No. 19-6426

In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2019

JOHN HENRY RAMIREZ, *Petitioner*

v.

LORRIE DAVIS, *Respondent*

On Petition for a reconsideration from a denial of Writ of Certiorari

THIS IS A CAPITAL CASE

AMENDED PETITION FOR RECONSIDERATION OF A DENIAL OF A WRIT OF CERTIORARI

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CERTIFICATE OF COMPLIANCE

No. 19-6426

John Henry Ramirez , *Petitioner*

v.

Lorrie Davis , *Respondent*

As required by Supreme Court Rule 33.1(h), I certify the petition for reconsideration contains 2778 words, excluding the parts of the petition that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on March 27, 2020.

Eric Allen

CERTIFICATE OF COUNSEL (RULE 44)

Counsel certifies under rules of practice of the Supreme Court of the United States 44 that this application for reconsideration was limited to intervening circumstances of a substantial or controlling effect or to other substantial grounds not previously presented and is done in good faith and not for delay.

Eric Allen

LIST OF PARTIES

1. Petitioner: John Henry Ramirez, Polunsky Unit, 3872 FM 350 South, Livingston, TX 77351. For Petitioner: Eric J. Allen, Law Office of Eric J. Allen, LTD. 4200 Regent Street, Suite 200, Columbus, Ohio 43219;.
2. Respondent: Lorie Davis, Jennifer Morris, Assistant Attorney General of Texas, 300 W. 15th Street, Austin, TX 78701.

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SUMMARY OF THE ARGUMENT

No court or jury has heard the mitigating evidence that would have spared the life of John Henry Ramirez. It is true that he stopped the mitigation proceedings. The colloquy doing so, however, lasted less than a minute. The judge deciding whether this waiver was valid spent less time allowing a man to allow the state to sentence him to death than he would hearing a guilty plea. Both involve important rights, and both involve a waiver consistent with state and federal law. It is clear that the evidence presented aggravated the jurors and provided a reason to impose the death sentence. One juror, who provided a statement via the BBC documentary, said he was doing Mr. Rameriz a favor because of how terrible his father was to him.

Mr. Rameriz was then provided state habeas counsel who did the bare minimum to collect information. The mitigation provided in the state habeas, 11.071 petition, consists of affidavits from family members who were already were interviewed by trial counsel. When this court decided *Trevino/ Martinez* which created a conflict, he failed to remove himself. The investigation that could have been done in habeas, was not. John has yet to present evidence, uncovered by a British

Broadcasting Company film crew to a court. Procedures and onerous standards regulating the filing of 60 (b) motions make a meaningful presentation impossible.

REASON FOR GRANTING THE PETITION FOR RECONSIDERATION

I. The mitigation waiver was woefully inadequate.

It is well established that a citizen's waiver of a constitutional right must be knowing, intelligent, and voluntary. As far back as Johnson v. Zerbst, we held that courts must "indulge every reasonable presumption against waiver' of fundamental constitutional rights." 304 U.S., at 464, 58 S. Ct. 1019, 82 L. Ed. 1461. Since then, "[w]e have been unyielding in our insistence that a defendant's waiver of his trial rights cannot be given effect unless it is 'knowing' and 'intelligent.'" Illinois v. Rodriguez, 497 U.S. 177, 183, 110 S. Ct. 2793, 111 L. Ed. 2d 148 (1990) (citing Zerbst, 304 U.S. 458, 58 S. Ct. 1019, 82 L. Ed. 1461).

The trial court had the following conversation:

The court:	And this is of your own free will
Defendant:	That's correct, your honor
The Court:	No one is forcing you to do this?
The Defendant:	No sir.
The Court:	No one is influencing you in any way to do this?
The Defendant:	No sir.
The Court:	Did you think about this long and hard?
The defendant:	Oh yeah ive thought about this since the even occurred, you know
The Court:	okay

The Defendant: I knew what was coming so I made my decision a long time ago.

The Court: okay. All right. All right why don't you have a seat, Mr. Ramirez

R. 31, Return of the Writ

Unless John knew of the most significant mitigation evidence available to him, he could not have made a knowing and intelligent waiver of his constitutional right to present that evidence. *See Battenfield v. Gibson*, 236 F.3d 1215, 1229-33 (10th Cir. 2001) (holding a defendant's waiver invalid where there was "no indication [counsel] explained . . . what specific mitigation evidence was available"); *Coleman v. Mitchell*, 268 F.3d 417, 447-48 (6th Cir. 2001); *see generally Iowa v Tovar, 541 U.S. 77 at 88.* The waiver contained no evidence that counsel explained what mitigation was available and what he could present. Counsel knew of what evidence they had and what they did not have. This was not presented to the court to bolster this waiver.

II. Trial and state habeas counsel were ineffective when failing to investigate compelling mitigation evidence.

This investigation principle set forth in *Strickland* applies to the sentencing phase of trials too. *Wiggins v. Smith*, 539 U.S. 510, 526 (2003). At the time of Mr. Ramirez's trial, his attorneys' professional obligations were governed by the American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 2003 (the "Guidelines") and the ABA Standards for Criminal Justice (3d Ed. 1993) (the "Standards"). "Those Guidelines applied the clear requirements for investigation set forth in

the earlier Standards to death penalty cases and imposed . . . similarly forceful directive[s].*"* *Rompilla v. Beard*, 545 U.S. 374, 387 n.7 (2005) (referring to 1989 Standards). Under the Guidelines, counsel has an obligation to conduct at every stage a "thorough and independent investigation ( ) relating to the issues of both guilt and penalty." Guidelines 10.7(A). Similarly, the Standards imposed an affirmative obligation "to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case." Standards 4-4.1 Most significantly, "[t]he duty to investigate exists regardless of the accused's admissions or statements to defense counsel of facts constituting guilt or the accused's stated desire to plead guilty." *Ibid.*

Once capital trial counsel completes the necessary pretrial investigation, he must then formulate a defense theory "that will be effective in connection with both guilt and penalty . . . ." Guideline 10.10.1 (2003); *accord* Guideline 11.7.1 (1989). This Court's precedent dictates that defense counsel must conduct a reasonable investigation or, at a minimum, to make a reasonable, *informed* decision that makes specific investigation unnecessary. *Strickland v Washington*, 466 U.S. 668, 691; *accord Sonnier v. Quarterman*, 476 F.3d 349, 358 (5th Cir. 2007). Trial counsel may not limit the scope of their investigation unless they determine that further investigation would be "counterproductive or fruitless." *Lewis v. Dretke*, 355 F.3d 364, 367 (5th Cir. 2003); *accord Smith v. Dretke*, 422 F.3d 269, 280 (5th Cir. 2005).

Here, neither trial counsel nor state-habeas-counsel Mr. Gross reasonably investigated Mr. Ramirez's mental state and traumatic history. Had they done so, they would have uncovered a terrible combination of serious mental illness and

childhood trauma as displayed in the BBC documentary. Ex. 1. This evidence, placed in proper context by expert medical professionals, would have resulted in a homicide conviction that was less than capital and, even if convicted of capital murder, a life sentence.

A. *Pablo Castro's son, Aaron Castro, Would Have Asked the Jury To Impose A Life Sentence Had He Known That Ramirez Had A Son.*

The BBC produced a video in 2017 in which they interviewed the victim's family. The BBC produced a video in 2017 in which they interviewed the victim's family.. See also Ex. 1.

At 3:35, Aaron Castro says, "I would not want that hate cycle to continue" because he would not support the death penalty be imposed on Ramirez because he now has an infant son. This would be powerful evidence to present to a jury.

The ABA guidelines for the representation of defendants charged with capital offenses discuss interviewing victim's family members. The guidelines state "counsel should consider interviewing potential witnesses . . . familiar with aspects of the client's life history that might affect . . . mitigating evidence to show why the client should not be sentenced to death[,]" as well as "members of the victim's family opposed to having the client killed." *ABA Guideleins for the Representation of Capital Defendants (1989) at 11.4.1(D)3.B and* C And the commentary to Rule 11.4.1 notes, "[c]ounsel's duty to investigate is not negated by the expressed desires of a client[,] [n]or may counsel 'sit idly by, thinking that investigation would be futile.'" *Id.*

This Court concluded that "all mitigating evidence can be given effect under the broad definition of mitigating evidence found in" § 2(e)(1) and that § 2(f)(4)'s "definition of mitigation evidence does not limit the evidence considered under" § 2(e)(1). On this latter point, the *Beazley* court stressed that "[v]irtually any mitigating evidence is capable of being viewed as having some bearing on the defendant's 'moral culpability.'" *Beazley v Johnson, 533 U.S. 969 (2001)*

B. The mitigation evidence shows Mr. Ramirez's horrific childhood trauma.

The BBC documentary also presents shocking testimony from Ramirez's mother, Priscilla Martinez, about the violence she endured during Ramirez's childhood. This interview contains far more detail than that which was presented in her affidavit (Doc. No. 7, p. 33): She was stabbed by a boyfriend in front of Mr. Rameriz. This extreme violence witnessed by Mr. Rameriz would be powerful in front of the jury. *Rompilla v Beard, 545 U.S. 374*, is instructive here. *Rompilla* was raised by addicted parents, subject to bouts of extreme violence, and knew little or no love. *Id.* John suffered the same. However, because his trial and post-conviction counsel failed to unearth these things, he cannot be granted relief.

The Circuits have been mindful of finding any and all mitigation evidence before approving a death sentence. In *Caro v. Calderon*, 165 F.3d 1223 (9th Cir. 1999), the Ninth Circuit stated that "it is imperative that all relevant mitigating information be unearthed for consideration at the capital sentencing phase." *Id*. at 1227. Counsel

failed to unearth this history of violence that Mr. Rameriz was exposed. *Harries v. Bell, 417 F.3d 631, 639-640 (6th Cir.2005*) (counsel's inadequate investigation failed to discover evidence of traumatic childhood, including physical abuse, exposure to extreme violence, brain damage, and mental illness); Hamblin v. Mitchell, 354 F.3d 482, 490-491 (6th Cir.2003) (counsel conducted no investigation into mitigation, which included evidence of unstable and deprived childhood and probable mental disability or disorder); *Coleman v. Mitchell, 268 F.3d 417, 450-52 (6th Cir. 2001*) (defendant was abandoned by his mother and raised by his grandmother, who abused him both physically and psychologically, neglected him while running her home as a brothel and gambling house, involved him in her voodoo practice, and exposed him to group sex, bestiality, and pedophilia); *Carter v. Bell, 218 F.3d 581, 594-600 (6th Cir. 2000)* (counsel deficient for failing to investigate and present mitigating evidence of petitioner's poor, violent, and unstable childhood, childhood and adult head injuries, psychiatric problems, and positive relationships with his step-children, family, and friends); *Skaggs v. Parker, 235 F.3d 261, 269-75 (6th Cir. 2000)* (post-conviction evidence indicated that Skaggs was mentally retarded, suffered from organic brain damage, and exhibited psychotic, paranoid, and schizophrenic features.*)*

III. Trial counsel operated under an actual conflict of interest.

An "actual conflict," for Sixth Amendment purposes, is a conflict of interest that adversely affects counsel's performance." *Mickens v. Taylor*, 535 U.S. 162. There is little doubt that the conflict that counsel labored under affected his performance.

When that conflict is discovered, counsel must step aside. Counsel could not "reasonably be expected to make such an argument, which" would have threatened his "professional reputation and livelihood." *Christeson v. Roper*, 135 S. Ct. 891, 894 (2015).

In fact, under Texas law he is required to do so. The Rules of Professional Conduct require counsel to refuse to represent a client where it "reasonably appears to be or become adversely limited by the lawyer's or law firm's responsibilities to another client or to a third person or by the lawyer's or law firm's own interests." Rules of Professional Conduct 1.06.

Here, Mr. Gross failed to do this even when it became obvious he had a conflict of interest. This taints the entire proceeding and weakens the structure of due process present in each criminal matter. A lawyer watching out for his own interest cannot be expected to save the life of his client.

Not only did counsel labor under a conflict of interest for four years, he abandoned his client at the end of the litigation. In January 2017, no clemency petition had been filed on behalf of the Petitioner. An execution date was set for February 2, 2017. Mr. Gross made no additional filings on Mr. Rameriz's behalf. Only the intervention of substitute counsel saved him.

a. The lower court provide clemency counsel

In *Martinez v. Ryan*, 132 S. Ct. 1309, 1320 (2012), this Court concluded that ineffective assistance by a state habeas attorney may amount to cause where state

procedural law requires that an ineffective assistance of trial counsel claim be raised in an initial state habeas application. The Supreme Court extended *Martinez* in *Trevino v. Thaler*, 133 S. Ct. 1911 (2013), to cases in Texas, where state law—on its face—permits an ineffective assistance of trial counsel claim to be raised on direct appeal, but in effect makes it virtually impossible to do so. To meet *Martinez*'s cause exception, a habeas petitioner must show that the representation provided by his state habeas counsel fell below the standards established in *Strickland* and that his underlying ineffective assistance of trial counsel claim "is a substantial one, which is to say . . . that the claim has some merit." *Martinez*, 132 S. Ct. at 1318.

Allen v. Stephens, 805 F.3d 617, 626 (5th Cir. 2015).

The District Court stepped in and provided John a lawyer to pursue clemency. There was no money for a mitigation specialist, an investigator or any collateral experts.

CONCLUSION

The District court provided clemency counsel but nothing more. The mitigation unearthed by the BBC crew was as good as the mitigation in *Rompilla*. The only difference is that his post conviction counsel worked to get all of the good information that was available. If this court does not accept this case and step in, John will be executed without a court ever having heard the mitigation.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby swear and affirm that on the 27th day of March, 2020, a copy of the foregoing was sent via electronic mail to Jennifer Morris, Assistant Texas Attorney General, 300 W. 15th Street, Austin, TX 78701

Eric Allen (0073384)