No. _____ (CAPITAL CASE)

In the Supreme Court of the United States

RAMIRO RUBI IBARRA,
Petitioner,
vs.

LORIE DAVIS, Director, Texas Department of Criminal Justice,
Correctional Institutions Division
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

RUSSELL D. HUNT, JR.
Attorney at Law
Texas State Bar No. 00790937
310 South Austin Avenue
Georgetown, Texas 78626
TEL: (512) 930-0860
r2@rhjrlaw.com

NAOMI E. TERR *
Attorney at Law
Texas State Bar No. 24033379
P.O. Box 19252
Houston, Texas 77224
TEL: (713) 471-3943
naomiterr@kuykendall-law.com

** Counsel of Record*
Counsel for Petitioner

CAPITAL CASE
QUESTION PRESENTED

1. Could reasonable jurists debate whether the equitable exception to procedural default recognized in *Martinez v. Ryan*, 566 U.S. 1 (2012), should be extended to claims based on retroactive rights in cases where the right was not recognized until after the conviction became final?

PARTIES TO THE PROCEEDINGS BELOW

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

TABLE OF CONTENTS

QUESTION PRESENTED ii
PARTIES TO THE PROCEEDINGS BELOW iii
TABLE OF AUTHORITIES v
PETITION FOR A WRIT OF CERTIORARI 1
OPINIONS BELOW 1
JURISDICTION 2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2
STATEMENT OF THE CASE 2
1. State Court Proceedings 3
2. Proceedings Below 9
REASONS FOR GRANTING CERTIORARI 12
I. THE COURT SHOULD GRANT CERTIORARI TO DECIDE THE IMPORTANT QUESTION OF WHETHER THE EQUITABLE EXCEP-TION IN MARTINEZ SHOULD BE EXTENDED TO RIGHTS MADE RETROACTIVE IN CASES WHERE THE RIGHT WAS NOT AN-NOUNCED UNTIL AFTER THE CONVICTION BECAME FINAL 12
A. *Martinez's* Rationale Should Extend to Trial Rights Made Retroactive in Cases That Became Final Before the Right Was Recognized ... 13
B. The Fifth Circuit's Reasons for Denying COA Were Flawed and This Court Should Reverse and Remand So the Correct Legal Standard May Be Applied 16
CONCLUSION 18

TABLE OF AUTHORITIES

Cases

Atkins v. Virginia, 536 U.S. 304 (2002) ..... *passim*
Ayestas v. Davis, 138 S. Ct. 1080 (2018) 16, 17
Coleman v. Thompson, 501 U.S. 722 (1991) 12, 13, 18
Cullen v. Pinholster, 563 U.S. 170 (2011) 12, 17, 18
Davila v. Davis, 137 S. Ct. 2058 (2017) 14
Ex Parte Gallo, 448 S.W.3d 1 (Tex. Crim. App. 2014) 6
Ex parte Lewis, 223 S.W.3d 372 (Tex. Crim. App. 2006) 8
Halbert v. Michigan, 545 U.S. 605 (2005) 13
Ibarra v. State, 11 S.W.3d 189 (Tex. Crim. App. 1999) 4
Martinez v. Ryan, 566 U.S. 1 (2012) ..... *passim*
Penry v. Lynaugh, 492 U.S. 302 (1989) 14, 15
Powell v. Alabama, 287 U.S. 45 (1932) 11
Trevino v. Thaler, 569 U.S. 413 (2013) 2, 10, 11, 12

Constitutional Provisions and Statutes

U.S. Const. Am. 8 2
U.S. Const. Am. 14 2
28 U.S.C. § 1254 2
28 U.S.C. § 2241 2
28 U.S.C. § 2253 2
28 U.S.C. § 2254 ..... 2, 10, 12, 17, 18

No. _____

In the Supreme Court of the United States

_____

RAMIRO RUBI IBARRA,
Petitioner,
vs.

LORIE DAVIS, Director, Texas Department of Criminal Justice,
Correctional Institutions Division
Respondent.

_____

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

_____

PETITION FOR A WRIT OF CERTIORARI

_____

Ramiro Ibarra petitions for a writ of certiorari to review an opinion of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The unpublished opinion of the United States Court of Appeals for the Fifth Circuit denying a certificate to appeal was issued on June 19, 2018, and is attached as Appendix 1. Rehearing was not sought. The unpublished memorandum opinion of the United States District Court for the Western District of Texas following a remand from the Fifth Circuit and from which appeal was sought is attached as Appendix 2. The published order of the Fifth Circuit remanding the case back to the district court

for further proceedings in light of *Trevino v. Thaler*, 569 U.S. 413 (2013), is attached as Appendix 3. The district court's original opinion denying habeas corpus relief on the *Atkins* claim that is the subject of this petition is attached as Appendix 4.

JURISDICTION

The district court had jurisdiction over the habeas cause under 28 U.S.C. §§ 2241 & 2254. The district court denied a certificate of appealability (COA) as to the claim that is the subject of this petition, and the Fifth Circuit had jurisdiction to determine whether it should grant a COA pursuant to 28 U.S.C. § 2253. This Court has jurisdiction to review the Fifth Circuit's opinion denying COA pursuant to its authority to issue writs of certiorari. 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment to the U.S. Constitution provides, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

The Fourteenth Amendment to the U.S. Constitution provides, "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."

STATEMENT OF THE CASE

This case arises from the adjudication of an application for a writ of habeas corpus by the United States District Court for the Western District of Texas. In the

district court, Mr. Ibarra raised a claim that he was intellectually disabled and ineligible for execution under the Eighth Amendment. ROA.500-ROA.511. Mr. Ibarra has a full-scale IQ of 65, as measured by the Spanish Language Wechsler Adult Intelligence Scale (3rd Edition), and psychologist Carol Romey has formed a professional opinion, based on his IQ score and social history available to her, that he is intellectually disabled. ROA.507, ROA.509. Although Mr. Ibarra has a substantial claim that he is intellectually disabled and ineligible for execution, this defense to a death sentence was not recognized by this Court until after his trial. *See Atkins v. Virginia*, 536 U.S. 304 (2002). His only opportunity to raise the defense and obtain an adjudication of the defense came in post-conviction proceedings. This petition therefore raises the question of whether a recently recognized equitable exception to traditional procedural default doctrine intended to ensure meaningful post-conviction review of certain claims occurs should be extended to cover a person who claims a right that has only been recognized after a criminal conviction has become final but which right is to be given full retroactive effect.

1. State Court Proceedings

On September 18, 1996, a McLennan County grand jury indicted Mr. Ibarra for capital murder for causing the death of Maria de la Paz Zuniga in the course of attempting to commit sexual assault. ROA.3403. The jury returned a guilty verdict on September 17, 1997. ROA.3638. In the sentencing phase, the jury answered Texas's special issues in a manner requiring the trial court to impose a death sen-

tence. ROA.3688; ROA.3689; ROA.3691. On September 22, 1997, the trial court sentenced Ibarra to death. ROA.3697. The Texas Court of Criminal Appeals affirmed the judgment. *Ibarra v. State*, 11 S.W.3d 189 (Tex. Crim. App. 1999). On June 21, 1999, Mr. Ibarra filed an application seeking state post-conviction relief, which the TCCA denied in an unpublished order on April 4, 2001. Order, *Ex parte Ibarra*, No. WR-48,832-01 (Tex. Crim. App. Apr. 4, 2001).

Mr. Ibarra filed an application for a writ of habeas corpus in the United States District Court for the Western District of Texas on April 4, 2002. On June 20, 2002, this Court decided *Atkins*, recognizing that execution of the intellectually disabled violates the Eighth and Fourteenth Amendments. In light of that decision, Mr. Ibarra sought a stay of his federal proceeding to permit him an opportunity to present an *Atkins* claim to the state court. ROA.878. Because of the timing of the *Atkins* decision, this was Mr. Ibarra's first opportunity to raise an intellectual disability defense to his death sentence.

On June 19, 2003, Mr. Ibarra, through § 3599 counsel, filed an application for a writ of habeas corpus in state court raising an *Atkins* defense. On November 10, 2004, the TCCA concluded a prima facia *Atkins* claim had been presented—meaning that if Mr. Ibarra could prove the allegations he made true he would be entitled to relief—and authorized the consideration of the claim by the state trial court. Although Mr. Ibarra's application had been authorized, state law at the time provided no right to appointment of counsel on a subsequent habeas corpus application, even

for death-sentenced prisoners. Neither the parties nor the state court took any further action on Mr. Ibarra's application in state court until June 28, 2006, when the CCA ordered the trial court to resolve the claim within 90 days of its order.

Out-of-state attorney Gregory Kuykendall requested and was granted leave to appear as retained, pro bono counsel on Mr. Ibarra's behalf on July 18, 2006. At the hearing, Mr. Kuykendall asked the court to schedule the hearing closer to the end of the year rather than in September as the court had indicated it desired. He explained that, because Mr. Ibarra was a Mexican national in his fifties who grew up in a rural part of Mexico, obtaining the evidence necessary to prove that the age of onset of Mr. Ibarra's intellectual disability occurred during the developmental era would be far more time consuming than in a typical case. Not only would documentary records be difficult to locate, but it would take substantial time to locate relevant witnesses and even to obtain the necessary governmental permission for them to travel to the United States to provide testimony. He also explained that in another case involving a Mexican national, the CCA had granted the trial court extensions of time to conduct the hearing upon its request. The State objected to setting the date beyond September, and the court set the hearing for September 18, 2006.

Immediately upon entry into the case, Mr. Kuykendall began preparing for a hearing on the *Atkins* claim. On August 4, 2006, Mr. Ibarra through counsel requested reconsideration of the trial court's order setting the hearing date for September 18. The motion pointed out that § 3599 counsel filed the subsequent application, but was not representing the applicant as to the matter as the federal court would

not pay for state court work and state law did not provide any right to counsel for cases in the posture.[1] Thus, he was neither appointed nor retained, and Mr. Ibarra was essentially unrepresented in state court until the time that attorney Kuykendall entered his appearance. The motion also asserted a constitutional right to counsel, investigative and expert services reasonably necessary to litigate the *Atkins* defense, and sufficient time to meaningfully research and prepare the claim. Attached to the motion was an affidavit from an attorney experienced in *Atkins* litigation, Richard Burr, explaining the standard of care for counsel representing a capital client who may be intellectually disabled, including the need to prepare a thorough social history. Also attached was an affidavit from an investigator with experience conducting investigation in Mexico, explaining the difficulty and time-consuming nature of investigating abroad. The state trial court denied the motion after hearing it on August 17, 2006.

A motion for investigative services in the amount of $12,500 was filed on August 17, 2006. On August 30, 2006, the trial court granted it in part, authorizing $7,500 in investigative services just a little more than two weeks before the hearing was scheduled to begin. On September 5, 2006, Mr. Ibarra filed a motion requesting the court to authorize Mr. Ibarra's retention of expert services in the amount of $7,900. The motion sought the funding to allow Mr. Ibarra to bring Dr. Carol Romey,

[1] Texas law allows any person, whether a lawyer or not, to file a habeas corpus application on behalf of a prisoner to initiate a proceeding. *See Ex Parte Gallo*, 448 S.W.3d 1, 4 (Tex. Crim. App. 2014) (habeas corpus application on behalf of prisoner may be filed by any "person" with consent to do so).

a psychologist who had already evaluated Mr. Ibarra and formed an opinion that he was intellectually disabled, to the evidentiary hearing so she could testify. On September 13, 2006, the trial court inexplicably denied the request in full, effectively prohibiting Mr. Ibarra, who is indigent, from presenting expert testimony at the hearing.

On September 14, 2006, Mr. Ibarra through counsel again requested a continuance of the evidentiary hearing. The motion alleged that Mr. Ibarra's counsel had not yet been able to conduct an adequate investigation. Attached to the affidavit was an affidavit from § 3599 counsel explaining that he was appointed by the federal court in Mr. Ibarra's federal habeas corpus proceeding; that in the course of that representation he developed claims that had not yet been presented to the state court; that the federal court had stayed the proceeding to permit Mr. Ibarra an opportunity to exhaust the claims; that he filed the state habeas application only because state law provided no right to counsel to indigent capitally sentenced prisoners for the purpose of preparing subsequent habeas applications; and that he conveyed multiple times to counsel representing the State that he had not been appointed to represent Mr. Ibarra in state court. That same day, Mr. Ibarra's pro bono counsel filed a motion for reconsideration of the denial of authorization to retain Dr. Romey for the purpose of securing her testimony and expertise at the hearing.

The motions were heard on September 18, 2006, the same date as the evidentiary hearing was scheduled to occur. At the hearing, pro bono counsel explained that, although he had been working diligently since his appearance in the case, and had

identified relevant witnesses in Mexico, it had proved impossible to get them to the United States on such short notice, as most did not have passports and would be required to apply for humanitarian visas. Counsel also explained that he was unable to bring his expert to the hearing because the court had denied authorization for him to spend money to do so. The court denied the motion.

At the evidentiary hearing, because none of Mr. Ibarra's witnesses were present, pro bono counsel offered a declaration under penalty of perjury from psychologist Carol Romey opining that Mr. Ibarra was a person with intellectual disability. Notwithstanding that state law allows a trial court hearing a habeas application to receive affidavits and other sworn material as evidence, the State objected to admission of the declaration as hearsay and because Dr. Romey was not licensed in the United States.[2] The court sustained the objections. Mr. Ibarra's counsel then asked the court to hold the hearing open to afford Mr. Ibarra an opportunity to obtain the presence of his witnesses. The court did not rule on the request.

The State told the court that, in the absence of any evidence from Mr. Ibarra, it would not present any evidence. The State then argued that the court could base its decision on the evidence presented in the guilt phase of the underlying capital

[2] Dr. Romey's resume attached to the state habeas application reflected that she was licensed by Puerto Rico, which is in fact a territory of the United States. Moreover, as Mr. Ibarra's pro bono counsel pointed out to the court, there is no requirement in state law that expert testimony on intellectual disability be given by a licensed psychologist. *See Ex parte Lewis*, 223 S.W.3d 372, 374 (Tex. Crim. App. 2006) (Cochran, J., concurring) (explaining that whether a physician or psychologist is licensed in Texas is of no "legal significance in deciding whether [an] applicant is mentally retarded").

murder trial. The State argued that the trial record "established a wealth of knowledge that Mr. Ibarra is not in fact mentally retarded." Specifically, "the nature of the crime," and that "Mr. Ibarra planned" were offered as a sufficient basis for the court to conclude that Mr. Ibarra is not intellectually disabled. The evidence, the State said, "show[ed] thinking and planning on the part of Mr. Ibarra." On the basis of crude stereotypes that intellectually disabled individuals are incapable of thinking and planning, the trial court orally denied the application. It later signed proposed findings of fact and conclusions of law written by the State. The fact findings relied entirely on the evidence of guilt presented at trial, without any citations to the record. On September 26, 2007, the CCA agreed with the trial court and denied relief on the *Atkins* claim. Order, *Ex parte Ibarra*, No. WR-42,832-02 (Tex. Crim. App. Sept. 26, 2007).

2. Proceedings Below

On March 31, 2011, after Mr. Ibarra returned to federal court from having presented the *Atkins* claim to the state court, the federal district court denied the claim. District Judge Walter Smith determined the claim to be "unexhausted" and therefore procedurally defaulted as a consequence of documentary exhibits attached to the application which had been presented to but not considered by the state court (including the expert's declaration that the state court excluded from its consideration). ROA.1849-ROA.1850. The district court nevertheless undertook review of the truncated claim that was considered by the state court—a claim on which no evidence had been admitted other than the trial record—and determined that the state court's

adjudication of it was not unreasonable. ROA.1851. The court denied a COA as to all claims. ROA.1854.

Mr. Ibarra sought a COA from the Fifth Circuit to appeal the district court's denial of the claim. On August 17, 2012, the Fifth Circuit denied a COA. The court held (1) that reasonable jurists could not debate the district court's ruling that the more fully developed claim Mr. Ibarra presented in federal court was procedurally defaulted, *id*. at 682; and (2) that reasonable jurists could not debate that 28 U.S.C. § 2254(d)'s relitigation bar precluded relief on the version of the claim that had been adjudicated by the state court, *id*. at 682-83.

On May 28, 2013, the Supreme Court decided *Trevino*, which held that a prisoner confined pursuant to the judgment of a Texas court could establish cause and prejudice under *Martinez v. Ryan*, 566 U.S. 1 (2012), for the procedural default of a Sixth Amendment trial-counsel-ineffectiveness claim if he could show that the default was attributable either to an absence of state habeas counsel or to ineffective assistance of state habeas counsel.[3] *Trevino*, 569 U.S. at 423-29. On July 17, 2013, the Fifth Circuit granted rehearing; vacated its decision denying COA to the extent inconsistent with *Trevino*; granted COA as to *Trevino*-relevant claims; vacated the district court's order to the extent inconsistent with *Trevino*; and remanded for further

[3] *Trevino* expressly overruled a non-dispositive order issued by the Fifth Circuit in Mr. Ibarra's case which had held that this Court's *Martinez* decision did not apply to Texas prisoners challenging state court criminal judgments. *See Trevino*, 569 U.S. at 420 (describing the non-dispositive opinion from this case holding that Texas prisoners could not avail themselves of the *Martinez* exception).

proceedings consistent with *Trevino*. Order, *Ibarra v. Stephens*, No. 11-70031 (July 17, 2013).

On remand, Mr. Ibarra argued, *inter alia*, that he was entitled to establish cause for the default of his fully developed *Atkins* claim based on the absence or ineffectiveness of state habeas counsel under the principles established by *Martinez* and *Trevino*. ROA.2794- ROA.2800. Specifically, he argued that pro bono counsel's efforts to represent him were so impeded by the trial court that he was deprived of reasonably effective assistance on the claim. *See* ROA.2845. *See also Powell v. Alabama*, 287 U.S. 45, 71 (1932) (counsel may be rendered ineffective by court actions which preclude the giving of effective aid in the preparation and trial of the case). Due to Judge Smith's retirement from the bench, the case was transferred to District Judge Robert Pittman on September 19, 2016. Just nine days later, Judge Pittman issued a memorandum opinion ruling, without any explanation or analysis, that Mr. Ibarra's *Atkins* claim was beyond the scope of the appeals court's *Martinez-Trevino* remand.

Mr. Ibarra again sought a COA from the Fifth Circuit to appeal the district court's ruling that his *Atkins* claim was beyond the scope of the *Martinez-Trevino* remand. He argued that reasonable jurists could debate the district court's conclusion that the *Atkins* claim was not within the scope of the remand because the principles underlying this Court's *Martinez* and *Trevino* decisions applied with equal force to his *Atkins* claim in light of its unusual posture (*i.e.*, a claim based on a retroactive right that was not recognized until after his conviction became final). The Fifth Circuit declined to permit an appeal of the question in an opinion that is less than fully

coherent. It held, for example, that it did not even need to consider the debatability of *Martinez's* applicability to an *Atkins* claim in this posture because "reasonable jurists could not debate that Ibarra's underlying *Atkins* claim, as presented to the state courts, has no merit." App. 1 at 7. In a footnote, the court held that it would be a significant extension of *Martinez* to apply it to an *Atkins* claim, because *Martinez* was limited to claims alleging ineffective assistance of trial counsel under the Sixth Amendment. *Id*. In another footnote, the court appeared to hold that extending *Martinez* in this circumstance would run afoul of 28 U.S.C. § 2254(e)(2) and *Cullen v. Pinholster*, 563 U.S. 170 (2011). App. 1 at 8. Demonstrating that reasonable jurists could disagree about the matter, Judge Graves dissented from the denial of COA, concluding that "Ibarra is not foreclosed from presenting his *Atkins* claim to the extent that it is encompassed within *Trevino*/*Martinez*." App. 1 at 13.

REASONS FOR GRANTING CERTIORARI

I. THE COURT SHOULD GRANT CERTIORARI TO DECIDE THE IMPORTANT QUESTION OF WHETHER THE EQUITABLE EXCEPTION IN *MARTINEZ* SHOULD BE EXTENDED TO RIGHTS MADE RETROACTIVE IN CASES WHERE THE RIGHT WAS NOT ANNOUNCED UNTIL AFTER THE CONVICTION BECAME FINAL

In federal habeas corpus proceedings, a claim is procedurally defaulted if it was either presented to a state court in a procedurally incorrect manner, or it was not presented at all and the state court would apply a procedural rule to dismiss it if it were presented now. *Coleman v. Thompson*, 501 U.S. 722 (1991). A prisoner could nevertheless have the default excused if he could show cause and prejudice for the default. *Id*. at 750. Showing cause requires demonstrating that an obstacle external

to the defense prevented the prisoner from presenting the claim in a procedurally correct manner. *Id*. at 753. Traditionally, where a prisoner was represented by counsel in the state habeas proceeding, the prisoner was bound by agency principles to the lawyer's acts, and therefore that lawyer's unprofessional omissions—ineffectiveness—could not serve as cause for procedural default because it was not an obstacle that was "external" to the defense. *Id*. at 753-54.

In *Martinez*, this Court carved out an equitable exception to *Coleman's* rule that ineffective state habeas representation could not serve as an obstacle external to the defense for purposes of establishing cause for procedural default of a Sixth Amendment claim of trial counsel ineffectiveness. 566 U.S. at 13. The Court reasoned that an initial review-collateral proceeding which presents the first opportunity to raise a claim that trial counsel's assistance was ineffective is the equivalent of a prisoner's direct appeal with respect to such a claim. *Id.* at 11 (citing *Halbert v. Michigan*, 545 U.S. 605 (2005)). Without an exception to *Coleman's* rule, a defendant risked losing the opportunity to have any court—state or federal—review a substantial Sixth Amendment ineffectiveness claim when such claims are first heard in a proceeding without a constitutional guarantee of effective representation. That was deemed equitably intolerable in light of the bedrock nature of the Sixth Amendment right to counsel. *Id*. at 12.

A. *Martinez's* Rationale Should Extend to Trial Rights Made Retroactive in Cases That Became Final Before the Right Was Recognized

The Court should extend *Martinez* to encompass claims based on retroactive rights in cases where the conviction became final before announcement of the right.

In *Davila v. Davis*, 137 S. Ct. 2058 (2017), this Court declined to extend the *Martinez* exception to direct-appeal-counsel-ineffectiveness claims. The Court observed that the "underlying rationale of *Martinez*" was "the unique importance of protecting a defendant's trial rights," and to "ensure that meritorious claims of trial error receive review by at least one state or federal court." 137 S. Ct. at 2066, 2067. Because the underlying trial right forfeited by putatively ineffective direct appeal counsel in *Davila* was ruled on by "at least one" state court with effective counsel (the trial court), the rationale of *Martinez* did not extend to it.

The Court should now decide whether the equitable exception announced by *Martinez* should extend to retroactive trial rights that could not have been enforced at trial or on direct appeal due to the happenstance that they were not yet recognized until after the conviction became final. While retroactively enforceable rights are few and far between, the right not to be executed if intellectually disabled is a retroactive right that this Court first recognized in 2002. *See Penry v. Lynaugh*, 492 U.S. 302, 329-30 (1989) (holding that recognition of categorical exemption for intellectual disabled people would be retroactive). Thus, for every prisoner sentenced to death whose case became final before 2002, there was no opportunity to raise and present the issue at trial, *i.e.*, during a proceeding in which effective representation by counsel is constitutionally guaranteed.

Retroactive rights are, *inter alia*, those which place certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe, or which place a certain class of individuals beyond the State's power to

punish by death. *Penry*, 492 U.S. at 329-30. These rights are necessarily "bedrock principle[s] in our justice system," *Martinez*, 566 U.S. at 12, which is precisely why they alone are enforced retroactively. Moreover, *Martinez* recognized that the inability to raise the claim at trial or outside of the direct-appeal process "where counsel is constitutionally guaranteed . . . significantly diminishes prisoners' ability to file such claims." *Id.* at 13. *Martinez* also recognized that where a claim may *only* be raised in a collateral proceeding, then the proceeding "if undertaken without counsel or with ineffective counsel, may not have been sufficient to ensure that proper consideration was given to a substantial claim." *Id.* at 14. This is always the case where the claim is based on a retroactive right that has not been recognized until the conviction is final. Collateral proceedings are the first and only opportunity to raise the claim.

In the absence of an equitable exception to *Coleman's* rule, a prisoner whose conviction became final before 2002, and who either was not afforded any state post-conviction counsel or was afforded only ineffective assistance of counsel, risks losing the opportunity to have any court—state or federal—meaningfully review a substantial claim that he is intellectually disabled and thus beyond the State's power to punish by death. In such a case, the claim is *always* first heard in a proceeding where counsel is not a constitutional guarantee of effective representation. Accordingly, the Court should grant certiorari and extend the rule of *Martinez* to encompass retroactive rights that were not recognized until after the conviction became final.

B. The Fifth Circuit's Reasons for Denying COA Were Flawed and This Court Should Reverse and Remand So the Correct Legal Standard May Be Applied

The Fifth Circuit held that reasonable jurists could not even debate whether the equitable Martinez exception should be extended to retroactive rights announced after a prisoner's conviction becomes final. Its reasons for so holding were flawed and this Court may grant COA to correct it and remand. *See Ayestas v. Davis*, 138 S. Ct. 1080, 1088 n.1 (2018) ("When the lower courts deny a COA and we conclude that their reason for doing so was flawed, we may reverse and remand so that the correct legal standard may be applied.").

First, the court below denied COA because it concluded that reasonable jurists could not debate that the *Atkins* claim Mr. Ibarra presented *to the state court* had no merit. App. 1 at 7. This ruling, while perhaps having some relevance to an alternative argument Mr. Ibarra made below, has no bearing on whether the *federal* claim is substantial for COA purposes or on the debatability of whether *Martinez* should encompass post-finality retroactive rights. In cases in which a prisoner seeks application of *Martinez*, the underlying claim either will have not been raised in state court at all, or it will have been raised or litigated ineffectively. In short, the claim as presented to the state court in this posture will *always* lack merit. The Fifth Circuit should have looked at the allegations in the *federal* habeas application to determine the claim's substantiality for COA purposes, not to what the state court record looked like.

Second, the appeals court's apparent holding that extending *Martinez* in this circumstance would run afoul of 28 U.S.C. § 2254(e)(2) and *Pinholster* is incoherent. Section 2254(e)(2) governs the power of a federal district court to hold evidentiary hearings. Whether a court is empowered to hold an evidentiary hearing is an entirely different question from whether a claim is excused from procedural default. Moreover, if a rule allowing a prisoner to excuse the procedural default of an *Atkins* claim based on ineffective state habeas representation runs afoul of § 2254(e)(2), so too would a rule excusing the procedural default of a claim that trial counsel was ineffective. In other words, the holding effectively purports to overrule this Court's *Martinez* decision as running afoul of § 2254(e)(2).[4]

The same reasoning applies to the appeals court's ruling that applying the equitable *Martinez* exception to an *Atkins* claim in a case that became final before this Court announced *Atkins* would be inconsistent with *Pinholster*. *Pinholster* is a case instructing courts as to what information is relevant when a federal court applies the (d)(1) exception to the bar against claims that were adjudicated on their merits by a federal court. But, when a claim is deemed procedurally defaulted by a federal court—as the *Atkins* claim Mr. Ibarra presented in the district court was—then it necessarily follows that the state court did not adjudicate its merits. A procedural default can only occur (1) where the state court clearly dismissed a claim on an independent and

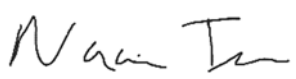
[4] The effect that 28 U.S.C. § 2254(e)(2) might have on a case in this posture is an open question, *Ayestas*, 138 S. Ct. at 1095, but it is not a question that precludes a finding that the *Martinez* equitable exception exists for a claim in this posture at all.

adequate procedural ground; or (2) where the claim was not presented to the state court at all. *Coleman*, 501 U.S. at 735 & n.1. A claim cannot both be procedurally defaulted and adjudicated on the merits by the state court. Thus, § 2254(d) and its exceptions—and *Pinholster*—will never be applicable to any claim that is procedurally defaulted.

CONCLUSION

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

Respectfully submitted,



NAOMI E. TERR
Attorney at Law
Texas State Bar No. 24033379
P.O. Box 19252
Houston, Texas 77224
TEL: (713) 471-3943
naomiterr@kuykendall-law.com

RUSSELL D. HUNT, JR.
Attorney at Law
Texas State Bar No. 00790937
310 South Austin Avenue
Georgetown, Texas 78626
TEL: (512) 930-0860
r2@rhjrlaw.com