of the adversarial system was undermined. The law is clear that in such a situation, the existence of a remedy does not hinge on a showing of prejudice. *See Satterwhite v. Texas*, 486 U.S. 249, 256 (1988) ("Since the scope of a violation such as a deprivation of the right to conflict-free representation cannot be discerned from the record, any inquiry into its effect on the outcome of the case would be purely speculative.").

The record is clear that trial counsel did no social history investigation, did not hire a mitigation investigator, and **presented not a single witness in punishment phase**. It is beyond dispute that trial counsel's performance in Mr. Moreno Ramos's case fell below an objective standard of reasonableness. Mr. Moreno Ramos's trial counsel conducted no mitigation investigations in preparation for his capital trial, a clear violation of their Sixth Amendment duties[2].

2 *See Williams v. Taylor*, 529 U.S. 362, 396 (2000) (trial counsel has an "obligation to conduct a thorough [mitigation] investigation of the defendant's

Had trial or post-conviction counsel conducted a life history investigation, they would have discovered the heart-breaking story of a child born in rural Mexico and raised into a life of crippling poverty, nutritional deprivation, brutal violence, and a multi-generational history of mental illness. All of the life history evidence developed by subsequent counsel is clearly relevant to Mr. Moreno Ramos's case and it is clearly of the type which supports habeas relief. Accordingly, Mr. Moreno Ramos's claims are not clearly meritless but rather are substantial.

None of these facts were ever discovered by trial counsel. None were ever presented to the jury that sentence Mr. Moreno Ramos to die. None were discovered or developed by counsel in Mr. Moreno Ramos's initial state and federal post-conviction proceedings. And no court has yet provided any merits review of the serious constitutional issues raised by these facts.

By the time Mr. Moreno Ramos met a mitigation specialist for the very first time, virtually all of his substantive constitutional rights had been waived, defaulted or trampled by counsel he had no hand in choosing.

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background); *Wiggins v. Smith*, 539 U.S. 510 (2003) (failure of trial counsel to investigate defendant's background and present mitigating evidence violated Sixth Amendment right to effective assistance of counsel); *Rompilla v. Beard*, 545 U.S. 374 (2005) (same); *Lewis v. Dretke*, 355 F.3d 364, 368 (5th Cir. 2003) ("It is axiomatic – particularly since *Wiggins* – that [the decision not to present mitigating evidence] cannot be credited as calculated tactics or trial strategy unless it is grounded in sufficient facts, resulting in turn from an investigation that is at least adequate for that purpose.").

Mr. Moreno Ramos is aware there are other procedural issues that he must address. Further litigation is, however, not plainly futile. Even where there are "a host of procedural obstacles to having a federal court consider his habeas petition", Mr. Moreno Ramos is entitled to one full and fair opportunity "and is entitled to the assistance of substitute [non-conflicted] counsel in doing so." *Christeson v. Roper*, 135 S.Ct. 891, 895-96. (2015).

The Catastrophic Failure Of Safeguards in Mr. Moreno Ramos's Case Undermines Confidence In The Fair Application of the Death Penalty

Mr. Moreno Ramos's case is extraordinary in several respects. The unfortunate timing of his appeals and post-conviction review caused him to miss fail-safe protections, in both state and federal court, that were subsequently implemented in cases decided after his. Given what occurred in his habeas proceedings, the risk of undermining the public's confidence in the judicial process is great. In considering the risk of injustice in a case, "[w]e must continuously bear in mind that 'to perform its high function in the best way 'justice must satisfy the appearance of justice.'" *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 864, (1988) (quoting *In re Murchison*, 349 U.S. 133, 136, (1955) (citation omitted)).

Although federal court proceedings often provide a backstop, a failsafe for when the state process goes awry, Mr. Moreno Ramos's case fared no better in

federal habeas. Because he was appointed the same attorney he had in state habeas (who proceeded to raise the same meager record-based claims) there was very little litigation in federal habeas. Mr. Moreno Ramos's case had completed the initial habeas proceedings well before *Trevino* was decided and, therefore, he was not afforded the protections litigants received who arrived in federal court at a later date. As discussed above, there is really no principled way to distinguish these cases (i.e. *Tabler*, *Speer*, and *Moreno*): Mr. Moreno Ramos's sole counsel had a clear conflict, his conflicted counsel failed to engage in the basic tasks required of post-conviction counsel, and substantial claims of trial IAC were neglected. There is no question that if Mr. Moreno Ramos appeared before the Fifth Circuit today, he would be entitled to appointment of supplemental counsel and a remand.

It is an additional cruel irony that the utter ineffectiveness of his state habeas counsel is one obvious reason he has been precluded from availing himself of other subsequent remedies. Had his habeas lawyer been even a little less ineffective and merely alleged defaulted bare-bones allegations of trial ineffectiveness, it is possible that Mr. Moreno Ramos could later have proceeded under Rule 60(b). *See Buck v. Davis*, 137 S.Ct. 759 (2017); *Balentine v. Stephens*, 553 Fed. Appx. 424 (5th Cir. 2014); *Barnett v. Roper*, 941 F.Supp. 2d. 1099 (E.D. Mo. April 22, 2013). However, because his counsel only filed record-based, direct appeal claims, the only avenue available to avoid this injustice is recalling the initial mandate.

The recent changes in state and federal procedural law which demonstrate that Mr. Moreno Ramos's claim would either be allowed further proceedings in state court or, at the very least, not precluded federal review, weigh against the continued enforcement of what has become an inequitable judgment in Mr. Moreno Ramos's case. The concerns of comity underlying the previous judgment no longer exist. Nor does the state have a legitimate interest in the finality of a death sentence obtained in violation of the Sixth Amendment and protected through a flawed habeas process. In such circumstances, Mr. Moreno Ramos is entitled to the equitable remedy he seeks: access to at least one review of the constitutionality of his death sentence.

Whatever the process, whatever the particularities, the decision to impose the death penalty must be made "fairly, and with reasonable consistency, or not at all." *Eddings v. Oklahoma*, 455 U.S. 104 at 112, (1982). But, Mr. Moreno Ramos's sentence was imposed under conditions that pose the "intolerable risk that 'the death penalty will be imposed in spite of factors which may call for a less severe penalty.'" *Callins v. Collins*, 501 U.S. 1141, 1150 (1994)(Blackmun, J. dissenting) (quoting *Lockett v. Ohio*, 438 U.S. 586 at 604-605 (1978)).

Despite more than two decades of litigation in state and federal courts, including more than a dozen lawyers and thousands of pages of pleadings, no jury, no judge, no court has ever considered the question of the appropriate punishment

for Mr. Moreno Ramos specifically as "uniquely individual human being," rather than just "a member of a faceless, undifferentiated mass" of those convicted of death-eligible crimes. *Woodson v. North Carolina*, 428 U.S. 280 at 304 (1976).

This Court does not have to allow Mr. Moreno Ramos to fall through the entire state and federal legal system without ever having *any opportunity* to raise and litigate clear constitutional infirmities in his trial, without having received any reasoned opinion on the constitutionality of his trial counsel's representation, whether trial counsel's deficient representation prejudiced him, and whether timely intervention by the Mexican government could have prevented or corrected said prejudice.

The various procedural obstacles to consideration of Mr. Moreno Ramos's claims are designed for the purpose of insuring that parties raise their claims in a timely fashion, that litigants do not waste court resources through piecemeal litigation doling out their complaints one at a time, that defendants are motivated to give state courts the first "bite at the apple." They are not meant to collide in such a fashion that a death row prisoner is given not one single forum for presentation and consideration of substantive and troubling questions regarding the constitutionality of his sentence.

Mr. Moreno Ramos has not abused the process by "laying behind the log", filing "piecemeal" litigation or bombarding the courts with "frivolous claims." His

is not the sort of plea meant to be filtered out by procedural bars. To suggest that a brain-damaged, mentally ill, undocumented Mexican national laborer unfamiliar with the American justice system and denied the assistance of his government made choices regarding what evidence to develop and present at trial or what claims to raise in state and federal post-conviction proceedings – to imply that he parsed Byzantine procedural rules that leave scholars and justices baffled to devise a wily scheme for defeating the ends of judicial economy, and spent twenty years deviously orchestrating this plan from his cell on Texas' death row – is to simply abandon any pretense of a fair and equitable death penalty and "retreat the field". *Callins v. Collins*, at 1156 (Blackmun, J., dissenting).

CONCLUSION AND PRAYER FOR RELIEF

This Court should review the Fifth Circuit's judgment denying Mr. Moreno Ramos's motion to recall the mandate, grant certiorari and summarily reverse the decision below; or grant such other relief as justice requires.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified in the Notice of Electronic Filing, this 14th day of November, 2018.

/s/ Danalynn Recer
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