No. 17-6883

In the Supreme Court of the United States

CARLOS TREVINO,
Petitioner,

v.

LORIE DAVIS, DIRECTOR, TEXAS DEPARTMANT OF CRIMINAL JUSTICE, CRIMINAL INSTITUIONS DIVISION,
Respondent.

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

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

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QUESTION PRESENTED

Petitioner Carlos Trevino was convicted and sentenced to death for the savage gang rape and murder of fifteen-year-old Linda Salinas. For that trial and in accordance with the Sixth Amendment, he was afforded trial counsel and tried by a jury of his peers. His appeal was automatic and he was again provided counsel, as per state law, and the Texas Court of Criminal Appeals affirmed both the conviction and sentence. His application for state habeas relief was denied, and a second application alleging that trial counsel was constitutionally ineffective for failing to investigate and present mitigating evidence, particularly as it related to Fetal Alcohol Spectrum Disorder (FASD), was dismissed as an abuse of the writ. A subsequent federal habeas application was denied. Upon a petition for writ of certiorari to this Court, however, it was determined that Trevino was denied effective assistance of state habeas counsel during the initial state habeas proceedings.

Once back in federal district court, Trevino was given several thousand dollars and nearly a year to investigate his procedurally defaulted claim. The district court found that even with all his new evidence—much of which was double-edged or supported the State's case for future dangerousness—Trevino was unable to demonstrate that he was prejudiced by counsel's alleged error. Examining the claim as it must, through the lens of *Strickland* and its progeny, the Fifth Circuit agreed with the district court, but granted a certificate of appealability (COA). After merits briefing and oral argument, the Fifth Circuit again agreed with the district court. In doing so, it correctly applied the law. This procedural history gives rise to the following question:

> Whether the court of appeals evaluated Trevino's new mitigation evidence under the correct standard to ultimately conclude that because of the double-edged nature of that evidence and because much of it ultimately strengthened the State's case for future dangerousness, Trevino could not establish *Strickland* prejudice?

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BRIEF IN OPPOSITION

Petitioner Carlos Trevino first raised his claim that trial counsel was constitutionally ineffective for failing to investigate and present mitigating evidence in a state habeas application, which application was dismissed as abusive by the Court of Criminal Appeals. He then raised the claim in his federal habeas petition, and the district court found it to be procedurally defaulted. In the alternative, the court found it meritless. The Fifth Circuit upheld that determination. This Court used his petition for certiorari to extend *Martinez v. Ryan*[1] to Texas capital cases. *Trevino v. Thaler*, 133 S. Ct. 1911 (2013) (Appendix D). Trevino then returned to district court to have his claim heard anew. The district court, after giving Trevino several thousand dollars and nearly one year to investigate, again determined the claim to be without merit. The Fifth Circuit again upheld that determination. Trevino has now returned to this Court. While he acknowledges that he "has been able to present his claim for review," he argues that the process employed by the courts below "preclude[d] [] full, fair, and meaningful review." Petition at 21. This is just another way of saying he does not agree with the courts' determination that he could not establish *Strickland* prejudice. This is not a reason to grant certiorari review.

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[1] 556 U.S. 1 (2012).

STATEMENT OF THE CASE

I. The 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 Reporter's Record (RR) 50, 57. After talking to Linda, Stephanie and her brother, Steve, drove to a nearby Whataburger to pick 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[2] (Trevino's cousin), Siendo "Sam" Rey, Santos Cervantes, and Brian Apolinar[3] attended a party at the home of Jay Mata. 16 RR 150–51; 18 RR 164–74. Having drank 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

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

[3] 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.

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 climbed on top of 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 Cervantes threatened to hit her if she did not turn on to 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. 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. *Id.* at 130–32.

II. Facts Relating to Punishment

A. The State's case for future dangerousness

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 Clerk's Record (CR) 2.

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, which 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.* at 67–80; 25 RR 101, 103, 120. For the last conviction, Trevino was sentenced to six years in prison. 25 RR 120. And this is where he "learned how to kill." 23 RR 84.

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,[4] 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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[4] 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.

B. The defense's case in mitigation

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 [5] 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 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 blame Linda's murder on Cervantes. *Id.* at 86–89.

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5 "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.

III. 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) (Appendix J). 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. WR-48,153-01 (Tex. Crim. App. April 4, 2001) (unpublished order) (Appendix H).

Trevino then sought federal habeas relief. *Trevino v. Thaler*, Civil Action No. SA-01-CA-306-XR (W.D. Tex. 2009), Docket Entry (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. WR-48,153-02 (Tex. Crim. App. Nov. 23, 2005) (citing Tex. Code Crim. Proc. art. 11.071, § 5) (unpublished order) (Appendix I).

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*[6] and *Strickland*[7] 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. 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 still no action had been 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 protect his constitutional

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

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

rights. DE 62 (citing 28 U.S.C. § 2254(b)(1)(B)). Ultimately, the district court denied relief in all aspects, but granted Trevino a certificate of appealability as to whether Trevino had satisfied the materiality and prejudice prongs of *Brady* and *Strickland*, respectively, regarding Rey's second statement and whether he 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. Appendix G. The circuit court affirmed the district court's denial of federal habeas relief. *Trevino v. Thaler*, 449 F. App'x 415 (5th Cir. 2011) (Appendix F). This Court then granted certiorari review and extended *Martinez* to Texas, holding that "procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective." *Trevino v. Thaler*, 133 S. Ct. at 1921 (Appendix D). The case was vacated and remanded for further proceedings on the questions of whether Trevino's ineffective-assistance claim was substantial or whether his state habeas attorney was ineffective. *Id.* The Fifth Circuit in turn remanded the case back to the district court for reconsideration of the ineffective-assistance claim. *Trevino v. Stephens*, 740 F.3d 378 (5th Cir. 2014) (per curiam) (Appendix E).

The district court granted Trevino's motion to appoint a mitigation expert and authorized funding under 18 U.S.C. § 3599(g)(2). Thereafter, he

filed a second amended petition. Having considered all of Trevino's new evidence, the court found that state habeas counsel was ineffective because (1) Trevino had not established that his "new" mitigating evidence was "reasonably available" at the time of his initial state habeas proceeding, and (2) the underlying claim was not substantial—it was meritless. Appendix C. After oral argument, the Fifth Circuit granted a COA on three issues: "whether the district court erred by (1) concluding that Trevino failed to sufficiently plead cause to excuse his procedural default under *Martinez/Trevino*; (2) concluding that Trevino's trial counsel's performance was not deficient under *Strickland* with respect to his failure to discover and introduce FASD evidence; and (3) concluding that Trevino's trial counsel's performance did not prejudice Trevino to the extent his counsel failed to investigate and present evidence, both expert and lay, showing that Trevino suffers from FASD." *Trevino v. Davis*, 829 F.3d 328, 356 (5th Cir. 2016) (Appendix B). After a second round of oral argument, the Fifth Circuit assumed without deciding that trial counsel was deficient but ultimately concluded that Trevino was not entitled to relief because he could not establish resultant prejudice. *Trevino v. Davis*, 861 F.3d 545 (5th Cir. 2017) (Appendix A). Trevino's petition for rehearing en banc was denied. Appendix K.

REASONS FOR DENYING CERTIORARI REVIEW

The question Trevino presents for review is unworthy of the Court's attention. Supreme Court Rule 10 provides that review on writ of certiorari is not matter of right, but of jurisdictional discretion, and will be granted only for "compelling reasons." Trevino advances no such special or important reason in this case, and none exists. Trevino's claim was correctly adjudicated—and found to be without merit—by the federal courts below. Trevino disagrees with that adjudication, but that in no way presents no compelling reason to review his case. This alone requires certiorari review to be denied.

I. Standard of Review

The Sixth Amendment, together with the Due Process Clause, guarantees a criminal defendant both the right to a fair trial and the right to effective assistance of counsel at that trial. *Strickland*, 466 U.S. at 684–86. A defendant's claim that he was denied constitutionally effective assistance requires him to affirmatively prove both that (1) counsel rendered deficient performance, and (2) counsel's actions resulted in actual prejudice. *Id.* 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 688, 690; *see also Hinton v. Alabama*, 134 S. Ct. 1081, 1088 (2014) (per curiam) (emphasizing that the "performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances") (citation omitted). This Court has admonished that judicial scrutiny of counsel's performance "must be highly deferential," with "every effort" made to avoid "the distorting effects of hindsight."[8] *Strickland*, 466 U.S. at 689; *Harrington v. Richter*, 562 U.S. 86, 105 (2011) ("It is 'all too tempting' to 'second–guess counsel's assistance after conviction or adverse sentence.'") (citations omitted); *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.

Even if deficient performance can be established, Trevino must still affirmatively prove prejudice that is "so serious as to deprive [him] of a fair

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[8] "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).

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.* As explained by *Richter*: The question concerning *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 a reasonable doubt might have been established [had] counsel acted differently." 562 U.S. at 111 (emphasis added and citation omitted). Rather. "[t]he likelihood of a different result must be substantial, not just conceivable." *Id.* at 112 (citation omitted).

Finally, with respect to errors at the sentencing phase of a death penalty trial, the relevant prejudice inquiry is "whether there is a reasonable probability, that absent the errors, the sentencer [] would have concluded the balance of aggravating and mitigating circumstances did not warrant death." *Strickland*, 466 U.S. at 695; *Wiggins v. Smith*, 539 U.S. 510, 534 (2003) ("In assessing prejudice, we reweigh the evidence in aggravation against the totality of available mitigating evidence."); *see also Wong v. Belmontes*, 558 U.S. 15, 26 (2009) ("reviewing court must consider all the evidence—the good and the bad—when evaluating prejudice").

II. The Court of Appeals Correctly Applied *Strickland* to Find Trevino Could Not Establish Prejudice.

Trevino concedes that the court of appeals applied the correct legal standard in determining that he was not prejudiced by counsel's alleged deficient performance. Petition at 11–12. And contrary to Trevino's argument, the court addressed the "correct question," *id.* at 20, that is, it decided there was not a reasonable probability that, but for counsel's alleged deficient performance, the outcome of the sentencing trial would have been different. 861 F.3d at 550–51 (Appendix A). Trevino's complaint is really that the court answered that question incorrectly. It did not.

Turning first to the question answered, *Strickland* made clear that to establish prejudice, a "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Wiggins*, 539 U.S. at 534 (internal quotation marks and citation omitted). The lower court found no "reasonable probability that the outcome of Trevino's sentencing proceeding would have been different." *Trevino v. Davis*, 861 F.3d at 551 (Appendix A). Trevino says the question that should have been answered was whether there was a reasonable probability that at least one juror would have struck a different balance. Petition at 17 (citing *Wiggins*, 539 U.S. at 537). This not a

different question; it is simply the same question expressed in different terms. Texas has long been governed by the "12/10 rule," that is, it requires the mitigation special issue may be not be answered in the negative unless 10 or more jurors agree. Tex. Code Crim. Proc. art. 37.071, § 2(f)(2). Therefore, a single juror has the power to change the outcome of any death penalty trial. When any court has looked at a claim such as the one Trevino has raised, it has always made the determination through the lens of a single juror. This is true whether the ultimate answer is couched in terms as it was in *Wiggins* or in terms as it was in *Strickland.*

To demonstrate prejudice from counsel's alleged failure to conduct an adequate investigation, Trevino "must allege with specificity what the investigation would have revealed and how it would have altered the outcome of the trial." *Gregory v. Thaler*, 601 F.3d 347, 352 (5th Cir. 2010). Trevino cannot establish prejudice here because the evidence he claims trial counsel should have introduced would have only strengthened the State's case for future dangerousness without reducing his moral culpability.

Trevino's new evidence would have bolstered the prosecution's case, even if the jury believed he had FASD. *See Wong*, 558 U.S. at 26 ("Here, the worst kind of bad evidence would have come in with the good."). This Court has recognized that evidence of diminished mental capacity—even when it amounts to intellectual disability—can have both an aggravating and a

mitigating effect.[9] *See Penry v. Lynaugh*, 492 U.S. 302, 324 (1989) ("Penry's mental retardation hand history of abuse is thus a two-edged sword: it may diminish his blameworthiness for his crime even as it indicates that there is a probability that he will be dangerous in the future."), *abrogated on other grounds*, *Atkins v. Virginia*, 536 U.S. 304 (2002); *cf. Sells v. Stephens*, 536 F. App'x 483, 495 (5th Cir. 2013) ("[E]vidence of fetal alcohol syndrome-related deficiencies is not necessarily beneficial to a criminal defendant.").

Witness statements offered in support of Trevino's habeas petition would have disproven any suggestion that he was not a violent person.[10] Petition at 5 (noting that his convictions were "non-violent"), 22 RR 140 (testimony of Trevino's aunt: "People make him sound like he's real mean and everything. He's not . . . He would never do anything to anybody."). The jury was already aware of Trevino's membership in a violent prison gang. 23 RR 99–100, 110. His former girlfriend described his violence towards her, which included striking her on the head, threats to kill her, DE 143–3 at 87, and an attempt

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[9] Trevino suggests the appellate court improperly relied on *Burger v. Kemp*, 483 U.S. 776 (1987), and *Darden v. Wainwright*, 477 U.S. 168 (1986), for the proposition that double-edged evidence can diminish *Strickland* prejudice. Petition at 15–16. This is so, he says, because those cases involved deficient performance. *Id.* But in *Wiggins*, both cases were cited in the discussion of the prejudice prong. 539 U.S. at 534–36. The lower court merely noted this discussion. *Trevino v. Davis*, 861 F.3d at 551 n.5 (Appendix A).

[10] These witnesses do not support Trevino's claim for the independent reason that he has not provided evidence they would have been available and willing to testify at trial. *See Gregory*, 601 F.3d at 352.

to rape her while holding a knife to her throat, *id.* at 89. Trevino's own brother confirmed her recollections, describing Trevino "would choke her and hit her with his fist," sometimes in front of her young son. *Id.* at 119.

Trevino's new evidence also presents "a number of factors" other than FASD "that likely had a negative impact on his cognitive, behavioral, and emotional development." DE 76–7 at 22. With respect to poor academic performance, the evidence establishes that Trevino began school in English-as-second-language classes, DE 143–3 at 118, and this his academic career was marked by "excessive absenteeism and lack of parental guidance," *id.* at 126. Any deficiencies in "daily living skills primarily in 'community skills' (employment, money management"), *id.* at 156, are consistent with the fact that Trevino never had a driver's license, a bank account, or a credit card, *id.* at 126. And his educational history and deviant behavior could be attributed, at least in part, to his early and persistent use of various drugs, beginning with marijuana and "huffing spray paint" at age twelve, *id.* at 95, 128, later "mov[ing] to injecting cocaine and smoking crack," DE 76–6 at 127. His new evidence also reveals multiple head injuries, including an instance in which Trevino was hit by a car and knocked unconscious, after which he became "angrier than before." DE 143–3 at 119; *see also* DE 76–6 at 138–39 (describing untreated childhood injuries).

This additional evidence would not have reduced Trevino's moral culpability for Linda's rape and murder. As one of his experts explained, FASD "would not have significantly interfered with his ability to know from right wrong, or to appreciate the nature and quality of his actions at the time of the capital offense." DE 76–7 at 24; *see Trevino v. Davis*, 861 F.3d at 550–551 (Appendix A).

The Fifth Circuit set out the correct standard, reviewed all the evidence––that presented during trial and that amassed during the federal habeas proceedings—and correctly concluded that Trevino could not establish *Strickland* prejudice because "the FASD evidence would be heard along with [the] graphic testimony of Trevino's violence toward [the mother of his children] and [the] testimony that he was involved in and criminal activity." *Trevino v. Davis*, 861 F.3d at 550 (Appendix A).[11] For all of these reasons, certiorari review must be denied.

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[11] In doing so, the court correctly distinguished Trevino's evidence from that in *Wiggins*, explaining that Trevino's new evidence presented a "significant double-edged problem" because "[j]urors could easily infer from this new FASD evidence that Trevino may have had developmental problems reflected in his academic problems and poor decisionmaking, but that he also engaged in a pattern of violent behavior toward both [the mother of his children] and [Linda] that he understood was wrong." *Trevino v. Davis*, 861 F.3d at 551 (Appendix A).

III. Although the Court of Appeals Assumed Without Deciding that Trevino Had Established Deficient Performance, the Record Demonstrates that He Did Not.

Giving Trevino every benefit of the doubt, the appellate court assumed without deciding that trial counsel's actions were deficient. *Trevino v. Davis*, 861 F.3d at 549 (Appendix A). The only person who could have given Trevino's trial attorney the information that his mother drank while she was pregnant with him was his mother. Trevino's aunt, who testified at trial, was only one year older than Trevino, so she would have no knowledge of her sister's behavior during pregnancy. 23 RR 139. Trevino has never identified a single other person who could have testified to his mother's alcohol use during her pregnancy. So to discover the basis of the current claim, trial counsel would have had to contact Trevino's mother before trial.

But there is no evidence that trial counsel could have done so, nor is there evidence that she would have responded if contacted. There is no evidence that Trevino or any other witness knew how to locate his mother at the time of trial, let alone that would have been willing and able to testify. *See* DE 76–8 at 56 (statement of trial counsel's investigator that Trevino "never did furnish us with any leads, other that cousin who testified against him"). Trial counsel cannot be faulted for failing to introduce evidence that his client failed to disclose. *Strickland*, 466 U.S. at 691 ("The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own

statements or actions. Counsel's actions are usually based, quite properly, on informed strategic decisions made by the defendant and on information supplied by the defendant. In particular, what investigation decisions are reasonable depends critically on such information."); *Ladd v. Cockrell*, 311 F.3d 349, 358 (5th Cir. 2002) ("[N]either Ladd nor his family ever advised counsel that Ladd had been sent to a juvenile facility (Gatesville State School) for an arson conviction as a child, or that Ladd, while at that facility, had been given a psychological evaluation, a prescription for a major tranquilizer, and an IQ test."); *Johnson v. Cockrell*, 306 F.3d 249, 252–53 (5th Cir. 2002) (evidence of any history of abuse or brain injury never disclosed despite specific questions on these topics). Indeed, the only record evidence establishes that she was not available to testify. Trevino's aunt testified that his mother could not attend the trial because she had a problem with alcohol. 23 RR 135. She did not say at that time, nor has she said any time since, that she knew where Trevino's mother lived or how to contact her. As of 2014, Trevino's aunt was not in contact with her. DE 143–3 at 112.

Ultimately, his mother's own testimony confirms that she was unavailable. At the time of her son's trial, she "didn't have an address or a telephone number to contact so they could talk to me." *Id.* at 35. But even she had been contacted, evidence demonstrates she would not have responded. In 1998, when she apparently had an address, she "got a letter from a lawyer who

said he wanted to talk to [her]." *Id.* She did not give any indication, however, that she ever responded to this letter, raising the question of whether she would have spoken to trial counsel (or state habeas counsel). In 2004, she gave an affidavit that she had only recently quit drinking, *id.*, but she also gave a statement that had been sober since 2006, *id.* at 109.

But even if counsel should (or could) have done a better or more thorough investigation and even if he had discovered the evidence that Trevino's mother drank excessively while she was pregnant, no expert would have been able to tie to that to a diagnosis of FASD. The terms "fetal alcohol syndrome" and "fetal alcohol effects" were only "just beginning to find acceptance in the mainstream with the mental health community."[12] *Garza v. Thaler*, 909 F. Supp.2d 578, 647 (W.D. Tex. 2012), *aff'd sub nom, Garza v. Stephens*, 738 F.3d 669 (5th Cir. 2013), *cert. denied*, 134 S. Ct. 2876 (2014). Indeed, neither term appears in the 2000 DSM-IV-TR.[13] Given that Trevino was tried in 1997, a trial strategy

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[12] Even now, the term "fetal alcohol spectrum disorder" itself is not a specific diagnostic term but rather a "range of effects" and conditions that "can affect each person in different ways, and can range from mild to severe." Centers for Disease Control and Prevention, Fetal Alcohol Spectrum Disorders (FASDs), https://www.cdc.gov/ncbddd/fasd/facts.html (last visited Feb. 26, 2018).

[13] *See Hall v. Florida*, 134 S. Ct. 1986, 1990 (2014) (describing the DSM-IV as "one of the basic texts used by psychiatrists and other experts" to diagnose intellectual disability); Ted Sampsell-Jones, *Preventive Detention, Character Evidence, and the New Criminal Law*, 2010 UTAH L. REV. 723, 743 ("The American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (DSM) is considered the authoritative standard for definitions of mental illness in the United States.") (footnote omitted).

relying on such would have relied on a "theory not generally accepted within the psychiatric community." *Sells v. Thaler*, 2012 WL 2562666, at *59 (W.D. Tex. 2012), *aff'd*, 536 F. App'x 483 (5th Cir. 2013), *cert. denied*, 134 S. Ct. 1786 (2014).

Trial counsel's failure to discover and present a mitigation theory based on FASD cannot establish deficient performance. At the time of trial, there were simply no leads for counsel to follow. Because the "tip" that led current counsel to investigate the possibility of FASD was not available, it was entirely reasonable for counsel not to even investigate the possibility. *See Garza v. Stephens*, 738 F.3d at 681 (holding that "it was entirely reasonable to not investigate the possible of effects of fetal alcohol syndrome" when the underlying facts were never made known and "[t]rial counsel had no leads to that effect").

For these reasons, Trevino's case is not in any way similar to *Rompilla v. Beard*. There, trial counsel would have been alerted to mitigation leads that would have created "a mitigation case that [bore] no relation to the few naked please for mercy actually put before the jury" by simply looking at a prosecution's file for a prior conviction. 545 U.S. 374, 393 (2005).

CONCLUSION

For his participation in the brutal rape and murder of fifteen-year-old Linda Salinas, Trevino was charged by the State of Texas with capital murder.

He "was afforded counsel and tried before a jury of [his] peers. [He was] duly convicted and sentenced. [He was] granted the right to appeal and to seek postconviction relief[.]" *Glossip v. Gross*, 135 S. Ct. 2726, 2746–747 (2015) (Scalia, J., concurring in the opinion). In 2004, Trevino alleged trial counsel was constitutionally ineffective for failing to investigate and present certain mitigating evidence, particularly as it related to FASD. Despite repeated opportunities—in both state and federal court—and thousands of dollars, he has been unable to satisfy either prong of *Strickland*.

Although he told counsel he was "too stoned" to remember the events of that night and he blamed the mother of his children for the choices he made that day—to get drunk and high with his friends—Trevino has never denied his role in Linda's rape and murder. Neither has he demonstrated even the slightest bit of remorse.[14] No doubt, counsel faced an uphill battle. But the jury knew about Trevino's childhood, his battle with substance abuse, and that his family regarded him as a loving and caring person.

Trevino argued to the courts below that the witnesses he uncovered "would have supported a picture of [him] as a loving father, a good worker, and

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[14] *See Masterson v. Stephens*, 596 F. App'x 282, 288 (5th Cir.) (different outcome not reasonably probable "given the heinous nature of the crime [and] Masterson's lack of remorse"), *cert. denied*, 135 S. Ct. 2841 (2015); *Sigala v. Quarterman*, 338 F. App'x 388, 395 (5th Cir. 2009) (no prejudice where "the crimes had been egregious, [Sigala] had a criminal history, and he did not express remorse").

a compassionate and caring friend and relative. Moreover, [he] did not have an exceedingly violent criminal history." DE 143 at 53. This is a myopic view of the evidence both the district court and the Fifth Circuit considered. Yes, it is true that the witnesses talked about his good character. It is also true that his criminal history was not "exceedingly violent." But in addition to the fact that Trevino has never denied his role in the events of that night nearly twenty years ago and the fact that he has never expressed any remorse, the record now clearly establishes that Trevino had a dark side. He could be controlling and violent, even more so when he was drinking or using drugs. He was a member of a violent prison gang. And his criminal history could be seen as escalating, especially because he had only been on parole for *one month* when he and his friends savagely attacked and murdered Linda.

For these reasons, Trevino simply cannot show "a reasonable probability that the jury would have rejected a capital sentence after weighed the *entire* body of mitigating evidence . . . against the *entire* body of aggravating evidence. . ." *Wong*, 558 U.S. at 20 (emphasis added). Certiorari review should be denied.

Respectfully submitted,

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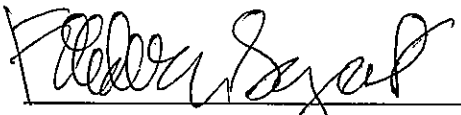

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