

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES

v.

RAMON DE LA CERDA

**EMERGENCY APPLICATION FOR A STAY PENDING
DISPOSITION OF PETITION FOR WRIT OF MANDAMUS
TO THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN
DISTRICT OF TEXAS**

Danalynn Recer
Counsel of Record
Texas Bar No. 00792935
Gulf Region Advocacy Center
2307 Union Street
Houston, Texas 77007
Telephone: (832) 969-0444
Fax: (713) 880-3811
dlrecer@aol.com

William David George
Texas Bar No. 00793212
Baker•Wotring llp
JPMorgan Chase Tower
600 Travis Street, Suite 700
Houston, Texas 77002
Telephone: (713) 980-6513
Fax: (713) 980-1701
dgeorge@bakerwotring.com

Counsel for Petitioner Ramon de la Cerda

**TO THE HONORABLE SAMUEL A. ALITO, JR., ASSOCIATE JUSTICE
OF THE UNITED STATES SUPREME COURT:**

Pursuant to Rule 23 of the Rules of this Court and the All Writs Act, 28 U.S.C. 1651, Applicant-Defendant respectfully applies for a stay of the written order entered by the Southern District of Texas on April 2, 2020. This order, in part, requires that the files containing confidential and privileged information belonging to Mr. de la Cerda be surrendered over Mr. de la Cerda's objection to counsel appointed by the Court today, April 7, 2020.

STATEMENT OF THE CASE

Over Mr. de la Cerda's objection, the district court has ordered that the file of Mr. de la Cerda's disqualified counsel of choice—which contains privileged and confidential information—be turned over to the counsel the district court has appointed to replace her. The district court ordered that Mr. de la Cerda's file be turned over on Tuesday, April 7, 2020.¹

Mr. de la Cerda intends to bring a mandamus proceeding asking this Court to direct the district court to withdraw its order requiring that Mr. de la Cerda's file be produced to appointed counsel over his objection.

Pending the filing of that petition for a writ of mandamus, Mr. de la Cerda

¹ Conclusions and Order, (Dkt. 1235). Citations to documents in the district court criminal docket, *United States v. Lopez et al.*, No. 4:15-cr-00564-26 (S.D. Texas), are designated as "Dkt.__".

now requests an emergency stay of the district court's order that:

- Requires his counsel to turn over his file over his objection today, Tuesday, April 7, 2020.

That will protect Mr. de la Cerdas rights and also protect this Court's jurisdiction by preventing this matter from becoming moot before it can rule.

I. FACTUAL/PROCEDURAL BACKGROUND OF THE CASE

Mr. de la Cerdas is under indictment in the Southern District of Texas for murder in aid of racketeering and kidnaping that resulted in death, both of which are punishable by death.² He is one of 32 co-defendants on a 75-count racketeering indictment and one of eight charged with death-eligible offenses. However, he is the only death-eligible defendant who was denied expedited review by the Department of Justice's Capital Case Review Committee ("Committee").

The United States Department of Justice has not yet decided whether it will seek the death penalty against Mr. de la Cerdas. His counsel is scheduled to make a presentation to the Committee on May 4, 2020.

Mr. de la Cerdas was added to the indictment through the Second Superseding Indictment more than three years into the case and initially faced non-capital charges.³ Magistrate Johnson appointed CJA Panel attorney Gregory C.

² Third Superseding Indictment at 23 (Dkt. 837).

³ Second Superseding Indictment (Dkt. 730).

Gladden.⁴ When death-eligible charges were added through the Third Superseding Indictment five months later, attorney Danalynn Recer was appointed as capital learned counsel pursuant to 18 U.S.C. §3005.

After a series of sealed orders and filings related to budgeting and funding issues, the District Court terminated Ms. Recer's appointment.⁵ At Mr. de la Cerda's request, Ms. Recer filed a notice of appearance to represent Mr. de la Cerda as private counsel on a pro bono basis.⁶ Without Mr. de la Cerda's knowledge or consent, CJA Panel attorney Mr. Gladden filed a motion to replace Ms. Recer with attorney William Sothern as learned counsel,⁷ and later a Motion to Strike Notice of Appearance to remove Ms. Recer as private pro bono counsel.⁸

Mr. de la Cerda has instructed Ms. Recer not to provide his legal file to the appointed attorneys.

After a series of sealed pleadings and a sealed hearing, on April 2, 2020, the district court granted the Motion to Strike Ms. Recer's appearance as pro bono counsel over Mr. de la Cerda's objection and ordered that her file regarding Mr. de la Cerda's representation be turned over to appointed counsel.⁹

⁴ Order of Appointment, (Dkt. 731).

⁵ Conclusions and Order at 2 (Dkt. 1235) (Appendix A).

⁶ Notice of Appearance (Dkt. 1133), with Affidavit of Ramon de la Cerda (Dkt. 1133-1).

⁷ Motion to Appoint Second Counsel (Dkt. 1143).

⁸ Motion to Strike Notice of Appearance (Dkt. 1171).

⁹ Conclusions and Order at 5-6 (Dkt. 1235) (Appendix A).

In sealed proceedings, Mr. de la Cerda sought an emergency stay of the order and mandamus in the Fifth Circuit Court of Appeals, both of which were denied after hours on the evening of April 6, 2020.

On April 7, 2020—following the Fifth Circuit’s denial of mandamus and the stay—Mr. de la Cerda filed motions in the district court and Fifth Circuit seeking stays until this Court has ruled on the mandamus petition. As of this filing, neither the district court nor the Fifth Circuit has ruled on those motions to stay.

JURISDICTION

This Court has jurisdiction to grant a stay pending disposition of a petition for a writ of mandamus as the stay is “necessary and appropriate in aid of [the Court’s] respective jurisdiction [] and agreeable to the usages and principles of law.” *See* 28 U.S.C. § 1651; *see also Lawrence on Behalf of Lawrence v. Chater*, 516 U.S. 163, 168 (1996) (per curiam) (recognizing the flexibility of the “Court’s longstanding approach to applications for stays and other summary remedies granted without determining the merits of the case under the All Writs Act.”).

ARGUMENT

Applicant-Defendant respectfully requests that this Court grant a stay of the district court order pending filing of a petition for a writ of mandamus. A stay pending disposition of a petition for mandamus is warranted where there is (1) a “fair prospect” that the Court will grant mandamus and (2) “a likelihood that

irreparable harm [will] result from the denial of a stay.” *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (per curiam). Mr. de la Cerdá meets these requirements.

I. There is a fair prospect that the Court would grant mandamus relief or reverse the lower court’s judgment denying mandamus relief.

Mandamus is appropriately used to “confine the court against which mandamus is sought to a lawful exercise of its prescribed jurisdiction.” *Cheney v. United States Dist. Court*, 542 U.S. 367, 380 (2004). Mandamus may also correct errors “amounting to a judicial “usurpation of power” or a “clear abuse of discretion. *Id.* Mandamus should issue when (1) the “right to issuance of the writ is ‘clear and indisputable’”; (2) “no other adequate means [exist] to attain the relief he desires,” and (3) “the writ is appropriate under the circumstances.” *Hollingsworth*, 558 U.S. at 190 (quoting *Cheney v United States Dist. Court for D.C.*, 542 U.S. 367, 380-81 (2004)). Each of these requirements are met here.

A. The Right to mandamus relief is clear and indisputable

The district court clearly exceeded his authority when it ordered that Mr. de la Cerdá’s file to be turned over to appointed counsel over his objection. This was a judicial usurpation of power.

The district court cited no authority allowing it to override Mr. de la Cerdá’s instructions regarding his file and no authority allowing it to intervene between defense attorneys to direct the distribution of work product among them for any

purpose.

The District Court cited no authority because there is none. All the existing law contravenes the District Court's position. State and federal law¹⁰ are in unambiguous agreement that an attorney's file belongs to the client and he alone may direct and limit disclosure of confidential materials, even among his own counsel and/or successor counsel.¹¹ The District Court may not control or direct custody of Mr. de la Cerda's confidential legal file.

The ethical and professional rules governing the duty of confidentiality owed to their clients by all counsel appearing before the District Courts in the Southern District of Texas are the Texas Disciplinary Rules of Professional Conduct.¹²

Texas attorneys may not tender their client's file to successor counsel without the client's authorization and courts may not override a litigant's decision to withhold that authorization.¹³

¹⁰ "So far as we can determine, it is a general principle of law that client files belong to the client and indeed the court may order them surrendered to the client or another attorney on the request of the client subject only to the attorney's right to be protected in receiving compensation from the client for work done." *In re Grand Jury Proceedings*, 727 F.2d 941, 944 (10th Cir. 1984).

¹¹ The Texas Disciplinary Rules of Professional Conduct permits a lawyer to disclose a client's confidence to other members of the legal team "except when otherwise instructed by the client". Rule 1.05(c)(3). The Commentary to this Rule notes that clients may instruct "that particular information be confined to specified lawyers." Rule 1.05, Comment 7.

¹² Rule 1(A) Standards of Conduct. Rules of Discipline, United States District Court Southern District of Texas (Effective June 19, 2007).

¹³ *In re McCann*, 22 S.W.3d 701 (2013).

The District Court Order requires Texas lawyers to violate these rules.

The District Court found that neither Ms. Recer nor Mr. de la Cerdá had shown that the file contained confidential or privileged information that Mr. de la Cerdá does not want disclosed.¹⁴

This is a misstatement of the record of the sealed proceedings and filings, but even if true, that is the wrong question, particularly for purposes of this motion.

In Texas, “confidential information” includes both privileged and unprivileged client information.¹⁵ In a criminal case, “a client has a privilege to prevent a lawyer or lawyer’s representative from disclosing any other fact that came to the knowledge of the lawyer or the lawyer’s representative by reason of the attorney-client relationship.”¹⁶ Thus, everything in Ms. Recer’s files regarding her representation of Mr. de la Cerdá is confidential, including both privileged and non-privileged client information.

A client does not have to articulate any reason for controlling access to their file or make any showing as to the contents.

The purpose of the attorney-client privilege is “to encourage full and frank

¹⁴ Conclusions and Order at 5.

¹⁵ Texas Rule 1.05 Confidentiality of Information. For purposes of the Rules of Professional Conduct, “Privileged information” is that “protected by the lawyer-client privilege of Rule 503 of the Texas Rules of Evidence or of Rule 503 of the Texas Rules of Criminal Evidence or 501 of the Federal Rules of Evidence for United States Courts and Magistrates.”

¹⁶ Rule 503(b)(2) “Special Rule in a Criminal Case.”

communication between lawyers and their clients and thereby promote broader public interests in the observance of law and administration of justice.”¹⁷ The privilege “is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure.”¹⁸

Attorneys and non-attorney team members build trust with the client by pledging to protect the confidentiality of their disclosures.¹⁹ The ABA Guidelines for Capital Representation and the Supplementary Guidelines both reflect “the importance of the Model Rule establishing the fiduciary obligation of confidentiality … because the foundation of the development of a relationship of trust with the client must be a commitment—an oft-repeated commitment—to maintaining the confidences of the client,” which is “of utmost importance in legal proceedings in which the client’s life hangs in the balance.”²⁰ The guidelines for capital representation make it clear that it is the duty of the entire defense team to

¹⁷ *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).

¹⁸ *Hunt v. Blackburn*, 128 U. S. 464, 128 U. S. 470 (1888).

¹⁹ “The very *raison d’être* of the confidentiality obligation is the fact that, as hard as it is to convince clients they should share their innermost concerns with their lawyers, one way to overcome that reluctance is to pledge that the lawyers’ lips are sealed.” Lawrence J. Fox, *Capital Guidelines and Ethical Duties: Mutually Reinforcing Responsibilities*, 36 HOFSTRA L. REV. 775, 800 (2008).

²⁰ Lawrence J. Fox, Capital Guidelines and Ethical Duties: Mutually Reinforcing Responsibilities, 36 HOFSTRA L. REV. 775, 800 (2008).

maintain the confidentiality of client communications.²¹

Ordering counsel to violate those promises of confidentiality made to Mr. de la Cerdá by all the members of his former defense team, and substituting its judgement for Mr. de la Cerdá's regarding the custody and control of his attorney-client confidences and private records, is a judicial usurpation of power.

B. No other Adequate means exist to attain relief.

Direct appeal of a final judgement would not offer a means to address the court's error.

The Court has interposed itself into the defense function to make decisions on behalf of Mr. de la Cerdá regarding disclosures of his confidential and privileged materials from one of his lawyers to another. The order has not taken place in the context of any suit or cause of action that could later be the subject of an appeal. Because it is not attendant to the criminal proceeding, it cannot be remedied in the normal course of the criminal proceeding as it could be if the issue were disclosure of information to the prosecution.

²¹ See SUPPLEMENTARY GUIDELINES, *supra* note 6, at Guideline 4.1(C) (all defense team members “are bound by rules of professional responsibility that govern the conduct of counsel respecting privilege, diligence, and loyalty to the client”); *id.* at Guideline 4.1(D) (counsel must inform non-attorney defense team members of “rules affecting confidentiality, disclosure, privileges and protections”); *id.* at Guideline 5.1(C) (mitigation specialists must have the skills to conduct interviews that produce “*confidential, relevant and reliable information*”) (emphasis added). Lawrence J. Fox, *Capital Guidelines and Ethical Duties: Mutually Reinforcing Responsibilities*, 36 HOFSTRA L. REV. 775, 801 (2008).

Mr. de la Cerdas file is scheduled to be turned over to the appointed counsel by the end of the day today. There is no other action that could be brought in that time.

C. Mandamus is appropriate under the circumstances.

Mandamus is appropriate in this case because of the particularly important interests at stake. In cases such as this one, where serious questions arise that might otherwise elude appellate review, mandamus is necessary to “protect important or clear claims of privilege.” 16 Charles Alan Wright, Arthur R. Miller, & Edward H. Cooper, *Federal Practice and Procedure* § 3935.3 (2d ed. 2009); *see also Mohawk Industries v. Carpenter*, 558 U.S. 100, 110 (2009) (“[L]itigants confronted with a particularly injurious or novel privilege ruling have several potential avenues of review apart from collateral order appeal....[A] party may petition the court of appeals for a writ of mandamus.”). Similarly, this Court, in *Schlaggenhauf v. Holder*, 379 U.S. 104, (1964), relied on mandamus to answer the novel question whether Federal Rule of Civil Procedure 35 authorized the physical and mental examination of a defendant. *Schagenhauf* “affords strong support for the use of supervisory or advisory mandamus to review a discovery question that raises a novel and important question of power to compel discovery, or that reflects substantial uncertainty and confusion in the district courts.” Wright & Miller, *supra*, at § 3935.3.

Mr. de la Cerda has presented a substantial allegation of usurpation of power in an order overriding his right to control his own legal file with no basis in caselaw or statute. Mandamus is appropriate under these circumstances.

II. There is a likelihood that irreparable harm will result from the denial of a stay.

Mr. de la Cerda will be irreparably injured if the stay is not entered. Without the stay, the question will become moot as Mr. de la Cerda's file containing confidential and privileged information will be disclosed over his objection to lawyers who he does not want to have it by the end of the day on Tuesday, April 7, 2020.

It is an invasion of Mr. de la Cerda's dignity and autonomy, a violation of his attorney client privilege, a violation of his privacy and a denial of his right to be master of his own defense for the District Court to take it upon itself to decide what Mr. de la Cerda will disclose to the lawyers representing him.

CONCLUSION

The district court's order that Mr. de la Cerda's confidential and privileged legal materials be disclosed to attorneys whom he does not wish to have it is clearly an usurpation of judicial powers. Because there is no adequate remedy on appeal, Mr. de la Cerda intends to file a petition for writ of mandamus with this Court. If the file is surrendered, however, the question would become moot and not subject to review. This Court, therefore, should issue an emergency stay of

those orders.

Respectfully submitted,

/s/ Danalynn Recer

Danalynn Recer
Texas Bar No. 00792935
GULF REGION ADVOCACY CENTER
2307 Union Street
Houston, Texas 77007
Telephone: (713) 869-4722
Fax: (713) 880-3811
dlrecer@aol.com

/s/ William David George

William David George
Texas Bar No. 00793212
BAKER•WOTRING LLP
JPMorgan Chase Tower
600 Travis Street, Suite 700
Houston, Texas 77002
Tel: (713) 980-1700
Fax: (713) 980-1701
dgeorge@bakerwotring.com

Counsel for Petitioner Ramon de la Cerdá