No. _____ (CAPITAL CASE)

In the Supreme Court of the United States

_____

RAMIRO RUBI IBARRA,
Petitioner,

vs.

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

_____

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

_____

APPENDICES TO PETITION FOR A WRIT OF CERTIORARI

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TABLE OF APPENDICES

APPENDIX 1

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
FILED
August 26, 2019
Lyle W. Cayce
Clerk

No. 17-70014

RAMIRO RUBI IBARRA,

Petitioner - Appellant

v.

LORIE DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent - Appellee

Appeal from the United States District Court
for the Western District of Texas
USDC No. 6:02-CV-52

Before JONES, HAYNES, and GRAVES, Circuit Judges.

PER CURIAM:*

Ramiro Rubi Ibarra was convicted of capital murder and sentenced to death. This court previously granted a certificate of appealability ("COA") under 28 U.S.C. § 2254 from the district court's denial of relief on his ineffective assistance of counsel claim and denied his petition for a COA on his *Atkins* claim. Following briefing on the former claim, we **AFFIRM**.

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

I. Background

The facts about the crime need not be recited again. This court summarized the procedural history as follows:

> Petitioner'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, 121 S. Ct. 79, 148 L.Ed.2d 41 (2000). His first state habeas corpus petition was denied. *Ex parte Ibarra*, No. WR–48832–01 (Tex.Crim.App. Apr. 4, 2001). Petitioner then submitted his federal habeas petition, which was stayed while he exhausted additional state court claims pursuant to *Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242, 153 L.Ed.2d 335 (2002), which banned the execution of the mentally retarded. 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, 128 S. Ct. 1346, 170 L.Ed.2d 190 (2008).
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> The Texas Court of Criminal Appeals remanded Petitioner's *Atkins* claim to the trial court for an evidentiary hearing. The trial court determined that Petitioner was not mentally retarded, and this holding was adopted on appeal by the Court of Criminal Appeals ("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–48832–03, 2007 WL 2790587, (Tex.Crim.App. Sept. 26, 2007). Petitioner's application for certiorari on his *Avena* claim was denied. *Ibarra v. Texas*, 553 U.S. 1055, 128 S. Ct. 2475, 171 L.Ed.2d 770 (2008). A fourth state habeas petition, raising a claim under *Wiggins v. Smith*, 539 U.S. 510, 123 S. Ct. 2527, 156 L.Ed.2d 471 (2003), was also dismissed by the CCA as a subsequent writ. *Ex parte Ibarra*, No. WR–48832–04, 2008 WL 4417283 (Tex.Crim.App. Oct. 1, 2008).

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After Ibarra had finally exhausted his claims in the Texas courts, he argued eleven grounds for relief in the federal district court, all of which were rejected, and then sought a COA from this court on only three claims: *Atkins*, VCCR, and *Wiggins*.

Pertinent to the instant appeal, Ibarra contended that "his trial counsel was ineffective in his investigation, development, and presentation of mitigation evidence, as well as the development of rebuttal evidence for the state's aggravating factors at sentencing" in violation of the Sixth Amendment and *Wiggins*, 539 U.S. at 522–23, 123 S. Ct. at 2536. As noted above, the TCCA dismissed this petition as an abuse of the writ. The district court rejected this claim for two independent reasons: (1) procedural default under then-governing precedent, and (2) alternatively, his claim was meritless, because Ibarra could not demonstrate prejudice. *Ibarra*, 691 F.3d at 683. This court held that reasonable jurists "could not disagree with the district court's conclusion that Petitioner's *Wiggins* claim was procedurally defaulted" and denied a COA. *Id.* at 685.

As to the *Atkins* claim, this court denied a COA on alternative grounds of procedural bar, non-exhaustion, and meritlessness. The evidence Ibarra offered in state court included an unsworn, inadmissible expert witness statement concerning Ibarra's IQ; an investigative report about his alleged adaptive deficits; and the opinion of Dr. Stephen Mark, who had found no evidence of mental handicap after two examinations of Ibarra. The TCCA had rejected this claim on the merits. Ibarra consequently offered material new evidence in federal court, rendering his claim unexhausted and procedurally barred. Finally, reviewing the state court record, this court found it not

debatable that the state courts' rejection of Ibarra's *Atkins* claim on the merits did not violate 28 U.S.C. § 2254(d)(1). *Ibarra,* 691 F.3d at 681–83.[1]

The Supreme Court then decided *Trevino v. Thaler*, 569 U.S. 413, 133 S. Ct. 1911 (2013). On a motion for rehearing, this court granted rehearing in part and vacated our initial decision "only to the extent inconsistent with *Trevino* and grant[ed] a COA only to that extent; in all other respects, the majority and dissenting opinions [of the prior opinion] remain[ed] in effect." *Ibarra*, 723 F.3d at 600. Judge Graves concurred in part and dissented in part.

Back in the district court, Ibarra moved to stay and remand so that he could pursue his ineffective assistance of counsel ("IATC") claim in state court. The district court denied this motion. The case was reassigned to Judge Pitman when Judge Smith retired. Ruling on a motion for rehearing of the denial order, Judge Pitman affirmed the denial and held *sua sponte* that a COA should not issue because Ibarra's IATC claim was not "substantial."

II. Standard of Review and Controlling Law

Martinez v. Ryan held that "a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective." 566 U.S. 1, 17, 132 S. Ct. 1309, 1320 (2013). This principle was extended to Texas in *Trevino,* 569 U.S. at 429, 133 S. Ct. at 1921. Such a "substantial claim" constitutes "cause" for the procedural default, but, in line with traditional precedent, the petitioner must also prove that he suffered "prejudice" from counsel's errors. *Martinez,* 566 U.S. at 10, 132 S. Ct. at 1316 (citing *Coleman v. Thompson,* 501 U.S. 722,

[1] This court also denied COA on the VCCR claim, a holding that has not been challenged.

750, 111 S. Ct. 2546 (1991)). A "substantial" claim is one that has "some merit." *Id.* at 14, 132 S. Ct. at 1318. An insubstantial claim is one which "does not have any merit" or "is wholly without factual support." *Id.* at 15–16, 132 S. Ct. at 1319. The standard for evaluating an ineffective assistance of counsel claim is provided by *Strickland*, which states the petitioner must show "that counsel's performance was deficient" and "that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064. The State succeeds in establishing procedural default if the IATC claim is insubstantial, if the initial habeas attorney was not constitutionally ineffective, or if Ibarra has not proved sufficient prejudice to overcome his procedural default. *Martinez*, 566 U.S. at 15–16, 18, 132 S. Ct. at 1319, 1321.

III. Analysis

Ibarra argues that his trial attorneys were ineffective for failing to investigate and present additional mitigating evidence about Ibarra's background. He alleges that a "reasonable investigation" would have uncovered:

> (1) Ibarra's extreme childhood impoverishment to the point of malnourishment and living conditions far more dire than "humble;" (2) extreme physical and emotional abuse perpetrated against Ibarra as a child by his father; (3) Ibarra's witnessing extreme physical and emotional abuse perpetrated against loved ones by his father as a child; (4) Ibarra's attempts to care for and protect his siblings from their poverty and from their father's abuse; (5) Ibarra's significantly subaverage intellectual functioning; (6) Ibarra's developmental intellectual disability; and (7) Ibarra's development of severe post-traumatic stress disorder as a result of his experiencing and witnessing the extreme violence perpetrated by his father throughout his childhood and

> experiencing the near deaths and deaths of family members due to their extreme poverty.[2]

Ibarra contends that trial counsels' failure to present this evidence prejudiced him at the sentencing stage and led the jury to unanimously conclude that no mitigating factors existed to support a sentence of life imprisonment instead of death.

This court earlier granted a COA because Ibarra's original IATC claim was debatable, and it was also debatable whether his initial habeas counsel was ineffective for not pursuing this claim in state court.

A. Whether Ibarra's New Evidence is Admissible

The parties join issue first over the admissibility of mitigating evidence presented by Ibarra for the first time in the district court and neither developed in nor considered by the state courts. As a general matter, federal habeas law bars federal courts from considering evidence not diligently developed in state court by the habeas petitioner. *See* 28 U.S.C. § 2254(e)(2). The State argues that, in light of the absence of the newly developed evidence from the state court record, despite its availability, he is now barred from presenting it in federal court. *See Holland v. Jackson*, 542 U.S. 649, 653, 124 S. Ct. 2736, 2738 (2004) (holding that attorney error in state habeas proceedings is "chargeable to the client").

Ibarra responds that in *Martinez,* the Supreme Court created a narrow exception to the vicarious fault rule for claims involving inadequate assistance of counsel during initial-review collateral proceedings (citing *Martinez*, 556 U.S. at 9). He further contends that because establishing cause for a procedural waiver under *Martinez* can allow a habeas petitioner to avoid the

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[2] Ibarra also contends that the district court was obliged to hold an evidentiary hearing on his *Martinez* claim, but circuit precedent does not support such a requirement. *See Segundo v. Davis*, 831 F.3d 345, 351 (5th Cir. 2016).

procedural bar and bring an ineffective assistance of counsel claim in federal court, establishing cause under *Martinez* must allow a habeas petitioner to present new evidence in federal court in connection with that claim. This court need not discuss the validity of this claim, however, because even if Ibarra's new evidence is admissible, his claim fails to meet the standard set forth in *Strickland*, for the reasons below. *See Newbury v. Stephens,* 756 F.3d 850, 872 (5th Cir. 2014) ("Because [the petitioner] has already received all of the relief available to him under the authority of *Martinez* and *Trevino*, that is, review of the merits by the federal court, it is not necessary" for the court to analyze the district court's application of those cases in further detail).

B. Whether State Habeas Counsel's Performance Was Deficient as a Matter of Law

Preliminarily, Ibarra argues that the district court violated the law of the case by determining that his claim did not amount to a "substantial" *Strickland* claim because, in his view, this court's decision to grant a COA by definition meant that his claim was substantial. This argument misapplies the standard for granting a COA. This court's grant of a COA means only *that reasonable jurists could debate* whether Ibarra's claim was substantial, *Buck v. Davis,* 137 S. Ct. 759, 775 (2017); it does not mean that the court held Ibarra's claim itself to be substantial on the merits. And after our grant of COA, the debate took place in the district court, and the court concluded that Ibarra's *Strickland* claim was not substantial. Thus, the district court's decision did not violate the law of the case. *See, e.g., Trevino v. Davis,* 861 F.3d 545, 550–551 (5th Cir. 2017), *cert. denied,* 138 S. Ct. 1793 (rejecting trial-IAC claim on merits after this court granted COA).

Next, Ibarra contends that the district court erred by holding that his state habeas counsel's performance was not deficient as a matter of law. The district court reviewed the evidence and concluded that there was "nothing to

support Ibarra's claim that counsel failed to investigate and present evidence in mitigation during the punishment phase, or that Ibarra's first habeas counsel was ineffective for failing to raise the IATC issue as it related to mitigation." In so holding, the district court noted that Ibarra's trial attorneys filed multiple motions including for investigative assistance and psychological evaluation. Ibarra was evaluated twice by Dr. Mark, a psychiatrist, who found no evidence of intellectual disability, discussed Ibarra's childhood, education, work history and alcohol abuse with him, and suspected him of "malingering." Further, the court found that much of the mitigating evidence that Ibarra proffers was in fact presented to the jury through the testimony of Ibarra's wife and sister, including "that [Ibarra] came to the United States to find work to help supports his family, that their family was poor, and they lived in 'humble' circumstances, working on the land, and the circumstances of his family situation in the United States."

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. To be sure, Ibarra's newly offered evidence and federal court briefing go into greater detail about Ibarra's specific circumstances, but 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. Under *Strickland*, counsel's conduct is "strongly presumed to fall within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 690. Moreover, counsel's advice or decisions need not be perfect—they need only to fall within the "range of competence demanded of attorneys in criminal cases." *McCann v. Richardson*, 397 U.S. 759, 771, 90 S. Ct. 1441, 1449 (1970). The

performance of Ibarra's state habeas counsel was not unconstitutionally deficient as measured by *Strickland*.

Ibarra also disputes the district court's conclusion that, even if his state habeas counsel's failure to raise the *Wiggins*[3] issue provided "cause" under the *Strickland* standard, Ibarra could not establish that he was prejudiced by that failure. To establish prejudice, a habeas petitioner must show that but for trial counsel's omissions, there exists a reasonable probability that the outcome of the trial would have been different. *See Strickland*, 466 U.S. at 694. As the Supreme Court explained, "*Strickland* asks whether it is 'reasonably likely' the result would have been different . . . The likelihood of a different result must be substantial, not just conceivable." *Harrington v. Richter,* 562 U.S. 86, 111–12, 131 S. Ct. 770 (2011) (quoting *Strickland,* 466 U.S. at 696).

The district court concluded that the aggravating factors presented by the State (detailing Ibarra's sexual assaults and domestic violence against multiple family members) were "more than sufficient to outweigh any additional potentially mitigating evidence" presented by Ibarra in light of the brutal facts of his case.

Challenging the district court's decision, Ibarra contends that the court erred as a matter of law in two ways. First, he argues that the district court erred by concluding that "a reasonable probability of a different sentencing result did not exist because the State's evidence establishing Mr. Ibarra's guilt for the capital offense was 'compelling' . . .." This argument is mistaken. The district court's only reference to the compelling evidence against Ibarra occurred during the court's recitation of the facts and procedural history of the case. In any event, the heinousness of the underlying crime—Ibarra raped, sodomized and murdered a young girl—can certainly be judged "compelling"

[3] *Wiggins v. Smith,* 539 U.S. 510 (2000).

by a jury determining the existence of aggravating circumstances, and Ibarra's guilt, which included DNA evidence and strong witness testimony, was also "compellingly" proven. The "brutal and senseless nature of the crime" and "evidence of violent conduct" may be weighed against *Strickland* prejudice. *Smith v. Quarterman,* 471 F.3d 565, 576 (5th Cir. 2006).

Second, Ibarra argues that the district court erred by "holding that [he] could not prevail because his allegations did not establish that the mitigating evidence presented 'outweighed' the aggravating evidence presented by the State" because "Texas imposes no such weighing requirement on juries considering mitigation evidence." This argument misses the mark because whether Texas formally requires juries to balance aggravating and mitigating factors has no bearing on the application of the *Strickland* standard. *Strickland* asks whether it is *reasonably likely* that, given the totality of the circumstances, a juror would have concluded that life in prison was a more appropriate sentence than the death penalty. Courts have routinely stated that to evaluate prejudice, the court "reweigh[s] the evidence in aggravation against the totality of the available mitigating evidence." *Wood v. Quarterman,* 491 F.3d 196, 203 (5th Cir. 2007) (quoting *Wiggins,* 539 U.S. at 534); *see also Trevino,* 861 F.3d at 549. That is the standard Ibarra must meet to establish prejudice, and the district court's application of the standard was not erroneous.

It must be added that although Ibarra wholly failed to brief the district court's weighing of the trial evidence along with his newly adduced mitigating evidence, the soundness of the district court's conclusion can hardly be doubted. Not only did Ibarra rape, sodomize and strangle his 16-year-old victim, but he had repeatedly sodomized his eight-year-old nephew and threatened to kill him; he molested his nephew on other occasions; he had beaten and come close to strangling a former girlfriend, including forcing her

to undress at gunpoint and threatening to kill her; he had beaten the woman when she confronted him about touching her daughter inappropriately; he had prior convictions for unlawfully carrying a weapon and DWI; and he misbehaved repeatedly in prison. 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 the facts above. The district court accurately found no prejudice.

For the foregoing reasons, the judgment of the district court denying habeas relief is **AFFIRMED**.

JAMES E. GRAVES, JR., Circuit Judge, dissenting:

Because I conclude that the district court violated the remand order, I would vacate and remand. Accordingly, I respectfully dissent.

This court previously vacated its prior decision, granted a certificate of appealability (COA), and remanded for the appropriate application of *Martinez v. Ryan*, 566 U.S. 1, 17 (2012), and *Trevino v. Thaler*, 133 S.Ct. 1911 (2013). *See Ibarra v. Stephens*, 691 F.3d 677 (5th Cir. 2012), *vacated in part*, 723 F.3d 599, 600 (5th Cir. 2013).

The majority states that the district court rejected Ramiro Rubi Ibarra's ineffective assistance of counsel claim because it was not "substantial." However, the district court explicitly said:

> Initially, the Court notes that Ibarra's request for a stay should be denied as *Martinez* and *Trevino* are inapplicable. 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, despite Ibarra's reliance upon Judge Graves' dissent. *Ibarra*, 723 F.3d at 600 (Graves, J., dissenting) ("I disagree with the majority's inclusion of the language that 'in all other respects, the majority and dissenting opinions remain in effect.'"). 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.

The district court's interpretation of the remand is erroneous. As the district court stated above, I previously dissented to the unnecessary, misleading, and limiting language included by the majority. In part, I was attempting to avoid a situation such as this. The district court then relied on that very language to somehow conclude it was prohibited from giving Ibarra's IATC claim the consideration ordered by this court. The district court erred in its determination that this court again affirmed the denial of Ibarra's IATC claim on the merits. Further, if that were the case, it would serve no purpose to remand to the district court on the basis of the erroneous application of

procedural default if we had already concluded the claim has no merit regardless of whether it is procedurally defaulted.

The district court's analysis of the remand order is erroneous. As stated by the majority, Ibarra had to prove that his claim was "substantial" or had "some merit." *Martinez*, 566 U.S. at 14-16. An insubstantial claim "does not have any merit." *Id.* at 16. Under the district court's erroneous conclusion that this court continued to affirm the denial of Ibarra's IATC claim on the merits, there was no possible way Ibarra could then establish that the claim was "substantial" or had "some merit."

Moreover, the district court's subsequent analysis regarding the application of *Martinez* is likewise erroneous. The district court said, "[i]n order to prove that his IATC claim has some merit, a petitioner must satisfy the requirements of *Strickland v. Washington*, 466 U.S. 668 (1984)." Ibarra does not have to fully prove his ineffective assistance of counsel claim. He merely has to prove that it has "some merit" in order to establish cause for the procedural default. *Martinez*, 566 U.S. at 10. While *Strickland* is a consideration in determining whether a claim is "substantial," the standards for proving an ineffective-assistance-of-counsel claim and establishing cause for procedural default are not interchangeable. If Ibarra is able to establish his claim is "substantial" or has "some merit," then he would have the opportunity to fully present his claim of ineffective assistance of counsel.

Despite the fact that this court had already granted a COA and remanded for the appropriate application of *Martinez*, the district court then found "sua sponte, that a certificate of appealability should not issue," denied Ibarra's motion and ordered the case back to this court. In doing so, the district court violated the remand order.

For these reasons, I would vacate and remand. Thus, I respectfully dissent.

APPENDIX 2

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-70014

RAMIRO RUBI IBARRA,

Petitioner - Appellant

v.

LORIE DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent - Appellee

Appeal from the United States District Court
for the Western District of Texas

ON PETITION FOR REHEARING

Before JONES, HAYNES, and GRAVES, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is denied.

ENTERED FOR THE COURT:

Edith H. Jones

UNITED STATES CIRCUIT JUDGE

APPENDIX 3

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-70014

United States Court of Appeals
Fifth Circuit
FILED
June 19, 2018
Lyle W. Cayce
Clerk

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Ramiro Rubi Ibarra was convicted of capital murder and sentenced to death. He is seeking a certificate of appealability ("COA") under 28 U.S.C. § 2254 from the district court's denial of relief on his *Martinez*/*Trevino* claims. For the reasons given below, we grant a COA on his ineffective assistance of counsel claim and deny his petition for a COA on his *Atkins* claim.

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

I. Background

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Most pertinent to the instant motion, Ibarra contended that "his trial counsel was ineffective in his investigation, development, and presentation of mitigation evidence, as well as the development of rebuttal evidence for the state's aggravating factors at sentencing" in violation of the Sixth Amendment and *Wiggins*, 539 U.S. at 522-23, 123 S. Ct. at 2536. As noted above, the TCCA dismissed this petition as a subsequent writ. The district court rejected this claim for two independent reasons: (1) procedural default under then-governing precedent, and (2) alternatively, meritlessness, because Ibarra could not demonstrate prejudice. *Ibarra*, 691 F.3d at 683. This court held that reasonable jurists "could not disagree with the district court's conclusion that Petitioner's *Wiggins* claim was procedurally defaulted" and denied a COA. *Id.* at 685.

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the state courts' rejection of the *Atkins* claim on the merits did not violate 28 U.S.C. § 2254(d)(1). *Ibarra,* 691 F.3d at 681-83.[1]

The Supreme Court then decided *Trevino v. Thaler*, 569 U.S. 413, 133 S. Ct. 1911 (2013). On a motion for rehearing, this court granted rehearing in part and vacated our initial decision "only to the extent inconsistent with *Trevino* and grant[ed] a COA only to that extent; in all other respects, the majority and dissenting opinions [of the prior opinion] remain[ed] in effect." *Ibarra*, 723 F.3d at 600. Judge Graves concurred in part and dissented in part.

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II. Standard of Review and Controlling Law

This court must first issue a COA, 28 U.S.C. § 2253(c)(1), a jurisdictional prerequisite to reviewing the district court's denial of habeas relief. *Miller-El v. Cockrell*, 537 U.S. 322, 323, 123 S. Ct. 1029, 1032 (2003). A COA may only be granted when the petitioner "has made a substantial showing of the denial of a constitutional right." *Id.* at 336, 123 S. Ct. at 1039 (internal quotation marks omitted). This standard means that the "petitioner must show that reasonable jurists could debate whether (or for that matter, agree that) the petition should have been resolved in a different manner or that the issues

[1] This court also denied COA on the VCCR claim, a holding that has not been challenged.

presented were adequate to deserve encouragement to proceed further." *Id.* (internal quotation marks omitted).

Martinez v. Ryan held that "a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective." 566 U.S. 1, 17, 132 S. Ct. 1309, 1320 (2013). This principle was extended to Texas in *Trevino*. 569 U.S. at 429, 133 S. Ct. at 1921. Such a "substantial claim" constitutes "cause" for the procedural default, but, in line with traditional precedent, the petitioner must also prove that he suffered "prejudice" from counsel's errors. *Martinez,* 566 U.S. at 10, 132 S.Ct. at 1316 (citing *Coleman v. Thompson,* 501 U.S. 722, 750, 111 S.Ct. 2546 (1991)). A "substantial" claim is one that has "some merit." *Martinez*, 566 U.S. at 14, 132 S. Ct. at 1318. An insubstantial claim is one which "does not have any merit" or "is wholly without factual support." *Id.* at 15-16, 132 S. Ct. at 1319. The standard for evaluating an ineffective assistance of counsel claim is given in *Strickland*, which states the petitioner must show "that counsel's performance was deficient" and "that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. at 687, 104 S. Ct. 2064. The State succeeds in establishing procedural default if the IATC claim is insubstantial, or the initial habeas attorney was not constitutionally ineffective, or Ibarra has not proved sufficient prejudice to overcome his procedural default. *Martinez*, 566 U.S. at 15-16, 18, 132 S. Ct. at 1319, 1321.

III. Analysis

Ibarra's motion for COA asserts that reasonable jurists could debate the district court's conclusions that his IATC claim lacked merit, his initial state

habeas counsel was constitutionally deficient for not raising that claim, and his *Atkins* claim may also be re-reviewed by this court.

A.

Ibarra argues trial counsel were ineffective for failing to investigate and present additional mitigating evidence about Ibarra's background. He argues that a "thorough background investigation" would have uncovered:

> (1) Ibarra's extreme childhood impoverishment to the point of malnourishment and living conditions far more dire than "humble;" (2) extreme physical and emotional abuse perpetrated against Ibarra as a child by his father; (3) Ibarra's witnessing extreme physical and emotional abuse perpetrated against loved ones by his father as a child; (4) Ibarra's attempts to care for and protect his siblings from their poverty and from their father's abuse; (5) Ibarra's significantly subaverage intellectual functioning; (6) Ibarra's developmental intellectual disability; and (7) Ibarra's development of severe post-traumatic stress disorder as a result of his experiencing and witnessing the extreme violence perpetrated by his father throughout his childhood and experiencing the near deaths and deaths of family members due to their extreme poverty.[2]

Ibarra argues that trial counsels' failure to present this evidence prejudiced him at the sentencing stage.

In *Buck v. Davis*, the Supreme Court cautioned this court that a COA determination "is not coextensive with a merits analysis." 127 S. Ct. 759, 773 (2017). At this stage, we only consider whether Ibarra's claim is debatable. *See id.* at 774. We find that it is. Because Ibarra's original IATC claim is debatable, we also find that it is debatable whether his initial habeas counsel

[2] Ibarra contends that the district court was obliged to hold an evidentiary hearing on his *Martinez* claim, but circuit precedent does not support such a requirement. *Segundo v. Davis*, 831 F.3d 345, 351 (5th Cir. 2016).

was ineffective for not pursuing this claim. Therefore, we grant a COA on this issue.

B.

Ibarra argues that he is entitled to a COA on his *Atkins* claim consistent with our COA on rehearing. Reasonable jurists could not debate the district court's rejection of this argument. This court denied a COA on the *Atkins* claim, *see Ibarra,* 691 F.3d at 682-83, and made clear that the order granting COA in light of *Trevino* did not affect this portion of our ruling. *See, e.g., Ayestas v. Stephens,* 817 F.3d 888, 889 (5th Cir. 2016) (remand order after *Trevino* did not leave open any matter other than the defaulted IATC claim).[3] Nothing in that order suggests that the *Atkins* claim was within the scope of remand.

Ibarra alternatively contends that *Martinez* and *Trevino* should be extended to cover *Atkins* claims. He states that *Davila v. Davis*, 137 S. Ct. 2058 (2017) supports his assertion. He also argues that he should be able to pursue this claim because *Moore v. Texas*, 137 S. Ct. 1039 (2017), is retroactive and provides an exception to the Section 28 U.S.C. 2254(d)(1) relitigation bar and law of the case. We need not consider the debatability of these issues because reasonable jurists could not debate that Ibarra's underlying *Atkins* claim, as presented to the state courts, has no merit. Even if *Moore* applied to this case, it would not benefit Ibarra because, although explicitly given a fair opportunity to present an *Atkins* claim, his counsel, who continue to represent

[3] The dissenting opinion appears to argue that the *Martinez/Trevino* holdings may be extended to Ibarra's second state postconviction proceeding, which explicitly considered his *Atkins* claim on the merits. Thus, are we to infer that Ibarra's counsel must have been ineffective in that proceeding, and they, the same attorneys, can relitigate de novo their *Atkins* claim in federal court? This would be a significant extension of *Martinez/Trevino*. Together, those cases hold only that a claim of ineffective assistance of state trial counsel is not procedurally defaulted (or the default can be overcome) if the state habeas counsel was ineffective for failing to raise trial counsel's ineffectiveness in the state habeas court.

him to this day, failed to offer admissible evidence of intellectual disability in the state court. Ibarra argues that this court should consider evidence that he did not present in state court. Under *Cullen v. Pinholster*, 563 U.S. 170, 181-82, 131 S. Ct. 1388, 1398 (2011), this is impermissible.[4] As this court previously held, Ibarra presented "essentially no supporting evidence" of intellectual disability in state court. *Ibarra*, 691 F.3d at 681-82. Accordingly, a COA on this claim must be denied.

We **GRANT** a COA on Ibarra's post-*Trevino* defaulted IATC claim. Counsel will proceed to file briefs as instructed by the clerk's office. However, in light of the substantial briefing we have already received concerning the COA, counsel are authorized to supplement the COA briefing as appropriate and may cross reference their COA briefs. We also hold that reasonable jurists could not debate the district court's refusal on remand to consider Ibarra's *Atkins* claim. We therefore **DENY** his application for a COA on his *Atkins* claim.

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[4] To allow such relitigation with counsel's newly proffered evidence would effect a complete end run around the state court system and would violate AEDPA specifically. 28 U.S.C. § 2254(e)(2). Although the dissenting opinion quotes this provision, Ibarra never attempted to show that this provision's stringent test for de novo review in federal court has been met. To begin, 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, as that provision requires. Holding that reasonable jurists could debate a potential extension of *Martinez/Trevino* under these circumstances is plainly at odds with AEDPA as well as *Cullen v. Pinholster*, *supra*.

JAMES E. GRAVES, JR., Circuit Judge, dissenting in part:

I concur with the majority in granting a certificate of appealability (COA) on Ramiro Rubi Ibarra's ineffective assistance of counsel claims. However, because I would also grant a COA on Ibarra's claim under *Atkins v. Virginia*, 536 U.S. 304, 321 (2002), I respectfully dissent in part.

Under the Antiterrorism and Effective Death Penalty Act (AEDPA), a COA should issue when a petitioner makes a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To meet this standard, Ibarra must show 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." *Miller–El v. Cockrell*, 537 U.S. 322, 327 (2003). Further, "any doubt as to whether a COA should issue in a death-penalty case must be resolved in favor of the petitioner." *Pippin v. Dretke*, 434 F.3d 782 (2005).

Ibarra was originally sentenced prior to *Atkins*. He later had an *Atkins* hearing. This court previously considered Ibarra's claims based on what was presented by counsel who was arguably ineffective, noting that "[a]t the state court evidentiary hearing regarding his *Atkins* claim, he presented essentially no supporting evidence." *Ibarra v. Thaler*, 691 F.3d 677, 681 (5th Cir. 2012). Although Ibarra's counsel attempted to introduce an expert affidavit in state court, it was found to be inadmissible because it was not notarized. *Id.* at 682. Counsel then attempted to introduce a notarized affidavit in federal court, but the district court found that it was procedurally barred under 28 U.S.C. § 2254(b) for failure to exhaust in state court. This court later acknowledged that the disallowed evidence was "essential to his claim of mental retardation." *Id.* The majority then agreed that the district court "properly disregarded this newly proffered evidence" as procedurally barred. The majority also purported to find, in the alternative, that the district court properly found that Ibarra's

claim had no merit based on the state court record, despite acknowledging that "[c]ritically, the record before the state court hearing Ibarra's claim of mental retardation did not include the expert affidavit that could have served as some evidence of his sufficiently low IQ." *Id*. The record also did not include mitigation evidence that would have provided additional insight into both Ibarra's intellectual disability and his adaptive skills deficits. If trial counsel was ineffective in failing to present evidence of intellectual disability or adaptive skills deficits for purposes of mitigation at sentencing, then that necessarily affected the outcome of Ibarra's *Atkins* claim.[1]

Ibarra has evidence that his full scale IQ is 65, well within the intellectually disabled range, that he suffered intellectual deficits throughout his childhood, and of his adaptive skills deficits. Ibarra has an expert affidavit from Dr. Carol Romey concluding that he is intellectually disabled. Ibarra asserts that Dr. Stephen Mark was not even hired until after voir dire in his trial had already begun. Further, Mark was not provided relevant social history information, failed to do necessary intellectual functioning testing of Ibarra, and did not speak Spanish, Ibarra's only language. Ibarra argued in his application for a COA that his trial counsel was ineffective for failing to investigate and present mitigation evidence relevant to his *Atkins* claim and that the state court process was blatantly unfair for various reasons, including the denial of adequate funding. To the extent that any failure to perform necessary investigation or to present adequate evidence in state court was the result of ineffective assistance of counsel, Ibarra is entitled to present his *Atkins* claim.

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[1] This is not an argument about Ibarra's second state post-conviction proceeding. But even if that were the case, the majority explicitly ignores the relevant authority that would allow Ibarra to overcome any procedural default, as well as the application of the fundamental miscarriage of justice provision.

As the majority acknowledges, under *Buck v. Davis*, 137 S.Ct. 759 (2017), Ibarra is not required to prove his claims on the merits. "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." *Id*. at 773.

The majority faults Ibarra's counsel "who continue to represent him to this day" for failing to offer admissible evidence of intellectual disability in state court. However, Ibarra's current counsel did not represent him at trial, on appeal, or in his "initial-review collateral proceedings." *Martinez*, 566 U.S. at 9. Moreover, the arguable ineffectiveness of Ibarra's previous counsel is the reason he benefits from the equitable ruling in *Martinez*. The majority cites *Cullen v. Pinholster*, 563 U.S. 170, 181-82 (2011), for the proposition that evidence of intellectual disability may not be considered unless it was presented in state court. While that typically may be the rule, *Pinholster* is distinguishable because the court concluded that the defendant was unable to demonstrate either prong of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 686-92 (1984). *Pinholster*, 563 U.S. at 194-201. Significantly, the court also acknowledged that "state prisoners may sometimes submit new evidence in federal court," although AEDPA discourages it. *Id.* at 186.

AEDPA includes a provision for the introduction of new evidence in federal court. 28 U.S.C. § 2254(e)(2) states:

> If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that--
>
> (A) the claim relies on--

> (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
> (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2254(e)(2).

Additionally, binding precedent allows a petitioner to overcome procedural defaults and introduce new evidence in certain instances. *See Morris v. Dretke*, 379 F.3d 199, 205 (5th Cir. 2004) (Exhaustion may be excused.); *see also Martinez v. Johnson*, 255 F.3d 229, 239 (5th Cir. 2001) (Petitioner may overcome a procedural default and "obtain federal habeas corpus review of his barred claims on the merits, if he can demonstrate cause for the defaults and actual prejudice."); and *Barrientes v. Johnson*, 221 F.3d 741, 758 (5th Cir. 2000) (Petitioner can overcome procedural default if "failure to consider the claims will result in a fundamental miscarriage of justice"). These cases rely on *Coleman v. Thompson*, 501 U.S. 722, 750 (1991), where the United States Supreme Court said:

> We now make it explicit: In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.

Id. at 750.

Under this relevant authority, Ibarra is arguably able to overcome the procedural default for failure to exhaust and obtain federal habeas review of his barred claims. Ibarra can arguably demonstrate cause for the defaults and actual prejudice. More importantly, failure to consider the claim would result in a fundamental miscarriage of justice if an intellectually disabled man were to be unconstitutionally executed.

However, on remand after the United States Supreme Court's decision in *Trevino v. Thaler*, 569 U.S. 413 (2013)[2], the district court did not discuss Ibarra's *Atkins* claim, finding that it was not within the scope of this court's remand order. That finding was the result of the majority's inclusion of language on remand limiting Ibarra's claims of ineffective assistance of counsel with regard to issues on which the majority had previously denied his COA. *Ibarra v. Stephens*, 723 F.3d 599, 600 (5th Cir. 2013). I dissented to the inclusion of any such language on the basis that Ibarra was not foreclosed from raising his ineffective assistance of counsel claims on those issues. *Id.* (Graves, J., dissenting in part) ("Simply put, the trial court is free to determine whether or not evidence related to these issues is relevant to any claim of ineffective assistance of counsel, and is likewise free to determine if any ineffective assistance affects the merits of these issues or any procedural default."). I continue to conclude that Ibarra is not foreclosed from presenting his *Atkins* claim to the extent that it is encompassed within *Trevino/Martinez*.

For the reasons stated herein, jurists of reason could find debatable the disposition of Ibarra's *Atkins* claim. Because I would grant a COA on Ibarra's *Atkins* claim to the extent that it is encompassed within *Trevino/Martinez*, I respectfully dissent in part.

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[2] In Trevino, the Supreme Court vacated this court's judgment that Martinez v. Ryan, 566 U.S. 1 (2012), did not apply to Texas. In Ibarra's case, the majority likewise concluded that Martinez did not apply to Texas, thus, necessitating remand.

APPENDIX 4

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

RAMIRO RUBI IBARRA, **Petitioner,**	§	
v.	§	**CIVIL ACTION NO. W-02-CA-052-RP**
LORIE DAVIS,[1] Director, Texas Department of Criminal Justice, Correctional Institutions Division, **Respondent.**	§	

MEMORANDUM OPINION AND ORDER

After being convicted of capital murder in the brutal rape and slaying of 16-year-old Maria De La Paz in 1996,[2] Petitioner Ramiro Rubi Ibarra ("Ibarra"), has sought review of his conviction and sentence through direct appeal and post-conviction relief in both state and federal court. The Fifth Circuit has remanded Ibarra's federal habeas application in light of the Supreme Court's opinion in *Trevino v. Thaler*, — U.S. —, 133 S.Ct. 1911 (2013). *Trevino* extended to Texas the effect of *Martinez v. Ryan*, — U.S.—, 132 S.Ct. 1309 (2012), in which the Supreme Court held for the first time that ineffective assistance of counsel could establish the cause required to overcome a procedural default.

In the present federal habeas application, Judge Walter S. Smith, Jr., who has since retired, originally denied all of Ibarra's claims and declined to issue a certificate of appealability (COA). One of the claims presented by Ibarra, and the subject of the Fifth Circuit's remand, was that his trial counsel was ineffective for failing to investigate, develop and present available mitigation evidence--a claim under *Wiggins v. Smith*, 539 U.S. 510 (2003) (the failure of petitioner's attorney to investigate and present

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[1] The previous named respondent in this action was William Stephens. On May 1, 2016, Lorie Davis succeeded Stephens as Director of the Texas Department of Criminal Justice, Correctional Institutions Division. Under Rule 25(d) of the Federal Rules of Civil Procedure, Davis is automatically substituted as a party.

[2] The murder was committed in 1987.

mitigating evidence during his capital murder trial constituted ineffective assistance of counsel). Judge Smith determined the claim was procedurally defaulted as it was first presented to the state court in Ibarra's fourth writ of habeas corpus, which was dismissed by the Texas Court of Criminal Appeals as an abuse of the writ under Article 11.071, Section 5(a) of the Texas Code of Criminal Procedure.

After appeal, the Fifth Circuit issued an opinion affirming Judge Smith's opinion and holding that *Martinez* did not apply to Texas cases as there were procedures in place to raise ineffective assistance of trial counsel (IATC) claims on direct appeal. *Ibarra v. Thaler*, 687 F.3d 222, 227 (5th Cir. 2012); *Ibarra v. Thaler*, 691 F.3d 677 (5th Cir. 2012). After the Supreme Court determined in *Trevino* that *Martinez* did apply in Texas, the Fifth Circuit granted rehearing and vacated its opinion to the extent it conflicted with *Trevino*. The Fifth Circuit then granted a rehearing and vacated its previous decision, but only to the extent it was inconsistent with *Trevino*. The Fifth Circuit then vacated Judge Smith's opinion, also only to the extent the opinion was inconsistent with *Trevino*, and remanded the case for further proceedings. *Ibarra v. Stephens*, 723 F.3d 599 (5th Cir. 2013). Judge Smith's opinion was affirmed in all other aspects. Judge Smith set a briefing schedule for the parties and denied Ibarra's request for a stay and a remand to state court to pursue his IATC claim. Ibarra now requests reconsideration of that denial.[3]

Initially, the Court notes that Ibarra's request for a stay should be denied as *Martinez* and *Trevino* are inapplicable. 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, despite Ibarra's reliance upon Judge Graves' dissent. *Ibarra*, 723 F.3d. at 600 (Graves, J., dissenting) ("I disagree with the majority's inclusion of the language that 'in all other respects, the majority and dissenting opinions remain in effect'"). As

[3] Petitioner also asks that this case be remanded to state court to allow him to pursue a claim under *Atkins v. Virginia*, 536 U.S. 304 (2002). However, that claim is beyond the scope of the Fifth Circuit's remand.

the majority opinion remanded the case only in regard to the procedural default issue, the opinion did not effect the denial of Ibarra's IATC claim on the merits.

Even if the Fifth Circuit's opinion does not bar re-analysis of Ibarra's IATC claim, his request for a stay is unwarranted. Generally, stay and abeyance is "available only in limited circumstances." *Rhines v. Weber*, 544 U.S. 269, 277 (2005). It is appropriate when "the district court determines there was good cause for the petitioner's failure to exhaust his claims first in state court." *Id.* However, even if good cause is demonstrated, "the district court would abuse its discretion if it were to grant [the petitioner] a stay when his unexhausted claims are plainly meritless." *Id.* It would also be an abuse of discretion to grant a petitioner a stay when he has engaged in "abusive litigation tactics or intentional delay. . . ." *Id.* at 278. Additionally, "a stay is not generally warranted when a petitioner raises only record-based claims subject to 28 U.S.C. § 2254(d)." *Ryan v. Gonzales*, — U.S. —, 133 S.Ct. 696, 708 (2013). In the present case, while Ibarra argues additional investigation and evidence is required to fully develop his IATC claim, the record in this case is sufficient to evaluate the validity of his claim.

"Federal courts lack jurisdiction to review a habeas claim 'if the last state court to consider that claim expressly relied on a state ground for denial of relief that is both independent of the merits of the federal claim and an adequate basis for the court's decision.'" *Canales v. Stephens*, 765 F.3d 551, 562 (5th Cir. 2014) (quoting *Roberts v. Thaler*, 681 F.3d 597, 603 (5th Cir.), *cert. denied*, — U.S. —, 133 S.Ct. 529 (2012)). Article 11.071, which was applied to Ibarra's IATC claim, is a procedural default rule which serves as an independent and adequate state law ground for the state court's dismissal of a petitioner's claim. *Barrientes v. Johnson*, 221 F.3d 741, 759 (5th Cir. 2000), *cert. dismissed*, 531 U.S. 1134 (2001). A federal court may consider the merits of a procedurally defaulted claim if the petitioner shows both cause and actual prejudice. *Martinez*, 132 S.Ct. at 1321. Federal review is barred if a petitioner cannot establish both. *Hernandez v. Stephens*, 537 F.App'x 531 542 (5th Cir. 2013).

Prior to *Martinez*, an attorney's negligence in a postconviction proceeding could not serve as "cause." *Martinez*, 132 S.Ct. at 1319. *Martinez*, extended to Texas by *Trevino*, carved out a "narrow" exception to the "cause" element. *Trevino*, 133 S.Ct. at 1917. A petitioner may now meet the cause element by showing "(1) that his claim of ineffective assistance of counsel at trial is substantial–i.e., has some merit–and (2) that habeas counsel was ineffective in failing to present those claims in his first state habeas proceeding." *Garza v. Stephens*, 738 F.3d 669, 676 (5th Cir. 2013), *cert. denied*, — U.S. —, 134 S.Ct. 2876 (2014)). "For a claim to be 'substantial,' a petitioner 'must demonstrate that the claim has some merit.'" *Reed v. Stephens*, 739 F.3d 753, 774 (5th Cir.), *cert. denied*, — U.S. —, 135 S.Ct. 435(2014) (quoting *Martinez*, — U.S. —, 132 S.Ct. at 1318). "Conversely, an 'insubstantial' ineffective assistance claim is one that 'does not have any merit' or that is 'wholly without factual support.'" *Reed*, 739 F.3d at 774 (quoting *Martinez*, 132 S.Ct. at 1319).

In order to prove that his IATC claim has some merit, a petitioner must satisfy the requirements of *Strickland v. Washington*, 466 U.S. 668 (1984). Under this test, the petitioner must establish: (1) that counsel's performance was deficient; and (2) that the deficient performance prejudiced the defense so as to deprive him of a fair trial. *Id.* at 687. The proper standard for evaluating counsel's performance is that of reasonably effective assistance, considering all of the circumstances existing as of the time of counsel's conduct. *Hill v. Lockhart*, 474 U.S. 52 (1985). Scrutiny of counsel's performance is "extremely deferential;" *Bell v. Lynaugh*, 828 F.2d 1085, 1088 (5th Cir. 1987); and counsel's conduct is "strongly presumed to fall within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 690. Counsel's advice need not be perfect -- it need only be reasonably competent within the "range of competence demanded of attorneys in criminal cases." *McMann v. Richardson*, 397 U.S. 759, 771 (1970). Ibarra's trial counsel did present mitigating evidence at trial. The fact that he might have

presented additional mitigating evidence is insufficient in and of itself to establish ineffective assistance of counsel.

The second prong of *Strickland* mirrors the second prong of *Martinez* – the petitioner must show prejudice. Under *Strickland*, this requires a showing that but for counsel's ineffective performance, there is a reasonable probability that a different outcome would have been reached. *Strickland*, 466 U.S. at 694. A reasonable probability is one that is sufficient to undermine the outcome of the case. *Id.* "[T]he mere possibility of a different outcome is not sufficient to prevail on the prejudice prong." *Crane v. Johnson*, 178 F.3d 309, 312 (5th Cir.), *cert. denied*, 528 U.S. 947 (1999). "The likelihood of a different result must be substantial, not just conceivable." *Harrington v. Richter*, 562 U.S. 86 (2011) (citation omitted). The defendant must demonstrate that the prejudice rendered his case "fundamentally unfair or unreliable." *Crane*, 178 F.3d at 312. Ibarra's habeas application falls short of establishing prejudice to either excuse his default or to establish his IATC claim.

The evidence supporting Ibarra's conviction was compelling. Ibarra's DNA matched the semen recovered from Maria's body and underwear, as well as material from under her fingernails. Witnesses identified Ibarra and his car leaving Maria's residence at the time of the murder. Ibarra's car was distinctive–a late-model Camaro, which was red in color from primer or oxidation, with mismatched rims, a bent antenna, dual exhaust pipes, and a fan mounted on the dashboard. Maria's family Ibarra, a family acquaintance, as matching the witnesses' descriptions. When questioned by police, Ibarra had scratches on his face, and additional scratches on his chest were noted after his arrest.

After Ibarra's conviction, the only issue raised by his first habeas counsel was that the lengthy delay between the commission of the offense and Ibarra's trial constituted cruel and unusual punishment.

Ibarra contends that the case should be stayed and remanded to state court to allow him to investigate and conduct discovery related to mitigation and in rebuttal of the State's case in aggravation.[4] However, it is unclear what further investigation would reveal. In his habeas petition, Ibarra indicated that further investigation by either trial counsel or his first state habeas counsel would have "established numerous problems with his background, including desperate poverty, inadequate nutrition, disruptive family life, experience of an exposure to family violence, poor childhood development both mentally and physically, poor performance at school," and that he suffered a head injury as a child. *Ibarra v. Thaler*, No. W-02-CA-052, p. 32 (W.D.Tex. Mar. 31, 2011). However, as Judge Smith found, the state court records reflect that counsel filed motions for investigative funding and assistance, including an evaluation by Dr. Stephen Mark, a psychiatrist. *Id.* at 33. "Many of the facts identified by Petitioner were in fact presented to the jury through the testimony of Petitioner's sister and his wife, 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." *Id.* There is, therefore, nothing to support Ibarra's claim that counsel failed to investigate and present evidence in mitigation during the punishment phase, or that Ibarra's first habeas counsel was ineffective for failing to raise the IATC issue as it related to mitigation.

Also, as Judge Smith noted, Ibarra is unable to establish prejudice even if either counsel were determined to be ineffective. The aggravating factors presented by the State were more than sufficient to outweigh any additional potentially mitigating evidence, "particularly considering the 'brutal and senseless nature of the crime.'" *Id.*, p. 33 (quoting *Smith v. Quarterman*, 471 F.3d 565, 576 (5th Cir. 2006),

[4] Ibarra's argument that he should also be allowed to investigate trial counsel's allegedly deficient performance at the guilt phase goes beyond the parameters of his IATC claim in his habeas corpus application. Even if the Court were to determine that trial counsel was somehow ineffective at the guilt phase as a result of a failure to investigate, Ibarra would be unable to establish *Strickland's* prejudice prong due to the strong evidence of his guilt.

cert. denied, 550 U.S. 939 (2007)). The evidence presented at the punishment phase consisted of the following:

> . . . Petitioner anally sodomized his eight-year-old nephew on two occasions, and threatened to kill him if he told. On another occasion, Petitioner had his nephew "masturbate" him in the shower, and he tried to force the nephew on a subsequent occasion to grab his penis. Petitioner's sister-in-law testified that Petitioner 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 Petitioner had sexually abused her son. Maria Luna Diaz, with whom Petitioner had a relationship, testified that Petitioner 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. Petitioner 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 Petitioner touched her breast inappropriately when she was 11 years old. She immediately told her mother of the incident. When Maria Luna confronted Petitioner, he beat her.
>
> The jury also heard that Petitioner had prior convictions for unlawfully carrying a weapon and driving while intoxicated. There was also testimony regarding an arrest for misdemeanor theft, when Petitioner 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 Petitioner's car, along with several college-level criminal justice textbooks in English.
>
> Other witnesses testified to Petitioner'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 Petitioner's alleged suicide attempt, wherein he cut his neck. Jail and hospital personnel testified about his uncooperativeness and feigned unconsciousness.
>
> While Petitioner's wife, Maria Gandera Ibarra, testified on his behalf, the State elicited testimony from her on cross-examination that Petitioner had beaten her on several occasions, even while she was pregnant. She also testified that Petitioner had brought an 18-year-old girl from Mexico to live with them. Although Petitioner 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.
>
> The State also presented the testimony of Dr. Richard Coons, a psychiatrist, who gave his opinion that an offender with Petitioner's history and sexual proclivities would constitute a continuing threat to society.

Id. at 5 (footnote omitted, which indicated that Ibarra was convicted of aggravated sexual assault as a result of the sexual assault of his eight-year-old nephew). This is in addition to the particularly violent nature of Maria's murder–she was sexually assaulted, including both vaginal and anal penetration; her

clothing was ripped and her underwear torn from her body; she was severely beaten in the face and the rest of her body, leaving her covered with numerous bruises and contusions, and causing significant blood loss; and she was strangled with a yellow-coated wire. *Id.* at 2. Ibarra does not identify what mitigating evidence might be uncovered which would come close to outweighing the aggravating factors introduced in this case. In light of the foregoing, the Court determines that Ibarra has failed to establish the actual prejudice necessary to overcome his procedural default or to establish ineffective assistance of counsel. It is, therefore,

ORDERED that Ibarra's Opposed Motion to Reconsider is **DENIED**. It is further

ORDERED that this case be returned to the Fifth Circuit Court of Appeals.

Additionally, having considered the findings and conclusions set forth above and the requirements of 28 U.S.C. § 2253, the Courts finds, *sua sponte*, that a certificate of appealability should not issue, as Ibarra has failed to make a substantial showing of the denial of a constitutional right.

SIGNED on September 28, 2016.

ROBERT PITMAN
UNITED STATES DISTRICT JUDGE

APPENDIX 5

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
FILED
July 17, 2013
Lyle W. Cayce
Clerk

No. 11-70031

RAMIRO RUBI IBARRA,

Petitioner - Appellant

v.

WILLIAM STEPHENS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent - Appellee

Appeal from the United States District Court
for the Western District of Texas

Before JONES, HAYNES, and GRAVES, Circuit Judges.

ORDER

Treating the Appellant's motion for en banc rehearing as a motion for panel rehearing, and given the Supreme Court's recent decision in *Trevino v. Thaler*,133 S. Ct. 1911 (2013), the court GRANTS the motion for rehearing in part.[1] 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.

[1] The effect of this ruling is to moot the Petition for Rehearing En Banc.

GRAVES, Circuit Judge, concurring in part and dissenting in part:

I agree that the Supreme Court's recent decision in *Trevino v. Thaler*, 133 S.Ct. 1191 (2013), requires us to vacate our prior decision, grant Ibarra's certificate of appealability (COA), and remand to the district court for the appropriate application of *Martinez v. Ryan*, 132 S.Ct. 1309 (2012).[2] The trial court should, in the first instance, be allowed to apply *Martinez* in accordance with *Trevino*. *See Cantu v. Thaler*, 682 F.3d 1053 (5th Cir. 2012)

However, I disagree with the majority's inclusion of the language that "in all other respects, the majority and dissenting opinions remain in effect." The inclusion of this language is an unwarranted and unnecessary potential limiter on the consideration of Ibarra's claims of ineffective assistance of trial counsel with regard to issues on which the majority previously denied his COA. Ibarra is clearly not foreclosed from raising his ineffective assistance of counsel claims on these issues. Simply put, the trial court is free to determine whether or not evidence related to these issues is relevant to any claim of ineffective assistance of counsel, and is likewise free to determine if any ineffective assistance affects the merits of these issues or any procedural default. *Id.* Thus, I disagree with any language which may be construed to the contrary.

[2] This is entirely consistent with my previous separate opinions in this case wherein I disagreed with the panel majority's rejection of the application of *Martinez*. *See Ibarra v. Thaler*, 687 F.3d 222 (2012) (Graves, J., concurring in part and dissenting in part), and *Ibarra v. Thaler*, 691 F.3d 677 (2012) (Graves, J., dissenting).

APPENDIX 6

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
FILED
August 17, 2012
Lyle W. Cayce
Clerk

No. 11-70031

RAMIRO RUBI IBARRA,

Petitioner-Appellant

v.

RICK THALER, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION,

Respondent-Appellee

Appeal from the United States District Court
for the Western District of Texas

Before JONES, Chief Judge, and HAYNES and GRAVES, Circuit Judges.

EDITH H. JONES, Chief Judge:

The court has considered Ramiro Rubi Ibarra's application for a Certificate of Appealability ("COA") from the district court's denial of habeas relief following his capital murder conviction. The issues he raises concerning mental retardation, ineffective trial counsel and breach of the Vienna Convention on Consular Relations were rejected by the district court in terms that are not debatable among reasonable jurists. We therefore DENY the application.

Background

The district court ably detailed the facts of this case; we recite them only as material here. Ramiro Rubi Ibarra ("Petitioner"), an illegal alien, brutally

raped, sodomized, and strangled 16-year-old Maria De La Paz Zuniga. Forensic and eyewitness evidence quickly led to Petitioner's arrest and indictment, but a technicality prevented police from obtaining a necessary warrant for his blood and hair samples, permitting him to escape justice for nearly a decade. A change in Texas law allowed police to obtain the requisite warrant, and DNA analysis matched Petitioner to the crime. He was indicted, tried, found guilty, and sentenced to death.

At the punishment phase of trial, the jury heard evidence that Petitioner sodomized his eight-year-old nephew and threatened to kill the boy if he told anyone. The jury also heard evidence that he molested his nephew on other occasions. Petitioner's sister-in-law testified that there was some indication he had abused her son. It heard testimony from his sometime paramour Maria Luna Diaz that Petitioner had beaten and sexually assaulted her, including once forcing her to undress at knifepoint and threatening to kill her if she disobeyed him. She testified that he threatened to strangle her, wrapped a wire around her neck, and pushed her down, releasing her only when she begged for her life. Diaz's daughter testified that Petitioner touched her breast inappropriately when she was eleven years old; she told her mother, who confronted Petitioner and was rewarded with a beating. Petitioner had been previously convicted for unlawfully carrying a weapon and driving while intoxicated. Further, Ibarra misbehaved while in prison: he masturbated in public view, attempted suicide, fought another inmate, feigned unconsciousness, and was generally uncooperative.

Petitioner's wife, Maria Gandera Ibarra, testified on his behalf, but admitted on cross-examination that he beat her several times, including when she was pregnant. She also testified that he brought an 18-year-old girl from Mexico to live with them; although Petitioner said that she was his daughter, he kissed her on the mouth and spent hours alone with her in a bedroom behind

closed doors. A psychiatrist testified for the state that in his expert opinion, an offender with Petitioner's history and sexual proclivities would constitute a continuing threat to society.

Petitioner'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, 121 S. Ct. 79 (2000). His first state habeas corpus petition was denied. *Ex parte Ibarra*, No. WR-48832-01 (Tex. Crim. App. Apr. 4, 2001). Petitioner then submitted his federal habeas petition, which was stayed while he exhausted additional state court claims pursuant to *Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242 (2002), which banned the execution of the mentally retarded. 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, 128 S. Ct. 1346 (2008).

The Texas Court of Criminal Appeals remanded Petitioner's *Atkins* claim to the trial court for an evidentiary hearing. The trial court determined that Petitioner was not mentally retarded, and this holding was adopted on appeal by the Court of Criminal Appeals ("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-48832-03, 2007 WL 2790587, (Tex. Crim. App. Sept. 26, 2007). Petitioner's application for certiorari on his *Avena* claim was denied. *Ibarra v. Texas*, 553 U.S. 1055, 128 S. Ct. 2475 (2008). A

fourth state habeas petition, raising a claim under *Wiggins v. Smith*, 539 U.S. 510, 123 S. Ct. 2527 (2003), was also dismissed by the CCA as a subsequent writ. *Ex parte Ibarra*, No. WR-48832-04, 2008 WL 4417283 (Tex. Crim. App. Oct. 1, 2008).

Petitioner's federal habeas petition asserted eleven grounds for relief, all of which were rejected by the district court. Petitioner seeks a COA to challenge three of those claims. First, he seeks a COA regarding his *Atkins* claim that he is mentally retarded. The district court concluded that Petitioner'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 Petitioner was not retarded. Second, Petitioner seeks 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 Petitioner could not demonstrate prejudice under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984). Finally, Petitioner seeks 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 Petitioner could not demonstrate prejudice.

Standard for a Certificate of Appealability

Under the Antiterrorism and Effective Death Penalty Act ("AEDPA"), 28 U.S.C. § 2253(c)(2), a prisoner requesting a COA must make "a substantial showing of the denial of a constitutional right." This standard is met when a petitioner demonstrates "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."

Druery v. Thaler, 647 F.3d 535, 538 (5th Cir. 2011) (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 327, 123 S. Ct. 1029, 1034 (2003)). In determining this issue this court "view[s] 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). Where a state court decision was reviewed on the merits, we defer to the state court's decision regarding that claim unless the decision is "contrary to, or involve[s] an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or . . . [is] based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." *Druery*, 647 F.3d at 538 (quotation marks and citation omitted).

Where the district court has denied a claim on procedural grounds, a COA will issue only if the petitioner demonstrates both that jurists of reason might debate whether his petition states a substantial showing of the denial of a constitutional right *and* "that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S. Ct. 1595, 1604 (2000).

Discussion

We address each of Ibarra's claims in turn: his *Atkins* claim, his *Wiggins* claim, and his VCCR claim.

A. Atkins claim.

Petitioner claims he is mentally retarded and therefore, under *Atkins*, may not be subjected to the death penalty. To establish that he falls under *Atkins*, Petitioner must demonstrate that he possesses significantly subaverage intellectual functioning and impaired adaptive functioning, both of which manifested before the age of 18. *See Lewis v. Quarterman*, 541 F.3d 280, 283 (5th Cir. 2008); *see also Atkins*, 536 U.S. at 308 n.3, 122 S. Ct. at 2245 n.3.

At the state court evidentiary hearing regarding his *Atkins* claim, he presented essentially no supporting evidence. He attempted to introduce his expert Dr. Romey's opinion in the form of an affidavit, but the affidavit was not notarized and was thus inadmissible. He also introduced the affidavit of defense investigator Yuriria Santin, who detailed facts she had discovered regarding Petitioner's alleged early adaptive deficits. In the (federal) district court, Petitioner attempted to introduce new evidence, including the authenticated expert report and affidavits from his family and childhood teacher, none of which was a part of the state court record. On this basis, the district court concluded that Petitioner had failed to exhaust his claim, as required by 28 U.S.C. § 2254(b) ("An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State[.]").

Prior to the Supreme Court's decision in *Cullen v. Pinholster*,131 S. Ct. 1388, 1398 (2011), this court held that the exhaustion requirement is not satisfied where a petitioner "presents *material* additional evidentiary support in the federal court that was not presented to the state court." *Lewis v. Quarterman*, 541 F.3d 280, 285 (5th Cir. 2008) (emphasis in original) (citations omitted). "Evidence is material if it fundamentally alters, not merely supplements, the claim presented in state court." *Id.* at 285-86 (emphasis omitted). Petitioner observes that essentially all of the allegations regarding his unfortunate childhood now presented in affidavits from family members and his childhood teacher were originally admitted to the district court in the affidavit of his investigator, and thus argues that the issue was exhausted, because its presence in the form of affidavits from family members does not "fundamentally alter[] . . . the claim presented in state court." *Id.*

We are inclined to agree with the district court that the evidence Ibarra offered to bolster his *Atkins* claim in federal court, which included an admissible affidavit of his psychologist in addition to numerous other affidavits, was essential to his claim of mental retardation. Even if there were a debatable issue about the scope of exhaustion based on *Lewis*, however, *Cullen* resolves the issue in favor of the state. By disallowing federal courts (with few exceptions) from considering additional evidence not developed in the state court record, *Cullen* necessarily rules out the use of such proffered evidence to flesh out claims inadequately presented to the state courts. The federal district court therefore properly disregarded this newly proffered evidence.

Moreover, jurists of reason could not find debatable the *alternative* ground for disposition offered by the district court, that even if Petitioner's claim is exhausted, his claim was meritless. When evaluating the merits of a claim for habeas relief from a state court judgment, federal courts must employ only the record before the state court. *Cullen*, 131 S. Ct. at 1398 (limiting consideration of relief under 28 U.S.C. 2254(d)(1) to the state-court record). *See also* 28 U.S.C. § 2254(d)(2) (contemplating relief based on an "unreasonable determination of the facts *in light of the evidence presented in the State court proceeding*" (emphasis added)). Critically, the record before the state court hearing Ibarra's claim of mental retardation did not include the expert affidavit that could have served as some evidence of his sufficiently low IQ, and Petitioner offers no excuse for his failure to render this affidavit admissible. The state court had before it the affidavit from Ibarra's investigator, concerning his allegedly inhibited adaptive functioning from a young age, and the opinion of Dr. Stephen Mark, a witness for the state who found no evidence of mental retardation when he evaluated the Petitioner on two occasions. On 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).

Additionally, relying on *Rivera v. Quarterman*, 505 F.3d 349 (2007), Petitioner argues that AEDPA deference is inappropriate here, because the state courts did not afford him adequate opportunity to develop his claim. *Rivera* held 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." *Id.* at 358; *see also Panetti v. Quarterman*, 551 U.S. 930, 948, 127 S. Ct. 2842, 2855 (2007) (holding that as a result of failure to provide process, review of competency claim was "unencumbered by the deference AEDPA normally requires"). *Rivera* does not apply here. *Rivera* dealt with a state court decision that dismissed the petitioner's *Atkins* claim on its face for failure to establish a prima facie case of mental retardation. *Rivera*, 505 F.3d at 352. But, as *Rivera* noted, 505 F.3d at 359, "states retain discretion to . . . define the manner in which habeas petitioners may develop their claims." *Blue v. Thaler*, 665 F.3d 647, 657 (5th Cir. 2011). The state provided Petitioner 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 mental retardation) to develop his claim. Ibarra was represented by counsel during this time. Petitioner's failure to present Dr. Romey's affidavit in admissible form is surely not attributable to the relatively 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 Petitioner to develop his claim. The narrow circumstances described in *Rivera* are not applicable here, where a hearing was held and Petitioner was assisted by counsel, was granted extensive funds, was given extensive time, and even had at his disposal the Mexican consulate.

B. *Wiggins* claim.

Petitioner argues that his trial counsel was ineffective in his investigation, development, and presentation of mitigation evidence, as well as the

development of rebuttal evidence for the state's aggravating factors at sentencing. He claims this deficiency merits relief under *Wiggins v. Smith*, 539 U.S. 510, 522-23, 123 S. Ct. 2527, 2536 (2007) (holding that lack of a "reasonable investigations" of mitigating evidence may constitute ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct 2052 (1984)). The district court found this claim procedurally defaulted, because it was dismissed by the Court of Criminal Appeals in a succinct order for failing to meet the criteria for a successive petition. Alternatively, the district court found the claim meritless, because even if Petitioner could demonstrate deficiency in his trial representation, he could not demonstrate prejudice. To obtain a COA, as noted, Petitioner must show that reasonable jurists could disagree regarding the district court's disposition. *Skinner v. Quarterman*, 528 F.3d 336, 340-41 (5th Cir. 2008) (quoting *Miller-El*, 537 U.S. at 336, 338, 123 S. Ct. at 1029).

Federal courts cannot reach the merits of a habeas claim if the state court denied relief on an adequate and independent state law ground. *Coleman v. Thompson*, 501 U.S. 722, 729, 111 S. Ct. 2546, 2553 (1991). To be adequate, a state rule must be "firmly established and regularly followed." *James v. Kentucky*, 466 U.S. 341, 348, 104 S. Ct. 1830, 1835 (1984). A state court's ground for judgment is not independent if it "depends on a federal constitutional ruling." *Ake v. Oklahoma*, 470 U.S. 68, 75, 105 S. Ct. 1087, 1092 (1985).

Here, the relevant state court order stated that the petitioner's *Wiggins* claim "does not meet the requirements for consideration of subsequent claims under Article 11.071, Section 5. Therefore, we dismiss this subsequent application." *Ex parte Ibarra*, No. 48,832-04, 2008 WL 4417283 (Tex. Crim. App. Oct. 1, 2008). Petitioner contends that the state ground for dismissal was both inadequate and not independent.

It was inadequate, he suggests, because "an emerging equitable exception" to Section 5 permits an applicant to seek relief where his first appointed counsel fails to raise a single cognizable claim in his application. *See Ex parte Granados*, No. WR-51135-1 (Tex. Crim. App. Jan. 10, 2007) (unpublished) (denying relief because Petitioner failed to identify claims that would be revealed in new petition); *Ex parte Moreno*, 245 S.W.3d 419, 420 (Tex. Crim. App. 2008) (reopening application for writ on the basis of two new Supreme Court decisions and taking into account "applicant's diligence in raising the claim in his initial state application"); *Ex parte Ruiz,* SW-04:8-13; 2007 WL 2011023 (Tex. Crim. App. July 6, 2007) (unpublished) (denying relief over suggestion by two dissenting justices and one concurring justice that forbidding subsequent petitions was inappropriate where state habeas counsel was ineffective in failing to raise claim of trial counsel's ineffectiveness); *Ex Parte Medina*, 361 S.W.3d 633, 642-43 (Tex. Crim. App. 2011) (permitting subsequent application where "habeas counsel ha[d] employed a Machiavellian strategy designed to thwart the proper statutory procedure for filing a death penalty writ" (internal quotation marks and citation omitted)).

Petitioner finds *Medina* especially suggestive of his idea that the Texas abuse of writ bar is not firmly established or regularly followed. *Medina*, he argues, should have been applied in Petitioner's case. But in fact, the *Medina* court took pains to distinguish that case from cases like Petitioner's. Not only was it *sui generis* in that counsel "intentional[ly] refus[ed] to plead specific facts that might support habeas corpus relief," but even more because "counsel's filing was not a proper habeas-corpus application," as the state there acknowledged. *Id.* at 642-43. The circumstances in that case involved "not habeas counsel's lack of competence but his misplaced desire to challenge the established law at the peril of his client." *Id.* at 643. Petitioner makes no such allegation regarding intentional malfeasance on the part of his state habeas counsel here. Texas's

Section 5 bar remains an adequate state ground for finding procedural bars based on TCCA decisions. *See, e.g., Balentine v. Thaler*, 626 F.3d 842, 854 (5th Cir. 2010) ("*Balentine II*"). No decision of this court holds otherwise. The district court's conclusion that the TCCA's decision here was based on an adequate state ground is not subject to dispute among jurists of reason.

Likewise, reasonable jurists could not disagree with the district court's conclusion that the TCCA's decision was based on an independent state ground. The TCCA's decision was not interwoven with federal law. As the district court noted, "[t]here is no indication in the order that the Court of Criminal Appeals relied on anything other than abuse of the writ." *Ibarra v. Thaler*, No. W-02-CA-052, slip op. 30 (S.D. Tex. Mar. 31, 2011). Where a Texas court does not state which prong of Article 11.071, Section 5 it relies on in dismissing a subsequent petition, we do not presume that it reached the separate statutory subdivision that involves the application of federal law. *Coleman*, 501 U.S. 722, 111 S. Ct. 2546 (1991). A denial of relief under Section 5, without more, does not justify a presumption that the TCCA reached the federal merits of the petition. *Balentine*, 626 F.3d at 856. Petitioner offers no evidence or even an assertion that he satisfied the first prong of Section 5, which requires that a petitioner establish that the factual or legal basis of his claim was unavailable at the time of his first petition. TEX. CODE CRIM. PROC. ART. 11.071, 5(a). Unlike the uncertain situation faced by this court in *Ruiz v. Thaler*, 504 F.3d 523, 527 (5th Cir. 2007), where a concurring state court judge, who provided a necessary vote for denial, relied on federal-law grounds for his vote, the TCCA here gave no reason to infer that the second prong was necessary to its decision. Because jurists of reason could not disagree with the district court's conclusion that

Petitioner's *Wiggins* claim was procedurally defaulted, we deny his application for a COA on this claim.[1]

C. VCCR claim.

Petitioner argues that the district court's decision denying his claim for relief under the VCCR is debatable. The court held that this claim, too, was procedurally defaulted. The state courts so held on direct appeal and in rejecting his successive state writ application. The state courts' dismissal of this claim as defaulted is enforceable. *Leal Garcia v. Quarterman*, 573 F.3d 214, 224 (5th Cir. 2009). Petitioner argues that the state waived its argument of procedural default in federal court. This is clearly not true, and we conclude that the district court's disposition of this claim is not subject to dispute among jurists of reason. The state requested that the federal district court provide an alternative prejudice review for Petitioner, which the district court did.[2] As the state points out, the federal district court's rendering of a prejudice analysis is

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[1] Petitioner also asserts that he should benefit from two recent Supreme Court decisions. First, *Maples v. Thomas*, 132 S. Ct. 912 (2012), holds that in a habeas case, a client cannot be charged with the acts or omissions of an attorney who abandoned him. Because counsel for Ibarra who filed his first state habeas application did not abandon him, but simply did not raise issues Ibarra now would like to argue, *Maples* is inapposite. Second, *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), held that in states which do not permit the raising of an ineffective assistance of counsel claim via post-trial motion or on direct appeal, ineffective assistance in a collateral proceeding–the first proceeding in which an ineffective assistance claim may be raised–may constitute "cause" for procedural default of the ineffective assistance claim. For the reasons explained in our June 28, 2012 order in this case, we reject this assertion.

[2] Petitioner strenuously protests the district court's finding that he was not prejudiced by the state's failure to notify him earlier about his right to consult with the Mexican consulate. His allegations of prejudice have no evidentiary support in the state court record, and he was furnished constitutionally sufficient counsel and resources for trial. Mere hypotheses about the further assistance the consulate could have offered do not carry Ibarra's burden to prove prejudice. Petitioner further suggests that the court below conducted a 2254(d) review of the state court decision's reasonableness, rather than a *de novo* merits review which found no prejudice. There is nothing in the district court's opinion to suggest this; rather, the district court wrote that the claim was "without merit" because "no reasonable jury would have made a different decision" in light of the powerful inculpatory and aggravating evidence against him.

a common device in habeas cases in this circuit; such alternative findings in themselves do not detract from a conclusion that a procedural bar is enforceable. Here, the state made clear that it did not waive the procedural bar to which the claim was subject, and the district court's conclusion that the claim was in fact procedurally defaulted is unassailable. *Trest v. Cain*, 522 U.S. 87, 89, 118 S. Ct. 478, 480 (1997). The state explicitly fulfilled this obligation here.

Conclusion

For the foregoing reasons, we conclude that jurists of reason could not find debatable the district court's disposition of the claims for which Petitioner seeks a COA. We therefore DENY his application for a COA.

APPLICATION DENIED.

GRAVES, Circuit Judge, dissenting:

I disagree with the majority's finding that Ibarra's ineffective assistance of counsel claim is defaulted. The majority rejects Ibarra's reliance on *Martinez v. Ryan,* 132 S.Ct. 1309 (2012), for the reasons explained in a June 28, 2012, order in this case. Because I continue to disagree for the reasons explained in my separate opinion to that order, I respectfully dissent. *See Ibarra v. Thaler*, --- F.3d ----, 2012 WL 2620520 (5th Cir. June 28, 2012)(Graves, J., dissenting in part).

APPENDIX 7

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 11-70031

RAMIRO RUBI IBARRA,

Petitioner-Appellant

v.

RICK THALER, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION,

Respondent-Appellee

Appeal from the United States District Court
for the Western District of Texas
USDC No. 6:02-cv-52

O R D E R:

Before JONES, Chief Judge, and HAYNES and GRAVES, Circuit Judges.

EDITH H. JONES, Chief Judge:

The Court has considered Ramiro Rubi Ibarra's motion to vacate the district court's judgment denying his petition for habeas corpus relief in light of the Supreme Court's decision in *Martinez v. Ryan*, 132 S. Ct. 1309 (2012). We DENY his motion.

Ibarra petitioned the district court for postconviction relief on 11 issues, which the district court denied, several of which as defaulted. Currently pending in this court is his application for a COA on three issues. Ibarra's current motion argues that *Martinez* invalidates the district court's conclusion that

Ibarra procedurally defaulted these COA issues: (1) an ineffective-assistance-of-trial-counsel claim; (2) a claim of mental retardation under *Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242 (2002); and (3) a claim that the prosecution violated his rights under the Vienna Convention on Consular Relations ("VCCR"). We may readily dismiss these latter two claims, as *Martinez*, by its terms, applies only to ineffective-assistance-of-trial-counsel claims. *Martinez*, 132 S. Ct. at 1311-12. *Martinez* is also limited, again by its own express terms, to "initial-review collateral proceedings," which it defines as "collateral proceedings which provide the first occasion to raise a claim of ineffective assistance at trial." *Id.* at 1315. Other courts have rejected entreaties to expand *Martinez*, and we do the same. *See, e.g.*, *Arnold v. Dormire*, 675 F.3d 1082 (8th Cir. Apr. 3, 2012) (declining to extend *Martinez* to claims of ineffective assistance in appeals from initial-review collateral proceedings); *Hunton v. Sinclair*, 2012 WL 1409608, at *1 (E.D. Wash. Apr. 23, 2012) (declining to extend *Martinez* to *Brady* claims); *Sherman v. Baker*, 2012 WL 993419, at *18 (D. Nev. Mar. 23, 2012) (declining to extend *Martinez* beyond ineffectiveness claims).

The district court concluded that Ibarra defaulted his ineffective-assistance-of-trial-counsel claim by first presenting it in his fourth state petition for habeas relief. Ibarra now argues that his initial habeas counsel was also ineffective, thereby excusing his procedural default in presenting his underlying ineffective assistance claim. A short summary of the facts underpinning Ibarra's allegedly deficient representation suffices. Ibarra claims his trial counsel "virtually abandoned their duty to prepare for sentencing," focusing instead on an innocence defense. Ibarra argues that trial counsel's failure to present more than two social history witnesses — Ibarra's wife and one of his siblings — rendered his sentencing-phase assistance constitutionally deficient. Following conviction, Ibarra was then appointed new counsel for his first state habeas

petition, who raised only a purported *Lackey* claim[1] predicated on pre-indictment delays. The state trial court denied relief, and the Texas Court of Criminal Appeals ("TCCA") affirmed. *Ex parte Ibarra*, No. 48,832-01 (Tex. Crim. App. Apr. 4, 2001) (unpublished).

Until recently, this court's precedent foreclosed Ibarra's argument. *See, e.g., Martinez v. Johnson*, 255 F.3d 229, 239-40 (5th Cir. 2001). A habeas petitioner must demonstrate cause — objectively external to his defense — and prejudice to overcome a regularly applied state procedural default, which ordinarily bars federal habeas review of a defaulted issue. *Coleman v. Thompson*, 501 U.S. 722, 746-47, 111 S. Ct. 2546, 2562-63 (1991).

But, as Ibarra notes, the Supreme Court recently recognized a "limited qualification to *Coleman*" in *Martinez*. *Martinez*, 132 S. Ct. at 1319. In *Martinez*, a defendant, represented by counsel, was convicted of sexual conduct with a minor based in part on expert testimony regarding child-abuse accusations and recantations. *Id.* at 1313. The state of Arizona appointed new counsel for the defendant's direct appeal. Appellate counsel pursued myriad claims unsuccessfully, but Arizona law required defendants to bring ineffectiveness of counsel claims only in post-conviction proceedings rather than on direct appeal. *Id.* at 1314. Appellate counsel initiated such a proceeding under Arizona procedures, but elected not to pursue an ineffectiveness claim against trial counsel; she ultimately filed a statement with the court that she found no colorable issue appropriate for post-conviction relief. *Id.* Martinez attempted to petition for post-conviction relief a year and a half later in state court, claiming trial counsel ineffectiveness. *Id.* The state habeas court

[1] A *Lackey* claim asserts violation of the Eighth Amendment if a prisoner remains on death row too long. *Lackey v. Texas*, 514 U.S. 1045, 115 S. Ct. 1421 (1995) (mem.) (Stevens, J., respecting denial of cert.).

dismissed Martinez's petition under its rule refusing to consider claims in subsequent petitions that could have been raised in earlier ones. *Id.*

Martinez began anew in federal court, again raising his IAC claims. *Id.* Martinez acknowledged his procedural default, but sought to avoid the familiar bar to federal review by alleging his habeas counsel's ineffectiveness as cause for his default. *Id.* at 1314-15. While leaving open the constitutional question "whether a prisoner has a right to effective counsel in collateral proceedings" that provide "the first occasion" to raise a trial-counsel-ineffectiveness claim, the Supreme Court established a "narrow exception" to the *Coleman* rule that "an attorney's ignorance or inadvertence in a postconviction proceeding does not qualify as a cause to excuse a procedural default." *Id.* at 1315. The Court distinguished Arizona's procedures for ineffectiveness claims from other post-conviction proceedings by noting that Arizona ineffectiveness claims roughly equate to direct review of ineffectiveness claims. *Id.* at 1311-12. The Court specifically noted that Arizona habeas courts "look[] to the merits of" the ineffectiveness claim, that no other court prior to the collateral proceeding has addressed the claim, and that prisoners pursuing initial review pro se are especially disadvantaged due to the lack of counsel's briefs or a court's opinion addressing their claims. *Id.* at 1312. The Court justified this ineffectiveness-specific exception based on the importance of counsel to the adversarial criminal process. *Id.* (citing the right to effective counsel as "bedrock").

Martinez, by its own terms, therefore establishes a specific and narrow exception to the *Coleman* doctrine; it reiterates this not merely once, but again and again, as the Court repeatedly (and exclusively) refers to the scenario of a state in which collateral review is the first time a defendant may raise a claim of ineffective assistance of counsel. Thus, the phrase "initial-review collateral proceeding" is a specifically defined term referring to states like Arizona in which a defendant is prevented from raising counsel's ineffectiveness until he

pursues collateral relief (normally bereft of a right to counsel). *Martinez* defines the legal issue that it addresses as follows: "[*Coleman*] left open, and the Court of Appeals in this case addressed, a question of constitutional law: whether a prisoner has a right to effective counsel in collateral proceedings which provide the first occasion to raise a claim of ineffective assistance at trial. *These proceedings can be called, for purposes of this opinion, 'initial-review collateral proceedings.'*" *Martinez*, 132 S. Ct. at 1315 (emphasis added). Reinforcing this definition, the Court states: "The State of Arizona does not permit a convicted person alleging ineffective assistance of trial counsel to raise that claim on direct review. Instead, the prisoner must bring the claim in state collateral proceedings." *Martinez*, 132 S. Ct. 1309, 1313 (2012). "Where, as here, the initial-review collateral proceeding is the first designated proceeding for a prisoner to raise a claim of ineffective assistance at trial, the collateral proceeding is in many ways the equivalent of a prisoner's direct appeal as to the ineffective-assistance claim." *Id.* at 1317. "From this it follows that, *when a State requires a prisoner to raise an ineffective-assistance-of-trial-counsel claim in a collateral proceeding*, a prisoner may establish cause for a default of an ineffective-assistance claim in two circumstances. The first is where the state courts did not appoint counsel in the initial-review collateral proceeding for a claim of ineffective assistance at trial. The second is where appointed counsel in the initial-review collateral proceeding, where the claim should have been raised, was ineffective under the standards of *Strickland v. Washington*." *Id.* at 1318 (emphasis added) (citation omitted). Finally, "The rule of *Coleman* governs in *all but the limited circumstances recognized here* . . . . 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 . . . ." *Id.* at 1320 (emphasis added).[2]

When a state diverts ineffectiveness claims to collateral proceedings that function as the prisoner's first opportunity to assert those claims, a prisoner who can demonstrate that he was either unrepresented in that collateral proceeding or that his initial habeas counsel performed ineffectively thereby establishes "cause" for purposes of *Coleman's* cause-and-prejudice framework to forgive a state procedural default. *Martinez* goes on to describe the parameters of a "prejudice" showing. The result of *Martinez* is to allow petitioners in these narrowly described cases to urge their claims of ineffective trial (and habeas) counsel in federal court.

No published opinion from this court has yet considered *Martinez*'s applicability to Texas cases. To ascertain *Martinez*'s applicability to Texas procedures, it is useful to describe Arizona's habeas procedures more carefully. Arizona bars initial review of ineffectiveness claims outside of collateral proceedings. Arizona's collateral-review proceedings — "Rule 32 proceedings" — have predominated Arizona ineffectiveness adjudication since at least 1989, when the Arizona Supreme Court recommended ineffectiveness claims be raised under Rule 32. *State v. Valdez*, 770 P.2d 313, 319 (Ariz. 1989). Yet Arizona practitioners continued to raise ineffectiveness claims on direct appeal. As Rule 32 motions could either follow direct appeals or proceed contemporaneously with direct appeals, these ineffectiveness proceedings were sometimes consolidated on direct appeal, only to be remanded to the trial court. *State v. Spreitz*, 39 P.3d 525, 526-27 (Ariz. 2002). In 2002, the Arizona Supreme

[2] Had the Court sought to craft a general exception to *Coleman* for claims of ineffective trial counsel, it would have said: "inadequate assistance of counsel at initial-review proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial." Instead, the court said: "inadequate 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." *Martinez*, 132 S. Ct. at 1315.

Court "clarif[ied]" this "murky" procedure by instructing appellate courts to disregard ineffectiveness claims on direct appeal, regardless of merit. *Id.* at 527. Arizona's Rule 32 proceedings remained the exclusive venue for developing an ineffectiveness record; at least one Arizona appellate court has expressly disapproved using motions for a new trial to develop ineffectiveness claims in favor of the Rule 32 procedure. *See State v. Williams*, 819 P.2d 962, 964 (Ariz. Ct. App. 1991).

Contrast these procedures with Texas's rules governing ineffectiveness claims. The TCCA made clear that a state habeas petition is the preferred vehicle for developing ineffectiveness claims. *Robinson v. State*, 16 S.W.3d 808, 809-10 (Tex. Crim. App. 2000). Yet Texas defendants may first raise ineffectiveness claims before the trial court following conviction via a motion for new trial, when practicable, and the trial court abuses its discretion by failing to hold a hearing on an ineffectiveness claim predicated on matters not determinable from the record. *Holden v. State*, 201 S.W.3d 761, 762-63 (Tex. Crim. App. 2003). A prisoner who develops such a record through a new trial motion can of course pursue the denial of an ineffectiveness claim through direct appeal, but the TCCA has indicated that a new trial motion is neither a sufficient nor necessary condition to secure review of an ineffectiveness claim on direct appeal. Indeed, an ineffectiveness claim may simply be raised on direct appeal without the benefit of a motion for new trial. *Robinson*, 16 S.W.3d at 813. As a result, both Texas intermediate courts and the TCCA sometimes reach the merits of ineffectiveness claims on direct appeal. *Thompson v. State*, 9 S.W.3d 808, 813-14 (Tex. Crim. App. 1999). Where they do not, Texas habeas procedures remain open to convicted defendants. *Ex parte Nailor*, 149 S.W.3d 125, 129, 131 (Tex. Crim. App. 2004). In short, Texas procedures do not mandate that ineffectiveness claims be heard in the first instance in habeas proceedings,

and they do not by law deprive Texas defendants of counsel-and court-driven guidance in pursuing ineffectiveness claims.

Accordingly, Ibarra is not entitled to the benefit of *Martinez* for his ineffectiveness claims, as Texas procedures entitled him to review through counselled motions for new trial and direct appeal. We therefore DENY Ibarra's motion to vacate the district court's judgment. This disposition does not affect our consideration of the pending COA application.

MOTION DENIED.

GRAVES, Circuit Judge, concurring in part and dissenting in part:

I agree with the majority that Ramiro Rubi Ibarra's motion to vacate should be denied, as he presently has an application for a certificate of appealability (COA) pending before this Court. Further, as the Government asserts, the motion is an "improper procedural vehicle" for obtaining the relief he seeks because this relief is not available until a decision is made on the COA. However, the majority denies the motion to vacate based on its interpretation and application of *Martinez v. Ryan,* 132 S. Ct. 1309 (2012), and its finding that *Martinez* does not apply to Texas. Therefore, I respectfully concur in part and dissent in part.

As the majority states, *Martinez* recognizes a limited exception to *Coleman v. Thompson*, 501 U.S. 722, 746-47, 111 S. Ct. 2546, 2562-63 (1991). Specifically, in *Martinez*, the Court said:

> To protect prisoners with a potentially legitimate claim of ineffective assistance of trial counsel, it is necessary to modify the unqualified statement in *Coleman* that an attorney's ignorance or inadvertence in a postconviction proceeding does not qualify as cause to excuse a procedural default. *This opinion qualifies Coleman by recognizing a narrow exception: Inadequate 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.*

Id. at 1315. (Emphasis added).

To find that Ibarra could not be one of those prisoners with a potentially legitimate claim of ineffective assistance of trial counsel that *Martinez* proposes to protect, one must read the above use of "initial-review collateral proceedings" to mean state-mandated initial-review collateral proceedings rather than rely on the literal definition of an "initial-review collateral proceeding."[1] Yet the

[1] The majority quotes language from *Martinez's* discussion of *Coleman* regarding a definition of "initial-review collateral proceedings" included in the Supreme Court's statement of the constitutional issue that the majority concedes the Supreme Court left open: "whether

Court did not include "state-mandated" or any such phrase in pronouncing this exception. The Court also did not exclude the application of this equitable exception to prisoners like Ibarra, who raised IAC claims in a collateral proceeding as strongly suggested by the state. Yet the Court specifically excluded "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." *Martinez*, 132 S.Ct. at 1320. While *Martinez* does repeatedly refer to the applicable Arizona requirement, it is an Arizona case, and, of course, the narrow exception set out above would apply to a state such as Arizona which requires that IAC claims are raised collaterally.

Moreover, as stated by the majority, the Supreme Court specifically noted that Arizona habeas courts look to the merits of the ineffectiveness claim, that no other court prior to the collateral proceeding has addressed the claim, and "defendants pursuing first-tier review . . . are generally ill equipped to represent themselves because they do not have a brief from counsel or an opinion of the court addressing their claim of error." *Id.* at 1317.[2] (Internal marks omitted). That is exactly the situation with Ibarra. The Texas habeas court would have been the first court to look to the merits of his ineffective assistance of trial counsel claim. As to the third factor above, Ibarra and Martinez were both

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a prisoner has a right to effective counsel in collateral proceedings which provide the first occasion to raise a claim of ineffective assistance at trial." *Martinez*, 132 S.Ct. at 1315. That "definition" does not include any language such as state-mandated. Further, that "definition" supports the proposition that *Martinez* applies to Ibarra as, based on the preference of the State of Texas, his first habeas proceeding would be one of the "collateral proceedings which provide the first occasion to raise a claim of ineffective assistance at trial."

[2] The majority's citation is to the syllabus rather than the actual opinion.

represented by counsel, but the Supreme Court extended the exception both to unrepresented and represented defendants. *Martinez*, 132 S.Ct. at 1318.

The Supreme Court unequivocally made an "equitable ruling" creating an exception to a default in instances with and without counsel. In an "equitable ruling," there is no practical or legal way to distinguish between a prisoner asserting that his initial-review collateral proceeding counsel was ineffective for failing to assert an ineffective-assistance-of-trial-counsel claim in a state that requires the claim to be raised collaterally and a state that strongly suggests that the claim should be raised collaterally. In both instances the claim would properly be raised collaterally. The only reasonable distinction between the two would be in the context of a constitutional ruling, which is not what the Supreme Court made. And, as the Supreme Court says, the purpose of the exception is to "protect prisoners with a potentially legitimate claim of ineffective assistance of trial counsel."

Texas, like Louisiana, Mississippi, Alabama, and others, is not a state where you must raise IAC claims in collateral proceedings, although it is the preferred and encouraged method of raising IAC claims. Notwithstanding that Texas does not require IAC claims to be raised in a motion for new trial or on direct appeal but does require that they must be raised no later than the initial collateral proceeding, there clearly are instances where a collateral proceeding will be the "first occasion" to legitimately raise a claim of ineffective assistance of trial counsel in Texas. That "first occasion" would necessarily be an "initial review." Ibarra's case appears to be one of those occasions.

Based on the interpretation of the application of *Martinez*, the majority is finding that Ibarra is not entitled to the benefit of *Martinez* because "Texas procedures entitled him to review through counselled motions for new trial and direct appeal." The majority also states, "[f]ollowing conviction, Ibarra was then

appointed new counsel for his state habeas petition, who raised only a purported *Lackey* claim. . . ." Based on the interpretation of the application of *Martinez*, the majority is finding that Ibarra has defaulted on any claim of ineffective assistance of trial counsel that state habeas counsel failed to raise in his initial state habeas petition because Texas allowed said claimed ineffective trial counsel to raise his own ineffectiveness in a motion for new trial or on direct appeal. Overlooking the fact that failing to raise his own ineffectiveness could possibly be a basis for an IAC claim, it is not equitable to find that Ibarra has defaulted on a claim of ineffective assistance of counsel because his claimed ineffective counsel did not prematurely raise said claim when clearly not practicable.

With regard to cited cases, the majority cites *Arnold v. Dormire*, 675 F.3d 1082 (8th Cir. Apr. 3, 2012), as a basis for not "expanding" *Martinez*. *Arnold* was an appeal from an initial-review collateral proceeding. This is not an appeal from an initial-review collateral proceeding. *Hunton v. Sinclair*, 2012 WL 1409608, at *1 (E.D. Wash. Apr. 23, 2012), was a *Brady* claim. This is an IAC claim. Also, *Sherman v. Baker*, 2012 WL 993419, at *18 (D. Nev. Mar. 23, 2012), actually said that to the "extent that Sherman claims ineffective assistance of post-conviction counsel prevented him from presenting any of his claims in compliance with Nevada's procedural rules, the Court in *Martinez* made clear that post-conviction counsel's ineffectiveness can serve as cause only with respect to claims of ineffective assistance of counsel at trial." *Id.* That is exactly the situation here - Ibarra's underlying claim is ineffective assistance of trial counsel, the merits of which would be decided pursuant to his application for a COA. Also, notably, it appears that Nevada, like Texas, allows ineffective

assistance of counsel to be raised on direct appeal. *McConnell v. State*, 212 P.3d 307, 314 (Nev. 2009). *See also* Nev. Rev. Stat. 34.810.

Additionally, the Ninth Circuit in *Leavitt v. Arave*, 2012 WL 1995091 (9th Cir. June 1, 2012), found that Idaho's unique post-conviction procedure for capital defendants requiring that any claim of ineffective assistance of trial counsel must be raised in a post-conviction action that is then litigated *before* the direct appeal was the "'initial-review collateral proceeding' as to those claims about which *Martinez* speaks." *Id.* at *8. The Ninth Circuit left open the question of whether *Martinez* would apply to non-capital matters.

Even more relevant is this Court's handling of *Martinez* in the unpublished opinion of *Lindsey v. Cain*, 2012 WL 1366040 (5th Cir. Apr. 19, 2012).[3] In *Lindsey*, this Court granted a COA and remanded for further proceedings in light of *Martinez*, saying:

> When a state, like Louisiana, requires that a prisoner raise an ineffective assistance of counsel claim on collateral review, a prisoner can demonstrate cause for the default in two circumstances: (1) "where the state courts did not appoint counsel in the initial-review collateral proceeding for a claim of ineffective assistance at trial" and (2) "where appointed counsel in the initial-review collateral proceeding, where the claim should have been raised, was ineffective under the standards of *Strickland [v. Washington*, 466 U.S. 668 (1984)]." *Id.* at *8 (citation omitted). Further, the prisoner must also show that "the underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit.

Id. at *1.

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[3] This unpublished case and others are mentioned to demonstrate how this Court and others have applied *Martinez*.

Louisiana, like Texas, allows a prisoner to raise ineffective assistance of counsel on direct appeal "when the record contains sufficient evidence to decide the issue and the issue is properly raised by assignment of error on appeal." *State v. Brashears*, 811 So.2d 985 (La. App. 5 Cir. 2002). *See also State v. Williams*, 738 So.2d 640, 651-652 (La. App. 5 Cir. 1999) ("Ineffective assistance of counsel claims are most appropriately addressed on application for post conviction relief, rather than on direct appeal, so as to afford the parties adequate opportunity to make a record for review. However, when an ineffective assistance claim is properly raised by assignment of error on direct appeal and the appellate record contains sufficient evidence to evaluate the claim, the reviewing court may address the ineffective assistance claim in the interest of judicial economy.").

In *Adams v. Thaler*, --- F.3d ----, 2012 WL 1415094 (5th Cir. April 25, 2012), a case where the prisoner reasserted ineffective assistance of counsel in a successive habeas petition after the district court found that he had procedurally defaulted under *Coleman*, this Court said:

> Although we need not, and do not, address the impact of *Martinez* on the Texas habeas landscape, we note that Texas does not require a defendant to raise an ineffective assistance of trial counsel claim only in state habeas proceedings, *see Lopez v. Texas*, 343 S.W.3d 137, 143 (Tex. Crim. App. 2011), and that ineffective assistance claims (particularly those, like Adams's claim, involving trial counsel's failure to object to jury instructions) are often brought on direct appeal, with mixed success.

Id. at *3, n.4.

In *Cantu v. Thaler*, --- F.3d. ----, 2012 WL 1970364 (5th Cir. June 1, 2012), on remand from the Supreme Court, this Court remanded to the district court

"so that the district court may decide in the first instance the impact of *Martinez v. Ryan* on Cantu's contention that he had cause for his procedural default." *Id.*[4]

In analyzing the application of *Martinez* in *Brown v. Thaler*, --- F.3d ----, 2012 WL 2107238 (5th Cir. 2012), this Court said:

> The Supreme Court's recent decision in *Martinez v. Ryan*, does not assist Brown's argument. In *Martinez*, the Court held that "[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." The Texas Court of Criminal Appeals did not find Brown's ineffective assistance claim to be procedurally defaulted, but instead considered the claim on the merits.

Id. at *15, n. 4.

In *Williams v. Alabama*, 2012 WL 1339905 (N.D.Ala. April 12, 2012), the district court found that Williams demonstrated cause under *Martinez* to overcome procedural default of his ineffective assistance of counsel claim. The court ultimately denied the claim for ineffective assistance of counsel because Williams failed to demonstrate prejudice or that his claim had merit. The fact that the Alabama district court found *Martinez* applicable is significant because Alabama, like Texas, Louisiana, and Mississippi, does not require a claim for ineffective assistance of counsel to be raised collaterally. Specifically, the Alabama rule says:

> Any claim that counsel was ineffective must be raised as soon as practicable, either at trial, on direct appeal, or in the first Rule 32 petition, whichever is applicable. In no event can relief be granted on a claim of ineffective assistance of trial or appellate counsel raised in a successive petition.

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[4] The Supreme Court also remanded *Newbury v. Thaler*, 132 S.Ct. 1793 (March 26, 2012), for consideration of *Martinez*. Further, this is not an exhaustive list of cases analyzing the application of *Martinez*.

Ala. R. Cr. P. 32.2(d).

Thus, various courts, including a panel of this Court, have decided the application of *Martinez* differently than the majority. To be clear, this has no bearing on whether Ibarra has a substantial claim of ineffective assistance of trial counsel, as any review of the merits of his claims would be conducted pursuant to his application for a COA. I am not convinced that it is correct to foreclose the possible application of an "equitable ruling" to Texas prisoners with potentially legitimate claims of ineffective assistance of trial counsel. Therefore, I respectfully concur in part and dissent in part.

APPENDIX 8

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

WACO DIVISION

RAMIRO RUBI IBARRA,	§	
Petitioner,	§	
	§	
v.	§	**CIVIL ACTION NO. W-02-CA-052**
	§	
RICK THALER, Director, Texas	§	
Department of Criminal Justice,	§	
Correctional Institutions Division,	§	
Respondent.	§	

MEMORANDUM OPINION AND ORDER

Petitioner Ramiro Rubi Ibarra, an illegal alien, was convicted of capital murder in the brutal rape and strangulation of 16-year-old Maria De La Paz Zuniga, an acquaintance. He was sentenced to death. Petitioner asserts that his capital murder conviction and sentence are unconstitutional and should be vacated under the provisions of Title 28, United States Code, Section 2254 ("§ 2254"). Respondent, having been ordered to respond to Petitioner's application, has filed an answer and Motion for Summary Judgment requesting that Petitioner's application be denied. Having reviewed Petitioner's application, Respondent's answer and Motion for Summary Judgment, the parties' amended pleadings, as well as the entire record in this case, the Court has determined Petitioner's application for habeas relief should be denied.

I. Background

The facts as established from the trial reflect that 16-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 the 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 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.[1]

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

[1] 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.

of his face as he mostly kept his head down. Two of the witnesses were subsequently able to pick Petitioner out of a line-up. The witnesses observed Petitioner 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 Petitioner, a family acquaintance, as a possible suspect.

The investigator assigned to the case, Ramon Salinas ("Salinas"), discovered Petitioner'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 Petitioner was parked on the street nearby. Salinas noticed that Petitioner had scratches on his face and was wearing clothing fitting the description given by the witnesses. Petitioner was placed under arrest and consented to a search of his home and car. Found in Petitioner's car was yellow wire similar to that used to strangle Maria.[2] Salinas also discovered that Petitioner had additional scratches on his chest under his shirt.

The police obtained a search warrant on March 10, 1987 to obtain blood and hair samples from Petitioner to compare to the hair and bodily fluids found at the crime scene. An indictment for murder was issued against Petitioner on May 27,

[2] The yellow wire found in Petitioner's trunk was not of the same thickness as that used to strangle Maria. However, testimony at trial revealed that Petitioner had access to the exact type of wire used to strangle her at his place of employment.

1987. Subsequently, Petitioner 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.[3] Because it believed there was insufficient evidence without the blood and hair comparisons, the State dismissed the indictment on July 19, 1998, and Petitioner was released from custody.

Texas law changed in 1995,[4] 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 Petitioner on July 2, 1996 and were able to secure such evidence from Petitioner. Examination of the evidence revealed that the facial and pubic hairs found on and around Maria were similar to those of Petitioner, and his DNA matched the semen recovered from her body and underwear, as well as the material under her fingernails.[5] Petitioner was then reindicted for Maria's murder on September 18, 1996. He was tried, found guilty, and sentenced to death.

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[3] 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. . . ."

[4] 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."

[5] DNA analysis was unsuccessful in 1988 and 1990, but was matched to Petitioner in 1996.

At the punishment phase, the jury heard evidence that Petitioner anally sodomized his eight-year-old nephew on two occasions, and threatened to kill him if he told.[6] On another occasion, Petitioner had his nephew "masturbate" him in the shower, and he tried to force the nephew on a subsequent occasion to grab his penis. Petitioner's sister-in-law testified that Petitioner 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 Petitioner had sexually abused her son. Maria Luna Diaz, with whom Petitioner had a relationship, testified that Petitioner 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. Petitioner 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 Petitioner touched her breast inappropriately when she was 11 years old. She immediately told her mother of the incident. When Maria Luna confronted Petitioner, he beat her.

The jury also heard that Petitioner had prior convictions for unlawfully carrying a weapon and driving while intoxicated. There was also testimony regarding an arrest for misdemeanor theft, when Petitioner was spotted taking rope from the back of a pickup truck and placing it in his own vehicle. Upon his arrest, police found the

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[6] Petitioner was convicted of aggravated sexual assault as a result of these acts and was sentenced to life in prison.

rope in Petitioner's car, along with several college-level criminal justice textbooks in English.

Other witnesses testified to Petitioner'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 Petitioner's alleged suicide attempt, wherein he cut his neck. Jail and hospital personnel testified about his uncooperativeness and feigned unconsciousness.

While Petitioner's wife, Maria Gandera Ibarra, testified on his behalf, the State elicited testimony from her on cross-examination that Petitioner had beaten her on several occasions, even while she was pregnant. She also testified that Petitioner had brought an 18-year-old girl from Mexico to live with them. Although Petitioner 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.

The State also presented the testimony of Dr. Richard Coons, a psychiatrist, who gave his opinion that an offender with Petitioner's history and sexual proclivities would constitute a continuing threat to society.

II. PROCEDURAL HISTORY

Petitioner's sentence and conviction were affirmed on appeal. *See Ibarra v. State of Texas*, 11 S.W.3d 189 (Tex. Crim. App., October 20, 1999), rehearing denied (Dec. 8, 1999). His petition for *writ of certiorari* was denied. *Rubi Ibarra v.*

U.S., 531 U.S. 828 (2000). Petitioner's first state writ of habeas corpus was denied. *Ex parte Ibarra*, No. 48,832-01 (Tex. Crim. App., April 4, 2001). Petitioner then submitted the present application for federal habeas relief. He requested a stay while he pursued additional claims in the State court as a result of the Supreme Court opinion in *Atkins v. Virginia*, 536 U.S. 304 (2002), which prohibited the execution of mentally retarded criminals. While that petition was pending, Petitioner's present application was further abated while Petitioner pursued another petition in state court arising out of a Memorandum to the United States Attorney General by President George W. Bush which announcing that the United States would discharge its international obligations by having state courts give effect to an International Court of Justice opinion. The *Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 12 (Judgment of March 31) held that Mexican nationals were entitled to review and reconsideration of their convictions due to the states' failure to abide by the Vienna convention requiring them to advise these defendants of their right to contact the Mexican consulate. *See Medellin v. Texas*, 552 U.S. 491 (2008).

The Court of Criminal Appeals remanded Petitioner's *Atkins* claim to the trial court. After a hearing, the trial court determined that Petitioner was not mentally retarded, which holding was adopted by the Court of Criminal Appeals. *Ex parte Ibarra*, 2007 WL 2790587, Nos. WR-48832-02 and WR-48832-03 (Tex. Crim. App. September 26, 2007). His third writ, considered at the same time, was dismissed

as a subsequent writ under Article 11.071, Section 5. Petitioner's application for a *writ of certiorari* as to the *Avena* claim was denied. *See Ibarra v. Texas*, 553 U.S. 1055 (2008). A fourth state habeas action, raising an issue under *Wiggins v. Smith*, 539 U.S. 510 (2003), was also dismissed as a subsequent writ under Article 11.071, Section 5. *Ex parte Ibarra*, 2007 WL 4417283, No. WR-48832-04 (Tex. Crim. App. October 1, 2008).

III. GROUNDS OF ERROR

Petitioner asserts the following claims for relief:

1) The amendment to the Texas statute permitting a second search warrant constituted an ex post facto and retroactive law in violation of Article I, § 9 of the constitution and the due process clause of the Fourteenth Amendment.

2) Petitioner's right to a speedy trial and effective assistance of counsel was violated due to the large amount of time between the original indictment and his trial in violation of the Sixth Amendment's right to a speedy trial, the Eighth Amendment prohibition of cruel and unusual punishment, and the Fourteenth Amendment right to due process.

3) Petitioner's initial arrest and subsequent consent to search were in violation of the Fourth Amendment's prohibition of unreasonable searches and seizures.

4) Petitioner's Sixth Amendment confrontation clause Fourteenth Amendment due process rights were violated by the improper identification procedures used by the police.

5) Petitioner's Sixth, Eighth and Fourteenth Amendment rights were violated by the admission of testimony regarding the Victim's fear of Petitioner.

6) Petitioner's Sixth, Eighth and Fourteenth Amendment rights were violated by the admission of testimony regarding Petitioner's sexually inappropriate behavior as it was based on only a single incident.

7) The Texas capital sentencing scheme is in violation of the Eighth and Fourteenth Amendments in that there is no appellate review of the jury's ultimate decision to impose the death penalty.

8) Petitioner received ineffective assistance of counsel in violation of the Sixth and Fourteenth Amendments as a result of counsel's failure to investigate, develop and present available mitigation evidence, and evidence rebutting portion's of the State's case in aggravation.

9) Petitioner's execution would violate the Eighth Amendment's prohibition against execution of individuals with mental retardation.

10) The Texas capital sentencing scheme violates the Sixth Amendment in that the State is not required to prove that the Petitioner is not mentally retarded and the jury is not required to find that the Petitioner is not mentally retarded.

11) Petitioner's conviction was in violation of the Vienna Convention on Consular Relations as Petitioner was never advised of his right to consult with the Mexican consul.

IV. DISCUSSION

A. Standard for Habeas Review. Title 28, United States Code, Section 2254 ("§ 2254") provides:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court, shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim–
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> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

Federal courts must defer to a state court's adjudication of a claim if the claim has been adjudicated on the merits in the state court proceeding unless the state court decision was (1) "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court," or (2) "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). *Woodfox v. Cain*, 609 F.3d 774, 789 (5th Cir. 2010).

A decision is "contrary to federal law" if it is contradicts a decision of the Supreme Court on a question of law or if it "resolves a case differently from the way

the Supreme Court has on a set of materially indistinguishable facts." *Reed v. Quarterman*, 504 F.3d 465, 471 (5th Cir. 2007), *quoting Williams v. Taylor*, 529 U.S. 362, 412-13 (2000). *See also Woodfox v. Cain*, 609 F.3d at 789. "Clearly established" under § 2254(d)(1) is "the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision." *Lockyer v. Andrade*, 538 U.S. 63, 71-72 (2003). "Clearly established" is limited to determinations by the Supreme Court and refers to actual holdings of the Supreme Court as opposed to dicta. *Williams v. Taylor*, 529 U.S. at 381.

A state court "unreasonably" applies federal law when it identifies the correct governing principle established by the Supreme Court, but unreasonably applies it to the facts of the case. *Williams v. Taylor*, 529 U.S. at 407; *Woodfox v. Cain*, 609 F.3d at 789. *See also Woodward v. Epps*, 580 F.3d 318, 325 (5th Cir. 2009); *Rogers v. Quarterman*, 555 F.3d 483, 488-89 (5th Cir. 2009). Unreasonableness is evaluated objectively rather than subjectively. *Williams v. Taylor*, 529 U.S. at 409-10. An unreasonable application of federal law is distinguished from a state court decision that is merely incorrect or erroneous. *Woodfox v. Cain*, 609 F.3d at 789. "The question under AEDPA is not whether a federal court believes the state court's determination was incorrect but whether that determination was unreasonable – a substantially higher threshold." *Schirro v. Landrigan*, 550 U.S. 465, 473 (2007). Habeas relief is merited only when the state court decision is both incorrect and objectively unreasonable. *Williams v. Taylor*, 529 U.S. at 411.

It is the state court's ultimate decision that is to be tested for unreasonableness. *Neal v. Puckett*, 286 F.3d 230, 246 (5th Cir. 2002) (*en banc*), *cert. denied*, 537 U.S. 1104 (2003) (focus should be "on the ultimate legal conclusion that the state court reached and not on whether the state court considered and discussed every angle of the evidence"). Even in cases where the state court fails to cite applicable Supreme Court precedent, or is even unaware of such precedent, the state court decision is still entitled to deference "so long as neither the reasoning nor the result of the state-court decision contradicts [Supreme Court precedent]." *Early v. Packer*, 537 U.S. 3, 8 (2002).

When evaluating an unreasonable determination of the facts, the state court's findings of fact are entitled to a presumption of correctness which a petitioner may overcome only by clear and convincing evidence. 28 U.S.C. § 2254(e)(1); *Leal v. Dretke*, 428 F.3d 543, 548 (5th Cir. 2005), *cert. denied*, 547 U.S. 1073 (2006). Relief may be granted only if "a factual determination is unreasonable based on the evidence presented to the state court." *Busby v. Dretke*, 359 F.3d 708, 713 (5th Cir. 2004), *cert. denied*, 541 U.S. 1087 (2004).

In addition to the foregoing, the amendments to § 2254 contained in the Anti-Terrorism and Effective Death Penalty Act ("AEDPA") did not overrule prior precedent which forecloses habeas relief in the following instances: (1) claims which are procedurally barred as a consequence of a failure to comply with state

procedural rules;[7] (2) claims for which the petitioner seeks retroactive application of a new rule of law on a conviction that was final before the rule was announced;[8] or (3) claims for which the petitioner asserts trial error that, although of constitutional magnitude, did not have a "substantial and injurious effect or influence in determining the jury's verdict."[9]

B. Exhaustion of State Remedies. Under 28 U.S.C. § 2254(b)(1)(A), a federal court may not grant habeas relief unless the petitioner has exhausted his available state court remedies, which means having the issues addressed by the highest court in the state. *Woodfox v. Cain*, 609 F.3d at 789-90. Once failure to exhaust has been raised, the court must compare the petitioner's state and federal claims to determine whether the substance of those claims were presented to the state court, which is a "case- and fact-specific inquiry." *Id*., *quoting Moore v. Quarterman*, 533 F.3d 338, 341 (5th Cir. 2008) (*en banc*).

> "It is not enough that all the facts necessary to support the federal claim were before the state courts or that a somewhat similar state-law claim was made." *Anderson v. Harless*, 459 U.S. 4, 6, 103 S.Ct. 276, 74 L.Ed.2d 3 (1982) (internal citations omitted). "Rather, the petitioner must afford the state court a 'fair opportunity to apply controlling legal principles to the facts bearing upon his constitutional claim.'" *Bagwell v. Dretke*, 372 F.3d 748, 755 (5th Cir. 2004) (*quoting Anderson*, 459 U.S. at 6, 103 S.Ct. 276).

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7 *Coleman v. Thompson*, 501 U.S. 722 (1991).

8 *Teague v. Lane*, 489 U.S. 288 (1989).

9 *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993).

Woodfox v. Cain, 609 F.3d at 792 (footnote omitted). "A petitioner fulfills the exhaustion requirement if 'all crucial factual allegations were before the state courts at the time they ruled on the merits" of the habeas petition.'" *Smith v. Quarterman*, 515 F.3d 392, 400 (5th Cir. 2008), *quoting Dowthitt v. Johnson*, 230 F.3d 733, 746 (5th Cir. 2000). The exhaustion requirement applies even if a petitioner's claims are now procedurally barred under state law. *Gray v. Netherland*, 518 U.S. 152, 161 (1996). In the present case, Petitioner's first, fifth, and sixth claims have not been presented to the State court for review and are unexhausted and procedurally defaulted.

C. Independent and Adequate State Grounds. Federal habeas review of a state court opinion is also precluded when the state court's decision was based upon an independent and adequate state law ground. *Coleman v. Thompson*, 501 U.S. 722, 729 (1991); *Rosales v. Dretke*, 444 F.3d 703 (5th Cir. 2006). "This rule is grounded in concerns of comity and federalism. It is designed to prevent federal courts from deciding cases on federal constitutional grounds regarding a petitioner's confinement that would be advisory because the confinement can be upheld on an independent and adequate state law basis." *Rosales v. Dretke*, 444 at 707. One of these grounds is procedural default, where dismissal is based upon a petitioner's failure to abide by state procedural rules. The procedural default rule prevents a habeas petitioner from avoiding exhaustion requirements by defaulting federal claims in state court. *Id*. "A state court expressly and unambiguously bases its

denial of relief on a state procedural default even if it alternatively reaches the merits of a defendant's claim." *Fisher v. Texas*, 169 F.3d 295, 300 (5th Cir. 1999). A claim should be construed as one involving federal law when "the state court decision rests 'primarily on federal law' or the state and federal law are 'interwoven,' and if 'the adequacy and independence of any possible state law ground is not clear from the face of the opinion. . . .'" *Id., quoting Ruiz v. Quarterman*, 504 F.3d 523, 527 (5th Cir. 2007).

In order to be "adequate" to support the judgment, the state law ground must be both "firmly established and regularly followed." *Ford v. Georgia*, 498 411, 424, 111 S.Ct. 850, 112 L.Ed.2d 935 (1991). "If the state law ground is not firmly established and regularly followed, there is no bar to federal review and a federal habeas court may go to the merits of the claim." *Rosales v. Dretke*, 444 at 707, citing *Barr v. Columbia*, 378 U.S. 146, 149, 84 S.Ct. 1734, 12 L.Ed.2d 766 (1964). The Fifth Circuit has held that Texas's abuse-of-the-writ doctrine has "provided an adequate state ground for the purpose of imposing a procedural bar." *Barrientes v. Johnson*, 221 F.3d 741, 759 (5th Cir. 2000). *See also Emery v. Johnson*, 139 F.3d 191 (5th Cir. 1997), *cert. denied*, 525 U.S. 969 (1998); *Rocha v. Thaler*, 626 F.3d 815, 829-30 (5th Cir. 2010).

A petitioner may be excused from a procedural default only if he can demonstrate cause and prejudice for the default, or show that the failure to consider the claim will result in a miscarriage of justice. *Coleman v. Thompson*, 501 U.S. at

750. Petitioner's eighth, tenth and eleventhS claims, which were dismissed in relevant part as abuses of the writ, were procedurally defaulted because they were decided on adequate and independent state grounds, and he has presented nothing to excuse the procedural default.

D. Specific Claims.

1. Second Search Warrant. Petitioner argues that his rights were violated when the trial court did not grant his second motion to suppress after his re-indictment. He asserts that the amendment to Article 18.02(d) is in violation of the Ex Post Facto clause and is an impermissible retroactive enforcement of a new law. As previously noted, Petitioner has failed to exhaust his available state court remedies by not having this issue addressed by the highest court in the state. He would also be procedurally barred from presenting this issue in a successive state habeas application under Article 11.071, Section 5(a) of the Texas Code of Criminal Procedure precluding successive writs. This is an adequate state procedural bar which forecloses federal habeas review, unless the petitioner shows cause and prejudice for his failure, or show that failure to consider the claims will result in a fundamental miscarriage of justice. *Nobles v. Johnson*, 127 F.3d 409, 422 (5th Cir. 1997), *cert. denied*, 523 U.S. 1139 (1998). "A claim of miscarriage of justice is limited to a claim of 'actual innocence,' which requires the prisoner to establish through new and reliable evidence 'that it was "more likely than not that no reasonable juror would have convicted him in the light of the new evidence."'"

Woodfox v. Cain, 609 F.3d at 793-95, *quoting Fairman v. Anderson*, 188 F.3d 635, 644 (5th Cir. 1999). In the death penalty context, he must establish actual innocence by showing by clear and convincing evidence that, "but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty under the applicable state law." *Sawyer v. Whitley*, 505 U.S. 333, 336 (1992).

Petitioner argues that this claim was presented to the state courts on direct appeal and was addressed on the merits by the Court of Criminal Appeals. However, Petitioner's claim was framed in terms of violations of state law, not federal constitutional law. A petitioner has not exhausted his state remedies when he relies on a legal theory different from that raised in the state court or when the same claim in federal court is supported by factual allegations not raised in the state court. *Ogan v. Cockrell*, 297 F.3d 349, 358 (5th Cir.), *cert. denied*, 537 U.S. 1040 (2002); *Dispensa v. Lynaugh*, 847 F.2d 211, 217-18 (5th Cir. 1988). As Petitioner's claims in the state court were not based upon violations of the federal constitution, they are barred.

Even if not barred, Petitioner's claim would be without merit. The ex post facto clause[10] prohibits implementation of a law to a defendant if it creates a crime that did not previously exist, if it makes the punishment for a crime greater than existed when the act was committed, or deprives "one charged with crime of any defense available

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[10] There are actually two ex post facto clauses in the constitution. Art. I, § 9, cl. 3 applies to the Federal government, while Art. I, § 10, cl. 1 applies to the States. *Stogner v. California*, 539 U.S. 607 (2003).

according to law at the time when the act was committed."[11] *Collins v. Youngblood*, 497 U.S. 37, 52 (1990). A law that alters legal rules of evidence, requiring less proof to obtain a conviction, also implicates the ex post facto clause. *Carmell v. Texas*, 529 U.S. 513 (2000). A statute does not run afoul of the ex post facto clause if it merely alters a procedural rule. *Id*. A procedural change is a change "in the procedures by which a criminal case is adjudicated, as opposed to changes in the substantive law of crimes." *Collins v. Youngblood*, 497 U.S. at 42. The statute in this case clearly falls within the procedural category. The elimination of the prohibition against a second search warrant did not eliminate a defense to the charges Petitioner faced, nor did it alter the quantum of proof necessary to convict him.

Petitioner's argument that the amended statute implicates his substantive right to be free from search and seizure is not supported. The Constitution protects against *unreasonable* searches and seizures, not all searches and seizures. There was, therefore, no due process or ex post facto violation in this case.

2. Speedy Trial Violation. Petitioner argues that his rights to a speedy trial and the effective assistance of counsel were violated due to the lapse of time which occurred between the first and second indictment. Petitioner asserts that the

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[11] While the Ex Post Facto Clause limits the powers of legislatures, the Supreme Court "has acknowledged a similar limitation on the power of the judiciary to render decisions that retroactively criminalize previously legal conduct." *Janecka v. Cockrell*, 301 F.3d 316, 322 n. 9 (5th Cir. 2002), *citing Marks v. United States*, 430 U.S. 188, 191 (1977) and *Bouie v. City of Columbia*, 378 U.S. 347, 353 (1964).

circumstances violated his Sixth and Eighth Amendment rights were violated, as well as his Fourteenth Amendment right to due process.

The Sixth Amendment provides the accused in a criminal prosecution the right to a speedy and public trial. "This protection attaches when 'the defendant has been formally indicted or actually restrained accompanying arrest.'" *United States v. Jackson*, 549 F.3d 963, 971 (5th Cir. 2008), *quoting Dickerson v. Guste*, 932 F.2d 1142, 1144 (5th Cir. 1991). *See also United States v. Marion*, 404 U.S. 307, 313 (1971). When no indictment is outstanding, only the "actual restraints imposed by arrest and holding to answer a criminal charge . . . engage the particular protections of the speedy trial provision of the Sixth Amendment. *Id*. at 320. *See also United States v. Loud Hawk*, 474 U.S. 302, 310 (1986). "Similarly, the Speedy Trial Clause has no application after the Government, acting in good faith, formally drops charges." *United States v. MacDonald*, 456 U.S. 1, 7 (1982). This is because the speedy trial guarantee "is designed to minimize the possibility of lengthy incarceration prior to trial, to reduce the lesser, but nevertheless substantial, impairment of liberty imposed on an accused while released on bail, and to shorten the disruption of life caused by arrest and the presence of unresolved criminal charges." *Id*. at 8. The appropriate means of protection for a defendant who alleges inordinate delay between arrest and trial is the applicable statute of limitations and the Due Process Clause. *United States v. Marion*, 404 U.S. at 322; *United States*

v. MacDonald, 456 U.S. at 8. As there is no statute of limitations for murder in Texas, Petitioner's basis for relief is under the Due Process Clause.

Any delay prior to charges being filed is scrutinized under the Due Process Clause, not the Speedy Trial Clause. *United States v. MacDonald*, 456 U.S. at 7. The burden of proving a due process violation due to pre-indictment delay is upon the defendant, "who must prove that (1) the prosecutor intentionally delayed the indictment to gain a tactical advantage, and (2) the defendant incurred actual prejudice as a result of the delay." *United States v. Beszborn*, 21 F.3d 62, 65, 66 (5th Cir.), *cert. denied sub nom Westmoreland v. United States*, 513 U.S. 934 (1994). *See also United States v. Marion*, 404 U.S. at 324 (the Due Process Clause could require dismissal of an indictment if a defendant established that pre-indictment delay "caused substantial prejudice to [his] rights to a fair trial and that the delay was an intentional device to gain tactical advantage"); *United States v. Crouch*, 84 F.3d 1497, 1514 (5th Cir. 1996) (*en banc*), *cert. denied*, 519 U.S. 1076 (1997) ("[F]or preindictment delay to violate the due process clause it must not only cause the accused substantial, actual prejudice, but the delay must also have been intentionally undertaken by the government for the purpose of gaining some tactical advantage over the accused in the contemplated prosecution or for some other impermissible, bad faith purpose"). In order to demonstrate prejudice, "the defendant must offer more than mere speculation of lost witnesses, faded memories or misplaced documents; he must show an actual loss of evidence that would have

aided the defense and that cannot be obtained from other sources." *United States v. Gulley*, 526 F.3d 809, 819-20 (5th Cir.), *cert. denied*, ___ U.S. ___, 129 S.Ct. 159 (2008). Petitioner has shown neither prejudice nor government misconduct.

Nor is there anything to indicate that the delay between the commission of the offense and Petitioner's conviction implicates the Eighth Amendment's prohibition against cruel and unusual punishment. Petitioner points to no clearly established Supreme Court authority that holds a lengthy delay between commission of an offense and date of execution constitutes cruel and unusual punishment.

Petitioner has failed to establish that the Court of Criminal Appeals' decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court," or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."

3. Search and Seizure in Violation of the Fourth Amendment. Petitioner asserts that the consent to search he gave to police should be disregarded as it was elicited as a result of his illegal arrest. Petitioner argues that there was insufficient probable cause to arrest him. As the State notes, a state habeas petitioner may not obtain relief based upon a Fourth Amendment claim where the state has provided an opportunity for full and fair litigation of the claim. *Stone v. Powell*, 428 U.S. 465 (1976). *Stone* forecloses review "in the absence of allegations that the processes provided by a state to fully and fairly litigate fourth amendment claims are routinely

or systematically applied in such a way as to prevent the actual litigation of fourth amendment claims on their merits." *Williams v. Brown*, 609 F.2d 216, 220 (5th Cir. 1980). "[E]rrors in adjudicating Fourth Amendment claims are not an exception to *Stone's* bar." *Moreno v. Dretke*, 450 F.3d 158, 167 (5th Cir. 2006), *cert. denied*, 549 U.S. 1120 (2007). Petitioner presents no argument that Texas courts systematically and erroneously apply the state procedural bar rule to prevent adjudication of Fourth Amendment claims.

Even if Petitioner's Fourth Amendment claim were not barred, it would be without merit. There were sufficient circumstances known to the arresting officer to provide probable cause to arrest Petitioner. The descriptions of the suspect and his vehicle led police to Petitioner through Maria's brother, who was acquainted with Petitioner. A car fitting the description given by the witnesses was parked in front of Petitioner's residence, and a check revealed the car was registered to Petitioner. Petitioner matched the physical description given by the witnesses, including the clothes he was wearing. He also had scratches on his face, which the arresting officer knew could have come from the attack on Maria who had blood and skin under her fingernails. Additionally, Petitioner ducked his head when the arresting officer told him why he was there, indicating guilt to the officer.

Even if there were a Fourth Amendment violation, the evidence discovered during the search was, some yellow wire, could not have had only slight, if any, influence on the jury's decision, as the wire was not the same size as that used to

murder Maria. The evidence linking Petitioner to Maria's murder was more than sufficient absent that piece of evidence. Much more inculpatory was the evidence that Petitioner had access at his place of employment to wire that was the same size as that used in the murder. Accordingly, Petitioner has no ground for relief under the Fourth Amendment as the Court of Criminal Appeals' decision was not contrary to, nor involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court, nor was it based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

4. Impermissibly Suggestive Identification Procedure. During the investigation, police discovered three witnesses who had observed an individual leaving Maria's house on the morning of the murder – Troy Wells, Lori Peterson, and Doreen Kennedy. All three witnesses identified Petitioner's Camaro as the car they had seen at Maria's house on the day of the murder. Kennedy was unable to identify Petitioner from a photo array or from a live line-up. Peterson was unable to identify Petitioner from the photo array, but did identify him at the live line-up. Wells was unable to identify Petitioner from the photo array, although he pointed to Petitioner's picture and said he "looked familiar." The individual Wells selected looked remarkably similar to Petitioner. Wells was then shown two photographs of Petitioner looking downward, which was the position all the witnesses had described. After looking at those photographs, Wells picked out Petitioner. At the live line-up

almost a month later, Wells again identified Petitioner. At the hearing on Petitioner's motion to suppress, Wells testified that he could identify Petitioner in court because he independently remembered him from the day of the murder, and that the photo line-up did not influence his decision in the live line-up.

Petitioner argues that the numerous photographs shown to Wells of Petitioner tainted his identification and constituted a violation of his Sixth Amendment right to confrontation and his Fourteenth Amendment due process rights.[12] An in-court identification is inadmissible when it has been tainted by an impermissibly suggestive pre-trial photographic identification. The test is whether, under the totality of the circumstances, "the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." Simmons v. United States, 390 U.S. 377, 384 (1968). Non-exclusive factors to be considered are: (1) the opportunity the witness had to view the defendant at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the defendant; (4) the level of certainty demonstrated by the witness at the time of the identification; and (5) the length of time which had elapsed between the commission of the crime and the identification. *Neil v. Biggers*, 409 U.S. 188, 199-200 (1972). Only the reliability of Wells'

[12] Although Petitioner appears to also question the identifications made by Peterson and Kennedy, there is nothing in the record to establish that either identified Petitioner after an impermissibly suggestive identification procedure.

identification at issue, as neither of the other witnesses was shown the additional photographs of Petitioner looking down.

The Court of Criminal Appeals noted the following when evaluating the Biggers factors:

> Wells, a reserve police officer at the time of the instant offense, stated he had one to two minutes in which to view [Petitioner]. He was dropping his wife off at work when they saw the primer-red Camaro and a man walking towards them from the direction of the victim's house. They felt the situation was unusual, so Wells waited with his wife until another employee arrived before she got out of their vehicle to open up the business. Viewing these deferentially, Wells' experience as a trained police officer and his concern for his wife could have heightened his ability to take in detail despite the fact that their infant sone was screaming in the car.
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> Next, Wells' description of the suspect matched that of the other two witnesses who saw the suspect that morning, and matched [Petitioner's] general appearance. [Petitioner] points out that every witness was mistaken because, although they were correct about he height, hair, clothing, race, and weight, they did not notice he had a full beard instead of just a mustache. However, Wells noted that he saw a mustache that went past the corners of the suspect's mouth and the suspect had his head buried in his chest while he walked quickly toward the Camaro. It is conceivable that the positioning of the suspect's head prevented the witness from viewing the full extent of the suspect's facial hair.
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> Wells' first confrontation with [Petitioner] was at the photo line-up, twenty-seven days following the crime. Wells indicated [Petitioner] looked familiar, but initially identified another individual – whose picture looked very similar to [Petitioner's] – because, he stated, of how the man was holding his eyes. Wells never changed his description of the suspect at any time. At both the live line-up and in court, Wells positively identified [Petitioner] and testified that the identification was based on what he observed the morning of the offense and not on any intervening photographs he may have viewed.

Ibarra v. State of Texas, 11 S.W.3d at 196. The totality of the circumstances supports the Court of Criminal Appeals determination there was no substantial likelihood of misidentification. Accordingly, Petitioner has no ground for relief under the Sixth and Fourteenth Amendments as the Court of Criminal Appeals' decision was not contrary to, nor did it involve an unreasonable application of, clearly established Federal law as determined by the Supreme Court, nor was it based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

5. Improper Introduction of Testimony Regarding Victim's Fear of Petitioner. As previously noted, Petitioner failed to exhaust his available state remedies as to this claim and it is barred from federal habeas review. While Petitioner raised the same factual basis in his appeal, he argued that the testimony was irrelevant hearsay because he did not raise self defense or the defense of sudden passion, a state evidentiary claim. The Court of Criminal Appeals' rejection of the claim was based solely on state law – he did not preserve the issue by failing to make a contemporaneous objection.

Even if the claim were not otherwise barred, it would be without merit. The Sixth Amendment protects a defendant's right to confront the witnesses against him. The Confrontation Clause "reflects a judgment, not only about the desirability of reliable evidence. . ., but about how reliability can best be determined." *Crawford v. Washington*, 514 U.S. 36, 61 (2004) (citation omitted). Testimonial evidence

regarding the statements of another are not in conflict with the Confrontation Clause and Sixth Amendment if the declarant is unavailable and there was a prior opportunity for cross-examination of the declarant. The *Crawford* case established a new rule regarding the introduction of such testimony. Prior authority permitted such testimony if the declarant was unavailable and if the statement bore adequate "indicia of reliability." *See Ohio v. Roberts*, 448 U.S. 56 (1980). As a new rule, application of *Crawford* retroactively would run afoul of *Teague v. Lane*, 489 U..S. 288 (1989).

Even under *Crawford*, the evidence could be deemed admissible if it fell within an exception to the hearsay rule, such as the existing mental, emotional, or physical condition codified in Rule 803(3) of the Federal Rules of Evidence. The rule is currently widely recognized in both federal and state courts and has been recognized for a long time, establishing it as a "firmly rooted" hearsay exception. *See White v. Illinois*, 502 U.S. 346, 356 n. 8 (1992). Finally, even if erroneously admitted, this testimony could have little influence on the jury's verdict considering the overwhelming physical evidence against Petitioner. Petitioner's fifth ground is without merit.

6. Improper Introduction of Reputation Evidence. As previously noted, Petitioner's claim in this regard was not exhausted in the state courts. Petitioner argued on appeal that this testimony was inadmissible as reputation testimony under state law because it was based solely on specific bad acts. The Court of Criminal

Appeals determined that the testimony was properly admitted as character testimony under Rule 405(a) of the Texas Rules of Criminal Evidence. Even if not procedurally barred, this claim would be without merit.

Evidentiary rulings in particular are not generally subject to federal habeas review unless they violate some particular constitutional right or if such rulings impacted a defendant's due process rights to such as degree as to render the trial as a whole "fundamentally unfair." *Cupit v. Whitley*, 28 F.3d 532, 536 (5th Cir. 1994); *Trussell v. Estelle*, 699 F.2d 256, 259 (5th Cir. 1983).

Petitioner argues about the testimony of his sister-in-law, who testified concerning a sexually inappropriate incident she had observed between Petitioner and her sister. The witness did not testify to just this incident, but also about the fact that Petitioner had molested her son. Also, as reputation testimony it would be admissible because it was based not only upon the witness's observation, but also upon what she had heard, not only from her father, but from other family members and other people. As a result, Petitioner's sixth ground is without merit.

7. Unavailability of Appellate Review of the Death Penalty. Petitioner argues that Article 37.071 of the Texas Code of Criminal Procedure prevents meaningful appellate review as the Court of Criminal Appeals has held that it cannot review the jury's decision to impose the death penalty. He asserts that appellate review is unavailable as to the jury's decision on mitigation in violation of the Eighth and Fourteenth Amendments. The Court of Criminal Appeals rejected Petitioner's

argument under both state and federal law. Petitioner's claim is foreclosed by federal law, which holds that the Eighth Amendment does not require a redetermination on appeal of the death sentence of one found to be death eligible. *McCleskey v. Kemp*, 481 U.S. 279 (1987); *Pulley v. Harris*, 465 U.S. 37, 45-46 (1984). The Fifth Circuit has rejected Petitioner's argument, upholding the Court of Criminal Appeals' refusal to review the jurors' subjective determination on mitigation. *Moore v. Johnson*, 225 F.3d 495 (5th Cir. 2000), *cert. denied*, 532 U.S. 949 (2001). The *Moore* court determined that this refusal meets Constitutional muster. Therefore, the Court of Criminal Appeals' decision was not contrary to, nor did it involve an unreasonable application of, clearly established Federal law as determined by the Supreme Court, nor was it based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

8. Ineffective Assistance of Counsel. Petitioner argues that his trial counsel was ineffective in failing to investigate, develop and present available mitigation evidence, as well as evidence which would rebut portions of the State's case in aggravation, relying upon the opinion in Wiggins v. Smith, 539 U.S. 510 (2003). As previously noted, this claim was procedurally defaulted because it was raised in his fourth state habeas application and was dismissed under the Texas abuse of the writ statute, an adequate and independent state ground. Petitioner responds that the

state dismissal was not clearly independent of federal law because the opinion required the incorporation and application of federal law.

The State court order in this case was a per curiam order which went through Petitioner's various filings and concluded, "[w]e have reviewed Applicant's claim for relief and find that it does not meet the requirements for consideration of subsequent claims under Article 11.071, Section 5. Therefore, we dismiss this subsequent application." *Ex parte Ibarra*,, 2008 WL 4417283, No. 48,832-04 (Tex. Crim. App. 2008). There is no indication in the order that the Court of Criminal Appeals relied upon anything other than abuse of the writ. In cases where a state court is silent about the basis for its decision, or where federal law was not expressly invoked in the opinion, does not create a presumption that the state judgment rested on federal grounds. *Coleman v. Thompson*, 501 U.S. 722, 737 (1991). A perfunctory dismissal does not suggest that the state court considered or ruled on the merits. *Hughes v. Quarterman*, 530 F.3d 336, 342 (5th Cir. 2008). While noting the distinctions in the *Ruiz*[13] case upon which Petitioner relies, the Fifth Circuit has distinguished it because of the dissension among the Court of Appeals judges. *Balentine v. Thaler*, 626 F.3d 842 (5th Cir. 2010) ("We conclude that *Ruiz*, by relying on the fact that one of the state court judges clearly reached the merits, had a decision in which it did 'fairly appear' that the state court primarily relied on federal grounds"). *Balentine* specifically rejected the argument that a denial of relief under Section 5, without

[13] *Ruiz v. Quarterman*, 504 F.3d 523 *(5th Cir. 2007).

more, would justify a presumption that the Court of Criminal Appeals reached the federal merits of the application. *Id*. at 851, 854.

The facts in this case are more akin to *Hughes v. Quarterman*, 530 F.3d 336 (5th Cir. 2008), in which the Fifth Circuit applied Texas' abuse of the writ doctrine. In the *Hughes* case, the Fifth Circuit identified two factors that discourage reading uncertainty into the Court of Criminal Appeals' terse order. First, the factual basis for the barred claims was available well before the petitioner filed those claims. Second, there is nothing in the perfunctory dismissal that remotely suggests that the Court of Criminal Appeals "actually considered or ruled on the merits." *Id*. at 342. The same is true here. The facts Petitioner raises in support of his ineffective assistance claim were available to him during the course of his first habeas application. He has shown no cause and prejudice for failing to present them earlier, nor has he established that failure to consider this claim now would be a miscarriage of justice.

Even assuming that Petitioner's claim is not procedurally barred, it is without merit. The Sixth Amendment to the Constitution provides that the accused in a criminal prosecution has the right to assistance of counsel for his defense. In evaluating whether counsel's performance is inadequate, the Supreme Court has developed a two-prong test. *Strickland v. Washington*, 466 U.S. 668 (1984). Under this test, the Petitioner must establish: (1) that counsel's performance was deficient; and (2) that the deficient performance prejudiced the defense so as to deprive him

of a fair trial. *Id*. The proper standard for evaluating counsel's performance is that of reasonably effective assistance, considering all of the circumstances existing as of the time of counsel's conduct. *Hill v. Lockhart*, 474 U.S. 52 (1985). Scrutiny of counsel's performance is "extremely deferential;" *Bell v. Lynaugh*, 828 F.2d 1085, 1088 (5th Cir. 1987); and counsel's conduct is "strongly presumed to fall within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 690. Counsel's advice need not be perfect -- it need only be reasonably competent within the "range of competence demanded of attorneys in criminal cases." *McMann v. Richardson*, 397 U.S. 759, 771 (1970). To establish prejudice, the defendant must show that his attorney's errors were so serious that they rendered "the result of the trial unreliable or the proceeding fundamentally unfair." *Lockhart v. Fretwell*, 506 U.S. 362, 372 (1993).

Petitioner asserts that further investigation by counsel would have established numerous problems with his background, including desperate poverty, inadequate nutrition, disruptive family life, experience of and exposure to family violence, poor childhood development both mentally and physically, poor performance at school, and suffering a head injury as a child. Petitioner further asserts that he suffers from mental retardation and post-traumatic stress disorder. The facts, however, are one-sided. Because these matters were not presented to 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.

Even assuming the foregoing deficiencies, the record establishes that there was at least some investigation made by counsel. The record reflects motions for investigative funding and assistance, including evaluations by Dr. Stephen Mark, a psychiatrist. Many of the facts identified by Petitioner were in fact presented to the jury through the testimony of Petitioner's sister and his wife, 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. 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.

Even if counsel were determined to be ineffective, Petitioner must still show prejudice before he may prevail, which entails showing a reasonable probability that the jury would not have imposed the death penalty in the absence of counsel's errors. 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." *Smith v. Quarterman*, 471 F.3d 565, 576 (5th Cir. 2006). Petitioner's ineffective assistance claim is likewise without merit.

9. Mental Retardation. Petitioner asserts that he is mentally retarded and that his execution would be in violation of the Eighth Amendment ban on excessive and cruel and unusual punishment under the authority of *Atkins v. Virginia*, 536 U.S. 304 (2002). In support of this claim, Petitioner presents a number of affidavits. However, these were never presented to the state court. Such evidence is to be analyzed under § 2254(b), which requires exhaustion in the state courts. "The exhaustion requirement is not satisfied if the petitioner 'presents *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), *quoting Dowthitt v. Johnson*, 230 F.3d 733, 745 (5th Cir. 2000) (emphasis in original). "Evidence is material if it fundamentally alters, not merely supplements, the claim presented in state court. *Id*.

In state court, Petitioner presented no witnesses at all and submitted no affidavits from family. In order to establish that he falls under the protection of *Atkins*, Petitioner must show that he possess significantly subaverage intellectual functioning, which impacts two or more adaptive skill areas (communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work), which manifested before the age of 18. *Atkins* at 309 n.3, 317 n. 22. Without the testimony or affidavits from Petitioner's family and teacher, which he submits in this court for the first time, Petitioner fails to establish that any impairment he may have in his intellectual functioning occurred

before the age of 18. The affidavits are, therefore, material rather than merely supplementary and should have been presented to the state court for exhaustion prior to presentation in this Court. Petitioner's claim in this regard is procedurally defaulted for failure to exhaust the claim in the state court.

Petitioner argues that he was unable to fully investigate or present evidence because he was not given sufficient time and resources to do so. However, Atkins was decided in 2002. The evidentiary hearing was scheduled in September of 2006. There was more than sufficient time to gather whatever evidence was needed to present to the state court. Petitioner's argument that funds were not approved by the state court is without merit, as certain funds were approved. Additionally, as there is no right to counsel in a habeas proceeding, there is also no right to funding of state habeas counsel. *Roberts v. Dretke*, 356 F.3d 632, 640 (5th Cir. 2004). Finally, Petitioner presents nothing to establish why assistance was not requested from the Mexican consul, who was advised of Petitioner's case in September of 1997. As the affidavit of Agustin Rodriguez De La Gala indicates, the Mexican consulate was available to provide assistance in mitigation investigations, as well as funds for expert and investigative assistance, interpreters, psychologists, mitigation specialists, psychiatrists and travel expenses. There is, therefore, no excuse for Petitioner's procedural default.

Even if the Court were to consider the merits of this claim, the evidence that was presented to the state court would be insufficient to overcome the record in this

case. Dr. Stephen Mark evaluated Petitioner on two occasions, finding that he was competent to stand trial and that he was not mentally retarded. The expert opinion provided by Petitioner, which was completed in 2003 after *Atkins*, cannot carry as much weight as it was completed at a time when Petitioner had great incentive to appear as intellectually compromised as possible. This claim is without merit.

10. Jury Verdict as to Mental Retardation. Petitioner next argues that his Sixth Amendment rights were violated because the State was not required to prove beyond a reasonable doubt and the jury was not required to make a factual finding that he was mentally retarded. As previously noted, this claim was also procedurally defaulted as it was dismissed by the Court of Criminal Appeals as an abuse of the writ. Even if not barred, the claim would be without merit.

Petitioner relies upon the holdings in *Ring v. Arizona*, 536 U.S. 584 (2002), *Apprendi v. New Jersey*, 530 U.S. 466 (2000), as well as *Atkins*. However, the Fifth Circuit has recently held that "neither *Ring* and *Apprendi* nor *Atkins* render the absence of mental retardation the functional equivalent of an element of capital murder which the state must prove beyond a reasonable doubt." *In re Johnson*, 334 F.3d 403, 405 (5th Cir. 2003). *See also Woods v. Quarterman*, 498 F.3d 580, 585 n. 3 (5th Cir. 2007). Accordingly, Petitioner's tenth claim is without merit.

11. Violation of the Vienna Convention on Consular Relations. Petitioner asserts his rights under the Vienna Convention were violated because he was not advised of his right to consult with the Mexican consulate when arrested. This claim

is also barred be procedural default. The Court of Criminal Appeals dismissed this claim in Petitioner's direct appeal due to lack of a contemporaneous objection. As such, Petitioner's claim is barred.

Even if not procedurally barred, Petitioner's claim would be without merit. The history of this particular claim is outlined in the Supreme Court's opinion in *Medellin v. Texas*, 552 U.S. 491 (2008). Basically, the United States ratified the Vienna Convention on Consular Relations ("Vienna Convention" or "Convention") and the Optional Protocol Concerning the Compulsory Settlement of Disputes to the Vienna Convention ("Optional Protocol" or "Protocol") in 1969. Article 36 of the Convention provides that if a person detained in a foreign country requests, that country should inform the consular post of the detained person's country of his detention and inform the detainee of the right to request assistance from his consulate. The Optional Protocol provides that disputes arising out of the Convention would be brought before the International Court of Justice ("ICJ"). A number of Mexican nationals filed a claim before the ICJ, claiming violations of the Convention. The ICJ held that the Mexican nationals were entitled to review and reconsideration of their state-court convictions and sentences in the United States. *Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 12 (Judgment of Mar. 31) (*Avena*). The Supreme Court then ruled, contrary to Avena, that the Vienna Convention did not preclude the application of state default rules. *Sanchez-Lamas v. Oregon*, 548 U.S. 331 (2006). President George W. Bush then determined, through a

Memorandum to the Attorney General (Feb. 28, 2005), that the United States would "'discharge its international obligations'" under Avena 'by having State courts give effect to the decision.'" *Medellin v. Texas*, 552 U.S. at 498. As Medellin filed his habeas action raising the Vienna Convention and the *Avena* case as a basis for relief, the Supreme Court determined that Avena was not binding federal law as ICJ judgments are not conclusive on American courts. *Id*. Nor was the President's Memorandum sufficient to bind *Avena* onto domestic courts. As a result, Petitioner's claim is subject to procedural bar. *See Leal Garcia v. Quarterman*, 5793 F.3d 214 (5th Cir. 2009).

Even if procedural default were somehow waived, to be successful Petitioner would need to show prejudice. No additional assistance could have diminished the power of the evidence against him. The DNA and witnesses that connected him to the murder, the brutality of the crime, and the continuing threat to society that he posed were of such weight that no reasonable jury would have made a different decision. Accordingly, Petitioner's eleventh ground is likewise without merit.

In light of the foregoing, it is

ORDERED that Respondent's Motion for Summary Judgment is **GRANTED**. It is further

ORDERED that Petitioner's application for federal writ of habeas corpus is **DENIED** and this case is **DISMISSED**. It is further

ORDERED that Petitioner's Motion for Evidentiary Hearing is **DENIED**. It is further

ORDERED that any motions not previously ruled upon by the Court are **DENIED**.

Additionally, having considered the findings and conclusions set forth above and the requirements of 28 U.S.C. § 2253, the Courts finds, *sua sponte*, that a certificate of appealability should not issue, as Petitioner has failed to make a substantial showing of the denial of a constitutional right.

SIGNED on this 31st day of March, 2011.

WALTER S. SMITH, JR.
UNITED STATES DISTRICT JUDGE

APPENDIX 9

FILED

IN THE 54TH JUDICIAL DISTRICT COURT
OF McLENNAN COUNTY, TEXAS

JUN 21 1 02 PM '99

JOE JOHNSON
DISTRICT CLERK
McLENNAN TEXAS
DEPUTY

EX PARTE *

*

RAMIRO RUBI IBARRA *

CAUSE NUMBER ~~96-354A-C~~
96-634-CA

APPLICATION FOR WRIT OF HABEAS CORPUS
SEEKING POST-CONVICTION RELIEF FROM A DEATH SENTENCE
[TEXAS CODE OF CRIMINAL PROCEDURE, ARTICLE 11.071]

RAMIRO RUBI IBARRA, hereinafter called **APPLICANT**, by and through Ray Bass, an attorney appointed to represent Applicant, files this Application for Writ of Habeas Corpus pursuant to **ARTICLE 11.071, TEXAS CODE OF CRIMINAL PROCEDURE**, seeking post conviction relief from a death sentence, and would show that Applicant is being unlawfully restrained and confined on death row by the Director of the Institutional Division of the Texas Department of Criminal Justice, in Huntsville, Texas, pursuant to an illegal death sentence set forth in a judgment entered in the 54th Judicial District Court of McClennan County, Texas, in Cause Number 99-364-C. Applicant would further show the following:

I.
FACTUAL SUMMARY OF THE CASE

At approximately 1:00 P.M. on March 6, 1987, Francisco Zuniga discovered the body of his 16 year old sister, Maria De La Paz Zuniga in a bedroom of their home at 402 South 17th, in Waco. She was lying on her back on the bed. Her dress was pulled up over her waist and her underware appeared to have been ripped. Her face had been beaten and she had been strangled with a piece of yellow electrical wire which was wrapped around her neck and shoulders. Various contusions and abrasions on her body were consistent with a defensive struggle, and blood underneath her fingernails suggested that she may have scratched her assailant.

Waco police officers soon learned that at approximately 8:15 A.M. witnesses had seen a mexican male, wearing a plaid flannel shirt and khaki colored pants, walking from the direction of 402 South 17th, to an automobile parked across the street from the house. The mexican male was described as

being in his early to mid 30's, weighing about 185 pounds, and approximately 5' 10" tall. He had black hair over his ears, a heavy mustache, and a stocky build. The vehicle was described as a 1968 or 1969 Camero, primer red in color, with a bent antenna and mismatched rims. Police also learned from Francisco Zuniga that Applicant owned a vehicle similar to that described by the witnesses.

At approximately 5:45 P.M. on March 6, 1987, Waco police officers observed a 1968 to 1970 Camero, red primer in color, parked in front of Applicant's home. They approached the house and knocked on the door. Applicant, wearing a blue T-shirt and beige pants, answered the door and acknowledged that his name was Ramiro. Noticing that applicant had what appeared to be scratch marks on his face and was a hispanic male, approximately 25 to 30 years old, 5' 8" to 5' 10" in height, and stocky built with dark hair and a beard, officers immediately placed applicant under arrest and requested and obtained applicant's consent to search his camero. In the car officers found pieces of yellow wire which appeared similar to that used to strangle Maria De La Paz Zuniga.

After his arrest Applicant was placed in a police line-up and was identified by two witnesses as the person seen in the vicinity of the victim's home at approximately 8:15 A.M. on March 6, 1987.

On March 10, 1987, Waco Police Officer Ramon Salinas obtained an evidentiary search warrant for blood, saliva, and hair samples from Applicant. These samples were obtained for comparison with facial and pubic hairs found on or about the body of the victim and with seminal fluid found in vaginal and anal swabs taken from the victim.

On May 27, 1987, Applicant was indicted for the capital murder of Maria De La Paz Zuniga. That indictment was subsequently dismissed on July 29, 1988, after a motion to suppress evidence obtained as a result of the March 10, 1987 evidentiary search warrant was granted.

On July 24, 1996, a second evidentiary search warrant was issued to obtain blood, saliva, and hair samples from applicant. Subsequent analysis of these samples revealed that applicant's facial and pubic hair is similar to the facial and pubic hair found on or about the body of the victim. DNA analysis yielded a 1 in 166,667,000 chance that the semen contained in swabs taken from the victim came from a hispanic male other than applicant.

On September 18, 1996, applicant was again indicted for the capital murder of Maria De La Paz Zuniga. On September 17, 1997, a jury found applicant guilty of capital murder and subsequently found that he would be a continuing threat to society and that there were not sufficient mitigating circumstances to warrant a life sentence. On September 22, 1997, applicant was sentenced to death by lethal injection. Appellate review of applicant's capital murder conviction and death sentence is currently pending in the Texas Court of Criminal Appeals in Case Number 72, 974. The state's original brief was filed in said case number on May 4, 1999. Pursuant to Article 11.071, Texas Code of Criminal Procedure, Applicant's original post conviction application for writ of habeas corpus must be filed on or before June 21, 1999.

II.
GROUNDS FOR HABEAS CORPUS RELIEF

IMPOSITION OF THE DEATH PENALTY IN THIS CASE VIOLATES THE PROHIBITION AGAINST "CRUEL AND UNUSUAL PUNISHMENT" AS CONTAINED IN THE EIGHT AMENDMENT TO THE UNITED STATES CONSTITUTION WHICH APPLIES TO THE STATES THROUGH THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The Eight Amendment to the United States Constitution prohibits the infliction of cruel and unusual punishment on those convicted of a crime. That prohibition is incorporated within and, thus, enforceable against the State of Texas through the "due process clause" of the Fourteenth Amendment to the United States Constitution. Robinson v. California, 370 U.S. 666 (1952).

In Gregg v. Georgia, 428 U.S. 153 (1976) the Supreme Court held that the Eight Amendment does not prohibit capital punishment, But, that "decision rested in large part on the grounds that (1) the death penalty was considered permissible by the Framers, and (2) the death penalty might serve `two principal social purposes: retribution and deterrence'". Lackey v. Texas, ___ U.S. ___ (1995) (No. 94-8262, decided March 27, 1995). But, when the death penalty ceases realistically to serve those social purposes "its imposition would then be the pointless and needless extinction of life with only marginal contributions to any discernible social or public service", and "would be patently excessive and cruel and unusual punishment violative of the Eight Amendment". Furman v. Georgia, 408 U.S. 238 (1972)(Justice White's Concurring Opinion). Justice Stevens recently noted that delay in imposing the death penalty "frustrates the public interest in deterrence and eviscerates the only rational justification for

that type of punishment". James Gomez, Director, California Department of Corrections v. David Fierro & Alejandro Gilbert Ruiz, ___ U.S. ___ (1996) (No. 95-1830, decided October 15, 1996)(Justice Stevens dissenting opinion).

In Lackey v. Texas, supra, Justice Stevens, in a memorandum opinion respecting the denial of certiorari, noted that a death row inmates claim that infliction of the death penalty after a 17 year delay constitutes cruel and unusual punishment, presented an important issue warranting review by the Supreme Court after it has been addressed by other courts.

Applicant respectfully submits that imposition of the death penalty in this case, after a nine year delay in prosecution for the alleged crime "undermines the deterrent effect of capital punishment and reduces public confidence in our criminal justice system". See, Commentary: Capital Punishment, Justice Lewis Powell, 102 Harvard Law Review 1035 (1989). Applicant respectfully submits that where, as in this case, the delay in prosecution was not occassioned as a result of actions or conduct of the accused, infliction of the death penalty after a nine year delay in prosecution, constitutes cruel and unusual punishment in violation of the Eight and Fourteenth Amendments to the United States Constitution.

WHEREFORE, applicant prays for issuance of the writ of habeas corpus, and, after notice and hearing to the Director of the Institutional Division of the Texas Department of Criminal Justice, applicant prays for judgment that infliction of the death penalty in this case would constitute cruel and unusual punishment in violatation of the Eight Amendment to the United States Constitution.

RESPECTFULLY SUBMITTED BY

Ray Bass

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FAX: [512] 707-8187

ATTORNEY FOR APPLICANT
SBN 01884000

IN THE 54TH JUDICIAL DISTRICT COURT
OF McLENNAN COUNTY, TEXAS

EX PARTE	*	
	*	**CAUSE NUMBER 96-354A-C**
RAMIRO RUBI IBARRA	*	

AFFIDAVIT

STATE OF TEXAS

COUNTY OF TRAVIS

BEFORE ME, the undersigned Notary Public for the State of Texas, on this 21st day of June, 1999, personally appeared Ray Bass, who upon being administered the oath by me, did state the following:

"My name is Ray Bass. I am an attorney licensed to practice law in the State of Texas. My Texas Bar Card Number is 01884000. I have been appointed by the Court of Criminal Appeals to represent Ramiro Rubi Ibarra in a Post Conviction Habeas Corpus proceeding under Article 11.07, Texas Code of Criminal Procedure. I have prepared the foregoing Application For Writ of Habeas Corpus and I hereby swear and affirm that the allegations of fact contained therein are true and correct."

Ray Bass

RAY BASS

SWORN & SUBSCRIBED TO THIS 21ST DAY OF JUNE, 1999.

Ralph A Modad

NOTARY PUBLIC, STATE OF TEXAS
MY COMMISSION EXPIRES:

RALPH A MODAD
NOTARY PUBLIC STATE OF TEXAS
Commission Expires:
MARCH 30, 2003