No. _____

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

_____

PETITION FOR WRIT OF CERTIORARI

_____

Warren Alan Wolf*
Texas Bar No. 21853500
Law Office of Warren Alan Wolf
115 E. Travis Street, Suite 746
San Antonio, Texas 78205
Tel: (210) 225-0055
Fax: (210) 225-0061
wwolf711@aol.com

John J. Ritenour, Jr.†
Texas Bar No. 00794533
The Ritenour Law Firm, P.C.
115 E. Travis Street, Suite 1716
San Antonio, Texas 78205
Tel: (210) 222-0125
Fax: (210) 222-2467
Ritenourlaw@aol.com

Attorneys for Petitioner Carlos Trevino

* Counsel of Record, Member, Supreme Court Bar
† Member, Supreme Court Bar

QUESTIONS PRESENTED

CAPITAL CASE

1. In federal habeas proceedings, undersigned counsel raised for the first time a claim under *Wiggins v. Smith*, 539 U.S. 510 (2003), that trial counsel were ineffective for failing to investigate the extraordinary mitigating evidence in Mr. Trevino's life. The federal proceeding was stayed to allow exhaustion, but the Texas Court of Criminal Appeals dismissed Mr. Trevino's *Wiggins* claim under state abuse of the writ rules. Thereafter, the federal district court dismissed the claim as procedurally barred, finding no cause for the default. On appeal, Mr. Trevino argued that the Court of Appeals should stay further proceedings until this Court resolved the question then-pending in several cases whether ineffective assistance of state habeas counsel in failing to raise a meritorious claim of ineffective assistance of trial counsel established cause for the default in state habeas proceedings. The Court of Appeals refused to stay Mr. Trevino's appeal for this purpose. Four months later, this Court decided in *Martinez v. Ryan*, 132 S.Ct. 1309 (March 20, 2012), that ineffective assistance of state habeas counsel in the very circumstance presented by Mr. Trevino's case could establish cause for the default of a claim of ineffective assistance of trial counsel. These circumstances present the following question:

> Whether the Court should grant certiorari, vacate the Court of Appeals' opinion, and remand to the Court of Appeals for consideration of Mr. Trevino's argument under *Martinez v. Ryan*?

2. Mr. Trevino raised a claim under *Brady v. Maryland*, 373 U.S. 83 (1963), that

the trial prosecutor suppressed a statement to the police by a codefendant to the effect that Trevino did not commit the capital murder. To rule against this claim, the panel majority in the Court of Appeals—without notice to Mr. Trevino or his counsel—conducted its own investigation of the separate trial court record of this codefendant, found a subsequent statement by him contradicting his exculpatory statement, took judicial notice of the statement and used it as the basis for affirming the district court's denial of Mr. Trevino's *Brady* claim. The panel majority acknowledged the lack of notice to Trevino, but said that he could be heard by petition for rehearing. Trevino presented arguments on rehearing and on rehearing en banc, but both were summarily denied. These circumstances present the following question:

> Whether the Court of Appeals' denial of notice and an opportunity to be heard on a matter that is determinative of a meritorious *Brady* issue requires the Court's exercise of its supervisory powers to assure that Mr. Trevino is afforded a fair opportunity to be heard on appeal?

LIST OF PARTIES

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PETITION FOR WRIT OF CERTIORARI

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Carlos Trevino respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit affirming the district court's denial of Mr. Trevino's writ of habeas corpus is not reported, but is included as Appendix A. The memorandum opinion of the federal district court denying Mr. Trevino's writ of habeas corpus is not reported, but is included at Appendix B. The opinion of the Texas Court of Criminal Appeals denying Mr. Trevino's initial state writ of habeas

corpus is not reported, but is included at Appendix C. The opinion of the Texas Court of Criminal Appeals denying Mr. Trevino's subsequent writ of habeas corpus is not reported, but is included at Appendix D. The decision of the United States Court of Appeals for the Fifth Circuit denying Mr. Trevino's Petition for Rehearing and Petition for Rehearing en banc is not reported, but is included at Appendix E. The Texas Court of Criminal Appeals decision denying Mr. Trevino's direct appeal is reported at *Trevino v. State*, 991 S.W.2d 849 (Tex. Crim. App. 1999), and included at Appendix F.

JURISDICTION

The Court has jurisdiction to entertain this petition for writ of certiorari pursuant to 28 U.S.C. §1254(1). The court of appeals rendered its decision sought to be reviewed on November 14, 2011. See Appendix A. Mr. Trevino's petitions for rehearing and for rehearing en banc were both denied on January 31, 2012. See Appendix E.

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in relevant part:

"In all criminal prosecutions, the accused shall . . . have the Assistance of Counsel in his defence."

The Fifth Amendment to the United States Constitution provides in relevant part:

> "No person shall be ... deprived of life, liberty, or property, without due process of law."

Section 1 of the Fourteenth Amendment to the United States Constitution provides in relevant part:

"No State shall ... deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

A. STATEMENT OF FACTS

The statement of facts from Mr. Trevino's trial is substantially set forth in the federal district court's opinion in *Trevino v. Thaler*, No. SA-01-CA-306-XR (W.D. Tex. December 21, 2009), Appendix B at 1-10.

In summary, Petitioner Carlos Trevino was a back seat passenger in a vehicle of five young men in San Antonio, Texas on the evening of June 9, 1996. While stopped at a gas station, one of the men, Santos Cervantes, encountered Ms. Linda Salinas, with whom he was acquainted. Mr. Cervantes invited Ms. Salinas to join them in their vehicle, and she accepted. Mr. Cervantes and Ms Salinas began sexually-intimate interactions with each other shortly after she got in the car. AS she sat in Mr. Cervantes' lap in the front passenger seat, Mr. Cervantes proceeded to strip her naked from the waist up. Mr. Cervantes had offered to take Ms. Salinas to a nearby fast-food restaurant. Instead, he directed the driver to go to a secluded park, where one, or two, or more of the men—statements of the co-defendants are conflicting—took Ms. Salinas out of sight. She was subsequently sexually assaulted and murdered. Her body was discovered the following day. The autopsy showed that Ms. Salinas died as a result of stab wounds to the neck.

The evidence elicited at trial convinced the jury that Mr. Trevino was among that group, and that he was involved in Ms. Salinas' murder. The central witness for the state at

trial was one Juan Gonzales, who was a juvenile at the time of the murder. While he was indisputably present at the scene, was identified by the trial court in the jury instructions as an "accomplice as a matter of law," and was on juvenile felony probation at the time, he was never charged in connection with the murder, nor was any action taken with regard to his probationary status. (There was no evidence revealed, nor any record uncovered, indicating that Juan Gonzales was ever offered immunity or any promise of leniency in return for his testimony.)

The state also presented forensic fiber and DNA evidence allegedly linking Mr. Trevino to the scene. The fiber evidence showed that the fibers involved were "similar to" those from Mr. Trevino's clothing. The DNA expert testified that a blood sample from Ms. Salinas' underwear contained a mixture of DNA, and that Ms. Salinas and Mr. Trevino could not be excluded as the contributors of that evidence. (During the subsequent federal habeas proceedings, federal habeas counsel had that underwear sample retested by an independent laboratory, which found the clothing contained neither blood nor DNA evidence.)

The defense presented no witnesses at the guilt-innocence phase of trial.

At the punishment phase of the trial the state presented, among other evidence, testimony regarding Mr. Trevino's prior convictions, and of his gang membership. His convictions were shown to be non-violent. The only evidence of Mr. Trevino's gang activity was that he first joined a gang while in prison. The defense offered no witnesses, lay or otherwise, to counter the impression left by the state that mere gang membership or

association while in prison equated with either commission of, or character for, violent behavior. Mr. Trevino's defense team presented only one witness, his aunt, who testified regarding her knowledge of Mr. Trevino's life, and disputed his ability to commit capital murder. The jury deliberated approximately eight hours, before returning a verdict which resulted in the trial court subsequently pronouncing a sentence of death.

B. PROCEEDINGS BELOW

Mr. Trevino was convicted and sentenced to death for his part in the sexual assault and murder of Linda Salinas in San Antonio, Texas on June 9, 1996.

Mr. Trevino was represented on direct appeal and initial state habeas proceedings by two different appointed counsel (neither of which was current counsel). Initial state habeas counsel, working alone without assembling a defense team of investigation, mitigation or any other experts or support specialists, filed an initial state writ of habeas corpus, raising only record-based claims. That initial state writ of habeas corpus was denied by the Texas Court of Criminal Appeals in an unpublished opinion, *Ex parte Trevino*, WR-48,153-01 (Tex. Crim. App. April 4, 2001), included at Appendix C. That initial state writ of habeas corpus raised, among other issues, eight claims of denial of effective assistance of trial counsel. However, all of those claims were based on evidentiary issues shown in the trial record. None were the result of an independent investigation of the facts or issues conducted by state habeas counsel, or of an independent review by state habeas counsel of how trial counsel's investigation and subsequent preparation compared to such an investigation.

State habeas counsel was continued on appointment by the federal district court as federal habeas counsel. Shortly after filing an initial federal habeas petition, again containing only record-based claims, that counsel withdrew, citing an inability to continue in that capacity for psychological and physical health reasons. Newly appointed federal habeas counsel (and current counsel of record) conducted an independent investigation of the facts and issues in accordance with established precedent and pertinent performance standards. That investigation disclosed a previously unidentified *Brady* claim, potentially affecting both the guilt-innocence and punishment phases of trial, along with a claim of ineffective assistance of trial counsel in failing to identify and effectively use the document that was at the core of the *Brady* claim.[1] The investigation also led to a previously unidentified *Wiggins* claim—a near total failure of trial counsel to investigate, develop and present mitigating evidence.

The federal district court permitted Mr. Trevino to return to state court twice, in an effort to exhaust those newly discovered claims. On his first return to state court, Mr.

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[1]The facts giving rise to the *Brady* claim were these: Three of the four men that were in the car that night with Mr. Trevino gave statements to the police variously implicating Trevino in the sexual assaults and/or the murder of Ms. Salinas. Only one, however, Juan Gonzalez, testified against Trevino. The fourth man, Seanido "Sam" Rey, at first told the police he knew nothing about what happened. He then gave a second statement exculpating Trevino from the murder. Finally, he gave a third statement implicating Trevino in the murder.

In the course of their investigation, undersigned counsel discovered the second statement in a prosecution file (but did not find the third statement), learned from trial counsel that they had not seen the second statement, and then claimed that the prosecution had suppressed the statement in violation of *Brady*, and that the statement was material because it contradicted the account of the murder by the prosecution's chief witness.

Trevino's *Wiggins* claim was rejected by the Texas Court of Criminal Appeals on state abuse-of-the-writ grounds in an unpublished opinion. See Appendix C. The second return involved an effort to exhaust the newly discovered *Brady* and associated ineffective assistance claims. After the responsible state judicial officer refused to take any action to deal in any manner at all with those claims for over two years, the federal district court found the state habeas process wholly ineffective to protect Mr. Trevino's rights pursuant to 28 U.S.C. §2254(b)(1), and excused the failure to exhaust the *Brady* and associated ineffective assistance claims in state court.

In a memorandum opinion, the federal district court subsequently denied all claims, finding the *Wiggins* claim to be procedurally defaulted, and the evidence in the *Brady* and associated ineffective assistance claims to not meet the materiality requirement of *Brady*. *Trevino v. Thaler*, No. SA-01-CA-306-XR (W.D. Tex. December 21, 2009), included at Appendix B. However, it granted Certificates of Appealability on all three claims.

With regard to the *Wiggins* claim, the district court explained that:

> While a showing of ineffective assistance can satisfy the "cause" prong of the "cause and actual prejudice" exception to the procedural default doctrine, petitioner cannot rely upon the allegedly deficient performance or even "ineffective" assistance of his first state habeas corpus counsel as a basis for excusing his failure to present this aspect of his ineffective assistance claims herein to the state courts during petitioner's first state habeas corpus proceeding. A negligent failure or a malicious refusal by a convicted defendant's state habeas counsel to present a potentially meritorious claim in the course of the defendant's state habeas corpus proceeding effectively precludes federal habeas review of that claim, unless the defendant can satisfy the fundamental miscarriage of justice exception to the federal procedural default doctrine. *See Ruiz v. Dretke*, 2005 WL 2146119, *14 (W.D. Tex. August 29, 2005) (holding a state habeas counsel's inexplicable failure to assert glaringly obvious grounds for state habeas corpus relief constituted a procedural barrier to federal habeas review of those

> same unexhausted claims), affirmed, 460 F.3d 638 (5th Cir. 2006), *cert. denied*, 549 U.S. 1283 (2007). Infirmities in state habeas corpus proceedings, even those that arise exclusively from the gross incompetence of a petitioner's state habeas counsel, do not constitute grounds for federal habeas relief and are insufficient to excuse a federal habeas petitioner's procedural default on a federal constitutional claim. *Ruiz v. Dretke*, 460 F.3d 638, 644-45 (5th Cir. 2006), *cert. denied*, 549 U.S. 1283 (2007).

App. B at 45-46. The district court ultimately concluded that "[n]one of the exceptions to the procedural default doctrine apply to [the *Wiggins* claim]." *Id.* at 55.

The United States Court of Appeals for the Fifth Circuit concurred with the district court's conclusion that Mr. Trevino's *Wiggins* claim was procedurally barred under Texas' abuse-of-the-writ doctrine. *Trevino v. Thaler*, No. 10-70004, (5th Cir. November 14, 2011), included at Appendix A. The court then examined the question of whether Mr. Trevino could satisfy the "miscarriage of justice" exception to that procedural bar in accordance with the district court's grant of a certificate of appealability. Following an analysis similar to that of the district court, the court of appeals concluded that this exception did not apply to Mr. Trevino's claim because he could not satisfy the actual-innocence standard with regard to his eligibility for the death penalty. However, in so doing, the court noted that:

> ... the volume of new evidence identified by Trevino is much greater than what was presented by his trial attorneys. Notwithstanding the volume of this potentially mitigating evidence or the effect it might have on the jury's sympathies, this evidence does not satisfy the demanding standard of "actual innocence" because it bears no relationship to Trevino's eligibility for the death penalty.

See Appendix A at 23.

In a 2-1 decision---with a strong dissent by Judge Dennis---the court of appeals also

affirmed the district court's denial of Mr. Trevino's *Brady* and associated ineffective assistance claims. Significantly, the court indicated that "[t]he record evidence indicates that [the allegedly withheld] statement was the second of three signed, written statements Rey gave to police [] during the investigation of Salinas' death."[2] However, that referenced "third statement" was and never had been, part of Mr. Trevino's record. The fifth circuit explained that the statement had been obtained and considered by the court—without notice to Mr. Trevino or his counsel—in the court's own *sua sponte* investigation. Appendix A, at fn3, p9.

In conducting its review of the claims related to Sam Rey's exculpatory statement, the court of appeals noted that it conducted an independent investigation into Rey's statement and found a third statement by him. The court then identified and quoted the third statement—which was not in Mr. Trevino's record at trial, on appeal, or on any habeas proceeding at any level. This statement was not identified, raised, or addressed by either party to Mr. Trevino's proceedings, or by any court reviewing any proceedings at any level prior to the Fifth Circuit's review. The court of appeals then took judicial notice of not only the existence of that document, but of its contents and credibility specifically in comparison to, and in contrast with, the document at the core of Mr. Trevino's *Brady* and associated ineffective assistance claims, Rey's second statement.

The court of appeals made Sam Rey's judicially-noticed third statement the

[2] Appendix A, at 6 (emphasis in original).

centerpiece of its analysis of Mr. Trevino's *Brady* and associated ineffective assistance of counsel claims. The panel majority explained:

> In light of Rey's third written statement to the police inculpating Trevino in Salinas's murder, it is indisputable that Rey's second written statement was immaterial to Trevino's case. If Trevino's lawyers had been successful in introducing Rey's second statement to suggest that Cervantes was solely responsible for Salinas's murder, the prosecution undoubtedly would have introduced Rey's third statement. Introduction of Rey's third statement would have destroyed any benefit Trevino would have otherwise gained from the second statement. Not only does Rey's third statement expressly retract his second statement's assertion that Cervantes took Salinas to the woods by himself, Rey's third statement plainly describes Trevino's active participation in Salinas's rape and murder....
>
> Under these circumstances, Rey's second written statement cannot be considered material because there is not a "reasonable probability" that the outcome of Trevino's trial would have been different if the full statement had been disclosed. In fact, quite the opposite is true—it is almost certain that the outcome would have been the same.

Appendix A, at 14-16.

The panel majority did note that Rule of Evidence 201 controlling a court's taking of judicial notice does provide an opportunity for the parties to a litigation to comment on such action. The court addressed that issue with the following entry in a footnote in its opinion:

> . . . Because Trevino has not had an opportunity to have input into our decision to take judicial notice of documents in the state court proceedings involving Rey, we afford him the right to raise any objection he may have by means of a petition for rehearing, which objection we will consider filed before our opinion issued.

Appendix A, fn3, p 9.[3]

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[3]Mr. Trevino did file petitions for both rehearing and rehearing en banc. Both were denied. Appendix E.

Judge Dennis dissented from this ruling, summarizing his views as follows:

Sam Rey, an accomplice to the rape and murder of Linda Salinas on June 9, 1996, gave a detailed, sworn, written statement to police on June 12, 1996, which completely exculpated Carlos Trevino. This statement by Rey contradicted the testimony of Juan Gonzales, the state's chief prosecution witness, who said that Trevino participated in the rape and shortly after the crime, Trevino made statements to Rey, Gonzales, and others inculpating himself in Salinas' murder. In his federal habeas petition, Trevino contends that the state failed to disclose Rey's June 12th written statement in violation of *Brady v. Maryland,* 373 U.S. 83 (1963); and that if the statement had been disclosed and available, his attorneys failed to discover and use it, rendering their assistance ineffective in violation of *Strickland v. Washington,* 466 U.S. 668 (1984). The majority concludes that Trevino is not entitled to habeas relief because Rey's June 12th statement is not "material" under *Brady* and *Strickland*. The majority reasons that Rey's statement is not material because the prosecutor in Trevino's trial would have used a subsequent, June 13th, written statement by Rey, which inculpated Trevino, to contradict Rey's earlier June 12th statement. However, that later statement does not appear anywhere in the record before the district court in this case; indeed, the majority has produced it *sua sponte* by going outside of the record in this case, to a record of another state court case to which Trevino was not a party. Neither the state nor Trevino had ever before mentioned Rey's June 13th statement, let alone litigated the significance of it—for all we know, neither Trevino nor the state's attorneys in Trevino's criminal trial, nor the state's attorneys in Trevino's habeas proceedings, has ever seen or heard of this statement before the majority *sua sponte* obtained a copy of it after this appeal was fully briefed.

I respectfully disagree with the majority's course in taking judicial notice of Rey's June 13th written statement and using it to resolve this case on its merits. The majority provides no authority that permits us, without request or agreement of the parties, to go outside of the record before the district court, to a state court record of a different case, of a different defendant, to find a statement by a non-party witness who did not testify at the petitioner's trial. Moreover, the majority makes a determination that Rey's June 13th statement is more truthful than his June 12th statement, and therefore is a retraction of it; however, such a credibility determination is not a kind of fact that may be judicially noticed, *viz.,* a fact "not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose

> accuracy cannot reasonably be questioned." Fed.R.Evid. 201(b). Rather than using judicial notice to improperly supersede Rey's June 12th statement with his June 13th statement that was not part of the district court's record, we should vacate the district court's judgment and remand the case for an evidentiary hearing or stipulations of the parties as to the context and circumstances surrounding Rey's June 12th and 13th statements and for decisions upon the issues arising out of them. I do not share the majority's confidence in their ability as appellate judges with nothing but a paper record to neatly reconstruct the likely outcome of this case had all of Rey's statements been disclosed to defense counsel before trial, since Rey's third statement, upon which the majority so heavily relies in affirming the death penalty, has never been introduced or subjected to any trial court adversary proceedings in this case.

Appendix A, at 27-28.

REASONS FOR GRANTING THE WRIT

A. THE COURT SHOULD GRANT CERTIORARI TO ALLOW THE LOWER COURTS TO REVIEW THE FINDING OF PROCEDURAL DEFAULT OF PETITIONER'S *WIGGINS* CLAIM IN LIGHT OF ITS RECENT DECISION IN *MARTINEZ v. RYAN*

In *Martinez v. Ryan*, 566 U.S. ___, 132 S.Ct. 1309 (2012), this Court recognized a narrow exception to the holding in *Coleman v. Thompson*, 501 U.S. 772 (1991) such that inadequate assistance of counsel at initial-review collateral proceedings may establish cause to excuse a prisoner's procedural default of a claim of ineffective assistance of counsel at trial. This is not a constitutional right, but an exception in equity applicable in situations in which a State requires a prisoner to raise an ineffective-assistance-of-trial-counsel claim in a collateral proceeding. Even then, it is available only where the State did not appoint counsel in the initial-review collateral proceedings, or where appointed counsel in such a proceeding in which such a claim should have been raised, was ineffective under the

standards of *Strickland v. Washington*, 466 U.S. 668 (1984). Still, to overcome the default, the prisoner must establish that the claim has some merit.

1. IN PRACTICE, CLAIMS OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL IN A TEXAS CAPITAL CASE CAN ONLY EFFECTIVELY BE RAISED ON INITIAL-COLLATERAL REVIEW

The Texas Court of Criminal Appeals effectively and consistently defers consideration of the vast majority of ineffective assistance of trial counsel claims to initial state habeas proceedings, because virtually every such claim relies upon facts outside the trial record. *See Ex parte White*, 160 S.W.3d 46, 49 n.1 (Tex. Crim. App. 2004); *Thompson v. State*, 9 S.W. 3d 808, 813 (Tex. Crim. App. 1999); *Ex parte Torres*, 943 S.W.2d 469, 475-76 (Tex. Crim. App. 1997); *Ex parte Duffey*, 607 S.W.2d 507, 513 (Tex. Crim. App. 1980), overruled on other grounds by *Hernandez v. State*, 988 S.W.2d 770 (Tex. Crim. App. 1999). *See also*, *Ex parte Brown*, 158 S.W.3d. 449, 460-61 (Tex. Crim. App. 2005) (Keasler, J., dissenting) (explaining that ineffective assistance of counsel claims as an entire class may not be raised until habeas corpus); *Boone v. State*, 77 S.W.3d 828, 833 (Tex. Crim. App. 2002) (dissuading the assertion of ineffective assistance of counsel claims on direct appeal).

While the facts giving rise to ineffective assistance of trial counsel claims might in theory be raised in the motion for new trial, the practical impossibility of such an effort precludes this as an alternative to habeas proceedings. New counsel would have to be appointed immediately at the conclusion of trial, and new counsel would have to obtain the required resources and conduct the intensive investigation required to examine guilt-

innocence and penalty phase facts underlying aggravation and mitigation. In addition, Rule 21.4 of the Texas Rules of Appellate Procedure require that the trial judge rule on a Motion for New Trial within 75-days of imposing sentence, else it is deemed denied by operation of law. In practical terms, that time is woefully insufficient for conducting a proper independent investigation and analysis, and developing an adequate record in a capital, death penalty, trial. Thus a person convicted of a capital offense in Texas is required, in practice, to raise any ineffective-assistance-of-trial-counsel claims on initial state habeas.

2. MR. TREVINO'S CLAIM THAT HIS TRIAL COUNSEL FAILED TO INVESTIGATE, DEVELOP AND PRESENT MITIGATION EVIDENCE HAS MERIT

Upon appointment to replace initial federal habeas counsel, who was also the initial state habeas counsel, new federal habeas counsel initiated a due diligence review of prior proceedings. He discovered that while trial counsel had made preparations for the guilt-innocence phase of trial, there had been almost no investigation into trial counsel's efforts to develop factual or mitigation issues pertinent to the punishment phase. He further discovered that state habeas counsel (continued on appointment as first federal habeas counsel) had also failed to perform an independent investigation into potential punishment or mitigation-related issues. Thus state habeas counsel entirely failed to investigate any non-record issue of effective assistance of trial counsel at the punishment phase of the trial. Accordingly, no effective assistance of counsel issues pertaining to the investigation, development or presentation of mitigation evidence at the punishment phase of the trial were

either examined or raised on initial collateral review.

The paucity of mitigation evidence presented by trial counsel is chronicled in the federal district court's review of the trial proceedings. That court noted that, at the punishment phase of trial:

> The defense presented a single witness, petitioner's aunt, who testified (1) she had known petitioner all his life, (2) petitioner's father was largely absent throughout petitioner's life, (3) petitioner's mother "has alcohol problems right now," (4) Petitioner's family was on welfare during his childhood, (5) petitioner was a loner in school, (6) petitioner dropped out of school and went to work for his mother's boyfriend doing roofing work, (7) petitioner is the father of one child and is good with children, often taking care of her two daughters, and (8) she knows petitioner is incapable of committing capital murder.

Appendix B at 8-9.

Second federal counsel's investigation, however, revealed that, at a minimum, the following information could have been developed and presented by trial counsel at the punishment phase of Mr. Trevino's capital trial:

1. Mr. Trevino's mother was emotionally unstable, physically abusive, alcoholic who abused alcohol throughout her pregnancy with Mr. Trevino.

2. Mr. Trevino was born premature.

3. Mr. Trevino weighed only four pounds at birth and required considerable hospital care during his first few weeks of life.

4. For the rest of his life, Mr. Trevino suffered the deleterious effects of Fetal Alcohol Syndrome, as well as his mother's physical and emotional abuse.

5. Mr. Trevino was without his biological father throughout his childhood.

6. Mr. Trevino was malnourished as a child.

7. Mr. Trevino suffered numerous serious head injuries as a child for which he received little or no medical care due to the neglect of his mother and the absence of his father.

8. Mr. Trevino was physically abused by his mother and her "boy friends" as a child.

9. Mr. Trevino was traumatized as a child by experiencing the death of his younger sister.

10. Mr. Trevino was traumatized as a child by witnessing his friend being shot to death.

11. Mr. Trevino's family wound up homeless.

12. Mr. Trevino was a talented artist.

13. Mr. Trevino is a father of a son, Carlos, Jr.

14. Mr. Trevino worked as a roofer with his stepfather.

15. Mr. Trevino helped raise the son of his girlfriend as if he was his own.

16. Mr. Trevino was exposed to alcohol and drug abuse from an early age and began abusing both alcohol and marijuana himself before he reached age twelve.

17. Mr. Trevino became involved in street gangs and street crime by age twelve.

18. Mr. Trevino's history of crime was nonviolence.

19. Mr. Trevino, if sentenced to capital life would not be eligible for parole until he turned 58 years old.

20. Mr. Trevino experienced a lifetime of adversity, disadvantage, and disability.

> 21. Mr. Trevino's first parole date would cause him to "age out," making him more docile and less likely to re-offend upon his first parole eligibility.

In a capital trial, these factors are certainly meritorious. Any subset of them could have given one or more jurors reason to vote for life. Because his trial counsel never investigated or developed this information, Mr. Trevino's jury was never told of this evidence, and initial state habeas counsel never even attempted to discover the mitigation factors listed above.

Mr. Trevino believes it significant that in reviewing this claim, the federal district court found that, under Texas law, the new mitigating evidence Mr. Trevino presented focused almost entirely on the "mitigation" or *post-Penry* special issue submitted to the jury at the punishment phase of his capital murder trial, and not on his "eligibility" for the death sentence. While the district court denied this claim, it did not totally disregard the potential impact of the new mitigating evidence. In granting a certificate of appealability on the question, the court noted that this evidence was so substantial that it could reasonably be considered as rendering Mr. Trevino ineligible for the death penalty:

> 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.

Appendix B, at 115.

> 3. IF GIVEN THE OPPORTUNITY TO DEMONSTRATE THAT HIS STATE HABEAS COUNSEL PROVIDED INEFFECTIVE ASSISTANCE IN FAILING TO DEVELOP AND ASSERT HIS *WIGGINS* CLAIM, MR. TREVINO WILL BE ABLE TO DEMONSTRATE CAUSE FOR THE DEFAULT OF THIS CLAIM IN STATE HABEAS PROCEEDINGS

When Mr. Trevino's case was decided by the federal district court, counsel for Mr. Trevino had no reasonable basis to believe that this Court would, a little more than two years thereafter, modify its decision in *Coleman v. Thompson* to permit federal habeas petitioners to demonstrate ineffective assistance of state habeas counsel as cause for the failure to raise ineffective assistance of trial counsel claims in state habeas proceedings. By the time he filed Mr. Trevino's reply brief in the Fifth Circuit, however—on October 18, 2010—this Court had given the first indication that it might be preparing to re-examine this question by staying the execution of another Texas prisoner who presented the very "cause" question that would later be decided in *Martinez v. Ryan*. *See Bradford v. Thaler*, No. 09-11519 (October 8, 2010) (staying execution pending the disposition of petition for writ of certiorari).[4] Mr. Trevino brought this matter to the attention of the Fifth Circuit, reminded the court that his state habeas counsel had undertaken no investigation of non-record-based ineffective assistance of trial counsel claims, and asked that the court stay further proceedings on his appeal so that he could take advantage of any ultimately favorable decision on this issue. *See Trevino v. Thaler*, No. 10-70004, Reply Brief of the Appellant, at 12-13, 18. The Fifth Circuit, however, denied his appeal one month later.

In the wake of *Martinez v. Ryan*, Mr. Trevino should have the opportunity to demonstrate that state habeas counsel was ineffective in failing to develop and present the

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[4]The Question Presented in *Bradford v. Thaler* was: "Whether the ineffective assistance of counsel in post-conviction proceedings constitutes 'cause,' when, as a matter of state law, post-conviction proceedings provide the only state forum in which a death-sentenced inmate can present the federal constitutional claim that his trial lawyer was incompetent."

substantial *Wiggins* claim that he was able to present later in federal habeas proceedings. He already demonstrated a *prima facie* case of habeas counsel's ineffectiveness in attempting to persuade the Texas Court of Criminal Appeals to allow his *Wiggins* claim to be heard when he pled the following:

On July 31, 2002, former state habeas counsel, Albert L. Rodriguez, filed in federal district court a motion to withdraw from further representation of Petitioner Trevino in the federal habeas proceedings. Mr. Rodriguez succinctly stated the reasons for his decision to withdraw:

> Over the last few years counsel has become progressively ill from a thyroid condition, diabetes, hypertension, and mental stress and depression from all of the above. Counsel is taking the following daily medications: Synthroid, Cartia, Glucophage, and Zoloft. Dr. Jose Sanchez has strongly urged that counsel discontinue death penalty writ cases as they greatly aggravate his existing medical condition.

See Motion to Withdraw as Attorney for Petitioner, p. 2. The federal district court granted the motion to withdraw on August 14, 2002.

Mr. Rodriguez refused to discuss his medical and psychological problems with undersigned counsel. However, it is clear from Mr. Rodriguez's own description of his conditions and daily prescription medications that his medical and psychological conditions were long-standing, growing progressively worse, and taking a serious toll on his day-to-day functioning. It is also clear that practicing death penalty law was exacerbating all of his health problems. His physician "***strongly urged***" him to stop representing death row inmates

in post-conviction proceedings, because such cases "***greatly aggravate his existing medical condition***." *Id.* at 2 (emphases added).

A death row inmate represented by an attorney who is suffering from a progressively worsening medical condition that is causing major depressive disorder and other mental stress and which is "greatly aggravated" by his continued representation of death row inmates in post-conviction proceedings has been deprived in some fundamental way of competent, effective assistance of counsel. By definition, a major depressive episode usually interferes with a person's daily functioning and can include increased fatigue, loss of interest in normal activities, and slowed thinking or impaired concentration. Hypothyroidism can cause depression, fatigue, and decreased concentration. The claims that Mr. Rodriguez did raise in the initial state habeas application provide compelling evidence of the extent to which his medical and psychological problems substantially impaired his abilities as Petitioner Trevino's appointed post-conviction counsel.

Twenty-nine of the claims contained in the initial state habeas application are lifted nearly verbatim from the direct appeal brief. The remaining claims consist of various allegations of ineffective assistance of counsel for failure to make specific objections at trial. ***Not one of the 46 separately pleaded claims contained in the initial state habeas application relies on facts outside of the trial record.*** Clearly, Mr. Rodriguez attempted to minimize the toll that a comprehensive investigation and litigation of extra-record claims would take on his physical and mental health. Unfortunately, because Mr. Rodriguez's

medical condition affected his abilities to act as habeas counsel, he should have notified the Texas Court of Criminal Appeals of his compromised condition at the time of his appointment.

The wealth of readily-available and compelling mitigating evidence demonstrates the effect Mr. Rodriguez's physical and mental problems had on his performance. Current habeas counsel developed a cognizable and meritorious claim of ineffective assistance of counsel at the punishment phase. The trial record alone would have placed a physically and mentally healthy attorney on notice that an investigation into Petitioner Trevino's background would be absolutely essential, because trial counsel put on only a single witness at the sentencing stage, whose testimony fills a mere five pages of transcript. *See* Testimony of Juanita Treviño DeLeon, RR Vol. XXIII, pp. 135-40.

For all the reasons set out herein, Mr. Trevino urges this Court to grant certiorari and remanding his case so the Fifth Circuit Court of Appeals can examine his claims of ineffectiveness of state habeas and trial counsel in light of *Martinez v Ryan*, as the Court has done in similarly-situated cases.[5]

B. THE FIFTH CIRCUIT ERRED IN USING AN EXTRAORDINARY AND FLAWED JUDICIAL PROCESS TO DENY PETITIONER'S *BRADY* AND ASSOCIATED INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS

1. THE COURT OF APPEALS' *SUA SPONTE* INVESTIGATION AND SUPPLEMENTATION OF THE RECORD BEFORE IT WAS WITHOUT PRECEDENT

[5] 10-8629, *Smith v. Colson*; 10-11031, *Cantu v. Thaler*; 11-5067, *Middlebrooks v. Thaler*; 11-6969, *Newbury v. Thaler*; 11-7978, *Woods v. Holbrook*

The *Brady* and associated ineffective assistance of counsel issues appealed to the Fifth Circuit involved an allegedly undisclosed/undiscovered exculpatory statement by a non-testifying co-defendant - the second statement of Seanido Rey. In the process of addressing those issues, the court of appeals conducted an independent investigation in which it *sua sponte* obtained a third statement of Mr. Rey from his plea proceedings, conducted nearly a year after Mr. Trevino's trial, in the District Court of Bexar County, Texas. A sharply divided panel of the court then proceeded to supplement Mr. Trevino's record on appeal by taking judicial notice of that document. In a 2-1 opinion, the court sharply divided over the question of whether it could take such action.

There is no question that an appellate court may take judicial notice of adjudicative facts pursuant to Rule of Evidence 201. However, there are qualifications to that action. The Rule requires that the fact judicially noticed not be subject to reasonable dispute because it is either generally known within the trial court's territorial jurisdiction, or can be accurately and readily determined from sources whose accuracy cannot be reasonably be questioned.

Judge Dennis' dissent sharply criticized the majority's action. Appendix A at 27-48 (Dennis, J.) It noted that:

> After this appeal was fully briefed, the majority, *sua sponte*, requested the state court record for Rey's murder conviction. That record contains three written statements by Rey, the second of which forms the basis of Trevino's claims in this case, and is the only written statement by Rey that was introduced into the habeas record before the district court. The other two statements do not appear in the district court record in this case and have never been addressed or litigated by the parties. Nonetheless, the majority now reasons that it can take

> judicial notice of Rey's third (June 13th) statement, and give credit to it in lieu of Rey's second (June 12th) statement. In my view, that course is not supported by precedent or authority.

Id. at 34. To be sure, the panel majority did cite several cases in support of its action. Appendix A at 9, n.3. However, as Judge Dennis' dissent explained, those cases do not provide precedent or authority for the panel majority's action.

The first cite by the majority is to *Brown v. Lippard*, 350 F. App'x 879, 883 n.2 (5th Cir 2009, unpublished). This case involved taking judicial notice of the transcript of the first of two trials on the same cause of action brought by Brown---as Judge Dennis' dissent noted, the *Brown* court took judicial notice "merely of a 'docket entry establishing the existence of the 2001 transcript.'" Appendix A at 38. In analyzing whether it could take judicial notice of the contents, and not just the existence of that document, the *Brown* court examined two authorities, *Lumen Constr., Inc. v. Brant Constr. Co.*, 780 F.2d 691, 697 n.4 (7th Cir. 1985) and *Jacques v. U.S. R.R. Ret. Bd.*, 736 F.2d 34, 39-40 (2d Cir. 1984). The *Lumen Construction* case addressed proceedings below involving the same litigants and the same questions. In *Jacques*, the document in question was from a proceeding involving the same appellant, was known to the parties, had been the topic of discussion at oral argument, and the contents of the document were not subject to dispute. After examining those cases, the *Brown* court made no decision regarding the propriety of taking judicial notice of documents not in any prior proceeding involving the appellant, and instead "assumed *arguendo"* that it could do so in that specific case. *Brown v. Lippard*, 350 F. App'x at 883 n.2. Thus, it

established no precedent for the panel majority's action.

The second authority cited by the majority was *Moore v. Estelle*, 526 F.2d 690, 694 (5th Cir. 1976). Appendix A at 9, n.3. The *Moore* court noted that "we take judicial notice of prior habeas proceedings brought by this appellant *in connection with the same conviction*." *Moore*, 526 F.2d at 694 (internal citations omitted, emphasis added). Clearly, the state trial court case file for Seanido Rey did not involve Mr. Trevino's conviction, nor was it brought, or contested for that matter, by Mr. Trevino. None of the cases cited or referenced provide precedent or authority for the panel majority's action.

2. THE COURT OF APPEALS' COMPOUNDED ITS ERROR BY TAKING, AND RELYING UPON, JUDICIAL NOTICE OF THE RELATIVE CREDIBILITY OF TWO DOCUMENTS IN DETERMINING THE MATERIALITY ISSUE

Not only did the court of appeals err in its *sua sponte* supplementation of the record, it compounded that error by taking judicial notice that Mr. Rey's newly acquired third statement was more credible than his second. As noted above, Rule of Evidence 201 only permits a court to take such notice of adjudicative facts that are "not subject to reasonable dispute" and "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201. Mr. Rey's second and third statements were, in many respects, in conflict with each other. There was no "source whose accuracy cannot reasonably be questioned" to which the court of appeals, or anyone else for that matter, could turn to determine the accuracy of the third statement, or of either statement. Because the statements are in partial conflict, and since none of the parties to Mr. Trevino's

proceedings had ever litigated, or even addressed, Rey's third statement, it was certainly subject to reasonable dispute. In fact, the credibility of Rey's second statement had not been litigated. Only its disclosure or discovery had been the subject of litigation.

At this point, the panel majority should have decided to remand Mr. Trevino's case to the district court for further consideration, for an appellate court can only speculate what a jury would have found as to the relative credibility of these two statements. *See Smith v. Cain*, 132 S.Ct. 627, 630 (2012) ("[t]hat merely leaves us to speculate about which of [the prosecution witness'] contradictory declarations the jury would have believed"). However, the panel majority proceeded undeterred by speculation.

The majority went on to examine the usefulness of the two statements at trial and found that the third statement would be found more credible had both statements been available. Thus, the majority concluded that:

> Rey's third written statement is consistent with the trial evidence. There is no reasonable probability that but for the alleged failure of the prosecution to disclose Rey's second written statement, the jury would have found Trevino not guilty of capital murder under Texas's law of the parties

Appendix A at 16. While engaged in such speculation, the majority discounted the affidavits of defense counsel asserting that neither had seen Rey's second statement, and overlooked the state's admission, as addressed in the dissent, that it may not have disclosed that statement. Appendix A at 46-47. Having discounted those affidavits, it chose as well to discount their statements of how the second statement would have been used if disclosed.

It completely ignored the usefulness of both statements in pretrial investigation and preparation. It ignored their usefulness by defense counsel in cross examination of state witnesses or challenging their credibility at both the guilt-innocence and punishment phases of trial.[6]

The majority thus concluded that because Rey's third, (speculatively) more credible, statement inculpated Trevino in the murder, "it is indisputable that Rey's second written statement was immaterial to Trevino's case." Appendix A at 14.

As the dissent succinctly pointed out,:

> It is clear that on the record before the district court, Rey's second statement is material—otherwise, the majority would not have found it necessary to commit serious legal error by *sua sponte* going outside of the district court's record to take notice of facts not judicially noticeable under Federal Rule of Evidence 201 in order to reach the contrary conclusion

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[6] As Mr. Trevino stated in his brief to the federal district court,

> [Mr. Trevino] contends that had Seanido Rey's statement been disclosed, the defense team would have been better able to counter the State's "lone killer" theory, especially at the punishment phase of trial. It would have better prepared the defense to cross examine other state witnesses. Placing the information contained in Rey's statement in context with the time-line of information in other statements in other statements attributed to co-defendants, a skilled trial attorney could have placed some question in the minds of the jurors at punishment regarding Mr. Trevino's moral culpability in Ms. Salinas' death.

See Trevino v. Thaler, No. 10-70004, Brief of the Appellant, at 10.

Appendix A at 40. The dissent then concisely summarized the errors of the panel majority as:

> The majority's taking judicial notice of Rey's third written statement in order to conclude that it retracts and makes immaterial Rey's second statement, is not authorized by law; it judicially notices a kind of adjudicative fact that courts may not take notice of under Federal Rule of Evidence 201. The majority's contention is that the prosecutors would have used Rey's third statement to undermine any beneficial use defense counsel could have made of Rey's second written statement, and thus, that the second statement is immaterial. To reach this conclusion requires the majority to take notice of the following facts: that Rey made a third written statement; that he made it before Trevino's trial; that the prosecutors in Trevino's case were aware of the existence of that written statement at the time of Trevino's trial; that the prosecutors in Trevino's trial would have used that statement if defense counsel had called Rey as a witness or used his second written statement to attack the state's case; and that the jury would have given credit to Rey's third written statement in lieu of his second written statement.
>
> However, these facts are "subject to reasonable dispute" and are not "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Therefore, they are not the "kinds of facts" of which Rule 201 allows a court to take judicial notice. Based on the record before the district court, supplemented by the record from Rey's state court criminal proceeding, we cannot properly know or judicially notice whether the state's attorneys in Trevino's criminal trial were aware of Rey's third statement. (The prosecutor in Rey's case was not the same as in Trevino's case.) It is not at all certain that the state's attorneys would have known of or resorted to using Rey's third statement at trial, because they did not use it or even mention it in Trevino's federal habeas proceedings. Moreover, the majority's argument rests on an improper determination of the relative truthfulness of one statement by Rey vis-à-vis another by him. However, the truth of a statement is not a proper matter for judicial notice. See Wright & Graham, supra, § 5106.4, at 231-36 ("It seems clear that a court cannot notice pleadings or testimony [in court records] as true simply because these statements are filed with the court. . . [A] court cannot take judicial notice of the truth of a document simply because someone put it in the court's files . . . [Courts] can notice [that an] assertion was made, but not that it was true . . .").

Appendix A at 36-37.

The court of appeals violated both precedent and established rules in its analysis and determination of Mr. Trevino's *Brady* and associated ineffective assistance of counsel claims. It has so significantly departed from the accepted and usual course of judicial proceedings as to call on this Court to exercise its supervisory powers, grant this petition for certiorari, and remand to the Fifth Circuit for further review in accordance with established precedent and rules.

CONCLUSION AND PRAYER FOR RELIEF

For the foregoing reasons, Carlos Trevino respectfully requests this Court grant the petition for writ of certiorari, and accept this case for review. Alternatively, Mr. Trevino requests that his petition be granted, his sentence be vacated, and his case remanded.

Respectfully submitted,

Warren Alan Wolf*
Texas Bar No. 21853500
Law Office of Warren Alan Wolf
115 E. Travis Street, Suite 746
San Antonio, Texas 78205
Tel: (210) 225-0055
Fax: (210) 225-0061
wwolf711@aol.com

John J. Ritenour, Jr.†
Texas Bar No. 00794533
The Ritenour Law Firm, P.C.
115 E. Travis Street, Suite 1716
San Antonio, Texas 78205
Tel: (210) 222-0125
Fax: (210) 222-2467
Ritenourlaw@aol.com

Attorneys for Petitioner Carlos Trevino

* Counsel of Record, Member, Supreme Court Bar
† Member, Supreme Court Bar