NO. 18-6682 & 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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REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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

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November 12, 2018

REPLY IN SUPPORT OF MOTION TO WRIT OF CERTIORARI

Respondent's position belies the need for guidance from the Court on this matter. According to Respondent, the Court should not involve itself in this matter as it is purely a state issue and due process is only implicated in "situations involving the right to counsel on first appeal" and issues like competency because they are rights that are "firmly grounded in the Constitution." BIO at 17.

As *Martinez v. Ryan*, 566 U.S. 1 (2012) made clear, however, claims regarding ineffective assistance at trial, like the one in this case, are unique and distinguishable. That right, "[t]he right to effective assistance of counsel at trial is a bedrock principle in our justice system." *Id.* at 12. And because it cannot be vindicated at a stage earlier than the initial-collateral review proceedings, "the collateral proceeding is in many ways the equivalent of a prisoner's direct appeal as to the ineffective-assistance claim." *Id.* at 11.

Thus the liberty interest in state postconviction is greater as to a trial IAC claim and the basic fairness of the state process matters more. This Court should grant cert to determine 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.

Despite insisting that Sec. 5 bars review, Respondent invites this court to consider the merits, both by arguing about the aggravating evidence and taking

issue with the fact that the evidence in support of the *Wiggins* claim includes expert reports relying upon hearsay statements. This is not grounds for dismissal of the writ certiorari.

Mr. Moreno Ramos wants his bite at the apple. Just one. And he hasn't gotten it. The harshness of Sec. 5 was justified by the simultaneous enactment of provisions in Section 3 and 4 that were meant to guarantee that one full and fair review. However, those new safeguards could not be created and implemented so quickly, in numerous cases counsel were appointed who did not provide the representation envisioned by the statute. Mr. Moreno Ramos was one of those. And he is the only remaining one who has not received any sort of opportunity to present his claims for merit review.

Of the 310 death row prisoners who were given counsel by the CCA between 1995 and 1999, only 31 are alive[1] and still serving their original death sentences[2]. Of those, 22 raised extra-record claims in their initial 11.071 applications and 2 were given new counsel and allowed to submit new 11.071 petitions pursuant to 4A. Of the remaining seven (7), six (6) had new counsel in federal habeas proceedings. ONLY Mr. Moreno Ramos did not.

Mr. Moreno Ramos is the only living Texas death row inmate whose

[1] 190 having been executed, 11 died of natural causes, 1 suicide.
[2] 77 had sentences reversed: 63 were subsequently sentenced to lesser sentences; 11 were resentenced to death; 3 are pending resentencing.

initial 11.071 contained no extra record claims who has never been given another vehicle for raising true post-conviction claims.

The filings submitted by Mr. Moreno Ramos over the past 8 days raising his Sixth Amendment trial IAC claim through various procedural vehicles in state and federal courts are not "exceedingly dilatory", tardy, late, "eleventh-hour", last-minute, or even unexpected. Though they have never before been considered and they appear now in unique and complex procedural postures, these claims are not even remotely new or surprising.

Undersigned notified the Hidalgo County District Attorney and the interim judge of the 93rd district court in a teleconference on July 13, 2018 and in writing on August 15, 2018 that "all legal challenges have not been completed" and that Mr. Moreno Ramos intended to file a Successive Application for Post-conviction relief containing a "compelling constitutional claim of ineffective assistance of trial counsel that has never been heard or considered on the merits by any state or federal court". Exhibit 1, Opposition to State's Request that an Execution Date be Set and Motion for Scheduling Order, at 2.

In a series of calls including the phone conference with the Court on July 13, 2018, undersigned described at length for ADA Hake and the Court the many undesirable consequences of setting an execution date when it was already known that substantial and previously unresolved litigation remained. Undersigned

pointed to the conditions that increased the risk of error, including the impact of hasty last-minute deadlines on the performance of counsel for all parties, the lack of time afforded the court to consider important matters, the lack of flexibility to accommodate unexpected events, and the negative impact on the quality and reliability of everyone's work product.

In a sincere effort to persuade ADA Hake of the virtues of an agreed scheduling order, undersigned quite candidly answered his questions regarding the nature of expected pleadings, the status of the team's progress and the amount of time necessary to prepare as well as the other obligations and schedules of the team. Undersigned disclosed a great deal regarding defense thinking, including information arguably invasive of the attorney client relationship, in the service of reaching agreement as to a reasonable pace of the litigation that would avoid both sloppy middle of the night filings and any undue delay. It was agreed that undersigned would file a written proposed scheduling order with follow up by teleconference if necessary.

On August 15, 2018, undersigned filed an Opposition to State's Request that an Execution Date be Set and Motion for Scheduling Order alerting the trial court and the State that "[f]actoring in case deadlines and other pre-existing obligations, and considering the amount of work to be done, undersigned can commit to filed the petition by October 26, 2018". Counsel further indicated that "[g]iven the

unique circumstances here and that the CCA will be seeing this claim for the first time, it is critically important that the court have time to review and consider the complex procedural history and fact-intensive basis of the claim. The date requested by the State would not allow full and fair consideration of the petition." *Id.* at 13.

Given that a lack of time for "full and fair consideration of the petition" is the circumstance most favorable to the state, undersigned's good-faith efforts to avoid the pressured litigation happening now had the unhappy effect of encouraging it instead.

Knowing that a petition would be filed, and having significant information about how soon it could possibly be filed, the State insisted upon pushing the Court to set an execution date for less than two weeks after the earliest filing date. The granting of that motion then triggered other obligations and dates, including deadlines for a Clemency Application, which pushed the earliest filing date from October 26th to November 6, 2018.

Not only has the State long known that Mr. Moreno Ramos would seek to at last vindicate his right to post-conviction review about now, but the State and the CCA have long been on notice as to the claims he would raise the arguments he would make and the facts he would allege.

At the urging of the trial court to provide as much detail as possible,

undersigned did much more than merely file a proposed scheduling order. The Opposition to State's Request that an Execution Date be Set and Motion for Scheduling Order is a 14 page document that sets out in narrative form virtually all of the facts and arguments now being advanced by Mr. Moreno Ramos, noting that "these are substantive constitutional issues that have not been heard and that the State has been aware, since at least 2014, would be raised and litigated in state court once federal litigation was exhausted.

The Hidalgo county district attorney, the Texas Attorney General, the Court of Criminal Appeals, the federal district court for the southern district of Texas, the Fifth Circuit and the Supreme court of the United States have all had in their possession all of the documentary support for Mr. Moreno Ramos' claim of ineffective assistance of trial counsel by 2005 when it was filed as a sub-part of his VCCR claim. And, since at the filings of Mr. Moreno Ramos's proposed Amended Petition for Post-Conviction Relief in 2010 and his Motion to Stay and Abey in 2013, all parties have had in their possession draft briefing and argument as to trial counsel's deficiencies, the prevailing standard of care and the prejudice suffered by Mr. Moreno Ramos substantially similar to the pleadings filed in the post-conviction cause numbers over the past eight days.

The State has been aware of the facts regarding the catastrophic failure of Mr. Moreno Ramos's initial 11.071 counsel and resulting prejudice to Mr. Moreno

Ramos for over twenty years, and aware of the abdication by his trial counsel during his capital penalty phase and the details of the resulting prejudice for over 13 years, but refused to consider reviewing it. All parties have been on notice that Mr. Moreno Ramos believes the performance of his 11.071 counsel should permit him another opportunity for merits review of his trial IAC claim since he filed a motion to amend just two days after the Trevino opinion. And the State has known for four months that Mr. Moreno Ramos would file post-conviction pleadings in the CCA and almost precisely what date he would do so. That litigation was no surprise. Nor was it a last-minute response to the execution date. On the contrary, the execution date was set for the purpose of disrupting and truncating that post-conviction litigation.

Defendant's mock surprise and outrage at the post-conviction filings by Mr. Moreno Ramos in the CCA and Fifth Circuit is disingenuous.

Mr. Moreno Ramos has diligently sought to vindicate his Sixth Amendment Right to Representation at Trial

Even after his initial federal habeas, Mr. Moreno Ramos alerted every court where he appeared of the failures of his trial counsel and that he had suffered prejudice. He provided every court with an offer of proof of that prejudice. And at every juncture the State urged those courts to disregard the unfolding tragedy.

For instance, when Mr. Moreno Ramos first raised the Vienna Convention violation in a domestic court, he chronicled the failings of his trial counsel, cited

authorities to demonstrate that counsel had not met the standard of care for capital counsel. *Application for a Writ of Habeas Corpus*, pp. 8-9, 42-47, CR-1430-92-B (03/23/2005).

Further, the prejudice arising from the VCCR violation was described as denying Mexico the opportunity to assist by "ensuring that trial counsel was effective", *Id.* at 42, 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. *Id.* at 42-47.

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).

When *Trevino* was decided in 2013, Mr. Moreno Ramos was litigating a non-successive second-in-time petition in district court and within **two days** had filed a proposed amendment attaching all the *Wiggins* evidence 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 this Court. *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).

In every instance, the state argued that no court should review the merits of Mr. Moreno Ramos' claims or conduct any prejudice analysis.

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.

> 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.

But after thus inducing Mr. Moreno Ramos to seek a Stay of Proceedings in this Court, *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.

It simply not true that Mr. Moreno Ramos slept on his rights.

Respectfully Submitted,

/s/ Danalynn Recer

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Date: November 14, 2018

CERTIFICATE OF SERVICE

I hereby certify that a that a true and correct copy of the foregoing document has been filed with the Clerk of the Court by using the CM/ECF System which will send a notice of electronic filing to all counsel of record on this 14th day of November, 2018.

/s Danalynn Recer
Danalynn Recer

Electronically Filed
8/15/2018 5:05 PM
Hidalgo County District Clerks
Reviewed By: Alexandra Gomez

IN THE 93rd DISTRICT COURT
HIDALGO COUNTY, TEXAS

EX PARTE	**§**	
	§	
	§	**CAUSE NO. CR-1430-92-B**
	§	
ROBERTO MORENO RAMOS	**§**	

OPPOSITION TO STATE'S REQUEST THAT AN EXECUTION DATE BE SET
AND
MOTION FOR SCHEDULING ORDER

Now comes Robert Moreno Ramos, by and through undersigned counsel, to respectfully move that this Court enter the attached Scheduling Order rather than setting an execution date at this time.

Robert Moreno Ramos has been sentenced to death for capital murder and, on July 12, 2018, the State asked this Court to schedule his execution for November 14, 2018. *Motion Requesting That An Execution Date Be Set*.

The Court held a brief phone conference with undersigned counsel and ADA Ted Hake on Friday, July 13, 2018 during which undersigned indicated an intention to oppose the motion and explained that she would need time to revisit the case and prepare a motion for the Court. The Court indicated that it would not sign the State's proposed order until the 91st day prior to the requested date, which will be Thursday, August 16, 2018. Undersigned indicated she would prepare a motion as quickly as possible. No date for a hearing was set.

Below, Mr. Moreno Ramos requests a limited period of time to file a viable claim that has never been heard before and for which there is now a procedural vehicle for merits review that was not available at the time of his last petition.

Undersigned understands the state's position that the case should not languish unnecessarily so any claims that Mr. Moreno Ramos has remaining should be filed expeditiously and does not ask that the Court decline to impose any schedule at all. Rather, as set out below, undersigned asks that, in lieu of an execution date, the Court set a date upon which all remaining state post-conviction claims must be filed and has asked for the shortest possible time in which a successor petition could reasonably be prepared.

All Legal Challenges Have Not Been Completed

Although no petition is currently pending to challenge Mr. Moreno Ramos' conviction or sentence, not all state and federal challenges have been "completed" as the State has indicated.

Mr. Moreno Ramos has a compelling constitutional claim of ineffective assistance of trial counsel that has never been heard or considered on the merits by any state or federal court, but which will now be presented in a Successive Application for Post-Conviction Relief for merits consideration through a procedural vehicle that did not exist at the time of his last state post-conviction petition. Texas Code of Criminal Procedure 11.071 §5(a).

The decision to take Mr. Moreno Ramos' life was made and has since been 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.

Mr. Moreno Ramos was sentenced to die in a one (1) day penalty phase during which the

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).

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. Penalty Phase Tr. Vol. 84, pp. 76-80, March 19, 1993. The jury burdened with deciding whether Mr. Moreno Ramos should live or die knew absolutely nothing about the life they were asked to take, imposing a death verdict under conditions that pose an intolerable risk that "the death penalty will be imposed in spite of factors which may call for a less severe penalty." *Lockett v. Ohio*, 438 U.S. 586 at 604-605 (1978).

Unfortunately, this complete abdication by trial counsel was not raised in the first Application for state post-conviction relief, nor his initial federal habeas petition. Indeed, Mr. Moreno Ramos was constructively unrepresented in the initial state and federal habeas proceedings that set the stage for everything that has happened since.

Subsequent investigation has revealed a compelling and undeniably mitigating life history of the sort courts have 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 state post-conviction attorney, but that counsel's ineffectiveness was not yet recognized as a defense to procedural bars in state or federal court. 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.

No state or federal court has ever considered the substance of the claim. Mr. Moreno Ramos has sought a merits review of his ineffectiveness claim for four years now and been denied review on procedural grounds at each juncture.

Despite Dozens of Filings Over Many Years, No Issues of Substance Have Been Considered by Any Court

There has not been as much process as it might appear from the listing of docket events in the motion.

The initial state and federal habeas petitions – both filed by the same lawyer whose appointment Mr. Moreno Ramos had opposed[2] – contained not one single properly framed legal challenge between them so that the Courts declined to even address a single issue raised.

The Court of Criminal Appeals appointed a solo practitioner who had never handled a capital post-conviction case and admits he "did not have the experience, training, assistance, resources or time to do what [was] necessary" and "was simply not equipped to handle this case the way it should have been handled" to represent Mr. Moreno Ramos. Declaration of Kyle Welch, supra, at 2.

He never sought funding for investigative or expert services, never conducted any investigation on his own, and developed no extra-record claims. After missing the filing deadline twice, he finally filed a twelve (12) page 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 found that no post-conviction claims had been raised, held that the claims raised "will not be addressed" and quickly disposed of the Application in a paragraph. *Ex Parte*

2 Motion for Stay and Abeyance, D.E. 64, Exh. 2 Affidavit of David Schulman, May 30, 2013, Ramos, No. 7:07-cv-0059 (S.D. Tex., 11/25/2014).

Ramos, 977 S.W.2d 616 at 616-17 (Tex. Crim. App. 1998). Dissenting, CCA Judge Overstreet recognized that holding Mr. Moreno Ramos accountable for the failures of the lawyer the Court had itself selected effectively denied him any representation at all:

> If a lawyer's actions deny an indigent death row applicant meaningful review of his claims, then I question whether the inmate standing in line to be executed has received effective assistance of counsel. Common-sense tells me that if you do not have effective assistance of counsel, with all due respect, I consider that worse than having no lawyer at all because having an ineffective lawyer gives a sense of legitimacy to the proceeding, yet the degree of assistance may be equivalent to not having a lawyer at all.

Id. at 619 (Overstreet, J., dissenting).

Shockingly, 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 habeas corpus proceedings, and filed the same eight (8) record-based claims in the federal petition that he had filed in state court. Unsurprisingly, the District Court granted the State's motion for summary judgment on all claims, Order, D.E. 15, Ramos v. Johnson, No. 7:99-cv-134 (S.D. Tex. 2000), the Fifth Circuit Court denied a certificate of appealability, *Ramos v. Cockrell*, No. 00-40633 (5th Cir. 2002) (per curiam), and the Supreme Court denied certiorari. *Ramos v. Cockrell*, 537 U.S. 908 (2002).

Mr. Moreno Ramos's chances for any state or federal review of his conviction and death sentence had been squandered by counsel whose appointment he vehemently opposed and he has spent the next 18 years buffeted about by changing procedural rules, litigating whether any court would ever consider the evidence that should have been considered by the sentencers.

Once an investigation was conducted and dramatic evidence in support of a life sentence had been developed, there was no Court to hear it. None of the long list of pleadings in state and federal court involved disputes over the facts or substantive law regarding this viable claim.

Rather, for over a dozen years the State of Texas has fought to prevent any court from considering the merits of the various claims raised regarding why and how Mr. Moreno Ramos' jury was denied any information regarding the "diverse human frailities" of the life they were asked to take.

The state has never argued that the performance of trial counsel was adequate or that the compelling evidence later developed would not have been persuasive to fact finders. Rather, the Texas AG has fought tooth and nail to prevent any court from hearing or considering the evidence.

Mr. Moreno Ramos first presented that evidence to the state court after the International Court of Justice ruled in Avena and Other Mexican nationals (Mex. v. U.S.), No. 128 (I.C.J. Mar. 31, 2004) [hereinafter "Avena"] that the United States had violated the Vienna Convention on Consular Relations by failing to notify him of his right to consular assistance. The new life history evidence was presented for purposes of demonstrating what the government of Mexico could have provided had they been notified. It could not have been presented in that petition as a claim of ineffective assistance of trial counsel because such a claim was not previously unavailable, as the State of Texas has frequently pointed out.

Neither the trial court or the CCA considered the substance of the evidence at that time because the successive petition was found to be procedurally barred. *Ex parte Ramos*, No. 35,938-02 (Tex. Crim. App. 2007).

In federal Court, there was no vehicle for presenting the ineffective assistance of trial counsel claim until the Supreme Court opinion in *Trevino v. Thaler*, 133 S.Ct. 1911 (2013) holding that ineffectiveness of initial-review state habeas counsel may excuse procedural default of ineffective assistance of trial counsel claims in federal court. *Id*. at 1921. Pending in federal

district court on his Avena claim at the time, Mr. Moreno Ramos immediately sought leave to amend with a trial counsel ineffectiveness claim, arguing that he can now establish cause under *Trevino.* Motion for Leave to File Amended Petition, D.E. 38, Ramos, No. 7:07-cv-0059 (S.D. Tex., 5/30/2013).

The past five years of litigation in federal court have all related to whether or not Mr. Moreno Ramos would be permitted amend his federal petition with the ineffectiveness claim, not about the substance of the claim itself.

Ridiculously, the state attempted to distinguish Mr. Moreno Ramos' case from the failures of state post-conviction counsel in *Medina* and *Trevino* by comparing the 8 non-cognizable record claims filed by his state habeas counsel to the "complete abandonment of counsel experienced by Martinez" (the Arizona petitioner in the Supreme Court holding that was ultimately extended to Texas in Trevino).[3]

This ignored that Mr. Moreno Ramos' state habeas counsel had been more deficient and filed fewer cognizable claims that the counsel in either of the relevant Texas cases of Trevino and Medina.

The State further argued that Mr. Moreno Ramos' ineffective assistance of trial counsel claim could not be heard by the federal courts because it had not yet been heard in state court and the state courts should get the first opportunity to consider the claim.[4]

However, when Mr. Moreno Ramos sought to go back into State Court to allow Texas that "first bite at the apple", pointing to legal developments in the CCA regarding consideration

3 Respondent's Opposition to Petitioner's Motion for Stay and Abeyance, Case 7:07-cv-00059 (TXSD), Doc. 66 at 4-5 (12/17/2014).
4 *Id.* at 9.

of the merits of a successive petition in light of Trevino[5], the State argued from the other side of its mouth that the federal court should not grant his Motion to Stay and Abey because raising the claim in the CCA would be "futile".

> Here, even if Ramos were given another opportunity to return to state court, there is no question that the Court of Criminal Appeals would dismiss any application as successive pursuant to Texas Code of Criminal Procedure Article 11.071, Section 5.[6]

In the end, the claim was never heard: the Federal District Court declined to Stay and Abate to send the case back to state court but also denied leave to amend so that the claim could be heard in federal court[7]; the Fifth Circuit denied a Certificate of Appealability on procedural grounds and never reached the question of whether Mr. Moreno Ramos had stated a denial of a significant constitutional right[8]; and the United States Supreme Court denied Certiorari.

Thus, despite the appearance of a great deal of activity and legal process, Mr. Moreno Ramos' compelling life history has still never been considered in deciding the fairness of his death sentence. No Court has addressed how and why the jury that sentenced him to die heard neither evidence nor argument as to why his life should be spared. And no court has yet provided any merits review of the serious constitutional issues raised by these facts.

There is Now No Barrier to Consideration of Mr. Moreno Ramos' IAC Claim by the CCA

The only question regarding whether Mr. Moreno Ramos' ineffective assistance of trial counsel claim will now finally be heard and considered on the merits is whether there is a procedural route for raising the claim today that was not available when he was last before the Court. Article 11.07 §4(a)(1); *Ex parte Chabot*, 300 S.W.3d 768 (Tex. Crim. App. 2009).

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5 Motion to Stay and Abey, Case 7:07-cv -00059, Doc. 64 at 1-2, (11/28/2017).
6 Opp., *supra*, at 10.
7 Final Judgment, D.E. 73, Ramos, No. 7:07-cv-0059 (S.D. Tex., 4/22/2015).
8 Opinion Order, Doc. 08-70044, Ramos, No. 08-70044 (5th Cir., 6/30/2016).

The operative facts necessary to meet the requirements of Article 11.071 §5(a) are only: What was the date of his last state habeas petition?; What rule would allow him back into state court?; and When did that procedural vehicle become available?

The CCA will adjudicate the merits of Mr. Moreno Ramos' argument that he was denied the effective assistance of counsel at trial because his last state habeas petition was denied in 2007 and a new rule, applied for the first time in 2011, provides for merits review.

In 2007, it was virtually impossible for Mr. Moreno Ramos to receive merits consideration in a subsequent application. Indeed, the CCA held that Mr. Moreno Ramos' VCCR claim was procedurally barred in March 2007, *Ex parte Cardenas et al.*, 2007 Tex. Crim. App. Unpub. LEXIS 691 (Tex. Crim. App. 2007).

However, CCA has since found that non-statutory exceptions to the Section 5 procedural bar do exist, and that it has the authority to apply judicially created doctrines when interpreting the plain language of Article 11.071, Section 5 of the Texas Code of Criminal Procedure.[9]

In 2011, the CCA found an initial application for writ of habeas corpus filed on behalf of a capital prisoner to be so deficient that it was not, "in fact, 'an application for writ of habeas corpus' under Article 11.071 of the Texas Code of Criminal Procedure." *Ex parte Medina,* 361 S.W.3d 633, 634 (Tex. Crim. App. 2011). The CCA remedied that constructive denial of counsel by exercising its discretion under Article 11.071 § 4A(b)(3) to appoint new counsel and granted the applicant 180 days to prepare and file a new state habeas application. *Id.* at 643.

In that case, where appointed counsel had conducted investigation and raised ten claims

9 *See Ex parte Granados,* No. WR-51, 135-01 (Tex. Crim. App. Jan. 10, 2007); Ex parte Hood, 211 S.W.3d 767 (Tex. Crim. App. 2007); Ex parte Moreno, No. WR-25, 897-01, 2007 WL 2019745 (Tex. Crim. App. 2007); Ex parte Ruiz, No. WR-27-328-03 (Tex. Crim. App. July 6, 2007).

but refused to plead the facts "because he did not want the State to know what his evidence was." *Id.* at 635-36, the CCA ordered briefing on the potential impact that the CCA's decision would have on "past, present and future 11.071 writ applications," *id.* at 637 n.8, and ultimately determined that counsel's deficient performance had deprived the applicant of his "one full and fair opportunity to present his constitutional or jurisdictional claims . . . . Not full because he is entitled to one bite at the apple, i.e., one application, and the document filed was not a proper writ application. Not fair because applicant's opportunity, through no fault of his own, was intentionally subverted by his habeas counsel." *Id.* at 642. Accordingly, the applicant was entitled to an entirely new "bite at the apple."

As the Fifth Circuit has since noted, *Ex parte Medina*, "allowed a mulligan after finding it was not the client's fault that [state habeas counsel] had filed an incomplete application." *Hall v. Thaler*, 504 Fed.Appx. 269, 284 (5th Cir. Dec. 21, 2012).

Merits review of Mr. Moreno Ramos's ineffective assistance of trial counsel claim by state post-conviction courts is exactly what the state of Texas always urged federal courts to ensure until they actually started doing it.

When urging the United States Supreme Court not to permit federal court review of claims defaulted by ineffective state post-conviction lawyers, the State of Texas represented that such oversight was 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). Respondent specifically invoked the CCA's decision in *Ex parte Medina*, 361 S.W.3d 633 (Tex. Crim. App. 2011), as a pre-*Trevino* basis for returning to the Texas court based on initial habeas counsel's ineffective assistance. Respondent informed the Supreme Court that:

> Texas courts likewise have a proven track record of hearing once-defaulted claims on the merits under appropriate circumstances. For example, the CCA has created equitable exceptions to the state-law bar on successive petitions—*including an exception for ineffective assistance of state-habeas counsel. See, e.g., Ex parte Medina*, 361 S.W.3d 633, 642-643 (Tex. Crim. App. 2011) (per curiam); *Ex parte McPherson*, 32 S.W.3d 860, 861 (Tex. Crim. App. 2000); *Ex parte Evans*, 964 S.W.2d 643, 647 (Tex. Crim. App. 1998). And the CCA has allowed prisoners to reopen their habeas applications and raise defaulted claims. *See, e.g., Ex parte Matamoros*, 2011 WL 6241295 (Tex. Crim. App. Dec. 14, 2011) (per curiam); *Ex parte Moreno*, 245 S.W.3d 419, 420 (Tex. Crim. App. 2008).

Brief for Respondent at 59, *Trevino v. Thaler*, No. 11-10189 (Jan. 14, 2013) (emphasis added).

The State of Texas assured the Supreme Court that "[i]f this Court changes the rules now, equity demands at a minimum that the [Court of Criminal Appeals] have an opportunity to reevaluate its procedural ruling and adjudicate Trevino's *Wiggins* claim on the merits." Brief for the Respondent, *Trevino v. Thaler*, No. 11-10189, 2013 WL 179940 at *59.

The Supreme Court did rule in favor of Mr. Trevino. And, Respondent is quite right that equity does demand that the CCA "adjudicate [Mr. Moreno Ramos'] *Wiggins* claim on the merits."

In other post-*Trevino* cases, Respondent has asked that the federal courts "force" a petitioner "to give the state courts what AEDPA demands—namely, *a fair opportunity to adjudicate his IATC claim on the merits*," by sending his claim back to state court for exhaustion. The Director's Supplemental Briefing Respecting the Petition for Rehearing En Banc at 4 (emphasis added), *Ibarra v. Thaler*, No. 11-70031 (5th Cir. June 4, 2013).

For Texas to now urge that an execution date be set without allow full and fair adjudication of this claim is inconsistent with the representations that the State has made to the U.S. Supreme Court and other federal and state courts presented with the ineffectiveness of state post-conviction counsel as a defense to procedural bars.

Mr. Moreno Ramos' Request

It is simply a fact that a new avenue for raising Mr. Moreno Ramos' ineffective assistance of trial counsel claim has been created since his last petition. Once filed, the petition will not be easily dismissed.

The facts here are unique – that the same lawyer represented Mr. Moreno Ramos in both state post-conviction and federal habeas denied him critical checks and balances present in virtually every capital case and is a circumstance that cannot possible happen again because the system has changed to avoid it. Texas has created mechanisms for appointment of capital state habeas counsel as well as the Office of Capital Writs. And, the federal Courts created a solution for those petitioners who had slipped through the system earlier by providing for appointment of "*Martinez/Trevino* counsel" in federal court to reconsider whether there were IAC claims that should have been raised – even where the initial federal habeas petition has already gone through district court but not yet been dismissed. *Speer v. Stephens*, No. 13-70001 (5th Cir., 2015). But the uniquely tragic timing placed Mr. Moreno Ramos outside the protection of these changes as he had already completed his initial post-conviction litigation in both state and federal courts.

That Mr. Moreno Ramos' first review state post-conviction attorney filed no cognizable claims whatsoever so that every Court at every level of state and federal proceedings found nothing to be addressed is a virtually unheard of circumstance, more egregious even than the deficits in *Medina*. And, that Mr. Moreno Ramos had actually opposed the appointment of that counsel in written pleadings submitted to the CCA and denied is extraordinarily unusual.

Further, that Mr. Moreno Ramos' trial counsel so completely abdicated the sentencing trial offering no witnesses, no evidence and no argument is equally rare and horrifying.

Under these facts, neither the trial ineffectiveness claim nor the assertion that Mr.

Moreno Ramos' subsequent petition will be authorized for review is a frivolous "Hail Mary" pass. These are substantive constitutional issues that have not been heard and that the State has been aware, since at least 2014, would be raised and litigated in state court once federal litigation was exhausted.

The next step for Mr. Moreno Ramos is to file a Successive Application for Post-Conviction Relief. Pursuant to 11.071 Sec. 5(c), the clerk of this Court will then forward the petition to the Court of Criminal Appeals as a successor petition to determine whether the claims meet the requirements of Art. 11.071§5. The CCA will then to consider it and either allow the successive litigation. Given the unique circumstances here and that the CCA will be seeing this claim for the first time, it is critically important that the Court have time to review and consider the complex procedural history and fact-intensive basis of the claim. The date requested by the State would not allow full and fair consideration of the petition.

Declining to set that specific date is no hardship to the State as the Texas Department of Corrections routinely provides courts and State officials with available dates for execution. There is no urgency to adopt this specific date at this time.

The State's larger concern, that this case not languish and that any remaining litigation begin to move expeditiously, can be address by setting a schedule.

It is not necessary to set an execution date in order to insure that Mr. Moreno Ramos seeks review in Texas state courts. Rather than setting an execution date now, this Court should issue an order setting a date by which Mr. Moreno Ramos must file any remaining state post-conviction litigation or the Court will then set an execution date.

Factoring in case deadlines and other pre-existing obligations, and considering the amount of work to be done, undersigned can commit to filing the petition by October 26, 2018.

CONCLUSION

Thus, for reasons stated above and any others that appear to the Court, Mr. Moreno Ramos asks that in lieu of setting an immediate execution date, this Court issue an order requiring that Mr. Moreno Ramos file any state post-conviction challenges to his conviction or sentence that he wishes to raise with the Texas Court of Criminal Appeals no later than October 26, 2018, and that this Court further order undersigned counsel to file a status report with this Court every 30 days after the filing of any subsequent petition to notify this Court of the status of the litigation. Should Mr. Moreno Ramos decline to file any further petition or should any such litigation be concluded without a grant of sentencing relief, this Court will then set an execution date for the next date available through TDCJ.

Respectfully Submitted,

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