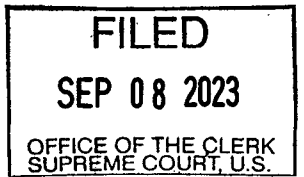


No. 23 - 5887



IN THE  
SUPREME COURT OF THE UNITED STATES

ARTHUR VASQUEZ — PETITIONER  
(Your Name)

vs.

BOBBY LUMPKIN, ET AL — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

FIFTH CIRCUIT COURT OF APPEALS  
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

ARTHUR VASQUEZ  
(Your Name)

MC CONNELL UNIT 3001 S. EMILY RD.  
(Address)

BEEVILLE TX 78102  
(City, State, Zip Code)

\_\_\_\_\_  
(Phone Number)

### QUESTION(S) PRESENTED

- 1) DID THE PANEL OF THE FIFTH CIRCUIT ERR BY DECIDING THE MERITS OF AN APPEAL NOT PROPERLY BEFORE THE COURT TO JUSTIFY THE DENIAL OF A CERTIFICATE OF APPEALABILITY?
- 2) HAS THE SUPREME COURT OF THE UNITED STATES OVERTURNED ITS OWN PRECEDENT IN *BUCK V. DAVIS*, 137 S. CT. 759 (2017); *TREVINO V. THALER*, 133 S. CT. 1911 (2013); AND *MARTINEZ V. ILLAN*, 566 U.S. 1 (2012). WHERE THIS COURT DECIDED THAT A PROCEDURAL DEFAULT WOULD NOT BAR A CLAIM OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL, WHEN COLLATERAL PROCEEDINGS WAS THE FIRST PLACE TO CHALLENGE A CONVICTION ON A GROUND OF INEFFECTIVE ASSISTANCE?
- 3) DOES THE SUPREME COURT DECISION IN *BUCK V. DAVIS* VIOLATE THE EQUAL PROTECTION OF LAW. WHERE IT ALLOWS A DIFFERENT STANDARD OF REVIEW FOR STATE PRISONERS AS COMPARED TO FEDERAL PRISONERS WHO ARE SIMILARLY SITUATED?
- 4) WHEN THE "LEAKING OF THE JURY VERDICT" IS CLEARLY OBVIOUS AND WEIGHS HEAVILY AGAINST THE INTEGRITY OF THE CONVICTION, IS NOT THE JURY TRIAL PROCESS IN QUESTION BY SUCH MISCONDUCT?

## LIST OF PARTIES

[ ] All parties appear in the caption of the case on the cover page.

[X] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

SIDNEY FITZWATER - SENIOR U.S. DISTRICT JUDGE  
GEORGE L. HURAN - U.S. MAGISTRATE JUDGE  
VAREN MITCHELL - U.S. ASS. DISTRICT ATTORNEY  
BOBBY LUMPKIN - DIRECTOR T.D.C.U.  
RICK MARNIS - TRIAL COURT JUDGE  
BRIAN COOK - BAILIFF  
JUSTIN MCCLANTS - ASS. DISTRICT ATTORNEY  
WILLIAM D. LOVETT - TRIAL COUNSEL  
MICHAEL MOWLA - APPELLATE COUNSEL

## RELATED CASES

F-1062372  
NO. 05-12-00354-CR  
PD-129112 VASQUEZ V. STATE  
W10-62372-T(A)  
WR-54,231-02  
W10-62372-ALB)

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IN THE  
SUPREME COURT OF THE UNITED STATES  
  
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

**OPINIONS BELOW**

☒ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

☐ reported at \_\_\_\_\_; or,  
☐ has been designated for publication but is not yet reported; or,  
☒ is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

☐ reported at \_\_\_\_\_; or,  
☐ has been designated for publication but is not yet reported; or,  
☒ is unpublished.

☐ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix \_\_\_\_\_ to the petition and is

☐ reported at \_\_\_\_\_; or,  
☐ has been designated for publication but is not yet reported; or,  
☐ is unpublished.

The opinion of the \_\_\_\_\_ court appears at Appendix \_\_\_\_\_ to the petition and is

☐ reported at \_\_\_\_\_; or,  
☐ has been designated for publication but is not yet reported; or,  
☐ is unpublished.

## JURISDICTION

☒ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was 5-3-2023.

☐ No petition for rehearing was timely filed in my case.

☒ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: 6-16-2023, and a copy of the order denying rehearing appears at Appendix \_\_\_\_\_.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including \_\_\_\_\_ (date) on \_\_\_\_\_ (date) in Application No. A \_\_\_\_\_.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☐ For cases from **state courts**:

The date on which the highest state court decided my case was \_\_\_\_\_.  
A copy of that decision appears at Appendix \_\_\_\_\_.

☐ A timely petition for rehearing was thereafter denied on the following date: \_\_\_\_\_, and a copy of the order denying rehearing appears at Appendix \_\_\_\_\_.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including \_\_\_\_\_ (date) on \_\_\_\_\_ (date) in Application No. A \_\_\_\_\_.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

THE FIFTH AMENDMENT: NO PERSON SHALL BE HELD TO ANSWER FOR A CAPITAL, OR OTHERWISE INFAMOUS CRIME, UNLESS ON A PRESENTMENT OR INDICTMENT OF A GRAND JURY, EXCEPT IN CASES ARISING IN THE LAND OR NAVAL FORCES, OR IN THE MILITIA, WHEN IN ACTUAL SERVICE IN TIME OF WAR. OR PUBLIC DANGER; NOR SHALL ANY PERSON BE SUBJECT FOR THE SAME OFFENSE TO BE TWICE PUT IN JEOPARDY OF LIFE OR LIMB; NOR SHALL BE COMPELLED IN ANY CRIMINAL CASE TO BE A WITNESS AGAINST HIMSELF, NOR BE DEPRIVED OF LIFE, LIBERTY, OR PROPERTY, WITHOUT DUE PROCESS OF LAW; NOR SHALL PRIVATE BE TAKEN FOR PUBLIC USE, WITHOUT JUST COMPENSATION.

THE SIXTH AMENDMENT: IN ALL CRIMINAL PROSECUTIONS, THE ACCUSED SHALL ENJOY THE RIGHT TO A SPEEDY AND PUBLIC TRIAL, BY AN IMPARTIAL JURY OF THE STATE AND DISTRICT WHEREIN THE CRIME SHALL HAVE BEEN COMMITTED, WHICH DISTRICT SHALL HAVE BEEN PREVIOUSLY ASCERTAINED BY LAW, AND TO BE INFORMED OF THE NATURE AND CAUSE OF THE ACCUSATION; TO BE CONFRONTED WITH THE WITNESSES AGAINST HIM; TO HAVE COMPULSORY PROCESS FOR OBTAINING WITNESSES IN HIS FAVOR, AND TO HAVE THE ASSISTANCE OF COUNSEL FOR HIS DEFENSE.

28 U.S.C. 2241: (a) WRITS OF HABEAS CORPUS MAY BE GRANTED BY THE SUPREME COURT, ANY JUSTICE THEREOF, THE DISTRICT COURTS AND ANY CIRCUIT JUDGE WITHIN THEIR RESPECTIVE JURISDICTIONS. THE ORDER OF A CIRCUIT JUDGE SHALL ENTER IN THE RECORDS OF THE DISTRICT COURT OF THE DISTRICT WHEREIN THE RESTRAINT COMPLAINED IS HAD.

(b) THE SUPREME COURT, ANY JUSTICE THEREOF, AND ANY CIRCUIT JUDGE DECLINE TO ENTERTAIN AN APPLICATION FOR A WRIT OF HABEAS CORPUS AND MAY TRANSFER THE APPLICATION FOR HEARING AND DETERMINATION TO THE DISTRICT COURT HAVING JURISDICTION TO ENTERTAIN IT.

28 U.S.C. 2253(c)(2). A CERTIFICATE OF APPEALABILITY MAY ISSUE UNDER PARAGRAPH (1) ONLY IF THE APPLICANT HAS MADE A SUBSTANTIAL SHOWING OF THE DENIAL OF A CONSTITUTIONAL RIGHT."

28 U.S.C. 2254(d)(1)(2): (1) RESULTED IN A DECISION THAT WAS CONTRARY TO, OR INVOLVED AN UNREASONABLE APPLICATION OF, CLEARLY ESTABLISHED FEDERAL LAW, AS DETERMINED BY THE SUPREME COURT OF THE UNITED STATES; OR (2) RESULTED IN A DECISION THAT WAS BASED ON AN UNREASONABLE DETERMINATION OF THE FACTS IN LIGHT OF THE EVIDENCE PRESENTED IN THE STATE COURT PROCEEDINGS.

TEX. R. CIV. PROC. RULE 283 DUTY OF OFFICER ATTENDING JURY.

"THE OFFICER IN CHARGE OF THE JURY SHALL NOT MAKE NOR PERMIT ANY COMMUNICATION TO BE MADE TO THEM EXCEPT TO INQUIRE IF THEY HAVE AGREED UPON A VERDICT. UNLESS BY ORDER OF THE COURT, [AND HE SHALL NOT BEFORE THERE VERDICT IS RENDERED COMMUNICATE TO ANY PERSON THE STATE OF THERE DELIBERATIONS OR THE VERDICT AGREED UPON].

### STATEMENT OF THE CASE

ON FEB. 24, 2012 DURING MR. VASQUEZ JURY TRIAL AND WHILE JURY WAS STILL IN DELIBERATIONS THE BAILIFF "LEAKED OUT" THE JURY'S VERDICT TO TRIAL COUNSEL WILLIAM D. COV III AND ASSISTANT DISTRICT ATTORNEY JUSTIN MCANTS BEFORE IT WAS RENDERED IN OPEN COURT WHICH LED TO AN INVOLUNTARY PLEA AGREEMENT.

ON OR ABOUT APR. 20, 2012 AT MR. VASQUEZ MOTION FOR NEW TRIAL HEARING SEEKED PERMISSION TO APPEAL DUE TO THE INEFFECTIVE ASSISTANCE OF COUNSEL, OFFICIAL MISCONDUCT, AND INTERFERING WITH THE JURY TRIAL PROCESS.

ON OR ABOUT APR. 20, 2012 AT MR. VASQUEZ MOTION FOR NEW TRIAL HEARING TRIAL COUNSEL TESTIFIED THAT "SINCE THE JUDGE WAS AWAY, I MUST HAVE LEARNED THAT THEY FOUND MR. VASQUEZ GUILTY." SEE: (R.R. VOL. 7 PG. 18 SENTENCES 3-5) AND "THAT IT MIGHT HAVE BEEN A BAILIFF." SEE: (R.R. VOL. 7 PG. 18 SENTENCES 11).

ON OR ABOUT APR. 20, 2012 AT MR. VASQUEZ MOTION FOR NEW TRIAL HEARING TRIAL COURT JUDGE RICK MARNIS ON THE RECORD STATES "BUT I WOULD SPECULATE THAT MR. COOK WOULD HAVE TOLD YOU ALL WHAT THE VERDICT WAS." SEE: (R.R. VOL. 7 PG. 23 SENTENCES 7-8) AND "SO I READ THE VERDICT AND IMMEDIATELY TOLD THEM THAT YALL HAD WORKED OUT AN ARRANGEMENT. SO YOU WERE INFORMED - THE TWO OF YOU WERE INFORMED WHETHER IT WAS BY MR. COOK OR BY ME, PRIOR TO ME READING THE VERDICT TO THE JURY WHAT THE VERDICT WAS." SEE: (R.R. VOL. 7 PG. 23 SENTENCES 19-23).

ON OR ABOUT APR. 20, 2012 AT MR. VASQUEZ MOTION FOR NEW TRIAL HEARING, THE TRIAL COURT DENIED MOTION ON THE GROUNDS THAT HE FEELS MR. VASQUEZ WAS NOT AN EASILY MANIPULATED INDIVIDUAL AND HE DOESN'T FEEL THAT MR. VASQUEZ WAS WAS TRICKED OR MANIPULATED TO ACCEPT PLEA AGREEMENT SEE: (R.R. VOL. 7 PG. 38 SENTENCES 3-7).

ON OR ABOUT AUG. 31, 2012 THE TEXAS COURT OF APPEALS DISMISSED FOR WANT OF JURISDICTION MR. VASQUEZ PLAINTS ON DIRECT APPEAL CITING INEFFECTIVE ASSISTANCE OF COUNSEL.

ON OR ABOUT JUN. 16. 2023 MR. VASQUEZ MOTION FOR RECON-  
SIDERATION AND REHEARING EN BANC WAS DENIED.

## REASONS FOR GRANTING THE PETITION

I. QUESTION ONE: DID THE PANEL OF THE FIFTH CIRCUIT ERR BY DECIDING THE MERITS OF AN APPEAL NOT PROPERLY BEFORE THE COURT TO JUSTIFY THE DENIAL OF A CERTIFICATE OF APPEALABILITY?

A. THE PANEL IMPROPERLY SIDESTEPED THE C.O.A. PROCESS BY DENYING RELIEF BASED ON ITS OWN VIEW OF THE MERITS.

IN REVIEWING THE FACTS AND CIRCUMSTANCES OF MR. VASQUEZ CASE, THE FIFTH CIRCUIT PANEL "PAID LIP SERVICE TO THE PRINCIPLES GUIDING ISSUANCE OF A C.O.A." *TENNARD V. DRETKE*, 542 U.S. 274, 283 (2004). BUT IN ACTUALITY PANEL HELD MR. VASQUEZ TO A FAR MORE STRINGENT STANDARD. SPECIFICALLY, THE FIFTH CIRCUIT PANEL SIDESTEPED THE THRESHOLD C.O.A. PROCESS BY FIRST DECIDING THE MERITS OF MR. VASQUEZ APPEAL, AND THEN JUSTIFYING ITS DENIAL OF A C.O.A. BASED ON ITS ADJUDICATION OF THE ACTUAL MERITS, THEREBY "IN ESSENCE DECIDING AN APPEAL WITHOUT JURISDICTION." *MILLER-EL V. COCKRELL*, 537 U.S. AT 326-37 (2003). AS THE SUPREME COURT HELD ON *MILLER-EL*, THE THRESHOLD NATURE OF THE C.O.A. INQUIRY "WOULD MEAN VERY LITTLE IF APPELLATE REVIEW WERE DENIED BECAUSE THE PRISONER DID NOT CONVINCE A JUDGE, OR FOR THAT MATTER, THREE JUDGES, THAT HE OR SHE WOULD PREVAIL." *MILLER-EL*, 537 U.S. 322 AT 337. IN MR. VASQUEZ CASE HOWEVER, THAT IS EXACTLY WHAT THE PANEL DID.

MR. VASQUEZ FILED A MOTION IN THE FIFTH CIRCUIT SEEKING A CERTIFICATE OF APPEALABILITY SO THAT HE MAY APPEAL THE DISTRICT COURT'S DENIAL OF HIS 2254 MOTION. THE PANEL HOWEVER, DETERMINED THAT MR. VASQUEZ DID NOT MAKE "A SUBSTANTIAL SHOWING OF THE DENIAL OF A CONSTITUTIONAL RIGHT." 28 U.S.C. 2253(c)(2); *SLACK V. McDANIEL*, 529 U.S. 473, 484 (2000).

THUS, THE PANEL CONCLUDED THAT MR. VASQUEZ SHOULD BE DENIED A CERTIFICATE OF APPEALABILITY BECAUSE THE APPEAL WAS OBVIOUSLY MERITLESS.

THE PANEL IMPERMISSIBLY SIDESTEPED THE C.O.A. INQUIRY IN THIS MANNER BY DENYING RELIEF BECAUSE THE APPEAL WOULD

BE MERITLESS. THE PANELS ASSESSMENT OF THE MERITS IS PATENTLY WRONG. THE PANEL COULD NOT POSSIBLY RESOLVE THE MERITS OF THE APPEAL BASED SOLELY ON A MOTION SEEKING A CERTIFICATE OF APPEALABILITY. MOREOVER, WITHOUT THE ISSUANCE OF A C.O.A. AND THE DISTRICT COURT'S RECORD BEFORE THE PANEL, THE PANEL WAS WITHOUT JURISDICTION TO DETERMINE THE MERITS OF THE APPEAL.

II. QUESTION TWO: HAS THE SUPREME COURT OF THE UNITED STATES OVERTURNED ITS OWN PRECEDENT IN *BUCK V. DAVIS*, 137 S. Ct. 759 (2017); *TREVINO V. THALER*, 133 S. Ct. 1911 (2013); AND *MARTINEZ V. IYAN*, 566 U.S. 1 (2012), WHERE THIS COURT DECIDED THAT A PROCEDURAL DEFAULT WOULD NOT BAR A CLAIM OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL, WHEN COLLATERAL PROCEEDINGS WAS THE FIRST PLACE TO CHALLENGE A CONVICTION ON GROUND OF INEFFECTIVE ASSISTANCE.

A. THE FIFTH CIRCUIT COURT OF APPEALS HELD THAT MR. VASQUEZ MUST MAKE A SUBSTANTIAL SHOWING OF THE DENIAL OF A CONSTITUTIONAL RIGHT. THE PROCEDURAL RULING BARRING RELIEF IS ITSELF DEBATABLE AMONG JURISTS OF REASON. OTHERWISE, THE APPEAL WOULD NOT DESERVE ENCOURAGEMENT TO PROCEED FURTHER.

IN THE FIFTH CIRCUITS DE NOVO REVIEW THE COURT FOUND THAT MR. VASQUEZ WAS BARRED BY PROCEDURAL DEFAULT BECAUSE HE DID NOT RAISE ALLEGATIONS IN THE DISTRICT COURT AND THEY WILL NOT BE CONSIDERED.

THE CLAIMS HAVE BEEN RAISED SINCE MOTION FOR NEW TRIAL, DIRECT APPEAL, PETITION FOR DISCRETIONARY REVIEW, ART. 1107 WRIT OF HABEAS CORPUS, AND NOW TO THE UNITED STATES DISTRICT COURT, AND FIFTH CIRCUIT COURT OF CRIMINAL APPEALS. THE PANEL HOWEVER, DISREGARDED WHAT THE SUPREME COURT SAID IN *BUCK*, *MARTINEZ*, 566 U.S. AT 9, 132 S. Ct. 1309 2, ED. 2d 272. WE HELD THAT WHEN A STATE FORMALLY LIMITS THE ADJUDICATION OF CLAIMS OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL TO COLLATERAL REVIEW, A PRISONER MAY

ESTABLISH CAUSE FOR PROCEDURAL DEFAULT. IF (1) THE STATE COURTS DID NOT APPOINT COUNSEL, OR APPOINTED COUNSEL IN THAT PROCEEDING... WAS INEFFECTIVE UNDER THE STANDARDS OF STRICKLAND V. WASHINGTON, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); AND (2) THE UNDERLYING CLAIM IS A SUBSTANTIAL ONE, WHICH IS TO SAY THAT THE CLAIM HAS SOME MERIT." Id. At 14, 132 S. Ct. 1309, 182 L. Ed. 2d 272".

THE MERITS IN MR. VASQUEZ 2254 IS SELF EVIDENT. HE MADE THE DISTRICT COURT AWARE OF THE CONFLICT OF INTEREST, BETWEEN HE AND HIS COUNSEL, THE OFFICIAL MISCONDUCT BY THE BAILIFF, TRIAL COUNSEL, AND ASSISTANT DISTRICT ATTORNEY BY LEARNING THE JURYS VERDICT AND "LEAKING OUT" THE VERDICT BEFORE IT WAS RENDERED IN OPEN COURT FORCING MR. VASQUEZ TO REPRESENT HIMSELF AT CRITICAL STAGES OF THE CRIMINAL PROCEEDING. THE COURT WAS AWARE OF ISSUES BUT FAILED TO DOE ITS DUTY IN CORRECTING ERRORS; AND WILLIAM D. POX III WAS INEFFECTIVE AS TRIAL COUNSEL AS HE ENGAGED IN MISCONDUCT WHICH LED TO INVOLUNTARY PLEA AGREEMENT, AND FAILING TO TAKE THE MOST ELEMENTARY STEP AS TO INVESTIGATE, THAT IS OBVIOUS IN THE COURTS RECORD.

B. THE SUPREME COURT HAS NOT YET ADDRESSED THE ISSUE OF WHETHER THE LACK OF COUNSEL AT THE INITIAL REVIEW COLLATERAL PROCEEDING CAN QUALIFY AS CAUSE FOR PROCEDURAL DEFAULT. IN THE CASE OF A FEDERAL PRISONER, CONCERNING CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL.

UNDER THE PROCEDURAL DEFAULT DOCTRINE. IF A STATE PRISONER "DEFAULTED HIS FEDERAL CLAIMS IN STATE COURT PURSUANT TO AN INDEPENDENT AND ADEQUATE STATE PROCEDURAL RULE. FEDERAL HABEAS REVIEW OF THE CLAIM IS BARRED UNLESS THE PRISONER CAN DEMONSTRATE CAUSE FOR THE DEFAULT AND ACTUAL PREJUDICE AS A RESULT OF THE ALLEGED VIOLATION OF FEDERAL LAW." COLEMAN V. THOMPSON, 501 U.S. 722, 750, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991). IN GENERAL,

LACK OF AN ATTORNEY AND ATTORNEY IN STATE POST-CONVICTION PROCEEDINGS DO NOT ESTABLISH CAUSE TO EXCUSE A PROCEDURAL DEFAULT. *Id.* AT 757. 111. S. CT. AT 2568.

IN *MARTINEZ*, THE SUPREME COURT ANNOUNCED A NARROW, EQUITABLE AND NON-CONSTITUTIONAL EXCEPTION TO COLEMAN'S HOLDINGS (THAT INEFFECTIVE ASSISTANCE OF COLLATERAL COUNSEL CANNOT SERVE AS CAUSE TO EXCUSE A PROCEDURAL DEFAULT).

IN THE LIMITED CIRCUMSTANCES WHERE (1) A STATE REQUIRES A PRISONER TO RAISE INEFFECTIVE TRIAL-COUNSEL CLAIMS AT AN INITIAL-REVIEW COLLATERAL PROCEEDING; (2) THE PRISONER FAILED PROPERLY TO RAISE INEFFECTIVE-ASSISTANCE OF TRIAL COUNSEL CLAIMS IN HIS STATE INITIAL REVIEW COLLATERAL PROCEEDINGS; (3) THE PRISONER DID NOT HAVE COLLATERAL COUNSEL OR HIS COUNSEL WAS INEFFECTIVE; AND (4) FAILING TO EXCUSE THE PRISONER'S PROCEDURAL DEFAULT WOULD CAUSE THE PRISONER TO LOSE A "SUBSTANTIAL INEFFECTIVE-TRIAL-COUNSEL CLAIM. IN SUCH A CASE, THE SUPREME COURT EXPLAINED THAT THERE MAY BE "CAUSE" TO EXCUSE THE PROCEDURAL DEFAULT OF THE INEFFECTIVE-TRIAL-COUNSEL CLAIM. *MARTINEZ*, 132 S. CT. AT 1319. SUBSEQUENTLY, THE SUPREME COURT EXTENDED *MARTINEZ* RULE TO CASES WHERE STATE LAW TECHNICALLY PERMITS INEFFECTIVE TRIAL-COUNSEL CLAIMS ON DIRECT APPEAL BUT STATE PROCEDURES MAKE IT "VIRTUALLY IMPOSSIBLE" TO ACTUALLY RAISE INEFFECTIVE TRIAL-COUNSEL CLAIMS ON DIRECT APPEAL. SEE *TREVINO*, 133 S. CT. AT 1915, 1918-21.

THERE CAN BE NO QUESTION WHETHER THE FEDERAL CRIMINAL COURT SYSTEM REQUIRES THAT INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS SHOULD BE BROUGHT IN COLLATERAL PROCEEDINGS AND NOT ON DIRECT APPEAL. SUCH CLAIMS BROUGHT ON DIRECT APPEAL ARE PRESUMPTIVELY DISMISSIBLE, AND VIRTUALLY ALL WILL BE DISMISSED. THE REASONS FOR THIS RULE ARE SELF-EVIDENT. A FACTUAL RECORD MUST BE DEVELOPED IN, AND ADDRESSED BY, THE DISTRICT COURT IN THE FIRST INSTANCE FOR EFFECTIVE REVIEW, EVEN IF

EVIDENCE IS NOT NECESSARY, AT THE VERY LEAST COUNSEL ACCUSED OF DEFICIENT PERFORMANCE CAN EXPLAIN THEIR REASONINGS AND ACTIONS. AND THE DISTRICT COURT CAN RENDER ITS OPINION ON THE MERITS OF THE CLAIM. AN OPINION BY A DISTRICT COURT IS A VALUABLE AID TO APPELLATE REVIEW FOR MANY REASONS, NOT THE LEAST OF WHICH IS THAT IN MOST CASES THE DISTRICT COURT IS FAMILIAR WITH THE PROCEEDINGS AND HAS OBSERVED COUNSEL'S PERFORMANCE, IN CONTEXT, FIRST HAND. THUS, EVEN IF THE RECORD APPEARS TO NEED NO FURTHER DEVELOPMENT, THE CLAIM WILL STILL BE PRESENTED FIRST TO THE DISTRICT COURT IN COLLATERAL PROCEEDINGS, WHICH SHOULD BE INSTITUTED WITHOUT DELAY, SO THE REVIEWING COURT CAN HAVE THE BENEFIT OF THE DISTRICT COURT'S VIEWS. THEREFORE, THE STATUTORY RIGHT TO APPEAL, THAT IS PART OF TODAY'S DUE PROCESS IN THE FEDERAL SYSTEM HAS BEEN REDUCED TO A RIGHT THAT NO LONGER INCLUDES A RIGHT TO APPEAL FROM SIXTH AMENDMENT I. A. C. CLAIMS.

INDIGENT DEFENDANTS PURSUING FIRST-TIER REVIEW IN A 2254 PROCEEDING ARE GENERALLY ILL EQUIPPED TO REPRESENT THEMSELVES. FOR (a) A FIRST-TIER REVIEW APPLICATION, FORCED TO ACT IN PRO-SE, WOULD FACE A RECORD UNREVIEWED BY APPELLATE COUNSEL; AND (b) WITHOUT GUIDES KEYED TO A COURT OF REVIEW. A PRO-SE PETITIONER ENTITLEMENT TO SEEK RELIEF FROM INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL MIGHT BE MORE A FORMALITY THAN A RIGHT. BECAUSE NAVIGATING THE CRIMINAL APPEAL AND COLLATERAL PROCESS WITHOUT A LAWYER'S ASSISTANCE IS A PERILOUS ENDEAVOR FOR A LAY PERSON. AND WELL BEYOND THE COMPETENCE OF INDIVIDUALS AFFORDED ONLY TWELVE MONTHS TO LEARN THE FEDERAL PROCESS INVOLVED. MOREOVER, DUE PROCESS REQUIRES THE APPOINTMENT OF COUNSEL FOR DEFENDANTS ON DIRECT APPEAL. IN THE AVERAGE CASE HOWEVER, THE MOST COMMON CLAIM OF CONSTITUTIONAL ERROR IS INEFFECTIVE ASSISTANCE OF COUNSEL.

IN MR. VASQUEZ CASE IT IS THE FIFTH CIRCUIT AND NOT THE UNITED STATES CONGRESS THAT ELECTED TO CHANGE THE REACH OF THE UNITED STATES LAW THAT GRANTED A DEFENDANT THE RIGHT TO APPEAL HIS SENTENCE WHEN THE SENTENCE WAS IN VIOLATION OF THE LAW. SEE 18 U.S.C. 3006 A.

III. QUESTION THREE: DOES THE SUPREME COURT DECISION IN BUCK V. DAVIS VIOLATE THE EQUAL PROTECTION OF LAW, WHERE IT ALLOWS A DIFFERENT STANDARD OF REVIEW FOR STATE PRISONERS AS COMPARED TO FEDERAL PRISONERS WHO ARE SIMILARLY SITUATED?

THE FIFTH CIRCUIT OF THE UNITED STATES COURT OF APPEALS, FAILED TO CONSIDER THE CONSTRUCTION OF THE FEDERAL REVIEW PROCESS AS IT IS COMPARED TO THE STATE PROCESS IDENTIFIED IN "MARTINEZ, TREVENO, AND BUCK".

MR. VASQUEZ CLAIMS THAT IT IS BECAUSE HE HAD NO COUNSEL DURING THE CLAIM PREPARATION PERIOD IN HIS COLLATERAL 2254 PROCEEDING THAT SERVES AS CAUSE FOR PROCEDURAL DEFAULT. ALTHOUGH HE DID MAKE A CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL IN HIS 2254, THE CLAIM WAS WEAK AND POORLY PRESENTED BECAUSE HE WAS FORCED, BY PROCEDURE, TO RELY ON A JAIL-HOUSE-LAWYER TO DRAFT HIS CLAIM. THUS, IT IS THE LACK OF COUNSEL (OR THE INEFFECTIVENESS OF 2254 COUNSEL) THAT CAUSED MR. VASQUEZ CLAIM OF INEFFECTIVE TRIAL COUNSEL TO FAIL.

MR. VASQUEZ CLAIM IS BEYOND THE REACH OF DIRECT APPEAL BECAUSE OF THE FEDERAL PROCEDURE. HIS CLAIM IS ALSO NEARLY IMPOSSIBLE FOR A LAY-PERSON TO RAISE IN A COLLATERAL PROCEEDING WHERE HE HAS NO RIGHT TO COUNSEL AND MUST FACE A MORE STRINGENT STANDARD OF REVIEW. CONGRESS HAD NOT INTENDED, IN 1948, THAT A DEFENDANT BE REQUIRED TO AWAIT THE FIRST ROUND OF COLLATERAL PROCEEDINGS TO RAISE A CONSTITUTIONAL ERROR WHERE COUNSEL WAS UNAVAILABLE TO INDIGENT PRISONERS. IT IS UNREASONABLE TO BELIEVE THAT THE AMERICAN CRIMINAL JUSTICE SYSTEM WOULD REQUIRE A CRIMINAL DEFENDANT TO RELY ON A

LAY-PERSON-AT-LAW TO PERFECT A FEDERAL CRIMINAL APPEAL. THIS HOWEVER IS EXACTLY WHAT THE PROCEDURE REQUIRES WHEN MAKING THE CONSTITUTIONAL CLAIM THAT A DEFENDANT IS DEPRIVED OF EFFECTIVE ASSISTANCE OF TRIAL COUNSEL. THE SUPREME COURT IN MARTINEZ HELD THAT THE PROCEDURAL DEFAULT THAT OCCURRED WHEN MARTINEZ POST-CONVICTION COUNSEL DID NOT RAISE A CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL IN HIS STATE COLLATERAL PROCEEDINGS WOULD NOT BAR HIS PETITION UNDER 28 U.S.C. 2254. WHERE "THE STATE COLLATERAL PROCEEDINGS WAS THE FIRST PLACE TO CHALLENGE HIS CONVICTION ON GROUNDS OF INEFFECTIVE ASSISTANCE". 132 S.Ct. AT 1313. THE SUPREME COURT EXPLAINED THAT "IF IN THE STATES INITIAL-REVIEW COLLATERAL PROCEEDINGS THERE WAS NO COUNSEL OR COUNSEL IN THAT PROCEEDINGS WAS INEFFECTIVE." PROCEDURAL DEFAULT WOULD NOT "BAR A FEDERAL HABEAS COURT FROM HEARING A SUBSTANTIAL CLAIM OF INEFFECTIVE ASSISTANCE AT TRIAL". Id. AT 1320 (EMPHASIS ADDED). IN MARTINEZ, STATE LAW REQUIRED THE PETITIONER TO WAIT UNTIL THE INITIAL REVIEW COLLATERAL PROCEEDINGS BEFORE RAISING SUCH A CLAIM. A YEAR LATER, IN TREVINO, THE SUPREME COURT EXTENDED MARTINEZ'S HOLDINGS TO CASES IN WHICH THE STATE DID NOT REQUIRE DEFENDANTS TO WAIT UNTIL THE POST-CONVICTION STAGE, BUT "THE STRUCTURE AND DESIGN OF THE STATE SYSTEM IN ACTUAL OPERATION... MADE IT VIRTUALLY IMPOSSIBLE FOR AN INEFFECTIVE ASSISTANCE CLAIM TO BE PRESENTED ON DIRECT REVIEW". 133 S.Ct. AT 1915.

THE QUESTION IS WHETHER THESE HOLDINGS APPLY TO SOME OR ALL PRISONERS WHO BRING MOTIONS FOR POST-CONVICTION RELIEF UNDER 28 U.S.C. 2254/2255. THE SEVENTH CIRCUIT HAS ALREADY ANSWERED THIS QUESTION IN THE AFFIRMATIVE. IN CHOICE HOTELS INTERN. INC. V. PROCTOR, 792 F.3d 753 (7th Cir. 2015). WHERE THE PANEL WROTE THAT "ALTHOUGH MAPLE'S AND HOLLAND V. FLORIDA, 560 U.S. 631 WERE CAPITAL CASES, WE DO NOT DOUBT THAT THEIR HOLDINGS APPLY TO ALL COLLATERAL

LITIGATIONS UNDER 28 U.S.C. 2254 AND 2255" *Id.* AT 755 (CITATIONS OMITTED). A CLOSER LOOK AT THE ISSUE SHOULD CONVINCE US THAT THE SEVENTH CIRCUIT'S POSITION IS CORRECT. IN *MASSARO V. UNITED STATES*, 538 U.S. 500, 123 S.Ct. 1690, 155 L.Ed. 2d 714 (2003), THE SUPREME COURT CONSIDERED THE CASE OF A MAN WHO DID NOT RAISE ANY CLAIM RELATIVE TO INEFFECTIVENESS OF TRIAL COUNSEL ON HIS DIRECT APPEAL, AND SO WAS TRYING TO RAISE SUCH AN ARGUMENT IN A MOTION UNDER 28 U.S.C. 2255. THE UNITED STATES ARGUED THAT THE INEFFECTIVENESS CLAIM WAS PROCEDURALLY DEFAULTED, BECAUSE MASSARO COULD HAVE RAISED IT ON DIRECT APPEAL. THE SUPREME COURT HOWEVER, REJECTED THAT POSITION AND HELD INSTEAD THAT THERE IS NO PROCEDURAL DEFAULT FOR FAILURE TO RAISE AN INEFFECTIVE-ASSISTANCE CLAIM ON DIRECT APPEAL, EVEN IF NEW COUNSEL HANDLES THE DIRECT APPEAL AND EVEN IF THE BASIS FOR THE CLAIMS ON DIRECT APPEAL IS APPARENT FROM THE TRIAL RECORD. *Id.* AT 503-04. INDEED, THE COURT CRITICIZED THE PRACTICE OF BRINGING THESE CLAIMS ON DIRECT APPEAL, BECAUSE "THE ISSUE WOULD BE RAISED FOR THE FIRST TIME IN A FORUM NOT BEST SUITED TO ASSESS THOSE FACTS" *Id.* AT 504. ALL APPEAL COURTS HAVE BEEN CRITICAL OF THE PRACTICE OF TRYING TO RAISE CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL ON DIRECT APPEAL, WHERE THE APPOINTMENT OF COUNSEL IS A STATUTORY GUARANTEE.

BECAUSE THE FEDERAL COURTS HAVE NO ESTABLISHED PROCEDURE TO DEVELOPE INEFFECTIVE ASSISTANCE CLAIMS FOR DIRECT APPEAL, THE SITUATION OF THIS PETITIONER IS THE SAME AS THE ONE THIS COURT DESCRIBED IN *TRIVINO*. AS A PRATICAL MATTER, THE FIRST OPPORTUNITY TO PRESENT A CLAIM OF INEFFECTIVE ASSISTANCE OF TRIAL OR DIRECT APPELLATE COUNSEL IS ALMOST ALWAYS ON COLLATERAL REVIEW. IN A MOTION UNDER 28 U.S.C. 2254/2255.

NEITHER MARTINEZ NOR TREVIÑO SUGGESTED THAT, FOR THESE PURPOSES, THE DIFFERENCE BETWEEN 2254 AND 2255 WAS MATERIAL. WHAT DOES MATTER IS THE WAY IN WHICH INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS MUST BE PRESENTED IN THE PARTICULAR PROCEDURE SYSTEM. THIS VARIES AMONG THE STATES, AND BETWEEN THE STATES AND THE FEDERAL SYSTEM, BUT MR. VASQUEZ HAS ALREADY EXPLAINED WHY IN THE GREAT MAJORITY OF FEDERAL CASES, INEFFECTIVENESS CLAIMS MUST WAIT THE FIRST ROUND OF COLLATERAL REVIEW. MOREOVER, IF REVIEW WERE TO BE RESTRICTED ON EITHER THE STATE OR THE FEDERAL SIDE, FEDERALISM CONCERNS SUGGEST THAT IT WOULD BE THE STATE SIDE. MOST OF THE RULES THAT GOVERN PETITIONS UNDER SECTION 2254 ARE MIRRORRED IN SECTION 2255.

INCLUDING IMPORTANTLY THE PROCEDURE FOR HANDLING SECOND OR SUCCESSIVE PETITIONS. MR. VASQUEZ CAN THINK OF NO REASON WHY MARTINEZ, TREVIÑO, AND BUCK SHOULD BE READ IN A WAY THAT WOULD PROVIDE DIFFERENT RESULTS BETWEEN FEDERAL AND STATE PROCEEDINGS. THE SUPREME COURT SHOULD INTERVENE NOW TO CORRECT AN EARTH-SHAKING MISAPPLICATION OF SETTLED LAW IN AN AREA OF GREAT PUBLIC CONCERN.

IV. QUESTION FOUR: WHEN THE "LEAKING OF THE JURY VERDICT" IS CLEARLY OBVIOUS AND WEIGHS HEAVILY AGAINST THE "INTEGRITY" OF THE CONVICTION, IS NOT THE JURY TRIAL PROCESS IN QUESTION BY SUCH MISCONDUCT?

A. THE ISSUES THAT HAVE BEEN PRESENTED TO THE COURTS FROM THE INCEPTION OF THIS CASE DEALS WITH THE "FAIRNESS AND INTEGRITY" OF THE JURY TRIAL PROCESS. THE "LEAKING OF PROTECTED INFORMATION" IS A MAJOR ISSUE IN OUR SOCIETY TODAY. LOOK NO FURTHER THAN THIS COURT'S RULING THAT OVERTURNED [ROE V. WADE]. BEFORE

THE PROCESS WAS FINISHED SOMEONE "LEAKED THE DRAFT" OF THIS COURTS DECISION. CONGRESS STATED IF A JUDGE "LEAKED OUT" THAT INFORMATION THEY WOULD MOVE TO IMPEACH THE "JUSTICE". HOW DOES THE "LEAKING OF PRIVATE AND PROTECTED INFORMATION" AFFECT/EFFECT THE PUBLIC'S JURY TRIAL PROCESS? PETITIONER IS LIVING THE ANSWER TO THIS QUESTION BY BEING IN PRISON 13 YEARS NOW. UNLESS THE ISSUANCE OF A CERTIFICATE OF APPEALABILITY OR THIS COURT ADDRESSING SUCH AN ISSUE THAT IS OF SUCH AN IMPORTANCE TO OUR NATION THE LOWER COURTS WILL CONTINUE TO USE PROCEDURES, BARS, AND RULES TO TURN A BLIND EYE TO THE JUSTICE THAT NOT ONLY PETITIONER BUT THOSE THAT ARE SIMILARLY SITUATED SEEK.

### CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Arthur Varquez

Date: September 8, 2003