

No. _____

In The Supreme Court of the United States

♦
PAUL WAYNE SLATER,
Petitioner,

v.

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

♦
PETITION FOR A WRIT OF CERTIORARI

♦
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QUESTIONS PRESENTED

This Court held in *Vasquez v. Hillery*, 474 U.S. 254, 260 (1986), that a federal habeas petitioner need not return to state court to exhaust a claim if he presents new evidence that supplements but does not fundamentally alter it. Post-AEDPA, it held in *Cullen v. Pinholster*, 563 U.S. 170, 185 (2011), that a federal habeas court generally may consider only evidence presented in state court. Thereafter, it held in *Martinez v. Ryan*, 566 U.S. 1, 17 (2012), and *Trevino v. Thaler*, 569 U.S. 413, 428-29 (2013), that, if a petitioner demonstrates cause-and-prejudice for a procedural default where state habeas counsel failed to exhaust a substantial ineffective assistance of trial counsel (IATC) claim, he still can obtain federal review. This Court has not resolved whether *Hillery* survives *Pinholster* and whether *Martinez* and *Trevino* permit a federal court to consider evidence not presented in state court in light of *Pinholster*. Slater's case lies at the intersection of these doctrines.

Slater's state habeas counsel raised guilt-innocence and punishment stage IATC claims but failed to develop the record by presenting available, material evidence or requesting an evidentiary hearing. The Texas Court of Criminal Appeals (TCCA) denied relief based on the trial court's recommendation.

New counsel filed a federal habeas petition raising a new punishment stage IATC claim and seeking to present additional, material evidence to support the

IATC claims rejected in state court. They sought to stay and abate the proceeding to raise the unexhausted claim and present the new evidence in state court. Alternatively, they sought to expand the record pursuant to Federal Habeas Corpus Rules 6 and 7 to demonstrate cause-and-prejudice for the procedural default. The district court denied both requests, relief, and a certificate of appealability (COA). The Fifth Circuit affirmed, primarily in reliance on *Pinholster*.

The questions presented are whether the Fifth Circuit erred in denying a COA because jurists of reason could debate the following issues:

1. Whether, after *Martinez v. Ryan* and *Trevino v. Thaler*, a district court must allow a federal habeas petitioner to expand the record to develop a substantial IATC claim not raised or adequately developed in state court because state habeas counsel was ineffective or, alternatively, whether it must stay and abate the proceeding so the petitioner can return to state court to attempt to exhaust the claim.

2. Whether, after *Martinez* and *Trevino* and in light of *Vasquez v. Hillery* and *Cullen v. Pinholster*, a district court in a habeas proceeding must consider new evidence that undermines a state court's credibility determination on a substantial IATC claim where that evidence places the claim in a significantly different, stronger evidentiary posture than in state court.

3. Whether trial counsel was ineffective at the guilt-innocence stage of a capital murder trial in allowing Slater, who was intellectually impaired, to decide not to request a jury instruction on the lesser included offense of murder, which forfeited his right to an instruction on the defense theory of self-defense.

4. Whether trial counsel was ineffective at the punishment stage in failing to present evidence of Slater's organic brain impairment and learning disabilities and in criticizing the jury during summation for convicting him instead of arguing that it should answer a special issue in a manner that would result in a life sentence.

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PETITION FOR A WRIT OF CERTIORARI

Paul Wayne Slater respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the Fifth Circuit (App. 1a-15a) and the order denying rehearing (App. 16a-17a) are not published in the Federal Reporter, but the opinion is available at 2018 WL 416492. The Memorandum And Order of the district court (App. 18a-61a) is not reported.

JURISDICTION

The Fifth Circuit denied rehearing on February 16, 2018. Slater invokes this Court's jurisdiction pursuant to 28 U.S.C. §1254(1).

RELEVANT CONSTITUTIONAL PROVISION

The Sixth Amendment to the United States Constitution provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

STATEMENT OF THE CASE

A. Procedural History

1. State Court

Slater was charged with robbing and killing two buyers during a drug deal in 1995 (ROA.867). He pled not guilty to capital murder. Charles Freeman represented him at trial.

The State introduced Slater's videotaped statement to the police that he fired shots after one of the buyers pulled a gun but did not steal their money (ROA.4531, 4537, 4547-48). The court announced that it would instruct the jury on self-defense only if Freeman requested a murder instruction, but he refused (ROA.4326, 4354-57). The jury convicted Slater of capital murder without considering murder or self-defense. He was sentenced to death in 1996.

The TCCA affirmed the conviction in 1998. *Slater v. State*, No. AP-72,623 (Tex. Crim. App. 1998) (unpublished).

Cynthia Cline filed a state habeas corpus application for Slater in 1998 alleging that Freeman was ineffective at the guilt-innocence stage in failing to request a murder instruction, which forfeited his right to a self-defense instruction (ROA.4991-5001), and that he was ineffective at the punishment stage in failing to present medical evidence of Slater's intellectual impairment (ROA.5007-12). She presented Dr. John Largen's 1991 report that Slater likely has organic brain

damage and learning disabilities and Dr. Walter Quijano's 1998 report that Slater is cognitively impaired and has a learning disorder (ROA.5064, 5255).

The state habeas trial court ordered Freeman to file an affidavit in 2000 (ROA.5103-04). He did so in 2002, insisting that he deferred to Slater's decision not to request murder and self-defense instructions and did not present intellectual impairment evidence because it was "double-edged" (ROA.5156-61). Cline did not file a controverting affidavit from Slater, investigate Freeman's background and present evidence to impeach his credibility, or request an evidentiary hearing.

Freeman died in 2003. Cline filed Slater's affidavit in 2013 asserting that Freeman advised him not to request a murder instruction so the jury could not compromise and that it would be able to consider self-defense (ROA.5569-70).

The trial court recommended that relief be denied in 2014. It found that murder and self-defense instructions would have been given upon request (ROA.6080). However, it believed Freeman's affidavit and disbelieved Slater's affidavit because it was filed more than ten years after Freeman died. It concluded that Freeman was not ineffective because Slater waived his right to these instructions (ROA.6063-67, 6080), and because medical evidence of Slater's intellectual impairment would have been more harmful than helpful (ROA.6055, 6059-63, 6078). The TCCA denied relief in 2014. *Ex parte Slater*, 2014 WL 6989189, No. WR-78,134-01 (Tex. Crim. App. Dec. 10, 2014) (unpublished).

2. Federal Court

New counsel, appointed in federal court, investigated what evidence was available to Cline to impeach Freeman. They found a treasure trove and included it with a habeas corpus petition filed in 2015.

Five months after Freeman filed his Slater affidavit, he filed an affidavit in the notorious Zaccarias Moussaoui federal prosecution. He asserted that the “defense lawyer controls the progress of the case”; the client decides only whether to plead guilty or not guilty, have a jury trial, and testify; “I follow such advice which is consistent with federal caselaw”; the lawyer makes “binding decisions of trial strategy”; and, “I agree with such explanation which is consistent with federal caselaw” (ROA.161). The Moussaoui affidavit impeaches his Slater affidavit that he deferred to Slater’s decision not to request murder and self-defense instructions. Both affidavits contain the same basic language, but the Slater affidavit omits that he agrees with and follows these practices. This omission demonstrates his intent to deceive the state habeas court into believing that Slater made the decision instead of him. Had Cline presented the Moussaoui affidavit, she would have demonstrated that the Slater affidavit was incredible.

Cline also failed to discover online newspaper articles reflecting that Judge Michael McSpadden, the senior state district judge in Harris County, had barred Freeman from his court in 1992 because Freeman was “disruptive, unethical and

untruthful” (ROA.165-67). New counsel presented in federal court an affidavit from Judge McSpadden that Freeman was untruthful, unethical, did not understand the law, and was incompetent to try a felony case (ROA.168-70).

The federal district court refused to consider the new evidence and deferred to the state court decision that Freeman reasonably pursued an “all-or-nothing” strategy at Slater’s request and made a sound strategic decision not to present medical evidence of intellectual impairment (App. 37a-38a). It denied relief and a COA (App. 60a-61a).

The Fifth Circuit majority held that the district court properly considered only the state court record under *Pinholster* and that Slater would not prevail even with the new evidence (App. 5a-10a). Judge Dennis concurred (App. 13a-15a).

B. Summary Of The Issues

This case raises important procedural issues that require this Court to harmonize doctrines set forth in *Hillery*, *Pinholster*, *Martinez*, and *Trevino*. *Martinez* and *Trevino* allow a federal habeas petitioner to demonstrate cause-and-prejudice for a procedural default where state habeas counsel failed to exhaust a substantial IATC claim, and thereby obtain *de novo* federal review. However, they are toothless if *Pinholster* prevents a federal court from considering evidence that was not presented in state court. This Court should grant certiorari to provide guidance on how to implement *Martinez* and *Trevino* in light of *Pinholster*.

1. New counsel filed a federal habeas petition raising a new punishment stage IATC claim—that Freeman was ineffective in criticizing the jury during summation for convicting Slater instead of arguing that it should answer a special issue in a manner that would result in a life sentence. They sought to present additional, material evidence to support the IATC claims rejected in state court. They moved to stay and abate the federal proceeding to return to state court to raise the unexhausted claim and present the new evidence. Alternatively, they sought to expand the record pursuant to Federal Habeas Corpus Rules 6 and 7 to demonstrate cause-and-prejudice for the procedural default. The district court denied the request to stay and abate because the TCCA would dismiss a subsequent application as an abuse of the writ (App. 27a n.8)—an independent question of state law for the TCCA, not a federal court, to determine. It ignored the request for discovery and expansion of the record. It also refused to consider the new evidence offered to support the IATC claims that, although raised in state court, effectively were unexhausted because that evidence was not presented (App. 36a, 44a n.2). The Fifth Circuit concluded that the issue whether to stay and abate or allow discovery and record expansion is not debatable (App. 11a-13a).

If the Fifth Circuit is correct, a federal habeas petitioner would fare better if state habeas counsel did not raise a substantial IATC claim at all—which would entitle him to *de novo* federal review—than if counsel raised but did not adequately

develop the claim. Unless federal habeas counsel has a forum to develop a substantial IATC claim not raised or adequately developed in state court because state habeas counsel was ineffective, *Martinez* and *Trevino* are meaningless. This Court should grant certiorari to determine whether it is debatable that a district court must allow discovery and record expansion or stay and abate the proceeding to enable a petitioner to develop a substantial IATC claim not raised or adequately developed in state court because state habeas counsel was ineffective.

2. This Court held in *Hillery* that a federal habeas petitioner need not return to state court to exhaust a claim if he presents additional evidence that supplements but does not fundamentally alter the claim. The Fifth Circuit has consistently held that new evidence fundamentally alters a claim and renders it unexhausted where the evidence places the claim in a significantly different, stronger evidentiary posture than in state court.¹ This Court held in *Pinholster* that a federal habeas court generally may consider only evidence presented in state court. *Pinholster*, 533 U.S. at 185. However, it held in *Martinez* that, if a petitioner demonstrates cause-and-prejudice for a procedural default where state habeas counsel failed to exhaust a substantial IATC claim, he still can obtain federal review. *Martinez*, 566 U.S. at 17. *Martinez* should apply to an IATC claim rejected in state court where state habeas counsel failed to present evidence that,

¹ See *Brown v. Estelle*, 701 F.2d 494, 495-96 (5th Cir. 1983); *Joyner v. King*, 786 F.2d 1317, 1319-20 (5th Cir. 1986); *Graham v. Johnson*, 94 F.3d 958, 969 (5th Cir. 1996).

when presented in federal court, fundamentally alters the claim by placing it in a significantly different, stronger evidentiary posture than in state court.

a. Cline presented no evidence in state court to impeach Freeman. The state courts weighed the unimpeached credibility of a dead lawyer against a Death Row inmate and, not surprisingly, believed the lawyer. Slater presented new evidence in federal court that destroyed Freeman's credibility. The district court erroneously refused to consider it under *Pinholster*, and the Fifth Circuit affirmed.

Had Cline presented Freeman's Moussaoui affidavit and Judge McSpadden's affidavit and timely filed Slater's affidavit, the trial court should have conducted an evidentiary hearing to resolve the credibility dispute. No reasonable jurist—especially a colleague of Judge McSpadden's—would believe that Freeman allowed Slater, intellectually impaired and functioning on a fourth- or fifth-grade level, to decide not to request murder and self-defense instructions.

The Fifth Circuit held that the district court could review only the state court record under *Pinholster* even if the “new evidence would be considered unexhausted . . .” (App. 5a). This Court should grant certiorari to determine whether it is debatable that a district court must consider new evidence that undermines a state court's credibility determination on a substantial IATC claim where that evidence places the claim in a significantly different, stronger

evidentiary posture than in state court.²

b. New counsel presented neuropsychological evidence that fundamentally altered the punishment claim. The district court refused to consider it. Cline alleged that Freeman was ineffective in failing to present medical evidence of Slater's intellectual impairment, but she did not present material evidence to support the claim (ROA.5007-12). She presented Largen's 1991 report that Slater likely has organic brain damage and learning disabilities (ROA.5255). She hired Quijano, a psychologist, to evaluate Slater in 1998. He concluded that Slater is cognitively impaired and has a learning disorder and recommended neuropsychological testing to determine Slater's current brain disorders (ROA.5064-65). She ignored the recommendation and did not obtain the testing.

New counsel hired Dr. Paul Schulz, a neuropsychiatrist, to perform the testing that Quijano recommended. Schulz concluded in 2015 that Slater's IQ is "near the range for mental retardation"; his cognitive impairment began before first grade; and he could not understand legal concepts (ROA.349-65). The district court refused to consider this evidence (App. 44a n.24). The Fifth Circuit deferred to the state court decision that Freeman reasonably decided not to present "mixed evidence" that "could be aggravating rather than mitigating"; and it refused to consider the new evidence because it differed "only in detail, not in mitigating

² Judge Dennis acknowledged in his concurring opinion that Slater's guilt-innocence stage IATC claim is debatable if *de novo* review applies (App. 13a-14a).

thrust,” and was cumulative of evidence that Cline presented (App. 8a-10a).

Schulz’s report and Judge McSpadden’s affidavit place Slater’s punishment stage IATC claim in a significantly different, stronger evidentiary posture than in state court. Schultz’s neuropsychological evaluation did not merely supplement the state court evidence, as Quijano would not have recommended cumulative testing. Judge McSpadden’s affidavit probably would have caused the trial court to disbelieve Freeman’s assertion that he made a strategic decision not to present evidence of intellectual impairment. The new evidence rendered the punishment stage IATC claim unexhausted and subject to *de novo* review. This Court should grant certiorari to determine whether it is debatable that the new evidence fundamentally alters the punishment stage IATC claim and renders it unexhausted.

3. Slater, who is intellectually impaired, was denied the effective assistance of counsel at the guilt-innocence stage because Freeman allowed him to decide not to request a murder instruction, which forfeited his right to a self-defense instruction. The state court found that Slater was entitled to and would have received murder and self-defense instructions upon request. However, he was not entitled to a self-defense instruction unless he requested a murder instruction. Freeman made the unsound decision not to request a murder instruction—a decision that he dubiously asserted Slater made—even though the record establishes that Slater did not understand the consequences of that decision. Even

if Slater made the decision, Freeman was ineffective in deferring to it where he knew that Slater was intellectually impaired and did not understand the difference between capital murder and murder. Absent these instructions, the jury could not give effect to the defense theory and acquit Slater. No rational jury would have acquitted him of capital murder without being allowed to consider self-defense where he admitted that he fired shots. This Court should grant certiorari to determine whether the guilt-innocence stage IATC claim is debatable.

4. Slater was denied the effective assistance of counsel at the punishment stage because Freeman made unsound decisions not to present medical evidence of intellectual impairment and to criticize the jury during summation for convicting him instead of arguing that it should answer the special issues in a manner that would result in a life sentence. This Court should grant certiorari to determine whether the punishment stage IATC claim is debatable.

◆

REASONS FOR GRANTING THE PETITION

The Fifth Circuit articulated the correct COA standard of review but failed to apply it and reviewed the merits instead. It also deviated from its practice to grant a COA on any viable issue in a death penalty case. *See Medellin v. Dretke*, 371 F.3d 270, 275 (5th Cir. 2004).

A COA must issue if Slater demonstrates “a substantial showing of the

denial of a constitutional right.” 28 U.S.C. §2253(c)(2). He must show that reasonable jurists could find the district court’s assessment of his constitutional claims debatable or wrong or that the issues are adequate to deserve encouragement to proceed further. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

A COA inquiry is not a merits analysis. *Buck v. Davis*, 137 S.Ct. 759, 773 (2017). The issue is whether “jurists of reason could disagree with the district court’s resolution of his constitutional claims or . . . conclude the issues presented are adequate to deserve encouragement to proceed further.” *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). The appellant need not show that he will prevail on appeal. *Id.* at 336-37. A claim may be debatable “even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that [he] will not prevail.” *Id.* at 338.

The district court found that Slater “raises issues worthy of judicial review” but denied a COA (App. 61a). Judge Dennis acknowledged in his concurrence that the guilt-innocence IATC claim is debatable if *de novo* review applies (App. 13a-14a). Slater met the standard for issuance of a COA, as there is plenty to debate.

A. The Fifth Circuit Erred In Denying A COA Because It Is Debatable That A District Court Must Allow A Federal Habeas Petitioner To Expand The Record To Develop A Substantial IATC Claim Not Raised Or Adequately Developed In State Court Because State Habeas Counsel Was Ineffective Or, Alternatively, That It Must Stay And Abate The Proceeding So The Petitioner Can Return To State Court To Attempt To Exhaust The Claim.

Slater raised a new punishment stage IATC claim that was not raised in state court and presented new, material evidence in support of the rejected IATC claims. He requested that the district court stay and abate the proceeding so he could raise the unexhausted claim and fully develop the rejected ones in state court (ROA.93, 346). Alternatively, he requested discovery and record expansion under Federal Habeas Corpus Rules 6 and 7 to demonstrate that Cline was ineffective in failing to raise the unexhausted claim and present material evidence in support of the rejected ones (ROA.92, 327-38). The district court refused both requests, and the Fifth Circuit held that this issue is not debatable (App. 11a-13a, 27a n.8, 44a n.2).

1. The Request To Stay And Abate

A district court may stay and abate if there was good cause for the failure to exhaust the claims in state court, the claims are not plainly meritless, and the failure to exhaust was not for purposes of delay. *See Rhines v. Weber*, 544 U.S. 269, 277-78 (2005). Yet, it refused to do so (App. 27a n.8). The Fifth Circuit affirmed, concluding that Slater lacks a remedy under Texas law because the TCCA would not consider the merits of a subsequent application (App. 11a-13a).

The Fifth Circuit applied the wrong standard of review by resolving an independent question of Texas law—whether Slater could meet an exception to the general prohibition against subsequent applications. *See TEX. CRIM. PROC. CODE* art. 11.071, §5(a) (West 2016); *Fearance v. Scott*, 56 F.3d 633, 642 (5th Cir. 1995)

(procedural requirement that applicant present all claims in initial application is independent state-law rule). The TCCA, not a federal court, must resolve this issue. *Rhines* does not require a federal court to determine whether the petitioner would overcome procedural hurdles in state court, successfully exhaust the claims, and ultimately prevail on the merits.

Cline's ineffectiveness constitutes good cause for the failure to exhaust; the claims are not plainly meritless; and she did not fail to present the unexhausted claim and evidence to delay. The Fifth Circuit concluded that Slater would not prevail on the claims even though the district court acknowledged that "Slater's petition raises issues worthy of judicial review" (App. 11a-13a, 61a). Claims that are "worthy of judicial review," *ipso facto*, are not "plainly without merit." The Fifth Circuit should have applied the *Rhines* standard instead of speculating what the TCCA would do with a subsequent application. This Court should grant certiorari to determine whether it is debatable that the Fifth Circuit used the wrong standard of review in concluding that Slater was not entitled to a stay and abatement because the TCCA would dismiss a subsequent application.

2. Expansion Of The Record

The district court ignored Slater's request to expand the record to demonstrate that Cline was ineffective in failing to raise the unexhausted claim and present material evidence in support of the rejected claims. Once it refused to stay

and abate, it should have allowed discovery and record expansion. The Fifth Circuit tangentially addressed this issue in observing that Cline was not ineffective in failing to present the new evidence because it would not change the determination that Freeman was effective and Slater did not suffer prejudice (App. 7a-8a). The Fifth Circuit put the cart before the horse. It assumed that, had Cline presented Freeman’s Moussaoui affidavit and Judge McSpadden’s affidavit and timely filed Slater’s affidavit, the trial court would have believed Freeman’s affidavit that he deferred to Slater’s decision not to request murder and self-defense instructions and did not present evidence of Slater’s intellectual impairment because it was “double-edged.” This Court should grant certiorari to determine whether it is debatable that the Fifth Circuit used the wrong standard of review in concluding that Slater was not entitled to expand the record.

B. The Fifth Circuit Erred In Denying A COA Because It Is Debatable That A District Court Must Consider New Evidence That Undermines A State Court’s Credibility Determination On A Substantial IATC Claim Where That Evidence Places The Claim In A Significantly Different, Stronger Evidentiary Posture Than In State Court.

1. The Court should determine whether *Hillery* survives *Pinholster*.

This Court held pre-AEDPA that a federal habeas petitioner need not return to state court to exhaust a claim if he presents new evidence that supplements but does not fundamentally alter the claim. *Hillery*, 474 U.S. at 260. Whether the new evidence “supplements” or “fundamentally alters” the claim is determined on a

case-by-case basis. *Anderson v. Johnson*, 338 F.3d 382, 388 n.24 (5th Cir. 2003).

The Fifth Circuit has consistently held that new evidence fundamentally alters a claim and renders it unexhausted where the evidence places the claim in a significantly different, stronger evidentiary posture than in state court.³ Before *Martinez*, the Fifth Circuit resolved claims supplemented by new evidence and dismissed claims rendered unexhausted by new evidence.⁴

This Court held post-AEDPA that a federal habeas court generally may consider only evidence presented in state court. *Pinholster*, 533 U.S. at 185. Thereafter, the Fifth Circuit has refused to consider new evidence that supplements but does not fundamentally alter a claim. See *Ibarra v. Thaler*, 691 F.3d 677, 682 (5th Cir. 2012), *vacated in part on other grounds*, 723 F.3d 599 (5th Cir. 2013); *Clark v. Thaler*, 673 F.3d 410, 417 (5th Cir. 2012). “[W]e explicitly reject . . . that where new affidavits supplement rather than fundamentally alter a state court claim, they may be admissible for review of a habeas claim under §2254(d).” *Lewis v. Thaler*, 701 F.3d 783, 791 (5th Cir. 2012).

This Court held after *Pinholster* that, if a federal habeas petitioner demonstrates cause-and-prejudice for a procedural default where state habeas counsel failed to exhaust a substantial IATC claim, he still can obtain federal

³ See *Brown*, 701 F.2d at 495-96; *Joyner*, 786 F.2d at 1319-20; *Graham*, 94 F.3d at 969.

⁴ *Anderson*, 338 F.3d at 386-87; *Dowthitt v. Johnson*, 230 F.3d 733, 745-46 (5th Cir. 2000); *Morris v. Dretke*, 413 F.3d 484, 492-98 (5th Cir. 2005); *Lewis v. Quarterman*, 541 F.3d 280, 284-86 (5th Cir. 2008).

review. *Martinez*, 566 U.S. at 17. The Fifth Circuit has relied on its pre-*Pinholster* factual-exhaustion jurisprudence to apply the *Martinez* exception where new evidence was presented in support of an IATC claim rejected in state court. *Sells v. Stephens*, 536 Fed.Appx. 483, 490-92 (5th Cir. 2013); *cf. Escamilla v. Stephens*, 749 F.3d 380, 394-95 (5th Cir. 2014) (*Martinez* does not apply to claim fully adjudicated on merits in state court where new evidence does not fundamentally alter claim). It recently distinguished *Ibarra* and *Clark*. If new evidence fundamentally alters a claim by placing it in a significantly different, stronger evidentiary posture than in state court, it is unexhausted and subject to *de novo* federal review. *Sorto v. Davis*, 859 F.3d 356, 361-62 (5th Cir. 2017).

Slater filed a petition for rehearing *en banc* on February 1, 2018, asserting that the panel decision was inconsistent with *Sorto*, which was pending on Davis' petition for rehearing *en banc*. The dominos quickly tumbled. The Fifth Circuit withdrew the panel decision in *Sorto* on February 7; denied Slater's petition for rehearing on February 16; and vacated *Sorto* and remanded to the district court for further consideration on a funding claim seven days after this Court issued its opinion in *Ayestas v. Davis*, 138 S.Ct. 1080 (2018), on March 21.

Davis had argued in her *Sorto* rehearing petition that *Pinholster* prohibits consideration of *all* new evidence in federal court. This Court has not determined whether *Hillery* survives *Pinholster* and under what circumstances a federal court

may consider new evidence in support of a claim raised in state court. It should grant certiorari to determine whether these important questions are debatable.

2. ***After Martinez, new evidence that fundamentally alters a claim raised in state court renders the claim unexhausted and subject to de novo review.***

This case depicts the tension between *Martinez* and *Pinholster*. At issue is whether the *Martinez* exception to the exhaustion and procedural default doctrines applies where new evidence “fundamentally alters” the IATC claims raised in state court. If *Martinez* applies to new evidence of a substantial IATC claim, this Court must decide what constitutes the “fundamental alteration” of a claim. It should grant certiorari to determine whether it is debatable that *Martinez* allows a federal court to consider new evidence that fundamentally alters a claim by placing it in a significantly different, stronger evidentiary posture than in state court.

3. ***New evidence that impeaches trial counsel’s state court affidavit fundamentally alters an IATC claim and constitutes cause-and-prejudice for the procedural default where state habeas counsel presented no impeachment evidence.***

Cline presented no evidence to impeach Freeman, and the state court believed him. Slater presented new evidence in federal court that destroyed Freeman’s credibility. The district court refused to consider it, and the Fifth Circuit concluded that the issue is not debatable.

- a. ***The new impeachment evidence fundamentally alters the guilt-innocence IATC claim.***

Had Cline presented Freeman's Moussaoui affidavit and Judge McSpadden's affidavit and timely filed Slater's affidavit, the state court should have conducted an evidentiary hearing to resolve the credibility dispute. No reasonable jurist and colleague of Judge McSpadden's would believe that Freeman allowed Slater, intellectually impaired and functioning on a fourth-or-fifth-grade level, to decide not to request murder and self-defense instructions.

The Fifth Circuit held that the district court could review only the state court record under *Pinholster* even if the "new evidence would be considered unexhausted . . ." (App. 5a). It concluded that *Pinholster* bars a federal court from considering new evidence supporting intellectual impairment and IATC claims.

Judge Dennis acknowledged in his concurring opinion that Slater's guilt-innocence IATC claim is debatable if *de novo* review applies (App. 13a-14a). However, he concluded that the new evidence merely supplemented the claim because it related only to the *credibility* of Freeman's affidavit.

The Fifth Circuit holds that *Martinez* is not an exception to *Pinholster* and does not apply to a claim that was fully adjudicated on the merits in state court. *Escamilla*, 749 F.3d at 394-95. Slater's case shows why this rule is unworkable. He introduced *non-cumulative* evidence that Freeman's affidavit was incredible rather than cumulative evidence that Freeman performed deficiently. The new evidence did not supplement his IATC claim; rather, it demonstrated that the state

court denied relief based on an incredible affidavit. It fundamentally alters the claim, renders it unexhausted, and requires *de novo* federal review. The Fifth Circuit erred in concluding that the issue is not debatable. This Court should grant certiorari to determine whether it is debatable that new evidence that impeaches trial counsel's state court affidavit fundamentally alters an IATC claim where state habeas counsel presented *no* impeachment evidence.

b. State habeas counsel's failure to present material impeachment evidence constitutes cause-and-prejudice for the procedural default.

The Fifth Circuit acknowledged that Slater's new evidence could be considered if he demonstrated cause-and-prejudice (App. 7a). However, it denied him a forum to do so. It concluded that Slater did not present "clear and convincing evidence that would rebut the state court's finding that Freeman's affidavit was reliable and Slater's was not credible" under 28 U.S.C. §2254(d)(1) (App. 6a). He presented Freeman's Moussaoui affidavit and Judge McSpadden's affidavit for that purpose. He also sought to question Cline at a hearing to establish cause for her failure to present this evidence in state court.

The district court acknowledged that Freeman and Slater discussed what jury instructions to request (App. 31a). However, after that discussion, Freeman told the trial court that he did not believe that Slater could make an informed decision whether to request a murder instruction or understood the consequences of that

decision (ROA.4323). The district court ignored that a psychologist who evaluated Slater for competency to stand trial concluded that he did not understand the difference between capital murder and murder (ROA.887). It also failed to consider the unfairness of the state court's decision to disbelieve Slater's affidavit because Cline delayed filing it for more than ten years. Delay attributable to Cline is not a legitimate reason to disbelieve Slater. Her failure to present material evidence to impeach Freeman constitutes cause for the procedural default and requires consideration of the evidence and *de novo* federal review under *Martinez*.

The Fifth Circuit held that Cline's failure to present the evidence did not result in prejudice because the jury would have convicted Slater of capital murder even with a self-defense instruction (App. 7a-8a). It assumed that, because the jury did not believe Slater's statement that he did not commit a robbery, it would not have believed his statement that he acted in self-defense. The jury had to decide whether to convict or acquit Slater of capital murder without an instruction on self-defense, his stated justification for the shooting. It may have doubted that he committed a robbery but believed that he committed murder and was not willing to acquit him of capital murder without the option of convicting him of murder. No one can say what a properly instructed jury would have done, but no jury would acquit without a self-defense instruction.

The Fifth Circuit concluded that Slater cannot demonstrate cause-and-

prejudice for the procedural default under *Martinez* because the new evidence “would not change the determination of the ineffective-assistance or prejudice inquiry” (App. 7a). Had Cline presented Freeman’s Moussaoui affidavit and Judge McSpadden’s affidavit and timely filed Slater’s affidavit, there is a reasonable probability that the trial court would not have believed that Freeman allowed Slater to decide not to request murder and self-defense instructions. The state court found that Slater would have received the instructions upon request. That the trial court would have given them demonstrates the requisite prejudice.

Finally, the Fifth Circuit used an erroneous COA standard by focusing on whether the new evidence would have altered the outcome of the proceeding instead of whether it is *debatable* that the evidence places the claim in a significantly different, stronger evidentiary posture. This Court should grant certiorari to determine whether it is debatable that Cline’s failure to present the impeachment evidence constitutes cause-and-prejudice for the procedural default.

c. The new impeachment and neuropsychological evidence fundamentally alters the punishment stage IATC claim.

Cline alleged that Freeman was ineffective in failing to present medical evidence regarding Slater’s intellectual impairment, but she failed to present material evidence to support the claim (ROA.5007-12). She presented Largen’s 1991 report that Slater likely has organic brain damage and learning disabilities (ROA.5255). She presented Quijano’s 1998 report that Slater is cognitively

impaired and has a learning disorder and recommended neuropsychological testing to determine Slater's current brain disorders (ROA.5064-65). She ignored the recommendation and did not obtain that testing.

New counsel hired Schulz to perform the neuropsychological testing that Quijano recommended (ROA.349-65). Schulz concluded in 2015 that Slater's IQ is "near the range for mental retardation"; his cognitive impairment began before first grade; and he could not understand legal concepts. The district court refused to consider this evidence (App. 44a n.24).

The state court decision that Freeman was not ineffective was based on his assertion that he did not present evidence of Slater's intellectual impairment because it was "double-edged" (ROA.5160). However, he called Slater's mother, Barbara Wiley, to testify that Slater was hit in the head by a car when he was five years old, had surgery, has a scar on his forehead, has a 63 IQ, functions on a fourth-or-fifth-grade level, and could not function in school (ROA.4811-13). He would not have called her were he not willing to present "double-edged" evidence of intellectual impairment. The opinion of a mental health professional carries more weight with a jury than the biased testimony of the defendant's mother.

The Fifth Circuit deferred to the state court decision that Freeman reasonably decided not to present "mixed evidence" that "could be aggravating rather than mitigating"; and it refused to consider the new evidence because it

differed “only in detail, not in mitigating thrust,” and was cumulative of Wiley’s testimony (App. 8a-10a).

Schulz’s report and Judge McSpadden’s affidavit place Slater’s punishment claim in a significantly different, stronger evidentiary posture than in state court. Schulz’s neuropsychological evaluation did not merely supplement the state court evidence, as Quijano would not have recommended cumulative testing. Judge McSpadden’s affidavit probably would have caused the state court to disbelieve Freeman’s assertion that he made a strategic decision not to present the medical evidence. The new evidence rendered the punishment stage IATC claim unexhausted and subject to *de novo* federal review. This Court should grant certiorari to determine whether it is debatable that the new evidence fundamentally alters the punishment stage IATC claim.

d. State habeas counsel’s failure to present the impeachment and neuropsychological evidence constitutes cause-and-prejudice for the procedural default.

The Fifth Circuit held that Slater cannot demonstrate cause-and-prejudice for the procedural default under *Martinez* because the new evidence is cumulative and there was “extensive evidence of future dangerousness” (App. 9a-10a). It ignored its own binding precedent. *See Miller v. Dretke*, 420 F.3d 356, 366 (5th Cir. 2005) (counsel ineffective at punishment stage in failing to call doctor to corroborate lay witnesses regarding defendant’s mental problems).

Had Cline presented neuropsychological test results and Judge McSpadden's affidavit, the state court should have conducted an evidentiary hearing, found that Slater's intellectual impairment and head injury caused learning problems, disbelieved Freeman, and concluded that he was ineffective in failing to present this evidence. This Court should grant certiorari to determine whether it is debatable that Cline's failure to present the impeachment and neuropsychological evidence constitutes cause-and-prejudice for the procedural default.

C. The Fifth Circuit Erred In Denying A COA Because It Is Debatable That Trial Counsel Was Ineffective At The Guilt-Innocence Stage Of A Capital Murder Trial In Allowing Slater, Who Was Intellectually Impaired, To Decide Not To Request A Jury Instruction On Murder, Which Forfeited His Right To An Instruction On The Defense Theory Of Self-Defense.

1. The Trial

Slater told the police that he obtained cocaine from the trunk of the car, reentered the car, and showed it to the buyers (ROA.4536-37). When a buyer pulled a gun, he pulled a gun and started shooting; and a buyer also started shooting (ROA.4531, 4533, 4536-37, 4541). Slater moved into the driver's seat and drove away without taking the money (ROA.4538-39, 4547-48). His statement negated the robbery element of capital murder and raised fact issues as to whether he committed a robbery and fired shots in self-defense. He would have been entitled to murder and self-defense instructions upon request.

The court told Freeman at the charge conference that it would not submit

self-defense instructions without a murder instruction (ROA.4326, 4353-54). Freeman did not believe that Slater could make an informed decision whether to request a murder instruction or understood the consequences of that decision (ROA.4323).⁵ The court overruled his objection to the denial of a self-defense instruction in the absence of a murder instruction (ROA.4355-57).

Freeman did not assert during the charge conference that he allowed Slater to make the decision and reluctantly deferred to it, nor did he assert that Slater understood that he would not receive a self-defense instruction unless he requested a murder instruction. The record does not reflect that Freeman conferred with Slater after the court warned him that it would not instruct the jury on self-defense if he did not request a murder instruction, nor did the court explain the consequences of this decision to Slater (ROA.4326, 4354).

Freeman gave a rambling closing argument asserting that the eyewitness lied, that the buyers were “ripping off” the sellers, and that Slater reacted and fired shots when a buyer pulled a gun (ROA.4391-94, 4397).

2. The State Habeas Proceeding

Cline alleged that Freeman was ineffective in failing to request a murder instruction, which would have entitled Slater to a self-defense instruction

⁵ Freeman also complained that he was being “pushed around” and forced to make objections and argue a capital murder case while he was wearing blue jeans and had not bathed, gone to the bathroom, or brushed his teeth (ROA.4355).

(ROA.4991-5001). She asserted that Slater's statement raised murder and self-defense, that the jury could believe he was engaged in a drug deal rather than a robbery, that he was entitled to a murder instruction, and that Freeman's failure to request the instruction effectively abandoned self-defense.

Freeman's affidavit asserted that Slater "surprisingly, albeit expressly, elected to pursue an 'all-or-nothing-at-all' strategy immediately prior to my objections to, as well as requested special charges for, the trial court's final charge on the issue of his guilt" (ROA.5156). He "reluctantly acquiesced to [Slater's] apparently sober decision to 'roll the dice' on the issue of his guilt without any lesser included offenses at all in the trial court's final charge" (ROA.5157). Slater made this decision after Freeman "fully explained the legal consequences of his election, as well as decision, on both his trial on the merits and separate sentencing proceeding, if any, privately in the open trial courtroom." Slater's "surprise, albeit express, election was, moreover, solely *his* election" (emphasis in original). Freeman did not reveal what he told Slater or that he explained that Slater would not receive a self-defense instruction without a murder instruction. He also did not explain why he purportedly deferred to Slater's decision when he knew that Slater was intellectually impaired, could not read or understand simple concepts, and did not understand the difference between capital murder and murder.

Cline did not obtain a contemporaneous, controverting affidavit from Slater,

did not request an evidentiary hearing or that Freeman file another affidavit addressing these omissions, and did not present evidence to impeach his credibility and affidavit. Ten years after Freeman died, she filed Slater's affidavit asserting that Freeman advised him not to request a murder instruction so the jury could not compromise and that it could consider self-defense (ROA.5569-70).

The trial court found that Slater would have been entitled to both instructions upon request (ROA.6080). It believed Freeman's affidavit, disbelieved Slater's affidavit because it was filed ten years after Freeman died, and concluded that Freeman was not ineffective because Slater waived his right to these instructions (ROA.6063-67, 6080). It failed to consider that a psychologist appointed to determine Slater's competency to stand trial reported that he did not understand the difference between capital murder and murder (ROA.887), and that Freeman told the court at the punishment stage that Slater could not read or understand simple legal documents, such as a guilty plea form (ROA. 4565-66). The TCCA adopted the findings and conclusions and denied relief.

3. Counsel Performed Deficiently In Failing To Request A Murder Instruction To Obtain A Self-Defense Instruction.

Slater caused the death of the deceased. However, the parties disputed whether he was a robber or a robbery victim who acted in self-defense. The jury could not give effect to the defense theory without a self-defense instruction.

Self-defense does not apply to capital murder in Texas. A person who commits robbery forfeits his right to defend himself from the victim. *Caraway v. State*, 489 S.W.2d 106, 110 (Tex. Crim. App. 1971). No competent lawyer would request a self-defense instruction without also requesting murder. It is debatable that Freeman performed deficiently in failing to request a murder instruction, which would have been submitted and entitled Slater to a self-defense instruction.

4. Counsel Performed Deficiently In Deferring To Slater's Purported Decision Not To Request A Murder Instruction.

The state court found that Freeman deferred to Slater's decision not to request a murder instruction (ROA.6063). The Fifth Circuit held that the district court's deference to that finding is not debatable because Freeman had to follow the instructions of a competent client (App. 6a-7a). No court has considered whether Slater understood the consequences of that decision if, indeed, he made it.

Before trial the court received a psychologist's report that Slater, although competent to stand trial, did not understand the difference between capital murder and murder (ROA.887). Freeman stated at the charge conference that he did not believe that Slater could make an informed decision whether to request a murder instruction or understood the consequences of that decision (ROA.4323), and stated at the punishment stage that Slater could not read or understand simple legal documents, such as a guilty plea form (ROA.4565-66). Slater's mother testified about his childhood injury, low IQ, and poor academic performance (ROA.4811-

13). Largen concluded in 1991 that Slater, then age 17, likely has organic brain impairment typical of a severe head injury and an IQ in the “dull normal” range (ROA.5247-63). Quijano concluded in 1998 that Slater had a head injury, cognitive impairment, and a learning disorder (ROA.5060-65). Competent counsel would neither allow nor defer to an uneducated, intellectually impaired client’s decision regarding what jury instructions to request in a death penalty case.

Counsel’s decision not to request a lesser included offense instruction raised by the evidence is reasonable where the defendant denies that he engaged in the conduct. Had Slater denied firing shots, Freeman reasonably could have decided not to request a murder instruction. But Slater admitted firing shots. If Freeman allowed him to decide not to request a murder instruction without understanding that he would not receive a self-defense instruction, he made an unintelligent decision based on inadequate information. Conversely, if Slater understood that he would not receive a self-defense instruction, Freeman unreasonably deferred to his suicidal decision. Either way, Freeman was ineffective.

Competent counsel would have requested murder and self-defense instructions regardless of an intellectually impaired client’s wishes. The Fifth Circuit erred in holding that it is not debatable whether the state court unreasonably determined the facts and unreasonably applied the deficient performance prong of *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984).

5. Slater Suffered Prejudice Without A Self-Defense Instruction.

Freeman's failure to request a murder instruction prevented the jury from considering self-defense. Had Freeman requested a murder instruction, and Slater received a self-defense instruction, there is a reasonable probability that the jury would not have convicted him of capital murder.

The State's flawed case relied on a drug dealer who could not see into the car or identify the occupants; did not know whether either deceased pulled a gun; and left town without reporting the shooting. Slater's statement, the only evidence that connected him to the shooting, was substantially exculpatory.

The state court did not address prejudice because it found that Freeman was not deficient. Thus, a federal court must review the prejudice prong of the IATC claim *de novo*. *Rompilla v. Beard*, 545 U.S. 374, 390 (2005) (AEDPA standard of review inapplicable to prong of IATC claim not addressed in state court). The state court found that Slater would have received murder and self-defense instructions upon request (ROA.6080). Thus, Freeman's omission caused the ultimate prejudice—it prevented the jury from giving effect to the defense theory.

The erroneous failure to instruct the jury on a confession-and-avoidance defense "is generally harmful because its omission leaves the jury without a vehicle by which to acquit a defendant who has admitted to all the elements of the offense." *Cornet v. State*, 417 S.W.3d 446, 451 (Tex. Crim. App. 2013). The

failure to instruct the jury on self-defense, where raised by the evidence, is prejudicial. *Guilbeau v. State*, 193 S.W.3d 156, 161 (Tex. App.—Houston [1st Dist.] 2006, pet. ref’d); *Carmen v. State*, 276 S.W.3d 538, 547 (Tex. App.—Houston [1st Dist.] 2008, pet. ref’d). Slater admitted to conduct that could constitute murder. He would have received a self-defense instruction only had Freeman requested a murder instruction. Without it, he “was left without his only defensive theory, making his conviction a virtual inevitability.” See *Dugar v. State*, 464 S.W.3d 811, 822 (Tex. App.—Houston [14th Dist.] 2015, pet. ref’d).

The Fifth Circuit concluded that it is not debatable whether the absence of a self-defense instruction harmed Slater because the jury disbelieved his statement that he did not commit a robbery, so it would have disbelieved his statement that he acted in self-defense (App. 6a). The Fifth Circuit used the wrong standard to determine prejudice. It should have analyzed whether Freeman’s failure to request murder and self-defense instructions, under the circumstances, undermines confidence in a capital murder conviction resulting in a death sentence.

Absent a self-defense instruction, the jury could not give effect to Freeman’s argument that Slater acted in self-defense. No jury would acquit Slater of capital murder if it believed that he committed murder, even if all jurors were not convinced beyond a reasonable doubt that he did so during a robbery. Also, had there been a murder instruction, the jury could have compromised and convicted

him of murder if any juror believed or had a reasonable doubt that he fired shots during a drug-deal-gone-bad instead of a robbery, even if he did not act in self-defense. But for Freeman's error, there is a reasonable probability that the jury would have acquitted Slater, convicted him of murder, or deadlocked.

The district court found that Slater "raises issues worthy of judicial review" but denied a COA (App. 61a). This Court should grant certiorari to determine whether it is debatable that Freeman was ineffective in failing to request murder and self-defense instructions.

D. The Fifth Circuit Erred In Denying A COA Because It Is Debatable That Trial Counsel Was Ineffective At The Punishment Stage In Failing To Present Medical Evidence Of Slater's Intellectual Impairment And In Criticizing The Jury During Summation For Convicting Him Instead Of Arguing That It Should Answer A Special Issue In A Manner That Would Result In A Life Sentence.

1. The Trial

Slater's mother testified that he was hit in the head by a car at age five, had surgery, and has a scar on his forehead; and he has a 63 IQ, functions on a fourth-or-fifth-grade level, and could not function in school (ROA.4811-13).

Freeman criticized the jury during summation instead of discussing the evidence and asking the jury to answer a special issue in a manner that would result in a life sentence (ROA.4845-48, 4866). He called the jury arrogant, racist, uncivilized, insolent, angry, and careless merely for ignoring his greeting of, "Good morning." He criticized the verdict, asserting that the jury "forgot the

testimony,” “bought a line,” and did not want to think or reason (ROA.4849, 4851). Slater was sentenced to death.

2. The State Habeas Proceeding

Cline alleged that Freeman was ineffective in failing to present medical evidence of Slater’s intellectual impairment (ROA.5007-12). She relied substantially on Largen’s 1991 report (ROA.5247-63). She also presented Wiley’s affidavit and a school report reflecting that Slater was functioning on a second-or-third-grade level when he was 12 to 13 years old and was promoted to sixth grade only because he already had been held back (ROA.5575-88). She hired Quijano to conduct a psychological evaluation in 1998 that confirmed Slater’s head injury, cognitive impairment, and learning disorder (ROA.5060-65). He recommended neuropsychological testing (ROA.5065), but she did not request or obtain it.⁶

Freeman asserted in his affidavit that Slater’s mental deficits were “a double-edged sword” that reduced his blameworthiness but indicated that he posed a continuing threat to society (ROA.5160). However, Freeman did not address whether he read Largen’s report, interviewed Largen, and had Slater evaluated by a mental health professional. Cline did not request an evidentiary hearing or another affidavit to address these matters and did not develop the claim adequately.

⁶ Had Cline obtained the testing that Quijano recommended, she could have presented evidence, such as Schulz’s report that federal habeas counsel obtained, that would have demonstrated a causal connection between Slater’s head injury and subsequent academic problems. She also failed to present available evidence of a letter from his kindergarten teacher and additional records reflecting that he functioned poorly in school (ROA.173-99).

The state court found that Freeman was not ineffective because Largen's evaluation was "mixed" and he did not conclude that Slater is mentally retarded (ROA.6057-63). Slater objected to this conclusion because Freeman could not have made a sound decision not to offer this evidence where he did not assert that he knew about Largen's findings of intellectual impairment; and, even if he did, this evidence had mitigating value under Supreme Court precedent (ROA.5973-76). The TCCA adopted the findings and conclusions and denied relief.

3. Counsel Performed Deficiently In Failing To Present Medical Evidence Of Slater's Intellectual Impairment And In Criticizing The Jury During Summation.

Had Freeman asserted that he read Largen's report and decided not to offer this evidence, the issue would be whether that strategy was sound. His failure to assert this suggests that he did not know about the report. His explanation that he did not present it because it is "double-edged" is belied by his decision to present Wiley's testimony regarding Slater's intellectual impairment. Competent counsel would have called Largen to testify that Slater likely has organic brain impairment typical of a severe head injury and an IQ in the "dull normal" range and would have presented the school records to demonstrate his learning disabilities. This medical evidence would have corroborated Wiley's lay testimony. Freeman was ineffective in failing to present it. *See Rompilla*, 545 U.S. at 385-87; *Porter v. McCollum*, 558 U.S. 30, 40 (2009) (counsel ineffective in failing to present

evidence of capital defendant's mental impairment). The state court findings are not supported by credible evidence and ignore Freeman's duty to investigate Slater's mental condition and present evidence that lessens his moral culpability.

A capital defendant has a constitutional right to present mitigating evidence, so counsel must investigate his background. *Wiggins v. Smith*, 539 U.S. 510, 521-23 (2003). Counsel has a "duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 690-91. At issue is whether Freeman reasonably decided not to present this evidence because he believed that it is aggravating. *Wiggins*, 539 U.S. at 523.

The state court found that Largen did not diagnose Slater as mentally retarded, that his report contained information that could have harmed Slater, and that Freeman was not ineffective in failing to present records that produced a "mixed result" (ROA.6058-59). The district court deferred to these findings (App. 46a-48a; ROA.394-96), and the Fifth Circuit held that the issue is not debatable (App. 8a-10a). The findings ignore the core issue and fail to appreciate the significance of the evidence not presented in state court.

If Slater were mentally retarded, he would be ineligible for the death penalty. *Atkins v. Virginia*, 536 U.S. 304, 321 (2002). Evidence that a defendant is intellectually impaired is mitigating and must be considered by the jury even if it does not rise to the level of mental retardation. *Cf. Porter*, 558 U.S. at 43-44. The

state court unreasonably “discount[ed] entirely the effect that this testimony might have had on the jury” *Id.* at 44.

The state court found that Freeman was not ineffective in failing to present Largen’s report because it contained information that could have harmed Slater, and the district court agreed (ROA.6059, App. 46a). Both assumed that Freeman could present this mitigating evidence only by offering the entire report. To the contrary, he could have called Largen to testify without eliciting the information that the state court considered unfavorable. The prosecutor may not have elicited this information on cross-examination. Regardless, the jury would have known that Largen believed that Slater likely has organic brain impairment and a low IQ instead of having to rely solely on the lay testimony of his mother.

4. Slater Suffered Prejudice In The Absence Of Medical Evidence Of His Intellectual Impairment.

The Fifth Circuit held that it is not debatable whether Slater would have received a death sentence had the jury known about his intellectual impairment because he sold crack cocaine, shot a boy at a church event, was seated near a machine gun and a revolver during a traffic stop, and pawned electronics from a burglarized home (App. 10a). At issue is not whether this evidence was sufficient to support the jury’s finding of future dangerousness but whether the fact that the jury did not know the medical evidence of Slater’s intellectual impairment undermines confidence in the death sentence. The medical evidence would have

provided an explanation for his behavior that probably would have caused at least one juror to find that he was less morally culpable and should be sentenced to life.

Slater must show that his death sentence is not worthy of confidence, not that he would have received a life sentence. Had all 12 jurors not agreed on the answers to the special issues, the court would have imposed a life sentence. TEX. CRIM. PROC. CODE art. 37.071(e) (West 1988). Prejudice is established if there is a reasonable probability that one juror would have answered a special issue in the defendant's favor, resulting in a life sentence. *Cf. Wiggins*, 539 U.S. at 537.

The State did not present a compelling case for the death penalty. The deceased were drug dealers. There was a plausible claim of self-defense (that the jury could not consider). Slater was 21 years old at the time of the incident. His criminal history consisted of delivering a rock of crack cocaine and shooting a boy in the buttocks when he was 16 years old; sitting near masks and two loaded weapons during a traffic stop when he was 19 years old; and pawning items stolen in a burglary one month before the charged offense.

To obtain a life sentence, Freeman had to persuade only one juror that some aspect of Slater's background made him less morally culpable for his conduct or that he would not constitute a threat in prison. Freeman presented only Wiley's brief lay testimony. He did not present medical evidence of intellectual impairment. He did not argue that the jury should answer the future dangerousness

issue “no” because the evidence did not establish beyond a reasonable doubt that Slater would commit acts of violence in prison. He did not argue that it should answer the mitigation issue “yes” because of Slater’s intellectual impairment. Instead, he criticized the jurors for being rude, arrogant, racist, unwilling to analyze the evidence critically, and convicting Slater (ROA.4845-49, 4851, 4866).

Mitigating evidence may influence the jury’s appraisal of the defendant’s moral culpability. “Mitigating evidence unrelated to dangerousness may alter the jury’s selection of penalty, even if it does not undermine or rebut the prosecution’s death-eligibility case.” *Williams v. Taylor*, 529 U.S. 362, 398 (2000). The *Wiggins* Court found prejudice because the defendant’s troubled history was relevant to his moral culpability. *Wiggins*, 539 U.S. at 535. Had Slater’s jury heard this evidence, there is a reasonable probability that at least one juror would have answered a special issue in his favor, resulting in a life sentence. *Id.* at 537.

In *Rompilla*, counsel failed to discover and present evidence of intellectual impairment, which would have led competent counsel to request additional testing. Testing during the habeas proceeding revealed evidence of organic brain damage that severely impaired cognitive functions. This Court vacated the death sentence because the undiscovered evidence might have influenced the jury’s assessment of moral culpability. “This evidence adds up to a mitigation case that bears no relation to the few naked pleas for mercy actually put before the jury, and although

. . . it is possible that a jury could have heard it all and still have decided on the death penalty, that is not the test.” *Rompilla*, 545 U.S. at 393.

The adversarial process broke down at the punishment stage. Had Freeman conducted an adequate mitigation investigation, presented medical evidence of Slater’s intellectual impairment, and argued that the jurors should spare his life instead of berating them, there is a reasonable probability that at least one juror would have answered a special issue in Slater’s favor, resulting in a life sentence. The Fifth Circuit’s decision is contrary to this Court’s well-settled precedent. This Court should grant certiorari to determine whether it is debatable that Freeman was ineffective in failing to present this evidence and in criticizing the jury during summation instead of arguing that it should answer a special issue in a manner that would result in a life sentence.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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