No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

FELIX ROCHA,

Petitioner,

v.

RICK THALER,
Director, Texas Department of Criminal
Justice, Institutional Corrections Division,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

David R. Dow
Texas Defender Service
1927 Blodgett Street
Houston, Texas 77004
Phone: 713.222.7788
Fax: 713.222.0260

Kathryn M. Kase
Texas Defender Service
1927 Blodgett Street
Houston, Texas 77004
Phone: 713.222.7788
Fax: 713.222.0260

ATTORNEYS FOR PETITIONER
FELIX ROCHA

QUESTIONS PRESENTED

CAPITAL CASE

1. Whether, in a federal habeas corpus proceeding, an unexplained state court ruling that disposes of a federal constitutional claim with a bare citation to a state procedural law that, according to the state court, incorporates an assessment of the merits of the federal claim, is ambiguous for purposes of the *Harris*[1] plain statement rule?

2. Whether, in a federal habeas corpus proceeding, a federal court may address the merits of a constitutional claim where the state court ruling disposed of the claim with a bare citation to a state law that, according to the state court, incorporates an assessment of the merits of the federal issue?

3. Whether suppression is an appropriate remedy for violation of the Vienna Convention where the police knew an arrestee was a foreign national, failed to apprise him of his right to consular assistance, but – and in contrast to the facts in *Sanchez-Llamas* – interrogated him 14 days after arrest until he incriminated himself in a death penalty offense?

---

[1] *Harris v. Reed*, 489 U.S. 255 (1989).

TABLE OF CONTENTS

LIST OF PARTIES

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

[ ] 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: N/A.

TABLE OF AUTHORITIES

Cases

Constitutional Provisions and Statutes

INDEX OF APPENDICES

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

FELIX ROCHA,

Petitioner,

v.

RICK THALER,
Director, Texas Department of Criminal
Justice, Institutional Corrections Division,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Felix Rocha respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The Memorandum and Order of the district court denying Mr. Rocha's ineffective-assistance-of-counsel claim as procedurally defaulted is unreported. App. A. The district court's order denying Mr. Rocha's 60(b) motion is likewise unreported. App. B. The opinion of the court of appeals is reported as *Rocha v. Thaler*, 619 F.3d 387 (5th Cir. 2010). App. C. The opinion of the court of appeals

denying panel rehearing is reported as *Rocha v. Thaler*, 626 F.3d 815 (5th Cir. 2010). App. D. The order of the court of appeals denying rehearing *en banc* and opinions dissenting from denial of rehearing *en banc* are reported as *Rocha v. Thaler*, 628 F.3d 218 (5th Cir. 2010). App. E.

JURISDICTION

On September 9, 2010, the Court of Appeals granted Mr. Rocha's request for a Certificate of Appealability on his claim that he was denied effective assistance of counsel in the sentencing phase of his capital trial but affirmed the district court's denial of his claim. Panel rehearing was denied November 17, 2010, and rehearing *en banc* was denied December 17, 2010. Apps. D, E. This Court has jurisdiction to review these orders pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

> In all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defence. U.S. CONST. amend. VI.
>
> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, Sec. 1.

STATEMENT OF THE CASE

Mr. Rocha, a Mexican national, was deprived of the effective assistance of counsel during his capital trial when his lawyers failed to conduct a reasonable sentencing phase investigation. Trial counsel's sentencing investigation consisted of a single, thirty-minute group interview with family members and friends that Mr.

Rocha's mother brought to the trial. As a result of counsel's deficiency, Mr. Rocha's jury never heard weighty testimony about his background that might well have influenced the jury's appraisal of his moral culpability, including that:

- Mr. Rocha was reared in an environment of extreme poverty in Michoacan, Mexico;
- Mr. Rocha was exposed to environmental contaminants during the first 15 years of his life in Michoacan, Mexico;
- Mr. Rocha was malnourished;
- Mr. Rocha witnessed his father, Guadalupe Rocha, perpetrate extreme physical abuse of his mother in the first three years of his life;
- Other family members had witnessed his father abuse his mother, but did not intervene;
- Mr. Rocha's mother was forced to flee his father with Mr. Rocha and his three siblings because she feared his father would kill her;
- Mr. Rocha was regularly physically abused by his father and, later, by his maternal grandmother and grandfather, and other family members witnessed that;
- Mr. Rocha's mother left him at age nine in the care of an abusive grandfather so that she could go to the United States to find work;
- Mr. Rocha had no positive, adult male role models in his life;
- Mr. Rocha's value to his family was measured according to the money that he made to support them;
- Mr. Rocha was pulled out of school at an early age to work full time;
- Mr. Rocha was a slow to learn and required help from his siblings to dress, to read, and to write;
- Mr. Rocha never attended school in the United States;
- Mr. Rocha never was able to learn to speak and comprehend English, even after living in the United States for six years.

Instead of this evidence, the jury that sentenced Mr. Rocha to death heard just fifty-four scant pages of testimony from four witnesses providing the most superficial background information about Mr. Rocha. The evidence was so thin that the prosecution was able to argue to the jury that Mr. Rocha's case was "one of

those rare cases that comes along where there is no mitigation." S.F. Vol. XXVIII: 40.[1]

In state habeas corpus proceedings, Mr. Rocha's appointed state post-conviction counsel filed a document entitled "Incomplete Application for Habeas Corpus Relief" raising several direct appeal claims not cognizable in habeas. Counsel raised no claims premised on extra-record evidence and the application demonstrated an absence of investigation or, indeed, any understanding of the purpose of habeas corpus. The trial court recommended a denial of Mr. Rocha's application and the Texas Court of Criminal Appeals denied Mr. Rocha's application for writ of habeas corpus on September 11, 2002. *Ex parte Rocha*, No. WR-52,515-01 (Tex. Crim. App. 2002) (not designated for publication).

Appointed new counsel in federal habeas proceedings, Mr. Rocha discovered and presented a *Wiggins* claim[2] in federal district court. He requested that the court stay its proceedings to allow him to present the claim to the state court. Mr. Rocha argued that it would not be futile to do so, because he believed he could satisfy Texas Code of Criminal Procedure, art. 11.071 § 5(a)(3). That provision provides an exception to Texas's general prohibition against the filing of subsequent habeas applications when it can be shown by clear and convincing evidence that, "but for a violation of the United States Constitution, no rational juror would have answered in the state's favor one or more of the special issues that were submitted to the jury

---

[1] The trial record is cited as "S.F. Vol. __: __."

[2] *Wiggins v Smith*, 539 U.S. 510 (2003).

in the applicant's trial under Article 37.071, 37.0711, or 37.072." Tex. Code Crim. Proc. art. 11.071 § 5(a)(3). In *Ex parte Blue*, 230 S.W.3d 151 (Tex. Crim. App. 2007), the CCA's only published case construing Section 5(a)(3), the CCA interpreted the provision to require the claimant to make a threshold showing of evidence that would be sufficient to support an ultimate conclusion, by clear and convincing evidence, of the underlying merits of the constitutional claim. *Id.* at 163. In *Blue* itself, the petitioner had raised an *Atkins* claim. The court held that the applicant had not "presented threshold evidence sufficient to support a firm belief or conviction that he is mentally retarded" and dismissed it as an abuse of the writ. *Id.* at 164; see also *id.* at 163-66 (reviewing merits of federal constitutional claim).

Despite noting that the mitigation evidence presented in federal habeas was of a quality that might well have impacted Mr. Rocha's sentencing jury, the district court denied a stay and abeyance and denied Mr. Rocha's *Wiggins* claim as unexhausted and procedurally defaulted. On appeal, the Fifth Circuit granted a stay of proceedings that allowed Mr. Rocha to present his *Wiggins* claim to the state court.

Mr. Rocha thereafter presented his *Wiggins* claim in a subsequent habeas application to the state court. Mr. Rocha argued that he satisfied the elements of Section 5(a)(3) because he had met his burden of showing (1) a "meritorious violation of the United States Constitution" and (2) that no rational juror would have would have answered in the state's favor one or more of the special issues that were submitted to the jury at punishment absent that violation. See Subsequent

Application for Post-Conviction Writ of Habeas Corpus, at 32. The state court dismissed Mr. Rocha's subsequent application in a short, *per curiam* order that read:

> We have reviewed the application and find that the allegations do not satisfy the requirements of Article 11.071, Section 5(a)(3). Accordingly, this application is dismissed as an abuse of the writ.

Order, *Ex parte Rocha*, No. WR-52,515-03 (Tex. Crim. App. 2008). One judge dissented and would have remanded the application to the trial court to hear evidence and make findings of fact on the claim.

After dismissal by the state court, and while his case remained stayed in the Fifth Circuit, Mr. Rocha filed in the district court a motion for relief from his judgment pursuant to Fed. R. Civ. P. 60(b). He argued that his *Wiggins* claim should be reviewed on the merits because it was exhausted and not procedurally defaulted. Mr. Rocha contended that the CCA's dismissal of his state court application was not independent of federal law because the legal standard applied was interwoven with federal law and the state court did not make clear that its decision rested on an independent state ground. The district court denied Mr. Rocha's motion on the ground that his *Wiggins* claim was procedurally defaulted because Mr. Rocha "failed to demonstrate" that the CCA decision constituted a "determination on the merits of the claim[]." App. 2. The district court also denied COA. *Id.*

Mr. Rocha sought a COA from the appeals court to appeal the district court's conclusion that the state court judgment disposing of his *Wiggins* claim was an

independent and adequate state ground. He again argued that the state court's disposition of his *Wiggins* claim was not based on an independent state ground, and asked the appeals court to reverse because the district court's placement of a burden on him to prove that the state court decision was in fact a "determination on the merits" disregarded the *Harris* presumption[3] for determining whether a state court judgment was independent.

In an opinion issued September 9, 2010, the appeals court granted COA and, in the same opinion, affirmed the district court's conclusion that the state court's decision was based on an independent state ground. The court below first determined that Texas "largely adopted" the federal innocence-of-the-death-penalty gateway in crafting its own conditions for consideration of subsequent habeas applications. *Rocha*, 619 F.3d at 402. After noting a split in the circuits and "inconclusive Supreme Court teachings" over whether "providing exceptions to habeas procedural bars under heightened pleading standards" will "negate an otherwise independent state-law ground," the appeals court decided it did not need to "enter the fray" because "the identity of state and federal law in this case has rendered meaningless any search for an independent and adequate ground." *Id.* at 403-04. According to the appeals court,

> Either § 5(a)(3) operates as an independent state ground, in which case federal law permits merits review only if the petitioner demonstrates cause and prejudice or actual innocence of the death penalty, or the

---

[3] Pursuant to the *Harris* presumption, state court decisions that are ambiguous about their basis—state or federal law—will be presumed to have been disposed on federal grounds unless the state court includes a plain statement to the contrary. *Harris v. Reed*, 489 U.S. 255 (1989).

> provision is not independent of federal law, and we apply the actual-innocence-of-the-death-penalty standard because state law—§ 5(a)(3) itself—demands that of us.

Id. at 404. The appeals court did not cite any authority for its proposition that a state court's disposition of a federal constitutional claim on non-independent grounds requires a federal court to apply state procedural rules to the claim on behalf of the state court. The court held, "In both cases, Rocha must clear the identical hurdle before we can reach the merits of his *Wiggins* claim." *Id.* The appeals court therefore held that even when a state court disposes a federal constitutional claim on grounds that are not independent of federal law, a petitioner must nevertheless satisfy the miscarriage-of-justice exception to federal procedural default before his claim may be considered on the merits.

The appeals court then proceeded to determine, in *de novo* fashion, whether Mr. Rocha satisfied the federal miscarriage-of-justice exception to procedural default articulated in *Sawyer v. Whitley*, 505 U.S. 333 (1992). The court concluded he did not because his *Wiggins* claim was not an ineligibility claim of the sort required by *Sawyer*. 619 F.3d at 405. In short, the court held that Mr. Rocha's *Wiggins* claim fell outside the purview of Section 5(a)(3) altogether because it was not an eligibility claim.

The court did note one "caveat" to its holding premised on a possible distinction in the state rule on which Mr. Rocha's state habeas application was disposed (Section 5(a)(3)) and the federal *Sawyer* standard:

> Although the state actual innocence standard as a general rule coincides with the federal standard, uncertainty exists because the

> CCA speculated in *Ex parte Blue* that it might "permit a subsequent state habeas applicant to proceed under circumstances that would not excuse a federal petitioner under *Sawyer v. Whitley*," specifically circumstances where the applicant faults his counsel's failure to develop and present mitigation evidence at sentencing. Thus, Rocha's *Wiggins* claim—the constitutional vehicle for complaints of inadequate mitigation at sentencing—might very well "meet the criteria" of § 5(a)(3) as a matter of state law.

Id. at 406. Following this acknowledgement, the court's reasoning again became convoluted. It held that because of this "state-law uncertainty" regarding the reach of Section 5(a)(3), the court could not "discern whether the CCA resolved the question left open in *Ex parte Blue*, concluded that the state version of actual innocence does in fact permit mitigation evidence to form the basis of such a claim, and then determined on the facts of this case that Rocha had nevertheless failed the standard, or whether the court simply reverted to the federal standard." *Id.* Based on this, and an apparent invocation of the *Harris* presumption, the court reasoned that it was forced to "conclude that the CCA relied on federal law in making its decision," citing the *Sawyer* standard as the federal law relied upon by the state court. *Id.*

It bears noting that petitioner did not press upon the court below an argument that the state court's reliance upon a federal procedural standard like the *Sawyer* standard renders a state court disposition interwoven with federal law or otherwise non-independent. Petitioner's position has been that the application of any standard by a state court to dispose of a federal claim that incorporates consideration of the *underlying constitutional claim* renders the state court decision interwoven with federal law or otherwise ambiguous for procedural default

purposes and, possibly, non-independent if the state court failed to make a plain statement regarding the basis of the decision. His contention was that Section 5(a)(3), *as interpreted and applied by the CCA*, does just that.

Strangely, the appeals court appears to have used the *Harris* presumption not to determine whether the state court decision was independent of federal law for procedural default purposes but instead to buttress its conclusion that the state court adhered precisely to the *Sawyer* standard rather than a more expansive state standard:

> Accordingly, we must "accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so." And federal law under *Sawyer* precludes Rocha's *Wiggins* claim.

Rocha, 619 F.3d at 406 (citing *Michigan v. Long*, 463 U.S. 1032, 1040–41 (1983)). Ultimately, the court merely held that Mr. Rocha failed to meet the *Sawyer* standard and failed to address the question actually before the court: whether the state court decision disposing of Mr. Rocha's *Wiggins* claim was based on an independent and adequate state ground that precluded review of the claim in federal habeas corpus proceedings.

One judge on the panel dissented. She described the majority opinion as "a novel analysis not fully consonant" with other decisions of the court. *Rocha*, 619 F.3d at 408. Those prior decisions, in which she included *Ruiz v. Quarterman*, 504 F.3d 523 (5th Cir. 2007), "suggest[ed] that the Texas Court of Criminal Appeals's decision in this case was merits-based rather than procedural, entitling Rocha to federal merits review of his *Wiggins* claim." 619 F.3d at 409. She further noted that

the Fifth Circuit's decisions in this sphere, as a whole, "creates confusion as to the precise language that will be considered to be 'an independent and adequate state ground' in cases where the state court does not elaborate on its reasoning." *Id.*

Mr. Rocha sought rehearing *en banc*. In that petition, Mr. Rocha (1) disputed the appeals court's conclusion that the CCA interprets and applies Section 5(a)(3) coextensively with the federal *Sawyer* standard; and (2) argued that the appeals court had decided the wrong question and that whether Mr. Rocha could meet the *Sawyer* standard was irrelevant if the state court's disposition of Mr. Rocha's *Wiggins* claim was not in fact independent of federal law. Mr. Rocha reasserted his argument that the CCA's application of Section 5(a)(3) required them to consider the merit of the underlying *federal constitutional claim*. The Respondent, in his response to the petition, "decline[d] to defend the reasoning of the panel decision."

In response to the petition for rehearing *en banc*, the panel on November 17, 2010 issued a 39-page panel opinion denying panel rehearing that sought to clarify its prior opinion. *Rocha v. Thaler*, 626 F.3d 815 (5th Cir. 2010). The Fifth Circuit began its analysis by examining *Ex parte Blue*, 230 S.W.3d 151 (Tex. Crim. App. 2007), the only published decision from the Court of Criminal Appeals interpreting and applying the Section 5(a)(3) rule, and concluded that the Texas legislature incorporated into § 5(a)(3) both *Sawyer's* definition of "actual innocence of the death penalty" and *Sawyer's* clear-and-convincing standard of proof for such a claim. *Rocha*, 626 F.3d at 822.

In fact, the CCA in *Blue* did not adopt a rule that it is bound by the federal *Sawyer* standard in applying Section 5(a)(3). Although it acknowledged that "Section 5(a)(3) of Article 11.071 represents the [Texas] Legislature's attempt to codify ***something very much like*** this federal doctrine of 'actual innocence of the death penalty' for purposes of subsequent state writs," the *Blue* Court explicitly *declined* to hold that it would interpret Section 5(a)(3) so as to precisely map the *Sawyer* standard's limited application to ineligibility claims. It was unnecessary to resolve that question in *Blue*, because *Blue* concerned an *Atkins* ineligibility claim; thus, the question was not before the court at all. In fact, the CCA strongly intimated that the answer was just the opposite:

> We hesitate to declare that Article 11.071, Section 5(a)(3) wholly codifies the Supreme Court's doctrine of "actual innocence of the death penalty," even inasmuch as it has tied the exception to the bar on subsequent writs to the statutory criteria for the death penalty under Article 37.071. Since 1991, one of the special issues that determine whether capital punishment will be imposed is the so-called "mitigation" special issue, embodied in Article 37.071, Section 2(e). Article 11.071 was originally promulgated in 1995, after this amendment to Article 37.071. Therefore it is arguable that, in theory at least, a subsequent habeas applicant could demonstrate by clear and convincing evidence that, but for some constitutional error, no rational juror would have answered the mitigation special issue in the State's favor. ***On its face this would seem to meet the criteria of Article 11.071, Section 5(a)(3).***

Blue 230 S.W.3d at 161 n.42 (internal citations omitted and emphasis supplied). See also *Rocha v. Thaler*, 628 F.3d 218, 234 (5th Cir. Dec. 17, 2010) (Dennis, J., dissenting) (the CCA's language in *Blue* "reflects a clear intent to avoid saying that § 5(a)(3) is defined by the same standard as that announced in *Sawyer*").

After erroneously equating the state law rule applied to Mr. Rocha's *Wiggins* claim to the federal *Sawyer* standard, the appeals court then looked to the Supreme Court's decision in *Sawyer* itself, which it considered "important to our disposition of Rocha's petition," to give content to the actual-innocence-of-the-death-penalty standard in Section 5(a)(3). Thus, the Fifth Circuit did not examine how the state court interpreted and applied Section 5(a)(3) in Mr. Rocha's case. Instead, the court held that because a federal *Sawyer* analysis does not require a *federal* court to consider the merits of the underlying constitutional claim, then the state court in this case did not consider the merits of the underlying constitutional claim in its Section 5(a)(3) analysis either. *See Rocha*, 626 F.3d at 824-25. Aside from being a non-sequitur, this faulty analysis follows from the appeals court's untenable assumption that the state court has wholly supplanted Section 5(a)(3) with *Sawyer*.

The appeals court drew a strong distinction between a "gateway innocence claim" and an "underlying constitutional claim," imputing to Mr. Rocha the argument that a court's consideration of a miscarriage-of-justice exception under *Sawyer* necessarily requires consideration of the underlying federal merits.[4] *Id.* at 825. Concluding that "[t]he only question [under *Sawyer*] is whether the petitioner was eligible for the death penalty," the court held that Mr. Rocha's *Wiggins* claim

---

[4] Mr. Rocha did not assert that the **federal *Sawyer* standard** necessarily requires consideration of the underlying federal claim. Instead, his argument has been a narrower one: that **Section 5(a)(3)**—*as the CCA interprets and applies it*—contemplates consideration of the underlying federal claim. Mr. Rocha does not agree that the CCA applies Section 5(a)(3) in the same manner in which a federal court would conduct a *Sawyer* analysis nor does he believe that a federal *Sawyer* analysis—properly conducted—necessarily requires consideration of the merit of the underlying federal claim.

fell outside the purview of Section 5(a)(3) altogether and hence "the CCA did not decide the merits of Rocha's *Wiggins* claim when it concluded that Rocha is not actually innocent of the death penalty." *Id.* at 826.

One judge again refrained from joining the opinion. Judge Haynes believed that the court had reached the "anomalous result that denial of a writ expressly referencing a statute that actually mentions the federal constitution—'by clear and convincing evidence, but for a violation of the United States Constitution no rational juror would have answered in the state's favor one or more of the special issues that were submitted to the jury in the applicant's trial under Article 37.071, 1 37.0711, or 37.072'—is nonetheless not sufficiently intertwined with the United States Constitution to allow our review." 626 F.3d at 841 (Haynes, J., specially concurring).

Mr. Rocha's petition for rehearing *en banc* was denied on December 17, 2010. Four judges would have voted to hear the case. Judge Dennis, joined by Judge Benavides, wrote a dissent to the denial of rehearing *en banc* in this case and a similar case, *Balentine v. Thaler*, 626 F.3d 842 (5th Cir. 2010).[5] *Rocha v. Thaler*, 628

---

[5] In *Balentine*, the posture of the case was similar to Mr. Rocha's in that the *Balentine* petitioner had raised a *Wiggins* claim in a subsequent state habeas application that was dismissed in an unexplained order pursuant to Section 5. Unlike Mr. Rocha's case, Balentine's order did not specifically reference Section 5(a)(3). The cases were also different in that Mr. Balentine presented an argument in his application that he satisfied the requirements of Section 5(a)(1) whereas Mr. Rocha presented an argument in his application that he satisfied the requirements of Section 5(a)(3). The CCA orders in both cases were ambiguous about the basis of the decision, albeit for different reasons. The two cases broadly present the same issue of how to analyze an unexplained state court decision that is ambiguous about

F.3d 218 (5th Cir. 2010) (Dennis, J., dissenting). Judges Dennis and Benavides believed that "[t]he ... *Rocha* panel opinion[] does not adhere to and faithfully apply the *Long* standard."

> In *Balentine* and *Rocha*, the panels' authors, after initially adhering to the *Long* standard, make volte-face and examine ambiguous and obscure state court data to guess that the unexplained dismissals of state habeas claims by the Texas Court of Criminal Appeals (CCA) are based on an independent and adequate state ground. I respectfully but strenuously disagree because these opinions seriously undermine the *Long* standard in our jurisdiction and retrogress into the ad hoc method of dealing with cases involving possible independent and adequate state grounds that the Supreme Court expressly disapproved as "antithetical to the doctrinal consistency that is required when sensitive issues of federal-state relations are involved."

Id. at 219. Judge Haynes also wrote a short dissenting opinion, lauding Judge Dennis's dissent as "a scholarly analysis of the substantive reasons that the panel opinions in *Rocha* and *Balentine* are incorrect" and writing to voice her belief that the court should have considered the case *en banc* because it "involve[s] a question 'of exceptional importance' and '"conflict[s] with a decision of the United States Supreme Court' (namely, *Long* and its progeny)." *Id.* at 237.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE A CIRCUIT SPLIT AND CLARIFY THE ANALYTIC PROCESS FOR DECIDING WHETHER AN UNEXPLAINED STATE COURT DECISION THAT IS AMBIGUOUS ABOUT WHETHER IT IS BASED ON STATE OR FEDERAL LAW IS INDEPENDENT OF FEDERAL LAW.

---

the state-or-federal basis of disposition and where there has been no previous explained order from a lower court to which to look through.

In federal habeas corpus proceedings, procedural default occurs when a federal claim presented for review was disposed by a state court and the state court's decision rests upon a state-law ground that "is independent of the federal question and adequate to support the judgment." *Cone v. Bell*, 129 S. Ct. 1769, 1780 (2009) (citing *Coleman v. Thompson*, 501 U.S. 722, 729 (1991)). Because, as this Court has acknowledged, *Coleman*, 501 U.S. at 732, it is not always easy to determine whether any given state court decision rests on a ground that is independent of the federal question, the Court has accepted many cases for review on this important question and has adopted various presumptions to aid the lower courts in resolving questions concerning independent state grounds. See *Michigan v. Long*, 463 U.S 1032 (1983) (adopting presumption that state court decision is based on federal law where the decision is ambiguous about whether it was based on federal law or state law and the state court did not clearly and expressly indicate that it was based on an independent state ground); *Harris v. Reed*, 489 U.S. 255 (1989) (adopting the *Long* presumption in the context of federal habeas corpus proceedings); *Ylst v. Nunnemaker*, 501 U.S. 797 (1991) (adopting "look through" presumption: where there has been one reasoned state judgment rejecting a federal claim, later unexplained orders upholding that judgment or rejecting the same claim rest upon the same ground).

Mr. Rocha's case presents a scenario not yet addressed by this Court—and it is a scenario that arises with some frequency. Specifically, the scenario is one in which a state court provides no reasons or explanation for its action but simply

dismisses a federal claim by citing to a state procedural rule that incontestably permits, and possibly requires, the state court to assess the merits of the underlying federal claim. . In other words, what is a federal court to do when confronted by an unexplained state court order that is ambiguous about the basis of decision. Faced with this scenario, other Circuits have applied the *Harris* presumption and concluded that the state court decision was not independent; in contrast, the Fifth Circuit did not apply any presumption, conducted its own *de novo* review of the state procedural question, and concluded based on its *de novo* review that the state court disposition was based on an independent state ground because petitioner did not meet the state law standard. Moreover, both the Fifth Circuit in this case and other cases—as well as other federal courts around the country—have struggled with the question presented by this case and have expressed the need for more guidance.

A. This Court Has Never Addressed Procedural Default in the Circumstances Presented By This Case.

In *Michigan v. Long*, 463 U.S 1032 (1983), a case on direct review, the question of independence arose in circumstances where the state court had "referred twice to the State Constitution in its opinion, but otherwise relied exclusively on federal law" in deciding a search-and-seizure question. *Id.* at 1037. Thus, *Long* presented a scenario in which it was clear that the state court had decided the merits of a claim, but it was unclear *which* merits it had decided: a search-and-seizure claim under the Fourth Amendment to the United States Constitution or a

search-and-seizure claim under the state constitution. Petitioner will refer to this kind of scenario as a federal-merits-or-state-merits scenario.

This Court "openly admit[ed]" that it had not, until then, developed a satisfying and consistent approach for resolving the "vexing issue" of determining "whether various forms of references to state law constitute adequate and independent state grounds." *Id.* at 1038. As the *Long* Court described this inconsistency:

> In some instances, we have taken the strict view that if the ground of decision was at all unclear, we would dismiss the case. See, *e. g., Lynch v. New York ex rel. Pierson*, 293 U.S. 52 (1934). In other instances, we have vacated, see, *e. g., Minnesota v. National Tea Co*, 309 U.S. 551 (1940), or continued a case, see, *e. g., Herb v. Pitcairn*, 324 U.S. 117 (1945), in order to obtain clarification about the nature of a state court decision. See also *California v. Krivda*, 409 U.S. 33 (1972). In more recent cases, we have ourselves examined state law to determine whether state courts have used federal law to guide their application of state law or to provide the actual basis for the decision that was reached. See *Texas v. Brown*, 460 U.S. 730, 732-733, n. 1 (1983) (plurality opinion). Cf. *South Dakota v. Neville*, 459 U.S. 553, 569 (1983) (STEVENS, J., dissenting). In *Oregon v. Kennedy*, 456 U.S. 667, 670-671 (1982), we rejected an invitation to remand to the state court for clarification even when the decision rested in part on a case from the state court, because we determined that the state case itself rested upon federal grounds.

Id. at 1038-39.

Believing this "ad hoc method" to be "antithetical to the doctrinal consistency that is required when sensitive issues of federal-state relations are involved," this Court adopted a presumption: "when ... a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the

face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so." *Id.* at 1040-41.

The *Long* Court gave an example of a state court decision that, despite using federal law, would nevertheless be independent:

> If a state court chooses merely to rely on federal precedents as it would on the precedents of all other jurisdictions, then it need only make clear by a plain statement in its judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached. In this way, both justice and judicial administration will be greatly improved. If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision.

Id. at 1041.

Two years after *Long*, this Court decided *Ake v. Oklahoma*, 470 U.S. 68 (1985). *Ake* presented a situation in which, after ruling on the merits of Ake's due process claim that he was denied expert assistance, the Oklahoma court had written that Ake had not repeated his request for a psychiatrist in his motion for a new trial and that his due process claim was thereby waived pursuant to Oklahoma procedural rules. *Id.* at 74. The Oklahoma court cited a previous state court decision for this proposition. *Id.* The Respondent (Oklahoma) therefore argued that this Court lacked jurisdiction because the state court disposed of the claim on an independent and adequate state ground. The petitioner disputed Oklahoma's contention that its waiver rule was independent because it contained an exception for fundamental error and the Oklahoma courts considered federal constitutional

violations to be such error. Thus, the *Ake* case presented a scenario in which it was clear that the state court had relied on a state procedural rule instead of the substantive federal merits to resolve the claim, but the state procedural rule it relied upon *itself* incorporated a required review of the underlying federal claim. Petitioner will refer to this scenario as a federal-merits-within-procedural-rule scenario.

To resolve the issue, the *Ake* Court examined state court case law to determine how Oklahoma applied its waiver rule and agreed with the petitioner that the Oklahoma waiver rule did not apply to fundamental trial error and that "[u]nder Oklahoma law ... federal constitutional errors are 'fundamental.'" *Id.* at 74-75.

> Thus, the State has made application of the procedural bar depend on an antecedent ruling on federal law, that is, on the determination of whether federal constitutional error has been committed. Before applying the waiver doctrine to a constitutional question, the state court must rule, ***either explicitly or implicitly***, on the merits of the constitutional question.
>
> As we have indicated in the past, when resolution of the state procedural law question depends on a federal constitutional ruling, the state-law prong of the court's holding is not independent of federal law, and our jurisdiction is not precluded.

Id. at 75 (emphasis supplied).

In 1989, this Court confirmed in *Harris v. Reed*, 489 U.S. 255 (1989), that the *Long* presumption for determining the independence of state court dispositions applies in federal habeas corpus proceedings. *Harris* presented a situation in which the state court had referred to a "well-settled" principle of Illinois law that those

issues which could have been presented on direct appeal, but were not, are considered waived. *Id.* at 258. The state court had found that, with one exception, the petitioner's ineffective-assistance allegations "could have been raised in [his] direct appeal." *Id.* The state court nevertheless went on to consider and reject the petitioner's ineffective-assistance claim on its merits. Thus, *Harris* presented a scenario in which it was unclear whether the state court had disposed of the federal constitutional claim on an independent state procedural rule or on the merits of the claim. Mr. Rocha will refer to this scenario as an independent-state-procedural-rule-or-federal-merits scenario.

In *Harris*, the Seventh Circuit court of appeals had, contrary to the district court, held the claim to be procedurally defaulted on the ground that a reviewing court "should try to assess the state court's intention to the extent that this is possible." *Id.* at 259 (quoting *Harris v. Reed*, 822 F. 2d 684, 687 (7th Cir. 1987).

> Undertaking this effort, the Court of Appeals concluded that the order "suggest[ed]" an intention "to find all grounds waived except that pertaining to the alibi witnesses." Based on this interpretation of the order, the Court of Appeals concluded that the merits of petitioner's federal claim had been reached only "as an alternate holding," and considered itself precluded from reviewing the merits of the claim.

Id. (internal citations omitted).

This Court reversed, holding that the *Long* "plain statement" rule applies regardless of whether the disputed state-law ground is substantive or procedural. *Id.* at 261.

> Thus, the mere fact that a federal claimant failed to abide by a state procedural rule does not, in and of itself, prevent this Court from reaching the federal claim: "[T]he state court must actually have relied

> on the procedural bar as an independent basis for its disposition of the case." Furthermore, ambiguities in that regard must be resolved by application of the *Long* standard. ...
>
> A state court remains free under the *Long* rule to rely on a state procedural bar and thereby to foreclose federal habeas review to the extent permitted by *Sykes*. Requiring a state court to be explicit in its reliance on a procedural default does not interfere unduly with state judicial decision-making. As *Long* itself recognized, it would be more intrusive for a federal court to second-guess a state court's determination of state law. Moreover, state courts have become familiar with the "plain statement" requirement under *Long* and *Caldwell*. Under our decision today, a state court need do nothing more to preclude habeas review than it must do to preclude direct review.

Id. at 261-62, 264 (internal citations omitted). Applying the "plain statement" requirement, this Court concluded that, while the state court had "laid the foundation" for relying on its waiver rule, the state court did not "clearly and expressly" rely on waiver as a ground for rejecting the petitioner's ineffective-assistance-of-counsel claim. *Id.* at 266.

Two years after *Harris*, this Court again confronted the question of independent state grounds in the habeas corpus context in *Coleman v. Thompson*, 501 U.S. 722 (1991). In *Coleman*, the state had filed a motion in state court requesting that the claim be dismissed for procedural reasons. *Id.* at 740 (the State's motion was based solely on Coleman's failure to meet ... time requirements"). The state court issued an order stating only that it was granting the state's motion and that the case was dismissed but that did not explain its reasoning any further. *Id.* In federal court, the petitioner asserted that the presumption of *Long* and *Harris* applied and permitted federal court review because the state court's order dismissing his appeal "did not 'clearly and expressly' state

that it was based on state procedural grounds." *Id.* at 735. Thus, *Coleman* presented a scenario in which it was clear that the state court had dismissed the claim by granting the state's motion to dismiss, but did not make explicit or illuminate the grounds upon which that motion were granted. Petitioner will refer to this scenario as the unambiguous-state-procedural-rule scenario.

Coleman had urged the Court to extend *Long* and *Harris* such that the "plain statement" rule be made to apply to *all* cases in which a federal claim is presented to a state court. *Id.* at 736. The *Coleman* Court declined to extend the plain statement rule in this fashion. Instead, the Court held that "[t]he presumption at present applies only when it fairly appears that a state court judgment rested primarily on federal law or was interwoven with federal law, that is, in those cases where a federal court has good reason to question whether there is an independent and adequate state ground for the decision." *Id.* at 739.

To determine whether the *Harris* presumption applied to Coleman's case, the Court looked behind the state court order dismissing the case.

> The Virginia Supreme Court stated plainly that it was granting the Commonwealth's motion to dismiss the petition for appeal. That motion was based solely on Coleman's failure to meet the Supreme Court's time requirements. There is no mention of federal law in the Virginia Supreme Court's three-sentence dismissal order. It "fairly appears" to rest primarily on state law.

Id. at 740. The petitioner in *Coleman* attempted to argue that Virginia's untimeliness rule was like *Ake*—the federal-merits-within-procedural-rule scenario—in that Virginia caselaw contained an exception for constitutional claims that required the state court to pass on the constitutional question before

dismissing for untimeliness. *Id.* at 740-41. This Court, however, rejected that interpretation of state law, finding that, unlike *Ake*, the state procedural rule relied upon by the state court to dismiss Coleman's federal claim did not in fact permit any consideration of the underlying federal claim. *Id.* at 741-43. In *Coleman*, there simply was no ambiguity to resolve, and hence there was no reason to apply the *Harris* presumption.

The case presented here is neither precisely *Long*, nor *Ake*, nor *Harris*, nor *Coleman*, although it nonetheless presents in exceedingly common issue in federal habeas corpus proceedings that the lower federal courts have treated differently. In this case, like *Ake* and *Coleman*, it is known that the state court relied on a state procedural rule to dispose of Mr. Rocha's federal claim. However, unlike *Coleman*, because the state procedural rule does contemplate consideration of the underlying federal claim,, the case does not present an unambiguous-state-procedural-rule scenario. This case is more like *Ake*, which presented a federal-merits-within-procedural-rule scenario. Unlike *Ake*, however, it is not altogether clear that the procedural rule relied upon by the state court in this case necessarily *required* consideration of the underlying federal merits antecedent to application of the rule. Rather, the rule at least *permits* it. *Blue*, 230 S.W.3d at 163-66. Mr. Rocha will refer to this scenario, his own, as an ambiguous-state-procedural-rule scenario.

In this scenario, when the state court, as in this case, disposes of a federal claim on such a procedural rule without stating anything further about the reason for the dismissal, ambiguity about the basis of the state court's decision arises. A

federal court cannot tell, from the face of the state court decision, whether the state court disposed of the claim due to its view of the underlying federal claim—which it has incorporated into its procedural review—or on an independent state ground. Federal courts have described state court decisions in which (1) the state court could have either relied on the underlying federal claim or relied on an independent state ground but doesn't give any indication at all which one; and (2) there is no prior reasoned state judgment disposing of the claim as "either/or" adjudications. See *Jimenez v. Walker*, 458 F.3d 130, 139 (2d Cir. 2006).

In *Ylst v. Nunnemaker*, 501 U.S. 797 (1991), this Court addressed the question of how federal courts in habeas proceedings are to determine whether an "unexplained order"—"an order whose text or accompanying opinion does not disclose the reason for the judgment"—rests primarily on federal law. *Id.* at 802. The *Ylst* Court created the following presumption for such circumstances: "Where there has been one reasoned state judgment rejecting a federal claim, later unexplained orders upholding that judgment or rejecting the same claim rest upon the same ground." *Ylst*, 501 U.S. at 803. Because there has not been any prior reasoned state judgment rejecting the federal claim in this case, however, the *Ylst* "look-through" presumption does not aid in disposing it.[6]

---

[6] The *Ylst* presumption has helped appellate courts in identical circumstances to Mr. Rocha's but where there has been prior reasoned opinions from state courts. See, *e.g.*, *Guilmette v. Howes*, 624 F.3d 286, 289-92 (6th Cir. 2010) (en banc) (after determining that Michigan rule contained both a procedural and a substantive component and therefore that bare citation to the rule rendered the opinion ambiguous and "unexplained," federal court should use the *Ylst* presumption to look through the opinion to lower state court opinions to determine basis of ruling).

B. Federal Courts Have Resolved The Question of Whether Procedural Default Occurs in Analogous "Either/Or" State Court Adjudications Differently.

The Second Circuit, relying on the *Harris* presumption, has held that "either/or" adjudications by state courts do not preclude federal habeas review. See *Jimenez v. Walker*, 458 F.3d 130 (2d Cir. 2006) ("[W]e read [our Circuit precedent] to hold that the *Coleman* requirement is met by an 'either/or' state-court opinion under any possible circumstances."); *DeBerry v. Portuondo*, 403 F.3d 57, 65 (2d Cir. 2005) (terse affirmance on basis that "remaining contentions are either unpreserved for appellate review or without merit" followed by citations to state law did not clearly demonstrate reliance on a independent and adequate state procedural bar); *Fama v. Comm'r of Corr. Servs.*, 235 F.3d 804 (2d Cir. 2000). The Seventh and Ninth Circuits have likewise done so. *Newell v. Hanks*, 283 F.3d 827 (7th Cir. 2002) (*Harris* presumption applied where state court failed to articulate basis of denial and it was unclear from the record and nature of the claim whether the state court relied on an independent state ground or federal grounds in disposing claim); *Koerner v. Gregas*, 328 F.3d 1039, 1052 (9th Cir. 2003) (describing Ninth Circuit case law as standing for the proposition that "where a state court decision affords no basis for choosing between a state law ground that would bar federal review, and one that would not, that decision cannot bar federal review").[7]

---

[7] The "either/or" adjudications these cases present do not exactly replicate the situation in which Mr. Rocha is in, but they are directly analogous. In *Jimenez*, *Fama*, and *Newell*, the state court adjudication of a claim is reported by the state court to have been either on the merits or procedurally defaulted, but it is not said which (i.e., it is an independent-state-procedural-rule-or-federal-merits scenario) or

Federal district courts in the First and Sixth Circuits have likewise ruled similarly. *Lewis v. Bell*, 2006 U.S. Dist. LEXIS 96326 at *25-*32 (E.D.Mich. 2006) (lack of clarity about which claims were denied for procedural reasons and which on the merits did not create a denial on independent state grounds); *Belton v. Blaisdell*, 559 F. Supp. 2d 128 (D.N.H. 2008) (finding state court not to have relied on independent state ground where basis for disposing of federal claims unclear).

Against this backdrop, the Fifth Circuit has taken a position that is inconsistent with other federal courts which have addressed the issue and unwarranted by the Court's line of cases beginning with *Long*. Thus, even though the plain text of the Texas statute (Section 5(a)(3)) cited in the decision references a requirement to establish a "violation of the United States Constitution;" and even though the highest state court's only published opinion interpreting and applying Section 5(a)(3) unambiguously rested on a review of the underlying federal claim, the court below held—albeit in a convoluted manner—that the state court decision rested on an independent state ground.

To reach this result, the appeals court applied its *own* interpretation of state law—not the *state court's* interpretation of state law—in a *de novo* fashion to Mr. Rocha's claim, and imputed that analysis to the state court. Despite lacking any

---

the state court has disposed of several claims at once as either without merit or procedurally defaulted and has not specified which claims are disposed on which basis. In Mr. Rocha's case, it is known that a procedural rule was applied, but it is a procedural rule that is ambiguous about whether it is based on state procedural or federal substantive review. In all of these cases, however, the actual basis of the decision is left completely unexplained by the state court. Thus, they all present either/or scenarios.

basis for discerning the state court ground of disposition, the appeals court made a wild guess at how, *in its view*, the state court *should* have disposed of the claim. It then reasoned that this manner in which the state court should have disposed of the federal claim was independent. Diving state court reasoning through de novo application of state procedural law is neither compelled by *Long* nor consistent with the principles underlying it. See *Rocha*, 628 F.3d at 237 (Dennis, J., dissenting) ("Most important, however, the panel opinions seriously undermine the *Long* standard and retrogress into unauthorized *Erie*-type guessing as to the nature of unexplained state court death penalty subsequent habeas decisions in our circuit."); *Abela v. Martin*, 380 F.3d 915, 924 (6th Cir. 2004) ("If a state court is slurring its words, our job is not to guess what it might be saying, but rather to demand that it enunciate more clearly.").

In addition, the method employed by the Fifth Circuit runs afoul of this Court's injunction in *Caldwell* that the mere existence of a basis for a state procedural bar does not preclude federal review: "the state court must actually have relied on the procedural bar as an independent basis for its disposition of the case." *Caldwell v. Mississippi*, 472 U.S. 320, 327 (1985); see also *Harris*, 489 U.S. at 262 ("[T]he mere fact that a federal claimant failed to abide by a state procedural rule does not, in and of itself, prevent this Court from reaching the federal claim."). To be faithful to this Court's precedents, the Fifth Circuit should have acknowledged that there was "good reason to question whether there is an independent and adequate state ground for the decision." *Coleman*, 501 U.S. at 739. Those reasons

include (1) a state court rule that explicitly references a "violation of the United States Constitution;" (2) the only published case applying the standard rested entirely on the state court's view of the underlying federal claim; and (3) the existence of a dissent from a state court judge clearly indicating the legal possibility that Mr. Rocha could have satisfied any independent aspect of the state procedural rule on which a dismissal could have been based. Had the Fifth Circuit applied the analytic approach of the Second and Seventh Circuits, it would have held that Mr. Rocha's *Wiggins* claim was reviewable by the federal court.

C. Lower Federal Courts Are in Need of Guidance on Cases Presenting Analogous Circumstances.

The lower federal courts are in need of guidance regarding how to resolve questions of procedural default in circumstances like Mr. Rocha's. The tortuous path of the instant case has been described, *supra*. A contemporary Fifth Circuit case, *Balentine v. Thaler*, 626 F.3d 842 (5th Cir. 2010), also demonstrates how the lower courts are currently struggling with this question. In *Balentine*, a panel of the Fifth Circuit had unanimously concluded that an unexplained CCA order dismissing a federal claim under Section 5 was not independent because, as interpreted and applied by the CCA, Section 5(a)(1)—a different provision from that at issue in this case—permitted consideration of the underlying federal claim and the state court order had not made clear that its disposition was not based on its assessment of the claim (*i.e.*, it was an "either/or" adjudication). In response to a petition for rehearing *en banc* filed by the Director, the panel—after first noting that rehearing *en banc* had been denied—treated the petition as a petition for panel

rehearing, granted it, and *unanimously* reversed course. All three judges who initially believed that *Long, Harris,* and *Coleman* required them to hold that the state court decision was not independent in that case wrote, just five months later,that *Long, Harris,* and *Coleman* required exactly the opposite.

Other courts have likewise struggled with the procedural default analysis under similar circumstances. See *Koerner v. Gregas*, 328 F.3d 1039, 1051 (9th Cir. 2003) ("*Coleman* gives little guidance on the proper approach to state court decisions that do not [on their face primarily] rely on federal law grounds, but for which the applicable state law ground is ambiguous or unclear."); *Guilmette*, 624 F.3d at 290 (describing how the court has "struggled" with the "interpretive task" presented by unexplained state court orders with bare citations to state rules that contain both procedural and substantive components). This Court should grant *certiorari* to provide guidance to the lower federal courts and to promote uniformity within them on this difficult—but common—question regarding independent state grounds of decision.

II. THIS COURT SHOULD GRANT *CERTIORARI* TO REVISIT *SANCHEZ-LLAMAS* BECAUSE IN THIS CASE THE POLICE KNEW PETITIONER WAS A FOREIGN NATIONAL, BUT FAILED FOR MORE THAN 14 DAYS TO ADVISE HIM OF HIS RIGHT TO CONSULAR CONTACT UNDER THE VIENNA CONVENTION, DURING WHICH TIME THEY EXTRACTED A CONFESSION TO CAPITAL MURDER.

Houston Police arrested Mr. Rocha on April 11, 1996, for an incident unrelated to the underlying offense. S.F. Vol. XX:8-9. Over the next 14 days, Houston police, knowing Mr. Rocha to be a Mexican citizen, failed to advise Mr.

Rocha of his Vienna Convention rights and to contact the Mexican Consulate to advise of Mr. Rocha's arrest. S.F. Vol. XX:9-13, 16, 31 & 47.

During the incident on April 11, 1996, for which Mr. Rocha was initially arrested, Mr. Rocha was shot six times by the police in his abdomen, groin, left thigh, and left forearm. He was taken to a hospital for life-saving treatment, underwent invasive surgery, and experienced heavy sedation and the administration of pain-killing drugs. On the same day, and despite his serious condition, a Houston Police officer interrogated Mr. Rocha in a hospital admitting room. Later, the officer, Xavier Avila, contended that Mr. Rocha made a waiver of his *Miranda* rights and consented to this interrogation. Officer Avila claimed to audio-taped this uncounseled waiver, but the tape has not been produced and its existence remains disputed. Despite understanding Mr. Rocha to be a Mexican national, neither Officer Avila nor anyone else informed Mr. Rocha of his right to contact the Mexican Consulate for assistance. *Rocha v. Texas*, 16 S.W.3d 1, 13 (2000); S.F. Vol. XX:31. Nor did Officer Avila notify the Mexican Consulate of Mr. Rocha's detention. S.F. Vol. XX:31, 47; *Rocha v. Texas*, 16 S.W.3d 1, 13 (2000).

Four days after Officer Avila first questioned Mr. Rocha, he saw him again at the hospital. S.F. Vol. XX:42. On April 24, 1996, Avila approached Mr. Rocha again at the Harris County Jail. S.F. Vol. XX:13. This time, Mr. Rocha again allegedly made an unrecorded, uncounseled waiver of his *Miranda* rights, but Officer Avila did not take a statement. S.F. Vol. XX:13. The following day, Officer Avila again interrogated Mr. Rocha in jail in the presence of Officer Jaime Escalante, and Mr.

Rocha again made an uncounseled waiver of his *Miranda* rights. S.F. Vol. XX:16. During this interrogation on April 25, 1996, Mr. Rocha made the damaging statement that he had participated in two capital murders to which no forensic or eyewitness evidence connected him. S.F. Vol. XXIX:State's Exhibits 2 & 2A. During none of these interviews was he advised of his Vienna Convention rights. S.F. Vol. XX:31 & 47.

Mr. Rocha timely sought to suppress the confession as a result of the Vienna Convention violation, but suppression was denied. *Rocha v. Texas*, 16 S.W.3d 1, 13 (2000); *see also* Tr.Vol. I:106A-106D; S.F. Vol. XXX:Exhibit D-4. The Texas Court of Criminal Appeals also denied relief. *Id.* at 13-19. Mr. Rocha again raised this issue on state habeas review, but relief again was denied. *Ex parte Rocha,* No. 52,515-01 & 52,515-02 (Tex. Crim. App. Sept. 11, 2002). App. G.

In the federal district court, Mr. Rocha argued that but for the State's violation of his Article 36 rights, he would not have made the statement that provided the primary basis for his conviction. He sought various relief, including suppression of the confession, a new trial or new sentencing, because the violation caused prejudice in the guilt-innocence and punishment phases of his capital trial.

The federal district court denied Mr. Rocha's claim in its entirety and held (1) that the Vienna Convention does not create individually enforceable rights; and (2) that, per the ICJ judgment in *Case Concerning Avena and Other Mexican Nationals (Mex. v. U. S.)*, 2004 I. C. J. 12 (Judgment of Mar. 31) (*Avena*), Mr. Rocha's rights

under the Convention were not violated or he was not prejudiced by the violation. ROA (05-70028) 814-15, 937.

The United States Court of Appeals for the Fifth Circuit denied Mr. Rocha's request for COA on the question of whether Article 36 creates individually enforceable rights, holding that no reasonable jurist could find that it does. *Rocha*, 619 F.3d at 407. App. C.

There is no question that the State of Texas failed to notify Mr. Rocha, a Mexican national, of his right to consular assistance under the Vienna Convention, even thought it was well known he was a Mexican national. There also is no question that Mr. Rocha incriminated himself in two capital murders to which no forensic or eyewitness evidence linked him as a result of repeated, uncounseled contacts with the Houston Police.

In *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006), this Court held that suppression of Sanchez-Llamas's confession was not a suitable remedy because of the tenuous "connection between an Article 36 violation and evidence or statements obtained by police." *Id.*, at 349. In this case, however, the connection between the Article 36 violation and the statement obtained by police is strong. Were it not for the Houston police's knowing disregard of Mr. Rocha's status as a Mexican national and their failure to advise him of his right to consular contact under the Vienna Convention, it is unlikely that their repeated, uncounseled contact with him over a 14-day period would have resulted in the damaging confession that was used against him in the merits and punishment phases of his death penalty trial.

The State of Texas has never disputed that Mr. Rocha is a Mexican national and that he was known to be a Mexican national when interrogated by Officers Avila and Escalante. *Rocha*, 16 S.W.3d at 13; S.F. Vol. XX:31. As the Texas Court of Criminal Appeals acknowledged in Mr. Rocha's direct appeal, the evidence of his Mexican nationality upon arrest was "ample," "uncontroverted," and "undisputed." *Rocha*, 16 S.W.3d at 13. Similarly undisputed was the fact that he had not been notified of his Vienna Convention rights. *Id.*

It is against this factual backdrop that *Sanchez-Llamas*' rationale for disallowing suppression based on a Vienna Convention violation pales, that reconsideration of that opinion is sought, and that suppression of Mr. Rocha's confession in a new trial is pursued as the remedy in this case.

A. The Vienna Convention Violation Greatly Prejudiced Mr. Rocha.

Mr. Rocha has a fourth grade education, obtained in rural Mexico under circumstances that show he was enrolled in Mexico's version of special education. ROA (05-70028) 381(Declaration of Laura Maldonado Granados at ¶ 2); *Id.* at 399-400 (Declaration of Norma V. Solis at ¶¶ 34-35). His testimony during the suppression hearing reflected his inability to understand the *Miranda* warnings as they were read to him. S.F. Vol. XXI:22 ("I don't know what that is. I don't know what the rights are."); *Id.*, at 24 ("He asked me if I - - if I understood. And I said yes. But I thought he was saying if I heard him. Because I was in a lot of pain. And I said yes, I did hear him."); *Id.*, at 51-52 ("I don't understand a lot of things about the law."). As a foreign national with little education, and no comprehension of what

legal rights he possessed in the United States, Mr. Rocha had a need for consular assistance that was far more acute than the typical foreign national.

The Mexican Consulate did not learn of Mr. Rocha's detention until a full 16 months had elapsed. According to then-Consul Velarde, had the Mexican Consulate been informed of Mr. Rocha's arrest in April 1996, "an officer of the Consulate would have contacted him immediately to explain to him the full significance and importance of his rights" under the United States Constitution. S.F. Vol. XXX:Defense Exh. D. This would have included a description of Mr. Rocha's right "to have legal counsel present to serve as an intermediary between himself and the police in the custodial setting" when interrogated about the capital murders the police suspected him of committing. S.F. Vol. XXX:Defense Exh. D.

B. Reconsideration of *Sanchez-Llamas* Would Allow this Court to Resolve The Question of Whether the Vienna Convention Creates Individually Enforceable Rights.

In *Sanchez-Llamas*, one of the questions presented was whether the Vienna Convention creates individually enforceable rights. Before resolving the consolidated cases against the petitioners on other grounds, this Court assumed, without deciding, the existence of such a privately enforceable right. *Sanchez-Llamas*, 548 U.S. at 343.

In dissent, three Justices—Breyer, Stevens and Souter—would have held that the Vienna Convention creates individually enforceable rights. Writing for the dissent, Justice Beyer chronicled the history of the Vienna Convention, noting that the treaty "speaks directly of the 'rights' of the individual foreign national."

Sanchez-Llamas, 548 U.S. at 374 (Breyer, J., dissenting). Unlike other provisions of the VCCR that speak to the rights of member nations and officials, Article 36 explicitly protects the rights of the individual. *Id.* Justice Breyer observed that the United States has historically provided individuals the right to enforce violations of their treaty rights in a judicial proceeding; nearly all member-nations have similarly held. *Id.* at 377.

Citing the need for resolution on the question, Justice Breyer noted the "hundreds" of cases in which courts diverge on the issue of "whether a criminal defendant may raise a claim ... that state officials violated Article 36 of the Vienna Convention." *Sanchez-Llamas* 548 U.S. at 371 (Breyer, J. dissenting) (citing *Cardenas v. Dretke*, 405 F.3d 244 (5th Cir. 2005) (defendant cannot bring Convention claim in judicial proceeding); *United States v. Emuegbunam*, 268 F.3d 377 (6th Cir. 2001) (same); *State v. Martinez-Rodriguez*, 33 P.3d 267 (N.M. 2001) (same); *Shackleford v. Commonwealth*, 547 S.E.2d 899 (Va. 2001) (same); *and Jogi v. Voges*, 425 F.3d 367 (7th Cir. 2005) (defendant can bring Convention claim in judicial proceeding)). Justice Ginsburg joined the dissent with respect to whether the Vienna Convention creates individually enforceable rights, observing that "Article 36 of the Vienna Convention grants rights that may be invoked by an individual in a judicial proceeding." *Sanchez-Llamas*, 548 U.S. at 360 (Ginsburg, J., concurring).

The question of whether the Vienna Convention creates rights enforceable by individual residents of signatory nations remains unresolved. *See Osagiede v.*

United States, 543 F.3d 399, 409-10 (7th Cir. 2008) (collecting cases)) (emphasis added); *see also Garcia v. Quarterman*, No. 08-70003, 2009 U.S. App. LEXIS 13085, at *8 n.19 (5th Cir. 2009). Reconsideration of the remedy of suppression for a Vienna Convention violation would necessarily require reconsideration of whether Article 36 creates individually enforceable rights and resolve the divergence among the state and federal courts on this issue.

C. The Direct Connection Between the Article 36 Violation and the Harm Merits Reconsideration of *Sanchez-Llamas* and Whether Suppression Is an Appropriate Remedy Where Police Knowingly Interrogate a Foreign National Without Advising Him of His Vienna Convention Rights.

The circumstances surrounding the Article 36 violation in this case and in *Sanchez-Llamas* are vastly different. In *Sanchez-Llamas*, the statement used against the petitioner at trial was obtained within a matter of hours after his arrest. *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 340 (2006). Because, as explained in *Sanchez-Llamas*, Article 36 does not require that law enforcement refrain from investigation or interrogation until consular assistance is provided, the violation in *Sanchez-Llamas* was highly unlikely to have made any difference in that case. *Sanchez-Llamas*, 548 U.S. at 349. Indeed, as was emphasized by the State of Oregon in its Brief, the Vienna Convention violation formally did not even occur prior to petitioner making the statements he sought to suppress. Brief for Respondent State of Oregon, at 38, *Sanchez-Llamas*, 548 U.S. 331 (2006). This was because "[t]he treaty preparation materials and other non-textual material clearly establish that the obligation to inform a detained foreign nation under Article 36 is

satisfied if the information is provided within 24-40 hours after the authorities determine an individual is a foreign national subject to the treaty," and Sanchez-Llamas's statements were made well within this period of time. *Id.*

By contrast, 14 *days* elapsed between Mr. Rocha's arrest and the time he made an uncounseled statement used against him at trial. During this time, had the State complied with its obligations under the law to notify Mr. Rocha of his right to contact the Consulate "without delay," Mr. Rocha would have obtained assistance prior to any statement having been made. As described, *supra*, the Consulate would have emphasized to him his right under American law to refrain from making uncounseled statements.

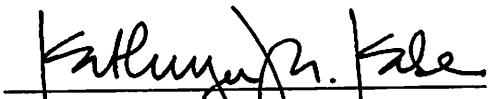
Additionally, while in *Sanchez-Llamas*, "Nothing in the transcript establishe[d] that the law-enforcement officers knew that petitioner was a foreign national," here it is undisputed that Houston police understood Mr. Rocha to be a foreign national. Brief for Respondent State of Oregon, at 5, *Sanchez-Llamas*, 548 U.S. 331 (2006). In *Sanchez-Llamas*, the State noted that its lack of knowledge as to the petitioner's nationality rendered it difficult to determine when its obligations to notify the detainee and the Consulate "without delay"—within 24-40 hours—were triggered. *Id.*, at 38. The kind of willful violation that occurred here—where law enforcement refrained from informing a known foreign national of his rights under the Vienna Convention over the course of two weeks and beyond as opposed to the incidental violation in *Sanchez-Llamas*—removes Mr. Rocha's case from the class of cases for which suppression is an inappropriate remedy.

This Court's holding that, "[i]n most circumstances, there is likely to be little connection between an Article 36 violation and evidence or statements obtained by police" does not contemplate the scenario where, like here, police knowingly interrogated a foreign national over a 14-day period without advising him at any time of his right to consular notification and assistance. This case represents one of the circumstances in which there is a direct connection to the harm, making suppression an appropriate remedy. Consequently, this Court should reconsider *Sanchez-Llamas* and the remedy of suppression for a violation of the Vienna Convention under the circumstances of this case.

CONCLUSION AND PRAYER FOR RELIEF

For the foregoing reasons, the petition for *certiorari* should be granted.

Respectfully submitted,



David R. Dow†
Kathryn M. Kase†
TEXAS DEFENDER SERVICE
1927 Blodgett
Houston, TX 77004
TEL. (713) 222-7788
FAX (713) 222-0260

Counsel of Record for Felix Rocha, Petitioner

†Member, Supreme Court Bar