

No. \_\_\_\_\_

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IN THE  
SUPREME COURT OF THE UNITED STATES

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CARLOS TREVINO,  
*Petitioner,*

V.

LORI DAVIS,  
Director, Texas Department of Criminal Justice,  
Correctional Institutions Division,  
*Respondent.*

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ON PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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**PETITION FOR WRIT OF CERTIORARI**

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## QUESTION PRESENTED

### CAPITAL CASE

This is Mr. Trevino's second petition for certiorari by this Court. In the first, this Court held, in *Trevino v. Thaler*, 133 S.Ct. 1911 (2013), that the holding of *Martinez v. Ryan*, 586 U.S. 1, 132 S.Ct. 1309 (2012) regarding cause to excuse procedural default of an IATC claim applied to claims arising from a Texas case. On remand, the district court denied Mr. Trevino's *Wiggins* claim, finding the claim both procedurally defaulted and failing on the merits. The court found the new mitigating evidence discovered on federal habeas review was "double-edged" and could not outweigh the substantial aggravating evidence. It denied a Certificate of Appealability. After briefing and oral argument, a panel of the Court of Appeals granted Mr. Trevino's application for a COA on those issues.

After subsequent briefing and oral argument, the majority of a differently configured panel of the Court of Appeals "assumed" the district court erred in finding procedural default, "assumed without deciding" that Mr. Trevino's trial counsel was deficient, but found that Mr. Trevino failed to show he was prejudiced by trial counsel's performance and denied the *Wiggins* claim, with a vigorous dissent to that denial. In so doing the panel improperly evaluated the effect of "double-edged" evidence, and misapplied the standard for evaluating prejudice in the *Wiggins* context. These circumstances present the question of:

Whether Mr. Trevino was denied due process by the Court of Appeals' improper evaluation of "double-edged" mitigation evidence, and misapplication of the standard for evaluating prejudice in the *Wiggins* context of a death-penalty case.

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CARLOS TREVINO,  
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ON PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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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 habeas petition is reported at *Trevino v. Davis*, 861 F.3d. 545 (5th Cir. 2017), and included at Appendix A. The decision of the United States Court of Appeals for the Fifth Circuit denying Mr. Trevino's Petition for Rehearing *En Banc* is not reported, but is included at Appendix K. The opinion of the United States Court of

Appeals for the Fifth Circuit granting Certificate of Appealability is reported at *Trevino v. Davis*, 829 F.3d 328, 2016 U.S. App. LEXIS 12745 (5th Cir. 2016), and included at Appendix B. The opinion of the Federal District Court denying Mr. Trevino's second amended habeas petition is not reported, but included at Appendix C. The opinion of this Court permitting the procedural default to be excused upon a proper showing is reported at *Trevino v. Thaler*, 133 S.Ct. 1911 (2013), and included at Appendix D. The decision by the United States Court of Appeals for the Fifth Circuit remanding the case to the district court following that decision of this Court is reported at *Trevino v. Stephens*, 740 F. 3d 378, 2014 U.S. App. LEXIS 1131 (5th Cir. 2014), and is included here at Appendix E. The opinion of the United States Court of Appeals for the Fifth Circuit affirming the district court's denial of Mr. Trevino's first writ of habeas corpus is not reported, but is included as Appendix F. The memorandum opinion of the federal district court denying Mr. Trevino's first writ of habeas corpus is reported at *Trevino v. Thaler*, 678 F. Supp. 2d 445, 2009 U.S. Dist. LEXIS 119672 (W.D. Tex. December 21, 2009), and is included at Appendix G. 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 H. 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 I. 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 J.

## **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 June 27, 2017. See Appendix A. Mr. Trevino's petition for rehearing en banc was denied on August 21, 2017. See Appendix K.

## **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 initial opinion in *Trevino v. Thaler*, 678 F. Supp. 2d 445, 2009 U.S. Dist. LEXIS 119672 (W.D. Tex. December 21, 2009), Appendix G at 449-454.

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 defense presented no witnesses at the guilt-innocence phase of trial. The evidence elicited at trial convinced the jury that Mr. Trevino was among that group, and that he was involved in Ms. Salinas' death, and it found him guilty.

At the punishment phase of the trial the state presented, among other evidence, testimony regarding Mr. Trevino's prior, non-violent, convictions and of his gang membership. Mr. Trevino's defense team presented only one witness, his aunt. She testified that Mr. Trevino had a difficult upbringing, that his mother had an alcohol problem, that his family was on welfare, that he had dropped out of high school, he had a child and was good with children, and was not violent. The jury deliberated approximately eight hours, before finding that Mr. Trevino would constitute a continuing danger to society, that he actually caused the death of Ms. Salinas or he intended to kill her or another or that he anticipated a human life would be taken, and that there were insufficient mitigating circumstances to warrant a sentence of life imprisonment. Based on those findings, the trial court subsequently pronounced 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.

In the 2016 opinion *Trevino v. Davis*, 829 F.3d 328, 333-337 (5th Cir. 2016) granting COA, a panel of the Court of Appeals adopted this Court's summary of post-conviction proceedings in *Trevino v. Thaler*, 133 S.Ct. 1911 (2013), updated with subsequent proceedings to that point, as follows:

Eight days later the judge appointed new counsel to handle Trevino's direct appeal. Seven months after sentencing, when the trial transcript first became available, that counsel filed an appeal. The Texas Court of Criminal Appeals then considered and rejected Trevino's appellate

claims. Trevino's appellate counsel did not claim that Trevino's trial counsel had been constitutionally ineffective during the penalty phase of the trial court proceedings.

About six months after sentencing, the trial judge appointed Trevino a different new counsel to seek state collateral relief. As Texas' procedural rules provide, that third counsel initiated collateral proceedings while Trevino's appeal still was in progress. This new counsel first sought postconviction relief (through collateral review) in the trial court itself. After a hearing, the trial court denied relief; and the Texas Court of Criminal Appeals affirmed that denial. Trevino's postconviction claims included a claim that his trial counsel was constitutionally ineffective during the penalty phase of Trevino's trial, but it did not include a claim that trial counsel's ineffectiveness consisted in part of a failure adequately to investigate and to present mitigating circumstances during the penalty phase of Trevino's trial. [See] *Wiggins v. Smith*, 539 U.S. 510, 523, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003) (counsel's failure to investigate and present mitigating circumstances deprived defendant of effective assistance of counsel).

Trevino then filed a petition in federal court seeking a writ of habeas corpus. The Federal District Court appointed another new counsel to represent him. And that counsel claimed for the first time that Trevino had not received constitutionally effective counsel during the penalty phase of his trial in part because of trial counsel's failure to adequately investigate and present mitigating circumstances during the penalty phase. Federal habeas counsel pointed out that Trevino's trial counsel had presented only one witness at the sentencing phase, namely Trevino's aunt. The aunt had testified that Trevino had had a difficult upbringing, that his mother had an alcohol problem, that his family was on welfare, and that he had dropped out of high school. She had added that Trevino had a child, that he was good with children, and that he was not violent.

Federal habeas counsel then told the federal court that Trevino's trial counsel should have found and presented at the penalty phase other mitigating matters that his own investigation had brought to light. These included, among other things, that Trevino's mother abused alcohol while she was pregnant with Trevino, that Trevino weighed

only four pounds at birth, that throughout his life Trevino suffered the deleterious effects of Fetal Alcohol Syndrome, that as a child Trevino had suffered numerous head injuries without receiving adequate medical attention, that Trevino's mother had abused him physically and emotionally, that from an early age Trevino was exposed to, and abused, alcohol and drugs, that Trevino had attended school irregularly and performed poorly, and that Trevino's cognitive abilities were impaired.

The federal court stayed proceedings to permit Trevino to raise this claim in state court. The state court held that because Trevino had not raised this claim during his initial postconviction proceedings, he had procedurally defaulted the claim, and the Federal District Court then denied Trevino's ineffective-assistance-of-trial-counsel claim. The District Court concluded in relevant part that, despite the fact that "even the most minimal investigation . . . would have revealed a wealth of additional mitigating evidence," an independent and adequate state ground (namely Trevino's failure to raise the issue during his state postconviction proceeding) barred the federal habeas court from considering the ineffective-assistance-of-trial-counsel claim. *See Coleman v. Thompson*, 501 U.S. 722, 729-730, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991).

Trevino appealed. The Fifth Circuit, without considering the merits of Trevino's ineffective-assistance-of-trial-counsel claim, agreed with the District Court that an independent, adequate state ground, namely Trevino's procedural default, barred its consideration. *449 Fed. Appx.*, at 426.

In 2011, when the panel decided Trevino's appeal, there was no applicable exception to the procedural default rule under any state habeas scheme. In 2012, however, the Supreme Court decided *Martinez*, which held that a federal habeas petitioner was not barred from asserting an ineffective-assistance-of-trial-counsel claim if (1) the state habeas scheme (such as Arizona's in *Martinez*) required a defendant convicted at trial to raise that claim during his first state habeas proceeding, and (2) defendant's counsel during his initial state habeas proceeding was ineffective. Trevino filed a petition for a writ of certiorari, seeking a determination that the *Martinez* rule should also apply to the Texas habeas scheme. The Supreme Court explained that although the Texas scheme did not require a defendant to



raise an ineffective-assistance-of-trial-counsel claim in his first state habeas proceeding, the result should be the same:

[W]e believe that the Texas procedural system—as a matter of its structure, design, and operation—does not offer most defendants a meaningful opportunity to present a claim of ineffective assistance of trial counsel on direct appeal. What the Arizona law prohibited by explicit terms, Texas law precludes as a matter of course. And, that being so, we can find no significant difference between this case and *Martinez*. The very factors that led this Court to create a narrow exception to *Coleman* in *Martinez* similarly argue for the application of that exception here.

Thus, the Court applied the rule of *Martinez* to Texas' scheme for post-conviction relief, i.e.: "[A] 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." Accordingly, it remanded to the Fifth Circuit:

Given this holding, Texas submits that its courts should be permitted, in the first instance, to decide the merits of Trevino's ineffective-assistance-of-trial-counsel claim. We leave that matter to be determined on remand. Likewise, we do not decide here whether Trevino's claim of ineffective assistance of trial counsel is substantial or whether Trevino's initial state habeas attorney was ineffective.

For these reasons we vacate the Fifth Circuit's judgment and remand the case for further proceedings consistent with this opinion.

We remanded to the district court as follows:

In light of the Supreme Court's decision in *Trevino v. Thaler*, \_\_\_ U.S. \_\_\_, 133 S. Ct. 1911, 185 L. Ed. 2d 1044 (2013), we remand to the district court for full reconsideration of the Petitioner's ineffective assistance of counsel claim in accordance with both *Trevino* and *Martinez v. Ryan*, 566 U.S. 1, 132 S. Ct. 1309, 182 L. Ed. 2d 272 (2012). If the Petitioner requests it, the district court may in its discretion stay the federal proceeding and permit the Petitioner to present his claim in state court. *Trevino v. Stephens*, 740 F.3d. 378

(5th Cir. 2014)

•••

On remand, the district court, in April to July 2014, "granted Petitioner's multiple requests for additional time to investigate and develop Petitioner's remaining claims for relief and authorized Petitioner to expend resources in excess of the statutory cap set forth in 18 U.S.C. Section 3599(g) (2) for investigative and expert assistance." On November 13, 2014, the district court held a status conference concerning pending motions, and it entered an order granting in part Trevino's motions for additional time and for expert funding that same day, which reads, in part:

After hearing arguments from both parties, for the reasons discussed at length during the hearing, the parties are directed to file amended pleadings designed to clarify the issues remaining in this cause and Petitioner should be permitted to proceed with some, but not all, of the expert examination of Petitioner requested in the motion for expert assistance. Once the parties have clarified their positions and the issues are more focused, the Court will hold another hearing to ascertain how best to proceed with the remainder of this cause.

On February 2, 2015, Trevino filed his second amended federal habeas petition, and the state filed its response on May 26, 2015.

On June 11, 2015, without holding a hearing or otherwise alerting the parties to its impending decision, the district court sua sponte issued its 36-page memorandum opinion and order, based on the pleadings, denying all relief under the second amended habeas petition and denying a COA. The court noted that it had rejected all five claims presented in Trevino's first amended habeas petition on the merits and had alternatively held that two of them were procedurally defaulted, including the ineffective-assistance-of-trial-counsel claim now presented in his second amended petition. In its new order, it reasoned that Trevino failed to show cause for excusing his procedural default even under *Martinez/Trevino*, but even if he could overcome the procedural default, his claim would still be subject to dismissal on the merits because none of the "new" mitigating evidence referred to in the second amended petition changed the district court's analysis set out in its earlier opinion, as discussed below.

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With respect to the *Martinez/Trevino* issue, the district court concluded that Trevino

still had failed to overcome the procedural default bar. Specifically, it held that Trevino failed to sufficiently allege that his state habeas counsel was ineffective, on the ground that the evidence at issue was not available to the first state habeas counsel at the time. The court explained that none of the "new" mitigating evidence (including testimony from Trevino's mother and evidence about his background and history) had been gathered by his state trial counsel. The district court reasoned that Trevino's state habeas counsel

cannot reasonably be faulted, much less declared "ineffective," for failing to develop and present an ineffective assistance claim during Petitioner's initial state habeas corpus proceeding premised upon "new" mitigating evidence absent some showing this "new" mitigating evidence was reasonably available to said counsel at the time of Petitioner's initial state habeas corpus proceeding.

On this basis, the district court held that Trevino had failed to show cause under *Martinez/Trevino* for his procedural default, and that his claim was still subject to dismissal on this ground alone. The district court also held that even if Trevino had overcome the procedural default bar, his claim should be dismissed on the merits.

Appendix B, at 333-337. (internal citations omitted).

In a unanimous opinion, that panel concluded that:

For the reasons set out above, we grant a COA issue on the questions of 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. We reach this conclusion not only because reasonable jurists could debate whether the district court erred in dismissing his FASD claim but because reasonable jurists would agree that the district court erred by doing so.

*Id.* at 356.

On October 26, 2016, Mr. Trevino filed his brief on the Merits with the Court of Appeals. Oral argument was granted, and held on May 15, 2017 before a differently configured panel than that which issued the 2016 opinion. On June 27, 2017, in a 2-1 decision - - with a strong dissent by Judge Dennis - - that panel affirmed the district court's denial of Mr. Trevino's *Wiggins* claim. With regard to the questions of cause to excuse procedural default and deficient performance by Mr. Trevino's trial counsel, the panel noted that:

Trevino's IATC claim was procedurally defaulted because he did not raise it in his initial state habeas petition. The procedural default may now be excused if he can demonstrate that his state habeas counsel was ineffective and the underlying IATC claim is substantial. *Trevino*, 133 S. Ct. at 1921. The substantiality of the underlying IATC claim is based on the same standard for granting a COA. *Martinez*, 566 U.S. at 14. We have already issued a COA on that issue, so we assume that requirement is satisfied. *See Trevino*, 829 F.3d at 356. We further assume, without deciding, that Trevino's state habeas counsel was ineffective.

Appendix A, at 548-549. However, the panel majority concluded that because Mr. Trevino failed to show that he had been prejudiced by his trial counsel's performance, his IATC claim failed, and the district court's judgment denying habeas relief was affirmed.

The majority began its review of the merits of the claim that Mr. Trevino's trial counsel had been ineffective, with a summary statement that "Trevino's IATC claim fails, because he has not shown that he was prejudiced by the mitigation investigation of his trial counsel." *Id.* at 548. It then presents a correct statement of the standard on review, as:

To prove prejudice, "[t]he 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.” For mitigation-investigation claims, “we reweigh the evidence in aggravation against the totality of available mitigating evidence.”

*Id.* at 549.<sup>1</sup> (internal citations omitted). Four pages later, it concludes that “[t]aking all of the evidence together, we cannot say this new mitigating evidence would create a reasonable probability that the outcome of Trevino’s sentencing would have been different.”

*Id.* at 551. In between those two summary statements, the majority undertakes an analysis of the new FASD<sup>2</sup> evidence related to the IATC claim.

The majority’s review began by summarizing the evidence presented by Dr. Rebecca H. Dyer, Ph.D., a clinical and forensic psychologist with Forensic Associates of San Antonio. With regard to that evidence, the majority stated:

She spent twelve and one-half hours interviewing Trevino and administering nine psychological tests. She also interviewed potential mitigation witnesses, including Trevino’s mother, and reviewed some of the federal habeas record. She determined that “his clinical presentation and the psychological test results are consistent with the characteristics of FAE.” His condition “would not have significantly interfered with his ability to know right from wrong, or to appreciate the nature and quality of his actions at the time of the capital

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<sup>1</sup> At this point the majority summarily explains that it is “is not bound” by the previous COA panel’s statement at *Trevino v. Davis*, 829 F.3d 328, 356 (5th Cir. 2016) “that not only were the issues raised debatable, but ‘reasonable jurists would agree that the district court erred’ by dismissing Trevino’s FASD claims’,” “because a merits panel is not bound by a motions panel.” Appendix A at 548, fn 1. The majority then proceeded to ignore not only that conclusion, but the significant, detailed analysis of the legal and evidentiary issues presented by the COA/motions panel.

<sup>2</sup> Fetal Alcohol Spectrum Disorder, FASD, is an umbrella term used to define a broad range of effects and symptoms caused by prenatal alcohol exposure. (See further explanation by the dissent, *Trevino v. Davis*, 861 F.3d 545, 551, fn 1 (5th Cir., Jun. 27, 2017).

offense.” But the effect of FASD “on his cognitive development, academic performance, social functioning, and overall adaptive functioning,” in combination with his difficult family history, “would . . . have impacted any of Mr. Trevino’s decisions to participate in or refrain from any activities that resulted in his capital murder charges . . . .”

*Id.* at 549 . This summary ignores the more complete basis for Dr. Dyer’s opinions as documented in the COA panel’s review, as:

Dr. Dyer also conducted interviews with a mitigation specialist, with Trevino's mother (face-to-face), and with the senior warden at the Polunsky unit. She reviewed a number of documents, including Trevino's school records (from prior to the trial), juvenile probation records (from prior to the trial), detention records (from prior to the trial), various sworn affidavits and statements (post-trial), and miscellaneous documents largely concerning psychological tests and correspondence (apparently all post-trial).

Appendix B at 352-353.

The majority opinion also misconstrued Dr. Dyer’s conclusions, and ignored what the COA panel found to be significant mitigating evidence documented as:

The results of the intellectual assessments indicate that Mr. Trevino is functioning within the low average range of intellectual functioning. His verbal, performance and full scale IQ scores are consistent with those found in individuals with FAE. Other characteristics consistent with FAE include a history of employing poor problem-solving strategies, attentional deficits, poor academic functioning, memory difficulties, and history of substance abuse, all characteristics that are present in Mr. Trevino’s history and test results. Although many of these characteristics are also consistent with a history of physical abuse, neglect, and other clinical and behavioral disorders, it is important to note that research has indicated that only individuals with FAS/FAE tend to present with long term problems with adaptive functioning, regardless of home background, history of childhood abuse or trauma, social background, or history of clinical and/or behavioral problems. *In essence, individuals with histories of significant prenatal exposure to alcohol have been shown to present with deficits in adaptive behavior, poor judgment, attentional deficits, and other cognitive deficits throughout childhood, adolescence and*

*into adulthood, which is not the finding in individuals with other childhood difficulties. In addition, the deficits found in FAS/FAE children tend to become more debilitating as these individuals get older.*

• • •

Based on my evaluation, Mr. Trevino's history of FAS would not have significantly interfered with his ability to know right from wrong, or to appreciate the nature and quality of his actions at the time of the capital offense. *However, his history of FAE clearly had an impact on his cognitive development, academic performance, social functioning, and overall adaptive functioning. These factors, along with his significant history of physical and emotional abuse, physical and emotional neglect, and social deprivation clearly contributed to Mr. Trevino's ability to make appropriate decisions and choices about his lifestyle, behaviors and actions, his ability to withstand and ignore group influences, and his ability to work through and adapt to frustration and anger. These deficits would not only have impacted any of Mr. Trevino's decisions to participate in or refrain from any activities that resulted in his capital murder charges, but also likely impacted his ability to understand and make appropriate decisions about the plea offer presented by his counsel. . . . as his original defense attorneys apparently did not explore, develop or present any mitigating evidence regarding Mr. Trevino's prenatal, developmental, social and academic background at the time of his trial, they were unlikely aware of his deficits.*

*Id.* at 353-354. (emphasis in original COA panel opinion). Clearly the majority's presentation of Dr. Dyer's information ignores and misconstrues significant aspects of her expert opinion - and of the mitigation evidence it presents.

The majority notes that Mr. Trevino's second expert opinion, mitigation expert Linda Mockeridge ". . . also reached the conclusion that Trevino demonstrated signs of FASD. She confirmed that Trevino's mother drank heavily and that he suffered developmental delays, struggled in school, and was easily angered. She recommended additional testing be done on Trevino to determine the extent of the damage to his brain that she believed FASD had caused." Appendix A at 549.

Regarding Mr. Trevino's third expert opinion, the majority correctly notes that: Dr. Paul Conner, Ph.D., a clinical neurologist, was brought in to conduct some of the testing recommended by Mockeridge. In the email summary of his findings, Conner found that Trevino demonstrated deficiencies in eight cognitive domains, where only three are necessary for a diagnosis of FASD. He concluded that Trevino's "*daily functioning skills are essentially at a level that might be expected from an individual who was diagnosed with an intellectual disability.*"

*Id.* at 549-550. (emphasis added). While funding precluded Dr. Conner's preparation of a formal final report, his conclusions were summarized in an email indicating 70 specific measurements taken by Dr. Conner covering the eight cognitive domains *Id.* Those measurements indicated significant deficits in 30 areas - a potential source of significant mitigation evidence, had trial counsel been aware of it.

The majority distinguished this situation from that in *Wiggins* by noting that Mr. Trevino's trial counsel "did present mitigating evidence from Trevino's life history," Appendix A, at 550. However, it did misrepresent part of that evidence by indicating that the sole defense witness to testify at punishment, Mr. Trevino's aunt, ". . . covered his mother's alcohol problems . . ." when in fact - in that regard - she testified only that his mother "had alcohol problems," and did not address his mother's alcohol consumption during pregnancy with Mr. Trevino.

The majority found that Mr. Trevino presented a significant double-edge problem that was not present in *Wiggins*. Appendix A at 551. In a footnote, it justified this conclusion by reference to *Burger v. Kemp*, 483 U.S. 776 (1987) and *Darden v. Wainwright*,



477 U.S. 168 (1986). However, both of those cases were decided on the basis of the deficient performance prong of the *Strickland* standard, and are therefore not relevant to the evaluation of the prejudice prong in the instant case.

The majority concluded its opinion by noting that:

Jurors could easily infer from this new FASD evidence that Trevino may have had developmental problems reflected in his academic problems and poor decision making, but that he also engaged in a pattern of violent behavior toward both Cruz and Salinas that he understood was wrong. Taking all of the evidence together, we cannot say this new mitigating evidence would create a reasonable probability that the outcome of Trevino's sentencing would have been different.

Appendix A, at 551. Unfortunately, as the dissent pointed out, that was not the question before the panel, and the wrong standard of review was applied, reaching an erroneous conclusion.

#### **REASONS FOR GRANTING THE WRIT**

THE COURT SHOULD GRANT CERTIORARI TO REAFFIRM THE PROPER QUESTION TO ANSWER IN APPLYING THE STANDARD OF REVIEW FOR DETERMINING PREJUDICE RESULTING FROM INEFFECTIVE ASSISTANCE OF COUNSEL IN A *WIGGINS* CLAIM, AND TO ELIMINATE THE UNACCEPTABLE RISK PRESENTED IN A DEATH PENALTY CASE BY THE FLAWED ANALYSIS UNDERTAKEN BY THE COURT OF APPEALS IN THIS MATTER

A. THE COURT OF APPEALS PANEL MAJORITY ANSWERED THE WRONG QUESTION IN ITS ANALYSIS OF THE MERITS OF MR. TREVINO'S *WIGGINS* CLAIM, AND HENCE APPLIED AN INCORRECT STANDARD OF REVIEW

There was no state court adjudication of Mr. Trevino's *Wiggins* claim, nor was there any hearing on the factual basis of that claim at any level. As the dissent notes:

The majority opinion does not dispute that Trevino has established that counsel

rendered deficient performance in failing to perform a thorough mitigation investigation and to introduce FASD evidence, and rightly so. *See* [Appendix B at 349-51] (discussing deficiency under *Strickland* and concluding that, "[g]iven that Trevino's life was on the line, reasonable jurists would consider the mitigation investigation conducted by his trial counsel insufficient")."

Appendix A, at 553.(Dennis dissent). Thus, the remaining issue before the Court of Appeals was the question of whether Mr. Trevino was prejudiced by that deficient performance. There being no state adjudication, the question is reviewed de novo. *See* 28 U.S.C. § 2254(d); *Cone v. Bell*, 556 U.S. 449, 472, 129 S. Ct. 1769 (2009).

The applicable standard of review regarding that question is as established by this Court in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984) and *Wiggins v. Smith*, 539 U. S. 510, 522, 526 (2003). Mr. Trevino must show that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* In assessing prejudice, a reviewing court is to "reweigh the evidence in aggravation against the totality of available mitigating evidence." *Wiggins*, 539 U.S. at 534. "The likelihood of a different result must be substantial, not just conceivable." *Harrington v. Richter*, 562 U.S. 86 (2011). The critical question is whether "there is a reasonable probability that at least one juror would have struck a different balance" in weighing the evidence for and against sentencing the defendant to death." *See Wiggins*, 539 U.S. at 537. That is not the question the panel majority in the Fifth Circuit answered.

The panel majority addressed a question of what “[j]urors could easily infer,” not whether “at least one juror would have struck a different balance.” But beyond that, it selected specific facts from the record by which it answered that question. As the dissent noted, to reach this conclusion, “the majority opinion misapplies controlling precedent and misconstrues the relevant evidence.” Appendix A at 552.

Among other sources and particularly as pertains to the COA issue of evidence supporting FASD, Mr. Trevino presented evidence by way of reports from two experts; Dr. Rebecca Dyer, a clinical and forensic psychologist, and Dr. Paul Connor, a licensed psychologist and neuropsychologist. Both conducted testing on Mr. Trevino. Dr. Dyer spent over twelve hours with Mr. Trevino administering nine psychological tests to him, conducted a number of interviews, including with Mr. Trevino, his mother, and the senior warden at the Polunsky prison unit. She also reviewed Mr. Trevino's school and disciplinary records along with available medical records. Based on this evidence—none of which had been discovered by his state trial counsel, she concluded Mr. Trevino suffers from FASD, and functions “within the low average range of intellectual functioning.” Dr. Dyer found that:

[Mr. Trevino's] history of [FASD] clearly had an impact on his cognitive development, academic performance, social functioning, and overall adaptive functioning. These factors, along with his significant history of physical and emotional abuse, physical and emotional neglect, and social deprivation clearly contributed to [Mr. Trevino's] ability to make appropriate decisions and choices about his lifestyle, behaviors and actions, his ability to withstand and ignore group influences, and his ability to work through and adapt to frustration and anger.

Appendix A, at 553 (Dennis dissent). She concluded that Trevino's FASD "would . . . have

impacted any of [his] decisions to participate in or refrain from any activities that resulted in his capital murder charges." *Id.*

Dr. Connor also conducted testing on Mr. Trevino. He found that Mr. Trevino demonstrated deficits in eight domains: academics, especially math; verbal and visuospatial memory; visuospatial construction; processing speed; executive functioning, especially on tasks that provide lower levels of structure and as such require greater independent problem solving or abstraction skills; communication skills, especially receptive skills; daily living skills, primarily "community skills"; and socialization skills. *Id.* at 553-554. Based on his initial findings, Connor concluded that Trevino's "daily functioning skills are essentially at a level that might be expected from an individual who was diagnosed with an intellectual disability." *Id.*

In his dissent to the panel majority opinion, Judge Dennis noted that:

Taken together, the newly proffered mitigation evidence establishes that the effects of FASD diminished Trevino's ability to resist external influences and to evaluate the consequences of his actions. Significantly, it shows that FASD, a condition caused by conduct outside of Trevino's control, specifically influenced the decision-making that led him to join others in committing a capital offense. This evidence, "taken as a whole, 'might well have influenced the jury's appraisal' of [Trevino's] culpability, and the likelihood of a different result if the evidence had gone in is 'sufficient to undermine confidence in the outcome' actually reached at sentencing." *Rompilla v. Beard*, 545 U.S. 374, 393, 125 S. Ct. 2456, 162 L. Ed. 2d 360 (2005) (first quoting *Wiggins*, 539 U.S. at 538, then quoting *Strickland*, 466 U.S. at 694); *cf. Williams v. Taylor*, 529 U.S. 362, 398, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000) (knowledge that petitioner's childhood was "filled with abuse and privation" and that he was "'borderline mentally retarded,' might well have influenced the jury's appraisal of his moral culpability"); *Penry v. Lynaugh*, 492 U.S. 302, 319, 109 S. Ct. 2934, 106 L. Ed. 2d 256 (1989) ("If the sentencer is to make an individualized

assessment of the appropriateness of the death penalty, 'evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse.'" (quoting *California v. Brown*, 479 U.S. 538, 545, 107 S. Ct. 837, 93 L. Ed. 2d 934 (1987) (O'Connor, J., concurring)).

The majority opinion offers two related reasons for avoiding this necessary conclusion. First, it notes that Trevino's counsel did present the jury with some mitigating evidence, viz., the brief testimony of Trevino's aunt. Op. at 8. Although this is true, it does not lessen the tendency of the previously unrepresented FASD mitigating evidence to persuade the jury to view Trevino as less morally culpable. An attorney's constitutionally deficient performance is not rendered harmless merely because he presented a superficial mitigation case. See *Sears v. Upton*, 561 U.S. 945, 954, 130 S. Ct. 3259, 177 L. Ed. 2d 1025 (2010) ("We have never limited the prejudice inquiry under *Strickland* to cases in which there was only little or no mitigation evidence presented."). Thus, the majority opinion's argument is meritless.

*Id.* at 554-555.

While the Court of Appeals initially stated at least a partially correct question to be answered under the standard of review for the issue before it, it subsequently answered a completely different question. And even to reach the answer it did, it had to misconstrue the relevant evidence, omitting any discussion of evidence contrary to the question it chose to answer. As the dissent noted, the panel majority opinion is meritless. But beyond that, it is unconscionable in a death penalty case.

B. FAILURE TO CAREFULLY AND CORRECTLY CONSIDER THE RELEVANT FACTS AND LAW IN A JUDICIAL REVIEW OF A CLAIM ALLEGING ERROR IN A DEATH PENALTY CASE VIOLATES DUE PROCESS AND INJECT AN UNACCEPTABLE RISK OF IRREPARABLE HARM

The basic question before this Court in *Trevino v. Thaler* (Appendix D) was whether a Texas petitioner in Mr. Trevino's position had the opportunity to have a meaningful review of an Ineffective Assistance of Trial Counsel claim. This Court held that, under the then existing procedure, that opportunity did not exist. Mr. Trevino has benefitted from that decision, in that he was able to show cause to excuse procedural default and have his case at least presented to the federal courts for review. He notes that he still has never had any fact-finding hearing on his claims at any level. However, he contends that under the procedures employed by the Court of Appeals in reviewing his IATC claim, he still has not had that meaningful opportunity. While he has been able to present the claim for review, the review process employed by the district court and the Fifth Circuit preclude a full, fair and meaningful review. Considering that this is a death penalty case with irreversible final consequences, those procedures inject an unacceptable risk of irreparable harm.

The Fifth Circuit's panel majority's review of the relevant punishment phase evidence now available, and not previously discovered by trial counsel, was cursory at best and selective and misleading at worse. The Fifth Circuit panel had significantly more evidence than the district court when it rendered its opinion in 2009 - which the district court called a "wealth of additional mitigating evidence far more substantial than the superficial account of petitioner's childhood given by petitioner's lone witness during the punishment

phase of trial.” *Trevino v. Thaler*, 678 F. Supp. 2d 445, 497 2009 U.S. Dist. LEXIS 119672 (W.D. Tex. December 21, 2009). But rather than consider and weigh all of the evidence, the panel majority chose to selectively review only a portion of the evidence, and present that evidence in a misleading light within the majority opinion. Once the panel majority decides the evidence it has identified presents a “double-edged problem,” it throws up its arms and declares game over.

Because the panel majority believes the evidence has aspects of both mitigation and future dangerousness, the panel concludes every juror will reach the same individualized decision that future dangerousness always wins in such a comparison. It, improperly Mr. Trevino contends, cites to this Court’s precedent to support that conclusion. But this Court’s jurisprudence regarding double-edged, or dual-edged, or two-edged evidence is principally in the context of whether a jury can give meaningful effect to the evidence and reach an individualized determination of whether death is the appropriate sentence in this case. Finding double-edged evidence does not change that calculus. That decision process, as guided by the jury instructions in a Texas death penalty case, does not require that an individual juror decide that the mitigation evidence must outweigh that of future dangerousness. A Texas death penalty qualified jury reaches the mitigation question only after it makes affirmative findings regarding “future dangerousness” and “party liability,” if appropriate. If those findings are made, it is then instructed to address the “mitigation” question. In Mr. Trevino’s case, the mitigation instruction given was:

Whether, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the *personal moral culpability of the defendant* there is a *sufficient mitigating circumstance or circumstances* to warrant that a sentence of life imprisonment rather than a death sentence be imposed.

Trial Court Clerk's Record, Volume II, page 186, at Exhibit L. (emphasis added).

This instruction allows an **individual** juror to decide a sentence of life is appropriate in this case, for this defendant, based on finding **one** mitigating circumstance, or alternatively reaching a conclusion that a life sentence is appropriate for this defendant, in this case, based that individual juror's assessment of the **personal moral culpability** of this defendant, in this case. There are no restrictions placed on what an individual juror may consider to be a mitigating circumstance. The review process of the Fifth Circuit, and its treatment of "double-edged evidence" does not comport with the standard of whether "there is a reasonable probability that at least one juror would have struck a different balance' in weighing the evidence for and against sentencing the defendant to death." *Wiggins v. Smith*, 539 U.S. 510, 537 (2003). Nor does equating "double-edged evidence" with further support for a finding of future dangerousness allow for a fair opportunity for Mr. Trevino's claim - or others in his posture - to be fully considered. The process and procedures as they exist and were practiced by the Fifth Circuit panel majority in this case are in violation of Due Process, and inject an unacceptable risk of irreparable harm in a death penalty case.

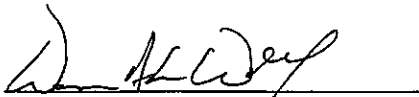
Mr. Trevino asks this Court to grant certiorari, vacate the sentence in his case, and remand the matter for a new punishment trial.



**CONCLUSION AND PRAYER FOR RELIEF**

For the foregoing reasons, Carlos Trevino respectfully requests this Court grant the petition for writ of certiorari, that his sentence be vacated, and his case remanded for a new punishment trial.

Respectfully submitted,



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