CAPITAL CASE
EXECUTION SCHEDULED FOR APRIL 23, 2025, 6:00PM CST
Nos. 24-7030 & 24A-1005

IN THE

Supreme Court of the United States

MOISES SANDOVAL MENDOZA,

Petitioner,

v.

STATE OF TEXAS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF CRIMINAL APPEALS OF TEXAS

REPLY BRIEF FOR PETITIONER

Melissa C. Cassel-Walker
Evan Hindman
O'MELVENY & MYERS LLP
Two Embarcadero Center
San Francisco, CA 94111

Jason Zarrow
Counsel of Record
Hana Stodder
O'MELVENY & MYERS LLP
400 S. Hope Street,
19th Floor
Los Angeles, CA 90071
(213) 430-8367
jzarrow@omm.com

Attorneys for Petitioner

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
(cont.)

Page(s)

STATUTES

OTHER AUTHORITIES

REPLY BRIEF FOR PETITIONER

Petitioner Moises Mendoza alleges that his trial counsel was ineffective for failing to investigate the prosecution's most important rebuttal witness at the punishment phase of this capital case. Mendoza could not litigate that claim in state court because his appointed habeas lawyer defaulted it. Mendoza attempted to litigate his ineffective-assistance-of-trial-counsel ("IATC") claim in federal court but that avenue was foreclosed because Mendoza's habeas counsel did not develop the state court record. On return to state court, Mendoza alleged that the lawyer appointed by the State to represent him in habeas proceedings was ineffective for failing to assert his IATC claim. But the Texas Court of Criminal Appeals denied Mendoza's application based on its rule that there is no right to effective habeas counsel, even in proceedings that represent the petitioner's first meaningful opportunity to assert an IATC claim. The question before this Court is whether that rule is correct.

That question is worthy of this Court's consideration. In fact, the Court granted certiorari to answer the question in *Martinez v. Ryan*, 566 U.S. 1 (2012), but did not resolve it. The State contends that this Court's review is no longer needed because its cases have settled the question. But as this Court is well aware, it does not settle weighty constitutional questions in cases that don't present them. And none of the cases cited by the State passed on—much less settled—the question presented here. Rather, the question here is the one *Coleman v. Thompson*, 501 U.S. 722 (1991), and later *Martinez* "left open"—*viz.*, "whether a prisoner has a right to effective counsel in collateral proceedings which provide the first occasion to

raise a claim of ineffective assistance at trial." 566 U.S. at 8. That question was profoundly important when the Court granted certiorari in *Martinez*. And it remains profoundly important today.

The State's main argument is that this Court lacks jurisdiction because the Court of Criminal Appeals denied Mendoza's application on an independent and adequate state-law ground—namely, the prior availability of the claim. Tex. Code Crim. Proc. art. 11.071, § 5(a)(1). That cannot be what the court below meant. Mendoza's claim obviously was not available for inclusion in his first petition. The claim is based on habeas counsel's omission of an IATC claim *from* that petition, and therefore did not come into existence until that petition was on file. And the State's interpretation would have required Mendoza's habeas counsel to assert her *own* ineffectiveness in the petition she filed. If that is really what the court below meant, this Court can review its decision. For state procedural rules to bar consideration of federal claims, criminal defendants must have a "[]realistic" opportunity to comply with them. *Reece v. Georgia*, 350 U.S. 85, 89 (1955). The State's interpretation of the decision below runs headlong into this principle.

The State's remaining arguments are similarly unpersuasive. The Court should grant certiorari and a stay, vacate the decision below, and remand for further proceedings.

A. Texas's Rule Conflicts With This Court's Precedents And Warrants This Court's Review

For the same reasons the Court granted review in *Martinez*, it should grant review here. The State's contrary arguments lack merit.

1. In *Martinez*, this Court granted certiorari to decide whether criminal defendants have a right to effective counsel in state habeas proceedings that represent their first opportunity to assert an IATC claim. The State briefly asserts that this question is not presented here, BIO 14, but that is incorrect for the reasons explained in Mendoza's petition (at 21-24) and in Part B, *infra*. Rather, the State's principal merits argument is that "the question has already been settled." BIO 18.

This Court knows which constitutional questions it has settled. Whether criminal defendants have a right to effective habeas counsel in proceedings that represent their first opportunity to assert a federal claim is not one of them. The only support for the State's contrary contention is a quote from *Shinn v. Ramirez*, 596 U.S. 366 (2022): "Since [*Martinez*], we have repeatedly reaffirmed that there is no constitutional right to counsel in postconviction proceedings." *Id.* at 386. That is true. This Court has been clear there is no general right to effective state habeas counsel. But that is not the question here. The question is whether there is an exception to that rule where state habeas represents a petitioner's first meaningful opportunity to assert an IATC claim. *Shinn* says nothing about that question. It remains "open." *Martinez*, 566 U.S. at 8.[1]

The State also suggests (BIO 16-17, 19-20) that *Martinez* implicitly rejected Mendoza's position on the merits when it elected to adopt an equitable exception to procedural default. That is a misreading of *Martinez*. The Court was not choosing between a constitutional right and an equitable exception, such that the adoption of

[1] *Shinn* cited *Davila v. Davis*, 582 U.S. 521, 529 (2017), but that case also did not

one reflects the rejection of the other. Instead, the Court concluded that it was not required to answer the constitutional question because the case could be resolved on statutory grounds: "This is not the case," the Court explained, "to resolve whether" an exception to the general rule that there is no right to effective habeas counsel "exists as a constitutional matter." 566 U.S. at 9.

For these reasons, the State's argument (BIO 17-18) that Congress and the Texas Legislature are now the only bodies with authority to remedy the unfairness here misses the mark. This Court has sole authority to determine whether the Constitution guaranteed Mendoza a right to effective counsel in habeas. Indeed, as Texas appears to acknowledge, under its rule "some petitioners will not have their defaulted IATC claims heard by any court." BIO 21. That is a matter of profound constitutional significance; not one subject only to legislative grace. *See* Pet. 19-20.

2. Beyond the argument that this Court has already answered the question presented, the State says very little about the merits. The State does not attempt to explain how its rule is consistent with *Douglas v. California*, 372 U.S. 353 (1963), *Evitts v. Lucey*, 469 U.S. 387 (1985), and *Halbert v. Michigan*, 545 U.S. 605 (2005). Those cases establish a right to effective counsel in a criminal defendant's first appeal as of right. If a defendant is entitled to effective counsel on appeal, they must have the same right in habeas proceedings that represent the first opportunity to *assert* a federal claim. Nor does the State deny, for example, that if its rule were

---

pass on the question here. In fact, *Davis* cited back to *Coleman*, which left it open.

correct, it could channel all federal claims into state habeas and then refuse to provide a lawyer. *See* Pet. 15-16. The State's argument refutes itself.

The State advances a handful of policy arguments centered around the burdens of providing counsel. *See* BIO 20. As a threshold matter, policy concerns do not dictate constitutional rights. The right to effective counsel—at trial and on appeal—imposes burdens on the states. But this Court recognized those rights because that is what the Constitution requires.

In any event, the State's concerns are overstated. Many states already "appoint counsel in every first collateral proceeding." *Martinez*, 566 U.S. at 14; *see also* Emily Garcia Uhrig, *A Case for a Constitutional Right to Counsel in Habeas Corpus*, 60 Hastings L.J. 541, 580-81 (2009). As a matter of state law, several recognize a right to effective counsel in those proceedings. *See, e.g.*, *Cooke v. Williams*, 316 A.3d 278, 293 (Conn. 2024) ("[H]abeas petitioners in this state are afforded the opportunity to challenge their convictions through successive petitions based on inadequate performance by habeas counsel."). There is no indication that right has proved unduly burdensome or upset too many convictions.

States also have ample tools to mitigate any burdens. Courts can limit the representation of subsequent habeas counsel to IATC claims that could not have been asserted in an initial habeas proceeding. And states are not obligated to channel claims into state habeas in the first place. States could avoid any potential burdens merely by appointing independent counsel in direct proceedings. What

they cannot do is what Texas has done here—channel federal claims into state habeas and then appoint the criminal defendant an ineffective lawyer.

The State worries (BIO 20) that it will not be able to assert its abuse-of-the-writ bar if there is a right to effective habeas counsel. But that is not true. It can invoke the bar when habeas counsel is effective. And "[i]t is likely that most of the attorneys appointed by the courts are qualified to perform, and do perform, according to prevailing professional norms; and, where that is so, the States may enforce a procedural default." *Martinez*, 566 U.S. at 15.

That the State might have to defend against claims resolved in state court "*again* in federal proceedings," BIO 20, also is not a valid critique. That is a function of the federal habeas statute and the longstanding rule requiring exhaustion. And a right to effective counsel in state habeas would promote comity by affording states the first opportunity to correct constitutional errors and allowing them to invoke AEDPA deference as opposed to de novo review in federal court under *Martinez*. In *Trevino*, for instance, Texas argued that if defaulted IATC claims could be litigated on the merits in federal court, there should be a corresponding change in state court. *See* Br. for Respondent, *Trevino v. Thaler*, No. 11-10189, 2013 WL 179940, at *58-59 (U.S. Jan. 14, 2013).

B. The State's Procedural Arguments Are Meritless

The State's main defense consists of two procedural arguments. First, it contends that the decision below rested on an independent and adequate state-law ground. Second, it contends that Mendoza cannot obtain relief under *Teague v. Lane*, 489 U.S. 288 (1989). Both arguments lack merit.

1. The State is wrong that this Court lacks jurisdiction to review the decision below because it rests on independent and adequate state-law grounds. *See Cruz v. Arizona*, 598 U.S. 17, 25 (2023). The State argues that the Court of Criminal Appeals's decision rests on such grounds because the court stated it was denying Mendoza's application "without reviewing the merits." App. 2a. According to the State, "[a]ll that can be gleaned . . . is that the CCA believed that [Mendoza's] claim was previously available." BIO 14.[2] And the prior availability of a claim, the State contends, is an independent and adequate state-law ground. BIO 11.

That is not the best reading of the decision below. *See* Pet. 21-24. When the court stated it was not reviewing the merits, it must have meant that it was not reviewing the merits of Mendoza's allegations of ineffectiveness because of its holding in *Ex parte Graves*, 70 S.W.3d 103 (Tex. Crim. App. 2002), that there is no right "to effective assistance of habeas counsel." *Ex parte Ruiz*, 543 S.W.3d 805, 825 (Tex. Crim. App. 2016). Under the court's "holding in *Graves*," such a "claim cannot be revived in a subsequent writ application." *Ruiz*, 543 S.W.3d at 825. That is how the State understands *Graves*: "the CCA held that a claim that initial-habeas counsel was ineffective during initial habeas proceedings could not form the basis of a subsequent writ under Texas statute" because there is no "constitutional right to counsel." BIO 13-14 (quotations omitted). That rule is based entirely on federal law; it is not independent.

[2] The State cites the three avenues available under state law for asserting subsequent habeas applications. BIO 10-11. Only one is relevant here. Mendoza asserted that his claim was covered by Section 5(a)(1) because it was unavailable

If the State is right that the court below meant to hold that Mendoza's "claim was previously available," BIO 14, then the asserted procedural rule (prior availability) plainly is not adequate as applied. *See* Pet. 23-24. The bare minimum for adequacy is that the defendant be afforded a "[]realistic . . . opportunity" to comply with the procedural rule. *Reece*, 350 U.S. at 89; *see* 16B Charles Alan Wright & Arthur Miller, *Federal Practice and Procedure*, § 4028 (3d ed. 2025) (procedural rule must "afford[] a reasonable opportunity to assert federal rights"); *id.* §§ 4025-27. States cannot "'evade' or 'avoid' federal rights" by erecting rules that diligent defendants cannot actually satisfy. *Id.* § 4026; *cf. Haywood v. Drown*, 556 U.S. 729, 739-40 (2009) (states cannot "shut the courthouse door to federal claims").

That describes the circumstances here. As the petition explained, it was temporally impossible for Mendoza to assert his ineffective-assistance-of-habeas-counsel claim in his prior state petition. *See* Pet. 22-24. The claim alleges that habeas counsel was ineffective for omitting an IATC claim from that prior petition, which means the claim did not ripen until *after* that petition was filed. Mendoza could not have asserted his counsel's ineffectiveness until she was ineffective. His claim could not have been asserted any sooner. *See Reece*, 350 U.S. at 89-90. And even beyond this temporal problem, the State apparently would require counsel to assert their *own* ineffectiveness before the courts will consider the claim—and to do so in the very same petition in which they are acting ineffectively. But if counsel knows enough to assert her own ineffectiveness, why not just provide effective

---

when he filed his prior application. *See* App. 35a; 58a.

representation and assert the IATC claim? *See* Pet. 23. The State has no answer to this very basic question. While Texas's prior-availability rule might be adequate in many (indeed, most) circumstances, *see* BIO 11-12, it plainly would be inadequate as applied here. *See, e.g.*, *Reece*, 350 U.S. at 89.

All that said, there really is good reason not to read the decision below to require "what no court has thus far expected an attorney to do, which is argue that she was ineffective in assisting her client." *Mendoza v. Stephens*, 783 F.3d 203, 207-08 (5th Cir. 2015) (Owen, J., concurring). But if the Court has any doubt about the decision's meaning or the adequacy of the state's prior-unavailability rule as applied, it should order additional briefing, as it recently did in *Glossip v. Oklahoma*, 144 S. Ct. 691, 692 (2024).

2. For two reasons, the State errs in arguing (BIO 12) that *Teague* nonretroactivity principles foreclose relief in state court.

First, *Teague*'s bar on retroactivity applies only to *federal* habeas courts. *See Edwards v. Vannoy*, 593 U.S. 255, 271 n.6 (2021); *see also Danforth v. Minnesota*, 552 U.S. 264, 278 (2008). "*Teague* does not preclude state courts from giving retroactive effect to a broader set of new constitutional rules than *Teague* itself required." *Montgomery v. Louisiana*, 577 U.S. 190, 199 (2016).[3]

[3] Texas allows petitioners to avail themselves of new rules. One of the bases for a subsequent habeas application is an unforeseen development in the law. Tex. Code Crim. Proc. art. 11.071, § 5(d) (defining legally unavailable claims). That avenue would not be open if, as the State contends, criminal defendants were "bound by the rule of law that existed at the time of . . . trial." BIO 12. In this case, however, the claim was plainly unavailable as a matter of fact, Tex. Code Crim. Proc. art. 11.071, § 5(a), because it did not ripen until after Mendoza's prior application was filed.

Second, "the argument has been waived." *Buck v. Davis*, 580 U.S. 100, 127 (2017) (*Teague* subject to waiver). The State did not assert *Teague* as a bar to relief in the court below. So the argument is not available now.

C. The District Court's Denial Of Habeas Relief On Mendoza's IATC Claim Is No Impediment To This Court's Review

The State's last argument is that the district court's denial of habeas relief on Mendoza's IATC claim is a reason to deny review. The State is wrong. The Fifth Circuit found the district court's decision to be debatable and Mendoza's claim to be substantial. But the merits are appropriately left for remand. And the State's contention that Mendoza should be satisfied with litigation in district court misunderstands his claim.

1. The State contends that this Court should deny review because Mendoza's claim that habeas counsel was ineffective for defaulting his IATC claim is "insubstantial." BIO 21.[4] The State is wrong, but this Court should not proceed that far. The court below did not reach the merits of Mendoza's allegations of ineffectiveness, which means this Court should not either. The Court should leave the merits for remand, as it has in similar cases. *See* Pet. 25. Especially here, where the merits question is about the sufficiency of Mendoza's allegations. *Id.*

The State's reliance on the district court's decision is also misplaced because it ignores what happened next in federal court. After the district court denied relief, the Fifth Circuit granted Mendoza a certificate of appealability. In doing so,

[4] To the extent the State is attempting to resurrect the preclusion argument it ran in the Court of Criminal Appeals, this Court should reject the argument. Pet. 31.

the Fifth Circuit found that the "district court's decision [wa]s debatable," *Mendoza v. Lumpkin*, No. 12-70035 (5th Cir. Dec. 23, 2022), Dkt. 276 at 2-3, and that Mendoza's claim was "substantial," 28 U.S.C. § 2253(c)(2). As the petition explained (at 31), the Fifth Circuit's grant of a certificate of appealability maps onto the question the Court of Criminal Appeals would consider on remand: whether Mendoza alleged facts demonstrating that his "application merits further inquiry." *Ex parte Staley*, 160 S.W.3d 56, 63 (Tex. Crim. App. 2005).[5]

On the merits, the district court's reasoning was wrong for the reasons set out in Mendoza's application for a certificate of appealability. *See Mendoza v. Lumpkin*, No. 12-70035 (5th Cir. Sept. 9, 2020), Dkt. 228 at 51. Briefly, the district court improperly focused on Mendoza's conduct outside prison. As Mendoza has explained, everyone—defense counsel, the defense's expert, the prosecution, and even the jury—was focused on whether Mendoza would be a danger *in* prison. *See* Pet 6-8. And Officer Hinton's false testimony was by far the most important evidence on that issue. That is why the prosecution called him first in rebuttal. The other evidence offered by the prosecution in rebuttal paled in significance. *See* Pet. 6-8 n.2.

---

[5] The State asserts that the Fifth Circuit "seemingly adopted the district court's analysis." BIO 24. It did not. The Fifth Circuit expressly held that Mendoza was not entitled to a stay under *Rhines v. Weber*, 544 U.S. 269 (2005), because the IATC claim was "procedurally barred from being presented in Texas state court." *Mendoza v. Lumpkin*, 81 F.4th 461, 482 (5th Cir. 2023). That is, the Fifth Circuit held that Mendoza could not show that "the factual basis" of his IATC claim was "unavailable at the time of the initial writ." *Id.* The court then recited the district court's holding, but nothing more. It neither adopted that holding nor commented on its correctness.

For many reasons, the district court was wrong that Johnson's potential testimony was "double-edged" because he had a negative view of Mendoza. BIO 23. First, counsel need not have called Johnson at all. Had counsel investigated and uncovered Hinton's false testimony, they could have raised a misconduct claim outside the jury's presence. Second, had trial counsel disclosed Johnson as a witness, the prosecution may not have called Hinton to testify. Third, even if trial counsel had called Johnson, anecdotal testimony wholly unrelated to rebutting Hinton's testimony would have exceeded the scope of cross-examination. Fourth, the fact that Johnson had a negative view of Mendoza would have bolstered Johnson's credibility with the jury—he apparently had no reason to do Mendoza any favors. Fifth, it is difficult to understand how the value of discrediting the prosecution's most significant rebuttal witness would have been outweighed by reports that people disliked Mendoza.

2. Finally, the State contends that the Court should deny review because the district court considered Mendoza's claim on the merits. *See* BIO 24-28. In the State's view, "one reviewing court is enough." BIO 25.

This argument ignores Mendoza's actual claim. He does not claim that he was denied "the equitable remedy created by *Martinez*." BIO 24, 27. Instead, Mendoza's claim is that he was denied the right to effective assistance of counsel in state habeas. The existence *vel non* of that right does not depend on the adequacy of federal procedures. *See* BIO 16 ("[S]urely the correctness of the CCA's ruling in *Graves* doesn't ebb and flow with this Court's interpretation of federal statute."). If,

as Mendoza contends, the Constitution requires the appointment of effective counsel in state habeas proceedings that represent a petitioner's first opportunity to assert a claim, then Mendoza was entitled to such counsel in state court *regardless of whether* he later received review of his IATC claim by a federal district court.

To be sure, the availability of some forum in which to assert a claim has constitutional significance. *See* Pet. 19-20. That is one reason why Texas's no-right-to-effective-habeas-counsel rule is wrong—it produces that untenable result. But Mendoza's claim that he was denied effective assistance of habeas counsel does not rise or fall on the fact that he had a forum in which to litigate his underlying IATC claim, just as any other substantive ineffective-assistance claim does not rise or fall on the availability of a forum in which to assert it. The State's argument confuses an adverse consequence of its rule (no available forum in many cases) with the right Mendoza is seeking to vindicate.[6]

Mendoza received some process only because of an accident of timing—his claim happened to be pending before the district court after *Trevino* but before *Shinn*. Going forward, Texas defendants will not be so lucky. So one undisputed (*see* BIO 21) consequence of Texas's rule is that criminal defendants with defaulted IATC claims that rely on extra-record evidence—like failure-to-investigate claims—will have *no forum* in which to assert their claims. That is a powerful reason for this Court to grant review now. The Court should consider the question presented

[6] Purely as a matter of process, the denial of effective habeas counsel also mattered a great deal in this case. If Mendoza had been appointed effective habeas counsel, he would have been able to litigate his claim in the trial court and on appeal, and in

before Texas defendants inevitably are imprisoned or executed without any forum in which to vindicate their "bedrock" right to counsel. *Martinez*, 566 U.S. at 12.

The State's suggestion that "this Court declined to take up the issue in *Coleman*" because the petitioner received review by one court, BIO 26, misreads that decision. *Coleman* did not take up the question presented in this case because it was not presented in that one. Coleman did not challenge the performance of his trial-level state habeas counsel. Rather, the question presented was "whether Coleman had a constitutional right to counsel on appeal from the state habeas trial court judgment," 501 U.S. at 755, which mattered because appellate counsel missed a deadline, *id.* at 727-28; *see* BIO 25-26. *Coleman* does not counsel against certiorari here.

D. The Court Should Grant A Stay

Apart from summarizing its points in opposition to certiorari, the State's argument against a stay is that Mendoza engaged in "extreme delay." BIO 29. That is not a fair critique. Mendoza asserted his underlying IATC claim at the first opportunity in federal court. When *Shinn* was decided in 2022, Mendoza immediately acknowledged that his claim could not proceed in that forum, and therefore asked for the opportunity to return to state court. But he could not return to state court under Texas's two-forum rule, *see Ex parte Soffar*, 143 S.W.3d 804 (Tex. Crim. App. 2004), until his federal case terminated in October 2024. The

---

state court as well as federal court, as opposed to federal district court only.

State rightly does not fault Mendoza for any delay during that period. After all, the State *opposed* Mendoza's request in 2022 to return to state court.

So what is the "extreme delay"? This Court denied certiorari in October 2024 and Mendoza did not file his successor petition until April 2025. But that modest delay hardly "smacks of dilatory tactics." BIO 30. As the State is well aware, habeas petitioners generally get one—and only one—opportunity to present discoverable claims in a successor habeas petition. Tex. Code Crim. Proc. art. 11.071, § 5(a)(1). All discoverable claims and evidence omitted from a petition are thereafter barred. Given these stakes, it is eminently reasonable for counsel in Texas to conduct an investigation before filing a successive petition. It would have been imprudent for counsel to gamble Mendoza's one opportunity to present discoverable claims by rushing to file "as soon as . . . federal proceedings ended," BIO 30, without first investigating the facts and researching the law.

To be sure, this case has been pending for a long time. But that does not mean Mendoza engaged "in dilatory tactics." BIO 30. The record shows that Mendoza has never intentionally dragged things out. And while "[c]ourts must be sensitive to the State's interest in punishment," they "must not shrink from their obligation to enforce the constitutional rights of all persons, including prisoners." *Brown v. Plata*, 563 U.S. 493, 511 (2011) (quotations omitted). So it is here.

CONCLUSION

The Court should grant certiorari and a stay.

April 22, 2025

Respectfully Submitted,

/s/ Jason Zarrow

Jason Zarrow
Counsel of Record
Hana Stodder
O'MELVENY & MYERS LLP
400 S. Hope Street,
19th Floor
Los Angeles, CA 90071
(213) 430-8367
jzarrow@omm.com

Attorneys for Petitioner

Melissa C. Cassel-Walker
Evan Hindman
O'MELVENY & MYERS LLP
Two Embarcadero Center
San Francisco, CA 94111