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
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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OVERVIEW

In addressing the first question Mr. Trevino presented to this Court, Respondent first contends that because the Fifth Circuit has determined that this Court's decision in *Martinez v. Ryan*, 132 S.Ct. 1309 (2012) does not apply to Texas, this Court should deny Mr. Trevino's petition. However, the question of the applicability of *Martinez* to Texas cases is, by the Fifth Circuit's own action, still an unsettled question. Respondent then contends that Mr. Trevino's *Wiggins* claim is not "substantial" as required for review under *Martinez*. But *Martinez* puts the "substantial" question in the context of a standard for a certificate of appealability to issue; i.e., whether the claim is debatable amongst jurists of reason. Mr. Trevino was granted a certificate of appealability on this issue for exactly that reason. His claim is substantial. Mr. Trevino's request to stay his appeal in the Fifth Circuit pending this Court's decision in then-pending *Martinez* was denied. He was not afforded an opportunity to litigate that question in the Fifth Circuit, and denial of his petition at this point will deprive him of presenting such an argument for review at any level.

In addressing the second question Mr. Trevino presented to this Court - regarding the extraordinarily flawed judicial process employed by the Fifth Circuit in addressing Mr. Trevino's *Brady* and associated ineffective assistance of counsel claims - Respondent begins by raising an argument already rejected by both the District Court and the Fifth Circuit. Respondent argues that both courts erred by deciding that Mr. Trevino was excluded from the exhaustion requirement on this question by an ineffective state process. In renewing that argument, Respondent again presents a misleading description of Texas law on the issue.

Respondent then proceeds to argue that Mr. Trevino cannot establish materiality with regard to those issues because, at trial, he successfully established reasonable doubt as to who actually killed

the victim. However, Respondent notes that said success is not determinative because Mr. Trevino was charged under Texas' law of parties. Since Respondent thus concedes that Mr. Trevino could only be found not guilty of actually committing the offense, the only remaining question is whether, under the law of parties, it was committed by another for whom he is criminally responsible. But the statement Mr. Trevino complains was suppressed, makes it clear that the declarant, Mr. Rey, decided to commit both the rape and the murder on his own, when he found that the victim "didn't want to give it up." Such statement would have been invaluable in contesting Mr. Trevino's culpability under the Texas law of parties at trial.

Beyond that, Respondent's only response to this question is that "[a]t worse, this was an isolated error not worthy of certiorari review." Bud even an "isolated error" leading to a wrong, or at least questionable, decision in a death penalty case is surely a serious matter. The error would only be magnified if this Court declines to exercise its supervisory powers and clearly indicate to the Fifth Circuit that such a flawed judicial process cannot be permitted to stand - or to reoccur in the future. This Court should grant review of this question.

I. Mr. Trevino's Reply to Respondent's Brief in Opposition to His First Question Regarding Trial Counsel's Ineffectiveness under *Wiggins*

A. The Question of the Applicability of *Martinez* to Texas, is Still Unresolved in the Fifth Circuit

The Fifth Circuit held that review of Mr. Trevino's claim that trial counsel was ineffective under *Wiggins v. Smith*, 539 U.S. 510 (2003), was procedurally barred by the failure of Mr. Trevino's first state habeas counsel to bring this claim in his first state habeas proceeding. *Trevino v. Thaler*, 449 Fed. Appx. 415 (5th Cir, 2011), Appendix A to the Petition for Writ of Certiorari, at 23 [identified therein as *Trevino v. Thaler*, No. 10-70004 (5th Cir. November 14, 2011)]. Anticipating that the eventual decision in *Martinez v. Ryan*, 132 S.Ct. 1309 (2012), might provide a basis for arguing "cause" for this default by state habeas counsel, Mr. Trevino asked the Fifth Circuit to stay his appeal until *Martinez* was decided, but the court declined, issuing its opinion on November 14, 2011, and denying rehearing on January 31, 2012. *Martinez* was decided March 20, 2012, and thus Mr. Trevino never had the opportunity to present his *Martinez*-based argument to the Fifth Circuit.

In the interim between the filing of Mr. Trevino's petition for writ of certiorari and the present, the Fifth Circuit has decided that *Martinez* does not apply to Texas. *Ibarra v. Thaler*, 687 F.3d 222 (5th Cir. 2012). As Respondent acknowledges, *Ibarra* has been the subject of a number of requests for rehearing en banc in the Fifth Circuit, and in at least one case, *Gates v. Thaler*, No. 11-70023, the Fifth Circuit has directed the respondent to file a response to the rehearing petition. Respondent argues that since the applicability of *Martinez* is still percolating in the Fifth Circuit, the Court should allow that process to take its course and not intervene by granting certiorari in Mr. Trevino's case.

Since Respondent filed his brief in opposition, further developments have taken place with respect to the *Martinez-Ibarra* question. On August 21, 2012, the Fifth Circuit denied rehearing en banc and a stay of execution on the question of whether *Ibarra* conflicted with *Martinez* in *Balentine v. Thaler*, No. 12-70023, 2012 U.S. App. LEXIS 17753 (5th Cir. Aug. 21, 2012). Four judges dissented from the denial of rehearing. *Id.* The next day, this Court granted a stay of execution. *Balentine v. Thaler*, No. 12-5906, 2012 U.S. LEXIS 5078 (U.S. August 22, 2012). For the Court to do this, it had to determine, inter alia, that there is (1) a reasonable probability that four members of the Court would consider the underlying issue sufficiently meritorious for the grant of certiorari or the notation of probable jurisdiction; and that there is (2) a significant possibility of reversal of the lower court's decision. *Barefoot v. Estelle*, 463 U.S. 880, 895 (1983). This message appears not to have been lost on the Fifth Circuit. In the wake of this Court's action in *Balentine*, on August 27, 2012 the Fifth Circuit moved the oral argument in the case of *Rayford v. Thaler*, No. 12-70004 -- a case in which the only issue in the application for a certificate of appealability is the applicability of *Martinez* to Texas, *Id.*, Docket Item May 14, 2012 (Application for Certificate of Appealability and Brief in Support) - from October 2, to December 4, 2012. *Id.*, Docket Item August 27, 2012. There now appears to be stronger percolation going on in the Fifth Circuit with respect to the threshold issue of whether *Martinez* applies to Texas, and if the move of the *Rayford* oral argument is indicative of this, the Fifth Circuit is anticipating that it will act between now and December 4.

In light of the acknowledged percolation that now seems to be going on in the Fifth Circuit concerning this issue, this Court should hold Mr. Trevino's case until the Fifth Circuit has decided whether to rehear *en banc* its ruling that *Martinez* does not apply to Texas. Following the Fifth Circuit's disposition of the *en banc* question, this Court should either remand in light of *Martinez*,

or allow Mr. Trevino to present a supplement to his petition for certiorari arguing why the Court should grant certiorari to decide whether the Fifth Circuit is wrong in holding in holding that *Martinez* does not apply in Texas. Despite all his efforts in anticipation of the decision in *Martinez*, Mr. Trevino was not allowed an appellate process in the Fifth Circuit that took *Martinez* into consideration. To deny certiorari now, simply because the Fifth Circuit still appears to be struggling with the applicability of *Martinez* to Texas, makes no sense and would be starkly unfair to Mr. Trevino. Upon denial of certiorari, his execution will be scheduled, and then he would be forced to litigate the *Martinez-Ibarra* question along the same track as *John Balentine*. This should not happen.

B. Mr. Trevino Was Granted a Certificate of Appealability Precisely on the Standard Required by *Martinez* for Presenting a "Substantial" Claim

Martinez held that, in states where its rule applies, a habeas petitioner must be allowed to show that state habeas counsel was ineffective as cause for the default of a trial ineffectiveness claim so long as 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." Cf. *Miller–El v. Cockrell*, 537 U.S. 322 (2003) (describing standards for certificates of appealability to issue). *Martinez*, 132 S.Ct. at 1318-19. *Miller-El* makes clear that this showing of merit need "not demonstrate an entitlement to relief." 537 U.S. at 337. The court must instead "ask whether th[e] [claim] [i]s debatable amongst jurists of reason," and "[t]his threshold inquiry does not require full consideration of the factual or legal bases adduced in support of the claims." *Id.* at 336.

By the district court's own assessment, Mr. Trevino's *Wiggins* claim meets this test, because the court granted a certificate of appealability on the *Wiggins* claim.

Thus, notwithstanding the district court's disparagement of the claim, as noted by Respondent, the court found the claim at least debatable on the merits, and that is all that *Martinez* requires for its protections to be triggered. As the District Court noted in its grant of a certificate of appealability on Mr. Trevino's *Wiggins* claim:

> [Mr. Trevino's] . . . complaint of ineffective assistance arising from his trial counsel's failure to adequately investigate petitioner's background and develop and present mitigating evidence during the punishment phase of his trial regarding petitioner's deprived and abusive childhood, was procedurally defaulted. Reasonable minds could not disagree on this point. Nonetheless, reasonable minds could disagree over whether petitioner has satisfied the "fundamental miscarriage of justice" exception to the procedural default doctrine in connection with this claim. Petitioner's federal habeas counsel has presented this Court with evidence suggesting petitioner suffers from the effects of Fetal Alcohol Syndrome, including the inability to express remorse in a recognizable manner. Furthermore, petitioner has presented this Court with evidence showing even the most minimal investigation into petitioner's background (through rudimentary interviews with family members and review of relevant school and medical records) would have revealed a wealth of additional mitigating evidence far more substantial that the superficial account of petitioner's childhood given by petitioner's lone witness during the punishment phase of trial. Under these circumstances, reasonable minds could disagree over whether petitioner has satisfied the fundamental miscarriage of justice exception to the procedural default doctrine with regard to his *Wiggins* claim, *i.e.,* petitioner's complaint that his trial counsel rendered ineffective assistance at the punishment phase of trial by failing to (1) adequately investigate petitioner's background and (2) discover, develop, and present available mitigating evidence.

Trevino v. Thaler, 678 F. Supp. 2d 445, 497-98 (W.D. Tex., 2009).

For these reasons, Mr. Trevino's petition for writ of certiorari should be held pending this Court's determination of whether and how it will intervene in the *Martinez-Ibarra* conflict.

II. Mr. Trevino's Reply to Respondent's Brief in Opposition to His Second Question Regarding the Fifth Circuit's Extraordinary and Flawed Judicial Process Used to Address His *Brady* and Associated Ineffective Assistance Claims

A. The Lower Courts' Decisions to Excuse the Exhaustion Requirement for These Claims Was Correct

Respondent's first response to Mr. Trevino's second question presented to this Court, is to reassert a procedural default argument that was rejected by both the Fifth Circuit and the District Court. *Trevino v. Thaler*, 449 Fed. Appx. 415, 423, n.5 (5th Cir, 2011); *Trevino v. Thaler*, 678 F. Supp. 2d 445, 458 (W.D. Tex., 2009). Respondent's contention is that, by filing a motion in the Texas trial court for appointment of counsel to assist with the preparation of a successive writ application, Mr. Trevino knowingly acted counter to the law in Texas regarding the process for submitting a successive state habeas application. Respondent cites to the Texas statutory scheme for capital habeas, and specifically section 5 of article 11.071 of the Texas Code of Criminal Procedure, contending that "state law does not provide for the appointment of counsel on successive state habeas application unless and until the Court of Criminal appeals finds the application meets one of the exceptions" enumerated in that section. Tex. Code Crim. P. art 11.071 §5. While it is true that section 5 does not *require* such appointment, as does section 2 of that article for an initial habeas application, it is also true that section 5 does not *prohibit* such appointment. A careful reading of section 5 will also reveal that the triggering event for all actions it specifies is the *filing* of a subsequent application for a writ of habeas corpus. There is no action triggered by any other event - including a motion for appointment of counsel. Conveniently, Respondent completely ignores the provisions of section (d)(3) of article 1.051 of the Texas Code of Criminal Procedure, which provides that a trial court may appoint counsel to represent an indigent defendant in "a habeas corpus proceeding if the court determines that the interests of justice requires representation." *See* Tex. Code Crim. Proc. art. 1.051 §(d)(3).

In support of his position, Respondent also cites to a decision by the Texas Court of Criminal Procedure, *Ex parte Blue*, 230 S.W.3d 151 (Tex. Crim. App. 2007). *Ex parte Blue* addressed a

situation in which a petitioner sentenced to death had filed a subsequent writ application in the Texas courts, contending that he could not be assessed the death penalty, consistent with this Court's decision in *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct 2242 (2002). One of the issues *Blue* raised, and the Court of Criminal Appeals addressed, was whether requiring *Blue*'s counsel to provide the resources, *pro bono*, necessary to establish the predicate conditions applicable to an *Atkins* claim in a subsequent writ application was unreasonably onerous. The *Blue* Court concluded, as Respondent correctly cites, that the Texas legislature had determined that such a hurdle was appropriate in such a case. *Id.* at 166-67. However, that case involved a situation in which a subsequent application has already been filed. The *Blue* decision did not address either article 1.051 or the situation in which an appointment, or the approval of resources, was sought before such an application was filed.

Mr. Trevino chose to request the appointment of counsel to assist with the preparation and filing of a successive writ in state court. Contrary to Respondent's contentions, such a request is not only *not* prohibited by state law, but is specifically available if the state court determines it is required in the interest of justice. However, rather that deciding that "interest of justice" question, the applicable Texas Judge chose to take no action whatsoever on Mr. Trevino's request for an extended period of time. The District Court in turn found that such circumstances rendered the applicable state process ineffective to protect Mr. Trevino's rights pursuant to 28 U.S.C. §2254(b)(1), and thus excused Mr. Trevino's failure to exhaust state remedies. *See* 678 F. Supp.2d 445 at 459. The Fifth Circuit agreed with the District Court's decision. 449 Fed. Appx 415 at 423, n5. Respondent's argument in opposition to these decisions failed in the courts below, misrepresents the state of the law in Texas on this issue, and should also be summarily rejected by this Court.

B. Respondent's Alternative Contention That The *Brady* Violation Was Not Material Because Mr. Trevino's Conviction Would Still Stand under Texas' Law of Parties Instruction, Ignores the Potential Value of the Suppressed Document in the Hands of Skilled and Talented Trial Defense Counsel

Neither the District Court nor the Fifth Circuit decided the suppression prong of Mr. Trevino's *Brady* claim, bypassing that in favor of deciding instead that the materiality prong could not be met.[1] The Fifth Circuit made this decision squarely on the basis of the extraordinarily flawed judicial process it employed, and that flawed decision will be addressed separately below.

On the other hand, both the District Court and the Respondent address the materiality prong in the context of a jury charge permitting conviction of capital murder under Texas' law of parties. Significantly, the Respondent directly concedes in his reply what the District Court's opinion only implies - that Mr. Trevino was successful in establishing reasonable doubt regarding his culpability as the actor who actually committed the murder. Of course, that did not stop the state at trial from presenting an argument in favor of the death penalty at the punishment phase, that focused on placing the bloody knife in the hands of Mr. Trevino.

The thrust of the analysis by both the District Court and the Respondent is that because Mr. Trevino never denied being present at the scene of the crime, and had made some confusing puffery statements, if he didn't actually commit the murder, he clearly was guilty as a party - that is that he either acted with the intent to assist in the commission of the murder, or should have anticipated that

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[1] Mr. Trevino finds it disturbing that Respondent perpetuates the Fifth Circuit's blatant misreading and misquotation of the record of the hearing on state habeas review, in the discussion of the procedural posture of his *Brady* issue. Specifically, Respondent cites to and quotes the Fifth Circuit's opinion at 449 Fed. Appx. at 421, purporting to recite verbatim testimony of co-defense trial counsel Gus Wilcox at that hearing. In fact, the record of that hearing shows clearly that Mr. Wilcox not only did not testify, but that he was recognized by the habeas court as being in attendance at the hearing, and was specifically not called by either party.

a murder would take place. But an implicit assumption underlying both analyses is that Mr. Trevino's trial attorneys were unskilled in the art and science of advocacy. While Mr. Trevino does complain that his trial counsel were ineffective in their efforts to acquire appropriate evidence, he does not complain of their skills during trial of regarding the use of the evidence they did have. They were unquestionably sufficiently talented and skilled to meet the strict criteria established by Bexar County, Texas necessary to put them in that small contingent of defense attorneys qualified to represent defendants facing the death penalty at trial. The Respondent's contentions totally ignore those qualifications, and the value of such a statement to defense counsel. In the hands of such skilled and talented trial attorneys, a statement in which a third party declarant says directly that the victim decided not to have sex - whether with him alone or with a group of men is unclear and was never available for the jury's consideration - and as a direct result of that decision, *he* decided to murder her. Not that "we" decided. That "I" decided. Thus, had the *Brady* violation not occurred, defense trial counsel could have easily made the argument that it showed that had the victim agreed to willingly participate in whatever sexual activity was being demanded of her, she would not have been murdered. Whether that argument would have been persuasive or not is a question that cannot be answered at this point, because *Brady* was violated, and the statement was not available. However, under that scenario, it clearly could not have been foreseeable to Mr. Trevino that the murder would have happened, nor would Mr. Trevino's participation have been based on an intent to promote or assist another in the commission of a murder that arguable would not have occurred had the victim been cooperative. As the respondent concedes, he would not have been guilty as the primary actor. As Mr. Trevino propounds, neither would he be guilty as a party to the murder. He could well have been convicted of the offense of aggravated sexual assault - a non-death penalty

offense. But in that situation, Mr. Trevino would not be in this Court under these circumstances. This question deserves further review.

C. Respondent's Contention That the Fifth Circuit's Extraordinary Judicial Process Used in Reviewing Mr. Trevino's *Brady* and Associated Ineffective Assistance of Counsel Claims Was "An Isolated Error Not Worthy of Certiorari Review," Is Absurd in the Context of the Review of a Death Penalty Case

As noted in section II.B above, the Fifth Circuit denied Mr. Trevino's *Brady* claim, holding that the complained-of statement was not material. But that decision was reached as a direct result of an extraordinary judicial process that involved the Court's *sua sponte* factual investigation, record supplementation, and denial of both notice to Mr. Trevino and of an opportunity to respond. In its opinion, the Fifth Circuit noted that Mr. Trevino's opportunity to respond would be considered via a Motion for Rehearing, but - as noted in part I above - summarily denied both Mr. Trevino's Motion for Rehearing and his Motion for Rehearing *en banc*.

The process used by the Fifth Circuit with regard to this issue was indeed extraordinary. That Court conducted, *sua sponte* and in a non-transparent way, an investigative review of the trial court files of at least one of Mr. Trevino's five co-defendants. Whether the files of all co-defendants were so reviewed is unknown. The Fifth Circuit procured a copy of one document from those files, and supplemented Mr. Trevino's appellate record with that document, again *sua sponte*. Whether other documents were also procured is unknown, as is whether all trial files so reviewed by the Fifth Circuit were complete and correct.

Having thus obtained a document here-to-fore unknown to, or litigated by, the parties, the Fifth Circuit then took judicial notice of said document. But that judicial notice was not just notice of the existence of the document but, as seen in a moment, also necessarily of it's *presumed*

credibility and reliability. The Fifth Circuit gave no notice to Mr. Trevino that it was taking such judicial notice, and thus offered him no opportunity to respond to it. It is presumed that the Fifth Circuit gave no notice, nor opportunity to respond, to Respondent as well, but that is not known. Having thus supplemented the appellate record, the Fifth Circuit proceeded with its analysis of Mr. Trevino's *Brady* and associated ineffective assistance of counsel claims. In a very short three paragraphs, the Fifth Circuit denies Mr. Trevino's *Brady* claim by concluding that "whatever probative value the [allegedly suppressed document] may have had, therefore, was negated by [the document it *sua sponte* obtained], and later by [declarant's] guilty plea." *Trevino*, 449 Fed. Appx. at 427. The Fifth Circuit never explains how a guilty plea entered by a co-defendant months after Mr. Trevino's trial has any bearing or relevance to any issue or evidence at that trial. Nor does the Fifth Circuit ever explain how it concluded that one statement was more credible and deserving of acceptance than another. Having thus easily dispatched with Mr. Trevino's *Brady* claim, the Fifth Circuit proceeds to do the same with his associated ineffective assistance of counsel claim. In one short paragraph, the Fifth Circuit holds that "[t]his claim has no merit for the reasons stated above." *Id.* at 428.

Respondent's claim that the foregoing extraordinary judicial process undertaken by the Fifth Circuit is "an isolated error not worthy of certiorari review," is absurd in the context of the review of a death penalty case. The question here is not whether an appellate court has the authority to take judicial notice of a document. Mr. Trevino does not debate that the Rule of Evidence 201 gives the Court such authority. *See* Fed. R. Evid. 201. The procedural questions at issue are the appropriateness of the independent, *sua sponte*, and non-transparent factual investigation undertaken by the Fifth Circuit; the subsequent independent, *sua sponte*, and non-transparent supplementation

of the appellate record under review, with a document that has never been even acknowledged, let alone litigated, by the parties, and; the presumption that such a document is both more credible and reliable than a contradictory statement by the same declarant, especially when that point has never been even raised, let alone argued, by Respondent in opposing Mr. Trevino's claims. Of course, there is also the question of the requirement in Rule 201(e) that "[i]f the court takes judicial notice before notifying a party, the party, on request, is still *entitled* to be heard. Fed. R. Evid. 201(e). (emphasis added).

Finally, Respondent repeatedly refers to the "brutal" or "cruel" nature of the underlying offense throughout his reply, as though that provides some justification for the ultimate penalty assessed against Mr. Trevino. This tactic was properly characterized as "the State's stereotypical fall-back argument" by the Fifth Circuit over ten years ago. *See*, *Gardner v. Johnson*, 247 F.3d 551, 563 (5th Cir. 2001). The logic of the *Gardner* Court's comments compel the conclusion that to permit a jury to impose the death penalty - or an appellate court to uphold it - based solely on the heinous or egregious nature of the offense would be to eviscerate the "special issues" scheme used in Texas capital cases, and approved as constitutional by this Court. As the *Gardner* Court noted, "if that were all that is required to offset prejudicial legal error and convert it to harmless error, habeas relief based on evidentiary error in the punishment phase would virtually never be available, so testing for it would amount to a hollow judicial act." *Id.*

In light of the serious impact of the extraordinary judicial process used by the Fifth Circuit in reviewing his *Brady* and associated ineffective assistance of counsel claims herein, Mr. Trevino is respectfully requesting that this Court take such action as appropriate pursuant to its supervisory powers, to ensure the review of the imposition of the ultimate penalty in his case not be simply a

"hollow judicial act."

CONCLUSION AND PRAYER FOR RELIEF

For the foregoing reasons, Mr. Trevino respectfully requests this Court withhold action on his petition for certiorari until the question of the applicability of this Court's decision in *Martinez v. Ryan* in Texas is resolved. Alternatively, Mr. Trevino respectively requests that his petition be granted, and that the Court either accept this case for review, or that his sentence be vacated, and his case remanded.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Warren Alan Wolf, hereby certify that on the 1st day of September, 2012, a true and correct copy of PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI was served on counsel for Respondent via First Class United States Mail, addressed to Ms. Fredericka Sargent, Assistant Attorney General, Office of the Attorney General, P.O. Box 12548, Capital Station, Austin, Texas 78711, in accordance with Sup. Ct. R. 29. All parties required to be served have been served. I am a members of the Bar of this Court.

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