No. 18A512

IN THE
Supreme Court of the United States

ROBERTO MORENO RAMOS,
Petitioner,
v.

STATE OF TEXAS
Respondent.

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

MOTION FOR LEAVE TO FILE AND BRIEF OF *AMICI CURIAE* RETIRED TEXAS COURT OF CRIMINAL APPEALS JUDGES IN SUPPORT OF APPLICATION FOR STAY OF EXECUTION

JON M. TALOTTA
Counsel of Record
HOGAN LOVELLS US LLP
Park Place II, 9th Floor
7930 Jones Branch Drive
McLean, VA 22012
(703) 610-6156
jon.talotta@hoganlovells.com

W. DAVID MAXWELL
HOGAN LOVELLS US LLP
555 Thirteenth Street, NW
Washington, DC 20004

Counsel for Amici Curiae

November 14, 2018

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

IN THE

Supreme Court of the United States

No. 18A512

ROBERTO MORENO RAMOS,

Petitioner,

v.

STATE OF TEXAS

Respondent.

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

MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* IN SUPPORT OF APPLICATION FOR STAY OF EXECUTION

Retired Texas Court of Criminal Appeals Judges Charles Baird, Morris Overstreet, and Cheryl Johnson ("Retired CCA Judges"), through undersigned counsel, respectfully move under Supreme Court Rule 37.2(b) for leave to file a brief as *amici curiae* in support of Petitioner.

All parties were timely notified of Retired CCA Judges' intent to file an *amicus* brief. Petitioner has consented to the brief. Respondent William Stephens did not respond to *amici* counsel's outreach.

Retired CCA Judges served on the Texas Court of Criminal Appeals at or around the time that Mr. Ramos's state habeas counsel was appointed by that court. As explained in the attached brief, it is now

evident that there were widespread problems with the appointment system in place at that time, resulting in the appointment of unqualified counsel, who—through no fault of their clients—procedurally defaulted compelling claims of constitutional error in numerous cases. Mr. Ramos's constitutional rights were deprived as a direct result of these systemic problems. His CCA appointed habeas counsel was not competent and did not provide Mr. Ramos a full and fair opportunity to pursue meritorious post-conviction claims.

The proposed brief details the background of the Texas rule under which Mr. Ramos's initial state habeas and federal habeas counsel was appointed and the resulting failure of that rule to ensure that each prisoner has a full and fair opportunity to present colorable claims for relief, including Mr. Ramos. The Retired Judges respectfully request that the Court issue a stay of execution to allow for consideration of the issues raised in the related petitions for writs of certiorari.

For the foregoing reasons, the motion should be granted.

November 14, 2018 Respectfully Submitted,

W. DAVID MAXWELL
HOGAN LOVELLS US LLP
555 Thirteenth Street, NW
Washington, DC 20004

Counsel for Amici Curiae

JON M. TALOTTA
Counsel of Record
HOGAN LOVELLS US LLP
Park Place II, 9th Floor
7930 Jones Branch Drive
McLean, VA 22012
(703) 610-6156
jon.talotta@hoganlovells.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

IN THE

Supreme Court of the United States

No. 18A512

ROBERTO MORENO RAMOS,

Petitioner,

v.

STATE OF TEXAS

Respondent.

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

BRIEF OF *AMICI CURIAE* RETIRED TEXAS COURT OF CRIMINAL APPEALS JUDGES IN SUPPORT OF APPLICATION FOR STAY OF EXECUTION

STATEMENT OF INTEREST[1]

Petitioner Roberto Moreno Ramos seeks a stay of his execution scheduled for November 14, 2018, to permit time for the Court to consider the deprivation of constitutional rights that occurred in Mr. Ramos's case. Mr. Ramos has alleged that his Sixth Amendment rights were violated during the penalty

[1] No party or counsel for a party authored this brief in whole or in part. No party, counsel for a party, or person other than the *amicus curiae,* its members or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

phase of his capital trial when his trial counsel failed to take any steps to investigate and present mitigation evidence, or to argue Mr. Ramos's case for a life sentence to the jury. Mr. Ramos was never afforded an opportunity to present this ineffective assistance of trial counsel claim on appeal. The Texas Court of Criminal Appeals ("CCA") initially appointed him counsel who was completely unqualified to handle a post-conviction death-penalty case. And the CCA failed to appoint new counsel for Mr. Ramos even after the deficiencies of his initially appointed counsel became clear.

Amici are retired CCA judges who served on the court when Mr. Ramos's habeas counsel was appointed. They have particular interest in ensuring that post-conviction review in capital cases functions as intended, giving prisoners a full and fair opportunity to have their constitutional claims heard. When this vital right is lost as a result of the system administered by the Texas courts, an alternative remedy is required to ensure that due process is protected.

Retired CCA judges also have an interest in aiding the Court—through their firsthand knowledge and experience—in understanding how the CCA appointment system in place at the time of Mr. Ramos's case caused the deprivation of Mr. Ramos's constitutional rights present in this case. The CCA appointment system failed to provide Mr. Ramos with competent and effective post-conviction counsel. Mr. Ramos was deprived of the right to have a full and fair opportunity to bring a claim for post-conviction relief because of unqualified and ineffective counsel who represented Mr. Ramos for state and federal habeas purposes in his case. As a

result, Mr. Ramos has never had a full and fair opportunity to raise compelling claims of ineffective assistance of trial counsel.

Retired Judge Charles F. Baird served as a Judge of the Texas Court of Criminal Appeals from 1991 to 1999 and as the 299th Criminal District Court Judge of Travis County, Texas, from 2007 to 2011. Judge Baird has also taught as a professor of law at Texas Tech University School of Law, Loyola University New Orleans School of Law, and South Texas College of Law.

Retired Judge Cheryl Johnson served as a Judge of the Texas Court of Criminal Appeals from 1998 to 2016. Prior to serving on the Court of Criminal Appeals, Judge Johnson served as the director of the Texas Association of Attorneys Board Certified in Criminal Law from 1996-1997.

Retired Judge Morris L. Overstreet served as a Judge of the Texas Court of Criminal Appeals from 1990 to 1998. After leaving the bench, Judge Overstreet taught at Thurgood Marshall School of Law as a Distinguished Visiting Professor. Before being elected, Judge Overstreet served as a prosecutor in the 47th Judicial District in Amarillo for five years. As a life member of the National Bar Association, Judge Overstreet served as the Chair of the Judicial Council Division.

SUMMARY OF ARGUMENT

Robert Moreno Ramos faces execution tonight without ever having had competent or effective post-conviction counsel. His state-court-appointed post-conviction counsel was incompetent, and ineffective, depriving Mr. Ramos of his one opportunity to present claims for post-conviction relief.

Mr. Ramos's counsel was appointed by the Texas Court of Criminals Appeals ("CCA") at a time when that court had no coherent system for appointing such counsel. The CCA had no uniform standards a lawyer needed to meet to be appointed habeas counsel, no requirement that such a lawyer have specialized knowledge or experience in this field, and no sensible method of inquiring into the qualifications of lawyers being considered for CCA appointment.

Under this haphazard regime, the CCA appointed habeas counsel for Mr. Ramos who had never handled a post-conviction case. The lawyer's incompetence was evident immediately. He failed to investigate Mr. Ramos's case. He failed to file a habeas petition with even a single cognizable claim. He even failed to meet the initial filing deadline. The CCA, in appointing such counsel to defend Mr. Ramos, violated its statutory duty to provide prisoners with competent and effective counsel.

Federal court intervention is required to vindicate Mr. Ramos's right to present his claims for post-conviction relief. The CCA's failure to provide Mr. Ramos with competent counsel directly prevented Mr. Ramos from exercising his right to have the courts conduct a full and fair review of the constitutional issues that arose in his trial. Having deprived him of that right, the CCA should not have blindly

enforced procedural rules against Mr. Ramos that are premised on competent and effective representation. This Court should intervene to preserve due process and basic principles of equity.

Mr. Ramos faces execution tonight. Absent a stay, his execution will be forever questioned by the CCA's failure to fulfill its vital duty to provide him competent and effective counsel.

ARGUMENT

I. THE TEXAS COURT OF CRIMINAL APPEALS DID NOT PERFORM ITS STATUTORY DUTY TO APPOINT MR. RAMOS COMPETENT COUNSEL.

Pursuant to Article 11.071 of the Texas Code of Criminal Procedure, the Texas Court of Criminal Appeals ("CCA") appointed post-conviction counsel for Mr. Ramos to investigate and present a writ of habeas corpus. The statute at the time required the CCA to appoint "competent counsel" pursuant to "rules and standards adopted by the court." *See* Tex. Code Crim. Proc. 11.071. However, at the time that Mr. Ramos's post-conviction counsel was appointed, the CCA had not yet adopted any "rules and standards." Appl. for a Writ of Habeas Corpus at 30-31, WR-35,938 (Tex. Crim. App. Nov. 6, 2018) [hereinafter "Appl. for Writ"] (quoting Declaration of Rick Wetzel); H. Comm. Rep. No. C.S.S.B. 440 (Tex. Apr. 27, 1995). As a result, the lawyer was appointed for Mr. Ramos, a lawyer who clearly was not competent to handle Mr. Ramos's case. Moreover, even after Mr. Ramos' made a request to the CCA for new counsel, the original lawyer was never replaced.

Article 11.071 of the Code of Criminal Procedure was enacted for the dual purpose of streamlining

review of capital convictions and ensuring that all convictions and death sentences "are fully and fairly reviewed." H. Comm. Rep. No. C.S.S.B. 440 (Tex. Apr. 27, 1995). To achieve these competing goals (speed and thoroughness), the Legislature required the appointment of competent counsel for all death sentenced habeas applicants, but imposed new time limitations on filings and barriers to successive applications. *See id.* Quoting one of the bill's authors, the CCA explained that the goal of article 11.071 was to provide habeas applicants one, well-represented opportunity to bring their claims:

> And we tell individuals that everything you can possibly raise the first time, we expect you to raise it initially, one bite of the apple, one shot . . . . The idea is this: you're going to be able to fund counsel in these instances and we are going to give you one very well-represented run at a habeas corpus proceeding. And unless you meet a very fine-tuned exception, you're not going to be able to come back time after time after time.

Ex parte Kerr, 64. S.W.3d 414, 418-419 (Tex. Crim. App. 2002) (quoting S.B. 440, Acts 1995, 74th Leg., codified at Tex. Code Crim. Proc. Art. 11.071 (Presentation by Rep. Gallego, May 18, 1995)). After reciting this clear statement of legislative intent, the CCA reinforced that promise:

> Of course, this entire statute is built upon the premise that a death row inmate *does* have one full and fair opportunity to present his constitutional or

> jurisdictional claims in accordance with the procedures of the statute.

Id. at 419 (emphasis in original).

At the time that Mr. Ramos's counsel was appointed, however, there were no standards or guidelines regulating such appointments. Lawyers received appointments on an ad hoc basis, with "few, if any, predetermined criteria." Appl. for Writ at 30-31; *see also Comments in Opposition to Certification*, Texas Defender Service et al., Dkt. No. OLP 167: Notice of Request for Certification of Texas Capital Counsel Mechanism 59-76 (Feb. 26, 2018), *available at* https://www.regulations.gov/document?D=DOJ-OLP-2017-0010-0048 (documenting the unstructured, haphazard, and *ad hoc* appointment system in Texas) [hereinafter, "Texas Defender Service Comments"]. In the words of the Fifth Circuit Court of Appeals, CCA's system of appointing "'capital habeas counsel'" lacked "'specific, mandatory standards.'" Texas Defender Service Comments at 63 (quoting *Mata v. Johnson*, 99 F.3d 1261, 1267 (5th Cir. 1996)). No "specialized training in capital post-conviction litigation" was required for an lawyer to be appointed at the time. *Id.* at 71. Inquiries into the lawyer's experience were cursory, primarily consisting of a phone call or two. *Id.* at 71-72. Instead, a judge need only have a " 'good feel' " about a lawyer to appoint him or her as capital habeas counsel. *Id.* at 60 (quoting Amici Baird and Overstreet). This bar was too low to satisfy minimum statutory requirements: In dozens of cases, the CCA appointed lawyers who had no experience representing clients in capital habeas proceedings. *Id.* at 64. The CCA also had no "formal process

for removing incompetent lawyers from the list" of approved counsel. *Id.* at 72.

Mr. Ramos's case illustrates the results of this ramshackle system. Reviewing the record in Mr. Ramos's case, it is clear that the State did not give Mr. Ramos an opportunity to fully and fairly litigate his post-conviction claims.

Despite the CCA's promise to appoint "competent" counsel who will provide a "well represented run at a habeas proceeding," the lawyer appointed for Mr. Ramos (Kyle Welch), had never handled a capital post-conviction case. Mr. Welch himself has admitted that he lacked the experience, training, and resources to properly handle Mr. Ramos's case. *See* Appl. for Writ at 37.

Mr. Ramos filed a *pro se* motion specifically seeking the appointment of his direct appeal lawyer. *Id.* 41-42. The CCA was given notice that this lawyer was already familiar with the case and had already developed an effective lawyer-client relationship with Mr. Ramos. *Id.* at 42. The CCA had the opportunity to substitute another lawyer for Mr. Welch, but instead denied Mr. Ramos's request to appoint his counsel of choice. *Id.*

That Mr. Welch was not competent to handle Mr. Ramos's habeas proceedings is not subject to dispute. It is evident from the face of the habeas application he filed, which was only twelve pages long and contained no cognizable claims. *See, e.g.*, *Ex parte Ramos*, 977 S.W.2d 616, 6117 (Tex. Crim. App. 1998); Appl. for Writ at 8. Mr. Welch failed to develop any extra-record claims, or even seek funding for investigative or expert assistance. Mr. Welch himself admitted that he failed to investigate and develop

cognizable habeas claims and that this was due in part "because I didn't know it was necessary." Appl. for Writ at 38 (internal quotation marks and citations omitted).

In addition to failing to investigate and develop cognizable claims, Mr. Welch also miscalculated the deadline to file Ramos's application, rendering the filing untimely. The CCA ultimately considered Ramos's application only because the trial court had endorsed Mr. Welch's miscalculation of the limitations deadline by signing a proposed order submitted by Mr. Welch with the incorrect deadline. *See Ex parte Ramos*, 977 S.W.2d at 617 (limitation cannot be constitutionally applied because Ramos relied in good faith on an improper order by trial court); Appl. for Writ at 42. Mr. Welch's failure to perform even the most basic tasks as state habeas counsel is the best evidence that Mr. Welch lacked the qualification and experience to qualify as "competent" counsel as required by article 11.071 of the Code of Criminal Procedure.

The law required the CCA to appoint counsel pursuant to "rules and standards" that the Legislature anticipated would select competent habeas counsel. *See* Tex. Code Crim. Proc. Art. 11.071. But as noted, the CCA had not enacted rules and standards at the time of Mr. Ramos' case. As a result, the CCA failed to comply with its statutory duty to appoint competent counsel. As Amicus Johnson acknowledged in her concurring opinion in *Ex parte Kerr*, "th[e] Court bears some responsibility" when an unqualified or incompetent counsel does not do his job. 64 S.W.3d at 422.

II. WHEN THE COURT'S FAILURE TO PERFORM ITS STATUTORY DUTIES RESULTS IN THE WAIVER OF COMPELLING CONSTITUTIONAL CLAIMS, THE COURTS MUST PROVIDE A REMEDY.

The role of the CCA—and the federal courts[2]—in causing Mr. Ramos to have no opportunity to fully and fairly litigate his substantial constitutional claims is manifest. And it is paramount to this Court's consideration of Mr. Ramos's current claim for relief. Through its appointment of Mr. Welch pursuant to Article 11.071, the CCA effectively vouched for Mr. Welch as a competent habeas counsel when he clearly was not. And because Mr. Welch was not a competent state habeas counsel, Ramos did not get his "one very well-represented run at a habeas corpus proceeding." *Ex parte Kerr*, 64 S.W.3d at 418-419. Having failed to enforce the underlying guarantee of competent counsel in article 11.071 of the Code of Criminal Appeals, it would violate due process and basic principles of equity to apply the "streamlining" aspects of the statute.

---

[2] The federal district court also did not examine whether Mr. Welch was a competent habeas lawyer. Despite the fact that Mr. Welch had: (1) narrowly avoided waiving Mr. Ramos's claim in state court through an untimely filing; and (2) failed to raise a single cognizable issue, his appointment was reaffirmed by the federal district court. Appl. for Writ at 44. Where the successor provisions of 28 U.S.C. § 2244 are equally premised on the appointment of qualified counsel in an initial federal habeas proceeding, a federal court cannot ignore its obligation to appoint qualified counsel while it enforces the interrelated barriers to review of subsequent petitions.

In the context of post-conviction proceedings, states are generally afforded flexibility in determining what procedures are used and due process does not dictate the exact form of these procedures. *See Dist. Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 69 (2009). However, federal courts may "upset" a State's post-conviction relief procedures where those procedures are "fundamentally inadequate to vindicate the substantive rights provided." *Id.* That is exactly what happened in Mr. Ramos's case. The entire premise of Texas's capital habeas scheme under article 11.071 was that the right to competent counsel would allow for a full and fair review of constitutional claims even with the new time limitations and barriers to subsequent habeas applications. *Ex parte Kerr*, 64 S.W.3d at 418-419. At the time of the CCA's appointment of post-conviction counsel for Mr. Ramos, there were no implementing rules and standards for determining if counsel was competent. These aspects of the statute are interrelated. The CCA cannot constitutionally ignore its obligation to appoint competent counsel pursuant to article 11.071 while it enforces the barriers to successive applications under section 5. *See Osborne*, 557 U.S. at 69 (due process violated where state post-conviction procedure "transgresses any recognized principle of fundamental fairness in operation") (quoting *Medina v. California*, 505 U.S. 437, 446 (1992)); *see also Ex parte Ramos*, 977 S.W.2d at 617 (application of a rule requiring the dismissal of a late-filed application for habeas corpus relief would violate the Texas Constitution's Due Course of Law provision where the petitioner relied in good faith on the court's erroneous calculation of the extended due date). That full and fair review

never happened for Mr. Ramos. It never had a chance because the CCA appointed incompetent counsel.

There is ample authority for the federal courts to require merits review of constitutional claims when the existing statutory scheme has failed to provide a full and fair review—especially where the impediment to review was caused by state action or otherwise outside the control of the petitioner. This Court has long examined the "adequacy" of state procedural rulings in determining whether to intervene in reviewing a state conviction. *See, e.g.*, *Lee v. Kemna*, 534 U.S. 362, 376 (2002) (constitution claim subject to federal review where "exorbitant application of a generally sound rule renders the state [procedural bar] inadequate to stop consideration of a federal question"). The Court has also fashioned common law exceptions to the AEDPA statutory scheme to ameliorate equitable and constitutional concerns. For example, the Court has created exceptions to the statutory exhaustion requirements where either: (1) the state suppressed exculpatory evidence; (2) ineffective state habeas counsel failed to raise a claim of ineffective assistance of counsel at trial; or (3) the petitioner makes a substantial showing of innocence. *See Strickler v. Greene*, 527 U.S. 263 (1999) (continued *Brady* violation constitutes "cause"); *Martinez v. Ryan*, 566 U.S. 1 (2012) (ineffective state habeas counsel constitutes cause for default of trial sixth amendment violation); *House v. Bell*, 547 U.S. 518, 539 (2006) (AEDPA did not overrule *Schlup* miscarriage of justice standard). This Court has even fashioned the traditional coram nobis writ into a habeas-like common-law remedy for persons not in custody. *See United States v. Mor-*

gan, 346 U.S. 502 (1954) (all writs act allowed for remedy for constitutional claims not otherwise anticipated by statute). Similarly, the Court should stay Mr. Ramos's execution and carefully consider the appropriate remedy for the violation of his due process right to one full and fair opportunity to raise his constitutional claims.[3]

CONCLUSION

For the reasons stated above, and in Petitioner's Application for Stay of Execution, a stay of execution should be granted and the judgment below should be reversed.

November 14, 2018

Respectfully Submitted,

W. DAVID MAXWELL
HOGAN LOVELLS US LLP
555 Thirteenth Street, NW
Washington, DC 20004

Counsel for Amici Curiae

JON M. TALOTTA
Counsel of Record
HOGAN LOVELLS US LLP
Park Place II, 9th Floor
7930 Jones Branch Drive
McLean, VA 22102
(703) 610-6156
jon.talotta@hoganlovells.com

[3] In the alternative, the due process violation stemming from the CCA's failure to enforce Mr. Ramos's right to competent counsel may be mitigated through traditional federal habeas review as requested in Mr. Ramos's pending proceeding in this Court (No. 18A-510) arising out the Fifth Circuit's refusal to recall its mandate. *See* Order, *Ramos v. Cockrell*, No. 00-40633 (5th Cir. November 10, 2018).