IN THE SUPREME COURT OF THE UNITED STATES
October Term, 2011

No. _____

YOKAMON LANEAL HEARN,

Petitioner,

v.

RICK THALER, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

(Capital Case, Execution Scheduled for July 18, 2012)

NAOMI TERR
1927 Blodgett Street
Houston, Texas
(713) 222-7788
(713) 222-0260 (fax)

RICHARD BURR*
PO Box 525
Leggett, Texas 77350
(713) 628-3391
(713) 893-2500 fax

Counsel for Yokamon Laneal Hearn

***Counsel of Record, Member of the Bar of the Supreme Court of the United States**

CAPITAL CASE

Question Presented

In Texas, state habeas proceedings provide the first opportunity for a prisoner to raise a claim of ineffective assistance at trial. This is so in the view of the Texas Court of Criminal Appeals even though it has not flatly prohibited the filing of such claims in a motion for new trial or on direct appeal. Time and again, the Court of Criminal Appeals has concluded that motions for new trial and direct appeal are not designed, and are inadequate vehicles, for the presentation of trial-ineffectiveness claims, and that habeas proceedings provide the first practical opportunity to raise these claims. Latching on to the only difference between Arizona and Texas—that the Texas courts have not flatly prohibited the filing of ineffectiveness claims anywhere except in state habeas proceedings—the Fifth Circuit decided in *Ibarra v. Thaler,* ___ F.3d ___, 2012 WL 2620520 (5th Cir June 28, 2012), that for this reason, *Martinez v. Ryan*, 132 S.Ct. 1309 (2012), does not apply to Texas. Mr. Hearn conceded in the district court and the Fifth Circuit that his arguments for overcoming procedural default and abuse of the writ on his claim of trial-ineffectiveness hinged entirely on the application of *Martinez* to Texas. The Fifth Circuit apparently accepted his concession by denying a certificate of appealability in a single sentence without further elaboration. On this basis, the following question is presented:

> **In holding that *Martinez v. Ryan*, 132 S.Ct. 1309 (2012), does not apply to Texas, has the Fifth Circuit read *Martinez* so narrowly that it has reduced to nothing the protection the Court intended to extend to habeas petitioners raising claims of trial-ineffectiveness in states where collateral proceedings offer the first opportunity to raise such claims?**

Parties to the Proceeding

The only parties to the proceeding are listed in the case caption. The petitioner, Yokamon Laneal Hearn, is under sentence of death in the State of Texas and is confined in the Polunsky Unit of the Texas Department of Criminal Justice (TDCJ). Respondent, Rick Thaler, is the director of the Correctional Institutions Division of TDCJ.

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The order of the panel for the United States Court of Appeals for the Fifth Circuit denying a certificate of appealability, without opinion, was issued July 12, 2012. *Hearn v. Thaler*, No. 12-70019 [Appendix 1]. Mr. Hearn's petition for *en banc* hearing was denied on July 16, 2012. *Id*. [Appendix 2]. The opinion of the United States District Court for the Northern District of Texas dismissing Mr. Hearn's federal habeas corpus petition was issued July 9, 2012. *Hearn v. Thaler*, 2012 WL 2715653 (N.D.Tex. 2012) [Appendix 3].

Statement of Jurisdiction

The order of the Fifth Circuit denying a certificate of appealability for Petitioner's appeal from the dismissal of his federal habeas petition was entered July 12, 2012. *See* Appendix 1. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254, Petitioner asserting a deprivation of his rights secured by the Constitution of the United States.

Constitutional Provisions Involved

This Petition involves the Eighth and Fourteenth Amendments to the United States Constitution:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

U.S. Const. amend. VIII.

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law....

U.S. Const. amend. XIV.

Statement of the Case

A. Introduction

On July 5, 2012, undersigned counsel filed a federal habeas corpus petition in the United

District Court for the Northern District of Texas raising a very substantial claim that Mr. Hearn's trial counsel failed to investigate the mitigating circumstances of his life and thus failed to provide effective assistance in his capital trial. In many respects, the failures of Mr. Hearn's counsel were identical to the deficient performance of counsel in *Wiggins v. Smith*, 539 U.S. 510 (2003), and the prejudice to Mr. Hearn was at least as pervasive as the prejudice to Mr. Wiggins.

The difficulty for Mr. Hearn with respect to his *Wiggins* claim is not the merit of the claim. Rather, it is that the claim was not raised previously. The claim was not raised in Mr. Hearn's first state habeas corpus application, filed in December, 2000. The facts supporting the claim were readily discoverable then, just as they were when undersigned counsel discovered them in the course of investigating Mr. Hearn's *Atkins*[1] claim between 2004 and 2007. There was no legitimate reason, strategy or otherwise, for this claim not to have been investigated in connection with and raised in the first state habeas application. It was not investigated or raised only because state habeas counsel provided ineffective assistance. Moreover, the failure to present an available *Wiggins* claim in a first state habeas proceeding in Texas precluded, under Texas' abuse of the writ rules, any future attempt to present it in a subsequent habeas application.[2] Under this Court's longstanding precedent, claims thereafter presented to the federal habeas courts in these circumstances are deemed procedurally defaulted when they are

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[1] *Atkins v. Virginia*, 536 U.S. 304 (2002). Mr. Hearn was allowed to proceed on an *Atkins* claim in his second federal habeas petition because *Atkins* was then a new retroactive decision by this Court, allowing him to satisfy the prerequisites of the federal abuse of the writ doctrine.

[2] *See* Tex. Code Crim. Proc. Article 11.071 § 5(a)(1)-(3)(allowing a claim to be considered in a subsequent habeas application only where the factual or legal basis of the claim was previously unavailable, or where the prisoner can show by a preponderance of the evidence that he would not have been convicted, or by clear and convincing evidence that he would not have been sentenced to death, but for the constitutional violation). Mr. Hearn's *Wiggins* claim would not qualify under either the second (non-conviction) or third (non-death-sentence) provision, and because the evidence supporting the claim was available at the time of the first state habeas proceeding, could not qualify under the first provision.

raised in a federal habeas petition.[3] Thus, for the federal courts to be able to consider Mr. Hearn's *Wiggins* claim on the merits, he had to be able to show "cause" for this procedural default and sufficient "prejudice" to overcome it.

Mr. Hearn's counsel in his first federal habeas proceeding—the same attorney who had been appointed as lead state habeas counsel—failed again to present his *Wiggins* claim in his first federal habeas petition. As a result, his claim now faces a second procedural obstacle: abuse of the writ. Under this doctrine, "[a] claim presented in a second or successive habeas corpus application under [28 U.S.C.] section 2254 that was not presented in a prior application shall be dismissed...," unless the claim relies on a retroactive new rule of constitutional law, or relies on facts that could not have been previously discovered and those facts show by clear and convincing evidence that he would not have been convicted but for the constitutional violation. 28 U.S.C. § 2244(b)(2). On its face, Mr. Hearn's *Wiggins* claim does not satisfy either of these exceptions to the abuse of the writ rule.

Before March 20, 2012, there was no way for Mr. Hearn to present his *Wiggins* claim in a "second or successive," 28 U.S.C. § 2244(b)(1), federal habeas petition and have any chance of overcoming procedural default or abuse of the writ. Because of the Court's decision in *Martinez v. Ryan*, ___ U.S. ___, 132 S.Ct. 1309, on March 20, 2012, there should now be a way

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[3]As the held in *Coleman v. Thompson*, 501 U.S. 722, 735 n.1 (1991), though normally a state court must explicitly apply a procedural bar in order for review to be barred, that rule

> [d]oes not apply if the petitioner failed to exhaust state remedies and the court to which the petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred. In such a case there is a procedural default for purposes of federal habeas....

(Citations omitted.) In these circumstances, the petitioner need not go through the meaningless ritual of exhausting state remedies solely to have the state courts default the claim. *Keeney v. Tamayo-Reyes,* 504 U.S. 1, 9-10 (1992).

for Mr. Hearn to overcome both procedural barriers. However, a very recent decision of the United States Court of Appeals for the Fifth, published on July 6, 2012, the day *after* Mr. Hearn filed his habeas petition in the district court, closed off this possibility. In *Ibarra v. Thaler*, ___ F.3d ___, 2012 WL 2620520 (5th Cir., June 28, 2012, published July 6, 2012), the Court held that *Martinez* **does not apply to Texas**. [Appendix 4.] Since Mr. Hearn's entire argument for overcoming both procedural default and abuse of the writ was premised on *Martinez* applying to Texas, *Ibarra* required the district court to dismiss Mr. Hearn's petition as successive. That is what the district court did, and the Fifth Circuit has now summarily denied a certificate of appealability and has refused *en banc* to take up the conflict between *Ibarra* and *Martinez*.

Thus, Mr. Hearn petitions this Court. He urges the Court to take up the question decided wrongly by *Ibarra* and applied summarily in his case. The reasons *Ibarra* is wrong and in conflict with *Martinez* are set forth herein.

B. Statement of the Course of Proceedings and Material Facts

Mr. Hearn was indicted for the capital murder of Joseph Franklin Meziere that occurred on March 25, 1998. The murder took place during the course of a robbery and kidnapping, in which Mr. Hearn and one other co-defendant were the principals. Mr. Hearn was tried, convicted and sentenced to death in the 282nd Judicial District Court of Dallas County, Texas, in December,1998. The Texas Court of Criminal Appeals (hereafter, CCA) affirmed Mr. Hearn's conviction and sentence in an unpublished decision, *Hearn v. State*, No. 73,371 (Tex. Crim. App. Oct. 3, 2001) (per curiam), and certiorari was denied. *Hearn v. Texas*, 535 U.S. 991 (2002).

Mr. Hearn filed a state habeas corpus application while his direct appeal was pending. On November 14, 2001, the CCA denied his habeas application. *Ex parte Hearn*, WR-50,116-01. Mr. Hearn then filed a federal habeas corpus petition in the United States District Court for

the Northern District of Texas. The court denied the petition, *Hearn v. Cockrell*, No. 3:01-CV-2551-D (N.D. Tex. July 11, 2002), the Fifth Circuit denied a certificate of appealability on appeal, *Hearn v. Dretke*, No. 02-10913, 73 Fed.Appx. 79, 2003 WL 21756441 (5th Cir. Jun. 23, 2003), and certiorari was denied. *Hearn v. Dretke*, 540 U.S. 1022 (2003).

Represented by different habeas corpus counsel and facing an execution date in early March, 2004, Mr. Hearn attempted (without success) to first raise an *Atkins* claim in the state courts and then, after securing a stay of execution from the Fifth Circuit, was authorized to file a successive petition raising an *Atkins* claim. After determining that Mr. Hearn established a *prima facie* case under *Atkins*, *Hearn v. Quarterman*, 2008 WL 679030 *4 (N.D.Tex. March 13, 2008), the district court stayed Mr. Hearn's federal proceedings and ordered him to return to the state courts to give them an opportunity to review the claim. *Hearn v. Quarterman*, 2008 WL 3362041 *7 (N.D.Tex. August 12, 2008).

Mr. Hearn filed a subsequent state habeas application, and on April 28, 2010, the CCA denied his *Atkins* claim. *In re Hearn*, 310 S.W.3d 424, *cert. denied*, *Hearn v. Texas*, 543 U.S. 960 (2010). Thereafter, the district court held that the CCA decision was not an unreasonable application of *Atkins*, *Hearn v. Thaler*, 2011 WL 825744, *4 (N.D.Tex. 2011), and the Fifth Circuit denied a certificate of appealability. *Hearn v. Thaler*, 669 F.3d 265 (5th Cir. 2012). On June 18, 2012, counsel for Mr. Hearn filed a petition for writ of certiorari from the Fifth Circuit's decision, and also asked the Court to stay his execution. The Court has not yet acted on Mr. Hearn's petition or request for a stay.

On July 5, 2012, Mr. Hearn filed a petition for writ of habeas corpus raising his *Wiggins* claim in the federal district court. On July 9, 2012, the court (1) dismissed the petition because the intervening *Ibarra* decision foreclosed Mr. Hearn's argument that *Martinez v. Ryan* provided

a vehicle for avoiding the procedural bars in his case, (2) denied a certificate of appealability, and (3) denied Hearn's motion to stay his execution. *Hearn v. Thaler*, 2012 WL 2715653 [Appendix 3]. Mr. Hearn appealed, seeking a certificate of appealability from a Fifth Circuit panel and *en banc* hearing of his argument that *Ibarra* is contrary to *Martinez*. Both requests, as well as his motion for a stay of execution, were denied. *Hearn v. Thaler*, No. 12-70019 [Appendices 1 and 2].

Argument

THE MERE POSSIBILITY THAT SOME PETITIONERS MAY OBTAIN FULL REVIEW OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL CLAIMS ON DIRECT APPEAL—IN THE RARE INSTANCES WHERE ALL OF THE MATERIAL FACTS ARE CONTAINED IN THE RECORD ON APPEAL—CANNOT PRECLUDE THE APPLICATION OF *MARTINEZ V. RYAN* TO THE VAST MAJORITY OF TEXAS PRISONERS, WHO CANNOT SECURE REVIEW OF, MUCH LESS RELIEF ON, EXTRA-RECORD CLAIMS OF TRIAL INEFFECTIVENESS UNTIL STATE HABEAS PROCEEDINGS

I. The Holding of *Martinez*—That Ineffectiveness of State Habeas Counsel Can Provide "Cause" to Excuse the Procedural Default of a Claim of Ineffectiveness of Trial Counsel—Is Based on a Prisoner's Dependence on the Assistance of Counsel to Raise Such Claims and the State's Decision to Move Trial-Ineffectiveness Claims Outside the Direct-Appeal Process

The State of Arizona, where *Martinez* arose, does not permit a prisoner to raise ineffective assistance of counsel claims on direct appeal, requiring prisoners to file such claims for the first time in state collateral proceedings. When a state collateral proceeding "provide[s] the first occasion to raise a claim of ineffective assistance at trial," *Martinez*, 132 S.Ct. at 1315, it takes on special significance. Such proceedings, which the *Martinez* Court denominated "initial-review collateral proceedings," *id*., are

> in many ways the equivalent of a prisoner's direct appeal as to the ineffective-assistance claim. This is because the state habeas court "looks to the merits of the clai[m]" of ineffective assistance, no other court has addressed the claim, and "defendants pursuing first-tier review ... are generally ill equipped to

> represent themselves" because they do not have a brief from counsel or an opinion of the court addressing their claim of error.

Id. at 1317.

In a direct appeal, for these very reasons, the Fourteenth Amendment right to due process applies to assure that a person whose constitutional claims are being considered for the first time are provided effective counsel. *See Halbert v. Michigan,* 545 U.S. 605, 617 (2005); *Douglas v. California,* 372 U.S. 353, 357–358 (1963). Because the right to counsel is not constitutionally guaranteed in collateral proceedings, however, *Coleman v. Thompson*, 501 U.S. at 752, there is no constitutionally protected right to effective assistance of counsel in an initial-review collateral proceeding, which, in Arizona, nevertheless provided the first opportunity for a claim of trial ineffectiveness to be reviewed. This problem—the need for effective counsel in an initial-review collateral proceeding—could have been solved by declaring that prisoners engaging in initial-review collateral proceedings have a Fourteenth Amendment right to counsel. However, the Court declined this option. *Martinez*, 132 S.Ct. at 1315.

Instead, the Court settled on the alternative that became the holding in *Martinez*: "Inadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial." *Id*. The Court deemed this a sufficient safeguard against the ineffectiveness of initial-review collateral proceeding counsel, because it allows a showing of the ineffectiveness of collateral proceeding counsel to open the door to federal review of the trial ineffectiveness claim.

Accordingly, the threshold that must be met for the rule of *Martinez* to apply is that initial review-collateral proceedings provide the first opportunity to raise a claim of trial counsel's ineffectiveness.

II. The Rationale of *Martinez* Applies to Texas Prisoners Whose Claims of Trial Ineffectiveness Depend on Facts Outside the Trial Record

Unlike Arizona, Texas does not, as matter of law, preclude all claims of trial ineffectiveness on direct appeal. However, just like Arizona, if the claim in Texas depends on facts outside the trial record, those claims cannot be reviewed on direct appeal. The reason is that the trial record does not contain the facts necessary to address the claim, and motion for new trial proceedings that can sometimes be used to expand the record on appeal are ill-suited for the kind of record expansion that enables counsel to present, and courts to consider, ineffectiveness claims fully and fairly. The first opportunity to raise such claims in Texas is, as in Arizona, state habeas proceedings.

The CCA has explained this practice in numerous cases. For example, in *Robinson v. State*, 16 S.W.3d 808 ((Tex.Crim.App. 2000), the court explained:

> [T]here is not generally a realistic opportunity to adequately develop the record for appeal in post-trial motions. In this regard, we have noted that a post-conviction writ proceeding, rather than a motion for new trial, is the preferred method for gathering the facts necessary to substantiate such a Sixth Amendment challenge....

Id. at 810. And in an earlier case, the CCA cautioned litigants against raising, and lower appellate courts against attempting to adjudicate, ineffective assistance claims on direct appeal:

> A substantial risk of failure accompanies an appellant's claim of ineffective assistance of counsel on direct appeal. Rarely will a reviewing court be provided the opportunity to make its determination on direct appeal with a record capable of providing a fair evaluation of the merits of the claim involving such a serious allegation. ***In the majority of instances, the record on direct appeal is simply undeveloped and cannot adequately reflect the failings of trial counsel***. *Jackson v. State*, 973 S.W.2d 954, 957 (Tex. Crim. App. 1998).... "Indeed in a case such as this, where the alleged derelictions primarily are errors of omission de hors the record rather than commission revealed in the trial record, collateral attack may be ***the*** vehicle by which a thorough and detailed examination of alleged ineffectiveness may be developed and spread upon a record." *Jackson v. State*, 973 S.W.2d at 957. [Footnotes omitted].

Thompson v. State, 9 S.W.3d 808, 814–815 (Tex.Crim.App. 1999)(emphasis supplied). Legions of CCA cases have reached the same conclusion. *See, e.g., Menefield v. State*, 363 S.W.3d 591, 592-93 (Tex. Crim. App. 2012); *Lopez v. State,* 343 S.W.3d 137, 143 (Tex. Crim. App 2011); *Freeman v. State*, 125 S.W.3d 505, 506–07 (Tex. Crim. App. 2003); *Bone v. State*, 77 SW 3d 828, 835 (Tex. Crim. App 2002); *Mitchell v. State,* 68 S.W.3d 640, 643 (Tex. Crim. App. 2002); *Jackson v. State*, 877 S.W.2d 768, 771–72 (Tex. Crim. App. 1994).

The reason that direct appeal does not provide an opportunity for a capitally-convicted-and-sentenced person to raise a non-record-based claim of ineffective assistance of trial counsel (hereafter, IAC claim) comparable to a *Wiggins* claim is that Texas' motion for new trial procedure, set forth in Tex.R.App.Proc. 21, is not designed to be a proceeding within which IAC claims are raised and decided.

To raise an IAC claim that relies on facts outside the trial record, a prisoner needs the following:

- A new lawyer, who was not the trial lawyer. Trial counsel cannot raise their own ineffectiveness. Thus, the prisoner must have new counsel to raise an IAC claim.
- The trial record, so that his or her lawyer can conduct investigation in relation to the evidence that was both presented, and not presented, at trial, and argue how the un-presented evidence would have changed the outcome of the trial. This is critical for an IAC claim that is based on failure to investigate relevant, material evidence. Such claims must place the un-investigated evidence in the context of the trial evidence in order to establish the necessary prejudice arising from trial counsel's failure to investigate. As the Court explained in *Strickland v. Washington*, 466 U.S. 668 (1984), the framework for analyzing the prejudice component of any IAC claim, not just those based on failure to investigate, requires courts to analyze the effect

of counsel's errors on the "totality of the evidence":

> In making this determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury. Some of the factual findings will have been unaffected by the errors, and factual findings that were affected will have been affected in different ways. Some errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated, trivial effect. Moreover, a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support. Taking the unaffected findings as a given, and taking due account of the effect of the errors on the remaining findings, a court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors.

Id. at 695-96. When the claim is based on evidence that was un-investigated and thus, un-presented, there is no way to measure the effect of the un-presented evidence on the trial without having the record of evidence that was presented at trial, *i.e.*, the transcript of the trial testimony and the compendium of trial exhibits, in short, the trial record.

- Resources for investigation of the facts that were not previously investigated.

Without access to investigative and expert resources, counsel attempting to raise an IAC claim focused on trial counsel's failure to investigate cannot undertake the investigation that is necessary to determine if there is such an IAC claim and if there is, to prove the claim.

Texas' motion for new trial procedure does not account for any of these prerequisites. First, it has no provision concerning counsel for the convicted defendant. While it does not preclude the appointment of new counsel, it does not provide more time for new counsel to become familiar with the case and determine what issues to raise in the motion for new trial. The motion for new trial must be filed within 30 days after sentence is imposed, Tex. R. App. Proc. 21.4(a), and that time cannot be extended. Second, the motion for new trial procedure does not allow sufficient time for the trial record to be prepared and filed before the due date and

required decision date of the motion for new trial. If a motion for new trial is filed, the record is not even due to be filed until 120 days after sentence is imposed, Tex. R. App. Proc. 35.2(b)—a full 90 days after the motion for new trial must be filed and a full 45 days after the motion must be ruled on. *See* Tex. R. App. Proc. 21.8(a) (requiring a ruling on the motion for new trial within 75 days after sentence is imposed). Trial records in capital cases are thus not available during the period of time a motion for new trial must be filed and ruled on.[4] Third, there is no provision for funding for investigation and expert assistance in connection with a motion for a new trial. This does not mean funding cannot be obtained, but it does mean there is no affirmative duty for the court to provide such funding.

Thus, if the motion for new trial procedure is intended to be the first opportunity in Texas for a capitally-convicted defendant to investigate and raise an IAC claim, it is extremely poorly designed for this purpose. It makes no accommodation for newly-appointed counsel to have sufficient time or tools to learn about and investigate the case before the new trial motion is due. It requires that the motion be filed and decided before the trial record is available. And, it provides no assurance that funding is available for investigative and expert assistance.

By contrast, Texas' capital habeas procedure accounts for all three of the prerequisites for raising an IAC claim like a *Wiggins* claim. First, habeas counsel is appointed for indigent defendants within 30 days after the court's post-trial determination of the defendant's indigence. Tex. Code Crim. Proc. Art. 11.071, § 2. Moreover, appointed counsel is mandated to investigate his or her client's case: "On appointment, counsel shall investigate expeditiously, before and

[4]Mr. Hearn's case is illustrative. The Reporter's Record (trial transcript) was filed on August 16, 1999. *See Hearn v. State*, Tex. Crim. App. No. 73,371 (8/16/99 Docket Entry). Mr. Hearn's sentence was imposed on December 11, 1998. RR Vol. 44 at 200-201. Thus, his motion for new trial was due January 10, 1999, seven months before the trial transcript was available.

after the appellate record is filed in the court of criminal appeals, the factual and legal grounds for the filing of an application for a writ of habeas corpus." Tex. Code Crim. Proc. Art. 11.071, § 3(a). Second, habeas counsel has 180 days after appointment to file the habeas application, or 45 days after the state's brief is filed on direct appeal, "whichever date is later," Tex. Code Crim. Proc. Art. 11.071, § 4(a), and for good cause, can secure a 90-day extension beyond this due date. Tex. Code Crim. Proc. Art. 11.071, § 4(b). Since the appellant's direct appeal brief is due no sooner than 30 days after the trial record is filed, a due date that can be extended, and the state's brief is due no sooner than 30 days after the appellant's brief is filed, also a due date that can be extended, Tex. R. App. Proc. 38.6(a),(b),(d), habeas counsel has at least 105 days after the trial record is filed to file the habeas application.[5] Thus, habeas counsel will always have access to the trial record for at least 3½ months before having to file the habeas application. Third, habeas counsel must be provided "reasonable" funds for investigative and expert assistance. Tex. Code Crim. Proc. Art. 11.071, § 3(b),(c) ("[t]he court shall grant a request for expenses ... if the request for expenses is ... reasonable").

Thus, it is plain that habeas corpus in Texas is *designed* to be the first proceeding in which IAC claims, particularly those requiring extra-record investigation and fact development, are raised. The habeas statute takes into account the pre-requisites for developing IAC claims, and makes sure that counsel has the tools and time available to bring these claims. Plainly, the Texas courts and the Texas legislature did not design or intend that such claims be submitted in motion for new trial proceedings. The CCA has made this clear:

While expansion of the record may be accomplished in a motion for new trial,

[5]This period is calculated by adding the minimum number of days after the trial record is filed for the state to file its direct appeal brief, 60 days, to the minimum number of days after the state's brief is filed for the habeas application to be filed, 45 days, or a total of 105 days.

> that vehicle is often inadequate because of time constraints and because the trial record has generally not been transcribed at this point. Further, mounting an ineffective assistance attack in a motion for new trial is inherently unlikely if the trial counsel remains counsel during the time required to file such a motion. Hence, in most ineffective assistance claims, a writ of habeas corpus is essential to gathering the facts necessary to adequately evaluate such claims.

Ex parte Torres, 943 S.W.2d 469, 475 (Tex.Crim.App.1997) (internal citation omitted).

There simply is no dispute about this. The State Bar of Texas Task Force on Habeas Counsel Training and Qualification, comprised of Court of Criminal Appeals judges, trial judges, and experienced defense counsel—all members of the bar with special expertise in this area —expressly recognized this when it wrote:

> Habeas proceedings are the only opportunity available to those sentenced to death to raise post conviction claims of prosecutorial misconduct or ineffective assistance of trial counsel and to present evidence not developed or discovered during trial—including evidence as to the actual innocence of the applicant.

Task Force Report, Apr. 27, 2007 (available at http://www.aclutx.org/files/SBOT%20Task%20Force%20Final%20Report%20Signed.pdf). Likewise, Court of Criminal Appeals judges, writing on habeas review, have characterized state habeas proceedings as the "first opportunity" for a prisoner to secure relief on the vast majority of ineffective assistance of trial counsel claims in Texas:

> While defendants in criminal cases in Texas are not legally prohibited from challenging the effectiveness of their trial counsel on direct appeal, such claims typically call for extensive factual development beyond what is disclosed in the appellate record, and thus, ***as a practical matter, post-conviction habeas corpus is the first opportunity to raise them***. *Thompson v. State,* 9 S.W.3d 808 (Tex. Crim. App. 1999).

Ex parte Balentine, No. WR-54,071-03, at Dissenting Statement, 2 n.5 (Tex. Crim. App. June 14, 2011) (Price, J., dissenting, joined by Johnson and Alcala. JJ., to failure to grant stay during

the pendency of *Martinez*.) (emphasis supplied).[6] Manifestly, the Texas courts and legislature designed habeas corpus, not motion for new trial proceedings and direct appeals, to provide the first opportunity to present a trial IAC claim.

Thus, at least one entire category of ineffectiveness of trial counsel claims cannot be heard on direct appeal in Texas. Claims that depend on facts outside the trial record cannot be adjudicated, because the "the record on direct appeal is simply undeveloped and cannot adequately reflect the failings of trial counsel." *Jackson v. State*, 973 S.W.2d at 957. Even though these claims are not prohibited on direct appeal, the result is the same as in Arizona: The claims will not be decided on direct appeal and must be raised in habeas proceedings, where there is no constitutional right to counsel and thus, no guarantee of effective assistance in raising them. The very rationale of *Martinez* in creating "cause" for procedural default of trial ineffectiveness claims in Arizona—to provide some protection against ineffective representation in the state proceedings that provide the first opportunity to raise a trial ineffectiveness claim—is thus invoked by the category of trial ineffectiveness claims in Texas that depend for their resolution on facts outside the trial record.

III. *Ibarra* Got It Wrong

Ibarra v. Thaler, declaring that *Martinez* does not apply to Texas, was wrongly decided. *Ibarra* was decided on purely theoretical grounds, on whether ineffective assistance of trial counsel claims can, in theory, be brought in a direct appeal in Texas. Answering this theoretical question, yes, because such claims are not prohibited on direct appeal, 2012 WL 2620520 *4 (citing *Robinson v. State*, 16 S.W.3d 808, 809-10 (Tex.Crim.App. 2000), and *Holden v. State*,

[6]The Court of Criminal Appeals' majority did not in any respect dispute this conclusion, nor would there have been any basis in Texas law to do so.

2012 S.W.3d 761, 762-63 (Tex.Crim.App. 2003)), the *Ibarra* panel then concluded that the prerequisite for the application of *Martinez*—"'*when a state requires a prisoner to raise an ineffective-assistance-of-trial-counsel claim in a collateral proceeding*,'" *Ibarra*, 2012 WL 2620520 *2 (quoting *Martinez*, 132 S.Ct. at 1318 (emphasis added by the panel)), was absent in Texas. On this basis, the *Ibarra* panel concluded, "Ibarra is not entitled to the benefit of *Martinez* for his ineffectiveness claims, as Texas procedures entitled him to review through counselled [sic] motions for new trial and direct appeal." *Id*. at *4 [Appendix 4].

Ibarra was wrongly decided, because it did not examine whether the kind of ineffectiveness claim before it—"trial counsel's failure to present more than two social history witnesses ... rendered his sentencing-phase assistance constitutionally deficient," 2012 WL 2620520 *1—could have been adjudicated in Ibarra's direct appeal. The rationale for *Martinez* in no way depends on whether an ineffectiveness claim might theoretically be brought in a motion for new trial and then on direct appeal. The rationale underlying *Martinez* depends entirely on whether the petitioner in question was able to raise *his or her* ineffectiveness claim on direct appeal. No petitioner can raise on direct appeal in Texas the kind of ineffectiveness claim Mr. Ibarra and Mr. Hearn have raised, a claim under *Wiggins v. Smith* that his trial counsel failed to conduct a reasonable investigation of potential mitigating circumstances. Indisputably, this kind of claim of ineffectiveness depends entirely on facts beyond the trial record, with respect to both trial counsel's failure to investigate mitigation—the deficient performance prong of a claim of trial ineffectiveness—and with respect to the evidence counsel would have found and could have presented had they not performed deficiently—the prejudice prong of a claim of trial ineffectiveness. And, as we have demonstrated, the motion-for-new-trial/direct-appeal

proceeding does not provide an opportunity for this kind of claim to be developed, raised, and decided on direct appeal.

Thus, the actual, non-theoretical answer to the *Ibarra* panel's query, whether ineffective assistance of trial counsel claims like Mr. Ibarra's and Mr. Hearn's claims can be brought in a direct appeal in Texas, is, unequivocally, no. Because this is the question that the lower federal courts must ask in applying *Martinez*, and because the *Ibarra* panel did not ask and answer this question, *Ibarra* was wrongly decided, and it must be set aside.

The district court was precluded by the *Ibarra* decision from proceeding to consider Mr. Hearn's arguments, based critically on *Martinez*, that he can overcome the procedural barriers, procedural default and abuse of the writ, that stand in the way of consideration of the merits of his *Wiggins* claim. *See Hearn v. Thaler*, 2012 WL 2715653 *4.[7] On appeal, the Fifth Circuit panel simply denied a certificate of appealability without elaboration, and the Fifth Circuit *en banc* declined to take up the conflict between *Martinez* and *Ibarra*. In these circumstances, it is plain that *Ibarra* has cut off Mr. Hearn's ability to show that he can now overcome the procedural barriers he faces in consideration of his *Wiggins* claim. The foregoing argument demonstrates that *Ibarra* was wrong, and that *Martinez* does apply in Texas to prisoners who seek to raise *Wiggins* claims.

[7]"In his notice of recent relevant authority [concerning the publication of the *Ibarra* decision], Hearn acknowledges that his argument does not circumvent binding Fifth Circuit precedent that the *Martinez* exception does not apply to Texas cases. Therefore, the *Wiggins* claim made the basis of the instant petition for federal habeas relief is unexhausted and now procedurally barred under the Texas abuse-of-the-writ doctrine. The petition does not present a claim that has only become ripe for review since the prior habeas petition was denied. Therefore, the petition is successive."

Conclusion

For these reasons, the Court should grant the petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit and stay Mr. Hearn's execution.

Respectfully submitted,

NAOMI TERR
1927 Blodgett Street
Houston, Texas
(713) 222-7788
(713) 222-0260 (fax)

RICHARD BURR*
PO Box 525
Leggett, Texas 77350
(713) 628-3391
(713) 893-2500 fax

Counsel for Yokamon Laneal Hearn

*Counsel of Record, Member of the Bar of the Supreme Court of the United States

Appendix 1

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 12-70019

YOKAMON LANEAL HEARN,

Petitioner - Appellant

v.

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

Respondent - Appellee

Appeal from the United States District Court for the Northern District of Texas, Dallas

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Before HIGGINBOTHAM, SMITH, and CLEMENT, Circuit Judges.

PER CURIAM:

IT IS ORDERED that appellant's motion for stay of execution scheduled for July 18, 2012, is DENIED.

IT IS FURTHER ORDERED that appellant's motion for certificate of appealability is DENIED.

Appendix 2

Appendix 3

Slip Copy, 2012 WL 2715653 (N.D.Tex.)

(Cite as: 2012 WL 2715653 (N.D.Tex.))

Only the Westlaw citation is currently available.

United States District Court,

N.D. Texas,
Dallas Division.
Yokamon Laneal HEARN, Petitioner,
v.
Rick THALER, Director, Texas Department of Criminal Justice Correctional Institutions Division, Respondent.
Civil Action No. 3:12–CV–2140–D.

July 9, 2012.

Richard H. Burr, III, Burr & Welch, Naomi E. Terr, Texas Defender Service, Houston, TX, for Petitioner.

Georgette Patrice Oden, Office of the Texas Attorney General, Austin, TX, for Respondent.

MEMORANDUM OPINION AND ORDER

SIDNEY A. FITZWATER, Chief Judge.

***1** Petitioner Yokaman Laneal Hearn ("Hearn"), who is scheduled for execution on July 18, 2012, filed a petition for a writ of habeas corpus, motion to proceed *in forma pauperis,* and motion for a stay of execution. Yesterday, he filed a notice of recent relevant authority that acknowledges that this court can do nothing but dismiss his petition. For the reasons explained, the court grants Hearn's motion to proceed *in forma pauperis,* dismisses his petition for want of jurisdiction as successive, and denies his motion to stay execution.

I

Hearn was convicted and sentenced to death for the capital murder of Joseph Franklin Meziere ("Meziere"), during which Hearn and three accomplices abducted Meziere from a car wash and drove him to a remote location where Hearn shot Meziere several times in the head at close range. *See Hearn v. State,* No. 73,371, slip op. at 3 (Tex.Crim.App. Oct. 3, 2001) (en banc) (per curiam). Hearn's conviction and death sentence were affirmed by the Texas Court of Criminal Appeals ("CCA") on direct appeal, and the Supreme Court denied his petition for a writ of certiorari. *See Hearn v. Texas,* 535 U.S. 991, 122 S.Ct. 1547, 152 L.Ed.2d 472 (2002). The CCA denied post-conviction habeas corpus relief in an unpublished order based on the state trial court's findings and conclusions and its own review of the record. *See Ex parte Hearn,* No. 50,116–01 (Tex.Crim.App. Nov. 14, 2001) (en banc) (per curiam). Hearn filed a petition for federal habeas relief in this court, which was denied. *See Hearn v. Cockrell,* 2002 WL 1544815 (N.D.Tex. July 11, 2002) (Fitzwater, J.), *cert. of appealability denied, Hearn v. Cockrell,* 73 Fed. Appx. 79 (5th Cir.), *cert. denied, Hearn v. Dretke,* 540 U.S. 1022, 124 S.Ct. 579, 157 L.Ed.2d 440 (2003).

On the eve of his scheduled execution, Hearn filed a successive habeas action in this court pursuant to *Atkins v. Virginia.*[FN1] The court transferred the petition to the court of appeals, which stayed the execution and authorized Hearn to pursue a successive habeas petition under *Atkins. See In re Hearn,* 418 F.3d 444, 448 (5th Cir.2005). This court later granted a stay and abatement to allow the exhaustion of that claim pursuant to *Rhines v. Weber.*[FN2] *See Hearn v. Quarterman,* 2008 WL 3362041, at *6–7 (N.D.Tex. Aug.12, 2008) (Fitzwater, C.J.). The CCA denied Hearn's

application for habeas relief. *See ex parte Hearn,* 310 S.W.3d 424 (Tex.Crim.App.), *cert. denied,* 543 U.S. 960 (2010). Hearn then returned to this court where proceedings were reopened and habeas relief was again denied. *See Hearn v. Thaler,* 2011 WL 825744, at *4–5 (N.D.Tex. Mar.3, 2011) (Fitzwater, C.J.). The court of appeals denied a certificate of appealability, *Hearn v. Thaler,* 669 F.3d 265, 273–74 (5th Cir.2012). Hearn filed a petition for writ of certiorari on June 18, 2012. *Hearn v. Thaler,* No. 11–10944. The petition is currently pending.

FN1. 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002).

FN2. 544 U.S. 269, 125 S.Ct. 1528, 161 L.Ed.2d 440 (2005).

On April 25, 2012 the state court set an execution date of July 18, 2012. *See State v. Hearn,* No. F98–46232–S (282nd Dist. Ct., Dallas Co., Tex.). On July 5, 2012 Hearn filed the instant habeas petition, presenting a claim of ineffective assistance of trial counsel under *Wiggins v. Smith*[FN3] for failing to investigate and present mitigating evidence at his trial. On July 8, 2012 Hearn filed a notice of recent relevant authority that is adverse to his position and that requires that the court dismiss his petition.

FN3. 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003).

II

***2** The court turns first to Hearn's notice of recent relevant authority. Hearn's notice "suggest[s] how the Court might proceed" and states "that it would waste the Court's resources, as well as valuable time for upcoming proceedings in the Fifth Circuit and the Supreme Court, to continue considering Mr. Hearn's petition." Notice 1, 3–4. The notice does not clearly indicate that it is intended to be a Fed.R.Civ.P. 41(a) notice of voluntary dismissal; instead, it appears to be counsel's attempt to comply with a "duty to bring to the Court's attention this development." Notice 1. Absent a clear indication that Hearn intends to dismiss this petition, this court will follow Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts.[FN4]

FN4. Hearn refers to this rule, which provides, in part: "If it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court, the judge must dismiss the petition and direct the clerk to notify the petitioner." Notice 4 (quoting Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts) (emphasis omitted).

III

Under the Antiterrorism and Effective Death Penalty Act ("AEDPA"), a state prisoner's right to file a subsequent habeas action in federal court is severely limited.

> A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless—
>
> (A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (B) (i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2244(B)(2). Hearn initially conceded that he could not make this showing,[FN5] but he asserted that his petition should not be considered successive in light of the Supreme Court's recent opinion in *Martinez v. Ryan,* ––– U.S. ––––, 132 S.Ct. 1309, 182 L.Ed.2d 272 (2012). Hearn now acknowledges the circuit precedent that teaches that *Martinez* is inapplicable to his case.

> FN5. Hearn acknowledged that he could not make the required showing under § 2244(B)(2) for authorization to file a successive petition:
>
> > On its face, Mr. Hearn's *Wiggins* claim does not satisfy either exception to the abuse of the writ rule of preclusion, because it is not based on a new, retroactive rule of constitutional law, and it is based on facts that were previously discoverable and do not call into question the viability of his conviction.
> >
> > Pet. 64; Stay Motion 3.

Hearn conceded in his petition that "the ineffective assistance of trial counsel claim presented here (the *'Wiggins* claim') was not raised in Mr. Hearn's first state habeas corpus application." Pet. 63 (referring to Pet. 4–6). Hearn does not assert that he has since exhausted this claim, but "concedes that the claim raised here would be barred as an abuse of the writ if he now tried to present it to the state courts." *Id.* at 63–64 n. 14 (citing Tex.Code Crim. Proc. Ann. art. 11.071, § 5).

Generally, a petition containing both exhausted and unexhausted claims must be dismissed or stayed so that the petitioner can return to state court to exhaust state remedies. *See Rhines,* 544 U.S. at 277–278 (discussing *Rose v. Lundy,* 455 U.S. 520, 522 (1982)). Such action would be futile and the federal court should deem the claims to be procedurally barred if "the court to which the petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred." *Coleman v. Thompson,* 501 U.S. 722, 735 n. 1, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991); *see also Neville v. Dretke,* 423 F.3d 474, 479–480 (5th Cir.2005) (holding unexhausted claims ineligible for stay when state court would find them to be procedurally barred). A habeas petitioner can avoid the imposition of this bar, however, by demonstrating a recognized exception.

> ***3** In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.

Coleman, 501 U.S. at 750. The "fundamental miscarriage of justice" exception allows the federal court to reach a claim when the constitutional violation has probably resulted in the conviction of one who is actually innocent. *Id.* at 748 (citing *Murray v. Carrier,* 477 U.S. 478, 496, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986)); *see also House v. Bell,* 547 U.S. 518, 536–37, 126 S.Ct. 2064, 165 L.Ed.2d 1 (2006) (holding that prisoners asserting innocence as a gateway to defaulted claims must establish that, in light of new evidence, "it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." (quoting *Schlup v. Delo,* 513 U.S. 298, 327, 115 S.Ct. 851, 130 L.Ed.2d 808 (1995)).

Despite his reference to Anthony Graves,[FN6] Hearn asserted neither actual innocence nor the kind of cause-and-prejudice recognized in *Coleman.* Instead, he relied entirely on the new exception to procedural bar created in *Martinez.*

FN6. Pet. 1.

Before March 20, 2012, there would have been no way for Mr. Hearn to overcome procedural default or abuse of the writ. Because of the Supreme Court's decision in [*Martinez*] on March 20, 2012, however, there is now a way for Mr. Hearn to overcome both procedural barriers to the consideration of the claim he presents in this petition.

Pet. 64–65; Stay Motion 4.

In *Martinez* the Supreme Court created an equitable exception to the imposition of a procedural bar to an ineffective assistance of counsel claim that was not raised in the initial state habeas proceedings (referred to as "initial-review collateral proceedings") because of the lack of the effective assistance of state habeas counsel. The Court limited the availability of this exception to the application of procedural bars in those states that do not allow ineffective assistance of trial counsel claims to be raised on direct appeal.

Where, under state law, claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding, a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective.

Martinez, 132 S.Ct. at 1320. This exception does not apply, however, to Texas cases.

The Fifth Circuit first observed in a footnote that Texas does not preclude a defendant from raising an ineffective assistance of trial counsel claim on direct appeal, and that such claims are often brought on direct appeal, with mixed success. *See Adams v. Thaler,* 679 F.3d 312, 317 n. 4 (5th Cir.2012) (citing *Lopez v. Texas,* 343 S.W.3d 137, 143 (Tex.Crim.App.2011)). The Fifth Circuit later held, in an unpublished opinion, that "unlike the petitioner in *Martinez,* Gates was not denied the opportunity under state law to raise his ineffective assistance of trial counsel claim on direct review. In Texas, a capital defendant can raise an ineffective assistance of trial counsel claim on direct review to the Court of Criminal Appeals." *Gates v. Thaler,* 2012 WL 2305855, at *6 (5th Cir. June 19, 2012) (per curiam) (citing *Narvaiz v. State,* 840 S.W.2d 415, 434 (Tex.Crim.App.1992) (en banc)). And in *Ibarra v. Thaler,* ––– F.3d ––––, 2012 WL 2620520 (5th Cir. June 28, 2012), the panel distinguished Texas procedure from the Arizona procedure in *Martinez*:

***4** The TCCA made clear that a state habeas petition is the preferred vehicle for developing ineffectiveness claims. Yet Texas defendants may first raise ineffectiveness claims before the trial court following conviction via a motion for new trial, when practicable, and the trial court abuses its discretion by failing to hold a hearing on an ineffectiveness claim predicated on matters not determinable from the record. A prisoner who develops such a record through a new trial motion can of course pursue the denial of an ineffectiveness claim through direct appeal, but the TCCA has indicated that a new trial motion is neither a sufficient nor necessary condition to secure review of an ineffectiveness claim on direct appeal. Indeed, an ineffectiveness claim may simply be raised on direct appeal without the benefit of a motion for new trial. As a result, both Texas intermediate courts and the TCCA sometimes reach the merits of ineffectiveness claims on direct appeal. Where they do not, Texas habeas procedures remain open to convicted defendants. In short, Texas procedures do not mandate that ineffectiveness claims be heard in the first instance in habeas proceedings, and they do not by law deprive Texas defendants of counsel-and court-driven guidance in pursuing ineffectiveness claims. Accordingly, Ibarra is not entitled to the benefit of *Martinez* for his ineffectiveness claims, as Texas procedures entitled him to review through counselled motions for new trial and direct appeal.

Id., 2012 WL 2620520, at *4 (citations omitted).

Hearn contended initially that the reasoning of these decisions should not apply to ineffective assistance of counsel claims that rely on facts outside the trial record. He argued that the only opportunity to include evidence that is not already in the trial record is by a motion for new trial that must be filed within 30 days of judgment, usually by trial counsel and before the record is transcribed. Pet. 90–91. Hearn pointed out that, in his case, the motion for new trial was due on January 10, 1999, but the reporter's record was not filed until August 16, 1999. Pet. 91, n. 26. Hearn concluded that, in death penalty cases like his, it is not practicable for the defendant to develop the evidence to support ineffective assistance of counsel claims through a motion for new trial. Absent the necessary factual development to support these claims, Hearn argued that they will not receive meaningful review in the direct appeal.

In his notice of recent relevant authority, Hearn acknowledges that his argument does not circumvent binding Fifth Circuit precedent that the *Martinez* exception does not apply to Texas cases. Therefore, the *Wiggins* claim made the basis of the instant petition for federal habeas relief is unexhausted and now procedurally barred under the Texas abuse-of-the-writ doctrine. The petition does not present a claim that has only become ripe for review since the prior habeas petition was denied. Therefore, the petition is successive.

***5** This court has no jurisdiction to authorize a successive habeas proceeding. *See* 28 U.S.C. § 2244(3)(A). If a successive petition is filed in the district court before leave has been obtained from the court of appeals, the district court can either dismiss the motion for lack of jurisdiction or transfer the motion to the court of appeals. *See In re Hartzog,* 444 Fed. Appx. 63, 65 (5th Cir.2011) (per curiam) (citing *United States v. Key,* 205 F.3d 773, 774 (5th Cir.2000)). This court would normally transfer a successive habeas petition to the court of appeals, but a transfer would be pointless in this case because Hearn has conceded that he cannot make the necessary showing. *See* Pet. 64; Stay Motion 3. Hearn acknowledges that "this Court can do nothing but dismiss Mr. Hearn's petition." Notice 3. Therefore, the court dismisses the petition for want of jurisdiction.

IV

Because the court lacks jurisdiction to consider the petition, it also denies the motion for stay of execution for want of jurisdiction. *See Green v. Harris Cnty.,* 390 F.3d 839, 839–840 (5th Cir.2004). Alternatively, the court would conclude that Hearn is not entitled to a stay of execution. In deciding whether to grant a stay of execution, the court must normally consider four factors:

> (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Adams, 679 F.3d at 318 (quoting *Nken v. Holder,* 556 U.S. 418, 434, 129 S.Ct. 1749, 173 L.Ed.2d 550 (2009)). The stay motion presents the same *Wiggins* claim made the basis of the successive petition and also relies upon the applicability of the *Martinez* exception to Texas cases. As discussed above, the *Wiggins* claim could not succeed because it is unexhausted, procedurally barred, and the *Martinez* exception does not apply.

Further, this court's equitable analysis "must be sensitive to the State's strong interest in enforcing its criminal judgments without undue inference from the federal courts." *Id.* (citing *Hill v. McDonough,* 547 U.S. 573, 584, 126 S.Ct. 2096, 165 L.Ed.2d 44 (2006)). "The party requesting a stay bears the burden of showing that the circumstances justify an exercise of [judicial] discretion." *Id.* (quoting *Nken,* 556 U.S. at 433–34). Hearn has not made the required showing, and the stay motion is denied on this alternate basis as well.

V

The court has granted Hearn's prior motions to proceed *in forma pauperis* in this court. The court likewise grants this instant motion.

VI

Considering the record in this case, and pursuant to Fed. R.App. P. 22(b), Rule 11(a) of the Rules Governing Section 2254 Cases in the United States District Courts, and 28 U.S.C. § 2253(c), the court denies a certificate of appealability. The court concludes that Hearn has failed to show (1) that reasonable jurists would find this court's "assessment of the constitutional claims debatable or wrong," or (2) that reasonable jurists would find "it debatable whether the petition states a valid claim of the denial of a constitutional right" and "debatable whether [this Court] was correct in its procedural ruling." *Slack v. McDaniel,* 529 U.S. 473, 484, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000). If Hearn files a notice of appeal, his *in forma pauperis* status will continue on appeal.

***6 SO ORDERED.**

N.D.Tex.,2012.

Hearn v. Thaler
Slip Copy, 2012 WL 2715653 (N.D.Tex.)
END OF DOCUMENT

Appendix 4

--- F.3d ----, 2012 WL 2620520 (C.A.5 (Tex.))

(Cite as: 2012 WL 2620520 (C.A.5 (Tex.)))

Only the Westlaw citation is currently available.

United States Court of Appeals,

Fifth Circuit.
Ramiro Rubi IBARRA, Petitioner–Appellant,
v.
Rick THALER, Director, Texas Department of Criminal Justice, Correctional Institutions Division, Respondent–Appellee.
No. 11–70031.

June 28, 2012.

Background: Following affirmance of his criminal conviction in state court, petitioner filed federal petition for writ of habeas corpus. The United States District Court for the Western District of Texas denied petition. Petitioner moved to vacate District Court's judgment in light of Supreme Court's decision in *Martinez v. Ryan*.

Holding: The Court of Appeals, Edith H. Jones, Chief Judge, held that as matter of first impression, state habeas counsel's alleged deficiency in failing to raise ineffective assistance of trial counsel claims in collateral proceedings did not establish cause to excuse procedural default.

Motion denied.

Graves, Circuit Judge, concurred in part and dissented in part and filed opinion.

West Headnotes

[1] Sentencing and Punishment 350H 1795

350H Sentencing and Punishment

350HVIII The Death Penalty
350HVIII(H) Execution of Sentence of Death
350Hk1795 k. In General. Most Cited Cases

"*Lackey* claim" asserts violation of Eighth Amendment if prisoner remains on death row too long. U.S.C.A. Const.Amend. 8.

[2] Habeas Corpus 197 404

197 Habeas Corpus

197I In General
197I(D) Federal Court Review of Petitions by State Prisoners
197I(D)5 Availability of Remedy Despite Procedural Default or Want of Exhaustion
197k404 k. Cause and Prejudice in General. Most Cited Cases

A federal habeas petitioner must demonstrate cause, objectively external to his defense, and prejudice to overcome regularly applied state procedural default, which ordinarily bars federal habeas review of defaulted issue.

[3] Habeas Corpus 197 406

197 Habeas Corpus

197I In General
197I(D) Federal Court Review of Petitions by State Prisoners
197I(D)5 Availability of Remedy Despite Procedural Default or Want of Exhaustion
197k405 Cause or Excuse
197k406 k. Ineffectiveness or Want of Counsel. Most Cited Cases

Where initial-review collateral proceeding is first designated proceeding for prisoner to raise claim of ineffective assistance at trial, collateral proceeding is in many ways equivalent of prisoner's direct appeal as to ineffective assistance claim, and from this it follows that, when state requires prisoner to raise ineffective assistance of trial counsel claim in collateral proceeding, prisoner may establish cause for procedural default of ineffective assistance claim, for federal habeas purposes, in two circumstances; first is where state court did not appoint counsel in initial-review collateral proceeding for claim of ineffective assistance at trial, and second is where appointed counsel in initial-review collateral proceeding, where claim should have been raised, was ineffective under standards of *Strickland*.U.S.C.A. Const.Amend. 6.

[4] Habeas Corpus 197 406

197 Habeas Corpus

197I In General
197I(D) Federal Court Review of Petitions by State Prisoners
197I(D)5 Availability of Remedy Despite Procedural Default or Want of Exhaustion
197k405 Cause or Excuse
197k406 k. Ineffectiveness or Want of Counsel. Most Cited Cases

Rule that attorney's ignorance or inadvertence in postconviction proceeding does not qualify as cause to excuse procedural default of ineffective assistance claim, for federal habeas purposes, governs except in limited circumstance in which collateral review is first time prisoner may raise ineffective assistance claim; it does not extend to attorney errors in any proceeding beyond first occasion state allows prisoner to raise claim of ineffective assistance at trial. U.S.C.A. Const.Amend. 6.

[5] Habeas Corpus 197 406

197 Habeas Corpus

197I In General
197I(D) Federal Court Review of Petitions by State Prisoners

197I(D)5 Availability of Remedy Despite Procedural Default or Want of Exhaustion
197k405 Cause or Excuse
197k406 k. Ineffectiveness or Want of Counsel. Most Cited Cases

When state diverts ineffectiveness claims to collateral proceedings that function as prisoner's first opportunity to assert those claims, prisoner who can demonstrate that he was either unrepresented in that collateral proceeding or that his initial habeas counsel performed ineffectively thereby establishes "cause" for purposes of cause-and-prejudice framework to forgive state procedural default on federal habeas review. U.S.C.A. Const.Amend. 6.

[6] Habeas Corpus 197 406

197 Habeas Corpus

197I In General
197I(D) Federal Court Review of Petitions by State Prisoners
197I(D)5 Availability of Remedy Despite Procedural Default or Want of Exhaustion
197k405 Cause or Excuse
197k406 k. Ineffectiveness or Want of Counsel. Most Cited Cases

State habeas counsel's alleged deficiency in failing to raise ineffective assistance of trial counsel claims in collateral proceedings did not establish cause to excuse procedural default of those claims for federal habeas purposes; although Texas Court of Criminal Appeals (TCCA) made clear that state habeas petition was preferred vehicle for developing ineffectiveness claims, Texas procedures entitled petitioner to review through counselled motions for new trial and direct appeal. U.S.C.A. Const.Amend. 6.

[7] Criminal Law 110 920

110 Criminal Law

110XXI Motions for New Trial
110k920 k. Incompetency or Neglect of Counsel for Defense. Most Cited Cases

Criminal Law 110 959

110 Criminal Law

110XXI Motions for New Trial
110k948 Application for New Trial
110k959 k. Hearing and Rehearing in General. Most Cited Cases

Texas defendants may first raise ineffectiveness claims before trial court following conviction via motion for new trial, when practicable, and trial court abuses its discretion by failing to hold hearing on ineffectiveness claim predicated on matters not determinable from record. U.S.C.A. Const.Amend. 6.

[8] Habeas Corpus 197 406

197 Habeas Corpus

197I In General
197I(D) Federal Court Review of Petitions by State Prisoners
197I(D)5 Availability of Remedy Despite Procedural Default or Want of Exhaustion

197k405 Cause or Excuse
197k406 k. Ineffectiveness or Want of Counsel. Most Cited Cases

For purposes of requirement of *Martinez* that, for prisoner to establish cause for default of an ineffective-assistance-of-trial-counsel claim based on want or ineffectiveness of appointed counsel in a collateral proceeding, state must have required prisoner to raise ineffectiveness of trial counsel in the first instance in collateral proceeding, Texas permits ineffectiveness claim to be raised on direct appeal without benefit of motion for new trial and, as result, both Texas intermediate courts and Texas Court of Criminal Appeals (TCCA) sometimes reach merits of ineffectiveness claims on direct appeal; where they do not, Texas habeas procedures remain open to convicted defendants. U.S.C.A. Const.Amend. 6.

[9] Habeas Corpus 197 406

197 Habeas Corpus

197I In General
197I(D) Federal Court Review of Petitions by State Prisoners
197I(D)5 Availability of Remedy Despite Procedural Default or Want of Exhaustion
197k405 Cause or Excuse
197k406 k. Ineffectiveness or Want of Counsel. Most Cited Cases

Texas procedures do not mandate that ineffectiveness claims be heard in first instance in habeas proceedings, and they do not by law deprive Texas defendants of counsel and court-driven guidance in pursuing ineffectiveness claims, as required for want or ineffectiveness of appointed counsel in state habeas proceeding to provide cause for default of ineffective-assistance-of-trial-counsel claim under *Martinez*.U.S.C.A. Const.Amend. 6.

Russell David Hunt, Jr. (Court–Appointed), Georgetown, TX, Naoimi E. Terr (Court–Appointed), Texas Def. Serv., Houston, TX, for Petitioner–Appellant.

Stephen M. Hffman, Asst. Atty. Gen., Austin, TX, for Respondent–Appellee.

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

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

EDITH H. JONES, Chief Judge:

ORDER:

***1** The Court has considered Ramiro Rubi Ibarra's motion to vacate the district court's judgment denying his petition for habeas corpus relief in light of the Supreme Court's decision in *Martinez v. Ryan,* ––– U.S. ––––, 132 S.Ct. 1309, 182 L.Ed.2d 272 (2012). We DENY his motion.

Ibarra petitioned the district court for postconviction relief on 11 issues, which the district court denied, several of which as defaulted. Currently pending in this court is his application for a COA on three issues. Ibarra's current motion argues that *Martinez* invalidates the district court's conclusion that Ibarra procedurally defaulted these COA issues: (1) an ineffective-assistance-of-trial-counsel claim; (2) a claim of mental retardation under *Atkins v. Virginia,* 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002); and (3) a claim that the prosecution violated his rights under the Vienna Convention on Consular Relations ("VCCR"). We may readily dismiss these latter two claims, as *Martinez,* by its terms, applies only to ineffective-assistance-of-trial-counsel claims. *Martinez,* 132 S.Ct. at 1311–12. *Martinez* is also limited,

again by its own express terms, to "initial-review collateral proceedings," which it defines as "collateral proceedings which provide the first occasion to raise a claim of ineffective assistance at trial." *Id.* at 1315. Other courts have rejected entreaties to expand *Martinez,* and we do the same. *See, e.g., Arnold v. Dormire,* 675 F.3d 1082 (8th Cir. Apr.3, 2012) (declining to extend *Martinez* to claims of ineffective assistance in appeals from initial-review collateral proceedings); *Hunton v. Sinclair,* 2012 WL 1409608, at *1 (E.D.Wash. Apr.23, 2012) (declining to extend *Martinez* to *Brady* claims); *Sherman v. Baker,* 2012 WL 993419, at *18 (D.Nev. Mar.23, 2012) (declining to extend *Martinez* beyond ineffectiveness claims).

[1] The district court concluded that Ibarra defaulted his ineffective-assistance-of-trial-counsel claim by first presenting it in his fourth state petition for habeas relief. Ibarra now argues that his initial habeas counsel was also ineffective, thereby excusing his procedural default in presenting his underlying ineffective assistance claim. A short summary of the facts underpinning Ibarra's allegedly deficient representation suffices. Ibarra claims his trial counsel "virtually abandoned their duty to prepare for sentencing," focusing instead on an innocence defense. Ibarra argues that trial counsel's failure to present more than two social history witnesses—Ibarra's wife and one of his siblings—rendered his sentencing-phase assistance constitutionally deficient. Following conviction, Ibarra was then appointed new counsel for his first state habeas petition, who raised only a purported *Lackey* claim[FN1] predicated on pre-indictment delays. The state trial court denied relief, and the Texas Court of Criminal Appeals ("TCCA") affirmed. *Ex parte Ibarra,* No. 48,832–01 (Tex.Crim.App. Apr. 4, 2001) (unpublished).

[2] Until recently, this court's precedent foreclosed Ibarra's argument. *See, e.g., Martinez v. Johnson,* 255 F.3d 229, 239–40 (5th Cir.2001). A habeas petitioner must demonstrate cause—objectively external to his defense—and prejudice to overcome a regularly applied state procedural default, which ordinarily bars federal habeas review of a defaulted issue. *Coleman v. Thompson,* 501 U.S. 722, 746–47, 111 S.Ct. 2546, 2562–63, 115 L.Ed.2d 640 (1991).

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

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

disadvantaged due to the lack of counsel's briefs or a court's opinion addressing their claims. *Id.* at 1312. The Court justified this ineffectiveness-specific exception based on the importance of counsel to the adversarial criminal process. *Id.* (citing the right to effective counsel as "bedrock").

[3][4] *Martinez,* by its own terms, therefore establishes a specific and narrow exception to the *Coleman* doctrine; it reiterates this not merely once, but again and again, as the Court repeatedly (and exclusively) refers to the scenario of a state in which collateral review is the first time a defendant may raise a claim of ineffective assistance of counsel. Thus, the phrase "initial-review collateral proceeding" is a specifically defined term referring to states like Arizona in which a defendant is prevented from raising counsel's ineffectiveness until he pursues collateral relief (normally bereft of a right to counsel). *Martinez* defines the legal issue that it addresses as follows: "[*Coleman*] left open, and the Court of Appeals in this case addressed, a question of constitutional law: whether a prisoner has a right to effective counsel in collateral proceedings which provide the first occasion to raise a claim of ineffective assistance at trial. *These proceedings can be called, for purposes of this opinion, 'initial-review collateral proceedings.*' " *Martinez,* 132 S.Ct. at 1315 (emphasis added). Reinforcing this definition, the Court states: "The State of Arizona does not permit a convicted person alleging ineffective assistance of trial counsel to raise that claim on direct review. Instead, the prisoner must bring the claim in state collateral proceedings." *Martinez,* ––– U.S. ––––, 132 S.Ct. 1309, 1313, 182 L.Ed.2d 272 (2012). "Where, as here, the initial-review collateral proceeding is the first designated proceeding for a prisoner to raise a claim of ineffective assistance at trial, the collateral proceeding is in many ways the equivalent of a prisoner's direct appeal as to the ineffective-assistance claim." *Id.* at 1317. "From this it follows that, *when a State requires a prisoner to raise an ineffective-assistance-of-trial-counsel claim in a collateral proceeding,* a prisoner may establish cause for a default of an ineffective-assistance claim in two circumstances. The first is where the state courts did not appoint counsel in the initial-review collateral proceeding for a claim of ineffective assistance at trial. The second is where appointed counsel in the initial-review collateral proceeding, where the claim should have been raised, was ineffective under the standards of *Strickland v. Washington.*" *Id.* at 1318 (emphasis added) (citation omitted). Finally, "The rule of *Coleman* governs in *all but the limited circumstances recognized here* . ... It does not extend to attorney errors in any proceeding beyond the first occasion the State allows a prisoner to raise a claim of ineffective assistance at trial ...." *Id.* at 1320 (emphasis added).[FN2]

***3** [5] When a state diverts ineffectiveness claims to collateral proceedings that function as the prisoner's first opportunity to assert those claims, a prisoner who can demonstrate that he was either unrepresented in that collateral proceeding or that his initial habeas counsel performed ineffectively thereby establishes "cause" for purposes of *Coleman's* cause-and-prejudice framework to forgive a state procedural default. *Martinez* goes on to describe the parameters of a "prejudice" showing. The result of *Martinez* is to allow petitioners in these narrowly described cases to urge their claims of ineffective trial (and habeas) counsel in federal court.

***4** No published opinion from this court has yet considered *Martinez*'s applicability to Texas cases. To ascertain *Martinez*'s applicability to Texas procedures, it is useful to describe Arizona's habeas procedures more carefully. Arizona bars initial review of ineffectiveness claims outside of collateral proceedings. Arizona's collateral-review proceedings—"Rule 32 proceedings"—have predominated Arizona ineffectiveness adjudication since at least 1989, when the Arizona Supreme Court recommended ineffectiveness claims be raised under Rule 32. *State v. Valdez,* 160 Ariz. 9, 770 P.2d 313, 319 (Ariz.1989). Yet Arizona practitioners continued to raise ineffectiveness claims on direct appeal. As Rule 32 motions could either follow direct appeals or proceed contemporaneously with direct appeals, these ineffectiveness proceedings were sometimes consolidated on direct appeal, only to be remanded to the trial court. *State v. Spreitz,* 202 Ariz. 1, 39 P.3d 525, 526–27 (Ariz.2002). In 2002, the Arizona Supreme Court "clarif[ied]" this "murky" procedure by instructing appellate courts to disregard ineffectiveness claims on direct appeal, regardless of merit. *Id.* at 527. Arizona's Rule 32 proceedings remained the exclusive venue for developing an ineffectiveness record; at least one

Arizona appellate court has expressly disapproved using motions for a new trial to develop ineffectiveness claims in favor of the Rule 32 procedure. *See State v. Williams,* 169 Ariz. 376, 819 P.2d 962, 964 (Ariz.Ct.App.1991).

[6][7][8][9] Contrast these procedures with Texas's rules governing ineffectiveness claims. The TCCA made clear that a state habeas petition is the preferred vehicle for developing ineffectiveness claims. *Robinson v. State,* 16 S.W.3d 808, 809–10 (Tex.Crim.App.2000). Yet Texas defendants may first raise ineffectiveness claims before the trial court following conviction via a motion for new trial, when practicable, and the trial court abuses its discretion by failing to hold a hearing on an ineffectiveness claim predicated on matters not determinable from the record. *Holden v. State,* 201 S.W.3d 761, 762–63 (Tex.Crim.App.2003). A prisoner who develops such a record through a new trial motion can of course pursue the denial of an ineffectiveness claim through direct appeal, but the TCCA has indicated that a new trial motion is neither a sufficient nor necessary condition to secure review of an ineffectiveness claim on direct appeal. Indeed, an ineffectiveness claim may simply be raised on direct appeal without the benefit of a motion for new trial. *Robinson,* 16 S.W.3d at 813. As a result, both Texas intermediate courts and the TCCA sometimes reach the merits of ineffectiveness claims on direct appeal. *Thompson v. State,* 9 S.W.3d 808, 813–14 (Tex.Crim.App.1999). Where they do not, Texas habeas procedures remain open to convicted defendants. *Ex parte Nailor,* 149 S.W.3d 125, 129, 131 (Tex.Crim.App.2004). In short, Texas procedures do not mandate that ineffectiveness claims be heard in the first instance in habeas proceedings, and they do not by law deprive Texas defendants of counsel-and court-driven guidance in pursuing ineffectiveness claims.

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

***5** MOTION DENIED.

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

I agree with the majority that Ramiro Rubi Ibarra's motion to vacate should be denied, as he presently has an application for a certificate of appealability (COA) pending before this Court. Further, as the Government asserts, the motion is an "improper procedural vehicle" for obtaining the relief he seeks because this relief is not available until a decision is made on the COA. However, the majority denies the motion to vacate based on its interpretation and application of *Martinez v. Ryan,* ––– U.S. ––––, 132 S.Ct. 1309, 182 L.Ed.2d 272 (2012), and its finding that *Martinez* does not apply to Texas. Therefore, I respectfully concur in part and dissent in part.

As the majority states, *Martinez* recognizes a limited exception to *Coleman v. Thompson,* 501 U.S. 722, 746–47, 111 S.Ct. 2546, 2562–63, 115 L.Ed.2d 640 (1991). Specifically, in *Martinez,* the Court said:

> To protect prisoners with a potentially legitimate claim of ineffective assistance of trial counsel, it is necessary to modify the unqualified statement in *Coleman* that an attorney's ignorance or inadvertence in a postconviction proceeding does not qualify as cause to excuse a procedural default. *This opinion qualifies Coleman by recognizing a narrow exception: Inadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial.*
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> *Id.* at 1315. (Emphasis added).

To find that Ibarra could not be one of those prisoners with a potentially legitimate claim of ineffective assistance of trial counsel that *Martinez* proposes to protect, one must read the above use of "initial-review collateral proceedings"

to mean state-mandated initial-review collateral proceedings rather than rely on the literal definition of an "initial-review collateral proceeding."[FN1] Yet the Court did not include "state-mandated" or any such phrase in pronouncing this exception. The Court also did not exclude the application of this equitable exception to prisoners like Ibarra, who raised IAC claims in a collateral proceeding as strongly suggested by the state. Yet the Court specifically excluded "attorney errors in other kinds of proceedings, including appeals from initial-review collateral proceedings, second or successive collateral proceedings, and petitions for discretionary review in a State's appellate courts." *Martinez,* 132 S.Ct. at 1320. While *Martinez* does repeatedly refer to the applicable Arizona requirement, it is an Arizona case, and, of course, the narrow exception set out above would apply to a state such as Arizona which requires that IAC claims are raised collaterally.

Moreover, as stated by the majority, the Supreme Court specifically noted that Arizona habeas courts look to the merits of the ineffectiveness claim, that no other court prior to the collateral proceeding has addressed the claim, and "defendants pursuing first-tier review ... are generally ill equipped to represent themselves because they do not have a brief from counsel or an opinion of the court addressing their claim of error." *Id.* at 1317. [FN2] (Internal marks omitted). That is exactly the situation with Ibarra. The Texas habeas court would have been the first court to look to the merits of his ineffective assistance of trial counsel claim. As to the third factor above, Ibarra and Martinez were both represented by counsel, but the Supreme Court extended the exception both to unrepresented and represented defendants. *Martinez,* 132 S.Ct. at 1318.

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

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

Based on the interpretation of the application of *Martinez,* the majority is finding that Ibarra is not entitled to the benefit of *Martinez* because "Texas procedures entitled him to review through counselled motions for new trial and direct appeal." The majority also states, "[f]ollowing conviction, Ibarra was then appointed new counsel for his state habeas petition, who raised only a purported *Lackey* claim ...." Based on the interpretation of the application of *Martinez,* the majority is finding that Ibarra has defaulted on any claim of ineffective assistance of trial counsel that state habeas counsel failed to raise in his initial state habeas petition because Texas allowed said claimed ineffective trial counsel to raise his own ineffectiveness in a motion for new trial or on direct appeal. Overlooking the fact that failing to raise his own ineffectiveness could possibly be a basis for an IAC claim, it is not equitable to find that Ibarra has defaulted on a claim of ineffective assistance of counsel because his claimed ineffective counsel did not prematurely raise said claim when clearly not practicable.

With regard to cited cases, the majority cites *Arnold v. Dormire,* 675 F.3d 1082 (8th Cir. Apr.3, 2012), as a basis for not "expanding" *Martinez. Arnold* was an appeal from an initial-review collateral proceeding. This is not an appeal from an initial-review collateral proceeding. *Hunton v. Sinclair,* 2012 WL 1409608, at *1 (E.D.Wash. Apr.23, 2012), was a *Brady* claim. This is an IAC claim. Also, *Sherman v. Baker,* 2012 WL 993419, at *18 (D.Nev. Mar.23, 2012), actually said that to the "extent that Sherman claims ineffective assistance of post-conviction counsel prevented him from presenting any of his claims in compliance with Nevada's procedural rules, the Court in *Martinez* made clear that post-conviction counsel's ineffectiveness can serve as cause only with respect to claims of ineffective assistance of counsel at trial." *Id.* That is exactly the situation here—Ibarra's underlying claim is ineffective assistance of trial counsel, the merits of which would be decided pursuant to his application for a COA. Also, notably, it appears that Nevada, like Texas, allows ineffective assistance of counsel to be raised on direct appeal. *McConnell v. State,* 125 Nev. 243, 212 P.3d 307, 314 (Nev.2009). *See also* Nev.Rev.Stat. 34.810.

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

Even more relevant is this Court's handling of *Martinez* in the unpublished opinion of *Lindsey v. Cain,* 2012 WL 1366040 (5th Cir. Apr.19, 2012). [FN3] In *Lindsey,* this Court granted a COA and remanded for further proceedings in light of *Martinez,* saying:

> When a state, like Louisiana, requires that a prisoner raise an ineffective assistance of counsel claim on collateral review, a prisoner can demonstrate cause for the default in two circumstances: (1) "where the state courts did not appoint counsel in the initial-review collateral proceeding for a claim of ineffective assistance at trial" and (2) "where appointed counsel in the initial-review collateral proceeding, where the claim should have been raised, was ineffective under the standards of *Strickland [v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)]." *Id.* at *8 (citation omitted). Further, the prisoner must also show that "the underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit.
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> *Id.* at *1.

***8** Louisiana, like Texas, allows a prisoner to raise ineffective assistance of counsel on direct appeal "when the record contains sufficient evidence to decide the issue and the issue is properly raised by assignment of error on appeal." *State v. Brashears,* 811 So.2d 985 (La.App. 5 Cir.2002). *See also State v. Williams,* 738 So.2d 640, 651–52 (La.App. 5 Cir.1999) ("Ineffective assistance of counsel claims are most appropriately addressed on application for post conviction relief, rather than on direct appeal, so as to afford the parties adequate opportunity to make a record for review. However, when an ineffective assistance claim is properly raised by assignment of error on direct appeal and the appellate record contains sufficient evidence to evaluate the claim, the reviewing court may address the ineffective assistance claim in the interest of judicial economy.").

In *Adams v. Thaler,* 679 F.3d 312, 2012 WL 1415094 (5th Cir. April 25, 2012), a case where the prisoner reasserted ineffective assistance of counsel in a successive habeas petition after the district court found that he had procedurally defaulted under *Coleman,* this Court said:

Although we need not, and do not, address the impact of *Martinez* on the Texas habeas landscape, we note that

> Texas does not require a defendant to raise an ineffective assistance of trial counsel claim only in state habeas proceedings, *see Lopez v. Texas,* 343 S.W.3d 137, 143 (Tex.Crim.App.2011), and that ineffective assistance claims (particularly those, like Adams's claim, involving trial counsel's failure to object to jury instructions) are often brought on direct appeal, with mixed success.
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> *Id.* at *3, n. 4.

In *Cantu v. Thaler,* ––– F.3d ––––, 2012 WL 1970364 (5th Cir. June 1, 2012), on remand from the Supreme Court, this Court remanded to the district court "so that the district court may decide in the first instance the impact of *Martinez v. Ryan* on Cantu's contention that he had cause for his procedural default." *Id.*[FN4]

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

> The Supreme Court's recent decision in *Martinez v. Ryan,* does not assist Brown's argument. In *Martinez,* the Court held that "[i]nadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial." The Texas Court of Criminal Appeals did not find Brown's ineffective assistance claim to be procedurally defaulted, but instead considered the claim on the merits.
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> *Id.* at *15, n. 4.

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

> Any claim that counsel was ineffective must be raised as soon as practicable, either at trial, on direct appeal, or in the first Rule 32 petition, whichever is applicable. In no event can relief be granted on a claim of ineffective assistance of trial or appellate counsel raised in a successive petition.
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> Ala. R. Cr. P. 32.2(d).

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

> FN1. A *Lackey* claim asserts violation of the Eighth Amendment if a prisoner remains on death row too long. *Lackey v. Texas,* 514 U.S. 1045, 115 S.Ct. 1421, 131 L.Ed.2d 304 (1995) (mem.) (Stevens, J., respecting denial of cert.).

FN2. Had the Court sought to craft a general exception to *Coleman* for claims of ineffective trial counsel, it would have said: "inadequate assistance of counsel at initial-review proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial." Instead, the court said: "inadequate assistance of counsel at initial-review *collateral* proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial." *Martinez,* 132 S.Ct. at 1315.

FN1. The majority quotes language from *Martinez's* discussion of *Coleman* regarding a definition of "initial-review collateral proceedings" included in the Supreme Court's statement of the constitutional issue that the majority concedes the Supreme Court left open: "whether a prisoner has a right to effective counsel in collateral proceedings which provide the first occasion to raise a claim of ineffective assistance at trial." *Martinez,* 132 S.Ct. at 1315. That "definition" does not include any language such as state-mandated. Further, that "definition" supports the proposition that *Martinez* applies to Ibarra as, based on the preference of the State of Texas, his first habeas proceeding would be one of the "collateral proceedings which provide the first occasion to raise a claim of ineffective assistance at trial."

FN2. The majority's citation is to the syllabus rather than the actual opinion.

FN3. This unpublished case and others are mentioned to demonstrate how this Court and others have applied *Martinez.*

FN4. The Supreme Court also remanded *Newbury v. Thaler,* ––– U.S. ––––, 132 S.Ct. 1793, 182 L.Ed.2d 612 (March 26, 2012), for consideration of *Martinez.* Further, this is not an exhaustive list of cases analyzing the application of *Martinez.*

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