**No. 18–6062**

IN THE

# Supreme Court of the United States

RAMIRO RUBI IBARRA,
Petitioner,

v.

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

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

## BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI


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## CAPITAL CASE
## QUESTIONS PRESENTED

In his federal habeas petition, Ibarra raised claims of ineffective-assistance-of-trial-counsel (IATC) and categorical ineligibility for the death penalty under *Atkins v. Virginia*, 536 U.S. 304 (2002). The district court denied both claims as procedurally defaulted and meritless. Ibarra sought relief from his defaults pursuant to the Court's decision in *Martinez v. Ryan*, 566 U.S. 1 (2012), which held that the ineffective assistance of state habeas counsel can constitute the cause necessary to overcome the default of a substantial IATC claim. But the Fifth Circuit rejected Ibarra's arguments in *Ibarra v. Thaler*, 687 F.3d 222, 224, 227 (5th Cir. 2012), holding that *Martinez* was not applicable to either *Atkins* cases or IATC cases arising in Texas. Following *Trevino v. Thaler*, 569 U.S. 413 (2013), which overruled *Ibarra* and applied *Martinez* to Texas, the Fifth Circuit granted rehearing and vacated its previous decision and the lower court's conclusions—but only to the extent that they were inconsistent with *Trevino*. The Fifth Circuit then remanded for further proceedings.

In district court, Ibarra attempted to use *Martinez*/*Trevino* to contest the court's previous resolution of his *Atkins* claim as well as its decision on his IATC claim. But the district court held that Ibarra's *Atkins* claim was beyond the scope of the remand. On appeal, the Fifth Circuit agreed that Ibarra's *Atkins* claim had been beyond the scope of its remand order. The Fifth Circuit also declined to reach Ibarra's argument that the *Martinez* equitable exception should extend to *Atkins* cases, finding instead that reasonable jurists could not debate that Ibarra's *Atkins* claim, as presented to the state court, was meritless and not worthy of a certificate of appealability (COA).

Accordingly, Ibarra's petition for certiorari review raises the following questions:

1. Whether reasonable jurists could debate the Fifth Circuit's decision that Ibarra's *Atkins* claim has no merit.

2. Whether reasonable jurists could debate the Fifth Circuit's decision that Ibarra's *Atkins* claim was beyond the scope of the remand.

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## INTRODUCTION

Thirty years ago Petitioner Ramiro Rubi Ibarra[1] (Ibarra) raped a sixteen-year-old girl and strangled her to death with wire. DNA linked Ibarra to the crime. Although he was apprehended soon afterwards, Ibarra evaded trial for almost a decade due to a legal technicality. Punishment evidence showed that—in addition to being a rapist and a murderer—Ibarra is a child molester and a wife beater, with a history of misogynistic violence and prior convictions for drunk driving and unlawfully carrying a weapon.

Ibarra's federal habeas petition raised both an *Atkins* claim and a *Wiggins*[2]-type IATC claim. The district court denied both as procedurally defaulted and meritless. ROA.1844–51. The district court further denied a COA, finding that Ibarra's claims were not debatable among reasonable jurists. ROA.1854. The Fifth Circuit likewise denied a COA and rejected Ibarra's *Martinez* argument that purported ineffective assistance by his state habeas counsel should excuse his defaults. *Ibarra*, 687 F.3d at 224, 227; *Ibarra v. Thaler*, 691 F.3d 677 (5th Cir. 2012). However, the Fifth Circuit was later obliged to grant rehearing, vacate its opinion, and remand the case following

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[1] Respondent Lorie Davis is referred to herein as "the Director." "ROA" refers to the record on appeal.

[2] *Wiggins v. Smith*, 539 U.S. 510 (2003) (the failure of petitioner's attorney to investigate and present mitigating evidence during his capital murder trial constituted IATC).

the Court's decision in *Trevino*. *Ibarra v. Stephens*, 723 F.3d 599 (5th Cir. 2013). Nevertheless, the Fifth Circuit's order made clear that it was vacating its decision and the district court's decision only to the extent that they were inconsistent with *Trevino*. *Id*. at 600.

After receiving supplemental briefing from the parties, the district court denied relief for a second time—specifically noting that Ibarra's *Atkins* claim was beyond the scope of the remand. ROA.2907 n.3. Ibarra sought a COA to appeal that decision. But the Fifth Circuit majority properly denied a COA again. *Ibarra v. Davis*, 738 F. App'x 814 (5th Cir. 2018) (unpublished). It held that reasonable jurists could not debate that its remand order "made clear that the order granting COA in light of *Trevino* did not affect this portion of our ruling." *Id*. at 818 ("Nothing in that order suggests that the *Atkins* claim was within the scope of remand."). It further held that reasonable jurists could not debate Ibarra's *Atkins* claim was meritless. *Id*. at 818–19. To secure a COA, Ibarra was required to demonstrate that reasonable jurists could debate both the district court's procedural ruling and that he has a valid constitutional claim. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

In his petition (Pet.) for certiorari review, Ibarra explains that *Atkins* came down after his trial and therefore he was only able to raise his intellectual-disability claim in postconviction proceedings. He suggests that, under the rationale of *Martinez* and *Trevino*, he should be allowed to

circumvent his procedural default. But Ibarra ignores that the Fifth Circuit expressly declined to reach this argument in its opinion denying a COA.[3] *Ibarra*, 738 F. App'x at 818. The court of appeals stated that it was unnecessary to address Ibarra's contentions because, in addition to being beyond the scope of the remand, Ibarra's underlying *Atkins* claim is meritless. *Id*. Indeed, the courts have repeatedly held that Ibarra's *Atkins* claim fails on the merits. ROA.9764–89; *Ex parte Ibarra*, WR–48,832–02 & –03, 2007 WL 2790587, at *1 (Tex. Crim. App. Sept. 26, 2007) (per curiam) (not designated for publication) ("We agree with the convicting court that applicant has not established that he is [intellectually disabled]."); ROA.1849–51 (based on the evidence presented to the state court, the record did not demonstrate that Ibarra is intellectually disabled); *Ibarra*, 691 F.3d at 682–83 (new evidence was foreclosed from consideration by *Cullen v. Pinholster*, 563 U.S. 170 (2011), and the underlying claim was meritless).

In any event, the appropriate time for Ibarra to ask this Court to extend *Martinez* was a petition for certiorari based either on the Fifth Circuit's initial rejection of his *Martinez* argument in 2012 or the Fifth Circuit's initial denial

[3] *See*, *e.g.*, *Ayestas v. Davis*, 138 S. Ct. 1080, 1095 (2018) ("declin[ing] to decide in the first instance" an issue "neither presented nor *passed on* below") (emphasis added).

of a COA, also in 2012.[4] The time for appealing those 2012 decisions is now long passed. Consequently, the instant petition for certiorari is jurisdictionally unsound. Supreme Court Rule 13; 28 U.S.C. § 2101.

Nevertheless, even if the Court wanted to consider whether *Martinez*/*Trevino* has some applicability to the case-at-bar, the Fifth Circuit's most recent opinion indicates that it believes that Ibarra's new federal evidence is more appropriately barred by *Pinholster* than procedural default. The original district court opinion in this case (dated March 31, 2011) was released before *Pinholster* came down (released April 4, 2011). When the Fifth Circuit evaluated the case on initial appeal, the Director raised *Pinholster*. However, the Fifth Circuit did not explicitly decide whether Ibarra's new evidence was barred by *Pinholster* or procedural default since Ibarra clearly could not prevail either way. *Ibarra*, 691 F.3d at 682. But the Fifth Circuit's most recent opinion reflects the view that *Pinholster* controls. *Ibarra*, 738 F. App'x at 819 ("Under [*Pinholster*], this is impermissible."). There is no *Martinez* exception to *Pinholster*. *See*, *e.g.*, *Escamilla v. Stephens*, 749 F.3d 380, 395 (5th Cir. 2014) ("once a claim is considered and denied on the merits by the state habeas court, *Martinez* is inapplicable, and may not function as an

[4] This would be analogous to the procedure that Ibarra employed with the instant petition, as his IATC claim remains pending before the Fifth Circuit concurrent with the instant appeal.

exception to *Pinholster*'s rule that bars a federal habeas court from considering evidence not presented to the state habeas court"). The Fifth Circuit also noted that 28 U.S.C. § 2254(e)(2) would preclude the introduction of new evidence in federal habeas to support Ibarra's *Atkins* claim.

Besides, *Martinez* and *Trevino*, by their own terms, only apply to IATC claims. The Court recently re-affirmed this principle in *Davila v. Davis*, 137 S. Ct. 2058 (2017). Ibarra fails to offer any precedent from any court that swells the *Martinez* equitable exception to cover *Atkins* claims. He also offers no compelling reason to make such an extension in the instant case. In fact, Ibarra does not even argue that that his state *Atkins* counsel were ineffective by virtue of their own actions, instead contending that the trial court's habeas rulings somehow rendered them ineffective. Pet.11. This, of course, undermines Ibarra's argument that refusing to extend *Martinez* would prevent error from being reviewed, since mistaken rulings by the trial court could have been brought to the attention of the Texas Court of Criminal Appeals (CCA) via objections to the trial court's findings and conclusions, or even to this Court on petition for a writ of certiorari.

In sum, the district court properly conformed its proceedings to the Fifth Circuit's mandate. Both the district court and the Fifth Circuit correctly rejected Ibarra's attempts to piggy-back his *Atkins* claim onto a remand clearly intended only to encompass his IATC claim. Reasonable jurists also could not

debate that Ibarra's underlying *Atkins* claim is meritless, and Ibarra fails to demonstrate that he deserves any encouragement to proceed further. Ibarra's petition does not demonstrate any special or important reason for this Court to review the court of appeals' decision, and this Court typically does not engage in routine error correction. Judicial restraint is further warranted in this case because Ibarra does not show that a split exists among the circuit courts regarding any relevant issue. No writ of certiorari should issue, and this Court should deny Ibarra's attempts to delay these proceedings further by allowing the re-adjudication of an *Atkins* claim long since rejected as procedurally defective and meritless.

## STATEMENT OF THE CASE

### I. Facts of the Crime

As observed by the Fifth Circuit[5], "the district court ably detailed the facts of this case" as follows:

> [Sixteen]-year-old Maria De La Paz Zuniga ("the Victim" or "Maria") was brutally raped, sodomized, and murdered on the morning of March 6, 1987. She was discovered by her brother, who found her lying on a bed in one of the bedrooms in her house. She was bloody, beaten and partially nude, with a yellow-coated wire wrapped around her neck and shoulder. Subsequent examination revealed that she had been sexually assaulted, including both vaginal and anal penetration. Her clothing was ripped, and her underwear had been torn from her body. Maria was beaten so severely in the face and the rest of her body, she was covered with numerous bruises and contusions, and she was also covered in and

[5] *Ibarra*, 691 F.3d at 679.

surrounded by significant amounts of blood. There was blood under her fingernails, indicating she had scratched her attacker while trying to fight him off. Further testing found sperm in Maria's body and on her underwear. A number of facial, head and pubic hairs were also found on and around her body.[6]

The police discovered three witnesses at a business across the road from Maria's home—RPM Manufacturing. The witnesses told police that they had noticed a man leaving Maria's house at the approximate time of the murder. They described a Hispanic male, approximately 30 years of age, with a medium, stocky build. He had black, mussed hair, and a moustache. They were unable to see much of his face as he mostly kept his head down. Two of the witnesses were subsequently able to pick [Ibarra] out of a line-up. The witnesses observed [Ibarra] walking to a car, which was a late-model Chevrolet Camaro with mismatched rims, a bent antenna, dual exhaust pipes, and a fan mounted on the dashboard. The car was red in color from primer or oxidization. All three witnesses were able to identify the car. When police provided the description to Maria's family, they named [Ibarra], a family acquaintance, as a possible suspect.

The investigator assigned to the case, Ramon Salinas ("Salinas"), discovered [Ibarra]'s address and went to his home to question him at approximately 6 p.m. on the day of the murder. The Camaro identified by the witnesses and registered to [Ibarra] was parked on the street nearby. Salinas noticed that [Ibarra] had scratches on his face and was wearing clothing fitting the description given by the witnesses. [Ibarra] was placed under arrest and consented to a search of his home and car. Found in [Ibarra]'s car was yellow wire similar to that used to strangle Maria.[7] Salinas also discovered that [Ibarra] had additional scratches on his chest under his shirt.

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[6] Hairs found on the victim's clothes and bedding were not recovered the first time these items were examined by the Dallas County Sheriff's Department Physical Evidence Section. They were recovered when the evidence was re-examined in 1996. [footnote in original]

[7] The yellow wire found in [Ibarra]'s trunk was not of the same thickness as that used to strangle Maria. However, testimony at trial revealed that [Ibarra] had access

> The police obtained a search warrant on March 10, 1987 to obtain blood and hair samples from [Ibarra] to compare to the hair and bodily fluids found at the crime scene. An indictment for murder was issued against [Ibarra] on May 27, 1987. Subsequently, [Ibarra] filed a motion to suppress, which was granted because the search warrant was not issued by the appropriate court. At that time, Texas law precluded the police from obtaining a second search warrant.[8] Because it believed there was insufficient evidence without the blood and hair comparisons, the State dismissed the indictment on July 19, 19[8]8, and [Ibarra] was released from custody.
>
> Texas law changed in 1995,[9] allowing police to obtain the issuance of more than one evidentiary search warrant in a case. The police obtained a second warrant for hair and blood samples from [Ibarra] on July 2, 1996 and were able to secure such evidence from [Ibarra]. Examination of the evidence revealed that the facial and pubic hairs found on and around Maria were similar to those of [Ibarra], and his DNA matched the semen recovered from her body and underwear, as well as the material under her fingernails.[10] [Ibarra] was then reindicted for Maria's murder on September 18, 1996. He was tried, found guilty, and sentenced to death.

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to the exact type of wire used to strangle her at his place of employment. [footnote in original]

[8] In 1987, Tex. Code Crim. Proc. Article 18.01(d) provided, in relevant part, "Subsequent search warrants may not be issued...to search the same person, place or thing subjected to a prior search. . . ." [footnote in original]

[9] The amendment to Article 18.02(d) provided, in relevant part, "A subsequent search warrant may be issued . . . to search the same person, place or thing subjected to a prior search . . . only if the subsequent warrant is issued by a judge of a district court, a court of appeals, the court of criminal appeals, or the supreme court." [footnote in original]

[10] DNA analysis was unsuccessful in 1988 and 1990, but was matched to [Ibarra] in 1996. [footnote in original]

ROA.1817–19; *Ibarra v. Thaler*, W–02–CA–052, 2011 WL 13177743, at *1–2 (W.D. Tex. Mar. 31, 2011).

## II. Evidence Relating to Punishment

The district court also provided the following summary of the punishment facts:

> At the punishment phase, the jury heard evidence that [Ibarra] anally sodomized his eight-year-old nephew on two occasions, and threatened to kill him if he told.[11] On another occasion, [Ibarra] had his nephew "masturbate" him in the shower, and he tried to force the nephew on a subsequent occasion to grab his penis. [Ibarra]'s sister-in-law testified that [Ibarra] had a bad reputation for truth and veracity, as well as a bad reputation for sexually inappropriate behavior. She also testified that there was some indication [Ibarra] had sexually abused her son. Maria Luna Diaz, with whom [Ibarra] had a relationship, testified that [Ibarra] beat her and sexually assaulted her. On one occasion he forced her to undress at knife point and threatened to kill her if she ever failed to do as she was told. [Ibarra] also threatened to strangle her, and wrapped a wire tightly around her neck and pushed her down. He released her when she begged for her life. Maria Luna's daughter testified that [Ibarra] touched her breast inappropriately when she was 11 years old. She immediately told her mother of the incident. When Maria Luna confronted [Ibarra], he beat her.
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> The jury also heard that [Ibarra] had prior convictions for unlawfully carrying a weapon and driving while intoxicated. There was also testimony regarding an arrest for misdemeanor theft, when [Ibarra] was spotted taking rope from the back of a pickup truck and placing it in his own vehicle. Upon his arrest, police found the rope in [Ibarra]'s car, along with several college-level criminal justice textbooks in English.

[11] [Ibarra] was convicted of aggravated sexual assault as a result of these acts and was sentenced to life in prison. [footnote in original]

> Other witnesses testified to [Ibarra]'s misbehavior while incarcerated. He got into a fistfight with another inmate, and he was observed by a Deputy Sheriff masturbating in front of a window where he could be seen by passers by. There was also testimony regarding [Ibarra]'s alleged suicide attempt, wherein he cut his neck. Jail and hospital personnel testified about his uncooperativeness and feigned unconsciousness.
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> While [Ibarra]'s wife, Maria Gandera Ibarra, testified on his behalf, the State elicited testimony from her on cross-examination that [Ibarra] had beaten her on several occasions, even while she was pregnant. She also testified that [Ibarra] had brought an 18-year-old girl from Mexico to live with them. Although [Ibarra] said she was his daughter, he treated her like a wife—kissing her on the mouth and spending hours with her alone in a bedroom behind closed doors.
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> The State also presented the testimony of Dr. Richard Coons, a psychiatrist, who gave his opinion that an offender with [Ibarra]'s history and sexual proclivities would constitute a continuing threat to society.

ROA.1820–21.

## III. Conviction and Postconviction Proceedings

The procedural posture of Ibarra's case is complex. The Fifth Circuit summarized the case's history during prior proceedings:

> [Ibarra]'s sentence and conviction were affirmed on direct appeal. *See Ibarra v. State of Texas*, 11 S.W.3d 189 (Tex. Crim. App. 1999), *reh'g denied* (Dec. 8, 1999), *cert. denied*, *Rubi Ibarra v. Texas*, 531 U.S. 828 (2000). His first state habeas corpus petition was denied. *Ex parte Ibarra*, No. WR–48,832–01 (Tex. Crim. App. Apr. 4, 2001). [Ibarra] then submitted his federal habeas petition, which was stayed while he exhausted additional state court claims pursuant to [*Atkins*], which banned the execution of the [intellectually disabled]. His petition was stayed further while he pursued state court claims following President Bush's announcement that the United States would have state courts give

effect to an International Court of Justice opinion declaring that Mexican nationals were entitled to review and reconsideration of their convictions due to states' failure to comply with the Vienna Convention on Consular Relations ("VCCR"). *See The Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.) ("Avena")*, 2004 I.C.J. 12 (Judgment of Mar. 31). *See also Medellin v. Texas*, 552 U.S. 491 (2008).

The [CCA] remanded [Ibarra]'s *Atkins* claim to the trial court for an evidentiary hearing. The trial court determined that [Ibarra] was not [intellectually disabled], and this holding was adopted on appeal by the [CCA]. In the same order, the CCA dismissed his separate petition for relief under *Avena* as a subsequent writ under Article 11.071, Section 5 of the Texas Code of Criminal Procedure. [*Ex parte Ibarra*, Nos. WR–48832–02 and WR–48,832–03, 2007 WL 2790587]. [Ibarra]'s application for certiorari on his *Avena* claim was denied. *Ibarra v. Texas*, 553 U.S. 1055 (2008). A *fourth* state habeas petition, raising a claim under *Wiggins v. Smith*, 539 U.S. 510 (2003), was also dismissed by the CCA as a subsequent writ. *Ex parte Ibarra*, No. WR–48,832–04, 2008 WL 4417283 (Tex. Crim. App. Oct. 1, 2008).

[Ibarra]'s federal habeas petition asserted eleven grounds for relief, all of which were rejected by the district court. [Ibarra] [sought] a COA to challenge three of those claims. First, he [sought] a COA regarding his *Atkins* claim that he is [intellectually disabled]. The district court concluded that [Ibarra]'s claim was not exhausted and procedurally barred to the extent that he presented "material additional evidentiary support to the federal court that was not presented to the state court." *Lewis v. Quarterman*, 541 F.3d 280, 285 (5th Cir. 2008) (emphasis omitted) (quoting *Dowthitt v. Johnson*, 230 F.3d 733, 745 (5th Cir. 2000)). Based on the record before the state court, the district court alternatively found that [Ibarra] was not [disabled]. Second, [Ibarra] [sought] a COA regarding his *Wiggins* claim that counsel was ineffective at sentencing. The district court held that this claim was procedurally defaulted and, alternatively, that the claim was without merit, principally because [Ibarra] could not demonstrate prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984). Finally, [Ibarra] [sought] a COA regarding his VCCR claims. The district court also held this claim procedurally

> defaulted, but found in the alternative that it was meritless, because [Ibarra] could not demonstrate prejudice.

*Ibarra*, 691 F.3d at 680–81. The Fifth Circuit affirmed the district court's initial decision denying relief (*see id.* at 677) but later granted rehearing and remanded the case for further proceedings after *Trevino* overturned the Fifth Circuit's previous determination in this case that *Martinez* was not applicable to Texas IATC claims. *Ibarra*, 687 F.3d at 227; *Ibarra*, 723 F.3d at 600.[12]

Following remand, the district court ordered supplemental briefing, which the parties supplied. ROA.2651, 2717, 2763. Ibarra then filed a motion for a stay and abeyance (ROA.2784, 2812, 2839, 2857, 2880), which the Director opposed and the district court denied. ROA.2877, 2892. On September 28, 2016, the district court denied Ibarra's claims for a second time and returned the case to the Fifth Circuit. ROA.2906–13. In the same order, the district court also denied a COA, as well as Ibarra's motion to reconsider the denial of his stay motion. *Id.* Claiming that the district court's order was ambiguous, Ibarra sought a hearing before the district court to clarify his status. ROA.2914. But the district court denied any hearing and issued final

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[12] We hereby VACATE our prior panel decision only to the extent inconsistent with *Trevino* and grant a COA only to that extent; in all other respects, the majority and dissenting opinions remain in effect. In light of this new authority, we VACATE the district court's order to the extent inconsistent with *Trevino* and REMAND to the district court for proceedings consistent herewith.

*Ibarra*, 723 F.3d at 600.

judgment. ROA.2941–42. The Fifth Circuit denied a COA on Ibarra's *Atkins* claim but granted a COA on his IATC claim. *Ibarra*, 738 F. App'x at 819. The instant petition for a writ of certiorari followed, and Ibarra's IATC claim remains pending below.

## REASONS FOR DENYING THE WRIT

The question that Ibarra presents for review is unworthy of the Court's attention. Supreme Court Rule 10 provides that review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only for "compelling reasons." An example of such a compelling reason would be if the court of appeals below entered a decision on an important question of federal law that conflicts with a decision of another court of appeals or with relevant decisions of this Court. Pursuant to Supreme Court Rule 10, Ibarra provides no basis to grant his petition for a writ of certiorari.

Additionally, there is no automatic entitlement to appeal in federal habeas corpus. *Miller-El v. Cockrell*, 537 U.S. 322, 335 (2003). As a jurisdictional prerequisite to obtaining appellate review, a petitioner is required to first obtain a COA. 28 U.S.C. § 2253(c)(1)(A); *Miller-El*, 537 U.S. at 335–36; *Slack*, 529 U.S. at 483. In determining whether to issue a COA, a court must consider whether the petitioner "has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *Barefoot v. Estelle*, 463 U.S. 880, 893 (1983). Nevertheless, the COA standard:

> . . . is not coextensive with a merits analysis. At the COA stage, the only question is whether the applicant has shown that "jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further."

*Buck v. Davis*, 137 S. Ct. 759, 773 (2017) (quoting *Miller-El*, 537 U.S. at 327); *see also Slack*, 529 U.S. at 484. "Until the prisoner secures a COA, the Court of Appeals may not rule on the merits of his case." *Buck*, 137 S. Ct. at 773 (citing *Miller-El*, 537 U.S. at 336).

However, "the determination of whether a COA should issue must be made by viewing the petitioner's arguments through the lens of the deferential scheme laid out in 28 U.S.C. § 2254(d)." *Barrientes v. Johnson*, 221 F.3d 741, 772 (5th Cir. 2000); *see also Miller-El*, 537 U.S. at 336 ("We look to the District Court's application of AEDPA[[13]]to petitioner's constitutional claims and ask whether that resolution was debatable amongst jurists of reason."). Under § 2254(d), a federal court may not issue a writ of habeas corpus for a defendant convicted under a state judgment unless the adjudication of the relevant constitutional claim by the state court, (1) "'was contrary to' federal law then clearly established in the holdings of" the Supreme Court; or (2) "'involved an unreasonable application of'" clearly established Supreme Court precedent; or

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13 The Antiterrorism and Effective Death Penalty Act of 1996.

(3) "'was based on an unreasonable determination of the facts' in light of the record before the state court." *Harrington v. Richter*, 562 U.S. 86, 100–01 (2011) (quoting *Williams v. Taylor*, 529 U.S. 362 (2000)).

The Court has emphasized § 2254(d)'s demanding standard, stating:

> [u]nder § 2254(d), a habeas court must determine what arguments or theories supported, or . . . could have supported, the state court's decision; and then it must ask *whether it is possible fairminded jurists could disagree* that those arguments or theories are inconsistent with the holding in a prior decision of this Court. . . . It bears repeating that even a strong case for relief does not mean the state court's contrary conclusion was unreasonable.

*Richter*, 562 U.S. at 102 (emphasis added); *Brumfield v. Cain*, 135 S. Ct. 2269, 2277 (2015) (if "'[r]easonable minds reviewing the record might disagree' about the finding in question, 'on habeas review that does not suffice to supersede the trial court's . . . determination.'").

The Court has noted that "[i]f this standard is difficult to meet, that is because it was meant to be." *Richter*, 562 U.S. at 102. "Section 2254(d) reflects the view that habeas corpus is a 'guard against extreme malfunctions in the state criminal justice systems,' not a substitute for ordinary error correction through appeal." *Id.* at 102–03 (quoting *Jackson v. Virginia*, 443 U.S. 307, 332 n.5 (1979) (Stevens, J., concurring in judgment)).

## I. Reasonable Jurists Could Not Debate That Ibarra's *Atkins* Claim Is Meritless.

During the state court hearing on his *Atkins* claim, Ibarra presented no witnesses or experts. ROA.10562–71. Ibarra did attempt to submit an affidavit from Dr. Carol Romey attesting that Ibarra was intellectually disabled; however, Ibarra did not produce Romey for cross-examination[14], and the affidavit itself was unnotarized and therefore not accepted by the trial court.[15] *Id*.

The CCA denied relief. *Ex parte Ibarra*, 2007 WL 2790587, at *1. On initial federal habeas review, the district court found that Ibarra's petition presented material new evidence, rendering his federal claim unexhausted and procedurally defaulted. ROA.1849–51. However, the district court alternatively held that Ibarra did not establish that he is intellectually disabled under *Atkins*. *Id*. The district court also denied a COA, finding that reasonable jurists could not debate its determination. The Fifth Circuit similarly held that Ibarra's new federal evidence[16] was either procedurally

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[14] The Fifth Circuit rejected the contention that Ibarra was impeded from presenting this evidence. *Ibarra*, 691 F.3d at 683.

[15] Dr. Stephen Mark, a licensed psychiatrist who examined Ibarra around the time of trial found no evidence of intellectually disability. ROA.830–31. He did, however, conclude that Ibarra had malingered in an attempt to manipulate his situation. *Id*.

[16] "In the (federal) district court, [Ibarra] attempted to introduce new evidence, including the authenticated expert report and affidavits from his family and

barred or foreclosed by *Pinholster* and that the claim was meritless to the extent that it was presented to the state court. *Ibarra*, 691 F.3d at 682–83. The Fifth Circuit observed that "[a]t the state court evidentiary hearing regarding his *Atkins* claim, [Ibarra] presented essentially no supporting evidence. He attempted to introduce his expert['s] opinion in the form of an affidavit, but the affidavit was not notarized and was thus inadmissible." *Ibarra*, 691 F.3d at 682–83. The Fifth Circuit further noted Dr. Mark's opinion, "who found no evidence of [intellectual disability] when he evaluated [Ibarra] on two occasions." *Id*. The Fifth Circuit thus held that "[o]n this record, it is impossible to conclude that the state courts' rejection of the *Atkins* claim based on the facts presented to them was unreasonable, as required by § 2254(d)." *Id*. at 683. When Ibarra re-raised his *Atkins* claim in the Fifth Circuit following the remand, the court reiterated that "although explicitly given a fair opportunity to present an *Atkins* claim, [Ibarra's] counsel, who continue to represent him to this day, failed to offer admissible evidence of intellectual disability in the state court." *Ibarra*, 738 F. App'x at 819.

These conclusions are not debatable. Even if it was not beyond the scope of the remand, Ibarra's *Atkins* claim is simply meritless. Accordingly, no writ of certiorari should issue.

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childhood teacher, none of which was a part of the state court record." *Ibarra*, 691 F.3d at 682.

## II. Reasonable Jurists Could Not Debate That Ibarra's *Atkins* Claim Was Beyond the Scope of the Remand.

The Fifth Circuit's remand order only vacated its prior opinion and the district court's opinion to the extent that they are incompatible with *Trevino*. By its own terms, *Martinez* is strictly limited to the procedural default of IATC claims and thus has no relevance to *Atkins* claims.[17] Since Ibarra's *Atkins* claim was not part of the remand and was instead fully resolved by the Fifth Circuit's 2012 decisions denying a COA and refusing to apply *Martinez*, Ibarra's attempt to petition for certiorari review is untimely. Supreme Court Rule 13; 28 U.S.C. § 2101.

On rehearing, the Fifth Circuit vacated its previous opinion and the district court's opinion only "to the extent inconsistent with *Trevino*." *Ibarra*, 723 F.3d at 600. "[I]n all other respects, the majority and dissenting opinions remain in effect." *Id*. As explained below, the *Martinez* equitable exception plainly does not extend *Atkins* claims. In district court, Ibarra attempted to assert that he was within the scope of the remand to re-contest the disposition of his *Atkins* claim. The district court summarily dismissed that argument in a footnote. ROA.2907 n.3 (Ibarra's *Atkins* "claim is beyond the scope of the Fifth Circuit's remand"). On appeal, Ibarra again argued that his *Atkins* claim was

[17] Ibarra's argument that *Martinez* "should be extended" to cover *Atkins* claims is a tacit acknowledgment that *Martinez* does not cover them in the first place. Pet.ii.

encompassed by the remand. The Fifth Circuit thoroughly rejected that contention, stating "[n]othing in that order suggests that the *Atkins* claim was within the scope of remand." *Ibarra*, 738 F. App'x at 818; *see also id*. at 819 ("We also hold that reasonable jurists could not debate the district court's refusal on remand to consider Ibarra's *Atkins* claim."). Given that the Fifth Circuit majority actually wrote the remand order in question, their pronouncement on what they intended it to include is definitive. Clearly, reasonable jurists could not debate that Ibarra's *Atkins* claim was beyond the scope of the remand. Ibarra's petition for certiorari review—which attacks decisions of the Fifth Circuit rendered in 2012 and not subject to the remand—is now many years too late.

## III. *Pinholster* Governs Ibarra's *Atkins* Claim, Not *Martinez*.

Ibarra's petition contends that the Fifth Circuit majority, through a misplaced reliance on *Pinholster*, improperly evaluated the merits of his state-level claim, when it ought to have reviewed the merits of his federal-level claim. Pet.16–18. But Ibarra's argument ignores the procedural history of the case. The district court's original decision on his *Atkins* claim occurred before *Pinholster*. The district court found that Ibarra had materially altered his state-level *Atkins* claim with the presentation of new federal evidence, rendering the claim unexhausted and procedurally defaulted. ROA.1849–51. That determination was the product of the factual-exhaustion procedure that

the Fifth Circuit employed prior to the Court's decision in *Pinholster*. *See Lewis v. Thaler*, 701 F.3d 783, 789–90 (5th Cir. 2012). While the Fifth Circuit on original appeal did not necessarily disagree with the district court's approach, it nevertheless also found that the then-recent decision in *Pinholster* was applicable. *Ibarra*, 691 F.3d at 682–83. The most-recent Fifth Circuit opinion adopts the view that *Pinholster* controls—in which case *Martinez* is inapplicable because the *Atkins* claim is not defaulted. *Ibarra*, 738 F. App'x at 819. This is logical, of course, since the *Atkins* claim was presented and adjudicated on the merits in state court.

Ibarra offers no precedent to suggest that *Pinholster* is subject to the *Martinez* exception. Indeed, "*Pinholster* bars [petitioner] from presenting new evidence to the federal habeas court with regard to [an] already-adjudicated claim." *Escamilla*, 749 F.3d at 395 (citing *Clark v. Thaler*, 673 F.3d 410, 417 (5th Cir. 2012)). The Fifth Circuit has further acknowledged that *Pinholster* "explained that the exhaustion requirement of § 2254(b) is a reinforcement of, rather than an escape hatch from, the rule that a federal habeas court's review is limited to the state court record." *Lewis*, 701 F.3d at 790.

The Fifth Circuit majority also properly found that § 2254(e)(2) would additionally preclude relief in this case. Ibarra argues that § 2254(e)(2) applies only to evidentiary hearings. Pet.17. But § 2254(e)(2)'s restrictions apply "when a prisoner seeks relief based on new evidence without an evidentiary

hearing" as well. *Holland v. Jackson*, 542 U.S. 649, 653 (2004); *see also Pinholster*, 563 U.S. at 186. Ibarra correctly notes that the Court has not yet addressed the question of how *Martinez* and § 2254(e)(2) interact. Pet.17 n.4 (citing *Ayestas*, 138 S. Ct. at 1095). However, to the extent that § 2254(e)(2) is applicable, the majority found that "Ibarra never attempted to show that this provision's stringent test for de novo review in federal court has been met." *Ibarra*, 738 F. App'x at 819 n.4. The court observed that "the *Atkins* issue was well known (not 'previously unavailable') to these counsel when they represented Ibarra in the state court system. The factual predicate for his *Atkins* claim could have been timely prepared for the state habeas hearing on the merits. And counsel have never attempted to demonstrate that the facts underlying Ibarra's alleged mental disability can be established by clear and convincing evidence[.]" *Id.* Thus, even if the district court were to reconsider its opinion on the merits, it still would not be able to consider Ibarra's new federal evidence.

## IV. In Any Event, *Martinez* Only Applies to IATC Claims—Not *Atkins* Claims.

*Martinez*—by its very own terms—is inapplicable to any of Ibarra's non-IATC claims. *Martinez* held that the "[i]nadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial." 566 U.S. at 9.

This holding, "recognizing a narrow exception," is a "limited qualification" of the rule in *Coleman v. Thompson*, 501 U.S. 722 (1991), wherein the Court decided that an attorney's negligence in a post-conviction proceeding does not establish cause to excuse procedural default. *Id.* at 9, 15. The Court created this exception in acknowledgment that "as an equitable matter, that the initial-review collateral 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. The Court limited its decision, however, emphasizing that it is an "equitable" rather than a "constitutional" holding. *Id.* at 16. The Court explained:

> The rule of *Coleman* governs in all but the limited circumstances recognized here. The holding in this case does not concern attorney errors in other kinds of proceedings, including appeals from initial-review collateral proceedings, second or successive collateral proceedings, and petitions for discretionary review in a State's appellate courts. . . . It does not extend to attorney errors in any proceeding beyond the first occasion the State allows a prisoner to raise a claim of ineffective assistance at trial, even though that initial-review collateral proceeding may be deficient for other reasons.

*Id.* (citations omitted); *see also Speer v. Stephens*, 781 F.3d 784, 785 n.4 (5th Cir. 2015) (noting the Court's emphasis on the limited nature of the exception to the procedural default rule); *Hunton v. Sinclair*, 732 F.3d 1124, 1126–27 (9th Cir. 2013) (refusing to extend *Martinez* to claims made under *Brady v. Maryland*, 373 U.S. 83 (1963)); *Gore v. Crews*, 720 F.3d 811 (11th Cir. 2013)

(refusing to extend *Martinez* to claims made under *Ford v. Wainwright*, 477 U.S. 399 (1986)).

The Court recently declined to extend the *Martinez* exception to ineffective-assistance-of-appellate-counsel claims in *Davila*. 137 S. Ct. at 2068–70. The *Davila* Court distinguished *Martinez*, noting that *Martinez* was focused on trial mistakes that might potentially evade review, not post-judgment errors. 137 S. Ct. at 2066. The Court also noted that *Martinez* also addressed situations where the state actively moved initial review of a claim outside the scope of constitutionally guaranteed counsel. *Id.* at 2068. In the instant case, Ibarra is not contesting an error that occurred at trial—*Atkins* had not yet been rendered. Also, Ibarra's subsequent post-conviction proceeding was not the result of a choice by Texas, it was a necessity imposed by the Court's *Atkins* decision. As with ineffective-assistance-of-appellate-counsel claims, claims based on new rights recognized by this Court "generally cannot be presented until after the termination of direct appeal. Put another way, they necessarily must be heard in collateral proceedings, where counsel is not constitutionally guaranteed. The fact that [these claims] are considered in proceedings in which counsel is not constitutionally guaranteed is a function of the nature of the claim." *Id*. at 2068.

Ibarra provides no cases that recognize his proposed extension of *Martinez* to *Atkins* claims. Rather, he argues that, based on *Davila*, the

purpose of *Martinez* is to "ensure that meritorious claims of trial error receive review by at least one state or federal court." Pet.14 (quoting *Davila*, 137 S. Ct. at 2066, 2067). Because *Atkins* was rendered after Ibarra's conviction became final, and he purportedly received ineffective assistance of state habeas counsel during the subsequent state habeas proceeding allowing him to raise his alleged intellectual disability in the first instance, Ibarra argues that he should also receive the benefit of *Martinez*. Otherwise, Ibarra contends that the alleged errors that occurred in the litigation of his *Atkins* claim will go unreviewed by any court.

However, Ibarra's suggestion that error would go unreviewed in his case does not hold water since his specific allegation is that the trial court's rulings during his *Atkins* proceedings rendered counsel ineffective (Pet.11), and those rulings could have been brought to the attention of the CCA after the trial court's recommendation was submitted with objections to the trial court's finding and conclusions of law.[18] Ibarra could have also contested those rulings

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[18] Again, Ibarra's contentions regarding the state trial court's conduct of his *Atkins* proceedings were rejected by the Fifth Circuit in its initial COA denial and are also beyond the time limit for appeal through a petition for a writ of certiorari. The Fifth Circuit explained that:

> The state provided [Ibarra] an opportunity for a hearing, and supplied him with $7,500, and over three years elapsed (between the filing of his *Atkins* habeas claim and the September 18, 2006 hearing on his claim of [intellectual disability]) to develop his claim. Ibarra was represented by counsel during this time. [Ibarra]'s failure to present Dr. Romey's affidavit in admissible form is surely not attributable to the relatively

in this Court with a petition for a writ of certiorari. The equitable concerns present in *Martinez* are simply not active in this case. The Court should thus decline Ibarra's invitation to expand the "narrow" and "limited" *Martinez* holding.

## CONCLUSION

Ibarra sexually assaulted and strangled sixteen-year-old Maria de la Paz Zuniga to death on the morning of March 6, 1987. It has now been more than thirty years since Maria was brutally raped and murdered. Justice should no longer be denied for her. For the foregoing reasons, the Director respectfully requests that the Court refuse certiorari review.

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> short notice on which the actual hearing date was set, nor to the state court's failure to grant even more thousands of dollars for [Ibarra] to develop his claim. The narrow circumstances described in [*Rivera v. Quarterman*, 505 F.3d 349, 358 (2007) (holding that "where a petitioner has made a prima facie showing of retardation . . . the state court's failure to provide him with the opportunity to develop his claim deprives the state court's decision of the deference normally due.")] are not applicable here, where a hearing was held and [Ibarra] was assisted by counsel, was granted extensive funds, was given extensive time, and even had at his disposal the Mexican consulate.

*Ibarra*, 691 F.3d at 683.

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