12-10251

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2012

CHRISTOPER SEPULVADO,

Petitioner,

vs.

BURL CAIN, Warden, Louisiana State Penitentiary,

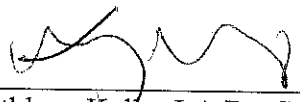
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITIONER'S MOTION TO PROCEED IN FORMA PAUPERIS

Petitioner Christopher Sepulvado respectfully requests leave to proceed *in forma pauperis*. Mr. Sepulvado was declared indigent by the Forty-Second Judicial District Court of Desoto Parish, Louisiana and the Nineteenth Judicial District Court of East Baton Rouge Parish, Louisiana. Pursuant to Louisiana Code of Criminal Procedure article 930.7, the DeSoto Parish district court appointed A.M. Stroud, III to represent Petitioner in his state post-conviction proceedings. Mr. Sepulvado was also declared indigent by the United States District Court for the Western District of Louisiana. His affidavit demonstrating indigence is attached. Pursuant to Sup. Ct. R. 39(1), Petitioner therefore moves to proceed with the filing of his Petition for Writ of Certiorari *in forma pauperis*.

Respectfully submitted,



*Kathleen Kelly, LA Bar Roll # 25433
J. Samuel Sweeney, La Bar Roll # 28304
Gary P. Clements, La Bar Roll # 21978
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1340 Poydras Street, Suite 1700
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Attorney for Petitioner

* Counsel of Record

CERTIFICATE OF SERVICE

I hereby certify that I have served Petitioner's Motion to Proceed In Forma Pauperis upon counsel for opposing party, by depositing a copy of same by means of U.S. Mail, and sending it to the following address:

Richard Z. Johnson, Jr., District Attorney
DeSoto Parish District Attorney's Office,
P.O. Box 432,
Mansfield, LA 71052

This 8th day of May, 2013.

Respectfully submitted,

*Kathleen Kelly, LA Bar Roll # 25433
Capital Post-Conviction Project Of Louisiana
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Telephone (504) 212-2110
Facsimile (504) 212-2130
Electronic Mail: kkelly@cpcpl.org
Attorney for Petitioner

*Counsel of Record

STATE OF LOUISIANA
PARISH OF WEST FELICIANA

AFFIDAVIT OF INDIGENCY

I, CHRISTOPHER SEPULVADO, being duly sworn, depose and say that I am the Petitioner in the above-entitled case; that in support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty, I am unable to pay the costs of said proceeding or to give security therefor; and that I believe I am entitled to relief.

I further swear that the responses which I have made to questions and instructions below are true.

1. Are you presently employed? Yes____ No X

a. If the answer is "yes", state the amount of your salary or wages per month, and give the name and address of your employer.

_____

_____

b. If the answer is "no", state the date of your last employment and the amount of the salary and wages per month which you received.

2. Have you received within the past twelve months any money from any of the following sources?

		Yes	No
a.	Business, profession or form of self-employment?	___	X
b.	Rent payments, interest or dividends?	___	X
c.	Pensions, annuities or life insurance payments?	___	X
d.	Gifts or inheritances?	X	___
e.	Any other sources?	___	X

If the answer to any of the above is "yes", describe each source of income, and state the amount received from each during the past twelve months.

Daughter - $450, Friend - $50, Friend - $50

3. Do you own any cash, or do you have any money in a checking or savings account? Yes X No ___ (Include any funds in prison accounts.) If the answer is "yes", state the total value of the items owned.

Prison account has $87.27

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? Yes ___ No X
If the answer is "yes", describe the property and state its approximate value.

5. List the persons who are dependent upon you for support, state your relationship to those persons, and indicate how much you contribute toward their support.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: 1/8/13

Christopher Sepulvado
CHRISTOPHER SEPULVADO, DOC # 186756

Sworn to and subscribed before me
this 8th day of January,
2013.

NOTARY PUBLIC

INSTITUTIONAL STATEMENT

I hereby authorize the Louisiana Department of Corrections to withdraw from my savings account or drawing account such funds with may be necessary to pay court costs.

Christopher Sepulvado
CHRISTPOHER SEPULVADO
DOC # 186756

I hereby certify that CHRISTOPHER SEPULVADO has the sum of $ 87.27 on account to his credit at the Louisiana State Penitentiary where he is confined. I further certify that he likewise has the following securities to his credit according to records of said institution:

Dated: DATE

JAN 04 2013

CERTIFIED

Saundra Ross
Authorized Officer of Institution

No. 1210251

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2012

CHRISTOPHER SEPULVADO,

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v.

BURL CAIN, Warden, Louisiana State Penitentiary,

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On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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Attorney for Petitioner

*Counsel of Record

CAPITAL CASE

QUESTIONS PRESENTED FOR REVIEW

Under *Slack v. McDaniel*, 529 U.S. 473 (2000), a habeas petitioner is entitled to a certificate of appealability (COA)--which is required for him to take a plenary appeal--if he can show that reasonable jurists could debate whether his petition should have been resolved in a different manner. The court below denied Mr. Sepulvado a certificate of appealability on two claims challenging the conduct of trial counsel, one involving counsel's conflict of interest and the other involving counsel's failure to investigate and present evidence of jury misconduct. The lower court's decision denying a certificate of appealability gives rise to the following three important questions of federal law:

1. Under *Martinez v. Ryan,* 132 S. Ct. 1309, 1315 (2012), ineffective assistance of counsel in an initial-review collateral proceeding may provide cause to excuse the procedural default of a claim of ineffective assistance of trial counsel raised in a federal habeas proceeding. Could reasonable jurists debate whether a death-sentenced prisoner confined pursuant to a Louisiana judgment may assert ineffective assistance of state post-conviction counsel as cause to excuse procedural defaults of claims of ineffective assistance of trial counsel?

2. Did the Court of Appeals for the Fifth Circuit err in denying a COA to Petitioner in order to determine whether his claims were reviewable under *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), where its holding here "that *Martinez* does not apply to Louisiana prisoners at all" squarely contradicts the Fifth Circuit's own earlier decision in *Lindsey v. Cain*, 476 F. App'x 777 (5th Cir. 2012)?

3. Where Petitioner was scheduled to be executed in six days, and the district court had transferred Petitioner's case to the Fifth Circuit for lack of jurisdiction, did the Fifth Circuit err in dismissing Petitioner's application for a certificate of appealability ("COA") due to the district court's lack of prior consideration of the COA?

PARTIES TO THE PROCEEDING IN THE COURTS BELOW

1. Christopher Sepulvado, Petitioner-Appellant
2. Burl Cain, Warden, Louisiana State Penitentiary, Respondent-Appellee

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v.

BURL CAIN, Warden, Louisiana State Penitentiary

Respondent.

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

Petitioner Christopher Sepulvado respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this case, and that the case be stayed pending this Court's decision in *Trevino v. Thaler*, 133 S. Ct. 524 (2012). Alternatively, even if *Trevino* is decided before this Court's consideration of Petitioner's case, *certiorari* should be granted and the case remanded for a merits determination and for the Fifth Circuit to resolve its intra-circuit split regarding whether *Martinez* applies to Louisiana prisoners.

OPINIONS BELOW

The January 16, 2013 Transfer Order of the United States District Court for the Western District of Louisiana is attached as Appendix A. The February 7, 2013 order of the United States Court of Appeals for the Fifth Circuit affirming the district court's Transfer Order, dismissing Petitioner's habeas petition and amended motion to appoint counsel, denying Petitioner's motion

for stay of execution and dismissing his request for a certificate of appealability ("COA") is attached as Appendix B.

JURISDICTIONAL STATEMENT

The order of the United States Court of Appeals for the Fifth Circuit was entered on February 7, 2013, and that ruling became final on that date. This Court has jurisidction to review and grant the Petition for Certiorari under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AT ISSUE

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

The Fourteenth Amendment to the United States Constitution provides, in pertinent part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

A. Factual and Procedural Summary.[1]

Mr. Sepulvado was convicted of the first-degree murder of his six-year-old stepson in the Louisiana Eleventh (now Forty-Second) Judicial District Court, Parish of DeSoto, on April 17, 1993. Judge Robert E. Burgess presided at the trial. Petitioner was represented by court-appointed counsel W. Charles Brown and Joseph D. Toups Jr. On April 19, 1993, the jury recommended that Mr. Sepulvado receive a sentence of death, and he was formally sentenced to death on May 19, 1993.

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[1] As used in this petition, "R" refers to the trial transcript in *State v. Sepulvado*, No. 93-2692, 42nd Judicial District Court of DeSoto Parish, as assembled by the Supreme Court of Louisiana.

Following the trial, the Louisiana Supreme Court affirmed Mr. Sepulvado's conviction and sentence on April 8, 1996. *State v. Sepulvado*, 93-2692 (La. 4/8/96), 672 So.2d 158. This Court denied a petition for *certiorari* on October 15, 1996, and denied rehearing on December 9, 1996. *Sepulvado v. Louisiana*, 519 U.S. 934 (1996), *reh'g denied*, 519 U.S. 1035 (1996). R. Neal Walker represented Petitioner in his direct review proceedings.

Following the denial of his direct appeal and petition for certiorari, Petitioner filed an application for post-conviction relief in the 11th Judicial District Court. Mr. Sepulvado was represented by A.M. Stroud in his post-conviction proceedings. Judge Burgess denied the application after conducting an evidentiary hearing on Petitioner's claim of ineffective assistance of counsel[2], and the Supreme Court of Louisiana denied writs on March 24, 2000. *Sepulvado v. Cain*, 757 So.2d 652 (La. 2000).

After the Louisiana Supreme Court denied post-conviction writs, Mr. Sepulvado timely filed a petition for a writ of habeas corpus in the United States District Court, Western District of Louisiana. In his habeas petition, Mr. Sepulvado argued that, under *Campbell v. Louisiana*, 523 U.S. 392 (1998), he was entitled to relief from his conviction and sentence due to a longstanding pattern of racial discrimination in the selection of grand jury forepersons in DeSoto Parish (hereinafter "the *Campbell* claim"). Pet.'s Memorandum in Support of Writ of Habeas Corpus 65, April 3, 2000, ECF No. 9. He also argued that his trial counsel was ineffective for having

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[2] Petitioner's application for post-conviction relief was fifty pages in length, with the first twenty-five pages consisting of procedural history. The ineffective assistance of counsel claim on which Judge Burgess held a hearing addressed trial counsel's failure to investigate and prepare for trial and the failure to object and present evidence at trial. The state post-conviction petition did not address trial counsel's failure to investigate and present evidence of jury misconduct in a motion for new trial, nor did it discuss the conflict of interest under which trial counsel labored.

failed to timely file a motion to quash the tainted grand jury indictment, and that counsel's error in that regard provided "cause and prejudice" for the resulting procedural default.

The United States District Court for the Western District of Louisiana conducted a hearing on the merits of the *Campbell* claim and found that the "grand jury foreman selection procedure used by DeSoto Parish ... violated Petitioner's constitutional guarantees and would *entitle him to habeas relief from his conviction* ..." Order on Report and Recommendations 2, June 27, 2002, ECF No. 50. The district court ultimately denied relief, however, because the claim was "subject to a procedural bar": trial counsel's failure to properly preserve the claim for subsequent review with a timely-filed motion to quash the indictment. *Id.* The district court further found that trial counsel's error did not establish "cause and prejudice" under *Murray v. Carrier*, 477 U.S. 488 (1986), so as to excuse the resulting default. *Id.* at 12-15. The federal district court denied the writ of habeas corpus on August 9, 2002, and denied Petitioner's request for a certificate of appealability ("COA") on the same date. *Sepulvado v. Cain,* No. 00-596 (W.D. La. Aug. 9, 2002).

On January 13, 2003, the United States Court of Appeals for the Fifth Circuit denied Mr. Sepulvado's request for a COA on all of his claims. *Sepulvado v. Cain*, 58 Fed. Appx. 595 (5th Cir. 2003). Mr. Sepulvado filed a petition for rehearing *en banc*, which was denied by the Fifth Circuit on February 18, 2003. *Id.* Following the Fifth Circuit's ruling, Mr. Sepulvado filed a petition for a writ of *certiorari* in this Court, which denied review on October 6, 2003. *Sepulvado v. Cain*, 540 U.S. 842; 124 S.Ct. 110 (2003).

On June 30, 2008, Mr. Sepulvado filed an unopposed motion to stay proceedings in state district court. The state district court granted the motion on July 1, 2008. On November 12,

2012, the district court ordered a December 12, 2012 hearing to show cause why the stay of proceedings should not be lifted. At the December 12, 2012 hearing, the state district court vacated the stay of proceedings and set an execution date for February 13, 2013.

Mr. Sepulvado filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. §2241 in the United States District Court for the Western District of Louisiana on January 15, 2013. The §2241 petition requested consideration of two new constitutional claims in light of this Court's recent decision in *Martinez v. Ryan*, 132 S. Ct. 1309 (2012). While a claim of ineffective assistance of counsel was raised in Petitioner's first-in-time petition for a writ of habeas corpus, the petition did not address trial counsel's failure to timely raise a claim of jury misconduct or trial counsel's conflict of interest. As to the first of these claims, Petitioner's trial counsel performed no investigation into jury misconduct despite the fact that a claim in Petitioner's Motion for New Trial was based on a prospective juror's statement, (who did not serve on Petitioner's jury), that "the defendant could get out and come back and kill us." R. 1942. Had trial counsel conducted any follow-up investigation regarding this prospective juror's statement, they would have discovered that during penalty phase deliberations the jury relied on Biblical passages supporting the death penalty and did not understand that a life sentence in Louisiana meant life without the possibility of parole.

As to Petitioner's *Campbell* claim, there was a valid basis for excusing the procedural bar that was never brought to any court's attention: Petitioner's trial counsel, Charles Brown, labored under a conflict of interest that precluded him from raising the meritorious claim of grand jury discrimination at the appropriate juncture. Prior to his representation of Petitioner, Mr. Brown had served as a judge on the 11th Judicial District Court (which encompassed DeSoto Parish),

where, as part of his duties, he selected some of the forepersons who were the very subject of the claim raised on post-conviction review and in the initial habeas petition. Put simply, trial counsel Brown found himself trapped in the position of having to choose between two directly competing interests concerning his representation of Petitioner: (1) advocating on Mr. Sepulvado's behalf by filing a motion to quash the racially tainted indictment, or (2) protecting his professional reputation by concealing his own role in that discriminatory selection process.

The federal district court issued a *Transfer Order* on January 16, 2013, deeming Mr. Sepulvado's §2241 petition a successor petition and transferring the case to the United States Court of Appeals for the Fifth Circuit due to lack of jurisdiction. On January 22, 2013, Mr. Sepulvado filed his *Brief of Petitioner-Appellant in Support of Application for a Certificate of Appealability and Stay of Execution.* The State of Louisiana filed an *Opposition to Application for Certificate of Appealability and Stay of Execution* on January 31, 2013.

The Fifth Circuit affirmed the federal district court's order of transfer, dismissed Mr. Sepulvado's habeas petition, request for a certificate of appealability and amended motion to appoint counsel, and denied his motion for a stay of execution on February 7, 2013.[3] In its order denying relief, the Fifth Circuit held that "current circuit precedent dictates that *Martinez* does not apply to Louisiana prisoners at all" and found that "[b]ecause *Martinez* is of no moment here, Sepulvado's second-in-time habeas petition is an abuse of the writ and is therefore successive."[4]

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[3] Mr. Sepulvado was granted a stay of execution in the United States District Court for the Middle District of Louisiana in unrelated civil proceedings on February 7, 2013. *Hoffman et al. v. Jindal et al.*, 2013 U.S. Dist. LEXIS 16747 (M.D.La. Feb. 7, 2013).

[4] The Fifth Circuit addressed Petitioner's claims in turn. As to the jury misconduct claim, the panel found, without explanation, that because the claim was not raised in Petitioner's state post-conviction petition "though it could have been raised then, ...any attempt to raise it now [is] successive." Appendix B at 7. As to the conflict of interest

Appendix B at 9. The Fifth Circuit dismissed Petitioner's request for a certificate of appealability due to the lack of prior consideration by the district court. Appendix B at 11. This Petition follows.

REASONS FOR GRANTING THE PETITION

I. THERE ARE COMPELLING REASONS TO GRANT CERTIORARI ON QUESTION 1 AND TO CLARIFY THE APPLICATION OF *MARTINEZ V. RYAN.*

This Court should grant certiorari on Question 1 to consider whether ineffective assistance of post-conviction counsel during the initial stage of state post-conviction review may excuse a procedural default of ineffective assistance of counsel trial counsel claims where state law channels the vast majority of ineffective assistance of counsel claims into state post-conviction review but does not absolutely bar all such claims from being raised on direct appeal.

In *Martinez v. Ryan,* 132 S. Ct. 1309, 1315 (2012), this Court recognized an exception to the procedural default doctrine under which the ineffectiveness of counsel in an "initial-review collateral proceeding" may excuse a prisoner's procedural default in state court of a claim of ineffective assistance trial counsel. The court below held that reasonable jurists could not debate whether the *Martinez* exception should extend to Mr. Sepulvado's claims of ineffective assistance of counsel at trial and juror misconduct claims.

For the reasons that follow, this Court should grant plenary review of the Fifth Circuit's decision to deny a COA on these points. A substantially similar question is currently pending before this Court on its plenary docket in *Trevino v. Thaler,* 133 S. Ct. 524 (2012). Should this Court find that Mr. Sepulvado's case is not appropriate for plenary review, it should nevertheless

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claim, the panel assumed without deciding that *Martinez* applies to conflict of interest claims and that the claim was procedurally defaulted, but then held that *Martinez* is not available in Louisiana. Appendix B at 8.

hold Mr. Sepulvado's case for a possible grant, vacate and remand (GVR) in light of any favorable decision in *Trevino.*

A. This Court Should Issue a GVR as the Applicability of *Martinez* to the State of Louisiana is "An Open Question."

The Amicus Brief filed on behalf of 25 States in support of the Respondent in *Trevino v. Thaler* concedes that "[w]hether *Martinez* applies to the . . . 43 States [that do not bar claims of ineffective assistance of counsel claims on direct appeal] is an open question." *See* Brief of *Amicus Curiae* Utah and 24 Other States, *Trevino v. Thaler,* No. 11-10189 at 7. The Brief then lists Louisiana among the 43 states as to which the applicability of *Martinez* is "an open question." To say that a legal issue is "an open question" is equivalent to saying that the matter is debatable amongst reasonable jurists and is to effectively admit that a COA should have been issued on the point.

B. There is Conflict Among the Courts of Appeals As to the Applicability *of Martinez*

There is extensive debate among the courts of appeals, and their constituent district courts, about the applicability of *Martinez* in states with different procedural rules than those the Court addressed in *Martinez.* The recent intra-circuit conflict in the Fifth Circuit demonstrates the nature of the dispute. The majority in *Ibarra v. Thaler,* 687 F.3d 222 (5th Cir. 2012), held that *Martinez* is not applicable in Texas because the state does not require defendants to bring claims for ineffective assistance of counsel in initial review collateral proceedings. But, in dissent, Judge Graves argued that there is no basis for drawing a distinction in the applicability of *Martinez* between states that require ineffective assistance of counsel claims to be raised collaterally and states that strongly prefer such claims to be raised collaterally. *Id.* at 229 (Graves, J., concurring in part and dissenting in part). Showing further disagreement with the

Ibarra majority's interpretation of *Martinez,* a different Fifth Circuit panel granted a COA under *Martinez* in a case on appeal from Louisiana, which has procedures similar to those of Florida and Texas. See *Lindsey v. Cain,* 476 F. App'x 777 (5th Cir. 2012). Similar conflicts exist among other courts of appeals. The Third Circuit has assumed *Martinez* applies to cases from Pennsylvania, where claims for ineffective assistance of counsel may be brought on direct appeal in limited circumstances. *See Jones v. Penn. Bd. of Prob. & Parole,* No. 10-2944, 2012 WL 3024969, at *5 (3d Cir. July 25, 2012); *see also Commonwealth v. Bomar,* 826 A.2d 831, 855 (Pa. 2003) (finding an exception to the general rule that claims of ineffectiveness of counsel must be brought collaterally). In contrast, both the Eight Circuit, in an Arkansas case, and the Tenth Circuit, in an Oklahoma case, have held that *Martinez* does not apply to cases arising from states where claims for ineffective assistance of counsel can be brought on direct appeal. *Dansby v. Norris,* 682 F.3d 711, 729 (8th Cir. 2012); *Banks v. Workman,* 692 F.3d 1133, 1148 (10th Cir. 2012).

In addition, a number of court of appeals judges have dissented from their court's narrow reading of *Martinez. See, e.g., Ibarra v. Thaler,* 687 F.3d 222, 227-28 (5th Cir. 2012) (Graves, J., dissenting); *Balentine v. Thaler,* 692 F.3d 352, 353-55 (5th Cir. 2012) (Dennis, J., dissenting from the denial of rehearing en banc); *id.* at 355-57 (Higginson, J., dissenting from the denial of rehearing en banc); *Haynes v. Thaler,* 2012 WL 4858204, *1-*10 (5th Cir. Oct. 15, 2012) (Dennis, J., dissenting) (unpublished); *Horonzy v. Smith,* 2012 WL 4017927 (D. Idaho 2012) (unpublished); *Williams v. Alabama,* 2012 WL 1339905] at *60-*63 (N.D. Ala. Apr. 12, 2012).

Given the existence of this debate among so many courts and respected jurists as to the applicability of *Martinez* to circumstances like those presented in Sepulvado's case, the standard

for granting the COA was easily satisfied here. This Court has made clear that a petitioner need only "show that reasonable jurists could debate" whether a petition should be granted to obtain a certificate of appealability, and that obtaining a COA "does not require a showing that the appeal will succeed." *Miller-El,* 537 U.S. at 336-37. This Court has emphasized:

> This threshold inquiry does not require full consideration of the factual or legal bases adduced in support of the claims. In fact, the statute forbids it. When a court of appeals sidesteps this process by first deciding the merits of an appeal, and then justifying its denial of a COA based on its adjudication or the actual merits, it is in essence deciding an appeal without jurisdiction.

Miller-El, 537 U.S. at 336-37.

Although the difference of opinion among so many courts and jurists establishes that the applicability of *Martinez* is "debatable," the better view is that *Martinez* should apply to Mr. Sepulvado's case, and to other cases from Louisiana. *Martinez* created an equitable rule designed to account for the fact that ineffective counsel at an initial-review proceeding renders the proceeding insufficient to ensure that substantial claims are properly raised. Claims for ineffective assistance at trial require the consideration of facts outside the record, which can only be determined through "investigative work and an understanding of trial strategy." *Martinez,* 132 S. Ct. at 1317. Furthermore, at an initial-review collateral proceeding, the defendant does not have the benefit of a court opinion or prior work of an attorney addressing his claim. *Id.*

The scope of *Martinez* is presently before the Court not only in *Trevino* but also in petition-stage cases including but not limited to the following, all of which are presumably being held for a decision in *Trevino: Washington v. Thaler,* No. 11-10870, *Hill v. Walsh,* No. 11-10983, *Smith v. Colson,* No. 12-390, *Ryan v. Runningeagle,* No. 12-894, *Balentine v. Thaler,* No. 12-5906, *Ayestas v. Thaler,* No. 12-6656, *Haynes v. Thaler,* No. 12-6760, and *Brown v. Thaler,* No. 12-7258. This case, which presents the contested question of whether *Martinez* applies to

states that do not absolutely bar all species of ineffective assistance of trial counsel claims from being presented on direct appeal is an ideal vehicle for that clarification.

C. The Decision Below Conflicts With the Equitable Principles Articulated in *Martinez v. Ryan.*

Third, the decision below conflicts with *Martinez.* This Court in *Martinez* held that, where collateral proceedings, "provide the first occasion to raise a claim of ineffective assistance at trial," the ineffective assistance of counsel at such "initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance of counsel." In death-penalty cases, the State of Louisiana s has chosen systematically to channel claims of ineffective assistance of trial counsel to state post-conviction proceedings. That channeling renders state post-conviction proceedings "the first occasion" for a defendant to develop the record necessary to establish an ineffective-assistance-of-trial-counsel claim. Because Louisiana's system presents the same considerations of comity and equity that informed this Court's decision in *Martinez,* the rule of that case should apply equally in Louisiana. *See, e.g., Ibarra,* 687 F.3d at 229 (Graves, J., dissenting) ("[T]here 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."); *Haynes,* 2012 WL 4858204, *10 (Dennis, J., dissenting) (asserting that *Martinez* must apply where state post-conviction represents "the first realistic opportunity a prisoner has to raise a claim of ineffective assistance of trial counsel"); *Balentine,* 692 F.3d at 354 (Dennis, J., dissenting) (same); Eve Brensike Primus, *Effective Trial Counsel after Martinez v. Ryan: Focusing on the Adequacy of State Procedures* 7 n.33 (U. of Michigan Pub. Law

Research Paper No. 311, 2013), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2203391; Nancy J. King, *Preview: A Preliminary Survey of Issues Raised by Martinez v. Ryan* 4-5 (Vanderbilt Pub. Law Research Paper No. 12-34, 2012-13), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2147164##.

The reasoning of *Martinez* applies with full force in Louisiana cases. The procedural default doctrine rests on "respect for state procedural rules," *Coleman v. Thompson,* 501 U.S. 722, 747 (1991), including those that "channel[], to the extent possible, the resolution of various types of questions to the stage of the judicial process at which they can be resolved most fairly and efficiently," *Murray v. Carrier,* 477 U.S. 478, 491 (1986) (internal quotation marks omitted). Here, as in Arizona, Louisiana has made a "deliberate[] cho[ice]" to channel death-sentenced inmates' ineffective-assistance-of-trial-counsel claims "outside of the direct-appeal process" and into collateral proceedings. *Martinez,* 132 S. Ct. at 1318. This Court should apply its procedural bar rules--and the exception recognized by *Martinez*--in a manner that reinforces that choice. *See Massaro v. United States,* 538 U.S. 500, 504 (2003). In Louisiana, claims challenging the conduct of trial counsel are "properly raised in an application for post-conviction relief," unless the trial record discloses sufficient evidence to resolve the question on appeal. *State v. Cooks*, 720 So.2d 637, 642 (La. 1998) (citing *State v. Burkhalter*, 428 So.2d 449 (La. 1983)). Holding *Martinez* inapplicable in Louisiana cases would encourage Louisiana prisoners under a sentence of death to do precisely what the Louisiana courts and legislature have said they should not do: direct their claims of ineffective assistance of counsel to appellate courts on direct review.

In addition, Louisiana's channeling of ineffective-assistance-of-trial counsel claims to collateral review implicates the same equitable considerations as the Arizona system at issue in *Martinez. See* 132 S. Ct. at 1317-18. Louisiana has designed a system, like Arizona, where in the vast majority of death-penalty cases the state post-conviction court is the first court to examine the merits of an ineffective- assistance-of-trial-counsel claim--particularly where, as in Mr. Sepulvado's case, the claims requires extensive extra-record factual development. If state post-conviction counsel's failure to raise such claims results in the claim being procedurally defaulted during the federal habeas proceeding, no court will ever review the claims, and substantial defects in the very fairness of a prisoner's trial may go unredressed.". The court of appeals erred by refusing to apply *Martinez* to Mr. Sepulvado's claims of ineffective assistance of trial counsel claims. At a minimum, the Fifth Circuit was required to grant a COA on the point. This Court should grant certiorari to correct the Fifth Circuit's error in refusing to grant a COA. This Court need not address whether Mr. Sepulvado's underlying claims of ineffective assistance of counsel and jury misconduct are substantial, as that question can be addressed by the lower court on remand after a COA is granted. *See Martinez*, 132 S. Ct. at 1321 ("[T]he Court of Appeals did not determine whether Martinez's attorney in his first collateral proceeding was ineffective or whether his claim of ineffective assistance of trial counsel is substantial. These issues remain open for a decision on remand

D. At a Minimum, This Case Should Be Held for a Decision in *Trevino v. Thaler.*

Assuming that Mr. Sepulvado's case does not merit placement on this Court's plenary docket, it should be held for a decision in *Trevino v. Thaler.* The State of Louisiana has effectively conceded that a decision in favor of Trevino would change the outcome below. *See* Brief of *Amicus Curiae* Utah and 24 Other States, *Trevino v. Thaler,* No. 11-10189 at 8-9 & n.3-

n.5 (Jan. 2013) (listing Louisiana as among the States with procedural regimes identical to Texas's); *id.* at 11-12 (asserting that "a decision holding that *Martinez* applies to Texas capital cases will mean that *Martinez* applies to many, if not most, of the other 43 States" that do not absolutely bar ineffective assistance claims from being raised on direct appeal). Under the circumstances, it should be estopped from opposing a hold for *Trevino*. Following a decision in favor of Trevino, this Court should issue a GVR requiring the Fifth Circuit to reconsider the propriety of a COA in light of *Trevino*.

II. THERE IS CONFLICT WITHIN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT AS TO THE APPLICABILITY OF *MARTINEZ V. RYAN*, 132 S. CT. 1309 (2012) TO LOUISIANA PRISONERS.

A. Louisiana Channels Claims of Ineffective Assistance of Trial Counsel to Collateral Review

The United States Court of Appeals for the Fifth Circuit has, through at least two inconsistent opinions, generated confusion as to when a Louisiana prisoner may assert ineffective assistance of state habeas counsel under *Martinez*. Before the Fifth Circuit issued its opinion and order in the instant case, it held, in *Ibarra v. Thaler*, 687 F.3d 222, 227 (5th Cir. 2012), that *Martinez* is not available to Texas prisoners, as defendants are not required to bring ineffective assistance of counsel claims in initial review collateral proceedings. Several months before the *Ibarra* decision, a unanimous panel of the Fifth Circuit held, in *Lindsey v. Cain*, 476 F. App'x 777 (5th Cir. 2012), that *Martinez* does apply to prisoners in Louisiana. The panel in *Lindsey* remanded in light of *Martinez* and explained that:

> [w]hen 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...."

Lindsey v. Cain, 476 F. App'x 777, 778 (5th Cir. 2012).

Now, in Mr. Sepulvado's case, the Fifth Circuit has held that *Martinez* "does not apply to Louisiana prisoners at all." Appendix B at 9. The Fifth Circuit's decisions in *Lindsey* and Petitioner's case cannot be squared.

While the Fifth Circuit panel in *Ibarra* held that Texas litigants could not avail themselves of the equitable exception in *Martinez*, Judge Graves, dissenting, quoted *Lindsey*, and, noting the similarities between the Texas and Louisiana[5] systems, argued that *Martinez* should be available to prisoners in Texas.[6] *Ibarra* 687 F.3d at 230 (Graves, J., concurring in part and dissenting in part) ("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"). The Fifth Circuit panel opinion in Petitioner's case cites to Judge Graves' separate opinion for the proposition that *Ibarra* mandates that *Martinez* does ***not*** apply to Louisiana. In fact, the quoted portion of Graves' opinion stands for just the opposite: that,

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[5] In Louisiana, claims challenging the conduct of trial counsel are "properly raised in an application for post-conviction relief," unless the trial record discloses sufficient evidence to resolve the question on appeal. *State v. Cooks*, 720 So.2d 637, 642 (La. 1998) (citing *State v. Burkhalter*, 428 So.2d 449 (La. 1983))

[6] As Graves' separate opinion in *Ibarra* points out, the *Martinez* Court did not limit the reach of its opinion to ***state-mandated*** initial-review collateral proceedings:

> 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." 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.

Ibarra, 687 F.3d 222, 228 (5th Cir. 2012) (Graves, J. concurring in part and dissenting in part).

consistent with the Fifth Circuit's decision in *Lindsey*, *Martinez* should apply to Texas as well as Louisiana.[7] Appendix B at 8-9; *see also Ibarra*, 687 F.3d at 230.

This Court granted *certiorari* in *Trevino v. Thaler*, 133 S. Ct. 524 (2012), to answer a question substantially similar to the one Petitioner now presents to this Court: namely, whether the equitable exception to *Coleman v. Thompson*, 501 U.S. 722, 111 S. Ct. 2546, 115 L.Ed. 2d 640 (1991), carved out by this Court in *Martinez* is available where a state effectively precludes a criminal defendant from raising a claim of ineffective assistance of counsel on direct appeal.[8]

The Supreme Court of Louisiana has held that claims challenging the conduct of trial counsel are "properly raised in an application for post-conviction relief," unless the trial record discloses sufficient evidence to resolve the question on appeal. *State v. Cooks*, 720 So.2d 637, 642 (La. 1998) (*citing State v. Burkhalter*, 428 So.2d 449 (La. 1983)). Thus, even if this Court decides *Trevino* before Petitioner's case is considered, a grant of *certiorari* and a remand to the Fifth Circuit would still be proper to resolve the intra-circuit split regarding the applicability of *Martinez* to Louisiana. Accordingly, Petitioner submits that a grant of *certiorari* is important to explain whether the *Martinez* equitable exception is available to Louisiana litigants.

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[7] The Fifth Circuit in Petitioner's case goes on to further twist its own words, concluding that *Ibarra* is an "'insurmountable hurdle'" for Mr. Sepulvado, "because, as Judge Graves observed, 'Louisiana, like Texas, allows a prisoner to raise ineffective assistance of counsel on direct appeal....'" *Id.* (internal citations omitted). The "insurmountable hurdle" language is found in *Adams v. Thaler*, 679 F.3d 312, 321-22 (5th Cir. 2012), while Judge Graves qualified observation is that Louisiana allows IAC claims to be raised 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.***'" *Ibarra*, 687 F.33d at 230 (Graves, J., concurring in part and dissenting in part) (quoting *State v. Brashears*, 811 So.2d 985 (La. App. 5 Cir. (2002)) (emphasis added).

[8] This Court has held a number of cases pending a decision in *Trevino v. Thaler*, 133 S. Ct. 524 (2012), including *Balentine v. Thaler*, No. 12-5906; *Ayestas v. Thaler*, No. 12-6656; *Haynes v. Thaler*, No. 12-6760; *Newbury v. Thaler*, No. 12-7657; *Washington v. Thaler*, No. 11-10870; *Gates v. Thaler*, No. 12-7612

B. Given the Opportunity, Mr. Sepulvado Can Establish Cause to Excuse His Procedural Default under *Martinez* Because his Claims are "Substantial"

The equitable concerns expressed in *Martinez* are abundant here, as post-conviction counsel's failure to investigate and present the jury misconduct and conflict-of-interest claims in state court denied Petitioner the opportunity to both present substantial[9] constitutional claims[10] challenging the conduct of trial counsel and offer a sufficient basis for excusing the procedural default.

Had collateral counsel investigated the issue of jury misconduct, he would have discovered that the jury that sentenced Mr. Sepulvado to death: (1) demonstrated a fundamental misunderstanding about the possibility that Mr. Sepulvado could be paroled if sentenced to life in prison; and (2) considered extraneous prejudicial evidence during deliberations (Bible scriptures supporting the death penalty). Because the death penalty can be imposed in Louisiana only upon a unanimous death verdict by the jury, merely showing that at least one juror might not have voted for death absent the misconduct satisfies the prejudice prong of the *Strickland* standard. *United States v. Tucker*, 404 U.S. 443, 448 (1972) (holding that a sentence based at least in part on an impermissible factor violates due process and stating that "the real question here is . . . whether the sentence . . . might have been different if the sentencing court[had not relied on improper or erroneous information]".). Petitioner was prejudiced by post-conviction counsels' failure to raise juror misconduct in the initial-review collateral proceedings as his death sentence rested on impermissible and prejudicial extraneous evidence.

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[9] *See Martinez*, 132 S. Ct. at 1318 ("To overcome the default, a prisoner must also demonstrate 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.")

[10] These omissions constitute deficient performance under *Strickland v. Washington*, 466 U.S. 668 (1984).

Post-conviction counsel also failed to investigate the issue of trial counsel's conflict of interest. The district court was therefore wholly unaware of trial counsel Brown's conflict when it considered whether Petitioner could demonstrate "cause and prejudice" regarding the procedurally defaulted *Campbell* claim. Collateral counsel's error prejudiced Petitioner, depriving him of the opportunity to excuse the procedural bar and to prevail on the merits of the underlying *Campbell* claim.[11]

Mr. Sepulvado's claims are substantial for the same reasons that post-conviction counsel's performance constitutes ineffective assistance of counsel under *Strickland*. These claims would have been meritorious if pursued in post-conviction and, in light of *Martinez*, should now be reviewed.

III. THERE IS CONFLICT AMONG THE UNITED STATES COURTS OF APPEALS AS TO A CIRCUIT COURT'S POWER TO DECIDE AN APPLICATION FOR A CERTIFICATE OF APPEALABILITY WHERE THE DISTRICT COURT HAS NOT PREVIOUSLY CONSIDERED THE APPLICATION.

A. The Split in the Circuit Courts

The United States Court of Appeals for the Fifth Circuit maintains that a circuit court is without jurisdiction to consider an application for a certificate of appealability ("COA") without a previous ruling by the district court. *Whitehead v. Johnson*, 157 F.3d 384, 388 (5th Cir. 1998) (holding that "the lack of a ruling on a COA in the district court causes this court to be without jurisdiction to consider the appeal"). That position is at odds with other circuits that have decided the same issue, and a grant of *certiorari* is necessary to resolve this conflict.

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[11] After conducting an evidentiary hearing, the federal district court held that if not for a procedural bar, Petitioner would be entitled to habeas relief and stated that "Petitioner has, therefore, undoubtedly established a prima facie case of racial discrimination in the selection process of grand jury foremen in DeSoto Parish during the relevant time." Order on Report and Recommendations 2, June 27, 2002, ECF No. 50.

In order for a habeas petitioner to appeal a district court's final order, a certificate of appealability ("COA") is required. 28 U.S.C. § 2253(c)(1). A COA may be issued by a district or circuit court only if the petitioner has made a "substantial showing of the denial of a constitutional right" and has indicated the specific issue that satisfies that showing. 28 U.S.C. § 2253(c)(2); 28 U.S.C. § 2253(c)(3). "A petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327, 123 S. Ct. 1029, 154 L. Ed.2d 931 (2003) (citing *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S. Ct. 1595, 146 L. Ed.2d 542 (2000)).

The passage of the Antiterrorism and Effective Death Penalty Act ("AEDPA"), in 1996, created a tension between the post-AEDPA version of 28 U.S.C. § 2253(c)(1) and the amended language in Rule 22(b)(1) of the Federal Rules of Appellate Procedure—now codified in Rule 11(a) of the Rules Governing Section 2254 Cases in the United States District Courts[12]—as to whether a district court judge could consider an application for a COA.[13] The post-AEDPA language of 28 U.S.C. § 2253(c)(1) reads that "[u]nless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals....", which arguably strips the district court of the power to issue a COA,[14] while Rule 22 has been

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[12] As of 2009, the relevant language from Federal Rule of Appellate Procedure 22 was moved to Rule 11(a) of the Rules Governing Section 2254 Cases in the United States District Courts. *See* Fed. R. App. P. 22 advisory committee notes to 2009 amendments. To avoid confusion, this petition will refer to Rule 22 throughout.

[13] *See* Horwitz, J., *Certifiable: Certificates of Appealability, Habeas Corpus, and the Perils of Self-Judging*, 17 ROGER WILLIAMS U. L. REV. 695, 704-705 (2012).

[14] The predecessor to a COA, a certificate of probable cause ("CPC"), could be issued by a district court or a circuit court. *See Nowakowski v. Maroney*, 386 U.S. 542, 543 (1967).

interpreted to require that a district court judge rule on an application for a COA before its consideration by a circuit court.[15]

The circuit courts have resolved this tension in favor of a district court's power to issue COAs, and in fact have embraced the Rule 22 requirement that a district court issue or deny a COA application first,[16] but an open question remains as to whether an exception can be made to the prior consideration requirement. *See Gonzales v. Thaler*, 132 S.Ct. 641, 649 n.5, 181 L. Ed.2d 619 (2012). The majority of circuit courts that have considered the issue recognize a limited exception.[17]

The Fifth Circuit recognizes no such exception however and has held that it is without jurisdiction to consider an appeal where the district court has not first ruled on a COA. *Whitehead v. Johnson*, 157 F.3d at 388; *Sonnier v. Johnson*, 161 F.3d 941, 946 (5th Cir. 1998); *United States v. Youngblood*, 116 F.3d 1113, 1115 (5th Cir. 1997). In its most recent opinion considering the issue, the Fifth Circuit explicitly held that former Rule 22 was a jurisdictional

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[15] Before the 2009 amendment, Rule 22(b)(1) read, in relevant part: "If an applicant files a notice of appeal, the district judge who rendered the judgment must either issue a certificate of appealability or state why a certificate should not issue." The relevant language was imported to Rule 11(a) of the Rules Governing Section 2254 Cases in the United States District Courts, which now reads: "The district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant."

[16] *See, e.g., Grant-Chase v. Comm'r, N.H. Dep't of Corrs.*, 145 F.3d 431, 435 (1st Cir. 1998); *Lozada v. United States*, 107 F.3d 1011, 1016 (2d Cir. 1997); *United States v. Eyer*, 113 F.3d 470 (3d Cir. 1997); *Else v. Johnson*, 104 F.3d 82, 83 (5th Cir. 1997) (per curiam); *Lyons v. Ohio Adult Parole Auth.*, 105 F.3d 1063 (6th Cir. 1997); *Tiedeman v. Benson*, 122 F.3d 518, 521 (8th Cir. 1997); *United States v. Asrar*, 108 F.3d 217, 218 (9th Cir. 1997) (per curiam); *Houchin v. Zavaras*, 107 F.3d 1465 (10th Cir. 1997); *Hunter v. United States*, 101 F.3d 1565 (11th Cir. 1996) (en banc); *United States v. Mitchell*, 216 F.3d 1126, 1129-30 (D.C. Cir. 2000); *cf. Williams v. United States*, 150 F.3d 639, 640 (7th Cir. 1998) (acknowledging that while district courts have the power to issue COAs "nothing in the statute makes initial resort to the district court essential.").

[17] *See, e.g., United States v. Mitchell*, 216 F.3d 1126 (D.C. Cir. 2000); *Williams v. United States*, 150 F.3d 639 (7th Cir. 1998); *Sassounian v. Roe*, 230 F.3d 1097 (9th Cir. 2000).

rule that cannot be suspended under Fed. R. App. P. 2.[18] *Cardenas v. Thaler*, 651 F.3d 442, 446-447 (5th Cir. 2011). The Fifth Circuit's rigid reading of Rule 22[19] as creating a jurisdictional requirement causes unnecessary delay, contradicts other circuit court authority, and is inapposite to this Court's recognition that "death is a different kind of punishment from any other."[20] *Gardner v. Florida,* 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977) (*citing Gregg v. Georgia,* 428 U.S. 153, 181-88, 96 S.Ct. 2909, 2928-32, 49 L.Ed.2d 859 (1976)).

The United States Court of Appeals for the District of Columbia, the Seventh and Ninth Circuits all recognize an exception to the prior consideration requirement of Rule 22 and have held that in circumstances where time is short—for instance, in capital litigation—a circuit court

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[18] Rule 2 allows a court of appeals to "expedite its decision or for other good cause[] suspend any provision of [the Rules of Appellate Procedure] in a particular case and order proceedings as it directs, except as otherwise provided in Rule 26(b)."

[19] While no circuit court has considered the impact, if any, of the 2009 amendment to Rule 22 and the relevant language's inclusion in Rule 11(a) of the Rules Governing Section 2254 Cases in the United States District Courts, Petitioner submits that a narrow exception to the prior consideration requirement in cases where time is limited would still be appropriate.

[20] Treating Rule 22 as a jurisdictional requirement, as the Fifth Circuit does, impedes the underlying purpose of AEDPA "to eliminate delays in the federal habeas review process." *Holland v. Florida*, 560 U.S. _____, _____, 130 S. Ct. 2549, 177 L. Ed.2d 130 (2010); *see also Cardenas v. Thaler*, 651 F.3d 442, 452 (5th Cir. 2011) (Garza, Circuit Judge, dissenting) ("Remanding the case merely for a COA determination now would needlessly contribute to an already lengthy delay.").

The dissent in *Cardenas* disputes the majority's conclusion that Rule 22 creates an independent jurisdictional bar:

> The requirement of a prior district court COA determination is not a feature of § 2253(c), but Rule 22. Moreover, we do not need to assume that the prior consideration requirement of Rule 22 is itself jurisdictional to conclude that it *causes* us to lack jurisdiction. A non-jurisdictional rule may cause us to lack jurisdiction by preventing us from remedying a *preexisting* jurisdictional defect. Whenever the district court has failed to consider a COA, it has, by definition, also failed to grant a COA. Therefore, when the case comes to us, we are jurisdictionally barred from considering it on the merits. That bar could be lifted by the issuance of a COA—but Rule 22 prevents us from doing so because the district court has not ruled first. Thus, under Rule 22, the lack of a district court determination does indeed cause us to be without jurisdiction. But that proposition does not require us to assume that Rule 22 creates an independent jurisdictional bar.

Cardenas, 651 F.3d at 450-51 (Garza, Circuit Judge, dissenting).

has the power to suspend the Federal Rules of Appellate Procedure[21] (or its analogous circuit rules) and issue or deny a COA without the district court having done so first. *See United States v. Mitchell*, 216 F.3d 1126, 1130 (D.C. Cir. 2000) (citing the "late stage in the proceedings" as grounds for suspending the prior consideration requirement of Rule 22); *Williams v. United States*, 150 F.3d 639, 640-41 (7th Cir. 1998); *Sassounian v. Roe*, 230 F.3d 1097, 1101 n.1 (9th Cir. 2000). "[A] court of appeals is entitled to make exceptions to its norms....Bypassing the district judge may be essential when time is short (as in death penalty litigation)...." *Williams*, 150 F.3d at 640-41. And the Fifth Circuit itself has conceded that Rule 2 may be employed in limited instances where "time is truly of the essence" or "important public policy issues are involved." *Groendyke Transp., Inc. v. Davis*, 406 F.2d 1158, 1161-62 (5th Cir. 1969).

Allowing for a narrow case-by-case exception to the former Rule 22 (current Rule 11(a)) requirement is the better position and is supported by a recent decision of this Court. In *Gonzalez v. Thaler*, 132 S. Ct. 641, 181 L. Ed.2d 619 (2012)[22], this Court noted that "[a] rule is jurisdictional '[i]f the Legislature clearly states that a threshold limitation on a statute's scope shall count as jurisdictional'" but that if "'Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional.'" *Gonzalez*, 132 S. Ct. at 648 (quoting *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 515-16, 126 S. Ct. 1235, 163 L. Ed.2d 1097 (2006)).

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[21] Federal Rule of Appellate Procedure 2 gives the circuit courts the authority to "suspend any provision of" the Rules of Appellate Procedure. Fed. R. App. P. 2; *see also U.S. v. Mitchell*, 216 F.3d at 1130.

[22] Considering the question of whether §2253(c)(3) is a jurisdictional requirement, the *Gonzalez* Court held that "the only 'clear' jurisdictional language in § 2253(c) appears in § 2253(c)(1)." *Gonzalez* at 649.

Further, this Court has "pressed a stricter distinction between truly jurisdictional rules, which govern 'a court's adjudicatory authority,' and nonjurisdictional 'claim processing rules,' which do not." *Gonzalez*, 132 S. Ct. at 648 (quoting *Kontrick v. Ryan*, 540 U.S. 442, 454-455, 124 S. Ct. 906, 157 L. Ed.2d 867 (2004)). Former Rule 22 and current Rule 11(a) serve to complement—not overpower— Congress' directive in § 2253(c)(1), as circuit courts have recognized. *See United States v. Mitchell*, 216 F.3d at 1130 (holding that "any defect in procedure occasioned by the appellant's failure to make application in this case is not jurisdictional, given the language of 28 U.S.C. § 2253 (c)(1) and Rule 22(b)(2)."). "It would seem somewhat counterintuitive to render a panel of court of appeals judges powerless to act on appeals based on COAs that Congress specifically empowered one court of appeals judge to grant." *Gonzalez* at 650.

Accordingly, Petitioner submits that a grant of *certiorari* is important to resolve the conflict among the circuit courts as to whether, under limited circumstances, a circuit court may consider a COA application without prior consideration by the district court.

B. The Court of Appeals Erred in Dismissing Mr. Sepulvado's Request for a COA Due to Lack of Prior Consideration by the District Court

In the instant case, Petitioner did not request a COA from the district court because it had already found that it had no jurisdiction, and because Petitioner's execution was imminent. *See* Appendix A. The district court dismissed Petitioner's claims for lack of jurisdiction, because it held that Mr. Sepulvado's §2241 petition was successive. The district court did not rule on the merits of Petitioner's constitutional claims. In *Slack* v. *McDaniel*, this Court made it clear that when a district court dismisses a Petitioner's claims on procedural grounds, a COA should issue from the circuit court when "jurists of reason would find it debatable whether the petition states a

valid claim of the denial of a constitutional right and the jurists of reason would find it debatable whether the district court was correct in its procedural ruling." 529 US 473, 478 (2000). Moreover, in death penalty cases, the circuit court must resolve any doubts as to whether a COA should issue in favor of the petitioner. *Moore v. Quarterman,* 534 F.3d 454, 460 (5th Cir. 2008).

Because post-conviction counsel provided ineffective assistance sufficient to excuse Mr. Sepulvado's procedural defaults under *Martinez* a COA should have been granted to review Mr. Sepulvado's claims of jury misconduct and conflict of interest.[23]

CONCLUSION AND PRAYER FOR RELIEF

For the foregoing reasons, the Court should grant Petitioner's petition and issue a writ of certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit. Further, Petitioner respectfully requests that his case be stayed pending a decision in *Trevino v. Thaler*, 133 S. Ct. 524 (2012), as the decision there will likely directly impact Petitioner. Alternatively, even if *Trevino* is decided before this Court's consideration of Petitioner's case, *certiorari* should be granted and the case remanded for a merits determination and for the Fifth Circuit to resolve its intra-circuit split regarding whether *Martinez* applies to Louisiana prisoners.

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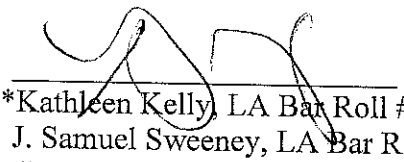
[23] This case merits further review especially as this is a close case in which the district court in the first habeas decision acknowledged that Petitioner would have been granted a new trial if the grand jury foreperson claim had not been procedurally defaulted by trial counsel's failure to file a motion to quash. If post-conviction counsel had raised trial counsel's conflict of interest to excuse the procedural default of the grand jury foreperson claim, Petitioner would have been granted a new trial.

Respectfully submitted,



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Attorney for Petitioner

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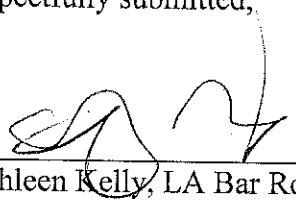
CERTIFICATE OF SERVICE

I hereby certify that I have served the forgoing Petition for Writ of Certiorari upon counsel for opposing party, by depositing a copy of same by means of U.S. Mail, and sending it to the following address:

Richard Z. Johnson, Jr., District Attorney
DeSoto Parish District Attorney's Office,
P.O. Box 432,
Mansfield, LA 71052

This 8th day of May, 2013.

Respectfully submitted,



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INDEX TO APPENDIX

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

CHRISTOPHER SEPULVADO	CIVIL ACTION NO. 13-0099
VERSUS	JUDGE ELIZABETH ERNY FOOTE
BURL CAIN	MAGISTRATE JUDGE HORNSBY

TRANSFER ORDER

Petitioner, Christopher Sepulvado, has filed a petition for writ of habeas corpus, pursuant to 28 U.S.C. § 2241. [Record Document 1]. He has also filed a motion to stay his execution and an amended motion to appoint counsel. [Record Documents 3 & 5]. In 1993, Petitioner was convicted of first degree murder in DeSoto Parish, Louisiana and sentenced to death. His execution date is February 13, 2013. After his conviction, Petitioner unsuccessfully sought post-conviction relief in the Louisiana state courts. Thereafter, he filed a petition for writ of habeas corpus in this court, which was ultimately denied in 2002. Petitioner's request for a certificate of appealability was likewise denied by the district court. In 2003, the Fifth Circuit Court of Appeals denied Petitioner's request for a certificate of appealability, as well as his petition for rehearing en banc. Subsequently, Petitioner filed a writ of certiorari in the United States Supreme Court, which was also denied.

The instant habeas corpus petition raises claims that challenge the constitutionality of Petitioner's state court conviction. Although the petition states that is not a second or successive petition subject to 28 U.S.C. § 2244(b), this Court's review of the submissions

does not comport with that belief. Rather, it is this Court's opinion that the instant petition constitutes a second or successive petition within the meaning of that statute. Therefore, before this petition can be considered on the merits by this Court, Petitioner must obtain authorization to file this second or successive petition from the United States Fifth Circuit Court of Appeals, in accordance with 28 U.S.C. § 2244(b)(3), by making a prima facie showing to the appellate court that his petition may be considered under the requirements set forth in 28 U.S.C. § 2244(b)(2). Until such time as Petitioner obtains said authorization, this Court is without jurisdiction to proceed on the petition or the ancillary motions. Accordingly,

IT IS ORDERED that Christopher Sepulvado's Petition for Writ of Habeas Corpus [Record Document 1], Motion To Stay [Record Document 3], and Amended Motion To Appoint Counsel [Record Document 5] be and are hereby **TRANSFERRED** to the United States Fifth Circuit Court of Appeals for that Court to determine whether he is authorized to file the instant petition in this District Court.

THUS DONE AND SIGNED in Shreveport, Louisiana, on this 16th day of January, 2013.

ELIZABETH ERNY FOOTE
UNITED STATES DISTRICT JUDGE

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
FILED
February 7, 2013
Lyle W. Cayce
Clerk

No. 13-30058

In re: CHRISTOPHER SEPULVADO,

Movant.

* * * * * * * * * * * * * * *

No. 13-70004

CHRISTOPHER SEPULVADO,

Petitioner-Appellant,

versus

BURL CAIN, Warden, Louisiana State Penitentiary,

Respondent-Appellee.

Appeals from the United States District Court
for the Western District of Louisiana

Before STEWART, Chief Judge, SMITH and SOUTHWICK, Circuit Judges.

JERRY E. SMITH, Circuit Judge:

Christopher Sepulvado is scheduled to be executed February 13, 2013. He appeals an order transferring his second-in-time petition for writ of habeas corpus, amended motion to appoint counsel, and motion to stay his execution. He also requests a certificate of appealability ("COA").[1] We affirm the order of transfer, dismiss the habeas petition and amended motion to appoint counsel, deny the motion for stay of execution, and dismiss the request for a COA. We also direct the clerk to notify Sepulvado that, should he wish to file a successive petition for writ of habeas corpus, a motion for authorization must be filed with this court pursuant to 28 U.S.C. § 2244(b)(3).

I.

In 1993, Sepulvado was convicted and sentenced to death for the first-degree murder of his six-year-old stepson. His conviction and sentence were affirmed. *State v. Sepulvado*, 672 So. 2d 158 (La.), *cert. denied*, 519 U.S. 934, (1996). Sepulvado sought post-conviction relief in state and federal court. The federal district court denied habeas relief, *Sepulvado v. Cain*, No. 00–596 (W.D. La. Aug. 9, 2002), and denied Sepulvado's application for a COA. In a detailed opinion setting out the facts and proceedings, we denied Sepulvado's request for a COA on six issues. *Sepulvado v. Cain*, 58 F. App'x 595, 2003 WL 261769 (5th Cir.) (unpublished), *cert. denied*, 540 U.S. 842 (2003).

Nearly a decade later, Sepulvado filed a second-in-time federal habeas petition pursuant to 28 U.S.C. § 2241. The district court deemed the petition

[1] Sepulvado's motion to intervene in a separate case challenging Louisiana's execution protocol, pending in the United States District Court for the Middle District of Louisiana, is not before us.

"successive" and thus barred by 28 U.S.C. § 2244(b)(3)(A), which requires an applicant seeking to file a second or successive petition "to move in the appropriate court of appeals for an order authorizing the district court." Believing it lacked jurisdiction to consider Sepulvado's motions, the district court transferred them to us "to determine whether he is authorized to file the instant petition." *See* 28 U.S.C. § 1631. Sepulvado appealed the transfer order and filed a brief "in Support of Application for a Certificate of Appealability and Stay of Execution."

II.

We first address, *sua sponte*, our appellate jurisdiction to hear this case, which comes to us as an appeal from the district court's transfer order.[2] "[A]s the transferee court, we have before us both the appeal from the transfer order and [a habeas] motion,"[3] along with Sepulvado's other related motions. Although in *Bradford* the petitioner was a federal prisoner who filed his habeas motion under 28 U.S.C. § 2255, and Sepulvado is a state prisoner who made his application pursuant to § 2241, that distinction does not affect our analysis. As in *Bradford*, "the appeal of the transfer order: (1) will conclusively determine the correctness of the transfer; (2) is separate from the merits of the [habeas] motion; and (3) is effectively unreviewable if the appeal is dismissed." *Id.* We conclude, therefore, that we have jurisdiction over both the district court's order and the motions it transferred thereby. *Id.*

III.

In concluding that it lacked jurisdiction to consider Sepulvado's second-in-

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[2] *See Mosley v. Cozby*, 813 F.2d 659, 660 (5th Cir.1987) ("This Court must examine the basis of its jurisdiction, on its own motion, if necessary."); *Martin v. Halliburton*, 618 F.3d 476, 481 (5th Cir. 2010) ("We have jurisdiction to determine our own jurisdiction.").

[3] *In re Bradford*, 660 F.3d 226, 229 (5th Cir. 2011) (per curiam)

time habeas petition, the district court relied on § 2244(b), which sharply limits the federal courts' consideration of "second or successive" habeas applications. The district court determined that

> before this petition can be considered on the merits by this Court, Petitioner must obtain authorization from the United States Fifth Circuit Court of Appeals, in accordance with 29 U.S.C. § 2244(b)(3), by making a prima facie showing to the appellate court that his petition may be considered under the requirements set forth in 28 U.S.C. § 2244(b)(2). Until such time as Petitioner obtains said authorization, this Court is without jurisdiction to proceed on the petition or the ancillary motions.

"The question of whether the district court lacked jurisdiction over [a] second-in-time federal habeas petition depends on whether [the] petition is a 'second or successive' petition within the meaning of 28 U.S.C. § 2244." *Adams v. Thaler*, 679 F.3d 312, 321 (5th Cir. 2012). The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), however,

> does not define "second or successive." The Supreme Court has stated that the term "takes its full meaning from [the Court's] case law, including decisions predating the enactment of [AEDPA]." *Panetti v. Quarterman*, 551 U.S. 930, 943–44 . . . (2007). "The Court has declined to interpret 'second or successive' as referring to all § 2254 applications filed second or successively in time, even when the later filings address a state-court judgment already challenged in a prior § 2254 application." *Id.* at 944 . . . . For instance, in *Slack v. McDaniel*, 529 U.S. 473 . . ., the Court concluded that "[a] habeas petition filed in the district court after an initial habeas petition was unadjudicated on its merits and dismissed for failure to exhaust state remedies is not a second or successive petition." *Id.* at 485–86 . . . ; *see also Panetti*, 551 U.S. at 944–46 . . . (holding that "a § 2254 application raising a *Ford [v. Wainwright]*-based[4] incompetency claim filed as soon as that claim is ripe" is not a successive petition); *Stewart v. Martinez–Villareal*, 523 U.S. 637, 643–45 . . . (1998) (holding that a second-in-time federal habeas petition is not "successive" when it only raises a *Ford* claim that was previously dismissed

[4] 477 U.S. 399 (1986).

as premature).

Id. Although "[a] prisoner's application is not second or successive simply because it follows an earlier federal petition," *In re Cain*, 137 F.3d 234, 235 (5th Cir. 1998), it is the well-settled law of this circuit that "a later petition is successive when it: (1) raises a claim challenging the petitioner's conviction or sentence that was or could have been raised in an earlier petition; or (2) otherwise constitutes an abuse of the writ," *id.*[5]

> According to Sepulvado's brief, his second-in-time habeas petition alleges
>
> that his [state] post-conviction counsel—who was also his federal habeas counsel—was ineffective for failing to investigate and present the following claims in state or federal court: (1) petitioner was deprived of his right to conflict[-]free trial counsel and this, in turn, excused the default of his meritorious *Campbell* claim; (2) the jury was not fair and impartial because it was exposed to extraneous and prejudicial influences; and, (3) trial counsel was ineffective for failing to raise the juror misconduct claim in a post-trial motion.

Sepulvado urges that his instant claims—brought a full decade after we denied a COA for claims raised in his first habeas petition—were not ripe before *Martinez v. Ryan*, 132 S. Ct. 1309 (2012).

To the extent that Sepulvado relies on a supposed constitutional right to the effective assistance of post-conviction counsel, he misapprehends the holding and import of *Martinez*, which did not alter our rule that "the Sixth Amendment does not apply in habeas proceedings."[6] "Because appointment of counsel on state habeas is not constitutionally required, any error committed by an attorney

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[5] *See also United States v. Orozco–Ramirez*, 211 F.3d 862, 867 (5th Cir.2000) (finding the *In re Cain* standard "consistent with the Supreme Court's views as expressed in" *Martinez-Villareal* and *Slack*); *Hardemon v. Quarterman*, 516 F.3d 272, 275 (5th Cir. 2008) (stating that we "look to pre-AEDPA abuse of the writ principles in determining whether [a] petition is successive") (citation and internal quotation marks omitted).

[6] *Shamburger v. Cockrell*, No. 01-20822, 34 F. App'x 962 (5th Cir. 2002) (unpublished) (citing *Pennsylvania v. Finley*, 481 U.S. 551, 555–56 (1987)).

in such a proceeding 'cannot be constitutionally ineffective.'"[7] *Martinez* explicitly left open the *constitutional* question "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." *Id.* at 1315.

Rather than establish a new rule of constitutional law, *Martinez* is an "equitable ruling" that "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."[8] Ordinarily, the doctrine of procedural default means that "federal courts will not review the merits of claims, including constitutional claims, that a state court declined to hear because the prisoner failed to abide by a state procedural rule." *Id.* at 1309. Sepulvado's habeas petition argues that, under *Martinez*, the ineffective assistance of Sepulvado's post-conviction counsel establishes cause for the procedural default of two claims: (1) that one of Sepulvado's trial counsel had an actual conflict of interest that prevented him from raising a meritorious claim under *Campbell v. Louisiana*, 523 U.S. 392 (1998); and (2) that trial counsel were ineffective for failing to raise a jury-misconduct claim in a motion for new trial.

It is far from evident that either of Sepulvado's ineffective-assistance-of-trial-counsel claims is procedurally defaulted.[9] He did raise several ineffective-

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[7] *Fairman v. Anderson*, 188 F.3d 635, 643 (5th Cir. 1999) (quoting *Coleman v. Thompson*, 501 U.S. 722, 752 (1991)). *See also Martinez*, 132 S. Ct. at 1315 (referring to the "general rule that there is no constitutional right to counsel in collateral proceedings").

[8] *Martinez*, 132 S. Ct. at 1315, 1319. *See also Adams*, 679 F.3d at 322 n.6.; *Ibarra v. Thaler*, 687 F.3d 222, 224 (5th Cir. 2012) (noting that "*Martinez*, by its terms, applies only to ineffective-assistance-of-*trial*-counsel claims") (emphasis added).

[9] *See Sepulvado v. Cain*, 2003 WL 261769, at *2 (noting that Sepulvado raised eleven claims in his filing for state post-conviction relief, including ineffective assistance of counsel); *id.* at *3 (noting that Sepulvado raised the "same 11 issues" in federal court as in state court);
(continued...)

assistance-of-trial-counsel claims in his initial petition for state-court relief, which this court addressed *on the merits*. *See Sepulvado v. Cain*, 2003 WL 261769, at *3–5. Jury misconduct, however, was not among them, though it could have been raised then, thus rendering any attempt to raise it now as successive. In the opinion that we issued, we *did* discuss Sepulvado's procedurally-defaulted argument that his trial counsel was ineffective—rather than conflicted—for failing to raise the argument that Louisiana discriminated against black venire members in the selection of grand jury forepersons. *Id.* at *5–6.

In essence, Sepulvado argued that his trial counsel should have anticipated the rule of law announced by the Supreme Court in *Campbell*—six years *after* he was indicted. *Id.* at *5. In denying a COA, we concluded Sepulvado had failed to show that his trial counsel's "failure to raise such a claim in 1992 fell below the objective level of competence required by *Strickland* [*v. Washington*, 466 U.S. 668 (1984)]," and we stated that

> [i]n the alternative, Sepulvado has not satisfied the COA standard concerning the prejudice portion [also a required showing under *Strickland v. Washington*] for "cause" *and* "prejudice". The report and recommendation, adopted by the district court, noted:
>
> > Petitioner has not attempted to articulate how the foreman selection process (in connection with a grand jury that indicts on mere probable cause found by 9 of 12 members) worked to his actual prejudice when he was convicted by a lawfully chosen petit jury of twelve persons who unanimously found him guilty beyond a reasonable doubt.
>
> Sepulvado states that, had a timely motion to quash been made, the judgment would have been reversed on appeal on that basis; and, on remand, he might have been offered a life sentence plea. He

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[9] (...continued)
id. at *3-6 (discussing Sepulvado's ineffective-assistance-of-counsel claims at length but omitting any mention of either conflict of interest or jury misconduct).

offers no basis for this conclusory plea-claim.

> In the alternative, Sepulvado urges that, absent a plea on remand, a second trial would not have resulted in the death penalty. Again, he provides no support for this conclusory claim. (Along this line, Sepulvado does not make an "actual innocence" claim as an alternative to a required showing of "cause" and "prejudice".)

Id. at *6.

Assuming without deciding that *Martinez* applies to conflict-of-interest claims[10] and that Sepulvado's conflict-of-interest claim is procedurally defaulted, Sepulvado's reliance on *Martinez* is still unavailing, because *Martinez* does not apply to Louisiana prisoners. It is limited 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." *Martinez*, 132 S. Ct. at 1315 (emphasis added). In other words, *Martinez* applies only "where the State barred the defendant from raising the claims on direct appeal." *Id.* at 1320.

In *Ibarra*, 687 F.3d at 227, we declined to extend *Martinez* to circumstances in which the state permitted a defendant to raise ineffectiveness-of-trial-counsel claims on direct appeal. As Judge Graves explained there in his separate opinion, *Ibarra* applies here:

> 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

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[10] *See United States v. Infante*, 404 F.3d 376, 389 (5th Cir. 2005) (characterizing conflict-of-interest-claims as a species of ineffective-assistance-of-counsel claims) (quotation and citations omitted).

> 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.").

Ibarra, 687 F.3d at 230 (Graves, J., concurring in part and dissenting in part). Therefore, because, as Judge Graves observed, "Louisiana, like Texas, allows a prisoner to raise ineffective assistance of counsel on direct appeal" in some circumstances, *id.*, *Ibarra* is an "insurmountable hurdle"[11] for Sepulvado.

In sum, *Martinez* does not provide the basis for the relief Sepulvado seeks. It does not confer a constitutional right to effective assistance of post-conviction counsel, nor does it apply to any of Sepulvado's ineffective-assistance-of-trial-counsel claims that are not procedurally defaulted. Even assuming *arguendo* that Sepulvado presents any procedurally-defaulted ineffective-assistance-of-trial-counsel claims, current circuit precedent dictates that *Martinez* does not apply to Louisiana prisoners at all.[12]

Because *Martinez* is of no moment here, Sepulvado's second-in-time habeas petition is an abuse of the writ and is therefore successive. *See In re Cain*, 137 F.3d at 235; *see also Adams*, 679 F.3d at 321–22. Because the petition is successive, the district court did not have jurisdiction to consider it in light of the fact that Sepulvado did not obtain our prior authorization pursuant to § 2244(b)(3)(A).[13]

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[11] *Balentine v. Thaler*, No. 12–70023, 2012 U.S. App. LEXIS 17370, at *9 (5th Cir. Aug. 17, 2012) (per curiam) (unpublished).

[12] Even if *Martinez* is held to apply to Sepulvado and thus provides the basis for the filing of a second-in-time habeas petition, it allows Sepulvado to establish cause for his procedural default only if post-conviction counsel was ineffective under the standards of *Strickland*; and (2) his "underlying ineffective-assistance-of-trial-counsel claim has . . . some merit." *Martinez*, 132 S. Ct. at 1318–19. As we noted over a decade ago, the state post-conviction court characterized all of Sepulvado's ineffective-assistance-of-trial-counsel claims as "completely without a scintilla of merit." *Sepulvado v. Cain*, 2003 WL 261769, at *3.

[13] *See Adams*, 679 F.3d at 321–22 (citing *Burton v. Stewart*, 549 U.S. 147, 152 (2007)).

IV.

Sepulvado has not filed in this court a motion for authorization to file a successive petition in the district court. We direct the clerk's office to notify Sepulvado that "(1) a motion pursuant to § 2244(b)(3) must be filed with the court of appeals within a specified time from the date of the clerk's notice and (2) failure to do so timely will result in the entry of an order denying authorization." *In re Epps*, 127 F.3d 364, 365 (5th Cir. 1997). The clerk shall also instruct Sepulvado to attach relevant documents analogous to those described in *Epps*. *Id.*

Bearing in mind the scheduled execution date, we will grant authorization only if the successive application is permitted by § 2244(b). We reiterate that, even where it applies, *Martinez* is not "a new rule of constitutional law."[14] Sepulvado's motion to appoint counsel, which we lack jurisdiction to consider, "should have been brought in this court as part of his § 2244(b)(3) petition for authorization to file a successive habeas petition in the district court." *United States v. Key*, 205 F.3d 773, 774 (5th Cir. 2000).

V.

"A stay of execution is an equitable remedy. It is not available as a matter of right, and equity must be sensitive to the State's strong interest in enforcing its criminal judgments without undue interference from the federal courts. *Hill v. McDonough*, 547 U.S. 573, 584 (2006) (citations omitted). Because we lack jurisdiction, there is no basis for a stay. *Accord Adams*, 679 F.3d at 323.

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[14] *Adams*, 679 F.3d at 322 n.6. *See also Buenrostro v. United States*, 697 F.3d 1137, 1139–40 (9th Cir. 2012) ("*Martinez* cannot form the basis for an application for a second or successive motion because it did not announce a new rule of constitutional law.").

VI.

Sepulvado did not request a COA from the district court but asserts in his brief that "[t]his court may direct issue a COA bypassing the District Court." Relying on *Williams v. United States*, 150 F.3d 639, 641 (7th Cir. 1998), Sepulvado ignores voluminous precedent from this court:

> [T]he district court did not rule upon whether a COA is warranted, and "the lack of a ruling on a COA in the district court causes this court to be without jurisdiction to consider the appeal." *Whitehead v. Johnson*, 157 F.3d 384, 388 (5th Cir.1998); *see also Brewer v. Quarterman*, 475 F.3d 253, 255 (5th Cir.2006) (per curiam) ("A district court must deny the COA before a petitioner can request one from this court. A request for COA must be filed in the district court before such a request can be made in the circuit court." (internal quotation marks omitted)); *Miller v. Dretke*, 404 F.3d 908, 912 (5th Cir. 2005) ("Under Federal Rule of Appellate Procedure 22(b)(1), the district court must first decide whether to grant a COA request before one can be requested here."); *Sonnier v. Johnson*, 161 F.3d 941, 946 (5th Cir.1998) ("[T]he lack of a ruling on a COA in the district court causes this court to be without jurisdiction to consider the appeal."); *United States v. Youngblood*, 116 F.3d 1113, 1115 (5th Cir. 1997) ("Under *Muniz* [*v. Johnson*, 114 F.3d 43, 45 (5th Cir. 1997)], jurisdiction is not vested in this Court because the district court has not yet considered whether [a] COA should issue."); *Muniz*, 114 F.3d at 45 ("A district court must deny the COA before a petitioner can request one from this court.").

Cardenas v. Thaler, 651 F.3d 442, 443–44 (5th Cir. 2011) (per curiam). In *Cardenas*, moreover, we expressly distinguished *Williams*. *Id.* at 446–47.

In summary, the order of transfer is AFFIRMED. The petition for writ of habeas corpus is DISMISSED for want of jurisdiction. The amended motion to appoint counsel is DISMISSED for want of jurisdiction. The motion for stay of execution is DENIED. The request for a COA is DISMISSED.