No. 19-8103 (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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF OF PETITIONER

The Director's response seeks to defend the Fifth Circuit's failure to afford meaningful review of Ibarra's serious Sixth Amendment allegations of unlawful confinement. The Director's primary strategy is simply to ignore Ibarra's central contention in his petition: that this Court should exercise its supervisory power over the lower federal courts to ensure that prisoners obtain the meaningful review of Sixth Amendment allegations to which Congress and this Court's decisions have entitled him. *See* Pet'n for a Writ of Cert., at 24-33 [hereinafter "Pet'n"]. Neither of the federal courts below afforded Ibarra anything approaching this.

Besides ignoring the central question presented, the Director's response is also contradictory. It insists that Ibarra seeks only error correction from the Court, Br. in Opp'n at 2, yet also plainly acknowledges that Ibarra has asked this Court to correct the Fifth Circuit's importation and persistent application of a gloss on this Court's individualized sentencing cases that it uses to discount all mitigating evidence presented in support of Sixth Amendment allegations related to trial counsel's failure to reasonably investigate a capitally charged defendant's background, as well as its refusal to apply Texas governing law when assessing prejudice as to such allegations. *Id*. at 9–14. In making these contentions, Ibarra has not simply asked this Court to correct a discrete error the Fifth Circuit made in applying law to his case. He asks the Court to correct a circuit-wide practice of evading this Court's directives intended to ensure that criminal trials are fair, especially in capital cases.

ARGUMENT

I. THE DIRECTOR HAS MADE NO OPPOSITION TO MR. IBARRA'S CONTENTION THAT FEDERAL COURT REVIEW BELOW HAS NOT BEEN MEANINGFUL

The Director has presented her own questions to this Court, which are not Ibarra's questions. While Ibarra asks this Court to address whether it should exercise its supervisory power because the Fifth Circuit failed to ensure meaningful federal judicial review of a substantial Sixth Amendment claim, the Director asks the Court whether it "[s]hould . . . grant review to correct alleged errors in the Fifth Circuit's straightforward application of *Strickland* and *Martinez*?"[1] Br. in Opp'n at i. Perhaps unsurprisingly, then, the Director never bothers to substantively respond to Ibarra's arguments that review is warranted to ensure federal courts afford meaningful review of substantial Sixth Amendment claims.

The Director spends just one sentence describing the district court opinion that the Fifth Circuit purported to review. Br. in Opp'n at 6. The Director describes the district court decision as "conclud[ing] 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." *Id*. Nowhere in the Director's response does she defend the district court opinion that the Fifth Circuit purported to review and affirmed.

Because the Director ignores the question presented, the Director does not address how, in her view, meaningful review occurred in the district court notwithstanding that (1) the district court judge disposed of the case just nine days after being assigned it; (2) the district court judge decided the case under a misapprehension that the Fifth Circuit had previously affirmed the prior district

[1] *Strickland v. Washington*, 466 U.S. 668 (1984); *Martinez v. Ryan*, 566 U.S. 1 (2012).

judge's alternative ruling on the merits of the claim; (3) the district court's rulings on the *Strickland* and *Martinez* issues were made in a context in which they did not matter in light of its misapprehension; (4) the district court judge relied on the prior district court judge's flawed reasoning conflating prejudice and deficient performance; (5) the district court judge relied on the prior district court judge's clearly erroneous finding that the allegations of prejudice had been presented to the jury; and (6) the district court's holding that mitigation evidence was irrelevant to this capital case.

Nor does the Director address the problems in the Fifth Circuit's order reflecting its extreme inattention to the case and its abdication of its duty to ensure habeas applicants receive meaningful review of substantial Sixth Amendment allegations by district courts. The Director does not explain how the Fifth Circuit has ensured meaningful review of such claims notwithstanding that (1) the Fifth Circuit effectively held, based on an uncontroverted record, that state habeas counsel have no duties to investigate the legality of their client's confinement under the Sixth Amendment, rendering *Martinez* a nullity within the Circuit;[2] (2) the Fifth Circuit failed to scrutinize the district court's unreasonable conclusion that Ibarra presented no additional mitigating information beyond what was presented at trial; (3) the Fifth Circuit recast the claim as one in which trial counsel failed to elaborate on the information they presented rather than failed to meaningfully investigate and discover substantial mitigating information, thereby avoiding reviewing the actual claim presented; and (4) the Fifth Circuit failed to meaningfully engage with any of the prejudice allegations before affirming the district court's judgment.

[2] The Director briefly denies that the Fifth Circuit applied any such rule. Br. in Opp'n at 8–9. The Director, however, simply cites other cases in which she asserts the Fifth Circuit applied other rules in different contexts. *Id*. at 8. (citing the Fifth Circuit's recognition of a duty *on trial counsel* to investigate). Otherwise, the Director just asserts that the Court "expressly invoked" *Strickland*, which explains nothing about the rules the court below applied. *Id*. at 8-9.

The Fifth Circuit decision is especially troubling in this case, because it has, through a fig leaf of review, effectively reimposed a rule it announced in an earlier decision in this case and which this Court has since expressly rejected. In 2012, the Fifth Circuit ruled in a published opinion *in this case* that the equitable exception to cause and prejudice for Sixth Amendment trial ineffectiveness claims announced by this Court in *Martinez v. Ryan*, 566 U.S. 1 (2012), was not available to Texas prisoners as a matter of law, because Texas permitted review of such allegations on direct review. App. 7 to Pet'n. In *Trevino v. Thaler*, 569 U.S. 413 (2013), this Court granted certiorari specifically to review the rule published *in this case* and concluded contrary to that court that the *Martinez* exception *was* available to Texas prisoners. *Trevino*, 569 U.S. at 420 (citing *Ibarra v. Thaler*, 687 F.3d 222 (5th Cir. 2012), as announcing the rule it was overruling). Although the Fifth Circuit granted rehearing in this case in light of *Trevino*, it nevertheless refused to faithfully apply this Court's *Martinez* decision. By refusing to recognize any duties of representation by state habeas counsel—in a context in which the allegations made against state habeas counsel amounted to abandonment—the Fifth Circuit has again rendered *Martinez* wholly unavailable to Texas prisoners, albeit through a pretense of review. The payment of "lipservice" to this Court's decisions, *Tennard v. Dretke*, 542 U.S. 274, 283 (2004), while refusing to implement them in practice, warrants exercise of the Court's supervisory power to correct.

As the Director puts up no defense of the lower federal courts' review, the Court should accordingly exercise its supervisory power, summarily reverse the decision below, and remand with instructions to conduct a meaningful review—a review that actually acknowledges and considers the Sixth Amendment allegations Ibarra made and which acknowledges duties of state habeas counsel to investigate Sixth Amendment violations.

II. CORRECTION OF THE FIFTH CIRCUIT'S GLOSS ON ASSESSING *STRICKLAND* PREJUDICE WARRANTS CERTIORARI REVIEW

The Director insists the Fifth Circuit has applied the "correct" legal standards, and that Ibarra merely "disagrees with the outcome." Br. in Opp'n, at 7–14. She argues that the Fifth Circuit's view that all mitigating evidence can be discounted to irrelevance because it is double-edged is consistent with this Court's cases. As if to prove Ibarra's point, she cites *Penry v. Lynaugh*, 492 U.S. 302, 324 (1989), for the proposition.

There is, of course, no doubt that mitigating evidence can have more than one "edge." But its "double-edged" nature is problematic only where state law does not allow for its mitigating "edge" to be given effect independently from its aggravating component, or, in Texas—where aggravating evidence does not exist as a legal concept in capital cases—independently from any component of the evidence that might also contribute to a conclusion that the defendant is likely to commit criminal acts of violence in the future. As Ibarra explained in his petition, this was the very problem *Penry* sought to correct, and which the Texas legislature addressed by amending the statute and creating a separate mitigation special issue.

Texas's mitigation special issue permits the jury to give the mitigating component of all evidence its mitigating effect, and to do so independently from any component that would contribute to an affirmative finding under the future dangerousness special issue. The Fifth Circuit effectively repealed this Texas law by refusing to recognize and independently assess the mitigating component of information offered to support a finding of prejudice in the context of Sixth Amendment claims in postconviction cases. By simply labeling and dismissing the evidence as "double-edged," the Fifth Circuit restores the status quo ante before the *Penry* decision when it adjudicates Sixth Amendment allegations. Thus, for purposes of the Sixth Amendment right to counsel in the Fifth Circuit, and notwithstanding that Texas has a mitigation special issue, there is

no right to consideration of mitigating evidence, and therefore effectively no duty on Texas trial counsel to investigate or present it.

The Director denies the Fifth Circuit "appl[ied] any rule deeming all mitigating evidence double-edged," but rather "considered the specific aggravating and mitigating evidence at issue." Br. in Opp'n at 10. She cites virtually the entirety of the Fifth Circuit opinion in support of this contention. Yet, only the last two paragraphs of the opinion even purport to address prejudice. The first of those paragraphs simply rejects the proposition that Texas law governing the sentencing proceeding should matter to the Sixth Amendment analysis. App. 1 to Pet'n at 10. *Cf. Strickland v. Washington*, 466 U.S. 668, 695 (1984) ("The governing legal standard plays a critical role in defining the question to be asked in assessing the prejudice from counsel's errors."). The second paragraph simply dismisses Ibarra's allegations about what mitigation information was discoverable—mischaracterized as information only about "his poverty and violent upbringing"—as "double-edged." App. 1 to Pet'n at 11. The court did not meaningfully engage with the allegations, did not meaningfully discuss them, and said nothing at all about, for example, how Ibarra's intellectual disability and severe post-traumatic stress disorder—information discovered only in post-conviction and which the jury never heard about at all—may have affected the jury's answer to the mitigation special issue. Indeed, there is no mention of Texas's mitigation special issue at all in this analysis.

The Director's own analysis runs a similar course. Ibarra could concede—although he does not—that evidence of Ibarra's being physically abused as a child by his father would have "led the jury to conclude that Petitioner was simply beyond rehabilitation," Br. in Opp'n at 10, but this still does not answer the question how a juror may have been affected by this evidence—let alone all the rest—in answering Texas's *mitigation* special issue. The mitigation special issue does not ask

whether a defendant is "beyond rehabilitation" but specifically asks whether the juror believes a life sentence is warranted *notwithstanding* that the defendant is likely to commit criminal acts of violence in the future—a question already unanimously answered beyond a reasonable doubt in the affirmative before the jury ever reaches the mitigation special issue.[3] By labeling the evidence "double-edged" and dismissing it on that basis, the lower courts and the Director are merely examining the evidence's effect on the jury's answer to the future dangerousness special issue, just as if Texas's mitigation special issue was never enacted, and as it would do before this Court's *Penry* decision recognized the problem with that scheme. In short, neither the Director nor the courts below are asking or answering the relevant legal question. For this reason, Ibarra need not even disagree with the lower courts' conclusions to still assert entitlement to relief on his Sixth Amendment claim.

Finally, the Director argues that Ibarra has "conjured" a "split" between the Fifth Circuit and Texas courts on how to examine prejudice in the context of a claim implicating the mitigation special issue. Br. in Opp'n at 10–14. Ibarra did not refer to this as a "split," nor has anything been "conjured." Ibarra simply described how a *Strickland* prejudice analysis applying governing Texas law should be conducted, citing an example of such from Texas's highest criminal court. The Texas court may not be the supreme authority for substantive Sixth Amendment purposes, but it

[3] This highlights how the lower courts have undermined this Court's individualized sentencing jurisprudence. If the mitigation special issue has to invariably be answered in the negative in light of the jury's affirmative answer to Texas's future dangerousness special issue, then the mitigation special issue cannot serve any purpose in the case and the problem identified in *Penry* has not been solved by the addition of the mitigation special issue. Yet, juries in Texas have answered the mitigation special affirmatively after answering the future dangerousness question affirmatively. It is therefore clear that the problem is not Texas law, but the gloss the lower federal courts are applying to the *Strickland* prejudice analysis.

is the supreme authority for how state sentencing laws operate in a capital trial in Texas and thus what is relevant to a prejudice analysis under the Sixth Amendment.

Ultimately, the Director has no disagreement with Ibarra here. The Director agrees with Ibarra that (1) the Texas capital sentencing scheme does not require a jury to determine that mitigating circumstances *outweigh* "aggravating" circumstances in order to answer the mitigation special in favor of the defendant; and (2) the Texas capital sentencing scheme does not require juries to weigh mitigating circumstances against aggravating circumstances *at all*, Br. in Opp'n at 12 (citing *Eldridge v. State*, 940 S.W.2d 646 (Tex. Crim. App. 1996)). Ibarra need establish no more than that to demonstrate that the district court and Fifth Circuit analysis in his case—ascertaining whether the mitigation allegations made in support of prejudice *outweighed* so-called aggravating evidence—ignored governing Texas law. It clearly did, and by doing so it imposed a higher burden on Ibarra than he would have faced at his capital trial or in a Texas postconviction court.

III. THE DIRECTOR'S ARGUMENT THAT RELIEF WAS PROPERLY FORECLOSED AS A MATTER OF LAW ON THE *MARTINEZ* ALLEGATOINS IS UNSOUND

The Director argues that the Court should deny certiorari review because Ibarra's allegations cannot establish *Martinez* cause as a matter of law. Br. in Opp'n at 14–23. The argument is unsound.

First, the Director argues that *Strickland* is deferential to counsel's judgments and eliminates the distorting effects of hindsight. Br. in Opp'n at 15. Ibarra agrees. But Ibarra's allegations do not take aim at professional judgments made by state habeas counsel. They implicate core representation duties of investigation and the *wholesale* failure to provide them. In short, the allegation in the district court is that Ibarra's state habeas counsel neglected to provide *any* of the

duties of state postconviction counsel, not that particular decisions made by state habeas counsel in the course of fulfilling representation duties were strategically unsound. Thus, the relevant question is not one of deference to state habeas counsel's judgments; it is whether state habeas counsel provided any meaningful legal services at all.[4]

Second, the Director seeks to replace meaningful adjudication of Ibarra's *Martinez* allegations with speculation. Br. in Opp'n at 16–19. The Director suggests that reasonable habeas counsel in 1999 would not have investigated whether the client's criminal judgment was obtained in violation of his Sixth Amendment right to effective counsel. The suggestion is indefensible. The Director reasons that habeas counsel would have had no reason to believe that effective representation under the Sixth Amendment would require trial counsel in a capital case to reasonably investigate relevant sentencing issues in the case, such as whether "the defendant's character and background, and the personal moral culpability of the defendant," Tex. Code Crim. Proc. art. 37.0711(e), warrant a life sentence, simply because this Court at the time had never specifically "vacated" a death sentence based on that specific deficiency. Br. in Opp'n at 16–17. But law does not work that way. A lawyer is charged with understanding and applying legal principles, not the specific outcomes of individual case decisions.

The Director relies on a trilogy of decisions from this Court post-dating Ibarra's state habeas application to argue that a reasonable habeas lawyer would not have investigated Sixth Amendment violations until 2000. Br. in Opp'n at 18 (citing *Williams v. Taylor*, 529 U.S. 362

[4] Contrary to the Director's suggestion, Br. in Opp'n at 16, state habeas counsel's death has no ramifications on Ibarra's ability to prove by a preponderance of evidence his allegation that counsel did not provide any meaningful representation services when representing Ibarra. As Ibarra's allegations do not implicate state habeas counsel's professional judgments, his testimony is wholly unnecessary. No court below explored Ibarra's ability or lack thereof to prove his allegations with evidence, and this is not a reason to deny review of the legal rulings made below.

(2000), *Wiggins v. Smith*, 539 U.S. 510 (2003); *Rompilla v. Beard*, 545 U.S. 374 (2005)). These cases demonstrate precisely the opposite: that reasonable habeas counsel in 1999 were, in fact, investigating Sixth Amendment violations and alleging them in habeas corpus applications as allegations of unlawful confinement. *See Williams*, 529 U.S. at 370 (habeas corpus application filed in state court in 1988 alleged Sixth Amendment violations for failing to reasonably investigate the client's background for mitigation purposes); *Wiggins*, 539 U.S. at 516 (habeas corpus application filed in state court in 1993); *Rompilla*, 545 U.S. at 378 (habeas corpus application filed in state court in 1995). In *Williams*, the Court observed that trial counsel in a 1986 capital murder trial had a duty to conduct a thorough investigation of the client's background for mitigation purposes. 529 U.S. at 396. The existence of that duty on trial counsel in 1986 necessarily imposed a corresponding duty on state habeas counsel to investigate whether trial counsel fulfilled that duty as early as 1986.

Bizarrely, the Director argues that none of this trilogy of decisions "suggest[ed] that the judges and justices who saw things differently were unreasonable." Br. in Opp'n at 18. Yet, each of these decisions was rendered under the Antiterrorism and Effective Death Penalty Act ("AEDPA") and necessarily held that an exception to 28 U.S.C. § 2254(d)'s relitigation bar existed because the state court decisions unreasonably applied clearly established Sixth Amendment law. Not only did the decisions therefore "suggest" that judges who saw it differently were unreasonable, it is the legal holding of all three cases that they were.[5]

[5] The Director's reliance on language in Ibarra's subsequent state habeas application pointing out that *Wiggins* "explained more fully" how *Strickland* applied in the capital context and "made clear" the applicability of professional guidelines, Br. in Opp'n at 18, does nothing to advance the Director's argument.

Third, the Director simply speculates that state habeas counsel "could have" concluded that the claim was not worth pursuing based on professional judgment that success on it was unlikely. Br. in Opp'n at 19–21. But Ibarra has never alleged that state habeas counsel ever made any such judgment. The Director is therefore not only attempting to replace fact adjudication with speculation, she is speculating about allegations that were never made. Ibarra's allegation is that state habeas counsel entirely neglected Ibarra's case and failed even to contemplate (let alone conduct) investigation into the effectiveness of trial counsel's sentencing investigation, not that state habeas counsel formed professional judgments about the likelihood of success after conducting reasonable investigation. The Director's allegation that the latter occurred amounts to a mere denial of Ibarra's allegation, creating a fact dispute that would require the district court to hear evidence to adjudicate. No hearing has ever been afforded.

Ultimately, Ibarra's petition requests that this Court require that the allegations he made in his habeas corpus application—and not those invented by the Director or the courts below—be meaningfully reviewed and adjudicated by a federal court. To date, that has not occurred.

IV. THE AEDPA DOES NOT BAR A FEDERAL COURT FROM HEARING EVIDENCE TO ADJUDICATE A CLAIM FOR WHICH RELIEF IS OTHERWISE NOT FORECLOSED

Finally, the Director argues that the Court should deny certiorari because the AEDPA—and specifically 28 U.S.C. § 2254(e)(2)—would preclude Ibarra from relying on any of this new evidence in federal habeas proceedings to win relief on his ineffective-assistance claim. It does not.

First, the court below did not reach this issue. App. 1 to Pet'n at 6–7. Nor would this Court need to reach this issue in order to answer the questions presented, reverse the court below, and

remand for further proceedings. *See Ayestas v. Davis*, 138 S. Ct. 1080, 1095 (2018) (declining to decide the 2254(e)(2) question as unnecessary to disposition).

Second, the AEDPA presents no bar to a federal court hearing evidence to adjudicate facts related to a claim on which relief is not otherwise procedurally precluded. Indeed, it could not do so, because Congress cannot bar a federal court from hearing evidence to adjudicate disputed facts necessary to decide a case. *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1324 n.19 (2016) (Congress "may not exercise [its authority] in a way that requires a federal court to act unconstitutionally." (brackets in original)) (quoting Meltzer, *Congress, Courts, and Constitutional Remedies*, 86 Geo. L.J. 2537, 2549 (1998)). Nor can it create a rule barring a party from presenting any evidence to prove claims before a federal court. *See Heiner v. Donnan*, 285 U.S. 312, 329 (1932) (a legislative body is without power to enact as a rule of evidence a statute denying a litigant the right to prove the facts of his case); *Bailey v. Alabama*, 219 U.S. 219, 238 (1911) (due process violated where rule deprives party of a proper opportunity to submit all the facts bearing upon the issue).

Third, notwithstanding the above, § 2254(e)(2) would not bar the district court from receiving evidence—should it need to do so to adjudicate disputed facts—to decide a Sixth Amendment claim for which cause for procedural default has been established. A habeas applicant has not failed to develop the factual basis of a *Strickland* claim under § 2254(e)(2) where state habeas counsel's deficiency supplies cause to overcome a procedural default. In that circumstance, both *Martinez* and *Trevino* recognize that an applicant who has never had adequate state representation is not "at fault" for any failure to develop the factual basis of his claim within the meaning of § 2254(e)(2).

The history of § 2254(e)(2) demonstrates that, in enacting the provision, Congress intended attribution of fault in the evidentiary hearing context to work the same way that it works in the

procedural default context. Prior to the AEDPA, evidentiary hearings were available if an applicant satisfied the cause-and-prejudice rule announced by *Keeny v. Tomayo-Reyes,* 504 U.S. 1 (1992). *Tomayo-Reyes* held that a prisoner who showed cause for excusing procedural default had not "failed to adequately develop" the factual basis of a claim—that it was "irrational to distinguish between failing to properly assert a federal claim in state court and failing in state court to properly develop such a claim." *Id*. at 5, 8. The absence of fault excused procedural default, and that same absence of fault activated access to federal evidentiary hearings. *Id*. at 9. In short, *Tomayo-Reyes* recognized that a failure to develop the factual basis of a claim in state court is a procedural default in federal court.

In *Williams v. Taylor*, 529 U.S. 420 (2000), the first major post-AEDPA case interpreting § 2254(e)(2), the Court rejected a "no-fault" view of § 2254(e)(2), under which a prisoner "failed to develop" a claim any time a claim was factually undeveloped in state court, regardless of the reason. *Id*. at 431, 444. *Williams* held that "there is no basis in the text of § 2254(e)(2) to believe Congress used 'fail' in a different sense than the Court did in [*Tomayo-Reyes*]." *Id*. at 433. *Williams* thus reaffirmed the longstanding alignment between the excuse of a procedural default and the opportunity to receive a hearing in federal court: each turns on the absence of fault attributable to the habeas applicant.

When *Williams* was decided, federal courts applied the rule of fault announced in *Coleman v. Thompson*, 501 U.S. 722 (1991), under which habeas claimants were always vicariously faulted, via agency rules, for any deficiency of state post-conviction counsel, *see id*. at 754. Thus, the *Williams* Court could write without caveat that a prisoner is "at fault" within the meaning of § 2254(e) where there was a "lack of diligence, or some greater fault, attributable to the prisoner *or the prisoner's counsel*." *Williams*, 529 U.S. at 432 (emphasis supplied).

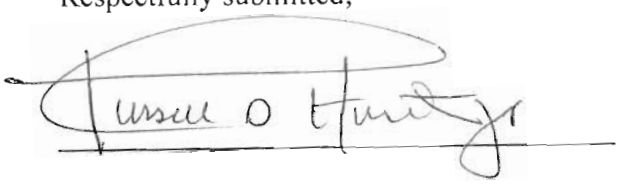
But *Martinez* revised that vicarious-fault rule "by recognizing a narrow exception: Inadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial." 566 U.S. at 9. The Court confirmed this understanding of *Martinez* as creating an exception to the fault attribution rule of *Coleman* in *Davila v. Davis*, 137 S. Ct. 2058, 2065 (2017). The *Davila* Court explained the general rule that attorney error "amounting to constitutionally ineffective assistance is 'imputed to the State' and is therefore external to the prisoner," but that attorney error "that does not violate the Constitution . . . is attributed to the prisoner 'under well-settled principles of agency law.'" *Id.* (citing *Coleman*, 501 U.S. at 754). Because there is no constitutional right to counsel in post-conviction proceedings, errors by habeas counsel in the litigation of a habeas corpus case are as a rule attributable to the habeas applicant. *Id*. The *Martinez* decision, however, "announced a narrow, 'equitable ... qualification' of the [fault attribution] rule in *Coleman* that applies where state law requires prisoners to raise claims of ineffective assistance of trial counsel 'in an initial-review collateral proceeding,' rather than on direct appeal." *Davila*, 137 S. Ct. at 2065. Because a habeas applicant who has established *Martinez* cause is not at fault for the procedural default, he has also not "failed to develop" his claim for purposes of § 2254(e)(2).

In short, the Director's argument that *Martinez* cannot "undermine" § 2254(e)(2) is more or less correct. Br. in Opp'n at 25. It is the Director's understanding of who is at "fault" in the *Martinez* context that is wrong, and thus the Director's *application* of the statute is off the mark.

CONCLUSION

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

Respectfully submitted,



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