NO. 18A512

In The
UNITED STATES SUPREME COURT

ROBERTO MORENO RAMOS,
Petitioner,

v.

STATE OF TEXAS,
Respondent.

On Petition for Writ of Certiorari to the Texas Court of Criminal Appeals

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PETITION FOR A WRIT OF CERTIORARI

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

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QUESTIONS PRESENTED

When a State chooses to create a mechanism for post-conviction relief, what due process is required to afford a habeas applicant an adequate and effective opportunity to present a claim of trial ineffectiveness in his initial collateral review?

Did the Texas Court of Criminal Appeals violate Mr. Moreno Ramos's due process rights when in applied unfair and arbitrary procedures to deny him any opportunity for review of his substantial trial ineffectiveness claim?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner ROBERTO MORENO RAMOS, by and through undersigned counsel, respectfully requests that this Court issue a writ of certiorari to review the opinion and judgment of Texas Court of Criminal Appeals.

OPINIONS BELOW

The Texas Court of Criminal Appeals' order in *Ex parte Moreno Ramos* No. WR-35,938-03, dismissing Mr. Moreno Ramos's application for a writ of habeas corpus as "an abuse of the writ" is attached as Appendix 1. Judge Alcala's dissent noting that a "possibly meritorious claim concerning the violation of applicant's Sixth Amendment right to counsel has never been reviewed on its merits by any court" is included.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1257(a).

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

Before wading into the tangled procedural complexities of this case, one simple and plain truth must be established at the outset:

The individualized sentencing required by the Supreme Court as an essential prerequisite to allow the imposition of the death penalty has never occurred in this case.

To say so is not exaggeration or hyperbole. The problem is not that consideration of Mr. Moreno Ramos' "diverse frailities" was limited or incomplete or poorly done or that undersigned disagrees with the result. What must be understood before going farther is that such a process never happened at all.

However defensible each of the procedural blows propelling Mr. Moreno Ramos through the system might have been on its own at the time, the cumulative result has been that the decision to take his life was made and repeatedly accepted without any of the decision-makers ever engaging in the "constitutionally indispensable"[1] process of considering powerfully mitigating evidence of his cognitive impairment, brain dysfunction, debilitating symptoms of severe life-long mental illness and childhood characterized by shocking brutality and desperate poverty.

Texas' authority to execute a capital defendant is conditioned upon providing "a system of capital punishment at once consistent and principled but also humane and sensible to the uniqueness of the individual." *Eddings v. Oklahoma*, 455 U.S. 104 at 110, (1982). 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*, 455 U.S. 104 at 112 (1982).

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).

But, Mr. Moreno Ramos' 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,* 428 U.S. at 304.

Tragically, this case represents a bizarre and catastrophic failure of the multiple redundant backup systems we would like to believe we have in place.

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.

As indefensible as it was, trial counsel's performance, by itself, would not result in an unconstitutional execution. The State of Texas has created 11.071 post-conviction writs as a vehicle for redressing such failures and insuring that no capital defendant goes to his death without the individualized consideration required by the Eighth Amendment. The statute

provides for the appointment of new counsel to review the performance of trial counsel and develop extra-record evidence to make sure the courts have an opportunity to consider anything trial counsel failed to put before the jury.

Unfortunately, that safety net failed Mr. Moreno Ramos just as completely as the trial process, leaving him constructively unrepresented in the initial state and federal habeas petitions that set the stage for everything that has happened since.

The Court of Criminal Appeals appointed Kyle B. Welch to represent Mr. Moreno Ramos in post-conviction proceedings. There was no process for capital certification of counsel at the time and Mr. Welch doesn't recall how the CCA came to appoint him. He had no experience in capital post-conviction cases. Exhibit 15 to application filed below, Declaration of Kyle Welch.

A solo practitioner appointed to his first capital post-conviction case, 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' family nor collect primary records regarding his life history and family background.

Exhibit 15 to application filed below, Declaration of Kyle Welch.

Mr. Welch developed no extra-record claims. This failure was not a strategic decision on the part of the defense. 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' life history. There was no factual or legal reason to avoid conducting a mental health evaluation.

Exhibit 15 to application filed below, Declaration of Kyle Welch.

After missing the first deadline for filing Mr. Moreno Ramos' 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.

The CCA 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.

Ex parte Roberto Moreno Ramos, 977 S.W.2d 616, 616-17 (Tex. Crim. App. 1998).

It is not the case that Mr. Welch considered and rejected the claims subsequently presented on behalf of Mr. Moreno Ramos. The petitions he produced were not the product of "informed strategic choices" of counsel or the defendant. *Strickland v. Washington*, 466 U.S. 664 at 691 (1984). Mr. Welch was disserved by the CCA, given the burden of defending Mr. Moreno Ramos in life-and-death proceedings for which he was untrained, without guidance or assistance and had only nine months to prepare. Exhibit 15 to application filed below ,Declaration of Kyle Welch.

Mr. Welch filed eight record-based claims not cognizable in post-conviction 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." Exhibit 15 to application filed below, Declaration of Kyle Welch.

The notion of holding Mr. Moreno Ramos responsible for the failures of appointed counsel is even more horrifying given that Mr. Moreno Ramos and his direct appeal counsel had both vehemently opposed the appointment of Mr. Welch, alerted the CCA to his lack of experience, and petitioned to have him removed. Exhibit 15 to application filed below, Declaration of Kyle Welch.

Even such disturbing systemic failures of the state are not without redress in a capital case, however. The purpose of 18 U.S.C. 2254 is to insure that, even in the face of catastrophic failure at the state level, no one is put to death in violation of federal constitutional guarantees.

Mr. Moreno Ramos' initial federal habeas proceedings provided not even a speed bump in "the blind infliction of the death penalty" through "[a] process that accord[ed] no significance to relevant facets of the character and record of the individual offender" and "exclude[d] from consideration . . . the possibility of compassionate or mitigating factors stemming from the diverse frailities of humankind." *Woodson*, 428 U.S. at 304.

The same attorney who had failed to file a single cognizable claim in state post-conviction proceedings was then appointed to represent Mr. Moreno Ramos in federal Court. He filed only the same eight (8) record-based claims. Unsurprisingly, the district court granted the State's motion for summary judgment on all claims, *Ramos v. Johnson*, No. M-99-134 (S.D. Tex. 2000) (Doc. 15), and this Court denied a certificate of appealability. *Ramos v. Cockrell*, 32 Fed. Appx. 126 (5th Cir. 2002) (*per curiam*).

Had Mr. Welch conducted an investigation into Mr. Moreno Ramos' life history, he would

have established that not only were Mr. Moreno Ramos's trial counsel deficient for failing to conduct any penalty phase investigations, but their deficient performance prejudiced Mr. Moreno Ramos in violation of his Sixth Amendment right to the effective assistance of counsel. *See Strickland*, 466 U.S. 668. He would also have established that had Mr. Moreno Ramos's VCCR rights been honored in a timely manner, his Government would have ensured that his trial representation was competent and effective and the outcome at the sentencing phase would likely have been different.

Subsequent investigation has revealed a compelling and undeniably mitigating life history of the sort the U.S. Supreme Court has repeatedly found to have been 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 his trial and post-conviction counsel. Thus, Mr. Moreno Ramos' compelling life history has never been considered in deciding the fairness of his death sentence.

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. The physical violence young Roberto endured at the hands of his father was unspeakable both in frequency – occurring several times *per week* – and in kind, including: Roberto's father regularly whipped him with a chain used on car engines, he would burn his hands on a hot stovetop, dunk his head in a pail used to wash dishes until Roberto believed he would drown, force him to kneel on sand or small stones for long periods with arms outstretched while holding bricks, and hang him upside-down from his ankles, sometimes so long that Roberto

would defecate himself while hanging.

Food was scarce to the point of near-starvation. *See id*. at 2152-2153. Shelter often consisted of little more than a shack without running water or electricity. *See id.* at 2152. Medical care was virtually non-existent except for two emergency instances in 15 years, including one where Roberto had swallowed a small arrow, which got stuck in his throat and severed his tonsils. *See id.*

Early childhood left Roberto ill equipped to grow and mature. He struggled in elementary school, was called "blockhead" or "stupid" by teachers and classmates alike, and eventually dropped out of school after the ninth grade. *See id.* at 2154.

Mental illness is also rampant in Roberto's family. His brother Enrique is schizophrenic, his sister Andrea, who is now deceased, struggled with addiction, and his father, though never formally diagnosed, shows clear signs of paranoia and mania. *See id*. at 2154.

Not surprisingly, Roberto, too, suffered with severe mental illness that went largely undiagnosed despite readily observable symptoms. Family members remember his hallucinations, grandiose delusions, abnormal speech patterns, bizarre behaviors, and severe mood swings. *See id*. at 2154-2159. This constellation of symptoms is the result of Mr. Moreno Ramos' co-morbid mental disease and cognitive impairments. Roberto has low-average intelligence. *See id*. He also suffers from a severe brain dysfunction, possibly of a genetic origin, which impairs his executive functions, such as impulse control, judgment and decision-making. *See id*. at 2159. On top of these cognitive impairments, Roberto has suffered from Bipolar Mood Disorder for most of his life, including the time period during which the offense occurred and throughout the time of his trial and conviction. *See id.* at 2160.

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' initial state and federal post-conviction proceedings. And – most critically for the current proceedings and this motion – 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.

After competent counsel conducted the first life history investigation *ever* in this case more than ten years after trial, the State of Texas agreed to a remand of the case to this Court so that Mr. Moreno Ramos could finally get merits consideration of the substantial prejudice arising from the denial of consular notification. However, opposing counsel continue to put up procedural roadblocks to both claims, reneging on prior agreements in this case and in other fora to ensure that all *Avena* plaintiffs such as Mr. Ramos receive merits consideration of any assertions of prejudice arising from the undisputed violation of VCCR rights.

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' 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).

The significance of the questions presented today is not even whether the mitigating circumstances of Mr. Moreno Ramos' 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.

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 his trial and post-conviction counsel. Thus, Mr. Moreno Ramos' compelling life history has never been considered in deciding the fairness of his death sentence.

The parties previously agreed to a remand of this case from the Fifth Circuit, and to a reopening of the judgment in the case pursuant to Federal Rule of Civil Procedure 60(b). The Fifth Circuit stayed the appeal to allow further proceedings in the District Court.

Consistent with that agreement, Mr. Moreno Ramos filed in the District Court an unopposed Rule 60(b) motion seeking merits review of his VCCR claim, a review he had been promised by the Texas Attorney General's office in light of the International Court of Justice's *Avena* decision,[2] and President Bush's determination that the United States will discharge its international obligations under *Avena*.[3] *See* Exhibit X (unopposed motion to reopen judgment).

The District Court granted the motion to reopen the judgment because "a claim attacking a state court's failure to address Vienna Convention claims under *Avena* and the Presidential declaration was" previously unavailable, Magistrate's Report and Recommendation, *Ramos v. Thaler*, No. M07-0059, Doc. 20 (March 10, 2010), and ordered Mr. Moreno Ramos to file an Amended Petition within ninety days. *Ramos v Thaler,* 0210 U.S. Dist. LEXIS 148593 (S.D. Tex. 2010).

As both parties noted, Mr. Moreno Ramos "has never had a review on the merits of his Vienna Convention claim." Mr. Moreno Ramos filed that petition on June 29, 2010. Petition for a Writ of Habeas Corpus, *Ramos v. Thaler*, S.D. Tex. No. 07-cv-00059, doc. No. 24 (June 29, 2010).

On May 28, 2013, the U.S. Supreme Court issued its opinion in *Trevino v. Thaler*, *supra*, 133 S.Ct. 1911, holding that Texas capital litigants may now establish cause and prejudice to excuse the procedural default of substantial ineffective assistance of trial counsel claims in federal

2 *Avena and Other Mexican Nationals* (Mex. v. US), No. 128 (I.C.J. Mar. 31, 20014).
3 Memorandum for the Attorney General, Compliance with the Decision of the International Court of Justice in *Avena*, Feb. 28, 2005, *available at* https://www.state.gov/s/l/2005/87181.htm (last visited Nov. 14, 2018).

court if they can show that initial-review state habeas counsel was ineffective. *Id*. at 1921. Just two days later, Mr. Moreno Ramos filed a Motion for Leave to Amend his § 2254 petition to include a trial counsel ineffectiveness claim, Motion for Leave to File Second Amended § 2254 Petition, *Ramos v. Thaler*, S.D. Tex. No. 07-cv-00059, doc. No. 38 (May 30, 2013), along with the Amended Petition, containing an ineffective assistance of trial counsel claim and arguing that he can establish cause under *Trevino*. Amended Petition for a Writ of Habeas Corpus, *Ramos v. Thaler*, S.D. Tex. No. 07-cv-00059, doc. No. 39 (May 30, 2013), at 67-110.

The Magistrate recommended that the District Court deny Mr. Moreno Ramos' leave to amend his petition to include the ineffectiveness claim, constructing a novel application of 28 U.S.C. § 2244(b)'s restriction on the courts' consideration of claims presented in successive applications to Mr. Moreno Ramos' motion for leave to amend his non-successive §2254 petition. Report and Recommendation, , *Ramos v. Thaler*, S.D. Tex. No. 07-cv-00059, doc. No. 55 (July 14, 2014) The Magistrate then Recommended that the Court deny the remaining issues in the case. Mr. Moreno Ramos filed objections to the both of the Magistrate's recommendations.

Mr. Moreno Ramos filed a Motion for Stay and Abeyance to allow him to present his claims regarding ineffective assistance of trial counsel and violation of the Vienna Convention to the state courts of Texas. Despite having previously taken the position that a Motion for Stay and Abey was the appropriate vehicle for review of such cases, Respondent opposed the Motion, *Ramos v. Thaler*, S.D. Tex. No. 07-cv-00059, doc. No. 66 (Dec. 17, 2014). The District Court denied the Motion without comment. *Ramos v. Thaler*, S.D. Tex. No. 07-cv-00059, doc. No. 69 (March 30, 2015). The same day, the District Court entered orders adopting the Magistrate's Reports and Recommendations to dismiss his habeas petition, deny leave to amend, and deny Certificate of Appealability. *Ramos v. Thaler*, S.D. Tex. No. 07-cv-00059, doc. No. 71 (March

30, 2015). The District Court entered a Final Judgment dismissing Mr. Moreno Ramos' Petition for Writ of Habeas Corpus under 28 U.S.C. § 2254 and denying a Certificate of Appealability and denying his Motion for Leave to File Second Amended § 2254 Petition. *Ramos v. Thaler,* S.D. Tex. No. 07-cv-00059, doc. No. 73 (April 22, 2015).

Pursuant to FRCP 59(e), Mr. Moreno Ramos filed a Motion to Alter or Amend the Judgment Pursuant to Rule 59(e), which the District Court denied. *Ramos v. Thaler,* S.D. Tex. No. 07-cv-00059, doc. No. 78 (June 24, 2015).

Mr. Moreno Ramos timely filed a Notice of Appeal.

REASONS FOR GRANTING THE WRIT

A state is, of course, not constitutionally obliged to provide a prisoner with particular mechanisms for postconviction relief, *Pennsylvania v. Finley*, 481 U.S. 551 (1987); nor is it constitutionally required to appoint counsel for state postconviction proceedings. *Murray v. Giarratano,* 492 U.S. 1 (1989). However, where a state *creates* mechanisms for postconviction relief, it is undisputed that "the procedures used…must comport with the demands of the Due Process [Clause]." *Evitts v. Lucey,* 469 U.S. 387, 393 (1985). Thus, relying in part on procedural process, the Court has held that, where a State provides for a direct appeal as of right, it must afford a criminal defendant an adequate and effective opportunity to present his claims. See, *e.g., Douglas v. California,* 372 U.S. 353, 358 (1963) (holding that a State must provide for the appointment of counsel on appeal to an indigent defendant); *Griffin v. Illinois,* 351 U.S. 12, 20 (1956) (holding that a State must provide free trial transcripts). Those decisions are rooted in the broader principle that proceedings provided by the State must be "essential[ly] fair[]," even if the proceedings themselves are not constitutionally mandated. *M.L.B. v. S.L.J.*, 519 U.S. 102, 120 (1996).

Where a State creates mechanisms for postconviction relief by which a prisoner may obtain relief from his underlying conviction, therefore, the prisoner has a liberty interest in meaningful access to those mechanisms, so as to avoid rendering the provision of those mechanisms arbitrary or futile. See *Ake v. Oklahoma*, 470 U.S. 68, 77 (1985) (noting that "[m]eaningful access to justice has been the consistent theme" of this Court's due process jurisprudence); cf. *Bounds v. Smith*, 430 U.S. 817, 821 (1977) (holding that provision of law libraries or similar resources to prisoners was necessary to protect "constitutional right of access to the courts"). That liberty interest exists even if the State is not required to use any particular procedures in a given form of proceeding, and even if the State may leave the ultimate decision on whether to provide relief to the discretion of the decisionmaker. Compare *Woodard*, 523 U.S. at 279-285 (plurality opinion) (concluding that no procedures are required in clemency proceedings), with *id.* at 289 (O'Connor, J., concurring in part and concurring in the judgment) (contending that "some *minimal* procedural safeguards apply to clemency proceedings").

In the more recent decisions of *Martinez v. Ryan*, 566 U.S. 1 (2012) and *Trevino v. Thaler*, 569 U.S. 413 (2013), this Court recognized that state postconviction plays a unique role in the review of a claim of ineffective assistance at trial. Where, as in Texas, the initial-collateral review process is the inmate's first opportunity to raise his Sixth Amendment claim, the integrity of the initial state postconviction process is more essential than with other types of claims. *Martinez*, 566 U.S. at 10-11 ("When an attorney errs in initial-review collateral proceedings, it is likely that no state court at any level will hear the prisoner's claim…"). In fact, this Court noted that, in a state like Texas, the importance is such that "the collateral proceeding is in many ways the equivalent of a prisoner's direct appeal as to the ineffectiveness claim." *Id.*

This case presents this Court with an unresolved yet extremely important issue flowing from the intersection of these two lines of cases: specifically, when a state like Texas creates a post-conviction process and appoints counsel what minimal procedural safeguards are required to ensure that habeas applicants have at least one opportunity to present a claim of trial ineffectiveness. This Court should grant certiorari review in this case because the Texas Court of Criminal Appeals' decision below is in conflict with this Court's precedent and this case presents a chance for this Court to clarify this issue for state courts and legislatures who must routinely grapple with these issues.

Mr. Moreno Ramos's case raises these issues squarely before this Court

It is clear that Mr. Moreno Ramos has a liberty interest in the opportunity to prove his trial Sixth Amendment claim. At a minimum, therefore, the state's framework for postconviction relief must provide procedures that are "fundamentally adequate" to vindicate his substantive rights. *District Attorney's Office for Third Judicial Dist. v. Osborne,* 557 U.S. 52, 69 (2009). Due process is violated where the state's procedures for postconviction relief " 'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental,' or 'trangresses any recognized principle of fundamental fairness in operation.'" *Id*. (quoting *Medina v. California,* 505 U.S. 437 (1992).

State postconviction review of a trial IAC claim demands adequate procedures. A "prisoner's inability to present a claim of trial error [for merits review] is of particular concern when the claim is one of ineffective assistance of counsel," because the "right to the effective assistance of counsel at trial is a bedrock principle in our justice system." *Martinez,* 132 S. Ct. 1317. The procedures provided by the state in Mr. Moreno Ramos's case failed to ensure the most basic standards of fundamental fairness.

The CCA's ad hoc appointment of counsel with little regard to qualifications or experience violated fundamental fairness in the state process.

Before 1995, Texas, unlike most American death penalty jurisdictions, did not appoint lawyers to represent indigent death row inmates in state habeas corpus proceedings. In 1995, the Texas Legislature passed Article 11.071 of the Texas Code of Criminal Procedure, which took effect on September 1, 1995. The new scheme ordered the CCA "under rules and standards adopted by the court, [to] appoint competent counsel" to indigent death row inmates for state post-conviction appeals. TEX. CODE CRIM. PROC. Art. 11.071 §2 (d). Such counsel, the statute provided, "shall investigate expeditiously…the factual and legal grounds for the filing of an application for a writ of habeas corpus." *Id.* §3(a).

Problems immediately beset the new system. Faced with hundreds of prisoners asking for appointed counsel under the new law, the CCA first announced its intention to cap the amount post-conviction counsel could be paid at $7,500. *Id.* Such a low figure guaranteed that many of the State's most respected appellate attorneys would refuse to apply for the work. Indeed, records from the Court show that some attorneys who had been licensed less than two years received habeas appointments. *Id.* In an effort to attract better attorneys, the Court removed the $7,500 cap, but still set no minimum qualifications. The result, according to former CCA Judge Charles Baird, was that the Court "appointed some absolutely terrible lawyers." *Id.* Because the timeliness set by federal and state habeas reform required habeas appeals to be filed quickly, the CCA began to order criminal defense lawyers to take habeas cases. *See* Christy Hoppe, *22 Inmates on Texas Death Row Lack Lawyers: State Pressing for Help as Deadline Looms,* Dallas Morning News, March 4, 1997, at 16A ("In November [of 1996], the Court of Criminal Appeals conscripted 48 defense lawyers, some of whom hadn't handled a capital case in 15 years and others who had never been connected to a capital case."). Mr. Moreno Ramos's post-conviction

attorney was appointed on November 22, 1996.

The CCA never articulated any standards for the competency of the appointed lawyers, a fact which caused federal courts to question the fairness and reliability of Texas' state habeas system. See, e.g., *Mata v. Johnson*, 99 F.3d 1261, 1266 (5th Cir. 1996), *vacated in part on other grounds*, 105 F.3D 209 (1997).

As one federal court concluded: "the State of Texas' decision to appoint [Mr. Kerr's appointed counsel] in what should have been petitioner's final foray into the state courts in search of relief from his death sentence *constituted a cynical and reprehensible attempt to expedite petitioner's execution at the expense of all semblance of fairness and integrity." Kerr v. Johnson*, No. SA-98-CA-151-OG, Slip op. at 20 (W.D. Tex. Feb. 24, 1999) (emphasis added). In an order denying Mr. Kerr's request to reconsider dismissing his unexhausted federal habeas petition, the court held that "the State of Texas must be held accountable for the abominable manner in which petitioner's state court-appointed attorney, who by his own admission was totally incompetent at the time of his appointment, his mis-handled petitioner's first state habeas proceeding." *Kerr v. Johnson*, No. SA-98-CA-151-OG, Slip op. at 3 (W.D. Tex. Mar. 12, 1999) (Order Denying Motion to Alter or Amend Judgement).

As the writs completed by lawyers appointed by the CCA reached that Court, serious problems become apparent:

> Applicant is represented by counsel appointed by this Court. The instant application appears to allege ineffective assistance of trial counsel, but also includes a wish list of discovery, research, and hearings necessary to represent applicant. No cases are cited. No analysis of the law is presented. Indeed, even the State recognizes this "application" appears to be a motion for discovery.
>
> Under these circumstances, the merits of the instant application should not be reached. Instead, this matter should be remanded to the habeas court to determine whether applicant has been afforded effective assistance of counsel on this habeas application as required by TEX. CODE CRIM. PROC. Ann. Art. 11.071 § 2.

Because the majority does not, I dissent.

Ex Parte Wolfe, 1998 WL 278960, *1 (Tex. Crim. App. May 20, 1998) (Baird, J., dissenting). *See also Ex Parte Martinez, 1998* WL 211569, at *1 (Tex. Crim. App. May 20, 1998); *Ex Parte Smith*, 1998 WL 210613, at *1 (Tex. Crim. App. May 20, 1998) (Baird, J., dissenting: *Ex Parte Kerr*, 1998 WL 81463, at *1 (Tex. Crim. App. Feb 23, 1998) (Overstreet, J., dissenting)

Despite being fully aware of this far-reaching problem, the Court of Criminal Appeals has never, in any case, removed appointed habeas counsel because of incompetence. Given the facts set forth above, it is incredible for defendants to claim that they were unaware of the rampant problems that were in part reflected in the appointment of incompetent counsel to represent Plaintiff in his initial state post-conviction proceeding.

Mr. Moreno Ramos is the *only* remaining prisoner who has not received some kind of review or relief after appointment of incompetent state habeas counsel appointed by the CCA during the time in question.

The CCA's Treatment of Trial IAC Claims, Like Mr. Moreno Ramos's, is Arbitrary and Does Not Comport with Fundamental Fairness.

When presented with cases where court-appointed 11.071 counsel has failed to provide the competent representation promised by statute, the CCA has responded in an arbitrary and capricious manner, resolving the cases seemingly on whim rather than *stare decisis*.

In *Ex parte Kerr*, 64 S.W.3d 414 (Tex. Crim. App. 2002), the CCA first addressed the burgeoning problem of troublesome writ applications. In *Kerr*, court-appointed 11.071 counsel filed a writ application that neglected to raise any claims challenging the conviction or sentence, instead complained only about the habeas corpus scheme. In response, the CCA enunciated its new rule to govern such cases: where the initial writ application does not even challenge the validity of the underlying judgment or sentence it is not "an initial application" and the procedural

hurdles of successive applications should not be applied to a second-in-time habeas writ. *Id.* at 419.

After denying numerous cases in cursory orders (presumably under the *Kerr* rule although the orders lacked any explication), the CCA's jurisprudence suddenly shifted. In 2006, in *Ex parte Reynoso*, 2006 WL 3735397 (Tex. Crim. App. Dec. 20 2006), the CCA suggested that some remedy might exist even where a writ, on its face, contained an actual challenge to the conviction or sentence. Initially-appointed 11.071 counsel filed an application containing one claim but it was a claim challenging the conviction and sentence. After the trial court recommended denial but before the CCA ruled, the applicant filed a "Pro Se Application for Appointment of New Counsel and Time to File Amended Application for Post-Conviction Writ of Habeas Corpus," alleging various failures by his appointed counsel. Rather than simply affirming the trial court's recommendation of denial—which appeared to be legally justified, given the contents of the application—the CCA remanded to the trial court with specific instructions to investigate counsel's alleged failures and make a recommendation regarding the appointment of new counsel. The CCA never explained why such recommendation was relevant in light of *Kerr*.

On January 10, 2007, the CCA explicitly suggested the existence of equitable exceptions to the Section 5 procedural bar. *Ex parte Granados*, 2007 WL 9683726 (Tex. Crim. App. Jan. 10, 2007). Mr. Granados presented the CCA with a request to vacate the previous judgment to allow filing of a new writ due to the appointment of incompetent counsel during Mr. Granados' initial habeas proceedings. The CCA denied Mr. Granados' requests – not on the *Kerr* rationale – but by finding a lack of prejudice. *Id.* at *2-3 (noting that his federal habeas lawyers in § 2254 failed to develop or raise any new compelling claims in federal court).

In 2011, in *Ex parte Medina*, 361 S.W.3d 633 (Tex. Crim. App. 2011), the CCA rejected a

filed writ and ordered new counsel and a new writ application. In *Medina*, court-appointed attorney filed a skeletal pleading raising ten claims challenging the conviction and sentence but containing no factual allegations. This was apparently done intentional, as part of a misguided strategy to force the court to hold an evidentiary hearing. Despite the fact that the application clearly raised cognizable claims, the CCA dismissed the application finding that counsel had deprived the applicant of his "one full and fair opportunity to present his constitutional or jurisdictional claims…" *Id.* at 642.[4]

In contrast, in *Ex parte Arturo Diaz*, 2013 Tex. Crim. App. Unpub. LEXIS 1011, No. WR-55,850-02, initial 11.071 counsel filed a pleading that a dissenting justice categorized as "*pro forma*, with no substantive comment,"—in other words, just like the *Medina* filing—but the CCA dismissed the petition in an unpublished, unexplained order on section 5 grounds. Similarly, in *Ex parte Christopher Wilkins*, 2017 Tex. Crim. App. Unpub. LEXIS 193, No. WR-75,229-02, the court-appointed attorney filed a pleading containing nothing on which the court could order relief; the claims presented were either direct appeal-type claims or challenges to lethal injection practices, none of which allowed for habeas relief. Moreover, the attorney had accepted a job at the District Attorney's office before filing the deficient application. But where the CCA in *Medina* appointed replacement counsel in *Wilkins*, it dismissed the request as an abuse of the writ in an unpublished order with no analysis. Why an applicant whose attorney attempts a strategy to

4 The CCA attempted to impose a limiting principle in *Medina*: whether the 11.071 attorney acted intentionally. But this principle cannot withstand scrutiny. As at least one CCA judge has noted "Whether a document pleads sufficient specific facts so as to constitute a 'writ application' in contemplation of *Kerr* cannot reasonably be made to turn on the good faith or the attorney who prepared it—it is either sufficiently well drawn or it is not. Such a document cannot be regarded as a writ application when the pleader deliberately omits sufficiently specific facts but not a writ application when the facts are left out because of the pleader's plain ineptitude." *Ex Parte Diaz*, 2013 WL 542971 (Tex. Crim. App. 2013)(Price, J. dissenting). Furthermore, this principle does not stand for the simple reason that the CCA does not consistently apply it. *See infra*.

get his evidence heard got to re-do his initial filing with new counsel while one whose attorney was working for his opponent did not, the CCA has never said.

This distinct lack of principle in distinguishing applicants who are allowed to pursue valid claims despite the failings of their initial court-appointed habeas counsel from those whose claims are summarily dismissed continues across dozens of cases and in a plethora of cases, the CCA has issued summary section 5 dismissals, despite allegations echoing those in cases like *Kerr*, *Medina*, and *Reynoso*. *See, e.g., Ex parte Howard Guidry,* 2018 Tex. Crim. App. Unpub. LEXIS 634; No. WR-47,417-04; *Ex parte Daniel Acker*, 2018 Tex. Crim. App. Unpub. LEXIS 632, No. WR-56,841-04; *Ex parte David Carpenter*, 2014 Tex. Crim. App. Unpub. LEXIS 858, No. WR-49,6560-05; *Ex parte Tarus Sales*, 2018 Tex. Crim. App. Unpub. LEXIS 127, No. WR-78,131-02; *Ex parte Clinton Young*, 2009 Tex. Crim. App. Unpub. LEXIS 368, No. WR-65,137-03; *Ex parte Robert Pruett,* 2014 Tex. Crim. App. Unpub. LEXIS 1137; 2017 Tex. Crim. App. Unpub. LEXIS 708, WR-62,099-01; *Ex parte Bernardo Tercero,* 2017 Tex. Crim. App. Unpub. LEXIS 480, No. WR-62,593-02.

CONCLUSION AND PRAYER FOR RELIEF

This Court should review the Texas Court of Criminal Appeals' judgment dismissing Mr. Moreno Ramos's case, grant certiorari and reverse the decision below; or grant such other relief as justice requires.

Respectfully Submitted,

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