No. 19-8103

In the Supreme Court of the United States

RAMIRO RUBI IBARRA, PETITIONER

v.

LORIE DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION
(CAPITAL CASE)

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

BRIEF IN OPPOSITION

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant Attorney General

RYAN BANGERT
Deputy First Assistant
Attorney General

OFFICE OF THE
ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
[Tel.]: (512) 936-1700
[Fax]: (512) 474-2697
Kyle.Hawkins@oag.texas.gov

KYLE D. HAWKINS
Solicitor General
Counsel of Record

JASON R. LAFOND
Assistant Solicitor General

Counsel for Respondent

QUESTIONS PRESENTED

The Fifth Circuit affirmed the district court's rejection of Petitioner's ineffective-assistance claim as procedurally defaulted in an opinion that expressly applied the standards set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), and *Martinez v. Ryan*, 566 U.S. 1 (2012). The questions presented are:

1. Should this Court grant review to correct alleged errors in the Fifth Circuit's straightforward application of *Strickland* and *Martinez*?

2. Is there any reason to reverse the Fifth Circuit's conclusions that Petitioner's state-habeas counsel reasonably chose not to pursue an ineffective-assistance claim challenging trial counsel's mitigation investigation where the legal and factual landscape at the time suggested the claim would not succeed and that Petitioner was not prejudiced by the choice in any event?

3. By invoking *Martinez v. Ryan*, thereby insisting that state-habeas counsel unreasonably failed to develop Petitioner's ineffective-assistance claim, has Petitioner pleaded himself into AEDPA's statutory bar on new evidence not diligently developed in state court?

TABLE OF CONTENTS

Questions Presented i

Table of Contents ii

Table of Authorities iii

Introduction 1

Statement 3

Reasons for Denying the Petition 6

I. Review Is Unwarranted Because the Fifth Circuit Explicitly and Unambiguously Applied the Correct Legal Standards. 7

II. Summary Reversal Is Unwarranted Because the Fifth Circuit Correctly Applied This Court's Precedent. 14

III. AEDPA Bars the New Evidence Upon Which Petitioner Relies to Support His Ineffective-Assistance Claim. 23

Conclusion 28

TABLE OF AUTHORITIES

Page(s)

Cases:

Am. Tradition P'ship v. Bullock,
567 U.S. 516 (2012) 14
Ex parte Armstrong,
No. WR-78,106-01, 2017 WL 5483404
(Tex. Crim. App. Nov. 15, 2017) 22
Austin v. Davis,
876 F.3d 757 (5th Cir. 2017) 8
Black v. Cutter Labs.,
351 U.S. 292 (1956) 14
Bowie v. Branker,
512 F.3d 112 (4th Cir. 2008) 10
Bradshaw v. Richey,
546 U.S. 74 (2005) 24
Brown v. Sanders,
546 U.S. 212 (2006) 12, 13
Bryant v. Scott,
28 F.3d 1411 8
Burger v. Kemp,
483 U.S. 776 (1987) 9, 17
California v. Rooney,
483 U.S. 307 (1987) (per curiam) 14
Clemons v. Mississippi,
494 U.S. 738 (1990) 12
Coleman v. Thompson,
501 U.S. 722 (1991) 8, 26
Cullen v. Pinholster,
563 U.S. 170 (2011) ..... *passim*
Cummings v. Sec'y for Dep't of Corr.,
588 F.3d 1331 (11th Cir. 2009) 10, 20
Ex parte Damaneh,
No. WR-75,134-01, 2011 WL 4063336
(Tex. Crim. App. Sept. 14, 2011) 23
Darden v. Wainwright,
477 U.S. 168 (1986) 17
Davila v. Davis,
137 S. Ct. 2058 (2017) 25, 26, 27
Eddings v. Oklahoma,
455 U.S. 104 (1982) 9

Cases—Continued: Page(s)

Eldridge v. State,
940 S.W.2d 646 (Tex. Crim. App. 1996)..... 12
Ex parte Gonzales,
204 S.W.3d 391 (Tex. Crim. App. 2006)..... 11, 17
Grayson v. Thompson,
257 F.3d 1194 (11th Cir. 2001) 20, 21
Harrington v. Richter,
562 U.S. 86 (2011) 14
Holland v. Florida,
560 U.S. 631 (2010) 15
Holland v. Jackson,
542 U.S. 649 (2004) 24, 25
Holsey v. Warden,
694 F.3d 1230 (11th Cir. 2012) 14
Ibarra v. Davis,
786 F. App'x 420 (5th Cir. 2019) .....*passim*
Ibarra v. State,
11 S.W.3d 189 (Tex. Crim. App. 1999)..... 4, 3, 5
Ex parte Ibarra,
No 48,832-01 (Tex. Crim. App. April 4, 2001) 5
Keeney v. Tamayo-Reyes,
504 U.S. 1 (1992) 26, 27
Ex parte Kerr,
No. AP-75500, 2008 WL 366970 (Tex. Crim. App. Feb. 6, 2008)..... 22
Lockett v. Ohio,
438 U.S. 586 (1978) 9
Ex parte Lucero,
No. AP-76,415, 2010 WL 3582978 (Tex. Crim. App. Sept. 15, 2010) 22
Maples v. Thomas,
565 U.S. 266 (2012) 15
Martinez v. Ryan,
566 U.S. 1 (2012) .....*passim*
Ex parte Martinez,
195 S.W.3d 713 (Tex. Crim. App. 2006)..... 11, 22, 23
Maryland v. Kulbicki,
136 S. Ct. 2 (2015) 19
McCleskey v. Zant,
499 U.S. 467 (1991) 14
Mosely v. State,
983 S.W.2d 249 (Tex. Crim. App. 1998)..... 11, 12, 13

Cases—Continued: Page(s)

Paul v. United States,
534 F.3d 832 (8th Cir. 2008) 10
Penry v. Lynaugh,
492 U.S. 302 (1989) 9
Rompilla v. Beard,
545 U.S. 374 (2005) 18, 22
Rosales v. State,
841 S.W.2d 368 (Tex. Crim. App. 1992)..... 17
Ross v. Blake,
136 S. Ct. 1850 (2016) 25
Sexton v. Beaudreaux,
138 S. Ct. 2555 (2018) (per curiam) 16
Smith v. Murray,
477 U.S. 527 (1986) 15, 16, 19
Sonnier v. Quarterman,
476 F.3d 349 (5th Cir. 2007) 8
St. Pierre v. Walls,
297 F.3d 617 (7th Cir. 2002) 10
Stafford v. Saffle,
34 F.3d 1557 (10th Cir. 1994) 20
Strickland v. Washington,
466 U.S. 668 (1984) .....*passim*
Stringer v. Black,
503 U.S. 222 (1992) 12
Sully v. Ayers,
725 F.3d 1057 (9th Cir. 2013) 14
United States v. Cronic,
466 U.S. 648 (1984) 27
United States v. Frady,
456 U.S. 152 (1982) 15, 22
Wheeler v. Simpson,
852 F.3d 509 (6th Cir. 2017) 14
Wiggins v. Smith,
539 U.S. 510 (2003) .....*passim*
Williams v. Roper,
695 F.3d 825 (8th Cir. 2012) 14
Williams v. Taylor,
529 U.S. 362 (2000), ... 18, 23
Williams v. Taylor,
529 U.S. 420 (2000) .....*passim*

Cases—Continued: Page(s)

Ex parte Williams,
No. AP-76,455, 2012 WL 2130951 (Tex. Crim. App. June 13, 2012) 11
Wong v. Belmontes,
558 U.S. 15 (2009) 19
Ex parte Woods,
176 S.W.3d 224 (Tex. Crim. App. 2005) 22

Constitutional Provisions and Statutes:

28 U.S.C. § 2254(e)(2) ..... *passim*
Tex. Code Crim. Proc. art. 37.071(e)(1) 13
Supreme Court R. 10 7

Other Authorities:

Emily Hughes, *Mitigating Death*, 18 Cornell J.L. & Pub. Pol'y 337
(2009) 16, 18
Claire Osborn, *Defense Attorney Ray Bass Called a Giant in the Legal Profession*, Austin American-Statesman (Sept. 15, 2016), *available at* https://bit.ly/2UKT9hE 5, 16
State Bar of Texas, *Guidelines and Standards for Texas Capital Counsel* (Nov. 2006) 15

In the Supreme Court of the United States

No. 19-8103

RAMIRO RUBI IBARRA, PETITIONER

v.

LORIE DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION
(CAPITAL CASE)

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

BRIEF IN OPPOSITION

INTRODUCTION

Petitioner seeks to raise a habeas clam that trial counsel was ineffective in failing to bring out evidence of Petitioner's troubled childhood and resulting PTSD to mitigate Petitioner's brutal rape and murder of a sixteen-year-old girl. Petitioner's ineffective-assistance claim is procedurally defaulted because he failed to properly raise the claim in state court. Petitioner invokes the cause-and-prejudice exception to procedural default, claiming that his original state-habeas counsel was negligent in failing to properly raise his ineffective-assistance claim in state court. In *Martinez v. Ryan*, 566 U.S. 1 (2012), this Court held that a federal-habeas petitioner could establish cause by showing that his state-habeas counsel's failure to raise a substantial ineffective-assistance-of-trial-counsel claim was unreasonable. Nevertheless, *Martinez* also reaffirmed that cause without prejudice is not sufficient to

overcome procedural default. *See* 566 U.S. at 18. The Fifth Circuit applied *Martinez* and *Strickland v. Washington*, 466 U.S. 668 (1984), and held that Petitioner could not overcome procedural default because he could not show cause or prejudice.

Review is unwarranted because Petitioner's challenges to the Fifth Circuit's ruling amount to fact-bound requests for error correction. The Petition does not dispute that the Fifth Circuit identified and applied the correct legal standard from *Martinez* and *Strickland*, only the outcome. Even if such rote error correction were a proper basis for review, there is no error to correct. Petitioner cannot show cause to overcome his default because Petitioner's state-habeas counsel in 1999 could reasonably conclude, in light of the caselaw at the time and the facts of Petitioner's case, that an ineffective-assistance claim challenging trial counsel's mitigation investigation lacked merit and was not worth pursuing. And even if state-habeas counsel should have pursued this claim, Petitioner cannot show actual prejudice because it is unlikely the Texas Court of Criminal Appeals would have granted relief.

To the extent that the Court is inclined to revisit the standards for an ineffective assistance claim as it pertains to mitigation investigation, this case presents a poor vehicle to do so. Even if Petitioner can overcome the equitable bar of procedural default, Petitioner will still lose because he cannot overcome AEDPA's bar on new evidence not diligently developed in state court. *See* 28 U.S.C. § 2254(e)(2). Due to the fact-intensive nature of Petitioner's claims, his success on cause—meaning his state-habeas counsel unreasonably failed to pursue his ineffective-assistance claim—necessarily means any new evidence is barred, as section 2254(e)(2) is triggered by "lack of diligence, or some greater fault, attributable to the prisoner *or the prisoner's counsel*." *Michael Williams v. Taylor*, 529 U.S. 420, 432 (2000) (emphasis added).

STATEMENT

1. On the morning of March 6, 1987, sixteen-year-old Maria De La Paz was babysitting her sister's two toddlers at her sister's home. *See* R.6384-85.[1] In the late morning, Maria's brother came by the home to visit. R.6385-86. He found the two toddlers locked outside, dirty and crying. R.6387. Worried for Maria's safety, he broke into the home. R.6389. He found Maria's bloody, badly beaten body splayed across a bed, her clothes torn to pieces, and a wire around her neck. R.6398. Maria had been raped and sodomized and then strangled to death.

It quickly became clear that Petitioner murdered Maria. Multiple witnesses placed Petitioner at the murder scene at the time of the crime and physical evidence linked him to the crime. *See Ibarra v. State*, 11 S.W.3d 189, 194, 196 (Tex. Crim. App. 1999). Petitioner's DNA was found on Maria's underwear, and inside her body. *See id.* at 194-95; R.7779. Petitioner remained free for nearly a decade after murdering Maria because the original warrant used to collect physical evidence was defective. *Ibarra*, 11 S.W.3d at 191-92. At the time, a Texas statute did not allow subsequent warrants. *See id.* at 192. When that law was repealed, authorities obtained a second warrant, and the evidence collected conclusively linked Petitioner to the crime. Unsurprisingly, a jury convicted Petitioner of capital murder. *Ibarra*, 11 S.W.3d at 192.

Petitioner's trial counsel also faced an uphill battle at the punishment phase of his trial. On top of the incredibly brutal and senseless nature of Petitioner's murder of Maria, the

[1] *R._* refers to the record on appeal before the Fifth Circuit.

jury heard substantial testimony concerning Petitioner's penchant for sexual violence. Petitioner's nephew gave graphic testimony how Petitioner repeatedly raped him when the nephew was only eight years old, including while Petitioner's two-year-old son slept in the next room. *See* R.7960-7970. Petitioner threatened to kill his nephew if the nephew ever told anyone. R.7966. These rapes and threats occurred after Petitioner murdered Maria, but before his trial. *See* R.7962, 7966. The daughter of Petitioner's one-time girlfriend also testified that Petitioner sexually assaulted her when she was eleven years old and beat her mother when the mother confronted him. R.8450-51. The mother also testified, recalling Petitioner's threatening her with a knife and strangling her with a wire, only relenting when she begged for her life. *See* R.8462-8466.

The jury was also shown evidence that Petitioner could not behave behind bars. While in jail awaiting trial for Maria's murder, Petitioner was caught masturbating in front of a window that faced a public street. R.8502. Petitioner also had a history of getting in fights with other inmates. R.8496-97.

In an effort to avoid the death penalty, Petitioner's trial counsel focused on (1) undermining the State's evidence of Petitioner's additional crimes, and (2) Petitioner's importance to his family. *See* R.8369-74, 8379-81. Petitioner's counsel elicited testimony from Petitioner's sister Rubi that Petitioner, one of thirteen children, came to the United States to work and help support his impoverished family in Mexico. R.8308-13. Petitioner's wife testified that Petitioner was a good and supportive father. *See, e.g.*, R.8322. And counsel implored the jury not to let Petitioner's "children . . . grow up and live the rest of their life without a father." R.8381.

Petitioner's counsel also secured the services of a psychiatrist to examine Petitioner. R.830. The psychiatrist concluded, however, that Petitioner was a malinger "attempting to manipulate the situation to his advantage." R.831.

The jury found that there was a probability that Petitioner would be a continuing threat to society and that there were not sufficient mitigating circumstances to warrant a sentence of life imprisonment. R.8391. The trial court sentenced Petitioner to death. R.8394, 8677. The Court of Criminal Appeals affirmed, rejecting Petitioner's eleven points of error. *Ibarra*, 11 S.W.3d 189.

2. On state-habeas review, Petitioner was represented by a well-respected member of the Texas defense bar. *See* Claire Osborn, *Defense Attorney Ray Bass Called a Giant in the Legal Profession*, Austin American-Statesman (Sept. 15, 2016) (eulogizing Bass), *available at* https://bit.ly/2UKT9hE. Acting on Petitioner's behalf, counsel raised a single claim challenging the length of time between the crime and Petitioner's death sentence. R.3097-00. Petitioner argued that his death sentence violates the prohibition against cruel and unusual punishment under the Eighth and Fourteenth Amendments because, owing to the nine-year delay between the offense and his indictment, a death sentence no longer served the social purposes of retribution and deterrence. Without these, petitioner contended, his execution would be "pointless" and "patently excessive." R.3099. The Court of Criminal Appeals denied relief. *Ex parte Ibarra*, No 48,832-01 (Tex. Crim. App. April 4, 2001).

3. Having failed to obtain relief on direct appeal or state-habeas review, Petitioner turned to federal court. As relevant here, Petitioner asserted that he was abused as a child and suffered posttraumatic stress disorder as a result. Pet. 11-17. A number of Petitioner's

many siblings averred that Petitioner's father was violent, including two who described incidents of abuse directed toward Petitioner. *See* R.10266, 10303. Petitioner's evidence shows he does not recall any abuse. R.10363.

The district court concluded that Petitioner could not overcome the procedural default of his ineffective-assistance claim because his state-habeas counsel was not deficient in failing to raise an ineffective-assistance claim attacking trial counsel's mitigation investigation and because Petitioner could not show prejudice in any event. R.2911-13; *see Martinez*, 566 U.S. 1 (allowing ineffective assistance of state-habeas counsel to establish cause in limited circumstances).

4. The Fifth Circuit affirmed. *Ibarra v. Davis*, 786 F. App'x 420 (5th Cir. 2019). Applying *Martinez v. Ryan* and *Strickland v. Washington*, the court held that Petitioner's state-habeas counsel was not ineffective under *Strickland* for failing to raise the ineffective-assistance claim Petitioner now presses, so Petitioner could not establish cause to overcome his acknowledged procedural default. *Id.* at 424-25. The court went on to hold that even if Petitioner could establish cause, he could not show actual prejudice because Petitioner's underlying ineffective-assistance claim likely would have failed on state-habeas review. *Id.* at 425-26. The court reasoned that it was unlikely the state court would have found that any punishment-phase ineffectiveness by trial counsel prejudiced Petitioner, given the brutality of the murder, Petitioner's other crimes, and the double-edged nature of Petitioner's new mitigation evidence. *Id.*

REASONS FOR DENYING THE PETITION

Review is unwarranted for three independent reasons: Petitioner seeks mere error correction. There is no error to correct. And this case presents a poor vehicle to clarify any

open issues regarding the standard for establishing an insufficient mitigation investigation because even if this Court overturns the Fifth Circuit's judgment, Petitioner's ineffective-assistance claim will still fail.

I. Review Is Unwarranted Because the Fifth Circuit Explicitly and Unambiguously Applied the Correct Legal Standards.

The Court should deny review because this is not the "rar[e]" case justifying certiorari review "when the asserted error consists of . . . the misapplication of a properly stated rule of law." Supreme Court R. 10. The rules here are well-settled and, most importantly, were applied consistently with other federal and state courts, which have had no difficulty deciding such garden-variety mitigation claims.

The Petition challenges the Fifth Circuit's application of *Strickland* and *Martinez*. Pet. 24-40. Petitioner does not dispute, however, that the Fifth Circuit correctly identified these decisions as controlling the court's analysis of Petitioner's ineffective-assistance claim. *See* Pet. 31. Concerning *Strickland*, the Fifth Circuit said:

> 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."

Ibarra, 786 F. App'x at 423 (quoting *Strickland*, 466 U.S. at 687). Because Petitioner is seeking to overcome procedural default of his ineffective-assistance claim based on the alleged deficiency of his state-habeas counsel, the Fifth Circuit also set forth *Martinez*'s standard:

> *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 (2012). . . . 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 (citing *Coleman v. Thompson*, 501 U.S. 722, 750 (1991)). A "substantial" claim is one that has "some merit." *Id.* at 14. An insubstantial claim is one which "does not have any merit" or "is wholly without factual support." *Id.* at 15-16.

Id.

The Fifth Circuit went on to apply these standards, holding that Petitioner could not satisfy *Martinez* because his state-habeas counsel was not deficient and, even if counsel was deficient, Petitioner was not prejudiced. *Id.* at 424-26. And the Fifth Circuit reached both conclusions after applying *Strickland* to examine the performance of Petitioner's state-habeas counsel and the merits of Petitioner's underlying ineffective-assistance claim. *Id.*

Petitioner disagrees with the outcome reached by Fifth Circuit's application of *Strickland* and *Martinez*, *see, e.g.*, Pet. 31-33, but that does not justify this Court's review. Petitioner also mischaracterizes the Fifth Circuit in at least three different ways to make his case about something more than error correction. These efforts to manufacture a certworthy issue fall short.

First, Petitioner insists that the Fifth Circuit established a rule "that state[-]habeas counsel have no duty to investigate whether a [Petitioner's] Sixth Amendment (or any other rights) were violated." Pet. 31. The Fifth Circuit's unpublished disposition did no such thing. The Fifth Circuit has repeatedly acknowledged that, under *Strickland*, counsel may be deficient for failing to investigate matters helpful to the defense. *See, e.g.*, *Austin v. Davis*, 876 F.3d 757, 785 (5th Cir. 2017); *Sonnier v. Quarterman*, 476 F.3d 349, 358 (5th Cir. 2007); *Bryant v. Scott*, 28 F.3d 1411, 1419 (5th Cir. 1994). And the Fifth Circuit expressly invoked *Strickland* here in examining state-habeas counsel's performance: "[I]t was not deficient

under *Strickland* for Ibarra's state[-]habeas counsel not to pursue an [ineffective-assistance] claim in state[-]habeas proceedings." 786 F. App'x at 425. *Strickland* requires a case-by-case inquiry "to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." 466 U.S. at 689. And that is what the Fifth Circuit did in this case. *See* 786 F. App'x at 425-26. The Fifth Circuit established no bright-line rule; it merely concluded that Petitioner's state-habeas counsel was not deficient under the circumstances presented in this case.

Second, Petitioner suggests that the Fifth Circuit has adopted a rule that treats "every conceivable form of mitigating information" as "double-edged" and "thus insufficient to demonstrate prejudice." Pet. 35-36. Petitioner is again mistaken.

This Court has long recognized that mitigation evidence tending to show that defendant's troubled background caused his violence may be double-edged: Such evidence may reduce the defendant's blameworthiness, but it may also suggest that the defendant is beyond rehabilitation. *See Penry v. Lynaugh*, 492 U.S. 302, 324 (1989); *Burger v. Kemp*, 483 U.S. 776, 793 (1987) (concluding that counsel was not deficient for failing to investigate and present mitigation evidence that also "suggest[s] violent tendencies"); *cf. Eddings v. Oklahoma*, 455 U.S. 104, 107-08 (1982) (faulting State for precluding the mitigating evidence of the petitioner's troubled youth that suggested positive prospects for rehabilitation in adulthood); *Lockett v. Ohio*, 438 U.S. 586, 594 (1978) (plurality op.) (same for psychiatric information suggesting a positive prognosis for rehabilitation). This Court reiterated that common-sense notion in *Cullen v. Pinholster*, 563 U.S. 170 (2011), which reasoned that "new evidence relating to Pinholster's family" including "serious substance abuse, mental illness,

and criminal problems" was "by no means clearly mitigating, as the jury might have concluded that Pinholster was simply beyond rehabilitation." *Id.* at 201.

Here, the Fifth Circuit did not apply any rule deeming all mitigating evidence double-edged. Rather, it considered the specific aggravating and mitigating evidence at issue before concluding that the Court of Criminal Appeals in 1999 was unlikely to find that trial counsel's failure to further investigate Petitioner's family history and mental health prejudiced Petitioner. *Ibarra*, 786 F. App'x at 425-26. And, under *Martinez*, the Fifth Circuit reviewed not whether trial counsel was ineffective but whether Petitioner was "prejudiced" by "state habeas counsel's failure to raise the *Wiggins* issue." *Ibarra*, 786 F. App'x at 425 (footnote omitted). Therefore, the relevant decision-maker is the Court of Criminal Appeals, not the jury in Petitioner's trial.

Other Courts of Appeals routinely reach similar conclusions on similar evidence. *See, e.g.*, *Cummings v. Sec'y for Dep't of Corr.*, 588 F.3d 1331, 1369 (11th Cir. 2009); *Bowie v. Branker*, 512 F.3d 112, 121 (4th Cir. 2008); *Paul v. United States*, 534 F.3d 832, 843 (8th Cir. 2008); *St. Pierre v. Walls*, 297 F.3d 617, 633-34 (7th Cir. 2002). Similar to *Pinholster*, the Fifth Circuit concluded that the Court of Criminal Appeals in 1999 was likely to conclude that "new evidence relating to [Petitioner's] family" would have led the jury to conclude that Petitioner "was simply beyond rehabilitation." 563 U.S. at 201. Petitioner disagrees with the Fifth Circuit's conclusion, but that does not justify this Court's review.

Third, Petitioner conjures a supposed split between the Fifth Circuit and Texas courts on how to examine prejudice when a habeas petitioner asserts that trial counsel's mitigation investigation was deficient. Pet. 36-40. As the Fifth Circuit explained, "[c]ourts have routinely stated that to evaluate prejudice, the court reweighs the evidence in aggravation

against the totality of the available mitigating evidence." *Ibarra*, 786 F. App'x at 426 . According to Petitioner, while the Fifth Circuit evaluates prejudice by weighing the totality of mitigation evidence against aggravation evidence, Texas courts in capital cases do not engage in any such weighing. Pet. 36-37.

There is no split. Petitioner misreads Texas caselaw, as shown by the precedent he relies on. In *Ex parte Gonzales*, 204 S.W.3d 391 (Tex. Crim. App. 2006) (cited at Pet. 37), the Court of Criminal Appeals found prejudice because it could not "say with confidence that the facts of the capital murder and the aggravating evidence . . . would clearly *outweigh* the totality of the applicant's mitigating evidence if a jury had the opportunity to evaluate it again." *Id.* at 399. The *Gonzalez* court, like the Fifth Circuit, thus expressly contemplates weighing the aggravating and mitigating evidence.

And *Gonzales* is just one example of many. In *Ex parte Martinez*, 195 S.W.3d 713 (Tex. Crim. App. 2006), for instance, the Court of Criminal Appeals explained in language nearly identical to the Fifth Circuit's that "[t]o determine whether applicant was prejudiced by trial counsel's alleged deficient performance, 'we reweigh the evidence in aggravation against the totality of available mitigating evidence.'" *Id.* at 730 (quoting *Wiggins v. Smith*, 539 U.S. 510, 534 (2003)). And in *Ex parte Williams*, No. AP-76,455, 2012 WL 2130951 (Tex. Crim. App. June 13, 2012), the Court of Criminal Appeals found no prejudice because the "applicant has not shown a reasonable probability that the unadmitted evidence would have *tipped the scale* in his favor on the punishment special issues." *Id.* at *14 (emphasis added).

In fact, in *Mosely v. State*, 983 S.W.2d 249 (Tex. Crim. App. 1998), the Court of Criminal Appeals confronted and rejected the very argument that Petitioner presses, that "the concept of 'aggravating factors' plays no role in a capital sentencing trial in Texas." Pet. 37; *see*

Mosely, 983 S.W.2d at 263 n.18 (rejecting dissent's conclusion that "aggravating evidence is irrelevant to the mitigation special issue"). Citing cases like *Eldridge v. State*, 940 S.W.2d 646 (Tex. Crim. App. 1996) (cited at Pet. 37), the court explained,

> While these cases have some language indicating that the mitigation question does not involve aggravating circumstances, such language should properly be viewed as simply observing that the issue does not *require* their consideration. Such an observation does not, however, preclude *permitting* the jury to consider aggravating factors in making its evaluation. We disavow any language in those cases that suggests otherwise.

983 S.W.2d at 263 n.18. "In determining whether to dispense mercy to a defendant after it has already found the eligibility factors in the State's favor," the court went on, "the jury is not, and should not be, required to look at mitigating evidence in a vacuum." *Id.*

Petitioner's confusion likely stems from this Court's distinction—introduced in cases like *Stringer v. Black*, 503 U.S. 222 (1992), and *Clemons v. Mississippi*, 494 U.S. 738 (1990)—between "weighing" and "non-weighing" capital punishment regimes. "Weighing" States require a jury to weigh mitigating evidence against only statutorily specified aggravating factors that the jury found present in concluding that the defendant was eligible for the death penalty. *Brown v. Sanders*, 546 U.S. 212, 217 (2006). "By contrast, in a non-weighing State," the jury may "consider aggravating factors different from, or in addition to" the statutory factors that make the defendant eligible for the death penalty under the particular State's laws *Id.* Texas is a so-called non-weighing jurisdiction under the *Stringer-Clemons* framework. Thus, Petitioner is not wrong when he distinguishes Texas from "Florida," a weighing State whose "capital sentencing scheme . . . involves the direct balancing of [statutory] aggravating and mitigating circumstances." Pet. 37-38 (quotation marks omitted).

This Court has warned, however, that the weighing/non-weighing "terminology is somewhat misleading, since we have held that in *all* capital cases the sentencer must be allowed to weigh the facts and circumstances that arguably justify a death sentence against the defendant's mitigating evidence." *Brown*, 546 U.S. at 216-17. Thus, it is "clearer to call" non-weighing "States 'complete weighing' States," because "the jury can weigh *everything* that is properly admissible." *Id.* at 289-90 (Breyer, J., dissenting). In Texas, after a jury finds a defendant eligible for the death penalty, the jury considers "[t]he mitigation issue," which "asks whether, after considering *all* the evidence, *sufficient* mitigating circumstances exist to warrant imposing a life sentence instead of the death penalty." *Mosely*, 983 S.W.2d at 263.

Thus, while Petitioner identifies Texas as non-weighing State, *see* Pet. 36-37, he gets the significance of that fact backward. This nomenclature means only that a Texas jury may weigh all evidence in deciding whether a defendant deserves the death penalty. *See Mosely*, 983 S.W.2d at 263 n.18. Indeed, it is difficult to conceive how a juror could conclude that the mitigation evidence is "*sufficient* . . . to warrant . . . a sentence of life imprisonment without parole *rather* than a death sentence," Tex. Code Crim. Proc. art. 37.071(e)(1) (emphases added); *see* R.8357-58, without weighing mitigating evidence favoring a life sentence against aggravating evidence favoring the death penalty.

It is theoretically possible that a Texas juror could decline to impose the death penalty "based on very little mitigation evidence" because she declined to weigh the mitigation evidence against the aggravating evidence. Pet. 38-39. But "the question" on prejudice "is not whether a court can be certain counsel's performance had no effect on the outcome," *Har-*

rington v. Richter, 562 U.S. 86, 111 (2011). "Instead, *Strickland* asks whether it is 'reasonably likely' the result would have been different"; "[t]he likelihood of a different result must be substantial, not just conceivable." *Id.* at 111-12. Because it is reasonably likely that a Texas juror would weigh all the evidence in determining whether to impose a sentence of life imprisonment without parole rather than a death sentence, both Texas courts and the Fifth Circuit correctly reweigh evidence when considering prejudice. *Cf., e.g.*, *Wheeler v. Simpson*, 852 F.3d 509, 515-18 (6th Cir. 2017) (analyzing prejudice in a case from a non-weighing State by reweighing evidence); *Sully v. Ayers*, 725 F.3d 1057, 1069 (9th Cir. 2013) (same); *Holsey v. Warden*, 694 F.3d 1230, 1268 (11th Cir. 2012) (same); *Williams v. Roper*, 695 F.3d 825, 833 (8th Cir. 2012) (same).

II. Summary Reversal Is Unwarranted Because the Fifth Circuit Correctly Applied This Court's Precedent.

Perhaps recognizing that the Petition asks for nothing more than error correction, Petitioner also urges this Court to summarily reverse the Fifth Circuit's decision. Pet. 33. Summary reversal is appropriate where "[t]here can be no serious doubt" that the decision below is wrong, and the arguments in support of the judgment below "were already rejected" elsewhere. *Am. Tradition P'ship v. Bullock*, 567 U.S. 516, 516, 517 (2012) (per curiam); *cf. California v. Rooney*, 483 U.S. 307, 311 (1987) (per curiam) (explaining that this Court "reviews judgments, not statements in opinions") (quoting *Black v. Cutter Labs.*, 351 U.S. 292, 297 (1956)). Summary reversal would be inappropriate here because the Fifth Circuit correctly concluded that Petitioner could not overcome procedural default.

As relevant here, a petitioner may overcome procedural default of an ineffective-assistance claim only if he can establish both cause and actual prejudice. *McCleskey v. Zant*, 499

U.S. 467, 494 (1991). To establish *cause*, he must show that his state-habeas counsel was ineffective under *Strickland v. Washington*, 466 U.S. 668 (1984), for failing to present the trial-court-ineffectiveness claim in the state-habeas proceeding, *Martinez*, 566 U.S. at 13. To establish *prejudice*, he must show a "substantial likelihood" that his state-habeas proceeding would have come out differently had his claim been raised. *See United States v. Frady*, 456 U.S. 152, 172 (1982). Petitioner cannot make either showing for his *Wiggins*-style failure-to-investigate-mitigation claim.

At the outset, Petitioner faults his state-habeas counsel for raising only one claim. Pet. 8-10. As Petitioner observes, the universe of cognizable claims in state habeas is very limited. Pet. 9 n.10. Petitioner identifies no other claim, aside from his new ineffective-assistance claim, that he believes his state-habeas counsel should have pursued. And Petitioner's suggestion that his state-habeas counsel "abandoned" him by filing a timely petition on his behalf, Pet. 10, is meritless, *see, e.g.*, *Maples v. Thomas*, 565 U.S. 266, 280-83 (2012) (finding abandonment where counsel of record filed nothing and essentially withdrew representation); *Holland v. Florida*, 560 U.S. 631, 659 (2010) (Alito, J., concurring) (similar). *Cf.* State Bar of Texas, *Guidelines and Standards for Texas Capital Counsel*, Guideline 12.2(B)(7)(b) (Nov. 2006) (placing the responsibility for evaluating the merits of potential claims with habeas counsel).

A. "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689. Those circumstances include "the . . . state of the law" at the time, which informs what claims are "worth pursuing." *Smith v. Murray*, 477 U.S. 527, 536

(1986). And under *Strickland*, a reviewing court is "required not simply to 'give the attorneys the benefit of the doubt,' but to affirmatively entertain the range of possible 'reasons . . . counsel may have had for proceeding as they did.'" *Pinholster*, 563 U.S. at 196 (citation and alteration omitted). This benefit of the doubt is especially necessary here, as Petitioner's deceased state-habeas counsel cannot defend himself. *See* Osborn, *supra*.

One possible (indeed likely) reason that Petitioner's state-habeas counsel declined to pursue an ineffective-assistance claim challenging trial counsel's mitigation investigation is that, in 1999, there was little reason to believe such a claim would be fruitful. It is not deficient performance for counsel to avoid a claim that "counsel reasonably could have determined . . . would have failed." *Sexton v. Beaudreaux*, 138 S. Ct. 2555, 2559 (2018) (per curiam). Thus, "[v]iewed in light of [the] law at time . . ., the decision not to pursue" an ineffective-assistance claim challenging trial counsel's mitigation investigation "fell well within the 'wide range of professionally competent assistance.'" *Smith*, 477 U.S. at 536 (quoting *Strickland*, 466 U.S. at 690).

1. In 1999, before this Court had ever vacated a death sentence on ineffective-assistance grounds, state-habeas counsel could have reasonably concluded that mitigation-focused ineffective-assistance claims had long odds of success. It was not until 2000 that this Court and others began "emphasizing the importance of thorough mitigation investigation in capital defense cases." Emily Hughes, *Mitigating Death*, 18 Cornell J.L. & Pub. Pol'y 337, 352 (2009). The situation was no different in Texas—in 1999, the Court of Criminal Appeals had never applied *Strickland* to vacate a death sentence based on trial counsel's failure to investigate mitigating evidence. It had, however, affirmatively rejected such claims. *See, e.g.*,

Rosales v. State, 841 S.W.2d 368, 376 (Tex. Crim. App. 1992) (rejecting an ineffective-assistance claim based on counsel's "fail[ure] adequately to investigate evidence that could have been used to [defendant's] advantage in mitigation of punishment").

In fact, this Court's case law at the time that Petitioner filed his 1999 state-court habeas petition strongly suggested that such a claim in this case would not have succeeded. In *Burger v. Kemp*, 483 U.S. 776, for example, this Court held that counsel's failure to offer any "mitigating evidence at all" was not ineffective. *Id.* at 788. And in two other cases—*Strickland* and *Darden v. Wainwright*, 477 U.S. 168 (1986)—this Court had rejected challenges to very limited mitigation investigations. In *Strickland*, counsel merely spoke with the defendant as well as the defendant's wife and mother; counsel did not seek out other character witnesses or request a psychiatric examination. 466 U.S. at 672-73; *see also id.* at 699 ("Trial counsel could reasonably surmise from his conversations with [his client] that character and psychological evidence would be of little help.").[2] And in *Darden*, trial counsel merely obtained a psychiatric report. 477 U.S. at 185. The effort of Petitioner's trial counsel

[2] Petitioner has never suggested that he informed his trial counsel of the details of his troubled childhood. And Petitioner's evidence shows he does not recall any abuse. R.10363. In 2006, a dissent by the presiding judge in the Texas Court of Criminal Appeals "disagree[d] with the [majority]'s claim that reasonably competent counsel would have known, at the time he represented applicant in this case (1994–1997), that he had a duty to specifically raise the topic of [child] abuse in the absence of any indication whatsoever that any abuse had occurred." *Ex parte Gonzales*, 204 S.W.3d at 404 (Keller, P.J., dissenting). It would been reasonable for state-habeas counsel to reach the same conclusion seven years earlier. Confirming this, when Respondent raised a similar point about Petitioner's failure to advise his trial counsel of Petitioner's childhood, Petitioner's only response was that "none of the *recent*" (2000 and later) "Supreme Court cases . . . consider the presence – or absence – of information from the defendant in making their reasonableness evaluation." R.1387 n.3 (emphasis added).

in pursuing a psychiatric evaluation (which showed that Petitioner was a malingerer), obtaining testimony from Petitioner's wife and sister compares well to these pre-2000 cases.

"Starting with [*Terry*] *Williams v. Taylor*[, 529 U.S. 362 (2000),] in 2000, and then continuing with *Wiggins v. Smith* in 2003, and *Rompilla v. Beard*[, 545 U.S. 374 (2005)] in 2005, the Court launched a series of decisions emphasizing the importance of thorough mitigation investigation in capital defense cases." Hughes, *supra*, at 352 (footnotes omitted). *Terry Williams*, *Wiggins*, and *Rompilla* all reversed decisions holding that trial counsel was *not* ineffective and did so over dissents from other members of this Court. None suggest that the judges and justices who saw things differently were unreasonable. Those cases clarified the constitutional law regarding minimally adequate mitigation investigations, increasing the likelihood of success for ineffective assistance claims based on trial counsel's inadequate investigation of such evidence.

Petitioner's belated presentation of his ineffective-assistance claim (first raised ten years after his initial state-habeas petition) confirms that his state-habeas counsel was not deficient for failing to raise the claim. In his successive state petition, Petitioner conceded that that this Court's 2003 decision in *Wiggins* "explained more fully" how "[t]he *Strickland* standards" applied to mitigation investigation. R.10177-78. Petitioner further argued that it was *Wiggins* and this Court's later decision in *Rompilla* that made "clear" that that the 1989 and 2003 "ABA Death Penalty Guidelines" "describe the 'well-defined' norms for counsel in capital cases." R.10179.[3] In his federal petition, Petitioner continually referred to this

[3] Of course, a decision concluding that trial counsel violated a professional norm means that the norm existed before the decision came down. The existence of a professional norm, however, is most relevant to trial counsel's choice to investigate, which is secondary to the

claim as his "*Wiggins* claim," *see, e.g.*, R.1033-35, 1047-48, 1056, 1386, demonstrating the importance of that 2003 decision. And Petitioner relied heavily on other case law postdating his original state-habeas petition. *See, e.g.*, R.1387 n.3, 1388-90, 1392-93, 1422. Petitioner's state-habeas counsel could not have been ineffective for failing to anticipate these legal developments. *See, e.g.*, *Maryland v. Kulbicki*, 136 S. Ct. 2, 4 (2015) (per curiam); *Smith*, 477 U.S. at 536-37.

2. Contemporary case law and the record also suggested that showing prejudice for any deficiency by Petitioner's trial counsel would be particularly difficult. Petitioner senselessly and brutally raped, sodomized, and murdered a child. Even today, the horrific facts of Petitioner's crime would make showing prejudice particularly difficult. *See Wong v. Belmontes*, 558 U.S. 15, 27-28 (2009) (per curiam). On top of the heinous facts of the crime lay significant aggravating evidence. *See supra* pp. 3-4. Petitioner's rape and murder of Maria was a more violent repeat of episodes in which he previously sexually assaulted a child and nearly killed a consensual lover. *See* R.8462-66. And for ten years, Petitioner escaped responsibility for murdering Maria, during which time he repeatedly raped his eight-year-old nephew and threatened to kill the boy. *See* R.7960-70. Petitioner also demonstrated that he could not behave behind bars, engaging in lewd and violent behavior. *See* R.8496-97, 8502.

---

question here—state habeas counsel's decision to pursue a claim. Courts *recognizing constitutional error* as to a particular norm is the primary concern of a state-habeas counsel evaluating potential claims. *See Strickland*, 466 U.S. at 688 ("Prevailing norms of practice as reflected in American Bar Association standards and the like . . . are guides to determining what is reasonable, but they are only guides.").

Even if state-habeas counsel anticipated everything Petitioner now claims should have been found, state-habeas counsel could still reasonably conclude that prejudice very likely could not be shown, and the claim not worth pursuing. It would have been reasonable, for example, for state-habeas counsel to conclude that evidence of Petitioner's difficult childhood would not move the jury. For instance, while many of Petitioner's siblings averred that Petitioner's father was violent, only two recounted isolated incidents of abuse directed toward Petitioner. *See* R.10266, 10303. Two of Petitioner's siblings specifically mentioned protecting him from abuse. *See* R.10268 ("Ramiro and I were always together as kids. I protected him all the time. I would tell him what to do or say so that my father wouldn't hit him."); R.10282 ("I took a lot of the beatings that were intended for Ramiro. . . . I always believed that I had to defend Ramiro."); *see also* R.10317 ("Apolinar always helped Ramiro with his chores. Apolinar protected Ramiro a lot."). And Petitioner himself does not recall the traumatic events described by his siblings. *See* R.10363.

Moreover, Petitioner's difficult childhood was "remote in time" from his various crimes, a fact the state-habeas counsel could reasonably conclude would lessen that evidence's persuasive value. *Stafford v. Saffle*, 34 F.3d 1557, 1565 (10th Cir. 1994); *accord Cummings*, 588 F.3d at 1369. And reasonable counsel could have anticipated that the State would have pointed out that there is no indication that any of Petitioner's twelve siblings, who all grew up in the same environment, committed crimes like Petitioners'. "The fact that [Petitioner] was the only child to commit such a heinous crime . . . may have undermined defense efforts to use his childhood in mitigation." *Grayson v. Thompson*, 257 F.3d 1194, 1227 (11th Cir. 2001). Thus, it would have been reasonable for state-habeas counsel to conclude that this

"'mitigation' evidence . . . actually may have been damaging to [Petitioner] in the eyes of the . . . jury that sentenced him to death." *Id.*

Petitioner's mental-health evidence suffers similar flaws. According to Petitioner's expert, Petitioner's violence was a product of PTSD stemming from Petitioner's childhood:

> The contrast between the sensitive, caring behavior described by siblings and the controlling, violent behavior described at trial is consistent with Ramiro Ibarra's background and cognitive ability, and is a direct result of his suffering from Posttraumatic Stress Disorder.
>
> . . .
>
> The trauma produced by extreme poverty and a violent, authoritarian upbringing created in Ramiro Ibarra the same sense of lack of control over circumstances that exerted such influence over his father. And like his father, whose dominant example he had seen and experienced for many years, Ramiro sought opportunities to exert control where his limited intellect permitted him to find them. In his case, the targets were his wife (as was the case with his father), a girlfriend, and, if the prosecution's evidence was correct, the homicide victim. While homicide was a more extreme outcome than any known outcome brought about by his father, the causal factors—desperation for control and resort to violence in response to that desperation—were the same.

R.10364. But Petitioner's expert never suggested that Petitioner's "desperation for control and resort to violence in response to that desperation," R.10364, would abate in prison, where Petitioner would have even less control. Thus, even if this evidence could reduce Petitioner's moral culpability, it is "by no means clearly mitigating, as the jury might have concluded that [Petitioner] was simply beyond rehabilitation." *Pinholster*, 563 U.S. at 201.

B. Even if Petitioner could establish cause by showing that his state-habeas counsel unreasonably failed to raise his ineffective-assistance-of-trial-counsel claim, he would still not be able to overcome procedural default because he suffered no actual prejudice. *See Ibarra*, 786 F. App'x at 425-26. Petitioner cannot show that, had his state-habeas counsel

raised this claim in 1999, there is a "substantial likelihood" that the Court of Criminal Appeals would have granted relief. *See Frady*, 456 U.S. at 172.

As set above, Petitioner concedes that *Wiggins* and its progeny changed the way courts think about ineffective-assistance claims challenging mitigation investigations. *See supra* pp. 18-19. Subsequent decisions from the Court of Criminal Appeals, which would have reviewed Petitioner's ineffective-assistance claim, bear this out. Shortly after *Wiggins*, the court observed that *Wiggins* "refined" "the standards set out in *Strickland*." *Ex parte Woods*, 176 S.W.3d 224, 225 (Tex. Crim. App. 2005). And post-*Wiggins*, the court refers to its analysis of claims like Petitioner's as a "*Strickland/Wiggins*" analysis. *Ex parte Armstrong*, No. WR-78,106-01, 2017 WL 5483404, at *2 (Tex. Crim. App. Nov. 15, 2017); *accord, e.g.*, *id.* at *16 (reasoning that "*Wiggins* and its progeny compel" the result); *Ex parte Kerr*, No. AP-75500, 2008 WL 366970, at *1 (Tex. Crim. App. Feb. 6, 2008) (referring to "the *Strickland/Wiggins* test"); *Ex parte Martinez*, 195 S.W.3d at 727 (referring to "the test set forth in *Wiggins*"); *see also, e.g.*, *Ex parte Lucero*, No. AP-76,415, 2010 WL 3582978, at *1 (Tex. Crim. App. Sept. 15, 2010) (per curiam) ("[W]e hold that applicant's counsel failed to investigate applicant's background or present mitigating evidence at the punishment phase in violation of *Rompilla*.").

Prior to *Wiggins*, the Court of Criminal Appeals had never vacated a death sentence on the ground that trial counsel insufficiently investigated mitigating evidence. And Petitioner's was unlikely to be the first. Trial counsel attacked the State's aggravating evidence, presented positive testimony from Petitioner's family, and had Petitioner evaluated by a

psychiatrist. As shown above, the fundamental cases on this topic at the time suggested that trial counsel was not deficient. *See supra* pp. 17-18.[4]

And even after *Wiggins*, the Court of Criminal Appeals has (correctly) found no prejudice on *Wiggins* claims where, as here, the circumstances of the crime are particularly heinous, *see, e.g.*, *Ex parte Martinez*, 195 S.W.3d at 730, or the new evidence is double-edged, *see, e.g.*, *Ex parte Damaneh*, No. WR-75,134-01, 2011 WL 4063336, at *2 (Tex. Crim. App. Sept. 14, 2011) (per curiam). As demonstrated above, Petitioner's effort to show prejudice faces both obstacles. *See supra* pp. 19-21. For that reason also, it is unlikely the Court of Criminal Appeals would have granted relied.

III. AEDPA Bars the New Evidence Upon Which Petitioner Relies to Support His Ineffective-Assistance Claim.

As Petitioner concedes, his ineffective-assistance claim depends on evidence gathered years after his original state-habeas proceeding. *See* Pet. 40. But even if Petitioner could overcome procedural default based on the negligence of his state-habeas counsel, AEDPA would preclude Petitioner from relying on any of this new evidence in federal habeas proceedings to win relief on his ineffective-assistance claim. Thus, Petitioner's claim has no hope of succeeding. For this reason also, review of the Fifth Circuit's decision on procedural default is unwarranted.

[4] This Court decided *Terry Williams* in 2000, while Petitioner's original state-habeas petition was pending, but a Westlaw search reveals that the Court of Criminal Appeals did not cite *Terry Williams* for anything other than its discussion of prejudice until 2006. *Wiggins* was the game-changer.

Section 2254(e)(2) "restricts the discretion of federal habeas courts to consider new evidence when deciding claims that were not adjudicated on the merits in state court." *Pinholster*, 563 U.S. at 186. Section 2254(e)(2)'s bar on new evidence is triggered if the habeas petitioner "has failed to develop the factual basis of a claim in State court proceedings." That opening clause is met if the petitioner "was at fault for failing to develop the factual bases for his claims in state court." *Bradshaw v. Richey*, 546 U.S. 74, 79 (2005) (per curiam). And this Court has held multiple times when addressing section 2254(e)(2)'s bar on new evidence that Congress intended the word "failed" in "failed to develop," 28 U.S.C. § 2254(e)(2), to mean a "lack of diligence, or some greater fault, attributable to the prisoner *or the prisoner's counsel*." *Michael Williams*, 529 U.S. at 432 (emphasis added); *accord Holland v. Jackson*, 542 U.S. 649, 652-53 (2004) (per curiam) (applying section 2254(e)(2) to an ineffective-assistance-of-trial-counsel claim).

To overcome procedural default, Petitioner asserts that his original state-habeas counsel was ineffective in failing to develop his ineffective-assistance-of-trial-counsel claim in state court. Pet. 32. That position, if accepted, necessarily means that state-habeas counsel was not diligent in developing the factual basis for Petitioner's ineffective-assistance claim. And under *Michael Williams* and *Holland*, counsel's lack of diligence means that Petitioner "failed to develop" the claim for purposes of § 2254(e)(2). Thus, if Petitioner succeeds in overcoming procedural default, he will be barred from relying on new evidence.[5]

[5] The Fifth Circuit declined to reach this question, concluding that "even if Ibarra's new evidence is admissible," his claim cannot succeed. *Ibarra*, 786 Fed. Appx. at 424.

Nothing in *Martinez* alters this conclusion. *Martinez* created a "narrow exception" to the court-created rules of procedural default, allowing state prisoners to pursue a substantial ineffective-assistance-of-trial-counsel claim if state-habeas counsel unreasonably failed to raise that claim in state court. 566 U.S. at 9. In modifying the court-created rules of procedural default, *Martinez* did not purport to change AEDPA's independent statutory bar on what evidence federal habeas courts may consider. In no event did *Martinez* overrule any part of *Michael Williams* or *Holland*: This Court in *Martinez* concluded that its holding raised no stare decisis concern. *Id.* at 15. And *Davila v. Davis* later confirmed that "[e]xpanding the narrow exception announced in *Martinez* would unduly aggravate the 'special costs on our federal system' that federal habeas review already imposes." 137 S. Ct. 2058, 2070 (2017). So *Michael Williams* and *Holland* remain the controlling precedent on the meaning of "failed" in section 2254(e)(2).

Nor can *Martinez* be used to undermine section 2254(e)(2). "The rules for when a prisoner may establish cause to excuse a procedural default are elaborated in the *exercise of the Court's discretion*." *Martinez*, 566 U.S. at 13 (emphasis added). But congressional directives in federal statutes like AEDPA are not subject to discretionary elaboration by courts. As this Court recently explained in *Ross v. Blake*:

> No doubt, judge-made . . . doctrines, even if flatly stated at first, remain amenable to judge-made exceptions. . . . But a statutory exhaustion provision stands on a different footing. There, Congress sets the rules—and courts have a role in creating exceptions only if Congress wants them to. For that reason, mandatory exhaustion statutes . . . establish mandatory exhaustion regimes, *foreclosing judicial discretion*.

136 S. Ct. 1850, 1857 (2016) (emphasis added); *see also Michael Williams*, 529 U.S. at 436-37 (describing section 2254(e)(2) as an exhaustion requirement).

Before AEDPA, this Court had developed equitable rules outlining what evidence federal-habeas courts could consider in resolving claims undeveloped in state court—specifically, the cause-and-prejudice rules from the procedural-default context. *See Keeney v. Tamayo-Reyes*, 504 U.S. 1, 6 (1992). But in AEDPA, Congress pointedly eliminated that judicially developed cause-and-prejudice standard for receiving new evidence and replaced it with section 2254(e)(2), which "raised the bar" for federal-habeas petitioners. *Michael Williams*, 529 U.S. at 433.

In interpreting section 2254(e)(2), *Michael Williams*, unlike *Martinez*, made no equitable judgment; this Court gave effect to what "Congress intended." *Id.* And *Michael Williams* concluded that section 2254(e)(2) codified the rule that state-habeas counsel's lack of diligence is attributed to the petitioner. *Id.* at 437, 439-40. *Michael Williams* reached this conclusion because, when Congress enacted AEDPA in 1996, Congress would have understood—relying on this Court's 1991 and 1992 decisions in *Coleman* and *Keeney*—that any lack of diligence by state-habeas counsel would be attributed to the petitioner under "well-settled principles of agency law." *Coleman*, 501 U.S. at 754; *see Davila*, 137 S. Ct. at 2065. This Court applied *Coleman*'s rule to this very context in *Keeney*, when it disallowed new evidence based on post-conviction "counsel's negligent failure to develop the facts." *Keeney*, 504 U.S. at 4; *see id.* at 7-11.

When Congress "raised the bar" in AEDPA, it could not have intended a weaker rule than the one adopted in *Keeney* just a few years earlier. Thus, *Michael Williams* held that "the opening clause of § 2254(e)(2) codifies *Keeney*'s threshold standard of diligence." *Michael Williams*, 529 U.S. at 434. So section 2254(e)(2)'s trigger—"the applicant has failed to develop the factual basis of a claim in State court proceedings"—uses "fail[]" just as

Keeney did: as including "attorney error." *Keeney*, 504 U.S. at 10 n.5; *see Michael Williams* 529 U.S. at 432-34.[6]

The result is that Petitioner cannot prevail on his ineffective-assistance claim even if he can show that state-habeas counsel rendered ineffective assistance in failing to raise and develop that claim. The condition for overcoming procedural default—ineffective assistance of state-habeas counsel—is the same condition that triggers section 2254(e)(2)'s bar on new evidence. Because Petitioner cannot possibly establish prejudice without new evidence, his ineffective-assistance will inevitably fail.

[6] There are many trial-record-based ineffective-assistance-of-trial-counsel claims for which *Martinez* will still do work under a faithful application of section 2254(e)(2). *See Davila*, 137 S. Ct. at 2067-68. To take a few examples: claims based on trial counsel failing to object to inadmissible evidence, trial counsel requesting an incorrect jury instruction, or per se ineffective assistance of counsel under *United States v. Cronic*, 466 U.S. 648 (1984). The rule adopted in *Martinez* saves these claims, for which no new evidence may be needed.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant
Attorney General

RYAN BANGERT
Deputy First Assistant
Attorney General

OFFICE OF THE
ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
[Tel.]: (512) 936-1700
[Fax]: (512) 474-2697
Kyle.Hawkins@oag.texas.gov

/s/ Kyle D. Hawkins
KYLE D. HAWKINS
Solicitor General
Counsel of Record

JASON R. LAFOND
Assistant Solicitor General

Counsel for Respondent

APRIL 2020