No. _____ (CAPITAL CASE)

In the Supreme Court of the United States

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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

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PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE
QUESTIONS PRESENTED

1. Whether the Fifth Circuit failed to ensure meaningful federal judicial review of a substantial Sixth Amendment claim.

2. Whether the Fifth Circuit's consistent practice of discounting the mitigating import of all so-called "double-edged" evidence fails to meaningfully protect criminal defendants' Sixth Amendment right to effective counsel in capital sentencing proceedings.

3. Whether the Fifth Circuit's requirement that habeas applicants prove that mitigating factors "outweigh" aggravating factors in order to prove prejudice on Sixth Amendment ineffectiveness claims disregards the Texas law that governs capital sentencing proceedings.

PARTIES TO THE PROCEEDINGS BELOW

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

LIST OF PROCEEDINGS

- *State v. Ibarra*, 54th District Court, No. 96-634-C (Sept. 22, 1997)
- *Ibarra v. State*, Court of Criminal Appeals of Texas, No. AP-72,974 (Oct. 20, 1999)
- *Ex parte Ibarra*, Court of Criminal Appeals of Texas, No. WR-48,832-01 (Apr. 4, 2001)
- *Ex parte Ibarra*, Court of Criminal Appeals of Texas, No. WR-48,832-03 (Sept. 26, 2007)
- *Ex parte Ibarra*, Court of Criminal Appeals of Texas, No. WR-48,832-02 (May 21, 2008)
- *Ex parte Ibarra*, Court of Criminal Appeals of Texas, No. WR-48,832-04 (Oct. 1, 2008)
- *Ibarra v. Stephens*, United States Court of Appeals for the Fifth Circuit, No. 11-70031 (July 17, 2013)
- *Ibarra v. Davis*, United States District Court for the Western District of Texas, No. 6:02-cv-00052 (Feb. 1, 2017)
- *Ibarra v. Stephens*, United States Court of Appeals for the Fifth Circuit, No. 17-70014 (Aug. 26, 2019)

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The opinion of the United States Court of Appeals for the Fifth Circuit affirming the district court's judgment was issued on August 26, 2019, and is attached as Appendix 1. Rehearing was denied October 22, 2019. Appendix 2. The opinion of the Fifth Circuit granting a COA is attached as Appendix 3. 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 4. The 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 published as *Ibarra v. Stephens*, 723 F.3d 599 (5th Cir. 2013), and is attached as Appendix 5. The Fifth Circuit's original opinion denying a certificate of appealability ("COA") on all matters is published as *Ibarra v. Thaler*, 691 F.3d 677 (5th Cir. Aug. 17, 2012), and is attached as Appendix 6. The Fifth Circuit's order holding that *Martinez v. Ryan*, 566 U.S. 1 (2012), has no applicability to persons confined pursuant to a judgment of a Texas state court is published as *Ibarra v. Thaler*, 687 F.3d 222 (5th Cir. June 28, 2012), and was expressly overruled by this Court in *Trevino v. Thaler*, 569 U.S. 413 (2013), and is attached as Appendix 7. The district court's original opinion denying habeas corpus relief, vacated in part by the court of appeals, is attached as Appendix 8.

JURISDICTION

The district court had jurisdiction over the habeas cause under 28 U.S.C. § 2241. The Fifth Circuit had appellate jurisdiction to review the district court's judgment by virtue of its grant of a COA. 28 U.S.C. § 2253. This Court has jurisdiction to review the Fifth Circuit's opinion affirming the district court's judgment pursuant to its authority to issue writs of certiorari. 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment provides, "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

STATEMENT OF THE CASE

This is a capital case. Petitioner Ramiro Ibarra Rubi has received no meaningful collateral review of his conviction and death sentence from either the state courts or the lower federal courts. Although Texas law guaranteed Mr. Ibarra "competent counsel" to represent him in a collateral challenge to his capital judgment, Tex. Code Crim. Proc. art. 11.071 § 2(a), he was denied this right by the state courts. The Texas trial court appointed a lawyer to Mr. Ibarra who failed to make any inquiry into the legality of his custody and who raised one frivolous, non-cognizable claim in a state habeas corpus application. As a consequence, Mr. Ibarra received no state collateral review.[1]

In federal court, Mr. Ibarra obtained different counsel who, for the first time, investigated whether his custody violated federal law. *See* 28 U.S.C. § 2241(c)(3). That investigation produced allegations that Mr. Ibarra had been deprived of effective assistance of counsel at his capital trial in a manner that prejudiced his sentence. Specifically, trial counsel did not conduct any investigation into their client's background for sentencing purposes. Notwithstanding this Court's decisions in *Martinez* and *Trevino* which permitted Mr. Ibarra to excuse the procedural default of the claim based upon his state collateral counsel's deficient representation, he was still unable to obtain any meaningful review of his Sixth Amendment claim from the federal courts below. As such, the legality of Mr. Ibarra's sentence has never been determined.

[1] The record of Mr. Ibarra's state collateral proceeding in the trial court is 48 pages long. That includes the habeas application, the State's answer, the parties' proposed findings of fact and conclusions of law, the docket sheet, and all trial court orders in the case. The application is attached as Appendix 9.

A. Trial

On September 18, 1996, a McLennan County grand jury indicted 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. On October 15, the trial court appointed attorney Walter Reaves to represent Ibarra on the charge. ROA.3408. Three days later, the court appointed Angel Gavito as co-counsel with Reaves. ROA.3409. Although Reaves and Gavito understood Ibarra to be a Mexican national, they did not inform Ibarra of his right to consular assistance and did not ever seek assistance from the Mexican consulate themselves.[2]

From appointment through judgment, counsel never requested any investigative assistance related to sentencing issues in the case. On October 24, 1996, the defense requested that the court authorize $1,000 to retain fact investigator Don Youngblood. ROA.3411-12. The court granted the request the next day. ROA.3413. Youngblood was not directed to conduct, and did not conduct, any investigation of sentencing issues. On June 24, 1997, defense counsel moved for and was granted the assistance of a DNA expert and hair expert. ROA.3422-23, ROA.3426-31. These services were requested for guilt phase investigation and were unrelated to any sentencing investigation.

On June 30, 1997, fact investigator Youngblood prepared a report for counsel. The report summarized police and prosecution reports of investigation of the offense and identified potentially relevant witnesses. It did not encompass anything related to sentencing issues. On July

[2] If the Mexican consulate would have received notice of Ibarra's pending capital murder trial, Mexico "would have played as active a role as necessary to help" counsel, including assisting counsel with investigation in Mexico by locating and interviewing witnesses and obtaining affidavits and documentary evidence, and by ensuring that the Mexican witnesses would be available to testify. ROA.1152. *See also Valdez v. State*, 46 P.3d 703, 710 (Okla. Crim. App. 2002) (trial counsel deficient for failing to inform client he could have obtained financial, legal and investigative assistance from Mexican consulate).

2, 1997, counsel requested and was granted additional investigative services from Youngblood not to exceed $5,000 in total. ROA.3434. On July 14, 1997, the defense moved for and was granted the services of a forensic pathologist. ROA.3494-97. The services were not related to any sentencing issues.

On August 6, 1997, the State noticed its intent to seek the death penalty. ROA.3487. Although voir dire was slated to begin in the case just a week later on August 13, 1997, and although counsel had not conducted any investigation relevant to a capital sentencing trial, counsel did not move for a continuance to obtain time to conduct a sentencing investigation. Counsel's time between August 13, 1997, and August 28, 1997, was spent in voir dire. Trial on the merits was set to begin September 9, 1997.

On August 27, 1997, defense counsel requested and was granted the services of a psychologist. ROA.3548-51. The motion was premised on defense counsel's "belie[f] it is necessary to have a complete psychological assessment performed" to "uncover any problems which may exist, and any information which may be relevant to the issue of punishment." ROA.3548. Counsel retained psychologist Stephen Mark. Dr. Mark did not speak Spanish, which was the only language Ibarra spoke. Counsel arranged for Dr. Mark to meet with Ibarra—through a translator—on August 29, 1997. As counsel had not conducted any investigation of their client's background, they provided Dr. Mark no social history information about their client, a necessary precursor for any reliable forensic mental health evaluation.[3] Likewise, because defense counsel did not know anything about their client's background or retain a mitigation specialist who could

[3] Counsel provided to Dr. Mark only their fact investigator's summary of his review of law enforcement records related to their investigation of the underlying offense, records having little to no relevance to a psychological evaluation. ROA.1144.

screen their client for potential mental health issues, they did not provide Dr. Mark any referral questions or direction; thus, he was not serving any strategic defensive objective.[4]

As counsel had no strategic objective in mind when they retained Dr. Mark, or indeed any defense sentencing strategy at all, defense counsel quickly converted him into a testifying expert on eyewitness identification. On September 10, 1997, counsel wrote to Dr. Mark providing him a summary of the circumstances under which identifications of his client had been made and "recent cases dealing with expert testimony on the reliability of eyewitness identification," explaining the defense was "essentially looking for the same type of testimony." ROA.1144–45. The defense never called Dr. Mark to testify. The merits phase of trial began September 9, 1997. ROA.6337. The jury returned a verdict of guilty on September 17, 1997. ROA.3638.

At sentencing, governing Texas law required the sentencing jury to answer "yes" or "no" to three special issues. First, the jury had to answer, "Was the conduct of the Defendant, Ramiro Rubi Ibarra, that caused the death of the deceased, Maria De La Paz Zuniga, committed deliberately and with the reasonable expectation that the death of the deceased or another would result"? ROA.3688. The State had the burden to prove this special issue ("deliberateness special issue") beyond a reasonable doubt, and the jury could only answer it affirmatively if it were unanimous. If any juror dissented, Texas law required the court to sentence Ibarra to life.

Second, and only if the deliberateness special issue was answered affirmatively, the jury was required to answer, "Is there a probability that the defendant, Ramiro Rubi Ibarra, would

[4] During his interview, Dr. Mark learned some information from Ibarra about Ibarra's impoverished youth growing up in a large family in Mexico and his history of substance abuse. ROA.1144. Counsel did not retain a mitigation specialist in response to the information or follow up on these leads or seek a continuance to do so. Although Dr. Mark was provided no relevant social history information, did not conduct any relevant testing, and did not make any relevant inquiry, he nevertheless purported to conclude from his interview that Ibarra was not intellectually disabled.

commit criminal acts of violence that would constitute a continuing threat to society?" ROA.3689. As with the deliberateness special issue, the State had the burden to prove this issue ("future dangerousness special issue") beyond a reasonable doubt, and the jury could only answer it affirmatively if it was unanimous. If any juror refused to answer the issue affirmatively, Texas law required the court to sentence Ibarra to life.

Third, and only if the future dangerousness special issue was answered affirmatively, the jury was required to answer, "Taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, do you find that there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed?" ROA.3691. No burden of proof is assigned with respect to this special issue ("mitigation special issue").[5] To answer the special issue negatively (i.e., in the State's favor), the jurors must be unanimous. To answer the question affirmatively, ten jurors must agree; however, if any juror refused to answer the issue affirmatively, such that no result could be reached, then Texas law required the court to sentence Ibarra to life.[6]

To prove the future dangerousness special issue, the State presented evidence Ibarra had committed or attempted to commit sexual assaults against his nephew in the past and that he placed his hand on his ex-girlfriend's daughter on one occasion. ROA.7962-ROA.7971; ROA.7988-ROA.7993; ROA.7997-ROA.7998; ROA.8000; ROA.8450-ROA.8451. The State also presented some evidence of domestic violence against his ex-girlfriend. ROA.8431; ROA.8433; ROA.8451;

[5] *See Blue v. State*, 125 S.W.3d 491, 501 (Tex. Crim. App. 2003) ("neither party bears the burden of proof at punishment on the mitigating evidence special issue").

[6] Thus, a single juror at a Texas capital trial could answer the mitigation special issue affirmatively, even where very little mitigating evidence was offered, and the defendant would receive a life sentence.

ROA.8462-ROA.8468; ROA.8486; ROA.8492. Ibarra had never been tried or convicted of committing these alleged assaults. The State also presented evidence that Ibarra had been convicted of two misdemeanors and had been arrested for a third. ROA.8444-ROA.8445. The State additionally presented evidence that Ibarra did not behave in jail and sustained a self-inflicted laceration to his neck while incarcerated in the McLennan County Jail. ROA.8003-ROA.8006; ROA.8018-ROA.8019; ROA.8025; ROA.8496-ROA.8497; ROA.8502-ROA.8503. The State also presented victim impact evidence from the victim's mother that her daughter's death affected everyone in the family badly. ROA.8536-ROA.8538. Finally, the State presented psychiatrist Richard Coons, who opined based on a hypothetical question that Ibarra would be a continuing threat to society.[7] ROA.8511-8513.

By the time it was the defense's turn to present its sentencing case, the defense team had not interviewed a single witness about Ibarra's background. Defense counsel simply subpoenaed witnesses without ever having spoken to any of them. The first contact Ibarra's youngest sister Sabina Gonzales (then Sabina Rubi) had with Ibarra's defense team was a subpoena summoning her to court. She spoke to Ibarra's counsel for the first time when she went to court. Counsel did not explain to her what was happening or prepare her in any way to testify. They called her to the witness stand and began asking her questions. ROA.1151.

Sabina testified that Ibarra grew up in Durango, Mexico. ROA.8309. Their father "worked on the land" and their mother "[w]orked at home." *Id*. Their father always worked hard to make

[7] Such hypothetical opinion testimony about future dangerousness has been discredited at least since the APA expelled Dr. James Grigson from its organization in 1995 for giving it. The APA called such hypotheticals "grossly inadequate to elucidate a competent medical, psychiatric differential diagnostic understanding adequate for diagnosing a mental illness according to current standards." In 2010, the Texas Court of Criminal Appeals described Dr. Coons's future dangerousness testimony as insufficiently scientifically reliable to be admissible as scientific evidence. *Coble v. State*, 330 S.W.3d 253, 279–80 (Tex. Crim. App. 2010).

sure they had enough to eat. *Id*. They lived in a "humble" house that had a kitchen and a bedroom. ROA.8309-ROA.8310. Ibarra came to the United States to work in order to support his family in Mexico. ROA.8309-ROA.8311. Sabina was "very young" when Ibarra left Mexico. ROA.8310. Sabina additionally testified she had lived with Ibarra upon her arrival in the United States in 1992 and he was supporting her, his wife, and his four children. ROA.8312.

Defense counsel also subpoenaed Ibarra's wife Maria Gandara Ibarra. She did not testify about Ibarra's childhood, as she had only met Ibarra in the United States. She testified she had a child with Ibarra in 1985 who was born with holes in his heart and died a year later. ROA.8318. She married Ibarra in 1987. ROA.8317. Ibarra worked manual labor to support her. ROA.8320. She subsequently had four more children. ROA.8322-ROA.8323. She also testified that she did not believe her nephew, Peter Gandera, when Peter told her that he could put Ibarra in jail; that she and Ibarra had a good relationship; and that she had told police untrue things about Ibarra because police angered her by telling her Ibarra had been involved with other women. ROA.8339; ROA.8341; ROA.8345. The defense rested after Maria's testimony. ROA.8346.

The jury deliberated and answered the first two special issues affirmatively and answered the mitigation special issue negatively. ROA.3688; ROA.3689; ROA.3691. Accordingly, on September 22, 1997, the trial court sentenced Ibarra to death.[8] ROA.3697.

B. State Collateral Proceeding

On March 2, 1998, the state court appointed Ray Bass to represent Ibarra in his state habeas corpus proceeding. Order Appointing Counsel, *Ibarra v. Texas*, No. AP-72,974 (Mar. 2, 1998) (en banc). Notwithstanding a statutory directive to "investigate expeditiously" upon appointment,[9]

[8] The Texas Court of Criminal Appeals affirmed Ibarra's judgment on direct appeal. *Ibarra v. State*, 11 S.W.3d 189 (Tex. Crim. App. 1999).

[9] Tex. Code Crim. Proc. art. 11.071 § 3.

Bass conducted no investigation.[10] ROA.1034. Moreover, Bass ignored all attempts by Ibarra to communicate with him about his case. *Id*. On June 21, 1999, Bass filed a three-and-one-half-page application. ROA.3097-ROA.3100. Over two pages of the application contained front matter. The remaining page presented one claim: a modified *Lackey* claim that the delay between Ibarra's crime and the prosecution violated the Eighth Amendment. The claim was premised on the fact that the State had previously indicted Ibarra in 1987, but subsequently dismissed the charges due to a defective search warrant that resulted in suppression of critical evidence. When in 1995 the law changed permitting the State to obtain another search warrant without necessitating the exclusion of evidence acquired from it, the State did so and re-indicted Ibarra in 1996.

A *Lackey* claim is derived from a 1995 statement Justice Stevens issued respecting the denial of a certiorari petition in *Lackey v. Texas*, 514 U.S. 1045 (1995). The statement expressed the Justice's opinion that spending 17 years under sentence of death awaiting execution might violate the Eighth Amendment. Justice Stevens, alone, wrote to say that there "may well be constitutional significance to the reasons for the various delays that have occurred" between judgment and execution. *Id*. No federal appeals court has ever recognized a *Lackey* claim that the delay between a capital judgment and execution can violate the Eighth Amendment.

[10] In state habeas corpus proceedings in Texas, claims which were raised and decided on direct appeal are not cognizable. *See Ex parte Brown*, 205 S.W.3d 538, 546 (Tex. Crim. App. 2006) ("[c]laims that have already been raised and rejected are not cognizable" on habeas corpus). Claims which were not raised on direct appeal, but which could have been, are also not cognizable. *See Ex parte Webb*, 270 S.W.3d 108, 111 (Tex. Crim. App. 2008) (claim that could have been, but was not, raised on direct appeal was "not cognizable on habeas"). In short, claims based on the trial record are not cognizable in a state habeas corpus proceeding. The essentialness of investigation to habeas corpus—reflected by Texas law imposing an absolute obligation on appointed counsel—means that a lawyer who does not conduct any investigation is simply not representing that prisoner as to any habeas corpus matter in state court. A lawyer that has not conducted any investigation in state habeas corpus has not made any effort to discover whether the client is being confined unlawfully due to matters outside the trial record. The lawyer who has conducted no investigation cannot possibly plead any cognizable habeas corpus claim.

The claim Bass raised, however, was even one step removed from a *Lackey* claim. He alleged that a delay between the *crime* and the *prosecution* violated the *Eighth* Amendment. Not only has no *court* ever recognized or even intimated that such a claim exists, no *judge* has either. Bass's file reflected that he "researched" the issue on June 20, 1999, the day before the application was filed. ROA.1034. The application cited a single source for the novel proposition: Justice Lewis Powell's *Commentary: Capital Punishment*, 102 Harv. L. Rev. 1035 (1989). That source does not support the existence of any such claim.

In short, Bass wholly abandoned Ibarra.[11] He did not communicate with his client and he did no meaningful legal work on his behalf.[12] Aside from reading the record, he could not have spent more than one billable hour preparing Ibarra's state habeas application.

C. Proceedings Below

1. United States District Court

In federal court, Ibarra received new counsel who, for the first time, investigated his background. Ibarra filed a habeas application in the district court raising, *inter alia*, a Sixth Amendment claim alleging that trial counsel failed to conduct a thorough background

[11] Habeas counsel has a duty to confer with his or her client about the attorney's legal judgment and advocacy decisions. An attorney's failure to communicate with his or her client is abandonment. *See Holland v Florida*, 560 U.S. 630, 636 (2010) (suggesting constructive abandonment where an attorney had, *inter alia*, refused to respond to repeated mail and telephone inquiries from client, and had communicated with his client only three times in three years, by letter); *see also Christeson v. Roper*, 135 S. Ct. 891, 892 (2015) (considering whether appointed counsel abandoned habeas applicant when they failed to meet with him until after the time for filing the application had elapsed).

[12] Ibarra was accordingly one of "the victims of deficient and inadequate lawyering" resulting in an application with "appalling deficiencies" referred to by Texas Court of Criminal Appeals Judge Keasler in his dissent in *Ex parte Medina*, 361 S.W.3d 633, 647 (Tex. Crim. App. 2011).

investigation, prejudicing Ibarra's sentencing trial ("*Strickland* claim").[13] *See* ROA.1136-ROA.1176. The application alleged that a thorough background investigation would have resulted in the discovery of a wealth of mitigating evidence, including extreme poverty, physical and mental abuse and anguish, intellectual disability, and post-traumatic stress disorder (PTSD).[14]

Specifically, Ibarra alleged that counsel conducting a reasonable investigation would have learned that Ibarra was one of thirteen children born to Pablo Ibarra and Candelaria Ibarra Rubi. Ramiro was the fourth born, with one older brother (Apolinar) and two older sisters (Rosario & Maria de Jesus (Jesusita)). His parents married in 1948 and lived on a "ranch" in Chalchihuites called Colonia Aurora. At first, the family lived in a hut made out of stone and grass. Candelaria was malnourished when she was pregnant with Ramiro, both because they had little food and also because she was forced by her husband to perform physical labor during pregnancy. Ramiro was born at home on a dirt floor in a difficult birth. He did not start breathing for several minutes.

The family eked out a bare survival by growing beans and corn on a small parcel of land. The crops fed the family, and also served as the family's only means of income. When Ramiro was between two and four years old, there was a freeze followed by a drought in Colonia Aurora that destroyed the family's crop. Pablo left Ramiro and his older sister Rosario with his parents in Colonia Aurora and moved the rest of his family to Mexico City for until the drought ended. Ramiro's diet during this period primarily consisted of the fruit and leaves from prickly pear cacti and other things, such as wild greens, found in the fields. After the drought was over, the rest of the family returned to Colonia Aurora. The family, which was continuing to grow, always lived in

[13] *Strickland v. Washington*, 466 U.S. 668 (1984).

[14] The application alleged that many witnesses, including eight of Ibarra's living siblings, a former girlfriend in Mexico, his daughter from Mexico, and a former school teacher would have been available to testify to the information. ROA.1153.

extreme poverty and hunger. They did not have water or electricity. They kept their few possessions in cardboard boxes because they did not have furniture, including beds. The family slept on woven grass mats. Covers were fashioned out of old clothing. The family cooked its food with fire, because they did not have a stove.

The children often went hungry. Generally, the only thing available for breakfast was oregano tea. "Air tacos"—tortillas with salt—were a typical lunch. Occasionally, Ramiro's mother made beans. But she would add water to make it appear like more food, creating a "bean broth." When there was a poor harvest, the family hardly ate. They survived on wild cactus with the thorns removed. When there was little food, Ramiro gave some of his to his younger siblings.

In 1958, Pablo moved the family to Vicente Guerrero, Durango, because there was not a school in Colonia Aurora, but the family's circumstances did not improve. While the family stayed in town, Pablo traveled on a donkey from village to village looking for work. The family barely survived. Candelaria often was forced to pick up discarded scraps of food from the trash at a market and give them to the children to eat. Sometimes the children had to steal food or pick wild fruit simply to get anything to eat at all, and occasionally had to spend two to three days at a time without food. Both in Colonia Aurora and in Vicente Guerrero, the family drank and bathed in contaminated water from wells and from a river containing animal and human waste, dust, and trash. The water frequently made them sick, but they were unable to afford medical care.

In Vicente Guerrero, the family lived in at least 20 different homes ("in reality just little rooms"). They often got evicted because Pablo could not pay the rent. Sometimes the family had to move twice in a month. The children found moving their cardboard boxes of possessions from place to place in the town humiliating. Their evictions became so common that other children

mocked them. Children also teased them about their clothes, which were often patched and ill-fitting because it was used clothing that people gave them.

The homes the family stayed in were just rooms. They had dirt floors, corrugated iron or plastic roofs, and holes in the floor that were used as toilets. Some of the places did not have windows or doors; the family had to hang a piece of cloth in the doorway for privacy. One of the places was a garage, another a small pen for pigs, another a room where part of the roof had fallen off, so when it rained, water entered. The family called one of these tiny places "The Dungeon." The Dungeon did not have windows or light. All the children contracted lice when living there. It was so cold and humid that Ramiro's mother and Apolinar became gravely ill. They were sick for months, and Ramiro's mother nearly died. The sight of his mother approaching death left Ramiro in daily despair. Ultimately, Pablo got a loan from a friend to pay for a doctor's care.

In another of these rooms, Ramiro's youngest sister Paulita died when she was about three months old. The family did not know the cause but suspected it happened because she and their mother were malnourished. Paulita had been sick for about a month before her death, but Ramiro's parents lacked money to take her to a doctor.

Although the children attended school in Vicente Guerrero, they struggled because their hunger made it difficult to concentrate on their studies. The family could not afford adequate supplies so the children had to fight over a pencil to do their homework. Once the pencil was used up, nobody else could complete their homework. They often did not have paper or notebooks. They could not afford books so they had to borrow books from classmates or do their homework with classmates. They had to reduce their food intake just to get the required school uniforms. They had to pay or even barter corn or beans to have them sewn. Because most of their homes had no electricity, the children had to do their homework by candlelight.

Even more so than his siblings, Ramiro struggled in early development and in school, even with the help of his older sisters and his teachers. When he was five, Ramiro was “very thin and small.” He talked like a two-year-old child. He had very bad pronunciation and his vocabulary was limited. Ramiro tried hard in school, but he was “'very slow” and lacked the intellectual capacity to succeed even when his teachers gave him special attention and help. He was unable to solve simple problems encountered while plowing the field without help from his older brother. When he could not understand or could not do something, he got frustrated and cried. He also became anxious and lost sleep, because he was not fulfilling basic school requirements for required materials due to his family’s poverty. He feared scoldings from his teachers.

Socially, Ramiro was a quiet and isolated child who did not have friends or emotional support except from his older brother Apolinar and his older sisters Rosario and Jesusita. In school, he was often ridiculed and teased by other children. He was timid and often got beaten up without defending himself. When this happened, Ramiro turned to his older sisters for consolation.

When the children were not in school, they returned to Colonia Aurora to farm. When they were as small as six years old, they had to help tend to the farm animals. From the time they were nine, they had to work in the fields planting and harvesting. They weeded the crops by hand and even cut their own wood, all of which was tiring physical labor. During these times Ramiro and his siblings began when the sun rose and worked until it set. Even when they were in town, they were not allowed to go out and play, but instead were kept isolated from other people.

From the time Ramiro was eight years old, he shined shoes in the town square. Like all the other children, the money he earned was given to Pablo to help support the family. They lived with the obligations of adults. When the children took jobs, the family’s plight improved only slightly. They could buy a little more food, like beans, salt, sugar, and rice. Once in a while, Pablo bought

one or two cans of sardines, which the family considered its luxury food. They would apportion the little pieces of sardine amongst fourteen people: twelve children and mother and father.

In addition to the poverty and the hardships of life, Ramiro and his siblings suffered the cruelty of their violent father. He was a strict man who enforced his demands with screams and blows. He beat his children with whatever was around: a belt, a rubber strap, rope, wooden sticks or clubs, a cable, a whip for animals. Sometimes the beatings lasted ten minutes or until Pablo was so tired that he could not swing anymore. He left physical scars, rope burns, and bruises on Ramiro and the other children. Sometimes he beat them so hard they could not sit down in school. Pablo's rage could be prompted by something as simple as the small children not being able to plant the crops by hand as fast as Pablo could plow; Ramiro, due to his slowness, was particularly vulnerable to these attacks. Although the family was starving, Pablo beat his children even for accepting prickly pear cactus fruit from his own parents. Often his violence would spill over with indiscriminate cruelty to whomever was nearby: even if an outburst was directed to only one of the children, blows would land on others around. Although owing to his impaired and slow nature Ramiro was the child who needed the most protection from his father's violence, he would often act with naïve courage to try to defend his younger siblings when Pablo beat them.

Pablo's extreme violence towards Ramiro's older sisters affected Ramiro greatly, because those siblings were his primary caretakers and emotional support. While Pablo often called his wife and children "pendejos" (dumbasses), he also called his wife and daughters "a bunch of whores." When Ramiro's oldest, then-unwed sister Rosario became pregnant, Pablo beat her and kicked her out of the house. She went to stay in the home of a family friend. Pablo followed her there and beat her again. She eventually left the area just to avoid their father.

Ramiro's other older sister Jesusita became pregnant after being brutally raped while coming home from work one night. She was afraid to tell anyone for fear of Pablo's reaction. When Pablo learned of the pregnancy, he refused to believe that Jesusita had been raped, beating her and locking her in a small closet. Her mother and siblings, including Ramiro, snuck food to her while Pablo was out.

Jesusita eventually gave birth on the dirt floor without a doctor or midwife present. Ramiro found her and gave her a shirt to wrap the newborn infant in, helping her into a makeshift bed. Pablo, however, locked her in the closet again with her baby, where they remained for at least a month, until Pablo's own father intervened.

Pablo was also cruel to his wife virtually daily in scenes witnessed by the children, including Ramiro. Pablo showed no emotion and rarely talked to his wife. When he did, he was "machista." He beat her in front of the children with a closed fist. He even pushed her to the floor and beat her and kicked her until he tired. She almost always had visible bruises marking her body. It took little to set off Pablo's violence. He beat his wife for asking for money or food to feed the children. He beat her when she had no food for him. He even once beat her in front of the children for serving him a burnt tortilla.

Ramiro tried to protect his younger siblings. If they were in the rain, he tried to find shelter. He gave them his food when there was not enough for all of them. He tied rubber from an old tire around their feet for shoes. And he would step in between his violent father and the youngers kids to deflect his beatings.

Ramiro followed his older brother, Apolinar, to the United States, and, along with his brother, would send money home to help support his younger siblings. When he came back to

visit, he brought clothing for them. As an adult in the United States, Ibarra often had nightmares about his past.[15] *See* generally ROA.1153 – 1165.

Ibarra's application further alleged that reasonable counsel in possession of this social history would have retained an expert to evaluate Ibarra's cognitive functioning and the effect of his childhood trauma. ROA.1165. An IQ test administered by psychologist Carol Romey reflects that Ibarra has a full-scale IQ score of 65.[16] ROA.1166.

Had trial counsel conducted a reasonable investigation and obtained the above information, professional norms would have required counsel to inquire further into whether Ibarra is intellectually disabled. Had that assessment been conducted, an expert would have opined in light of the score and Ibarra's social history that Ibarra is intellectually disabled. *Id*. Additionally, had counsel retained an expert to assess the impact of Ibarra's severe childhood trauma on his mental health, an expert would have opined that Ibarra suffers from severe PTSD owing to the horrific and cruel circumstances of his childhood. ROA.1166-ROA.1167.

On March 31, 2011, without affording any process or holding a hearing, the district court denied relief. With respect to Ibarra's *Strickland* claim, the district court held it was procedurally defaulted. App. 8 at 16, 29. The district court alternatively held the claim was without merit. *Id*. at 31. The district court bizarrely reasoned that the allegations Ibarra made in support of prejudice were "one-sided," by which it presumably meant that they were helpful to Ibarra's Sixth Amendment claim. *Id*. at 32. The court lamented, "Because these matters were not presented to

[15] All of Ibarra's allegations in the application were supported by proffers of evidence in the form of sworn statements from witnesses. *See* Volume of Exhibits to Petition for Writ of Habeas Corpus, Exhibits 1-20 (marked "received but not available electronically as too large to scan") (Jan. 5, 2009).

[16] This is the only, undisputed IQ score available; no other intellectual testing scores from either party are present in the record in this case.

the state court in a procedurally correct manner, there was no hearing on the issues before the trial court and no fact findings. Additionally, without the evidentiary hearing, there are no affidavits or statements from trial counsel which could explain strategic decisions." *Id*. at 32–33.

The district court nevertheless held that Ibarra's allegations could not establish deficient performance as a matter of law, observing only that "there was at least some investigation made by counsel," citing only counsel's retention of Dr. Mark and the fact that trial counsel presented information from Ibarra's sister and wife that Ibarra "came to the United States to find work to help support his family, that their family was poor, and that they lived in 'humble' circumstances, working on the land, and the circumstances of his family situation in the United States." *Id*. at 33. It concluded, "Since the information was provided to the jury, Petitioner has failed to establish that counsel was ineffective for failing to investigate or present such evidence." *Id*. The district court further held that Ibarra could not show prejudice because the "overwhelming aggravated factors . . . outweigh the possible mitigating evidence" Ibarra could introduce. *Id*.

2. First Appeal of the District Court's Denial of the Application

Ibarra sought a COA from the Fifth Circuit to appeal the denial of several claims, including his *Strickland* claim. On August 17, 2012, the Fifth Circuit denied COA. App. 6. As to the *Strickland* claim, the Fifth Circuit concluded that reasonable jurists would not debate the district court's application of procedural default to the claim. *Id*. at 8–12. It did not comment on the merit or substantiality of the underlying claim.

While the appeal pended on rehearing, this Court agreed to hear *Trevino v. Thaler*, 569 U.S. 413 (2013), which challenged a ruling the Fifth Circuit made in *this* case that the equitable exception created in *Martinez* was unavailable to a Texas prisoner. *See* App. 7 at. 7–8. On May 28, 2013, this Court decided *Trevino* and overturned the Fifth Circuit ruling, holding that the

equitable exception created in *Martinez* was available to prisoners confined pursuant to the judgment of a Texas court. *Trevino*, 569 U.S. at 420. The Fifth Circuit thereafter 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 proceedings consistent with *Trevino*. App. 5.

3. On Remand in the United States District Court

On November 22, 2013, Ibarra filed a post-remand brief in the district court. The brief argued (1) that the court should stay his case to permit him an opportunity to present his *Strickland* claim to the state court; and (2) that the court should afford him a meaningful opportunity to investigate and plead a *Martinez* cause-and-prejudice argument, because he had not had any opportunity to do so when the case was last before the court. ROA.2666-ROA.2674. The Director responded by labeling Ibarra's request for a meaningful opportunity to plead his *Martinez* cause allegations "inappropriate" because of an "alternative merits review" the court previously conducted. ROA.2719. Although Ibarra had not yet been given any opportunity to plead cause for default, the Director preemptively declared that Ibarra had not "demonstrated" that his state habeas counsel "performed ineffectively" and that—notwithstanding the Fifth Circuit's grant of COA—Ibarra failed to show his *Strickland* claim was substantial. ROA.2720; ROA.2723-ROA.2738. The district court took no action on the briefs.

Ibarra followed up this briefing with a motion seeking to stay the district court proceedings to present his *Strickland* claim to the state court, citing recent legal developments in Texas suggesting the availability of a state court remedy. ROA.2787-ROA.2792. He also asked to present his *Atkins* claim in those exhaustion proceedings, arguing that, absent returning to state court, he

would be entitled to federal review of it under the principles established by *Martinez* and *Trevino*. ROA.2794- ROA.2800.

On September 30, 2015, the district court summarily denied the request. ROA.2877. On October 14, 2015, Ibarra filed a motion to reconsider the order denying the stay. ROA.2880. On September 19, 2016, with the motion still pending, the case was transferred from United States District Judge Walter Smith to United States District Judge Robert Pittman for all proceedings. ROA.2905. Just *nine* days after being assigned the case, on September 28, 2016, Judge Pittman issued an order denying Ibarra's motion for reconsideration of the denial of his motion for stay and abeyance and ordering the case "returned" back to the court of appeals. App. 4. The order also purported to deny a COA. *Id*. at 8.

The September 28 order issued by the district court is largely incoherent and lacks any perceivable organizational structure. It is difficult to discern what legal issue it is purporting to address at any particular point within it, making it challenging even to summarize its holdings. The order initially begins discussing Ibarra's entitlement to a stay of proceedings under *Rhines v. Weber*, 544 U.S. 269 (2005), but devolves into an apparent application of *Martinez* to the *Strickland* claim. Ultimately, the district court appeared to (1) re-impose Judge Smith's previous alternative merits holding on the ground that it was unaffected by the Fifth Circuit's vacatur of its judgment; and (2) hold that the *Strickland* claim remained procedurally defaulted notwithstanding the intervening decisions in *Martinez* and *Trevino*, because the claim did not have "some merit."

With respect to the latter, the court held that in order to demonstrate that the *Strickland* claim had "some merit," Ibarra had to "satisfy the requirements" of *Strickland* by "establishing" its deficiency and prejudice prongs. App. 4 at 4. It concluded, first, that Ibarra could not establish that trial counsel's sentencing investigation was deficient because "trial counsel did present

mitigating evidence at trial." *Id*. Thus, the district court applied a rule that the presentation by counsel of any mitigating evidence at a capital trial precludes, as a matter of law, a deficiency finding under *Strickland*.

As to prejudice, the district court held that the claim fell short of "establishing prejudice" to "either excuse his default or to establish his IATC claim," citing: (1) the strength of the evidence of his guilt; and (2) Judge Smith's prior holding that the "aggravating factors" presented by the State were "more than sufficient to outweigh any additional potentially mitigating evidence" in light of the "brutal and senseless nature of the crime." App. 4 at 5–6. In sum, the district court concluded that Ibarra "failed to establish the actual prejudice necessary to overcome his procedural default or to establish ineffective assistance of counsel." *Id*. at 8.

The district court also wrote, in an apparent throwaway line without any analysis, that there was "nothing" to support Ibarra's ineffectiveness claim or that Ibarra's state habeas counsel was ineffective. App. 4 at 6.

4. Second Appeal of the District Court's Denial of the Application

Ibarra filed a motion for certificate of appealability seeking to appeal the denial of Mr. Ibarra's *Strickland* claim. The Fifth Circuit granted a COA, finding it debatable (1) whether he was deprived of effective assistance at his capital trial; and (2) whether ineffective state habeas representation excused the default of the *Strickland* claim. *See* App. 3 at 6–7.

On appeal, Ibarra argued that the district court had erred in several ways. First, he argued it had erred by concluding Ibarra had not made sufficient allegations to meet the *Martinez* cause standard, including the presentation of a "substantial" underlying claim. The district court had made this ruling in the face of the Fifth Circuit's prior grant of a COA on the claim, and the Fifth Circuit had just—again—granted a COA on the claim, expressly finding the underlying claim

debatable. *See Martinez*, 566 U.S. at 14 (equating a substantial claim for *Martinez* purposes to the standard for granting a COA). Ibarra also argued that any district court determination that his state habeas counsel was not ineffective had been premised on the district court's erroneous conclusion that the underlying Sixth Amendment allegations lacked any conceivable merit. Ibarra further argued that any merits rulings the court made as a matter of law—the case never progressed past the pleading stage in the district court—regarding his Sixth Amendment allegations were error. The Director did not attempt to argue that trial counsel or state habeas did not perform deficiently. Instead, the Director merely asked the Fifth Circuit to hold that 28 U.S.C. § 2254(e)(2) precluded relief by virtue of its prohibition on evidence and that the allegations could not establish prejudice.

The Fifth Circuit affirmed the district court's denial. Ultimately, the appeals court held the Sixth Amendment allegations "fail[] to meet the standard set forth in *Strickland*" as a matter of law. App. 1 at 7. Observing that the district court had determined trial counsel's sentencing investigation to be reasonable, the appeals court held that "[t]o the extent that trial counsel performed an investigation, the facts were properly presented to the jury, and the jury nevertheless found no mitigating factors to support life imprisonment, it was not deficient under *Strickland* for Ibarra's state habeas counsel not to pursue an IATC claim in state habeas proceedings." App. 1 at 8. Although the Director never contested it, the court held, "The performance of Ibarra's state habeas counsel was not unconstitutionally deficient as measured by *Strickland*." App. 1 at 8–9. To justify the conclusion, the court wrote, "there is no evidence that Ibarra's state habeas counsel's decision not to investigate and present the evidence in more granular detail to the state habeas court amounted to deficient performance as a matter of law."[17] App. 1 at 8.

[17] It is unclear what this means. The district court never held any hearing to admit evidence, and the case never progressed past the pleading stage.

With respect to prejudice, the court held as a matter of law that whether Texas formally requires juries to balance aggravating and mitigating factors in order to determine the sentence has no bearing on a federal court's application of prejudice in a *Strickland* analysis. Insisting on determining the outcome by weighing mitigation against aggravation to ascertain which is greater, it held that the "additional evidence Ibarra now proffers of his poverty and violent upbringing is a double-edged sword in terms of proving future dangerousness and is greatly outweighed by" various crimes the Fifth Circuit declared Ibarra had committed, including some Ibarra has never been convicted by a jury of committing.[18]

Judge Graves dissented from the decision to affirm, because he believed the district court violated the court's Remand Order. He observed that the district court had operated under the misimpression that the court's Remand Order "continued to affirm the denial of Ibarra's IATC claim on the merits." App. 1 at 13. He pointed out this meant "there was no possible way Ibarra could then establish that the claim was 'substantial' or had 'some merit.'" *Id*. Judge Graves also believed the district court erred by requiring Ibarra, effectively, to both plead and prove the merit of his *Strickland* claim in his pleading to establish cause for default under *Martinez*. *Id*.

[18] The evidence was presented by the State to try to meet its burden to prove that there was a probability that Mr. Ibarra would commit acts of criminal violence in the future. The jury answered that question affirmatively, but the affirmative verdict did not require the jury to find beyond a reasonable doubt that Mr. Ibarra committed any of the criminal acts. Yet, the court below declared that he did commit them, and relied on that adjudication to find that the "aggravation"—a term having no legal meaning in a Texas capital trial—outweighed the mitigation. Thus, the federal appeals court itself appears to have adjudged Ibarra guilty of these crimes notwithstanding that he has never been tried or convicted by a jury of committing them, raising questions about whether the appellate court's judgment itself violated the Fifth and Sixth Amendments to the United States Constitution. It is one thing for a court reviewing such a trial in habeas corpus to note and take into account the *evidence* the state presented, quite another to pronounce judgment that the person committed various criminal offenses.

REASONS FOR GRANTING THE WRIT

Mr. Ibarra has proceeded through state court and two layers of federal courts without having received any meaningful review of serious allegations that his capital judgment was obtained by Texas in violation of the United States Constitution. Both courts below proceeded under an erected fiction that the allegations Ibarra made in support of prejudice on his *Strickland* claim merely provided "more granular detail" than what counsel presented at trial. This fiction, in conjunction with a gloss the Fifth Circuit has placed on *Strickland* prejudice analyses, led to Ibarra's substantial *Strickland* allegations receiving no meaningful review.

I. THE COURT OF APPEALS'S FAILURE TO ENSURE MEANINGFUL FEDERAL REVIEW OF THE LEGALITY OF A DEATH SENTENCE UNDER THE SIXTH AMENDMENT CALLS FOR AN EXERCISE OF THE COURT'S SUPERVISORY POWER

In state court, although he was guaranteed by Texas statute a right to "competent representation" in an initial habeas corpus proceeding, Tex. Code Crim. Proc. art. 11.071 § 2(a), Texas appointed him a lawyer who did nothing for him. Notwithstanding that only non-record-based claims which derive from extra-record investigation are cognizable in the state habeas corpus proceeding, the lawyer conducted no investigation at all. On the day before the application was filed, the lawyer simply researched a "*Lackey* claim" and then wrote a four-page habeas corpus application raising a frivolous, modified version of a "*Lackey* claim." The application was summarily denied. In short, Mr. Ibarra was effectively induced by Texas's illusory promise of competent representation to forego *all* collateral review of his capital judgment in state court. The effectiveness of the representation afforded him at trial was never scrutinized. The scenario in which a prisoner, through no fault of his own, fails to receive scrutiny of substantial Sixth Amendment claims in state court is precisely the one for which this Court announced an equitable exception to procedural default in *Martinez*.

In federal court, Mr. Ibarra received competent representation which investigated the legality of his confinement and raised substantial allegations, inter alia, that his capital judgment was obtained in violation of his "bedrock" Sixth Amendment right to counsel. *Martinez*, 566 U.S. at 12. Despite the stark deprivation of effective counsel in his state habeas proceeding, Ibarra received no meaningful review by the federal courts of his serious Sixth Amendment allegations.

In the district court, his application presenting the Sixth Amendment allegations was originally presided over—and denied—by Judge Walter S. Smith, Jr. in 2011.[19] The opinion produced by Judge Smith gave no meaningful consideration to Ibarra's Sixth Amendment allegations.

First, the context in which the district court purportedly addressed the substance of Mr. Ibarra's allegations was not conducive to meaningful review. The opinion first found the Sixth Amendment claim to be procedurally defaulted, and therefore only considered the substantive

[19] Judge Smith retired from the bench in 2016 amid allegations of extreme misconduct, including sexual harassment, making false statements (through counsel), and failing to recuse himself in the face of clear conflicts of interest. In September 2014, a court employee lodged a complaint alleging that Judge Smith made inappropriate and unwarranted sexual advances in 1998. *See* Order of Mem. & Reasons, In re Compl. of Judicial Misconduct Against United States District Judge Walter S. Smith, Jr., No. 05-14-90120 (Sept. 28, 2016) at 1. In 2015, the Judicial Council of the Fifth Circuit ("Judicial Council") imposed "severe sanctions" after determining that (1) Judge Smith "made inappropriate and unwanted physical and non-physical sexual advances toward a court employee, and that such behavior was in contravention of existing standards;" (2) Judge Smith "does not understand the gravity of such inappropriate behavior and the serious effect that it has on the operations of the courts;" and (3) Judge Smith "allowed false factual assertions to be made in response to the complaint, which, together with the lateness of his admissions, contributed greatly to the duration and cost of the investigation." Order of Reprimand & Mem. Of Reasons, In re Compl. of Judicial Misconduct Against United States District Judge Walter S. Smith, Jr., No. 05-14-90120 (Dec. 3, 2015) at 2. Ordered by the Committee on Judicial Conduct and Disability of the Judicial Council of the United States to undertake additional investigation and make additional findings where appropriate, the Judicial Council completed further investigation but concluded the proceeding without making any further findings or taking further disciplinary action because Judge Smith announced his retirement. Order of Mem. & Reasons, In re Compl. of Judicial Misconduct Against United States District Judge Walter S. Smith, Jr., No. 05-14-90120 (Sept. 28, 2016) at 3.

allegations in the alternative to the default ruling, i.e., in a posture in which the court's consideration was, ultimately, irrelevant to its judgment.

Second, Judge Smith conflated prejudice with deficient performance, and therefore never actually determined whether trial counsel's performance was deficient. Judge Smith based his conclusion that trial counsel's failure to conduct any investigation into their client's background was not deficient on a finding that the mitigating evidence at trial was coextensive with the mitigating information Ibarra alleged in the application could have been discovered with reasonable investigation at trial. Specifically, the district court based its deficiency holding on the fact that trial counsel presented Ibarra's sister and his wife as witnesses at sentencing, "who testified that Petitioner came to the United States to find work to help support his family, that their family was poor, and that they lived in 'humble' circumstances, working on the land, and the circumstances of his family situation in the United States." App. 8 at 33. The district court concluded, "Since the information was provided to the jury, Petitioner has failed to establish that counsel was ineffective for failing to investigate or present such evidence." *Id*. A finding that the mitigating information proffered in post-conviction was cumulative of what trial counsel presented is a *prejudice* determination, not a deficiency determination. By basing its deficient-performance conclusion on a prejudice inquiry, Judge Smith never adjudicated whether Ibarra's trial counsel rendered deficient representation.

Third, Judge Smith's conclusion that Ibarra's prejudice allegations were coextensive with the evidence presented at trial was a clearly erroneous one. Ibarra's allegations of what mitigating information would have been discoverable plainly went *well* beyond the meager information trial counsel presented, which did not touch upon childhood abuse, intellectual disability, or PTSD at all. By equating the information, the court effectively refused to consider Ibarra's prejudice

allegations. Judge Smith wrote exactly one sentence justifying his conclusion that Ibarra's allegations could not establish prejudice. The court wrote, "In this case, the overwhelming aggravated factors, previously discussed, outweigh the possible mitigating evidence Petitioner could introduce, particularly considering the 'brutal and senseless nature of the crime.'" App. 8 at 33. The mitigating information Ibarra alleged could have been discovered through reasonable investigation was never mentioned or discussed. And given Judge Smith's clearly erroneous conclusion that no additional mitigation information was alleged in support of his *Strickland* claim beyond what was presented at trial, this prejudice outcome would have been foreordained. Accordingly, the only ruling that Judge Smith actually made to dispose of Ibarra's substantial Sixth Amendment allegations "on the merits" was the clearly erroneous one that Ibarra had not alleged any discoverable mitigating information beyond what counsel presented at trial.

After the Fifth Circuit vacated the district court's judgment and remanded it for reconsideration in light of *Trevino,* what occurred there was anything but consistent with that decision. *Trevino* instructed the federal courts as to the importance of ensuring that prisoners receive meaningful habeas review of substantial claims that they were deprived of their Sixth Amendment right to counsel. *Trevino*, 569 U.S. at 421 (recognizing "the historic importance of federal habeas corpus proceedings as a method for preventing individuals from being held in custody in violation of federal law"). The equitable exception to the rule prohibiting reliance on ineffective state post-conviction counsel to establish cause for default was created precisely to ensure that *at least one* court afford meaningful review to such claims. *See Trevino*, 569 U.S. at 425 (considering whether the review available is "meaningful review" to ascertain whether the equitable exception would apply). *See also Davila v. Davis*, 137 S. Ct. 2058, 2067 (2017) ("chief concern identified by this Court in *Martinez*" was "ensur[ing] that meritorious claims of trial error

receive review by at least one state or federal court"). Although Ibarra had alleged a substantial deprivation of his Sixth Amendment right to counsel, he received no meaningful review of his claim.

First, Judge Smith, under investigation by the Fifth Circuit Judicial Council for serious ethical and other allegations, retired in 2016 while the case pended in the district court on remand. A new district judge, Judge Robert Pitman, was assigned to the case. Judge Pitman denied relief just *nine* days after being assigned it. Under these circumstances, it is highly unlikely the district judge was in a position to give any meaningful consideration to the case.[20]

Second, Judge Pitman operated under a misimpression that the Fifth Circuit had "affirmed" Judge Smith's merits ruling. App. 4 at 2–3. ("Judge Smith determined that Ibarra's IATC claim was not just procedurally barred, but that it lacked merit. *This opinion was affirmed by the Fifth Circuit*. . . . As the majority opinion remanded the case only in regard to the procedural default issue, *the opinion did not effect [sic] the denial of Ibarra's IATC claim on the merits*." (emphasis added)). As Judge Graves pointed out, the Fifth Circuit had done no such thing.[21] App. 1 at 13.

Third, Judge Pitman's erroneous belief that the Fifth Circuit had already "affirmed" Judge Smith's merits ruling clearly impacted the court's review, which was reduced merely to explaining what Judge Smith's ruling was, rather than deciding anything itself. Much like Judge Smith's original merits ruling made in the alternative to the procedural default ruling, and as Judge Graves observed in his dissent below, App. 1 at 13, the district court's ruling on remand was made in a

[20] As will be discussed, *infra*, one likely reason the new judge did not give meaningful consideration to the claim is because he operated under the false impression that Judge Smith's alternative denial on the merits had been affirmed by the Fifth Circuit.

[21] Even in the Fifth Circuit's original opinion denying a COA on the Sixth Amendment claim before granting rehearing, the court had merely ruled—before *Trevino*—that reasonable jurists could not debate that the claim was procedurally defaulted and said nothing about its underlying merit. App. 6 at 8–12.

context in which it did not matter, given its belief the Fifth Circuit had already "affirmed" the denial of the claim's merit.

Fourth, perhaps also because of Judge Pitman's false belief that the Fifth Circuit had "affirmed" Judge Smith's merits ruling, Judge Pitman relied almost exclusively on Judge Smith's prior flawed reasoning, including its conflation of prejudice and deficient performance. For example, Judge Pitman relied on Judge Smith's holding that Ibarra's trial counsel could not be deficient as a matter of law because they filed a motion to retain an expert. *Cf. Sears v. Upton,* 561 U.S. 945, 955 (2010) (We certainly have never held that counsel's effort to present some mitigation evidence should foreclose an inquiry into whether a facially deficient mitigation investigation might have prejudiced the defendant."). Judge Pitman also relied on Judge Smith's clearly erroneous finding that "[m]any of the facts identified by Petitioner were in fact presented to the jury through the testimony of Petitioner's sister and his wife." App. 4 at 6. As Judge Smith did, Judge Pitman relied on this prejudice observation to conclude that Ibarra's counsel was not *deficient*. The only basis of the lower court's deficiency holding was therefore the singular holding that trial counsel filed a single motion.

As to prejudice, Judge Pitman also relied on Judge Smith's conclusory determination that prejudice could not be shown because the "aggravating factors presented by the State were more than sufficient to outweigh any additional potentially mitigating evidence." App. 4 at 6. In short, Judge Pitman ruled that there was no conceivable mitigation information that Ibarra could have ever presented that could have created a reasonable probability of producing a "yes" answer to Texas's mitigation special issue. Because mitigation was irrelevant to the outcome of Ibarra's capital trial in Judge Pittman's view, he, like Judge Smith, did not need to actually consider the allegations Ibarra made in support of prejudice, and he did not consider them. *See Sears,* 561 U.S.

at 955 ("[W]e have consistently explained that the *Strickland* inquiry requires precisely the type of probing and fact-specific analysis that the state trial court failed to undertake below."). Bizarrely, Judge Pittman even wrote that there was "nothing" in the record to support Ibarra's *Strickland* claim, and that "Ibarra does not identify what mitigating evidence might be uncovered which would come close to outweighing the aggravating factors introduced in this case," App. 4 at 6, 8, suggesting that Judge Pittman may not have even read Ibarra's pleadings. *See Sears*, 561 U.S. at at 955 n.12 (calling the lower court's declaration that the record was "largely silent" on what evidence would have been shown if additional investigation occurred a "curious assertion in light of the 22 volumes of evidentiary hearing transcripts and submissions in the record and concluding that this "undermines any suggestion that the court simply discounted the value of the testimony").

Fifth, the memorandum opinion is bizarre and incoherent, reflecting a lack of attention and thoroughness. The opinion, which was issued in response to a motion for reconsideration on the denial of Ibarra's request for a *Rhines* stay on his *Strickland* claim, begins by discussing Ibarra's entitlement to a *Rhines* stay, but devolves into an opinion "evaluat[ing] the validity of his claim." App. 4 at 3. It makes inexplicable rulings, like that there was "nothing" alleged by Ibarra to support his *Strickland* claim or his argument that state habeas counsel afforded ineffective assistance. App. 4 at 6. Whether or not Ibarra is ultimately entitled to relief on his claim, the hyperbolic pronouncement that he alleged "nothing" reflects extreme inattention to the pleadings in the case.

Back in the Fifth Circuit, Ibarra's case continued to receive inadequate review. Although the Fifth Circuit granted a COA, finding his *Strickland* allegations against both trial and state habeas counsel to be "debatable," App. 3 at 6–7, it did not thereafter give the capital case appeal meaningful review. The Fifth Circuit's opinion affirming the district court's denial of the

Strickland claim reflects extreme inattention to the pleadings and record, drew absurd conclusions in light of the record, and ignored and recast allegations made in the case below such that it never even passed on Ibarra's core allegations.

First, the Fifth Circuit held that Ibarra received effective representation during his initial state habeas corpus proceeding, and therefore he could not establish cause for procedural default under *Martinez*. App. 1 at 8–9. The conclusion that Ibarra was not deprived of effective representation in his initial state collateral proceeding in this case—which presents an extreme deviation from professional norms of habeas corpus representation—threatens to undermine the bedrock Sixth Amendment right to counsel. The equitable exception announced in *Martinez* was created to help enforce that pillar of American justice by ensuring that claims of Sixth Amendment deprivation would receive meaningful review by at least one court. But if Ibarra was not deprived of effective state habeas representation in a case in which state habeas counsel made no inquiry whatsoever into whether Ibarra was deprived of effective counsel at trial or, indeed, illegally restrained for any reason, then no prisoner in Texas can ever be deprived of effective representation in a state habeas proceeding. In effect, the Fifth Circuit has held that state habeas counsel have no duty to investigate whether a prisoner's Sixth Amendment (or any other) rights were violated. In so doing, the court has merely restored the ruling it previously made in this case that *Martinez* is unavailable to Texas prisoners, a ruling this Court has already expressly overturned.

Second, the Fifth Circuit opinion reflects extreme inattention to the record and careless appellate review. The court's conclusion about the effectiveness of state habeas counsel was not supported by its reasoning. The court wrote, "To the extent that trial counsel performed an investigation, the facts were properly presented to the jury, and the jury nevertheless found no mitigating factors to support life imprisonment, it was not deficient under *Strickland* for Ibarra's

state habeas counsel not to pursue an IATC claim in state habeas proceedings." App. 1 at 8. But the Fifth Circuit never actually answered the question to what "extent" trial counsel did these things. (Ibarra alleged trial counsel did *not* "perform[] an investigation" into Ibarra's background, an allegation he was afforded no opportunity to prove.) The court simply concluded, "[T]here is no evidence that Ibarra's state habeas counsel's decision not to investigate and present the evidence in more granular detail to the state habeas court amounted to deficient performance as a matter of law." *Id*. It is unclear what this means, but it appears to uncritically accept the district court's bizarre conclusion that Ibarra did not allege mitigating information in support of prejudice that differed in any material way from the mitigating evidence presented at trial. To be clear, this case does not involve allegations that trial counsel failed to present mitigating information "in more granular detail" than was actually presented. Trial counsel conducted virtually no investigation and presented virtually no mitigating evidence, and what "rudimentary" information they did present by happenstance did not remotely touch upon the mitigating information Ibarra put forward to support his *Strickland* claim. By accepting the district court's absurd conclusion without scrutiny, the court effectively recast the claim as one involving a failure to present information "in more granular detail," and avoided reviewing the real claim that Ibarra raised.

Third, the Fifth Circuit upheld Judge Smith's and Judge Pitman's prejudice conclusion without any meaningful consideration of the prejudice allegations Ibarra made below. The court simply recited the evidence the State relied on to meet its burden on Texas's future dangerousness special issue and held that the mitigating information Ibarra alleged could have been discovered was "double-edged" and "greatly outweighed" by it. The court made no effort to identify Texas's governing law in capital sentencing proceedings or to parse out what mitigating evidence the jury heard and evaluate how its answer to Texas's mitigation special issue may have been affected by

the information Ibarra discovered in post-conviction. It referenced only Ibarra's "poverty and violent upbringing," ignoring Ibarra's allegations of intellectual disability and severe PTSD, information about which the jury was entirely ignorant.

The Court should exercise its supervisory power, summarily reverse the decision below, and remand with instructions to conduct a meaningful review—a review that actually acknowledges and considers the allegations Ibarra made—of Ibarra's Sixth Amendment claim.

II. CERTIORARI SHOULD BE GRANTED TO CORRECT THE FIFTH CIRCUIT'S CONSISTENT PRACTICE OF DISCOUNTING THE MITIGATING IMPORT OF ALL SO-CALLED "DOUBLE-EDGED" EVIDENCE AND OF IGNORING GOVERNING TEXAS LAW THAT DOES NOT REQUIRE JURIES TO DETERMINE THAT MITIGATION OUTWEIGHS AGGRAVATION BEFORE SENTENCING A PERSON TO DEATH

The Fifth Circuit held that Ibarra's allegations in support of prejudice resulting from trial counsel's failure to conduct any background investigation could not, even if true,[22] create a reasonable probability of a different outcome. This was because the additional information that Ibarra's post-conviction counsel discovered was "double-edge" and therefore could not "outweigh" the aggravating evidence before the jury. App. 1 at 11. The Fifth Circuit's penchant for labeling and dismissing the mitigating import of evidence as "double-edged," combined with its rote application of a prejudice standard that lacks roots in the law governing Texas capital trials, fails to adequately protect defendants' "bedrock" Sixth Amendment right to effective counsel.

A. The Fifth Circuit's Treatment of So-Called "Double-Edged" Mitigating Evidence in Its Sixth Amendment Prejudice Analyses Replicates the Problem *Penry* Was Decided to Solve

In 1989, this Court decided *Penry v. Lynaugh*, 492 U.S. 302 (1989), *abrogated on other grounds by Atkins v. Virginia*, 536 U.S. 304 (2002), which mandated that capital juries be provided

[22] No hearing has been held by any court on Mr. Ibarra's Sixth Amendment allegations.

with a vehicle for giving effect to mitigating evidence. The decision recognized that the Texas statute—before it added the mitigation special issue in 1991—failed to do so with respect to Penry's evidence of child abuse and mental retardation. *Id.* at 328. Because capital sentencing juries were asked to assess only the deliberateness with which the defendant acted and his future dangerousness, mitigating evidence presented by the defense that went beyond the scope of these inquires was out of the reach of the jury. *Id.*

Penry recognized that the question of whether a defendant is morally culpable enough to die for a crime is a different question from whether he poses a threat of future criminal violence. The Court specifically noted that Penry's evidence of mental retardation and childhood abuse functioned as a "two-edged sword," because it might "diminish his blameworthiness for his crime even [while indicating] a probability that he will be dangerous in the future." *Penry,* 492 U.S. at 324. Nevertheless, the Court held that such evidence had relevance to Penry's moral culpability "*beyond the scope of* the [deliberateness and future dangerousness] special issues." *Id.* at 321-22 (emphasis added). The Court recognized that neither the "deliberateness" nor the "future dangerousness" special issue in the former Texas sentencing statute provided the jury with a meaningful opportunity to give effect to the petitioner's mitigating evidence in deciding his sentence. As one judge in the Fifth Circuit described it in 1994:

> The defect in the Texas scheme, as applied to Penry, however, was that such evidence could not be considered as mitigating in terms of the second special issue but only could be aggravating in that it could be interpreted as indicating a likelihood of future dangerousness. *This is what the Penry Court meant by the "two-edged" nature of the Penry mitigating evidence*: that, *absent additional instruction,* a death sentence imposed under the Texas special issues is unconstitutional if the defendant's evidence mitigates against a death sentence for reasons wholly unrelated to-and independent of-the special issue inquiries.

Holland v. Collins, 950 F.2d 169, 171 (5th Cir. 1991) (Smith, J., dissenting) (emphasis added).

In response to the *Penry* decision, the Texas legislature enacted a separate and independent mitigation special issue which became effective in 1991.[23] The mitigation special issue solves the Eighth Amendment problem *Penry* identified with so-called "double-edged" mitigating evidence: it permits the jury to give such evidence aggravating effect on the future dangerousness special issue if it so chooses, but it *independently* allows the jury to give the same evidence its mitigating import through the mitigation special issue.

After *Penry*, the Fifth Circuit spent two decades in the 1990s and 2000s erecting various "glosses" on the decision in order to deny relief on claims coming before it relating to capital trials that predated the change in law, i.e., cases related to trials that lacked the mitigation special issue.[24] Relying on *Penry*, the Circuit has erected a similar gloss in the Sixth Amendment context, whereby mitigating information discovered in post-conviction that applicants proffer to show prejudice from trial counsel's investigative deficiencies is discounted to irrelevance as "double-edged." All such evidence given the label is deemed unable to "outweigh" aggravating evidence and thus insufficient to demonstrate prejudice. So mechanistic has this process become that the Fifth Circuit has effectively turned it into a legal principle: if "double-edged," then no prejudice.

More problematically, every conceivable form of mitigating information has earned the label "double-edged" by the Fifth Circuit over the course of its three-decade use of the concept. *See, e.g., Trevino v. Davis*, 861 F.3d 545, 551 (5th Cir. 2017) (information that defendant had Fetal Alcohol Syndrome Disorder is double-edged such that prejudice could not result);

[23] It also repealed the "deliberateness" special issue for capital offenses that post-dated the effective date of the new law. Although Ibarra's trial post-dated the change in law, his offense pre-dated the change, and so the deliberateness special issue was still given to Ibarra's jury, in addition to the new mitigation special issue.

[24] *See generally Tennard v. Dretke*, 542 U.S. 274, 284 (concluding that the Fifth Circuit's Penry jurisprudence had "no foundation in the decisions of this Court").

Chanthakoummane v. Stephens, 816 F.3d 62, 72 (5th Cir. 2016) (holding that "'double edged' evidence . . . cannot form the basis for a claim of ineffective assistance of counsel" because prejudice cannot be shown from it); *Tamayo v. Stephens*, 740 F.3d 986, 988 (5th Cir. 2014) (describing prior conclusion in case that the habeas applicant "had not raised a debatable issue on the prejudice prong because of the 'double-edged sword' nature of the proffered evidence" of organic brain damage); *Clark v. Thaler*, 673 F.3d 410, 423 (5th Cir. 2012) (evidence of an abusive and troubled childhood is double-edged such that prejudice could not result); *Druery v. Thaler*, 647 F.3d 535, 541 (5th Cir. 2011) (evidence of brain injury is double-edged such that prejudice could not result); *Vasquez v. Thaler*, 389 F. App'x 419, 429 (5th Cir. 2010) (Fifth Circuit has "repeatedly rejected IAC claims where alleged failures to investigate mitigating evidence did not prejudice the defendant because of the double-edged nature of the evidence available.") (internal quotation marks omitted).

The result of this practice is that, when prisoners raise allegations of deprivation of effective counsel, the Fifth Circuit's Sixth Amendment prejudice analysis replicates the problem *Penry* was originally decided to address: the court only gives the mitigating information its aggravating effect and ignores its mitigating component in relation to the independent mitigation special issue.

B. The Fifth Circuit's Sixth Amendment Prejudice Analysis Disregards Texas Law That Governs Capital Sentencing Proceedings

Once labeled "double-edged" such that the mitigating import of the proffered evidence is neutralized, the Fifth Circuit invariably concludes, as it did in this case, that the "aggravating evidence" "outweighs" the totality of mitigating evidence. Unlike most states, however, Texas is not a state that asks jurors to weigh aggravation against mitigation in order to assess whether a death sentence should be given. Specifically, a jury need not ever conclude that mitigating

circumstances outweigh aggravation in order to answer Texas's mitigation special issue favorably to a defendant. *See Ex parte Gonzales*, 204 S.W.3d 391, 394 (Tex. Crim. App. 2006) ("Texas' capital sentencing scheme does not involve the direct balancing of aggravating and mitigating circumstances."); *Ex parte Davis*, 866 S.W.2d 234, 239 (Tex. Crim. App. 1993) ("Unlike Florida, where *Strickland* arose, we do not have a capital sentencing scheme that involves the direct balancing of aggravating and mitigating circumstances."). Indeed, "[t]he issue of future dangerousness is completely independent of the [mitigation] special issue[.]" *Eldridge v. State*, 940 S.W.2d 646, 654 (Tex. Crim. App. 1996). In Texas, regardless of which "outweighed" the other, a defendant could be sentenced to life if a single juror decided to answer the mitigation special issue affirmatively.

Unlike most states, the concept of "aggravating factors" plays no role in a capital sentencing trial in Texas. Texas requires the State to prove discrete, special issues at sentencing beyond a reasonable doubt. In Ibarra's trial, the State had to prove that (1) Ibarra's conduct was committed deliberately and with the reasonable expectation that death would result; and (2) a probability existed that Ibarra would commit criminal acts of violence that would constitute a continuing threat to society. If those questions were answered favorably to the State, the jury was then required simply to determine whether mitigating circumstances "warrant" a life sentence be imposed. The Court of Criminal Appeals of Texas ("CCA") has held that no burden of proof exists as to this mitigation special issue and that the jury is not directed to "weigh" mitigation against aggravation. *Blue*, 125 S.W.3d at 501; *Davis*, 866 S.W.2d at 239.

In *Strickland*, this Court held that "[t]he governing legal standard plays a critical role in defining the question to be asked in assessing the prejudice from counsel's errors." As the CCA has recognized, when this Court framed the prejudice "question" to be addressed in *Strickland* as

"whether there is a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death," it was formulated specifically with reference to the "governing legal standard" in Florida, which directed the sentencer to do just that. As there is no requirement in Texas for a jury to weigh mitigating factors against aggravating factors—and as there could *not* be any such requirement in Texas because Texas does not even specify or define aggravating factors for a jury to consider—it is inappropriate, and incoherent, for an appellate court to require a habeas applicant sentenced to death by a Texas court to prove a reasonable probability that, but for the omissions, a jury would have determined the mitigating factors to outweigh unspecified, unknown "aggravating" factors.

To answer the question of whether there is a reasonable probability that one juror would have answered the mitigation special issue differently, a reviewing court should look at the difference in the evidentiary profiles between the mitigating evidence the jury had to consider and the evidence it would have had to consider absent the deficient performance. It should then ask what the "marginal impact" of that new evidence might be. *See Ex parte Armstrong*, No. WR-78,106-01, 2017 WL 5483404, at *15 (Tex. Crim. App. 2017) ("When some mitigating evidence has been presented at trial, and additional evidence is developed during post-conviction proceedings, we consider what the marginal impact might have been on the jury had both sets of evidence been presented as a package."). When doing so, the reviewing court should keep in mind that the defense bears no burden of proof on the matter at trial. *Blue*, 125 S.W.3d at 501 (Tex. Crim. App. 2003). Thus, a juror can decide to answer the mitigation special issue "yes"—i.e., decide that a life sentence is an "appropriate response"—based on very little mitigation evidence, and even in the face of substantial evidence of future dangerousness, because in order to answer

the mitigation special issue affirmatively, a juror in a Texas capital case need not ever conclude that mitigating evidence "outweighs" any "aggravating evidence" (whatever that is).

In this case, trial counsel's performance caused the jury that sentenced Ibarra to death to have almost no meaningful mitigation evidence before it for consideration, so it is unsurprising it answered the mitigation special issue unanimously in the negative, even despite the lack of any burden of proof and absence of weighing. Because almost nothing was presented at trial, the "marginal impact" of the omitted mitigating evidence the jury could have considered relevant to the mitigation special issue is immense in this case.[25]

In *Armstrong*, the CCA thought it important that the additional mitigation evidence discovered in post-conviction "helped lay the groundwork for making a case for mitigation that could extend beyond a mere plea of sympathy for Applicant because of the abuses and deprivations he suffered as a child." *Armstrong*, 2017 WL 5483404, at *15. As the CCA explained, "To provide a basis for assessing a sentence less than death, mitigating evidence need not provide a 'nexus' to specifically explain the capital offense. This is not to say, however, that mitigating evidence that does provide such a nexus will not potentially have a greater impact on the jury."[26] *Id*. at 15* n.20.

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[25] Even if there were a legal requirement in Texas that the jury determine the mitigating evidence outweighs the aggravating evidence before answering the mitigation special issue affirmatively, Ibarra's allegations would still fit that bill. In *Armstrong*, the Court of Criminal Appeals of Texas drew just such a conclusion, notwithstanding "the obvious brutality of the offense, the apparent depravity of the motive, and the criminal history that preceded it" in that case. Armstrong, 2017 WL 5483404, at *16. This Court has regularly admonished that mitigation evidence may alter the life-death calculus even where significant evidence of aggravation has been presented. *See, e.g., Williams v. Taylor*, 529 U.S. 362, 398 (2000) ("While this, coupled with the prison records and guard testimony, may not have overcome a finding of future dangerousness, the graphic description of Williams' childhood, filled with abuse and privation, or the reality that he was 'borderline mentally retarded,' might well have influenced the jury's appraisal of his moral culpability."); *id*. ("Mitigating evidence unrelated to dangerousness may alter the jury's selection of penalty, even if it does not undermine or rebut the prosecution's death-eligibility case.").

[26] Although Armstrong's lawyer presented substantially more mitigation information at trial than Ibarra's lawyer did—and thus the "marginal impact" of Armstrong's post-conviction

The exceedingly cursory information that leaked out to the jury about Ibarra's poor background was, if it could be characterized as anything beyond a passing mention, a mere "naked plea for mercy." *Rompilla v. Beard*, 545 U.S. 374, 393 (2005). Ibarra's post-conviction mitigation allegations, by contrast, "contributed to a psychological diagnosis of mental deficiency that helps explain how he could have perpetrated such an offense." *Armstrong*, 2017 WL 5483404 at *15 n.20. The allegations reflected that evidence could have been presented that Ibarra's abusive, deprived, and troubled background led to his developing an intellectual disability and severe post-traumatic stress disorder, both of which affected his behavior as an adult. As in Armstrong, "the jury might have been willing to view his crime as at least partly the product of his dysfunctional upbringing, over which he exerted no control whatsoever." *Id.* At a minimum, Ibarra should receive meaningful review of his claim by at least one court.

CONCLUSION

For the foregoing reasons, the Court should either summarily reverse the Fifth Circuit's judgment and remand with instructions to the lower courts to give meaningful consideration to Mr. Ibarra's *Strickland* claim or grant certiorari to address and correct the lower court's persistent misapplication of *Strickland* and its progeny.

Respectfully submitted,

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mitigation was substantially smaller—the same dynamic nevertheless operates here as operated in Armstrong, and should similarly cause confidence in the verdict to be undermined.

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