ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

rec'd 8/16/12

August 6, 2012

VIA OVERNIGHT MAIL
Hon. William K. Suter, Clerk
United States Supreme Court
Office of the Clerk
1 First St., N.E.
Washington, D.C. 20543

Re: *Carlos Trevino v. Rick Thaler*, No. 11-10189

Dear Mr. Suter:

Enclosed for filing with the papers in the above styled cause are the original and nine copies of **Respondent Thaler's Brief in Opposition**. Also enclosed is the Proof of Service Form. Please indicate the date of filing on the enclosed copy of this letter and return it to me in the post-paid envelope provided.

By copy of this letter, I am forwarding a copy of said brief to counsel for Petitioner.

Thank you for your kind assistance in this matter.

Yours truly,

Fredericka Sargent

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FS/ga
Enclosures
c:

Mr. Warren Wolf
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(By regular mail)

No. 11-10189

IN THE
SUPREME COURT OF THE UNITED STATES

CARLOS TREVINO,
Petitioner,

v.

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

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

PROOF OF SERVICE

I hereby certify that on the 6th day of August, 2012, one copy of Respondent's Brief in Opposition was mailed, postage prepaid, to Mr. Warren Wolf, 115 E. Travis St., Suite 746, San Antonio, TX, 78205. All parties required to be served have been served. I am a member of the Bar of this Court.

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RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Trevino procedurally defaulted his claim that trial counsel was constitutionally ineffective for failing to investigate and present mitigating evidence when he failed to raise it in his initial state habeas corpus application. The federal district court determined that Trevino had shown neither cause and prejudice nor a fundamental miscarriage of justice that might excuse the default. In the alternative, the district court concluded that Trevino had not established deficient performance and resultant prejudice under *Strickland*. That court then granted a certificate of appealability (COA) on the issue of whether Trevino had shown a fundamental miscarriage of justice. The circuit court found that he had not and did not pass on the issue of whether he had—or could have—established cause and prejudice. Now, Trevino seeks to take advantage of the Court's recent ruling in *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), thus raising the following question:

> Should Trevino be allowed to allege ineffective assistance of state habeas counsel to overcome a procedurally defaulted claim that is without merit or not "substantial" in contravention of *Martinez*?

2. After the Court of Criminal Appeals dismissed Trevino's claim of ineffective assistance of counsel as an abuse of the writ, Trevino again returned to state court to raise a *Brady* claim, as to both guilt/innocence and punishment, based on the discovery of a second statement by one of his co-defendants (Siendo "Sam" Rey) implicating a third co-defendant (Santos Cervantes) as Linda's actual killer. However, instead of filing an application for state writ of habeas corpus in accordance with state law (and as he did previously in connection with his ineffective-assistance-of-counsel claim) this time, Trevino filed only a motion for appointment of counsel in the state trial court. Because state law does not allow for the appointment of counsel unless and until the Court of Criminal Appeals has determined that specific exceptions are met, the lower state court did not act on the motion. And rather than taking corrective action in order to meet state law requirements, Trevino did nothing for two years. The lower courts both erroneously concluded that Trevino should be excused from the exhaustion requirement because the state process had been rendered ineffective to protect his constitutional rights under 28 U.S.C. § 2254(b)(1). Trevino's wanton disregard of well-established state rules raises the following question:

Should Trevino be permitted to bypass the state courts and raise a federal constitutional claim for the first time when he deliberately chose to disregard the state's rules for filing a second or successive state habeas application?

3. Trevino and four friends brutally sexually assaulted and killed fifteen-year-old Linda Salinas. Trevino has never denied taking part in the actions that night. Indeed, the record establishes that he not only actively participated in her sexual assault—by holding her down while the others raped her—he was at the very least, complicit in her murder. Over sixteen years later, Trevino seeks to have his conviction and sentence overturned relying on the alleged newly discovered statement of one co-defendant (Rey) naming a third co-defendant (Cervantes) as Linda's actual killer. Having taken judicial notice of a third statement by Rey, the circuit court concluded, first, that suppression of the second statement had not been established because defense counsel were—at the least—on notice of its existence, and second, that the statement was not material because Trevino had been charged as a party in Linda's brutal and senseless murder; thus, the jurors did not have to believe, beyond a reasonable doubt, that he was the actual killer. They only had to believe that he was complicit in the actions of a third party. This gives rise to the following question:

Where the petitioner has never denied taking part in the offense that led to his conviction and death sentence, can he establish materiality for purposes of *Brady* when the record establishes beyond a reasonable doubt that he was an active participant in the underlying sexual assault and at least complicit in the murder?

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Statutes and Rules

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERITORARI

Petitioner Carlos Trevino[1] was convicted of capital murder and sentenced to death for his role in the vicious gang rape and brutal murder of fifteen-year-old Linda Salinas in San Antonio in 1996. In the courts below, he unsuccessfully challenged his presumptively valid conviction and death sentence pursuant to 28 U.S.C. § 2254. Trevino now seeks to reverse the Fifth Circuit's judgment, arguing that *Martinez v. Ryan* allows him to excuse the procedural default of his ineffective-assistance-of-trial-counsel claim and that the lower court erred in ultimately finding his *Brady* claim to be without merit. As discussed below, this Court should deny certiorari review.

STATEMENT OF THE CASE

I. Statement of Facts

A. Facts of the crime

On the evening of June 9, 1996, Linda Salinas left her house around 8:45 or 9:00 p.m. to go use the phone at her cousin's house; she was calling her best friend, Stephanie Saldivar. 18 RR 50, 57.[2] After talking to Linda, Stephanie and her brother, Steve, drove to a nearby Whataburger to pick

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1 Respondent Rick Thaler will be referred to as "the Director."

2 "RR" refers to the Reporter's Record (Statement of Facts) of transcribed trial proceedings, preceded by volume number and followed by page number(s).

Linda up. When Linda never arrived, the two went home and waited up until 1:00 a.m. At that time—with still no sign of Linda—the two went to bed, leaving the front door unlocked for Linda. *Id.* at 84-85.

That same evening, Trevino, Juan Gonzales[3] (Trevino's cousin), Siendo "Sam" Rey, Santos Cervantes, and Brian Apolinar[4] attended a party at the home of Jay Mata. 16 RR 150-51; 18 RR 164-74. Having drunk all the beer, Trevino, Gonzales, Rey, Cervantes, and Apolinar drove to a nearby convenience store to get more. 18 RR 173-75. As he departed the store, Gonzales noticed Cervantes talking to Linda, who had been using a pay phone outside the store. *Id.* at 176. Apolinar, the group's driver, agreed to take Linda to a nearby Whataburger to meet Stephanie. *Id.* at 177.

But instead of taking Linda to Whataburger, Apolinar drove the group to Espada Park. *Id.* at 180. Cervantes took Linda into the woods and was soon followed by Apolinar, Gonzales, Rey, and Trevino. *Id.* at 181-82. Cervantes then mounted her and raped her while Apolinar restrained her, despite her struggle to escape. *Id.* at 182-83. Rey then sexually assaulted Linda while Apolinar continued to hold her hands. *Id.* at 183. When

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[3] Gonzales was the State's key witness and the only one of the five not charged in relation to Linda's rape and murder.

[4] Rey was sentenced to fifty years after pleading guilty to murder. Cervantes was sentenced to life in prison after pleading guilty to capital murder. Apolinar was sentenced to twenty-five years, having been found guilty of aggravated sexual assault.

Cervantes threatened to hit her if she did not turn onto her stomach, Linda reluctantly complied. *Id.* at 184. At this point, Trevino told Gonzales he should participate in the assault, but Gonzales refused and returned to the car to act as a lookout. *Id.* at 185. He later returned to find Cervantes engaged in forcible anal intercourse with Linda. Apolinar and Rey alternately forced their penises into Linda's mouth, and Rey restrained Linda during those times when he was not forcing her to perform oral sex on him. *Id.* at 185-86. Trevino also participated in restraining her. *Id.* at 194-95. According to Gonzales, Rey told Cervantes that "we don't need no witnesses," and Cervantes repeated the statement to Trevino, who responded, "[W]e'll do what we have to do." *Id.* at 190-91. Gonzales returned to the car again, and approximately five minutes later, so did the others. *Id.* at 192.

The evidence at trial showed that Linda had been stabbed in the neck with a knife, partially severing her carotid artery; she bled to death as a result. 19 RR 63-68. The shirts that Trevino and Cervantes wore were stained with Linda's blood. 18 RR 192; 19 RR 4. As they left the area, with Linda's backpack still in the car, Cervantes told Trevino that Trevino's snapping of Linda's neck was "cool," to which Trevino replied that he had "learned how to kill." 19 RR 4-5; 23 RR 84. The five men returned to Mata's house, after the group had, in Gonzales's words, "raped and killed the girl."

19 RR 7. Trevino and Cervantes then burned Linda's backpack in Mata's backyard. 16 RR 204-06.

A forensics expert testified that she compared several items taken from Linda and Trevino. 17 RR 139. She determined that fibers found on a pair of white panties found at the crime scene were consistent with pants belonging to Trevino. *Id.* at 142-43. She also determined that polyester fibers taken from Linda's shorts were consistent with fibers from Trevino's pants. *Id.* at 145-46. She further concluded that the pants used in the comparison could have been the same pants worn by Trevino during the offense. *Id.* at 147-48. In addition, Trevino's fingerprints were found inside Apolinar's car. 18 RR 34. Finally, in examining Linda's underwear, a forensic serologist discovered a mixed blood stain that was sufficient for DNA testing. 19 RR 118, 127. Those tests excluded Rey, Apolinar, Gonzales, and Cervantes as donors of the blood, but they did not exclude Linda and Trevino.[5] *Id.* at 130-32.

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[5] In an order dated December 4, 2008, the federal district court granted Trevino's motion for new DNA testing on this particular blood stain. Docket Entry (DE) 74. The subsequent testing detected nothing—no blood. DE 91-2 at Exhibit 10. In its order denying Trevino's motion to alter or amend the judgment, the court rejected Trevino's argument that the absence of blood alone should be a basis for relief because the possibility that the entire sample had been consumed during the original testing could not be excluded. DE 92 at 10-11.

B. Facts relating to punishment

1. The State's case

In addition to the horrific brutality visited on Linda by Trevino and his friends, the jury heard about his criminal history. Importantly, the jury learned that Trevino had been on parole for only *one month* when the instant crime was committed. 23 RR 113; 1 CR 2.[6]

Trevino's probation officer, Lorraine Reagan, testified that when he was sixteen, Trevino was placed on probation, having been arrested for evading arrest, carrying a weapon and possession of marijuana. 23 RR 20. Reagan said that he "did well on probation. He followed the rules." *Id.* at 24. However, while still on probation, Trevino was again arrested; this time for burglary of a building and burglary of a vehicle. He was allowed to continue on probation, but he was placed in the intensive supervision program. This required that Trevino be seen by his probation officer at least four times a week, and these visits could be during the week, on weekends or at night. *Id.* at 26-27. Trevino also had prior convictions for unlawful possession of a weapon, a Cobray M-11 semi-automatic 9 mm handgun, driving while intoxicated and evading arrest, and unauthorized use of a motor vehicle. *Id.*

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[6] "CR" refers to the Clerk's Record (Transcript) of pleadings and documents filed with the trial court, preceded by volume number and followed by page number(s).

at 67-80; 25 RR 101, 103, 120. For the last conviction, Trevino was sentenced to six years in prison. 25 RR 120.

Bob Morrill, an Intake Interviewer for TDCJ, explained to the jury that Trevino had been confirmed as a member of the La Hermidad y Pistoleros Latinos (HPL) gang. Trevino not only admitted to being a member of the gang, but he also had tattoos indicating membership. On each hip, he had a tattoo of a .45 semi-automatic handgun. On his chest, he had a "PISTOLERO" tattoo. Finally, on his left hand, he had a "16/12" tattoo. Morrill explained that the number sixteen represented the sixteenth letter of the alphabet, "P," and the number twelve represented "H," the twelfth letter of the alphabet. *Id.* at 99-103.

Morrill told the jury that prison gangs such as HPL are typically involved in extortion, drugs, murder and sexual exploitation. He also explained that, as with any gang, members must swear an oath,[7] follow particular rules or be killed, and membership ends *only* with death. *Id.* at 104-06; *see also id.* at 110-12 (HPL's rules and regulations read to the jury).

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[7] The oath was read to the jury: "From today and onward and for the rest of my life, I am a brother. Furthermore, I promise under oath and a decree and punishment of death to be true and firm, to comply by the ruling imposed by the Brotherhood of Pistoleros Latinos, that as of this moment we are brothers. Thanks to our Lord Latino." 23 RR 110.

2. The defense's case

The defense started its case by cross-examining Trevino's probation officer. Reagan first told the jury that Trevino had an absentee father. 23 RR 30. She went on to describe the home visits:

> The Lena Horne is in the Sutton Homes, I think. I think it's the Sutton Homes. I don't know what you - - how you want me to describe that. During that particular, Mom's on AFDC.[8] I can remember Mom having problems trying to discipline him. I mean, not discipline, really, because Carlos was kind of - - as I can remember, kind of quiet. Didn't give her a lot of problems but yet still there were times when she probably didn't know where he was at some point in time. I think there were two other siblings, I'm not sure, that were younger than Carlos. Because Carlos is the oldest. And I think there were a couple of other siblings in the family. I can't remember anything else.

Id. at 31-32 (footnote added). Reagan opined that school was one of Trevino's "biggest problems," explaining that he eventually dropped out. *Id.* at 32. She did not remember if his mother had either a drinking problem or a drug problem. *Id.* at 34-35. Finally, she said that Trevino "associated with some undesirable characters," but he had denied membership in any gang. *Id.* at 35.

Through the cross-examination of Juan Gonzales, the jury learned that Trevino had been "on his own most of his life," but his grandfather helped him some. *Id.* at 85. Gonzales also tried to pin the blame for Linda's murder on Cervantes. *Id.* at 86-89.

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8 "AFDC" refers to Aid to Families with Dependent Children.

The sole witness for the defense was Trevino's aunt, Juanita DeLeon. She told the jury that Trevino's mother had an alcohol problem and was on welfare. DeLeon said that Trevino "[d]id okay" in school but that he dropped out. *Id.* at 135-37. DeLeon explained that Trevino often took care of her children, telling the jury, "Well, my girls loved him. They were attached to him. When he would go to the store, they would want to go with him." *Id.* at 138. Finally, she said of Trevino that he was "real easy to get along with. I would always tell him my problems. He would always give me advice." *Id.* at 139.

II. Direct Appeal and Postconviction Proceedings

Having been indicted on charges of capital murder, Trevino was convicted and sentenced to death for the extraordinarily cruel rape and murder of Linda Salinas. 1 CR 5-6, 15; 2 CR 303-04. The Court of Criminal Appeals upheld Trevino's conviction and death sentence. *Trevino v. State*, 991 S.W.2d 849 (Tex. Crim. App. 1999). That same court denied Trevino's first state habeas application based on the trial court's findings of fact and conclusions of law and its own review of the record. *Ex parte Trevino*, No. 48,153-01 (Tex. Crim. App. April 4, 2001) (unpublished order).

Trevino then sought federal habeas relief. *Trevino v. Thaler*, Civil Action No. SA-01-CA-306-XR (W.D. Tex. 2009), DE 10. After requesting and being granted funding, DE 32, Trevino sought and was granted a stay to

return to state court to exhaust a claim that trial counsel was constitutionally ineffective for failing to investigate and present mitigating evidence. DE 36-37. That second application was dismissed as an abuse of the writ. *Ex parte Trevino*, No. 48,153-02 (Tex. Crim. App. Nov. 23, 2005) (citing Tex. Code Crim. Proc. art. 11.071, § 5) (unpublished order).

Trevino once again returned to federal court. DE 42. Soon after filing his petition, DE 76, however, Trevino sought to return to state court again, this time to exhaust *Brady*[9] and *Strickland*[10] claims based on the alleged discovery of Rey's statement naming Cervantes as Linda's actual killer. DE 49. The district court granted his motion, DE 54, but once back in state court, Trevino filed only a motion for appointment of counsel. Because state law does not allow for the appointment of counsel before permission has been granted to file a successive application, the trial court took no action on the motion for two years. And Trevino, rather than taking corrective action and filing an application in the Court of Criminal Appeals, complained to the federal district court, which then intervened in an attempt to force the trial court to act. DE 61. After two years, when no action had still be taken, the federal district court allowed Trevino to return to federal court and raise his *Brady* claims, finding the state process had been rendered ineffective to

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9 *Brady v. Maryland*, 363 U.S. 83 (1963).

10 *Strickland v. Washington*, 466 U.S. 668 (1984).

protect his constitutional rights. 28 U.S.C. § 2254(b)(1)(B). DE 62.

Ultimately, the district court denied relief in all aspects, but granted Trevino a certificate of appealability on three issues: (1), (2) whether *Trevino* had satisfied the materiality and prejudice prongs of *Brady* and *Strickland*, respectively, regarding Rey's second statement, and (3) whether Trevino had established a fundamental miscarriage of justice so as to overcome the procedural bar applied to his claim of ineffective assistance of counsel for failure to investigate and present mitigating evidence. *Id.* at 111-17. On appeal to the Fifth Circuit, Trevino requested a COA on five additional issues. The circuit court affirmed the district court's denial of federal habeas relief and denied Trevino's request for an additional COA. *Trevino v. Thaler*, No. 10-70004 (5th Cir. Nov. 14, 2011).

REASONS FOR DENYING THE WRIT

The Fifth Circuit explained the hurdles Trevino must overcome in order to obtain a COA and what the standard of review is where the district court has previously granted a COA:

> Under the Antiterrorism and Effective Death Penalty Act (AEDPA), "[b]efore any appeal may be entertained, a prisoner who was denied habeas relief in the district court must first seek and obtain a COA[.]" *Miller-El v. Cockrell*, 537 U.S. 322, 335 [] (2003); 28 U.S.C. § 2253(c)(1). To meet this standard, Trevino must demonstrate "that reasonable jurists could debate (or for that matter, agree that) the petition should have been resolved in a different manner or that issues presented were adequate to deserve encouragement to proceed further." *Id.* (internal

quotations and citations omitted); *accord Tennard v. Dretke*, 542 U.S. 274, 288 [] (2004).

* * *

"[A]bsent special circumstances, a federal habeas petitioner must exhaust his state remedies by pressing his claims in state court before he may seek federal habeas relief." *Orman v. Cain*, 228 F.3d 616, 619-20 (5th Cir. 2000); 28 U.S.C. § 2254(b)(1). Special circumstances permitting federal courts to review a claim before it has been exhausted in state court include (1) when there is an absence of state corrective process; or (2) when circumstances exist that render such process ineffective to protect the federal habeas petitioner's rights. 28 U.S.C. § 2254(b)(1)(B)(i)-(ii).

In reviewing an issue on which the district court granted COA, "we review the district court's findings for clear error and its conclusions of law *de novo*, applying the same standards to the state court's decision as did the district court." *Busby v. Dretke*, 359 F.3d 708, 713 (5th Cir. 2004).

Trevino v. Thaler, slip op. at 11-12.

Because Trevino was wholly unable to meet these standards, habeas relief was properly denied by the district court, and the appellate court affirmed that judgment and further denied Trevino a COA. Consequently, certiorari review is not merited in this case.

I. *Martinez v. Ryan* Does Not Apply in Texas. But Even If It Does, Trevino's Defaulted Ineffective-Assistance-of-Counsel Claim Is Not "Substantial."

In his second state habeas application, Trevino alleged that trial counsel was constitutionally ineffective for failing to investigate and present mitigating evidence. The Court of Criminal Appeals dismissed his application

as an abuse of the writ pursuant to Texas Code of Criminal Procedure Article 11.071, Section 5. The district court procedurally barred the claim, finding that Trevino had established neither cause and prejudice nor a fundamental miscarriage of justice. DE 87 at 43-52. That court then granted a COA on the issue of whether Trevino had established a fundamental miscarriage of justice. *Id.* at 114-16. The court below found that he had not. *Trevino v. Thaler*, slip op. at 21-25. No ruling was made on the issue of cause and prejudice. Now, in an attempt to take advantage of the recent ruling in *Martinez*, Trevino asks this Court to grant certiorari on his argument that the lower court has never passed on, i.e., whether his claim of ineffective assistance of state habeas counsel constitutes cause so as to excuse his procedurally defaulted claim that trial counsel was ineffective.[11]

A. *Martinez* does not apply in Texas.

Martinez carved out a limited—and equitable as opposed to constitutional—exception to the general rule that ineffective assistance of state habeas counsel will not constitute cause to excuse a procedurally defaulted claim. 132 S. Ct. at 1319. The Court held that where state law provides that "initial-review collateral proceedings" are the first place ineffective-assistance-of-counsel claims may be raised, a petitioner may allege

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[11] Although his earliest opportunity to do so would have been in a petition for rehearing, Trevino did not assert that *Martinez* created cause so as to overcome the procedural default in the circuit court.

counsel at that stage was ineffective. *Id.* at 1318. The Court was careful to emphasize, though, that this rule "does not extend to attorney errors in any proceedings beyond the first occasion the State allows a prisoner to raise a claim of ineffective assistance at trial, even though that initial-review collateral proceeding may be deficient for other reasons." *Id.* at 1320.

The Fifth Circuit has recently explained that *Martinez* does not apply to procedurally defaulted claims of ineffective assistance of trial counsel in Texas:

> The [Court of Criminal Appeals] 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 [Court of Criminal Appeals] has indicated that a motion for new trial 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 [Court of Criminal Appeals] 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 proceedings 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 deprive Texas

> defendants of counsel- and court-driven guidance in pursuing ineffectiveness claims.

Ibarra v. Thaler, 2012 WL 26205020 at *4 (5th Cir. June 28, 2012), *motion for reconsideration filed* (July 26, 2012); *see also Adams v. Thaler*, 679 F.3d 312, 317 n.4 (5th Cir. 2012).

But more importantly, *Martinez* was only decided months ago. It would be premature for the Court to inject itself into this issue before it can percolate in the district and circuit courts. The Court "should give them some time to address the nuances of th[is] precedent[] before adding new ones. As has been said, a plant cannot grow if you constantly yank it out of the ground to see if the roots are healthy." *Spears v. United States*, 555 U.S. 261, 270 (2009) (Roberts, C.J., dissenting). In addition to treating Ibarra's motion for reconsideration as a petition for rehearing en banc and calling for a response from the Director, the Fifth Circuit has also called for a response from the Director to a petition for rehearing en banc in *Gates v. Thaler*, No. 11-70023.

But even if this Court were to disagree and find that *Martinez* does apply to Texas, Trevino must also establish that his claim is "substantial." *Martinez*, 132 S. Ct. at 1320. This he cannot do.

B. Trevino was not denied constitutionally effective assistance in any event; thus, his claim is not "substantial."

Trevino's ineffective assistance claim is governed by the two-part test set forth in *Strickland v. Washington*, which requires him to establish both

deficient performance and resultant prejudice. 466 U.S. at 687-88, 690. Importantly, failure to prove either deficient performance or resultant prejudice will defeat an ineffective-assistance-of-counsel claim, making it unnecessary to examine the other prong. *Id.* at 687.

In order to demonstrate deficient performance, Trevino must show that, in light of the circumstances as they appeared at the time of the conduct, "counsel's representation fell below an objective standard of reasonableness," i.e., "prevailing professional norms." *Id.* at 689-90. The Supreme Court has admonished that judicial scrutiny of counsel's performance "must be highly deferential," with every effort made to avoid "the distorting effect of hindsight."[12] *Strickland*, 466 U.S. 689-90; *see also Harrington v. Richter*, 131 S. Ct. 770, 788 (2011) ("It is 'all too tempting' to 'second-guess counsel's assistance after conviction or adverse sentence.'"); *Yarborough v. Gentry*, 540 U.S. 1, 6 (2003) ("The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight.") (citations omitted). Accordingly, there is a "strong presumption" that the alleged deficiency "falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689.

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[12] "Representation of a capital defendant calls for a variety of skills. Some involve technical proficiency connected with the science of law. Other demands relate to the art of advocacy. The proper exercise of judgment with respect to the tactical and strategic choices that must be made in the conduct of a defense cannot be neatly plotted in advance by appellate courts." *Stanley v. Zant*, 697 F.2d 955, 970 & n.12 (11th Cir. 1983).

Even if deficient performance can be established, Trevino must still affirmatively proved prejudice that is "so serious as to deprive [him] of a fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. at 687. This requires him to show a reasonable probability that but for counsel's deficiencies, the result of the proceeding would have been different." *Id.* at 694. A "reasonable probability" is one sufficient to undermine confidence in the outcome. *Id.* The mere possibility of a different outcome is insufficient to prevail on the prejudice prong. As recently explained by the Supreme Court: The question in conducting *Strickland*'s prejudice analysis "is *not* whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible [the jury would have reached a different verdict] if counsel [had] acted differently." *Richter*, 130 S. Ct. at 791-92 (emphasis added and citations omitted). Rather, "[t]he likelihood of a different result must be substantial, not just conceivable." *Id.* at 792 (citation omitted).

Where, as here, a federal habeas petitioner alleges constitutionally ineffective assistance during the punishment phase of a death penalty trial, the relevant inquiry is "whether there is a reasonable probability that, absent the errors, the sentencer [] would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Id.* at 695; *see also Riley v. Cockrell*, 339 F.3d 308, 315 (5th Cir. 2003) ("If the petitioner brings a claim of ineffective assistance with regard to the sentencing phase,

he has the difficult burden of showing a reasonable probability that the jury would not have imposed the death sentence in the absence of errors by counsel." (internal quotation marks and citation omitted)). "In assessing prejudice, [the reviewing court] reweigh[s] the evidence in aggravation against the totality of available mitigating evidence." *Wiggins v. Smith*, 539 U.S. 510, 534 (2003).

While the circuit court did not pass on the merits of this claim, the district court did so in the alternative:

> [Trevino's] "new" mitigating evidence consists of double-edged evidence detailing [his] history of childhood abuse and neglect (both physical and emotional), alcohol and narcotics abuse, spotty attendance and poor performance in school, Fetal Alcohol Syndrome, and ensuing tendency to exercise poor judgment. Despite the foregoing, however, [Trevino] also furnishes a number of affidavits that describe [him] as a hard-working, non-violent, loving father. This "new" mitigating evidence must also be weighed in the context of other, uncontradicted, evidence now before this Court, which shows (1) [Trevino's] callous comments regarding [Linda] before and after her murder (including [his] suggestion that Gonzales should participate in the sexual assault on [Linda] and [his] failure to object when Rey and Cervantes suggested the need to eliminate witnesses), (2) [Trevino's] participation in the violent sexual assault upon [Linda] (*i.e.*, holding her down while others sexually assaulted her), (3) [Trevino's] subsequent directive to Gonzales not to talk to police about the incident, (4) [Trevino's] nonchalant demeanor immediately following the murder upon his return to the party at the Mata residence, (5) [Trevino's] many tattoos reflecting membership in a notorious prison gang, and (6) the complete and total absence of any indication [Trevino] has ever expressed sincere contrition or genuine remorse over [Linda's] murder.

> The latter point cannot be overemphasized. [Linda's] murder was particularly brutal and senseless. Yet [Trevino] has consistently refused to acknowledge his role in her murder, even to his own trial counsel, claiming instead to have been "too stoned" to remember exactly what happened that evening. [Trevino's] own affidavit, executed on June 11, 2004, contains not even a scintilla of sincere contrition; instead[,] [he] expresses hostility and blames his trial counsel for allegedly misrepresenting the terms of a proffered plea bargain for a life sentence without accepting any responsibility for his own rejection of the other offer after it was accurately described to [him].
>
> Absent some indication [Trevino] has willingly accepted responsibility for his role in [Linda's] brutal rape and murder, the evidence showing [his] long history of alcohol and drug abuse, long history of criminal misconduct, and membership in a violent street and prison gangs precludes this Court from finding this aspect of [his] ineffective assistance claim herein satisfies the prejudice prong of *Strickland*. There is simply no reasonable probability that, but for the failure of [Trevino's] trial counsel to present [Trevino's] capital sentencing jury with the additional, double-edged mitigating evidence now before this Court, the outcome of the punishment phase of [Trevino's] capital trial would have been different.

Trevino v. Thaler, DE 87 at 52-55 (footnotes omitted).

Thus, given the brutality visited on Linda Salinas by Trevino and his friends that night, his criminal history, his history of alcohol and substance abuse, and his complete lack of remorse, the likelihood of a different outcome, while conceivable, was certainly not substantial. *See Martinez*, 132 S. Ct. at 1321 (remanding for a determination of whether the claim of ineffective assistance of counsel was "substantial"); *see also Richter*, 131 S. Ct. at 792

(emphasizing that "[t]he likelihood of a different result must be substantial, not just conceivable") (citation omitted).

For these reasons, certiorari review is not warranted.

II. Trevino's *Brady* Claims Are Procedurally Defaulted from Federal Habeas Review. In Any Event, the Fifth Circuit Did Not Err in Ultimately Concluding that these Claims Are Meritless.

Having returned to federal court after unsuccessfully raising the previous claim of ineffective assistance of trial counsel in state court, Trevino again sought a stay to return to state court, this time based on "federal habeas counsel's discovery in the state's files of a written statement dated June 12, 1996 given by Rey indicating that Cervantes, not Trevino, stabbed [Linda]." *Trevino v. Thaler*, slip op. at 6; *see also* DE 49. Trevino asserted *Brady* claims (and concomitant *Strickland* claims) relative to both the guilt/innocence trial and the punishment trial. DE 49. The lower courts both excused the default, finding that the state process had been rendered ineffective to protect Trevino's constitutional rights, 28 U.S.C. § 2254(b)(1)(B)(ii), but on de novo review, concluded that Trevino could not establish a *Brady* claim.

A. Because these claims were not presented to the state court in a procedurally correct manner, they are procedurally defaulted.[13]

The exhaustion requirement codified at 28 U.S.C. § 2254(b)(1) reflects a policy of comity consistently adhered to by the Court. *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 8-10 (1992). Thus, before a federal court will entertain the alleged errors, a petitioner must have first provided the state's highest court with a fair opportunity to apply (1) the controlling federal constitutional principles to (2) the same factual allegations. *Duncan v. Henry*, 513 U.S. 364, 365-66 (1995). This requirement is designed to give state courts the initial opportunity to pass on and, if necessary, correct errors of federal law in a state prisoner's conviction. *Picard v. Connor*, 404 U.S. 270, 275-76 (1971). The purpose of exhaustion "is not to create a procedural hurdle on the path to federal habeas court, but to channel claims into an appropriate forum, where meritorious claims may be vindicated and unfounded litigation obviated before resort to federal court." *Keeney*, 504 U.S. at 10; *see also Cullen Pinholster*, 131 S. Ct. 1388, 1398 (2011) (reiterating that the 'broader context of the statute as a whole' [] demonstrates Congress' intent to channel prisoners' claims first to the state courts") (citation omitted). To that end, AEDPA proscribes granting relief on an unexhausted claim unless "there is

---

[13] The district court rejected the Director's contention regarding the procedural default. DE 87 at 21-22. The circuit court did as well. *Trevino v. Thaler*, slip op. at 13 & n.5.

an absence of available state process, or circumstances exist that render such process ineffective to protect the rights of the applicant." 28 U.S.C. § 2254(b)(1)(B)(i)-(ii). Here, both the federal district court and the lower court found that Trevino's failure to exhaust the instant *Brady* and *Strickland* claims should be excused because the state process was rendered ineffective when the trial court took no action on his motion for appointment for counsel. *Trevino v. Thaler*, slip op. at 6, 13 & n.5. But as discussed below, this was incorrect.

1. Ineffective state process has not been established.

Neither this Court nor the Fifth Circuit has established a bright-line test for determining when the state process has been rendered ineffective. However, the Fifth Circuit has used the *Barker*[14] factors as guidance. Those factors include (1) the length of the delay, (2) the reasons for the delay, (3) the defendant's assertion of his right, and (4) the prejudice to the defendant occasioned by the delay. *See Rheuark v. Shaw*, 628 F.2d 297, 302-04 (5th Cir. 1980). But the court has cautioned that "noncompliance with the exhaustion doctrine [should be excused] *only* if the inordinate delay is wholly and completely the fault of the state." *Deters v. Collins*, 985 F.2d 789, 796 (5th Cir. 1993) (emphasis in original, citations omitted). "Petitioners without

[14] *Barker v. Wingo*, 407 U.S.514 (1972) (setting forth factors for reviewing courts to look to when assessing a claim that a defendant's right a speedy trial was violated).

clean hands—those who contribute to the excessive delay—will not be heard to complain of the delay they have caused and thus will not be excused from the exhaustion doctrine." *Id.* (citations omitted). In the instant case, Trevino cannot be said to have clean hands; thus, his failure to exhaust these claims should not be excused.

After the district court granted Trevino's motion to stay and abate the federal habeas proceedings so that he could return to state court to exhaust this bundle of claims, Trevino filed *only* a motion for appointment of counsel. But federal habeas counsel should have been well aware that state law does not provide for the appointment of counsel on a successive state habeas application unless and until the Court of Criminal Appeals finds the application meets one of the exceptions to Texas Code of Criminal Procedure Article 11.071, Section 5. *See* Tex. Code Crim. Proc. art. 11.071 §§ 2, 5.

In response to the Director's second motion to lift the stay, DE 59, Trevino wrote: "Current appointed counsel in federal court does not have sufficient resources to adequately represent Petitioner pro bono in state court, and Petitioner is without the necessary skills and knowledge himself to navigate the difficult, treacherous, and often hazardous waters of state habeas." DE 60 at 3. Despite these proclamations, however, federal habeas counsel had previously filed a successive state habeas application—raising the previously discussed claim of ineffective assistance of counsel for failure

to investigate and present mitigating evidence and a claim that Trevino's execution would violate the Eighth Amendment as interpreted by *Atkins v. Virginia*, 536 U.S. 304 (2002), because he has Fetal Alcohol Syndrome—pro bono. Certainly these claims are far more in need of counsel and require far more resources than the relatively simple *Brady* claims Trevino chose to take a stand on. Indeed, the record establishes that counsel conducted an extensive investigation in support of those claims—never complaining about a lack of resources to any court. *See* DE 87 at 52-53 & n.59. In other words, regarding the ineffective-assistance-of-counsel claim, no motion for appointment of counsel was ever filed, much less denied or not acted on. And Trevino certainly did not file a pro se application for state writ of habeas corpus.

Finally, to the extent federal habeas counsel might have believed he needed to be appointed in order to conduct an investigation, state law does not provide for such. *See* Tex. Code Crim. Proc. art. 11.071 §§ 2, 5. Commenting on the legislature's determination that funding is not available until the requirements of Section 5 have been met, the state court wrote: "That is the hurdle the Legislature has deemed appropriate for the subsequent applicant who has, for whatever reason, bypassed his opportunity to avail himself of the resources to which he would have been entitled had he raised the issue in an initial writ application, when it was factually and

legally available to him." *Ex parte Blue*, 230 S.W.3d 151, 166-67 (Tex. Crim. App. 2007).

Both the lower court and the federal district court concluded that because the trial court "failed or refused to appoint counsel for Trevino [for over two years], despite explicit entreaties from the district court," the state process was rendered ineffective, thus excusing Trevino's failure to exhaust the instant *Brady* claims. *Trevino v. Thaler*, slip op. at 6, 13 & n.5. But as explained above, state law does not allow for the appointment of counsel unless and until a successive state habeas habeas application has been found to meet the requirements of Article 11.071, Section 5. Indeed, it is questionable whether the convicting court has the discretion to do anything until the Court the Criminal Appeals determines that the statutory requirements for filing a successive application have been met. *See* Tex. Code Crim. Proc. art. 11.071, § 5(c). If Trevino wanted to force the trial court's hand, he could very well have filed his successive habeas application so that the Court of Criminal Appeals could make its ruling.

Regardless, federal habeas counsel—who has also been acting as state habeas counsel—knew the rules; the record establishes that. And the record belies his excuse that he was unable to file a third successive application pro bono. An admittedly more complicated successive state habeas application had been previously filed without the benefit of court-appointed counsel

and/or funding—by the same federal habeas counsel who now complains that he was unable to file such without funding, the same federal habeas counsel who "discovered" the statement giving rise to the instant *Brady* claims.

Because Trevino cannot say that the delay was "wholly and completely the fault of the state," he should not be able to claim ineffective state process. Thus, his claims based on the alleged unavailability of Rey's second statements are procedurally barred. *See Coleman v. Thompson*, 501 U.S. 722, 735 n.1 (1989).

B. *Brady*'s mandate was not violated relative to Siendo "Sam" Rey's second statement to police.

Trevino alleges that the State failed to turn over a statement made by Rey indicating that Cervantes—not Trevino—actually killed Linda. In this statement, Rey says: "When Santos comes back up the creek I asked him where the girl was at. He told me 'Fuck that bitch, she didn't want to give it up so I stabbed her.'" In the courts below, Trevino contended that this directly contradicted the State's evidence at trial pointing to Trevino as the one who stabbed Linda to death, including the testimony of Juan Gonzales. His argument goes that if this statement had been available, defense counsel could have established reasonable doubt regarding who actually killed Linda by impeaching in Gonzales's testimony and more effectively cross-examining Detective Gresham. Regardless of whether the Fifth Circuit was correct in

its use of extra-record evidence, Trevino simply cannot establish materiality because a complete reading of the record demonstrates (1) that counsel did in fact create reasonable doubt as to who actually killed Linda, but (2) Trevino was charged as a party.

1. **The Fifth Circuit's use of Rey's third statement does not warrant certiorari review because, as discussed above, Trevino's *Brady* claims are procedurally defaulted. Second, as discussed below, the court relied on judicial notice, not it "inherent equitable authority." Finally, the claims are ultimately without merit.**

In determining that Trevino had failed to establish a *Brady* violation, the Fifth Circuit took judicial notice of a third statement given by Rey. This statement had not been previously placed in the record during the federal habeas proceedings. *Trevino v. Thaler*, slip op. at 6-10 & n.9; *see also id.* at 14-17. *Amici* suggest a circuit split exists regarding whether the circuit courts have inherent authority to consider evidence outside the record in rare, limited circumstances. However, they cite no case directly establishing a such a split; rather, the cases cited merely state a rule, that like many rules, applies differently in different situations.

Even if there was a circuit split, this case is not the proper vehicle for the Court to resolve it. The Fifth Circuit did not consider Rey's third statement based on any "inherent equitable authority" or Rule 10(e). Instead, the majority simply took judicial notice of the statement. *See*

Trevino v. Thaler, slip op. at 9 n.3. Therefore, regardless of whether the court misapplied the legal principles of judicial notice, its action does not squarely implicate the purported circuit split, which involves a distinct issue. At worst, this was an isolated error not worthy of certiorari review. Moreover, Trevino's *Brady* claims are both procedurally defaulted, as discussed above, and without merit, as discussed below.

2. Trevino simply cannot establish a *Brady* violation.

To establish a due process violation arising from the State's failure to disclose exculpatory evidence, Trevino must demonstrate that (1) the prosecution suppressed evidence; (2) the evidence was favorable to him; and (3) the evidence was material to either guilt or punishment. *Brady*, 373 U.S. at 87. *Brady*'s disclosure requirements extend to materials that may be used to impeach a witness. *Strickler v. Greene*, 527 U.S. 263, 282 n.21 (1999). The prosecution, however, has no duty "to make a complete and detailed accounting of all investigatory work done." *Blackmon v. Scott*, 22 F.3d 560, 565 (5th Cir. 1994) (citations omitted). Finally, evidence is constitutionally "material" "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. *United States v. Bagley*, 473 U.S. 667, 682 (1995); *see also Miller v. Dretke*, 404 F.3d 908, 913-16 (5th Cir. 2005) (emphasizing the "reasonable probability" prerequisite to materiality). "The mere possibility that an item

of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense." *United States v. Argurs*, 427 U.S. 97, 109-10 (1976). Rather, the suppression must undermine confidence in the trial. *Kyles v. Whitley*, 514 U.S. 419, 434 (1995).

a. Because Trevino's trial attorneys were on notice of the existence of Rey's statement, Trevino cannot establish suppression.

While Rey's actual statement may not have been in the State's file, that file did contain a supplementary police report filed by Detective Gresham. DE 53 at Exhibit A. On page 17 of that report there is a summary of the statement Rey gave to police including: "Seanido [sic] stated Santos returned after about fifteen minutes and when he asked him where the girl was at Santos told him he killed her." In the district court, the prosecutors and defense counsel provided competing affidavits. *See* DE 53 at Exhibits B-E. But as the circuit court explained:

> [T]he record of Trevino's first state habeas proceeding is inconsistent with the affidavits of Trevino's attorneys. During the proceeding Wilcox and Mario Trevino both gave testimony strongly suggesting that they had evaluated the witness statements in Gresham's report. Mario Trevino testified that he had been given access to statements of the prosecution's potential witnesses, as well as various police reports, and that he was aware of at least "two guys that gave statements that were pointing the finger to Mr. Trevino." Wilcox went further and testified that because he knew that *all* of the [S]tate's potential witnesses would inculpate Trevino, Wilcox had adopted a trial

> strategy of not calling any witnesses while instead relying on cross-examination in an attempt to create reasonable doubt. The potential witness list that prosecutors provided to Trevino's attorneys prior to trial included Rey.

Trevino v. Thaler, slip op. at 10. Based on this record, then, the circuit court determined that defense counsel should have been "on notice that Rey had made one statement to police suggesting that Cervantes had stabbed [Linda]. The onus was then on Trevino's lawyers to request a copy of the full statement." *Id.* at 14 (citing *Rector v. Johnson*, 120 F.3d 551, 558 (5th Cir. 1997) (failure to discover material evidence must not be the result of the lack of due diligence); *see also Gonzales v. Quarterman*, 458 F.3d 384, 392 (5th Cir. 2006) (evidence not suppressed where defense counsel knew of information that would have enabled them to discover results of a luminol test had they questioned the defendant or the officers who gave the test); *United States v. Runyan*, 290 F.3d 223, 246 (5th Cir. 2002) ("Evidence is not 'suppressed' if the defendant knows or should know of the essential facts that would enable him to take advantage of it. ... The Government is not required, in other words, to facilitate the compilation of exculpatory material that, with some industry, defense counsel could marshal on their own.") (citation omitted); *see also Raley v. Ylst*, 470 F.3d 792, 804 (9th Cir. 2005) (prosecutor does not violate *Brady* by failing to disclose evidence contained in defendant's medical records where defendant possessed salient facts regarding the

existence of the records, knew that he had made frequent visits to medical personnel, and knew that he was taking medication that they had prescribed for him); *United States v. Zagari*, 111 F.3d 307, 320 (2d Cir. 1997) ("*Brady* cannot be violated if the defendants have actual knowledge of the relevant information); *United States v. Zackson*, 6 F.3d 911, 919 (2d Cir. 1993) (finding no suppression where defendant "had sufficient access to the essential facts enabling him to take advantage of any exculpatory material that may have been available"). Here, the record plainly establishes that defense counsel were on notice regarding the existence of Rey's statement. Thus, Trevino cannot establish suppression as required by *Brady*.

b. Regardless, because the record establishes that defense counsel was able to do exactly what Trevino says should have been done with Rey's second statement—put the knife in Cervantes's hands—Trevino cannot establish materiality.

i. Guilt/innocence

Trevino cannot establish materiality because the claim rests on a flawed reading of the record. The *evidence presented to the jury* does *not* clearly establish that Trevino had a knife, much less that he was the one who stabbed Linda. If anything, Gonzales's testimony puts the knife in Cervantes's hands—exactly what Trevino wants to do with Rey's statement.

In its opening statement, the State told the jury: "We expect the evidence to show that Carlos volunteered to them [the others involved in

Linda's rape and murder] that he learned how to choke people and he learned how to use a knife." 16 RR 16. And the State expected this would be done through Gonzales's testimony. Before Gonzales testified, however, a hearing regarding the specifics of his testimony was held *outside the presence of the jury*. 18 RR 137-65. During that hearing, Gonzales testified about a conversation between Cervantes and Trevino—that seems to clearly indicate Trevino was the one responsible for stabbing Linda—as follows:

> Q. What do you remember them saying?
>
> A. Santos said it was - - I don't remember if he said "cool" or some other word about snapping her neck.
>
> Q. And he said it was cool about snapping her neck?
>
> A. Uh huh. ...
>
> Q. All right. And then what was the rest of the sentence he said?
>
> A. "*It was cool how you used that knife.*" ...
>
> Q. All right. Did Carlos respond to that?
>
> A. Yes.
>
> Q. And what did he say?
>
> A. He said, "I learned how to kill in prison."

18 RR 142-44 (emphasis added). But the testimony that *was presented to the jury* was not nearly as clear and certainly did not indicate that Trevino had "learned how to kill *in prison*":[15]

Q. And what happens next?

A. And then Santos said something about being cool about snapping her neck.

Q. Who was he talking to when he said that?

A. To Carlos.

Q. All right. And I couldn't quite hear you. Did you say, "Being cool while snapping her neck?"

A. I don't remember the word he said.

Q. Are you saying he said something like that?

A. Yes, ma'am.

Q. All right. And did Carlos say anything in response to that?

A. He said, "I learned how to kill." ...

Q. All right. Once everyone was in the car, *does Santos say anything about a weapon*?

A. No, ma'am.

Q. All right.

A. Oh yeah.

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[15] The prosecution explained to the trial court that Gonzales had been told not say "in prison" when testifying in front of the jury if so instructed. 18 RR 146; *see also id.* at 153-54 (Gonzales instructed on the record).

Q. What does he say?

A. *He said something about using a knife.*

Q. Did you see the knife?

A. No, ma'am.

19 RR 5-6 (emphasis added). Thus, the State did *not*, as it had during the hearing outside the presence of the jury, clearly tie the knife to Trevino. Indeed, the knife was tied to Cervantes.

On cross-examination, defense counsel was able to more clearly able to put the knife in Cervantes's hands as follows:

Q. It was Santos with the knife. Is that correct?

A. I didn't see him with the knife.

Q. Remember making the statement to that effect to the district attorney's office?

A. Yes, sir.

Q. You told them Santos had the knife. Right?

A. He had a knife like two days before, but I don't know if he still had it.

Q. But you told them Santos had a knife. Right?

A. Yes, sir.

Q. You also told them that it was Santos that got rid of that knife two days later. Right?

A. Yes, sir.

Q. Not you. Right. You're not the one with the knife. You're not the one who got rid of the knife?

A. No. ...

Q. *Was it Carlos with the knife?*

A. *I don't know.*

Q. And he didn't get rid of that knife?

A. No.

Q. *And it was Santos that you asked, "Why did you kill Linda Salinas,"* isn't it?

A. *Yes, sir.*

Q. What did he tell you?

A. To mind my own business.

Q. It was the same Santos who two days later told you that he broke up that knife and threw it into a river?

A. Yes, sir.

19 RR 28-30 (emphasis added). Thus, defense counsel was able to put at the knife *in Cervantes's hands* and identify him as the actual killer, exactly what Trevino contends they could have done with Rey's statement.

Finally, on re-direct, the State elicited the following testimony:

Q. All right. And with regard to those statements - - well, how did you know Linda was dead?

A. Because of what Santos had said in the car.

Q. All right. Did you also know because of what Carlos said in the car?

A. Yes. ...

Q. And when you say that Santos was responsible, how do you come to that conclusion?

A. Because two days before at Jay's house, he had a knife.

19 RR 44-45. By the end of Gonzales's testimony, Trevino was—at best—possibly responsible for snapping Linda's neck, something the autopsy revealed did not happen anyway. There was no clear evidence that Trevino had stabbed her or ever even had possession of a knife. But there was evidence tying Cervantes to a knife—a knife he destroyed two days after Linda's murder—and it was Cervantes who was responsible for Linda's murder, at least according to Gonzales.

After Gonzales's testimony, the medical examiner confirmed that the cause of death was two stab wounds to the neck. 19 RR 68. On cross-examination, the defense attempted to cast reasonable doubt on the inference that Trevino had snapped Linda's neck by eliciting testimony that her neck was not broken, and there was no bruising or lacerations suggesting someone might have tried to do so. *Id.* at 85.

Ultimately, Trevino was one of five men—and the only one of the three most culpable for Linda's murder who did not accept a plea bargain—who brutally raped a fifteen-year-old girl, killed her "because we don't need no

witnesses,"[16] and then set fire to her backpack and other belongings in an attempt to destroy evidence. He also warned Gonzales not to talk to the police. And Trevino has never denied taking part in the brutality that occurred on June 9, 1996. During the state habeas hearing, one of Trevino's lawyers testified that Trevino had admitted to being present when Linda was raped and murdered; he just did not remember exactly what happened because he was "too stoned." SHRR 33-38.[17]

But putting all of that aside, Trevino was charged as a party. As was explained to the jury: "Our law provides a person is criminally responsible as a party to an offense if the offense is committed by his own conduct, or by the conduct of another for which he is criminally responsible, or by both." 2 CR 150. In short, the jurors did not need to be convinced beyond a reasonable doubt that Trevino was the one who actually stabbed Linda in order to convict him of capital murder. They only had to be convinced that Trevino understood that Linda would be killed that night, something the evidence establishes that beyond a reasonable doubt.[18]

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[16] 18 RR 191.

[17] "SHRR" refers to the Reporter's Record of transcribed state habeas proceedings, followed by page number(s).

[18] As the prosecutor explained to the jury during closing argument: "*Whether you choose to believe he actually plunged that knife into her or not*, you know that when she went down this path and they had that conversation, it was his conscious objective and desire not to go back to prison, not to have any witnesses, to kill Linda

Whatever the State told the jury during its opening statement was not borne out by the evidence at guilt/innocence. As it stood at the end of the trial, the evidence did not clearly put the knife in Trevino's hands, but there was no doubt he was there that night, that he was an active participant in the brutal assault on Linda, that he was—at the very least—complicit in her murder.

For all of these reasons, Trevino cannot establish a "reasonable probability" that "the result of the [guilt/innocence] proceeding would have been different." *Bagley*, 473 U.S. at 682.

ii. Punishment

Trevino also contended that Rey's statement would have given the jury something on which to base a negative answer to the second special issue, the so-called anti-parties charge:

> Do you find from the evidence beyond a reasonable doubt that Carlos Trevino, the defendant himself, actually caused the death of Linda Salinas, the deceased, on the occasion in question, or if he did not actually cause the deceased's death, that he intended to kill the deceased or another, or that he anticipated that a human life would be taken?

Salinas." 24 RR 20 (emphasis added). The prosecutor went on to argue: "You can infer from the evidence that he committed sexual assault. *You can infer from the evidence that he's the actual killer. And if you don't believe that, you certainly have ample evidence to know exactly what his intent was out there that day was.*" *Id.* at 43-44 (emphasis added).

2 CR 179, 186. But the evidence more than supports the jury's affirmative answer to this question. Most importantly, Gonzales testified that *both* Cervantes *and* Trevino had blood on their shirts when they came back to the car. Combined with Trevino's statement "[w]e'll do what we have to do," 18 RR 191, or "[d]o what you have to do," 19 RR 33-34, in response to Rey's statement that "we don't need no witnesses," 18 RR 191, this is certainly enough for the jury to infer that Trevino—at the very least—"anticipated that a human life would be taken." Thus, as with the guilt/innocence trial, the availability of Rey's statement would not have changed the outcome.

On the whole of this record, then, Trevino simply cannot establish that the result of the punishment trial would have been different, even if defense counsel had and/or could have used Rey's statement.[19]

For these reasons, certiorari review should be denied.

CONCLUSION

For the foregoing reasons, the Director respectfully requests that this Court deny Trevino's petition for writ of certiorari.

Respectfully submitted,

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[19] As stated above, Trevino raised concomitant *Strickland* claims relative to Rey's statement. Both the circuit court and the district court, however, found Trevino had failed to establish either deficient performance or resultant prejudice for essentially the same reasons he could not establish materiality under *Brady*. *See Trevino v. Thaler*, slip op. at 17; DE 87 at 40-41.

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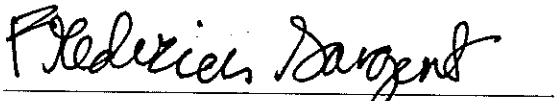

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