No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

CARLOS TREVINO,
Petitioner,

V.

LORI DAVIS,
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

APPENDICES

A. *Trevino v. Davis*, 861 F.3d. 545 (5th Cir. 2017)

B. *Trevino v. Davis*, 829 F.3d 328, 2016 U.S. App. LEXIS 12745 (5th Cir. 2016)

C. *Trevino v. Stephens*, 2015 U.S. Dist. LEXIS 75400 (W.D. Tex 2015)

D. *Trevino v. Thaler*, 133 S.Ct. 1911 (2013)

E. *Trevino v. Stephens*, 740 F. 3d 378, 2014 U.S. App. LEXIS 1131 (5th Cir. 2014)

F. *Trevino v. Thaler*, 449 Fed. Appx. 415, 2011 U.S. App. LEXIS 22873 (5th Cir. 2011)

G. *Trevino v. Thaler*, 678 F. Supp. 2d 445, 2009 U.S. Dist. LEXIS 119672 (W.D. Tex. December 21, 2009)

H. *Ex parte Trevino*, WR-48,153-01 (Tex. Crim. App. April 4, 2001)

I. *Ex parte Trevino*, WR-48,153-02 (Tex. Crim. App. November 23, 2005)

J. *Trevino v. State*, 991 S.W.2d 849 (Tex. Crim. App. 1999)

K. *Trevino v. Davis*, No. 15-70019 (5th Cir. August 21, 2017)

L. Trial Court Clerk's Record, Volume II, page 186, Mitigation Jury Instruction

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APPENDIX A

***Trevino v. Davis*, 861 F.3d. 545 (5th Cir. 2017)**

Trevino v. Davis

United States Court of Appeals for the Fifth Circuit

June 27, 2017, Filed

No. 15-70019

Reporter
861 F.3d 545 *; 2017 U.S. App. LEXIS 11581 **; 2017 WL 2772574

CARLOS TREVINO, Petitioner—Appellant, versus LORIE DAVIS, Director, Texas Department of Criminal Justice, Correctional Institutions Division, Respondent—Appellee.

Prior History: [**1] Appeal from the United States District Court for the Western District of Texas.

Trevino v. Stephens, 2015 U.S. Dist. LEXIS 75400 (W.D. Tex., June 11, 2015)

Case Summary

Overview

HOLDINGS: [1]-Defendant's ineffective assistance of trial counsel (IATC) claim was procedurally defaulted because he did not raise it in his initial state habeas petition; [2]-The procedural default could now be excused if he could demonstrate that his state habeas counsel was ineffective and the underlying IATC claim was substantial; [3]-His IATC claim failed because he had not shown that he was prejudiced by the mitigation investigation of his trial counsel; [4]-The new mitigation evidence was insufficient to create a reasonable probability that he would not have been sentenced to death had it been presented to the jury.

Outcome

Denial affirmed.

LexisNexis® Headnotes

Criminal Law & Procedure > Habeas Corpus > Review > Burdens of Proof

Evidence > Burdens of Proof > Allocation

Criminal Law & Procedure > ... > Order & Timing of Petitions > Procedural Default > Exceptions to Default

Criminal Law & Procedure > ... > Review > Specific Claims > Ineffective Assistance of Counsel

HN1[] **Review, Burdens of Proof**

A procedural default may be excused if a defendant can demonstrate that his state habeas counsel was ineffective and the underlying ineffective assistance of trial counsel (IATC) claim is substantial. The substantiality of the underlying IATC claim is based on the same standard for granting a certificate of appealability.

Criminal Law & Procedure > Habeas Corpus > Review > Burdens of Proof

Evidence > Burdens of Proof > Allocation

Criminal Law & Procedure > ... > Review > Specific Claims > Ineffective Assistance of Counsel

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Sentencing

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Tests for Ineffective Assistance of Counsel

HN2[⬇] **Review, Burdens of Proof**

To prove 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. For mitigation-investigation claims, habeas court reweighs the evidence in aggravation against the totality of available mitigating evidence.

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Tests for Ineffective Assistance of Counsel

HN3[⬇] **Effective Assistance of Counsel, Tests for Ineffective Assistance of Counsel**

Failure to make the required showing of either deficient performance or sufficient prejudice defeats an ineffectiveness claim.

Counsel: For Carlos Trevino, Petitioner - Appellant: Warren Alan Wolf, Law Office of Warren Alan Wolf, San Antonio, TX; John Joseph Ritenour Jr., Esq., Ritenour Law Firm, P.C., San Antonio, TX.

For Lorie Davis, Director, Texas Department of Criminal Justice, Correctional Institutions Division, Respondent - Appellee: Fredericka Searle Sargent, Assistant Attorney General, Office of the Attorney General, Criminal Appeals Division, Austin, TX.

Judges: Before SMITH, DENNIS, and CLEMENT, Circuit Judges. JAMES L. DENNIS, Circuit Judge, dissenting.

Opinion by: JERRY E. SMITH

Opinion

[*546] JERRY E. SMITH, Circuit Judge:

Carlos Trevino appeals the denial of habeas corpus relief on his claim of ineffective assistance of trial counsel ("IATC"). Because Trevino has not demonstrated that trial counsel's performance in the punishment phase prejudiced him, we affirm.

I.

Trevino was convicted of capital murder for killing Linda Salinas. Further discussion of the factual background can be found in *Trevino v. Thaler, 678 F. Supp. 2d 445, 449-50 (W.D. Tex. 2009)*, and *Trevino v. Davis, 829 F.3d 328, 332-33 (5th Cir. 2016)*. We recite only the facts needed to resolve the merits of the IATC claim regarding the mitigating evidence of fetal alcohol spectrum disorder ("FASD"), the claim on which **[**2]** we granted a certificate of appealability ("COA").

A.

Before the punishment phase, Trevino's counsel investigated the question of mitigation.

> [T]rial counsel attempted to find family members "that could give us some idea as to where or how Mr. Trevino grew up. What was going on in his life. What were the circumstances, you know, regarding his past. And we tried to find them, but really, I don't think we came up with any witnesses. We tried to contact his mother as best we could. She was from out of the city." Trial counsel retained an investigator to track down [Trevino's] education records. . . . Trial counsel interviewed [Trevino's] stepfather. [Trevino] failed to assist his trial counsel in identifying any family members or others who may have provided mitigating testimony.

*Trevino v. Stephens, No. SA-01-CA-306-XR, 2015 U.S. Dist. LEXIS 75400, 2015 WL 3651534, at *11 (W.D. Tex. June 11, 2015)*. Trevino's mother was the main connection to the evidence of FASD. Trevino's trial counsel testified at the state **[*547]** habeas hearing that Trevino's "mother was aware of [his] trial but she refused to communicate with [his] defense counsel." *2015 U.S. Dist. LEXIS 75400, [WL] at *11 n.35*. That was not contested until 2003, when trial counsel stated in an affidavit that "I did know his mother was around but we never could connect. I **[**3]** believe she lived somewhere near Bas-trop, Texas. I heard she was in the court house [*sic*] one time but I never did talk with her."

Trial counsel ultimately put on a short presentation regarding mitigation. The district court's original opinion summarized the evidence presented in the punishment phase as follows:

> The prosecution presented evidence establishing (1) [Trevino] was first referred to the Bexar County juvenile probation office at age thirteen, (2) as a juvenile, [Trevino] was adjudicated on charges of evading arrest, possession of up to two ounces of marijuana, unauthorized use of a motor vehicle, and unlawfully carrying a weapon (identified as a nine millimeter handgun), and (3) [Trevino] was

convicted as an adult of operating a motor vehicle while intoxicated, burglary of a vehicle, and burglary of a building. The jury also heard uncontradicted testimony establishing (1) [Trevino] had identified himself to a juvenile probation officer as a member of a street gang and (2) [Trevino] was a documented prison gang member whose body bore the tell-tale tattoos indicative of [his] membership in the violent prison gang La Hermidad y Pistoleros Latinos ("HPL").

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

On July 3, 1997, after deliberating approximately eight hours, [Trevino's] jury returned its verdict at the punishment phase of trial, finding (1) beyond a reasonable doubt, there is a probability [Trevino] would commit criminal acts of violence which would constitute a continuing threat to society, (2) beyond a reasonable doubt [Trevino] actually caused the death of Linda Salinas or, if [he] did not actually cause her death, [he] intended to kill her or another, or [he] anticipated a human life would be taken, and (3) taking into consideration all of the evidence, including the circumstances of the offense, [Trevino's] character **[**5]** and background, and [his] personal moral culpability, there were insufficient mitigating circumstances to warrant a sentence of life imprisonment be imposed upon [Trevino]. In accordance with the jury's verdict, the state trial court imposed a sentence of death.

Trevino, 678 F. Supp. 2d at 452-53.

Trevino's initial collateral-review proceedings began with new appointed counsel while the direct appeal was ongoing. His initial state habeas counsel brought IATC claims with respect to the penalty phase but did not include a claim that trial counsel had failed adequately to investigate and present mitigating circumstances. Trevino alleges in his second amended petition that his state habeas counsel's petition included only "record-based claims" and that he conducted no independent mitigation investigation to uncover new evidence that might have lead him to conclude **[*548]** that he should bring an IATC claim on mitigation grounds.

B.

After Trevino's state habeas petition had been denied by the Texas Court of Criminal Appeals, he filed a federal habeas petition, raising for the first time his claim that trial counsel had been ineffective in investigating and presenting mitigating evidence at the punishment phase.

> The federal court stayed **[**6]** 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 [IATC] 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 evi-dence," 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 [IATC] claim.

Trevino v. Thaler, 133 S. Ct. 1911, 1916, 185 L. Ed. 2d 1044 (2013). We affirmed on the same ground. The Supreme Court reversed, extending its holding in *Martinez v. Ryan, 566 U.S. 1, 17, 132 S. Ct. 1309, 182 L. Ed. 2d 272 (2012)*, that ineffective assistance of state habeas counsel would excuse procedural default of IATC claims, to Texas, where "it [is] highly unlikely in a typical case that a defendant will have a meaningful opportunity to raise a claim of [IATC] on direct appeal . . . ." *Trevino, 133 S. Ct. at 1921.*

We remanded to the district court, where Trevino filed his second amended habeas petition. That court denied all habeas relief under that petition and refused to grant a COA, so **[**7]** Trevino sought a COA from this court.

> [W]e grant[ed] [it] 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.

Trevino, 829 F.3d at 356. We now review the merits of those claims.[1]

II.

Trevino's IATC claim was procedurally defaulted because he did not raise it in his initial state habeas petition. *HN1*[↑] 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 **[*549]** 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. **[**8]**

III.

Trevino's IATC claim fails, because he has not shown that he was prejudiced by the mitigation investigation of his trial counsel.[2] *HN2*[↑] 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."[3] For mitigation-investigation claims, "we reweigh the evidence in aggravation against the totality of available mitigating evidence." *Wiggins v. Smith, 539 U.S. 510, 534, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003)*. Our merits discussion is limited by the COA to "potential evidence of FASD," including "lay witness testimony, such as personal and family history interviews relevant to a possible FASD diagnosis, that might otherwise have been excluded as character witness testimony" as to which a COA was denied. *Trevino, 829 F.3d at 356*.

Trevino has come forward both with evidence that he suffers from FASD and with additional lay testimony that he alleges would provide context for the FASD evidence. He has three experts who report that he suffers from FASD. Dr. Rebecca H. Dyer, Ph.D., is a clinical and forensic psychologist with Forensic Associates of San Antonio. She spent twelve **[**9]** 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 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 . . . ."

Mitigation expert Linda Mockeridge interviewed seven witness and reviewed some of the record. She 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 **[**10]** testing be done on Trevino to determine the extent of the damage to his brain that she believed FASD had caused. 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 **[*550]** 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."

To contextualize his FASD evidence, Trevino includes

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[1] In granting the COA, we stated that not only were these issues debatable, but "rea-sonable jurists would agree that the district court erred" by dismissing Trevino's FASD claims. *Trevino, 829 F.3d at 356*. That statement is not binding on this panel, because a merits panel is not bound by a motions panel. *See Newby v. Enron Corp., 443 F.3d 416, 419 (5th Cir. 2006)*. Furthermore, we cannot be bound by a merits holding in a COA decision, because "until a COA has been issued federal courts of appeals lack jurisdiction to rule on the merits of appeals from habeas petitioners." *Miller-El v. Cockrell, 537 U.S. 322, 336, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003)*. We review Trevino's petition on the merits unbound by the COA opinion's observations on the merits.

[2] *See Strickland v. Washington, 466 U.S. 668, 700, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)* (*HN3*[↑] "Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim.").

[3] *Id. at 694*.

affidavits from multiple family members with his second amended petition.[4] His mother, Josephine Trevino, discussed how she "would usually drink 18 to 24 cans of Budweiser, every day during [her] pregnancy with Carlos." Trevino weighed only four pounds at birth and remained in the hospital until he gained weight. She explained that Trevino suffered significant injuries as a child, hitting his head on a piano and being hit by a car and thrown into a street light.

Janet Cruz, Trevino's ex-girlfriend, states that he was a good father and caring toward her, but **[**11]** was easily influenced by his friends. She also describes occasions on which Trevino was violent toward her. Cruz claims that he had physical altercations with both her and his mother, he once put a gun to Cruz's head, he attempted to rape her at knife point, and she "was always fearful of him." Peter Trevino, Trevino's brother, alleges that he witnessed Trevino be physically violent toward Cruz, including choking her.

Robert Gonzalez, Trevino's former employer, comments that Trevino "has never been involved in violence" and that he was a good worker that lacked initiative. Mario Cantu, an old friend of Trevino's, states that he was a follower and "was a peaceful person and he was not violent." But Cantu also acknowledges that he knew Trevino "had firearms and was part of a street gang," and two weeks after he was released on parole Trevino went out with friends "getting high and drunk and robbing people." Jennifer DeLeon, Trevino's sister, describes the difficulty that he had in school, including repeating some grade years. His academic problems are also demonstrated in Dyer's mitigation report.

This new mitigation evidence is insufficient to create a reasonable probability that Trevino **[**12]** would not have been sentenced to death had it been presented to the jury. Unlike in *Wiggins, 539 U.S. at 537*, where the Court held trial counsel was ineffective, Trevino's trial counsel did present mitigating evidence from Trevino's life history. "Wiggins' sentencing jury heard only one significant mitigating factor—that Wiggins had no prior convictions." *Id.* Trevino's trial counsel presented a mitigation witness, his aunt, who covered his mother's alcohol problems, his absent father, his trouble in school, and the love he demonstrated toward her daughters. The prosecution presented aggravating evidence that he had a juvenile criminal record, adult convictions for DUI, burglary of a vehicle, and burglary of a building and had joined a violent prison gang.

We review that evidence along with all of the new evidence that Trevino has presented to determine whether the outcome of the punishment hearing was prejudiced. *Id. at 534*. The mitigating evidence that Trevino suffers the effects of FASD would be heard along with Cruz's graphic testimony of Trevino's violence toward her and Cantu's testimony that he was involved in gang and criminal activity. The FASD evidence itself is also undermined by Dyer's conclusion that Trevino's **[**13]** FASD "would not have significantly interfered with his ability to know right from **[*551]** wrong, or to appreciate the nature and quality of his actions at the time of the capital offense."

This is a significant double-edged problem that was not present in *Wiggins*.[5] Jurors 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 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.

The judgment denying habeas relief is AFFIRMED.

Dissent by: JAMES L. DENNIS

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[4] The district court acknowledged that several of the affidavits and reports attached to Trevino's second amended petition are unsigned and unauthenticated. *Trevino, 2015 U.S. Dist. LEXIS 75400, 2015 WL 3651534, at *7 n.4*. In evaluating the mitigating evidence, the court decided to take into account those documents "[o]ut of an abundance of caution," and we do the same. *Id.*

[5] *Wiggins, 539 U.S. at 535* ("Wiggins' history contained little of the double edge [the Court] ha[s] found to justify limited investigations in other cases."). The Court cited *Burger v. Kemp, 483 U.S. 776, 794, 107 S. Ct. 3114, 97 L. Ed. 2d 638 (1987)*, and *Darden v. Wainwright, 477 U.S. 168, 186, 106 S. Ct. 2464, 91 L. Ed. 2d 144 (1986)*, for examples of double edged evidence preventing a finding of prejudice. *Wiggins, 539 U.S. at 535*. In *Burger*, the petitioner's new family history evidence included encounters with the police that had not been previously disclosed as well as evidence of his erratic, violent tendencies. *Burger, 483 U.S. at 794*. In *Darden, 477 U.S. at 186*, presenting mitigation evidence would have allowed the introduction of the petitioner's prior convictions, including for rape, and a psychiatric report that determined he was capable of committing the crime. The double edge of Trevino's new evidence is analogous to these cases.

Dissent

JAMES L. DENNIS, Circuit Judge, dissenting:

During the penalty phase of Carlos Trevino's capital murder trial, his defense counsel put on a single mitigation witness, his aunt, who in testimony that filled only five pages of trial transcript stated little more than that Trevino's mother had alcohol problems and was living in nearby Elgin, Texas; that Trevino had dropped out of high school; and that she thought **[**14]** that he was incapable of capital murder. Defense counsel had not previously located or talked to Trevino's mother, nor did counsel introduce any other mitigating evidence. After hearing only this and the State's aggravating evidence, the jury found that Trevino had failed to demonstrate sufficient mitigating circumstances to warrant a sentence of life imprisonment without parole. As a result, he was sentenced to death.

During federal post-conviction proceedings, Trevino's federal habeas counsel contacted Trevino's mother in Elgin, Texas, and learned from her that during her pregnancy with Carlos she drank between eighteen and twenty-four bottles of beer every day. Counsel hired three experts who developed substantial evidence that Trevino suffers from fetal alcohol spectrum disorder (FASD), a condition that results from a child's *in utero* exposure to alcohol during his mother's pregnancy and which can cause brain damage and resulting impairments in behavioral and cognitive functioning.[1] Trevino argues that his **[*552]** trial counsel was constitutionally ineffective in failing to conduct a reasonably thorough mitigation investigation, to discover evidence that he suffered from FASD, and to present **[**15]** this powerful mitigating evidence to the jury, and he asks this court to reverse the district court's dismissal of his claim, vacate his death sentence, and grant him a new penalty trial. I believe that he is entitled to this relief. Had trial counsel conducted a reasonably competent investigation, discovered that Trevino suffered from FASD, and presented evidence of his condition to the jury, there is a reasonable probability that the result of the penalty phase would have been different, viz., that at least one juror would have voted against imposing a death sentence.[2] *See* Wiggins v. Smith, 539 U.S. 510, 537, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003); *see also* Strickland v. Washington, 466 U.S. 668, 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) ("A reasonable probability is a probability sufficient to undermine confidence in the outcome.").

A majority of the current panel comes to the contrary conclusion and denies Trevino relief on the merits, holding that trial counsel's failure to investigate, discover, and present evidence of Trevino's FASD during the penalty phase did not prejudice his case. To reach this conclusion, the majority opinion misapplies controlling precedent and misconstrues the relevant evidence. Because a proper application of Supreme Court and Fifth Circuit decisions to the facts of this case plainly lead to the conclusion that Trevino was prejudiced by his trial counsel's deficient penalty-phase performance, I respectfully dissent.

*

As an initial matter, in this case we must apply de novo review because no state court adjudicated Trevino's claim of penalty-phase ineffective assistance of counsel on the merits. *See* § 2254(d); Cone v. Bell, 556 U.S. 449, 472, 129 S. Ct. 1769, 173 L. Ed. 2d 701 (2009). As a result, we must squarely consider whether Trevino is entitled to relief under *Strickland* ***[**17]*** and its progeny.

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[1] FASD is an umbrella term used to define a broad range of effects and symptoms caused by prenatal alcohol exposure. According to the National Institute on Alcohol Abuse and Alcoholism at the National Institutes of Health,

> Each individual with FASD experiences a unique combination of day-to-day challenges that may include medical, behavioral, educational, and social problems. People with FASD may have difficulty in the following areas: learning and remembering, understanding and following directions, shifting attention, controlling emotions and impulsivity, communicating and socializing, [and] performing daily life skills, including feeding, bathing, counting money, telling time, and minding personal safety. FASD-related brain **[**16]** damage makes it difficult to address routine life situations. It causes people to make bad decisions, repeat the same mistakes, trust the wrong people, and have difficulty understanding the consequences of their actions.

NAT'L INST. ON ALCOHOL ABUSE & ALCOHOLISM, FETAL ALCOHOL EXPOSURE (April 2015), https://pubs.niaaa.nih.gov/publications/fasdfactsheet/fasd.pdf.

[2] Indeed, a previous panel of this court unanimously granted a certificate of appealability (COA) to Trevino, concluding that "not only . . . [could] reasonable jurists . . . debate whether the district court erred in dismissing his FASD claim but . . . reasonable jurists *would agree* that the district court erred by doing so." Trevino v Davis, 829 F.3d 328, 356 (5th Cir. 2016) (emphasis added).

We cannot shield our decision under the "deference and latitude" afforded by the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA), as they "are not in operation when the case involves review under the *Strickland* standard itself." *See* Harrington v. Richter, 562 U.S. 86, 101, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011).

"As with all claims for ineffective assistance of counsel, relief based on an insufficient mitigation investigation requires a showing of both deficient performance and prejudice." Loden v. McCarty, 778 F.3d 484, 498 (5th Cir. 2015) (citing Porter v. McCollum, 558 U.S. 30, 38, 130 S. Ct. 447, 175 L. Ed. 2d 398 (2009)); *see also* Strickland, 466 U.S. at 688, 694. Trevino asserts that his trial counsel's performance was unconstitutionally deficient because counsel failed to conduct a reasonably thorough mitigation investigation, to **[*553]** discover evidence that Trevino suffers from FASD, and to present this mitigating evidence to the jury. FASD occurs in persons who suffer heavy prenatal exposure to alcohol. Persons with FASD typically demonstrate cognitive, academic, attentional, and behavioral deficiencies. 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* Trevino v. Davis, 829 F.3d 328, 349-51 (5th Cir. 2016) (discussing deficiency under *Strickland* and concluding that, " **[**18]** [g]iven that Trevino's life was on the line, reasonable jurists would consider the mitigation investigation conducted by his trial counsel insufficient").

Next, Trevino argues that evidence of his FASD would have established a sufficient mitigating factor that was reasonably likely to have changed the outcome of his sentencing. In order to establish that his attorney's deficient performance in the penalty phase of a capital case prejudiced his defense, a petitioner must show that there is a reasonable probability that, but for the relevant deficiencies, at least one juror would have voted against imposing a death sentence. *See* Wiggins, 539 U.S. at 537; *see also* Strickland, 466 U.S. at 694 ("A reasonable probability is a probability sufficient to undermine confidence in the outcome.").

In support of his claim, Trevino has presented expert and lay witness testimony pertaining to his FASD, including a 2004 report by Dr. Rebecca Dyer, a clinical and forensic psychologist. Dyer stated that "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 **[**19]** is not the finding in individuals with other childhood difficulties," and noted that "the deficits found in [FASD] children tend to become more debilitating as these individuals get older." Dyer conducted a number of interviews, including with Trevino and his mother; administered nine psychological tests to Trevino; and reviewed 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—Dyer concluded that Trevino suffers from FASD: he functions "within the low average range of intellectual functioning" and has a "history of employing poor problem-solving strategies, attentional deficits, poor academic functioning, memory difficulties, and history of substance abuse."

Turning to the relevance of her diagnosis to Trevino's conviction and sentence, Dyer stated:

> [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 [Trevino's] **[**20]** 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.

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."

Dr. Paul Connor, a licensed psychologist and neuropsychologist, also conducted testing on Trevino. Connor found that Trevino **[*554]** 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. 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."

This expert evidence is supported and contextualized **[**21]** by lay witness testimony, compiled by mitigation expert Linda Mockeridge, that includes details as to how FASD adversely affected Trevino's mental and social development. Specifically, Mockeridge collected testimony establishing that Trevino's mother drank between eighteen and twenty-four beers a day while pregnant with Trevino; that Trevino weighed only four pounds at birth and had to stay in the hospital for several weeks until he reached five pounds; that Trevino's developmental milestones were significantly delayed compared to his siblings; that Trevino was not potty-trained until he was six years old and wore pampers at night until he was eight years old; that Trevino repeated several grades in elementary school and ultimately dropped out of school in ninth grade, at which point he was reading at a third-grade level; that Trevino was "a follower" and acted impulsively; and that Trevino got angry easily.

"'To assess the probability of a different outcome under *Strickland*, we consider the totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in the habeas proceeding—and reweigh it against the evidence in aggravation.' . . . In all circumstances, **[**22]** this is the proper prejudice standard for evaluating a claim of ineffective representation in the context of a penalty phase mitigation investigation." *Sears, 561 U.S. at 955-56* (quoting *Porter, 558 U.S. at 40-41* (alterations omitted); *see also Wiggins, 539 U.S. at 534*. We therefore must measure the evidence of Trevino's crime and other aggravating factors presented to the jury by the State against both the mitigation evidence adduced at trial and the significant new evidence, adduced in the federal habeas proceeding, which contextualizes his criminal history.

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.* ***[**23]*** *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 **[*555]** 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 unpresented 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. **[**24]** *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.

Second, the majority opinion asserts that Trevino's previously undiscovered FASD evidence suffers from a "significant double-edged problem," op. at 9, arguing that it has both aggravating and mitigating effects and that the failure to introduce it therefore could not have prejudiced Trevino. The majority mistakenly relies on *Burger v. Kemp, 483 U.S. 776, 107 S. Ct. 3114, 97 L. Ed. 2d 638 (1987)*, and *Darden v. Wainwright, 477 U.S. 168, 106 S. Ct. 2464, 91 L. Ed. 2d 144 (1986)*, two cases in which the Supreme Court rejected claims of ineffective assistance of counsel based on counsel's decision to not develop and present certain mitigating evidence because of fears that it contained detrimental elements that would harm the defendant's case. Initially, it must be clarified that, contrary to the majority opinion's

statement that these cases are "examples of double edged evidence preventing a finding of prejudice," op. at 9 n.5, both *Burger* and *Darden* were in fact decided on the deficiency prong of *Strickland*. In both cases, defense counsel, after conducting a reasonably competent investigation, opted not to develop and present mitigation **[**25]** evidence that would have opened the door for the prosecution to present damaging evidence to the jury. *Burger, 483 U.S. at 794-95*; *Darden, 477 U.S. at 186*. And in both cases, the Court found that counsel's strategic decisions were entitled to substantial deference and thus did not constitute deficient performance under the first prong of *Strickland*. *Burger, 483 U.S. at 794-95*; *Darden, 477 U.S. at 186*.

Under *Strickland*, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *466 U.S. at 689* (quoting *Michel v. Louisiana, 350 U.S. 91, 101, 76 S. Ct. 158, 100 L. Ed. 83 (1955)*). As this court has observed, "the fact that an attorney reached the wrong conclusion does not necessarily make his performance deficient." *United States v. Freeman, 818 F.3d 175, 178 (5th Cir. 2016)*. The Supreme Court's determination in *Burger* and *Darden* that counsel's decision not to present certain mitigation evidence on the grounds that it might undermine another defense strategy was "professionally reasonable" therefore **[*556]** has no bearing on the distinct question presented here of whether there is a reasonable probability that, had mitigation evidence been presented, the result of the proceeding would have been different. *See Strickland, 466 U.S. at 694*. To the extent that **[**26]** the majority opinion relies on *Burger* and *Darden*, its argument must therefore fail.

Further, the majority opinion exaggerates the potential aggravating impact of Trevino's FASD evidence. Although some of the new lay-witness testimony includes potentially aggravating statements about Trevino's past conduct, evidence of a similar nature had already been presented by the State during the penalty phase;[3] additional, cumulative references to these negative factors would thus be of marginal relevance to the jury. The majority opinion also points to Dyer's statement that Trevino's FASD "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" as potentially aggravating. Op. at 9. But the jury would have found this testimony by Dyer to merely state the obvious, as Trevino did not assert an insanity defense and the same jury had already found him guilty of the offense. By focusing on this statement, the majority opinion elides the much more significant part of Dyer's testimony: that FASD "clearly had an impact on [Trevino's] cognitive development, academic performance, social functioning, **[**27]** and overall adaptive functioning" and that "[t]hese deficits would . . . have impacted . . . [his] decisions to participate in or refrain from any activities that resulted in his capital murder charges."

Even if the mitigation evidence Trevino offers were meaningfully double-edged, that would not foreclose his claim for relief. Both the Supreme Court and this court have found that previously unpresented evidence indicating reduced moral culpability was sufficient to establish prejudice even when such evidence also had a potential aggravating effect. For example, in *Williams*, despite significant aggravating evidence, the Supreme Court found that newly proffered evidence of mistreatment, abuse, and neglect during the petitioner's early childhood, as well as testimony that he was "borderline mentally retarded," might have influenced the jury's appraisal of the petitioner's moral culpability. *529 U.S. at 398*. The Court noted that although "not all of the additional evidence was favorable," *id. at 396*, the mitigation evidence reinforced the notion that the petitioner's violent behavior "was a compulsive reaction rather than the product of cold-blooded premeditation," and explained that "mitigating evidence unrelated to **[**28]** dangerousness may alter the jury's selection of penalty, even if it does not undermine or rebut the prosecution's death-eligibility case," *id. at 398*. Similarly, although the FASD evidence may not have affected the jury's finding as to Trevino's future dangerousness, it nevertheless would have provided insight into his motivations and state of mind and, in so doing, "might well have influenced the jury's appraisal of his moral culpability." *See id.*

In *Rompilla*, the Supreme Court considered new mitigation evidence that included prison files

[3] Specifically, the majority opinion notes that the new evidence shows that although Trevino was a good father and employee, he had also been abusive toward his girlfriends, possessed firearms, was in a street and prison gang, and abused drugs and alcohol. Evidence that Trevino was at times prone to violence, was associated with a gang, and had previous drug convictions had already been presented by the State during the penalty phase.

documenting "a series of [juvenile] **[*557]** incarcerations . . . often of assaultive nature and commonly related to over-indulgence in alcoholic beverages," as well as "test results that the defense's mental health experts would have viewed as pointing to schizophrenia and other disorders," "test scores showing a third grade level of cognition after nine years of schooling," and evidence of childhood abuse and severe privation. *545 U.S. at 391-92*. Despite what the majority opinion would undoubtedly call the "double-edged nature" of this evidence, the Court concluded, "It goes without saying that the undiscovered 'mitigating evidence, taken as a whole, might well have influenced the **[**29]** jury's appraisal of [the petitioner's] culpability.'" *Id. at 393* (quoting *Wiggins, 539 U.S. at 538*). I see no reason why the evidence offered by Trevino would not have had the same effect.

Finally, in *Neal v. Puckett, 286 F.3d 230, 243-44 (5th Cir. 2002)* (en banc), despite our recognition that some of the proposed mitigating evidence that Neal sought to introduce might be considered "double-edged," we concluded that "with a more detailed and graphic description and a fuller understanding of [the defendant's] pathetic life, a reasonable juror may have become convinced of [his] reduced moral culpability."[4] In the same way, a fuller description of Trevino's life that included his struggles with FASD may have convinced a reasonable juror of his "reduced moral culpability" even if parts of that description could be characterized as "double-edged." *See id.*

The reasoning undergirding *Williams*, *Rompilla*, and *Neal* strongly supports the conclusion that Trevino suffered prejudice as a result of trial counsel's failure to conduct a reasonably thorough mitigation investigation, to discover evidence that Trevino suffers from FASD, and to present this mitigating evidence to the jury. The FASD evidence and supporting lay witness testimony put Trevino's life and his juvenile and criminal **[**30]** history in context and help to explain his conduct. "[A]lthough . . . it is possible that a jury could have heard [the additional mitigation evidence] and still have decided on the death penalty, that is not the test." *Rompilla, 545 U.S. at 393*. The question before this court is whether "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." *Strickland, 466 U.S. at 694*. Had the jury heard about the existence, origin, and effects of Trevino's FASD, it is difficult not to conclude that "there is a reasonable probability that at least one juror would have struck a different balance." *See Wiggins, 539 U.S. at 537*.

I respectfully dissent.

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[4] The en banc court ultimately denied relief to Neal, concluding that under the deferential standard of *28 U.S.C. § 2254(d)*, it could not say that the Mississippi Supreme Court unreasonably applied *Strickland*. *Neal, 286 F.3d at 243*. Nevertheless, had the court not been constrained by *§ 2254(d)*, as is the case here, it would have concluded that there was a reasonable probability that a single juror would have been swayed. *Id. at 244*.

APPENDIX B

***Trevino v. Davis*, 829 F.3d 328,**
2016 U.S. App. LEXIS 12745 (5th Cir. 2016)

Trevino v. Davis

United States Court of Appeals for the Fifth Circuit

July 11, 2016, Filed

No. 15-70019

Reporter
829 F.3d 328 *; 2016 U.S. App. LEXIS 12745 **

CARLOS TREVINO, Petitioner - Appellant v. LORIE DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, Respondent - Appellee

Prior History: [**1] Appeal from the United States District Court for the Western District of Texas.

Trevino v. Stephens, 2015 U.S. Dist. LEXIS 75400 (W.D. Tex., June 11, 2015)

Disposition: COA GRANTED IN PART AND DENIED IN PART.

Case Summary

Overview
HOLDINGS: [1]-In a death penalty case, petitioner at least sufficiently pleaded that his state habeas counsel was ineffective so as to excuse his procedural default in failing to raise the ineffective-assistance-of-trial-counsel failure-to-investigate claim earlier; [2]-Reasonable jurists could debate the district court's dismissal of petitoner's fetal alcohol syndrome claim under the Strickland prejudice prong because the evidence, if introduced, could tend to show that petitioner was unable to express remorse in a recognizable manner, which the district court characterized as the most aggravating factor; evidence of petitioner's defense could go to the very heart of that issue.

Outcome
The certificate of appealability was granted in part and denied in part.

LexisNexis® Headnotes

Criminal Law & Procedure > ... > Appeals > Standards of Review > De Novo Review

Criminal Law & Procedure > ... > Review > Standards of Review > Deference

HN1[] **Standards of Review, De Novo Review**

The standard of review under the Anti-Terrorism and Effective Death Penalty Act (AEDPA) is usually highly deferential. AEDPA deference does not apply where the district court was not reviewing a state court decision on the merits of the petitioner's claim but rather addressing the merits for the first time. Thus, AEDPA's deferential standard of review does not apply, and the appellate court reviews the merits de novo.

Criminal Law & Procedure > Habeas Corpus > Procedural Defenses > Failure to Exhaust Remedies

HN2[] **Procedural Defenses, Failure to Exhaust Remedies**

Under *28 U.S.C.S. § 2254(b)(2)*, an application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

Criminal Law & Procedure > ... > Order & Timing of Petitions > Procedural Default > Exceptions to Default

Criminal Law & Procedure > Habeas Corpus > Independent & Adequate State Grounds > Procedural Default

Criminal Law & Procedure > ... > Jurisdiction > Cognizable Issues > Ineffective Assistance of Counsel

HN3[↓] Procedural Default, Exceptions to Default

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.

Criminal Law & Procedure > ... > Jurisdiction > Cognizable Issues > Ineffective Assistance of Counsel

HN4[↓] Cognizable Issues, Ineffective Assistance of Counsel

Where the initial-review collateral proceeding is the first designated proceeding for a prisoner to raise a claim of ineffective assistance at trial, the collateral proceeding is in many ways the equivalent of a prisoner's direct appeal as to the ineffective-assistance claim. This is because the state habeas court looks to the merits of the claim of ineffective assistance, no other court has addressed the claim, and defendants pursuing first-tier review are generally ill equipped to represent themselves because they do not have a brief from counsel or an opinion of the court addressing their claim of error.

Criminal Law & Procedure > ... > Standards of Review > Deferential Review > Ineffective Assistance of Counsel

Evidence > Inferences & Presumptions > Presumptions

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Tests for Ineffective Assistance of Counsel

HN5[↓] Deferential Review, Ineffective Assistance of Counsel

To demonstrate deficient performance, the defendant must show that counsel's representation fell below an objective standard of reasonableness as measured by prevailing professional norms. Scrutiny of counsel's performance is highly deferential. The appellate court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. To overcome this presumption, a convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. Choices made after less than complete investigation are reasonable only to the extent that reasonable professional judgments support the limitations on investigation. Factors affecting whether it is reasonable not to investigate include whether counsel has reason to believe that pursuing certain investigations would be fruitless or even harmful, resource constraints, and whether the information that might be discovered would be of only collateral significance.

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Tests for Ineffective Assistance of Counsel

HN6[↓] Effective Assistance of Counsel, Tests for Ineffective Assistance of Counsel

The prejudice prong of Strickland allows relief only if 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. The likelihood of a different result must be substantial, not just conceivable.

Counsel: For Carlos Trevino, Petitioner - Appellant: Warren Alan Wolf, Law Office of Warren Alan Wolf, San Antonio, TX; John Joseph Ritenour Jr., Esq., Ritenour Law Firm, P.C., San Antonio, TX.

For Lorie Davis, Director, Texas Department of Criminal

Justice, Correctional Institutions Division, Respondent - Appellee: Fredericka Searle Sargent, Assistant Attorney General, Office of the Attorney General, Criminal Appeals Division, Austin, TX.

Judges: Before DAVIS, SMITH, and DENNIS, Circuit Judges.

Opinion by: W. EUGENE DAVIS

Opinion

[*331] W. EUGENE DAVIS, Circuit Judge:

Carlos Trevino ("Trevino") seeks a certificate of appealability ("COA") to appeal the district court's dismissal, on the pleadings and without an evidentiary hearing, of his habeas corpus petition under *28 U.S.C. § 2254*, claiming that he was deprived his *Sixth Amendment* right to effective assistance of counsel when his trial counsel allegedly failed to adequately investigate and present mitigation evidence at the punishment phase of his capital murder trial. The district court held that Trevino's claim is procedurally barred, even under *Martinez v. Ryan, 566 U.S. 1, 132 S.Ct. 1309, 182 L.Ed.2d 272 (2012)*, and *Trevino v. Thaler, U.S. , 133 S. Ct. 1911, 185 L. Ed. 2d 1044 (2013)*, because Trevino failed to sufficiently [**2] allege that his initial state habeas counsel rendered ineffective assistance. In the alternative, the district court held that his claim must be dismissed on the merits because the new mitigating evidence Trevino seeks to develop and admit, which the district court characterized as "double-edged," could not outweigh the substantial aggravating evidence.

Trevino seeks a COA, arguing that reasonable jurists could debate whether the district court properly dismissed his claims on the pleadings and whether it erred by failing to hold an evidentiary hearing. For the reasons set out below, we conclude that reasonable jurists could debate whether the district court correctly dismissed his habeas claim with respect to potential evidence of his fetal alcohol syndrome ("FAS") or, more broadly, fetal alcohol spectrum disorder ("FASD"). Indeed, reasonable jurists would agree that the district court erred in prematurely dismissing that claim. We also conclude that no reasonable jurist could debate whether the district court erred in dismissing his habeas claim with respect to his additional character witness testimony that is not relevant to an FASD diagnosis or whether the district court erred [**3] by failing to hold [*332] an evidentiary hearing before its dismissal on the pleadings. **I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY**

This is the second time this case has come before us and the first in which we reach beyond the procedural default issue to address the merits. Trevino contends that if his trial counsel had conducted a constitutionally sufficient investigation, he not only would have located more witnesses to testify about his character but also would have been able to discover and introduce evidence that Trevino suffers from FASD. The background is set out more fully in the prior opinions in this case,[1] but we summarize them here for convenience.

A. TRIAL[2]

Trevino was convicted for the June 9, 1996 gang rape and murder of 15-year-old Linda Salinas in San Antonio, Texas. One of the other participants, Juan Gonzales (Trevino's cousin), testified on behalf of the prosecution that he was with the group that night, though he walked away briefly during the murder. He testified that although Trevino [**4] did not rape Salinas himself, he held her down while another participant raped her; that Trevino encouraged Gonzales to rape her (though Gonzales refused); that Trevino discussed the need to get rid of Salinas as a witness; and that Trevino later appeared with blood on his shirt. Gonzales also testified that Trevino bragged after the murder that he had "learned how to kill in prison" and "learned how to use a knife in prison." Thus, although Gonzales did not witness the murder itself, he presented substantial testimony of Trevino's involvement in the crime.

Salinas's body was discovered the day after her murder, and an autopsy revealed that she suffered two stab wounds to her neck, one of which was fatal, as well as other injuries consistent with sexual assault. The prosecution presented this autopsy evidence at Trevino's trial. The prosecution also presented

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[1] *See Trevino v. Thaler, 678 F. Supp. 2d 445, 467-71 (W.D. Tex. 2009), aff'd, 449 F. App'x 415 (5th Cir. 2011), vacated and remanded, 133 S. Ct. 1911, 185 L. Ed. 2d 1044 (2013)*, and the district court's subsequent opinion at *Trevino v. Stephens, No. CIV. SA-01-CA-306-XR, 2015 U.S. Dist. LEXIS 75400, 2015 WL 3651534 (W.D. Tex. June 11, 2015)*.

[2] The facts in this section come from our previous opinion. *See 449 F. App'x at 416-18*.

testimony from forensic and DNA experts establishing that fibers found on Salinas's clothing were consistent with fibers from Trevino's slacks and that Trevino's DNA could not be excluded as a source of DNA found in Salinas's panties.

Based on this and other evidence, the jury returned a guilty verdict. During the punishment phase, **[**5]** the prosecution presented substantial evidence regarding Trevino's culpability and future dangerousness, including his former arrests and admitted membership in a violent street gang. Trevino's state trial counsel called only one witness, Trevino's aunt, who testified generally about his rough childhood and his mother's alcoholism. Her testimony, comprising approximately five pages, made up the entirety of his mitigation case.

At the conclusion of the punishment phase, the jury found (1) that he constituted a future risk of dangerousness, (2) that he had actually caused the death of Salinas or, if he did not actually cause her death, that he intended to kill her or another, or anticipated a loss of life, and (3) that there were insufficient mitigating circumstances **[*333]** to warrant a sentence of life imprisonment. In accordance with the verdict, the state trial court imposed a sentence of death.

B. Post-Conviction Proceedings

The Supreme Court summarized the post-conviction proceedings, which are central to this COA application, 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 **[**6]** 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 **[**7]** 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. App. 438, 456-478. 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. *Id.*, at 285-291.

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 **[**8]** 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. *Id.*, at 66-67.

The federal court stayed proceedings to permit

> Trevino to raise this claim in **[*334]** 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, *id.*, at 27-28; and the Federal District Court then denied Trevino's ineffective-assistance-of-trial-counsel claim, *id.*, at 78-79. 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 **[**9]** state postconviction proceeding) barred the federal habeas court from considering the ineffective-assistance-of-trial-counsel claim. *Id.*, at 131-132. 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*.[3]

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 **[**10]** 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.[4]

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."[5] Accordingly, it remanded to the Fifth Circuit:

> Given this holding, Texas submits that its courts should be permitted, in the first instance, **[**11]** 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 **[*335]** 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.[6]

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.[7]

C. District Court Proceedings on Remand

On remand, the district court, in April to July 2014,

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[3] *Trevino, 133 S. Ct. at 1915-16* (emphasis in original).

[4] *Id. at 1921*.

[5] *Id. at 1921* (quoting *Martinez, 132 S. Ct. at 1320*).

[6] *Id.*

[7] *Trevino v. Stephens, 740 F.3d 378 (5th Cir. 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." **[**12]** [8] On November 13, 2014, the district court held a status conference concerning pending motions,[9] 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.[10]

On February 2, 2015, Trevino filed his second amended federal habeas petition, and the state filed its response on May **[**13]** 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.[11] 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.[12] In its new order, it **[*336]** 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.

1. MARTINEZ/TREVINO Issue

With respect to the *Martinez/Trevino* issue, the district court concluded that Trevino still had failed to overcome the procedural default bar. Specifically, **[**14]** 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.[13] 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.[14] 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.[15]

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.

2. [**15] $WMerits of the Claim

On its merits determination, the district court relied

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[8] *Trevino v. Stephens, No. CIV. SA-01-CA-306-XR, 2015 U.S. Dist. LEXIS 75400, 2015 WL 3651534, at *1 (W.D. Tex. June 11, 2015)* (citations omitted).

[9] *See* Minutes of Civil Proceedings, Docket Number SA-01-CA-306-XR, ECF Doc. 137 (Nov. 13, 2014).

[10] *See* Order Granting in Part Motion for Expert Funding and Setting New Filing Deadlines, Docket Number SA-01-CA-306-XR, ECF Doc. 138 (Nov. 13, 2014).

[11] *2015 U.S. Dist. LEXIS 75400, 2015 WL 3651534.*

[12] *2015 U.S. Dist. LEXIS 75400, [WL] at *2.*

[13] *2015 U.S. Dist. LEXIS 75400, [WL] at *5-6.*

[14] *Id.*

[15] *Id.*

extensively on its alternative holding in its 2009 opinion that the "new" mitigating evidence (concerning Trevino's character, childhood abuse and neglect, alcohol and narcotics abuse, school performance, and possible FASD) could not outweigh the substantial aggravating evidence presented at trial.[16] The district court listed some of the aggravating evidence, including Trevino's "callous comments" following the murder of Salinas, his participation in the violent assault, and his gang membership, but the district court placed special emphasis on "the complete and total absence of any indication the Petitioner has ever expressed sincere contrition or genuine remorse over Salinas' murder."[17] In the district court's estimation, Trevino's apparent lack of remorse seemed to be the primary piece of aggravating evidence:

> The latter point cannot be over-emphasized. Salinas' murder was particularly brutal and senseless. Yet Petitioner has consistently refused to acknowledge his role in her murder, even to his own trial **[*337]** counsel, claiming instead to have been "too stoned" to remember exactly what happened that evening. Petitioner's **[**16]** own affidavit, executed June 11, 2004, contains not even a scintilla of sincere contrition; instead Petitioner expresses hostility and blames his trial counsel for allegedly misrepresenting the terms of a proffered plea bargain for a life sentence without accepting any responsibility for his own rejection of the offer after it was accurately described to Petitioner.
>
> Absent some indication the Petitioner has willingly accepted responsibility for his role in Salinas' brutal rape and murder, the evidence showing Petitioner's long history of alcohol and drug abuse, long history of criminal misconduct, and membership in violent street and prison gangs precludes this Court from finding this aspect of Petitioner's ineffective assistance claims herein satisfies the prejudice prong of *Strickland*. There is simply no reasonable probability that, but for the failure of Petitioner's trial counsel to present Petitioner's capital sentencing jury with the additional, double-edged, mitigating evidence now before this Court, the outcome of the punishment phase of Petitioner's capital trial would have been different.[18]

The district court concluded that the second amended petition did not change the balance because the "new" mitigating evidence was fundamentally the same "double-edged" evidence it had addressed in its earlier opinion.[19] The district court summarized the "new" evidence as follows:

> Petitioner asserts that trial counsel could have called various witnesses who would have offered supportive testimony (e.g., Janet Cruz, the mother of his two children; Mario Cantu, friend; Ruben Gonzalez, employer; Jennifer DeLeon, his sister).
>
> One of the experts recently retained opines that Petitioner "presents with characteristics of Fetal Alcohol Affect", and a "low average range of intellectual functioning." She further opines that his "history of Fetal Alcohol Affect, along with his history of physical and emotional abuse" contributed to his "inability to make **[**18]** appropriate decisions." She opines that this may also have contributed to Petitioner rejecting the plea offer made to him that would have spared him from the death sentence.
>
> Another expert opines that based on his preliminary assessment, Petitioner suffers from "8 domains" of poor "cognitive functioning," (i.e., academics, verbal and visuospatial memory, visuospatial construction, processing speed, executive functioning, communication skills, daily living skills and socialization skills). This expert states that although his assessment is a "critical component in the FASD diagnostic process," the diagnosis of FASD must be made by a medical doctor. According to this expert, yet unexamined is whether Petitioner's "FASD has resulted in an organic brain disorder." In summary, Petitioner argues that, had the "jury been able to consider [Petitioner's] mixed up and unexplainable turbulent and chaotic life history on the mitigating side of the scale, there is unquestionably a reasonable probability that at

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[16] *2015 U.S. Dist. LEXIS 75400, [WL] at *3-4* (quoting *Trevino v. Thaler, 678 F. Supp. 2d at 471-72*). The court also stated that "neither the Fifth Circuit nor the Supreme Court **[**17]** has rejected this Court's legal conclusions or factual findings underlying its determination that Petitioner's claims of ineffective assistance by his trial counsel asserted in his first amended petition lacked merit," *id.*, but it is more accurate to say that neither the Fifth Circuit nor the Supreme Court addressed the merits at all.

[17] *2015 U.S. Dist. LEXIS 75400, 2015 WL 3651534 at *3-4*.

[18] *Id.* (quoting *Trevino, 678 F. Supp. 2d at 471-72*).

[19] *2015 U.S. Dist. LEXIS 75400, [WL] at *4*.

> least one juror would have struck a different balance."[20]

The expert "recently retained" was Dr. Rebecca A. Dyer, Ph.D., of Forensic Associates of San Antonio, whose 18-page **[**19]** report dated May 6, 2004, was attached to **[*338]** Trevino's earlier habeas petition that was the subject of the district court's 2009 opinion, and was again attached to his second amended habeas petition.[21]

The district court correctly set out the standards for uncalled witnesses and uninvestigated facts as follows:

> "To prevail on an ineffective assistance claim based upon uncalled witnesses, an applicant must name the witness, demonstrate that the witness would have testified, set out the content of the witness's proposed testimony, and show that the testimony would have been favorable." *Gregory v. Thaler, 601 F.3d 347, 352 (5th Cir.)*, cert. denied, *562 U.S. 911, 131 S. Ct. 265, 178 L. Ed. 2d 175 (2010)*. "An applicant 'who alleges a failure to investigate on the part of his counsel must allege with specificity what the investigation would have revealed and how it would have altered the outcome of the trial.'" *Id.*[22]

Applying these standards, the district court addressed two distinct categories of proposed evidence: (1) character witness testimony and (2) evidence pertaining to Trevino's possible FASD.[23] The district court explained that although the character witness testimony did contain some mitigating evidence, it contained a great deal of aggravating evidence as well, which would serve to bolster **[**20]** the prosecution's case.[24] Among the aggravating evidence was testimony that Trevino was "always high" from sniffing spray paint, that he was abusive to the mother of one of his children and had two sides to his personality, that he was "always jealous," "angry," "violent," and "impulsive" even when he was not drunk, and that he always had a gun.[25] Thus, the district court concluded that the "new" character witness testimony was "double-edged" and, if introduced, could not have affected the outcome.

Next, the district court found that the FASD evidence was also "double-edged," though the court's language suggested that the FASD evidence may be more mitigating than aggravating:

> Finally, this Court has previously noted the double-edged nature of a diagnosis of Fetal Alcohol Syndrome or Fetal Alcohol Effects. This Court has also noted that a diagnosis of Fetal Alcohol Syndrome or Fetal Alcohol Effects or Fetal Alcohol Spectrum Disorder was not within the mainstream of psychological diagnosis and treatment at the time of Petitioner's 1997 capital murder trial.
>
> In sum, the "new" evidence presented by Petitioner, while admittedly containing some mitigating aspects (particularly those concerning **[**21]** Petitioner's mother's alcoholism and the likelihood Petitioner suffers from Fetal Alcohol Spectrum Disorder), also contains a plethora of information which would have assisted the prosecution in obtaining an affirmative answer to the Texas capital sentencing scheme's future dangerousness special issue.[26]

[*339] After characterizing all of the proposed "new" evidence as "double-edged," the district court turned to the question of whether Trevino's trial counsel rendered ineffective assistance, setting out the same standards we will apply here:

> To establish ineffective assistance of counsel, a petitioner must show that counsel's representation fell below an objective standard of reasonableness, and to establish prejudice he must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding **[**22]** would have been different. *Williams v. Taylor, 529 U.S. 362, 390-91, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000)* (*citing Strickland v.*

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[20] *2015 U.S. Dist. LEXIS 75400, [WL] at *7-8* (footnotes omitted).

[21] *2015 U.S. Dist. LEXIS 75400, 2015 WL 3651534 at *8 n.12*.

[22] *2015 U.S. Dist. LEXIS 75400, [WL] at *7*.

[23] *2015 U.S. Dist. LEXIS 75400, [WL] at *9-10*.

[24] *Id.*

[25] *Id.*

[26] *2015 U.S. Dist. LEXIS 75400, [WL] at *10* (footnotes omitted) (citing *Sells v. Thaler, 2012 U.S. Dist. LEXIS 91521, 2012 WL 2562666, *58 (W.D. Tex. June 28, 2012)*, *COA denied, 536 F. App'x 483 (5th Cir. July 22, 2013)*, *cert. denied, __ U.S. __, 134 S. Ct. 1786, 188 L. Ed. 2d 612 (2014)* ("[P]ursuit of a defense at the punishment phase of petitioner's trial premised upon petitioner suffering from fetal alcohol syndrome or fetal alcohol effects would have amounted to an admission by petitioner's trial counsel that petitioner would, in fact, pose a substantial risk of future violent conduct.")).

> *Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)).*
>
> A few highlights from *Strickland* should be noted. "Counsel also has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." *Strickland, 466 U.S. at 688*. "Prevailing norms of practice as reflected in American Bar Association standards" are mere guides. *Id.*[27]

The district court concluded that Trevino had failed to satisfy either the performance or prejudice prong of *Strickland*. On the performance prong, the district court essentially concluded that the evidence simply was not available to his trial counsel at the time of his trial and therefore counsel's failure to investigate it could not constitute deficient performance.[28] The district court stated that "trial counsel was not wholly inattentive to developing mitigating evidence," in that he interviewed Trevino's stepfather, and Trevino "failed to assist his trial counsel in identifying any family members or others who may have provided mitigating testimony."[29]

With respect to the evidence of Trevino's mother's alcohol abuse during pregnancy, the court noted that Trevino's mother did not provide a sworn statement until 2004 and did not state that she would have been available **[**23]** to testify at the 1997 trial.[30] "Accordingly, it is difficult to understand how trial counsel could reasonably be blamed for not locating Ms. Trevino prior to Petitioner's 1997 capital murder trial and presenting potentially mitigating evidence from this witness."[31] The court also found that the FASD claim should be denied primarily on the performance prong because Trevino failed to show that the evidence was available at the time of trial.[32] In sum, the district court found that there was no evidence that Trevino's state trial counsel knew or should have known about additional character witnesses or about the factual basis for a possible FASD claim.

On the second prong of *Strickland*, the district court concluded that, even if Trevino could show that his trial counsel's performance fell below an objectively reasonable standard, that failure did not result in prejudice. Again, the district court set out the correct legal standards, which are also applicable to this COA application, but the district court focused primarily on the character witness testimony:

> In evaluating prejudice in the context of the punishment phase of a capital trial, a federal habeas court must re-weigh all the **[**24]** evidence in aggravation against the totality of available mitigating evidence **[*340]** (had the Petitioner's trial counsel chosen a different course). *Wong v. Belmontes, 558 U.S. 15, 20, 130 S. Ct. 383, 175 L. Ed. 2d 328 (2009); Wiggins v. Smith, 539 U.S. 510, 534, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003).* *Strickland* does not require the State to "rule out" or negate a sentence of life in prison to prevail; rather, it places the burden on the defendant to show a "reasonable probability" that the result of the punishment phase of a capital murder trial would have been different. *Wong v. Belmontes, 558 U.S. at 27*. The prejudice inquiry under *Strickland* requires evaluating whether 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*. "The likelihood of a different result must be substantial, not just conceivable." *Brown v. Thaler, 684 F.3d 482, 491 (5th Cir. 2012) (citing Harrington v. Richter, 562 U.S. 86, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011)), cert. denied, 568 U.S. 1164, 133 S. Ct. 1244, 185 L. Ed. 2d 190 (2013).*
>
> Federal habeas corpus petitioners asserting claims of ineffective assistance based on counsel's failure to call a witness satisfy the prejudice prong of the *Strickland* analysis only by naming the witness, *demonstrating the witness was available to testify and would have done so*, setting out the content of the witness' proposed testimony, and showing the testimony would have been favorable to a particular defense. *Woodfox v. Cain, 609 F.3d 774, 808 (5th Cir. 2010); Day v. Quarterman, 566 F.3d 527, 538 (5th Cir. 2009).*[33]

The district court found it sufficient **[**25]** that Trevino's trial counsel presented the testimony of his aunt, "albeit

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[27] *2015 U.S. Dist. LEXIS 75400, 2015 WL 3651534 at *10-11.*

[28] *2015 U.S. Dist. LEXIS 75400, [WL] at *12.*

[29] *Id.*

[30] *Id.*

[31] *Id.*

[32] *2015 U.S. Dist. LEXIS 75400, [WL] at *13.*

[33] *2015 U.S. Dist. LEXIS 75400, 2015 WL 3651534 at *12-13.*

in a cursory fashion," to explain "the facts that Petitioner's mother was an alcoholic and Petitioner's family lived on welfare in public housing."[34] The court concluded that the proposed "new" character witness testimony could not have changed the result because, "in addition to noting that Petitioner was raised in a very troubled household and neighborhood, and that he was kind and caring at times, these individuals also have described Petitioner as a man quickly prone to angry and violent outbursts."[35] In the district court's view, the character witness testimony is only weakly mitigating and contains highly aggravating evidence, so there is no reason to believe it would serve any meaningful mitigation purpose.

In summing up its conclusion that the "new" evidence could not have changed the outcome (i.e., the failure to introduce it was not prejudicial under *Strickland*), the district court focused on the heinous nature of the crime, the fact that there was a great deal of aggravating evidence, and the fact that the proposed character witness testimony contained additional aggravating evidence in addition to **[**26]** fairly inconsequential mitigating evidence.[36] In short, it concluded that the "new" mitigating evidence simply could not outweigh the aggravating evidence because it was "double-edged," placing greater emphasis on the character witness testimony. Because the district court concluded that Trevino failed to satisfy either prong of *Strickland*, it denied relief on the merits.

3. Denial of Evidentiary Hearing

The district court did not hold an evidentiary hearing because it found Trevino **[*341]** "has failed to allege specific facts which, if proven, would entitle Petitioner to federal habeas corpus relief in this cause."[37] Because it based its decision on the pleadings, an evidentiary hearing could not affect the outcome.

4. Denial of CoA

Based on all the above, the district court denied all relief under the second amended petition. It also denied a COA. Although it noted that "[i]n death penalty cases, any doubt as to whether a CoA should issue must be resolved in the petitioner's favor," it concluded there was no such doubt here, at least with respect to the *Martinez/Trevino* procedural default issue (i.e., whether Trevino sufficiently alleged that his state habeas counsel rendered ineffective assistance **[**27]** for failing to raise the ineffective-assistance-of-trial-counsel claim) and the prejudice prong of *Strickland*.[38]

II. Applicable Law

Before turning to the particular claims asserted by Trevino, we first address the applicable law; the framework for *Strickland* claims generally and the *Wiggins* inadequate investigation claim at issue here; and the law concerning "double-edged" evidence.

A. Jurisdiction and Standard of Review

We have jurisdiction in this application for a COA from the district court's denial of habeas relief under *28 U.S.C. § 2254* pursuant to *28 U.S.C. §§ 1291* and *2253(c)(1)(B)*. As we set out in our 2011 opinion, *HN1*[↑] the standard of review under AEDPA is usually highly deferential.[39] AEDPA deference does not apply here, however, because the district court was not reviewing a state court decision on the merits of Trevino's claim but rather addressing the merits for the first time.[40] Thus, AEDPA's deferential standard of review does not apply, and we review the merits de novo.[41]

HN2[↑] Under *§ 2254(b)(2)*, "An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State." **[**28]**

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[34] *2015 U.S. Dist. LEXIS 75400, [WL] at *13.*

[35] *Id.*

[36] *2015 U.S. Dist. LEXIS 75400, [WL] at *14.*

[37] *2015 U.S. Dist. LEXIS 75400, 2015 WL 3651534 at *15.*

[38] *Id. at *16* (citing *Avila v. Quarterman, 560 F.3d 299, 304 (5th Cir.)*, *cert. denied*, ***558 U.S. 993, 130 S. Ct. 536, 175 L. Ed. 2d 350 (2009)***; *Bridgers v. Dretke, 431 F.3d 853, 861 (5th Cir. 2005)*, *cert. denied*, ***548 U.S. 909, 126 S. Ct. 2961, 165 L. Ed. 2d 959 (2006)***).

[39] *Trevino, 133 S. Ct. at 1921* (quoting *Martinez, 132 S. Ct., at 1320*).

[40] *See, e.g., Carty v. Thaler, 583 F.3d 244, 253 (5th Cir. 2009)*; *Mercadel v. Cain, 179 F.3d 271, 275 (5th Cir. 1999)*.

[41] *Id.*

Because Trevino's claim may be dismissed on either procedural default grounds or on the merits, he must demonstrate that reasonable jurists would debate the correctness of the district court's dismissal on both grounds.

B. *Strickland* and *Wiggins*

Strickland analysis is, of course, central to this COA application, especially as applied in *Wiggins v. Smith, 539 U.S. 510, 523, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003)*. Because *Wiggins* demonstrates the basis for Trevino's entire claim, we examine the case in some detail.[42]

The petitioner, Wiggins, was convicted in August 1989, after a four-day jury trial, for a murder he committed in 1988. Prior **[*342]** to sentencing, his trial counsel moved for bifurcation of sentencing into two phases: in the first, counsel proposed to prove that Wiggins did not act as the principal in the murder, and in the second, they intended to present mitigating evidence. Counsel argued that bifurcation would prevent mitigation evidence from undercutting their argument that Wiggins was not primarily responsible for the murder. The trial judge denied the motion, and sentencing commenced in a single phase.

> On October 12, the court denied the bifurcation motion, and **[**29]** sentencing proceedings commenced immediately thereafter. In her opening statement, Nethercott told the jurors they would hear evidence suggesting that someone other than Wiggins actually killed Lacs. Counsel then explained that the judge would instruct them to weigh Wiggins' clean record as a factor against a death sentence. She concluded: "'You're going to hear that Kevin Wiggins has had a difficult life. It has not been easy for him. But he's worked. He's tried to be a productive citizen, and he's reached the age of 27 with no convictions for prior crimes of violence and no convictions, period. . . . I think that's an important thing for you to consider.'" During the proceedings themselves, however, counsel introduced no evidence of Wiggins' life history.
>
> Before closing arguments, Schlaich made a proffer to the court, outside the presence of the jury, to preserve bifurcation as an issue for appeal. He detailed the mitigation case counsel would have presented had the court granted their bifurcation motion. He explained that they would have introduced psychological reports and expert testimony demonstrating Wiggins' limited intellectual capacities and childlike emotional state on the **[**30]** one hand, and the absence of aggressive patterns in his behavior, his capacity for empathy, and his desire to function in the world on the other. At no point did Schlaich proffer any evidence of petitioner's life history or family background.[43]

The jury returned a sentence of death.

In 1993, Wiggins sought state habeas relief, "arguing that his attorneys had rendered constitutionally defective assistance by failing to investigate and present mitigating evidence of his dysfunctional background."[44] In support, he submitted testimony by a licensed social worker who had prepared an extensive social history report detailing severe physical and sexual abuse by his own father and mother as well as various foster parents. During these proceedings, one of Wiggins' trial attorneys testified that he did not recall retaining a forensic social worker to prepare a social history, even though the State of Maryland made funds available for that purpose, and he testified that the trial team had, "well in advance of trial, decided to focus their efforts on 'retry[ing] the factual case' and disputing Wiggins' direct responsibility for the murder."[45]

The state habeas courts denied relief on the ground **[**31]** that the decision not to investigate was "a matter of trial tactics" and therefore did not constitute deficient performance under *Strickland*. The state appellate court focused on the fact that trial counsel knew at least the general contours of Wiggins' childhood, and that at least one mitigating factor, Wiggins' lack of prior convictions, was presented to the jury.

[*343] Wiggins filed a habeas petition in federal court, arguing that the state habeas courts' rejection of his ineffective-assistance-of-trial-counsel claim was based on an unreasonable application of clearly established federal law. The federal district court agreed, concluding

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[42] The facts in this section all come from *Wiggins*, with citations provided only for quotations.

[43] *539 U.S. at 515-16* (citations omitted).

[44] *Id. at 516*.

[45] *Id. at 517*.

that trial counsel's decision not to investigate Wiggins' social history further could only be reasonable if it was "based upon information the attorney has made after conducting a reasonable investigation."[46] Reviewing de novo, the Fourth Circuit reversed. The Supreme Court granted certiorari and reversed the Fourth Circuit.

After setting out the *Strickland* standards and emphasizing the "heavy measure of deference" accorded to the judgments of trial counsel, the Supreme Court explained the limits of that deference:

> Our opinion in *Williams v. Taylor* ***[**32]*** is illustrative of the proper application of these standards. In finding Williams' ineffectiveness claim meritorious, we applied *Strickland* and concluded that counsel's failure to uncover and present voluminous mitigating evidence at sentencing could not be justified as a tactical decision to focus on Williams' voluntary confessions, because counsel had not "fulfill[ed] their obligation to conduct a thorough investigation of the defendant's background." *529 U.S., at 396, 120 S. Ct. 1495* (citing 1 ABA Standards for Criminal Justice 4-4.1, commentary, p. 4-55 (2d ed.1980)). While *Williams* had not yet been decided at the time the Maryland Court of Appeals rendered the decision at issue in this case, cf. *post*, at 2546 (SCALIA, J., dissenting), Williams' case was before us on habeas review. Contrary to the dissent's contention, *ibid.*, we therefore made no new law in resolving Williams' ineffectiveness claim. See *Williams, 529 U.S., at 390, 120 S. Ct. 1495* (noting that the merits of Williams' claim "are squarely governed by our holding in *Strickland*"); see also *id., at 395, 120 S. Ct. 1495* (noting that the trial court correctly applied both components of the *Strickland* standard to petitioner's claim and proceeding to discuss counsel's failure to investigate as a violation of *Strickland's* performance ***[**33]*** prong). In highlighting counsel's duty to investigate, and in referring to the ABA Standards for Criminal Justice as guides, we applied the same "clearly established" precedent of *Strickland* we apply today. Cf. *466 U.S., at 690-691, 104 S. Ct. 2052* (establishing that "thorough investigation[s]" are "virtually unchallengeable" and underscoring that "counsel has a duty to make reasonable investigations"); see also *id., at 688-689, 104 S. Ct. 2052* ("Prevailing norms of practice as reflected in American Bar Association standards and the like . . . are guides to determining what is reasonable").
>
> In light of these standards, our principal concern in deciding whether Schlaich and Nethercott exercised "reasonable professional judgmen[t]," *id., at 691, 104 S. Ct. 2052*, is not whether counsel should have presented a mitigation case. Rather, we focus on whether the investigation supporting counsel's decision not to introduce mitigating evidence of Wiggins' background *was itself reasonable. Ibid.* Cf. *Williams v. Taylor, supra, at 415, 120 S. Ct. 1495* (O'CONNOR, J., concurring) (noting counsel's duty to conduct the "requisite, diligent" investigation into his client's background). In assessing counsel's investigation, we must conduct an objective review of ***[*344]*** their performance, measured for "reasonableness under prevailing professional norms," *Strickland, 466 U.S., at 688, 104 S. Ct. 2052*, which includes a context-dependent ***[**34]*** consideration of the challenged conduct as seen "from counsel's perspective at the time," *id., at 689, 104 S. Ct. 2052* ("[E]very effort [must] be made to eliminate the distorting effects of hindsight").[47]

The Court noted that trial counsel drew its mitigation case from three sources: an IQ test conducted by a psychologist, which revealed Wiggins had an IQ of 79; a presentence investigation report ("PSI"), which included a brief summary of his miserable personal history; and records kept by the Baltimore City Department of Social Services ("DSS"), which showed his various placements in the foster care system. They did not, however, develop any further social history, despite the availability of funds for that purpose.

The Court held that this constituted constitutionally deficient investigation in light of not only Maryland's standards but ABA Guidelines in place prior to his sentencing, including the admonition that "investigations into mitigating evidence 'should comprise efforts to discover *all reasonably available* mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor.'"[48]

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[46] *Id. at 519* (quoting *Wiggins v. Corcoran, 164 F. Supp. 2d 538, 558 (D. Md. 2001)*).

[47] *Id. at 522-23* (emphasis in original).

[48] *539 U.S. at 524* (quoting ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.4.1(C), p. 93 (1989) (emphasis added in *Wiggins*)).

> Despite these well-defined norms, however, counsel abandoned their investigation **[**35]** of petitioner's background after having acquired only rudimentary knowledge of his history from a narrow set of sources. *Cf. id.*, 11.8.6, p. 133 (noting that among the topics counsel should consider presenting are medical history, educational history, employment and training history, *family and social history*, prior adult and juvenile correctional experience, and religious and cultural influences (emphasis added)); 1 ABA Standards for Criminal Justice 4-4.1, commentary, p. 4-55 (2d ed. 1982) ("The lawyer also has a substantial and important role to perform in raising mitigating factors both to the prosecutor initially and to the court at sentencing . . . . Investigation is essential to fulfillment of these functions").[49]

Moreover, the Court found that "the investigation was also unreasonable in light of what counsel actually discovered in the DSS records," including the fact that Wiggins' mother was an alcoholic, that he had spent time in different foster homes, that he displayed emotional difficulties, that he was frequently absent from **[**36]** school, and that he was left without food for days at a time.[50]

> As the Federal District Court emphasized, any reasonably competent attorney would have realized that pursuing these leads was necessary to making an informed choice among possible defenses, particularly given the apparent absence of any aggravating factors in petitioner's background. *164 F.Supp.2d, at 559*. Indeed, counsel uncovered no evidence in their investigation to suggest that a mitigation case, in its own right, would have been counterproductive, or that further investigation would have been fruitless; this case is therefore distinguishable from our precedents in which we have found limited investigations **[*345]** into mitigating evidence to be reasonable. See, *e.g., Strickland, supra, at 699, 104 S. Ct. 2052* (concluding that counsel could "reasonably surmise . . . that character and psychological evidence would be of little help"); *Burger v. Kemp, 483 U.S. 776, 794, 107 S. Ct. 3114, 97 L. Ed. 2d 638 (1987)* (concluding counsel's limited investigation was reasonable because he interviewed all witnesses brought to his attention, discovering little that was helpful and much that was harmful); *Darden v. Wainwright, 477 U.S. 168, 186, 106 S. Ct. 2464, 91 L. Ed. 2d 144 (1986)* (concluding that counsel engaged in extensive preparation and that the decision to present a mitigation case would have resulted in the jury hearing evidence that petitioner **[**37]** had been convicted of violent crimes and spent much of his life in jail). Had counsel investigated further, they might well have discovered the sexual abuse later revealed during state postconviction proceedings.[51]

In sum, the Court concluded that Wiggins' trial counsel's investigation was constitutionally inadequate under the performance prong of *Strickland*:

> In finding that Schlaich and Nethercott's investigation did not meet *Strickland's* performance standards, we emphasize that *Strickland* does not require counsel to investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing. Nor does *Strickland* require defense counsel to present mitigating evidence at sentencing in every case. Both conclusions would interfere with the "constitutionally protected independence of counsel" at the heart of *Strickland, 466 U.S., at 689, 104 S. Ct. 2052*. We base our conclusion on the much more limited principle that "strategic choices made after less than complete investigation are reasonable" only to the extent that "reasonable professional judgments support the limitations on investigation." *Id., at 690-691, 104 S. Ct. 2052*. A decision not to investigate thus "must be directly assessed for reasonableness **[**38]** in all the circumstances." *Id., at 691, 104 S. Ct. 2052*.[52]

The Court then turned to the prejudice prong of *Strickland*:

> In order for counsel's inadequate performance to constitute a *Sixth Amendment* violation, petitioner must show that counsel's failures prejudiced his defense. *Strickland, 466 U.S., at 692, 104 S. Ct. 2052*. In *Strickland*, we made clear that, to establish prejudice, a "defendant must show that there is a reasonable probability that, but for counsel's

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[49] *Id. at 524-25*.

[50] *Id. at 525*.

[51] *Id.*

[52] *Id. at 533*.

> unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id., at 694, 104 S. Ct. 2052*. In assessing prejudice, we reweigh the evidence in aggravation against the totality of available mitigating evidence.[53]

The Court concluded that the failure to investigate and discover the "powerful" mitigation evidence was indeed prejudicial, in that it showed a history of severe abuse, starting with his "alcoholic, absentee mother" and continuing through an unbroken series of extreme hardships.[54] In the Court's words, Wiggins "thus has the kind of troubled history we have declared relevant **[*346]** to assessing a defendant's moral culpability."[55]

> Given both the nature and the extent of the abuse petitioner suffered, we find there to be a reasonable probability **[**39]** that a competent attorney, aware of this history, would have introduced it at sentencing in an admissible form. While it may well have been strategically defensible upon a reasonably thorough investigation to focus on Wiggins' direct responsibility for the murder, the two sentencing strategies are not necessarily mutually exclusive. Moreover, given the strength of the available evidence, a reasonable attorney might well have chosen to prioritize the mitigation case over the direct responsibility challenge, *particularly given that Wiggins' history contained little of the double edge we have found to justify limited investigations in other cases. Burger v. Kemp, 483 U.S. 776, 107 S. Ct. 3114, 97 L. Ed. 2d 638 (1987); Darden v. Wainwright, 477 U.S. 168, 106 S. Ct. 2464, 91 L. Ed. 2d 144 (1986)*.[56]

Accordingly, the Supreme Court held that the mitigating evidence, considered as a whole, could have resulted in a different sentence, and it reversed and remanded.

C. "Double-Edged" Evidence

The district court focused on the fact that *Wiggins* does not necessarily apply when the proposed "new" evidence is "double-edged," as *Wiggins* itself explained. Therefore, the two cases the Supreme Court cited in *Wiggins* for such evidence, *Burger* and *Darden*, are worth examining briefly.

In *Burger*, the petitioner's trial counsel **[**40]** was aware of some, but not all, of his troubled family history, including his "unhappy and unstable childhood," one of his stepfathers getting him involved in marijuana and alcohol, his running away from home and being placed in a juvenile detention home, and similar facts.[57] During his investigation, trial counsel had talked to the petitioner's mother, an old friend of the petitioner's, a psychologist counsel had employed to examine him prior to trial, and others, before deciding not to present evidence of his childhood.[58] Counsel also decided not to have the petitioner testify on the ground that he showed no remorse and might actually brag about the crime on the witness stand.[59]

The petitioner argued that his attorney should have conducted more of an investigation, but the Court concluded that the proposed "new" testimony could not have helped. The proposed testimony contained only meager mitigation evidence and a substantial amount of aggravating evidence, including the fact that he had spent time in juvenile detention, which had not been disclosed at trial, and that he had violent tendencies and seemed to have a split personality that resulted in unpredictable angry outbursts.[60] As the **[**41]** Court noted, "Even apart from their references to damaging facts, the papers are by no means uniformly helpful to petitioner because **[*347]** they suggest violent tendencies that are at odds with the defense's strategy of portraying petitioner's actions on the night of the murder as the result of Stevens' strong influence upon his will."[61]

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[53] *Id. at 534*.

[54] *Id. at 534-35*.

[55] *Id. at 535* (citing *Penry v. Lynaugh, 492 U.S. 302, 319, 109 S. Ct. 2934, 106 L. Ed. 2d 256 (1989); Eddings v. Oklahoma, 455 U.S. 104, 112, 102 S. Ct. 869, 71 L. Ed. 2d 1 (1982); Lockett v. Ohio, 438 U.S. 586, 604, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978)*).

[56] *539 U.S. at 535* (emphasis added).

[57] *Burger, 483 U.S. at 789-90*.

[58] *Id. at 790-91*.

[59] *Id. at 791-92*.

[60] *Id. at 793-95*.

[61] *Id. at 793*.

In short, the petitioner's trial counsel in *Burger* had conducted a fairly extensive investigation into mitigation evidence and had made considered judgments in choosing not to present some seemingly mitigating evidence. The evidence trial counsel failed to discover through his investigation contained a great deal of aggravating evidence and therefore its absence could not have prejudiced him.

In *Darden*, the petitioner argued that he had received ineffective assistance of trial counsel on the ground that his attorney spent insufficient time preparing the mitigation case and had opted to "rely on a simple plea for mercy from petitioner himself."[62] The Court found that his trial counsel had spent hundreds of hours preparing his case, including mitigation. The problem was that there simply was no mitigating evidence that would not have permitted the state to bring **[**42]** in even stronger aggravating evidence to rebut it.[63] Any argument that he was nonviolent would have allowed the state to bring in evidence of his prior convictions, which had not previously been admitted in evidence, and any argument that he was incapable of committing the crimes would have allowed the state to introduce a psychiatric report indicating he very well could have based on his "sociopathic type of personality," among other damaging rebuttal evidence.[64] Accordingly, the Court concluded that the trial counsel's decision to rely on a simple plea of mercy, following the investigation and consideration of potentially mitigating evidence, constituted a defensible trial strategy under *Strickland*.[65]

III. Analysis

A. *Martinez/Trevino* Issue

Trevino argues (1) that he is entitled to an evidentiary hearing on the *Martinez/Trevino* issue, and (2) that he properly established cause for his procedural default under the Supreme Court's *Martinez/Trevino* rule. Based on his pleadings alone, we conclude he has at least alleged sufficient cause, so we need not address his evidentiary hearing argument. As noted above, the Supreme Court in *Trevino* stated, *HN3*[↑] "[A] procedural default will not bar a **[**43]** 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."[66] The district court, citing standards for appellate counsel, found that Trevino failed to show that his state habeas counsel was ineffective because he failed to show that the proposed "new" evidence was even available at the time.

Martinez suggests that a similar standard should apply to both state trial counsel and state habeas counsel. There, the Supreme Court explained that the purpose of the exception is to recognize that the initial state habeas proceeding is virtually the same as a direct appeal for some purposes:

> *HN4*[↑] Where, as here, the initial-review collateral proceeding is the first designated proceeding for a prisoner to raise a **[*348]** claim of ineffective assistance at trial, the collateral proceeding is in many ways the equivalent of a prisoner's direct appeal as to the ineffective-assistance claim. This is because the state habeas court "looks to the merits of the clai[m]" of ineffective assistance, no other court has addressed the claim, and "defendants pursuing first-tier **[**44]** review . . . are generally ill equipped to represent themselves" because they do not have a brief from counsel or an opinion of the court addressing their claim of error.[67]

Here, the crux of Trevino's claim is not that his trial counsel made an informed decision not to present certain evidence following a constitutionally sufficient investigation, but that his trial counsel failed to conduct such an investigation in the first place. Trevino argues that the state trial counsel's failure to investigate would have been obvious to his state habeas counsel as well. Thus, he argues that his state habeas counsel's failure to investigate the possibility of a *Wiggins* claim constitutes ineffective assistance, satisfying *Martinez/Trevino*.

Trevino's second amended petition's section titled "Petitioner's State Habeas Counsel was Ineffective" is mostly devoted to the many failings of his state *trial* counsel, but it also squarely addresses his state habeas

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[62] *Darden, 477 U.S. at 186*.

[63] *Id.*

[64] *Id. at 186-87*.

[65] *Id.*

[66] *133 S Ct. at 1921* (quoting *Martinez, 132 S. Ct. at 1320*).

[67] *Martinez, 132 S. Ct. at 1317*.

counsel's alleged ineffective assistance:

> Failing to raise such a claim after investigation, and making a thoroughly informed decision that there was no merit in raising that issue for review was an option to Attorney Rodriguez. Never investigating **[**45]** the possibility or merits of such a claim was not.
> AS [sic] thoroughly demonstrated in the foregoing sections of this petition, there was an immense amount of material not included in the record indicating that trial counsel had indeed been ineffective at the punishment phase of trial. State habeas counsel had a duty and obligation to undertake an investigation to at least determine whether such a claim was a viable one. Had such an investigation been undertaken, the magnitude of the error would have become evident. At that time, there was simply no scenario in which state habeas counsel's actions and performance could be considered effective representation of any client - especially one sentenced to death who was relying on state habeas counsel for his one and only possible opportunity in existence at that time.
> State habeas counsel was undoubtedly ineffective in his failure to raise a claim that Petitioner's trial counsel was ineffective at the punishment phase of Petitioner's trial.[68]

Trevino essentially argues that the facially deficient investigation by the state trial counsel should have put his state habeas **[**46]** counsel on notice to investigate a claim for failure to investigate. The district court's approach, on the other hand, suggests that Trevino's state habeas counsel could not have rendered ineffective assistance for failing to assert a claim based on his trial counsel's failure to investigate because there was no record evidence of what mitigating evidence his trial counsel failed to discover.

We conclude Trevino has the better argument here. If state habeas counsel is not subject to the same *Strickland* requirement to perform some minimum investigation prior to bringing the initial state habeas **[*349]** petition, the *Martinez/Trevino* rule would have limited utility (if any) in addressing *Wiggins* claims. There is a serious danger, under the district court's reasoning, that a state trial counsel's failure to investigate (and put into the record) mitigation evidence could insulate state habeas counsel from an ineffective assistance claim simply because the evidence was missing. That would only compound the problem with state trial counsel's failure to conduct a reasonable investigation in the first place, and *Wiggins* claims for deficient investigation might be effectively unreviewable under *Martinez/Trevino* ***[**47]***.

In this case, Trevino's state trial counsel presented only one mitigation witness and no other evidence during the punishment phase. The deficiency in that investigation would have been evident to any reasonably competent habeas attorney. Thus, we conclude that reasonable jurists not only could debate the correctness of the district court's conclusion on the *Martinez/Trevino* issue, but would agree that the district court reached the wrong conclusion. Trevino at least sufficiently pleaded that his state habeas counsel was ineffective so as to excuse his procedural default in failing to raise the ineffective-assistance-of-trial-counsel failure-to-investigate claim earlier.

B. *Wiggins* Claim— *Strickland* Performance Prong

Turning to the merits of Trevino's ineffective-assistance-of-trial-counsel claim under *Wiggins*, we must determine whether Trevino satisfied both prongs of *Strickland*. First, we must determine whether Trevino's trial counsel's performance was deficient.

> *HN5*[↑] To demonstrate deficient performance, "the defendant must show that counsel's representation fell below an objective standard of reasonableness" as measured by "prevailing professional norms." Our scrutiny of counsel's performance **[**48]** is highly deferential. We "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" To overcome this presumption, "[a] convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment." Of central importance here, "choices made after less than complete investigation are reasonable [only] to the extent that reasonable professional judgments support the limitations on investigation." Factors affecting whether it is reasonable not to investigate include whether counsel has "reason to believe that pursuing certain

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[68] Second Amended Petition, Docket Number SA-01-CA-306-XR, ECF Doc. 143 at 52.

> investigations would be fruitless or even harmful," resource constraints, and whether the information that might be discovered would be of only collateral significance.[69]

As set out above, the district court held that Trevino had failed to allege facts showing that the performance of his trial counsel was deficient **[**49]** and instead concluded that Trevino's "trial counsel was not wholly inattentive to developing mitigating evidence," in that he interviewed Trevino's stepfather, and Trevino "failed to assist his trial counsel in identifying any family members or others who may have provided mitigating testimony."[70] Moreover, the court emphasized that because Trevino's mother drank heavily during the time of **[*350]** trial in 1997, Trevino's trial counsel could not be blamed for failing to locate her or discover evidence pertaining to FASD.[71]

Reasonable jurists could debate the correctness of the district court's determination that Trevino failed to plead that his trial counsel conducted a constitutionally deficient investigation into mitigation evidence. The record shows that Trevino's trial counsel only put forward one mitigation witness, Trevino's aunt, and that he interviewed her briefly only on the day of her testimony. As Trevino argued in his COA application:

> The relevant legal question is not whether counsel were "wholly inattentive" to developing mitigation evidence. Nor is it whether counsel's client meaningfully assisted in the mitigation investigation. Nor is it whether one particular witness was easily **[**50]** locatable. Nor is it whether counsel successfully managed to investigate so little so as to remain completely ignorant about significant aspects of their client's background. It is significant to note here that the one witness the trial counsel did present, Appellant's aunt Juanita DeLeon, testified that Appellant's mother could not be present to testify because she "had alcohol problems" and lived "in Elgin [Texas]." Clearly, Ms. DeLeon had current knowledge of where Appellant's mother was living, and of her current state of health. Had counsel simply asked that question of Ms. DeLeon during the trial preparation phase, instead of when she was on the stand, and followed up with a diligent investigation, significant mitigation evidence could have, and would have, been uncovered. It is also significant that, in the state habeas hearing, trial counsel testified that he knew Appellant's mother had been in court - or at least in the courthouse - at some time before the appellant's trial, but that he was "unable to get hold of her." [record citations omitted].

This is a fair characterization of the evidence. The record shows that the minimal investigation conducted by Trevino's trial counsel **[**51]** here is remarkably similar to the investigation in *Wiggins* that the Supreme Court held to be constitutionally deficient. Not only did Trevino's trial counsel do an abysmal job of locating potential mitigation witnesses, but he failed to elicit easily obtainable information from the few interviews he conducted, most notably the whereabouts of Trevino's mother. Trevino's trial counsel also admitted in a 2003 affidavit that the trial team "did not ask for any experts in this case other than to check the DNA results" and that "[i]n hindsight, we should have gotten mitigation expert [sic] to do a psycho-social history of Carlos' life. But mitigation experts were not used very much at the time of the trial (1997 in Bexar County)." As *Wiggins* pointed out, the ABA has called for intensive mitigation investigations in capital cases, including into a defendant's family and social history, since well before Trevino's sentencing in this case.[72]

Given that Trevino's life was on the line, reasonable jurists would consider the mitigation investigation conducted by his trial counsel insufficient. We therefore conclude that not only would reasonable jurists debate the district court's determination of the **[**52]** *Strickland* performance prong, they would agree that it erred. Trevino has at least sufficiently pleaded that his trial counsel's investigation into mitigation evidence was constitutionally deficient under *Strickland* and, more specifically, *Wiggins*.

[*351] C. *Wiggins* Claim—*Strickland* Prejudice Prong

As explained above, *HN6*[↑] the prejudice prong of *Strickland* allows relief only if there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been

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[69] *Coleman, 716 F.3d at 903-04* (footnotes to *Strickland* omitted).

[70] *2015 U.S. Dist. LEXIS 75400, 2015 WL 3651534 at *12*.

[71] *Id.*

[72] *Wiggins, 539 U.S. at 524-25*.

different."[73] "A reasonable probability is a probability sufficient to undermine confidence in the outcome."[74] "The likelihood of a different result must be substantial, not just conceivable."[75]

As indicated above, the district court appears to have lumped all of the proposed "new" evidence together for much of its analysis, which heavily focused on the character witness testimony. It is worthwhile to distinguish between Trevino's proposed character witness testimony and his proposed FASD evidence. The character witness testimony certainly falls under the classic "double-edged" evidence distinction discussed above in connection with *Burger* and *Darden*, but the FASD evidence potentially has far greater **[**53]** mitigation value.

Trevino's proposed character witness testimony, as in *Burger*, contains only weak mitigation evidence but strong additional aggravating evidence, including Trevino's unpredictable and violent behavior. Thus, no reasonable jurist would debate whether the district court correctly concluded that Trevino had failed to show prejudice in his trial counsel's failure to discover and introduce the additional character witness testimony. However, that does not necessarily mean that no reasonable jurist would debate whether the district court properly found that trial counsel's failure to discover and introduce FASD evidence did not prejudice Trevino.

The district court characterized the FASD evidence as "double-edged" in that an FASD diagnosis could tend to show that Trevino would pose a risk of future violent conduct,[76] but it did not discuss the issue at length. Notably, it also highlighted the FASD evidence as the most mitigating "new" evidence:

> In sum, the "new" evidence presented by Petitioner [including the character witness testimony], while admittedly containing some mitigating aspects (particularly those concerning Petitioner's mother's alcoholism and the likelihood Petitioner **[**54]** suffers from Fetal Alcohol Spectrum Disorder), also contains a plethora of information which would have assisted the prosecution in obtaining an affirmative answer to the Texas capital sentencing scheme's future dangerousness special issue.[77]

Dismissing the FASD out-of-hand as "double-edged" is problematic for a few reasons. First, *Garza v. Stephens, 738 F.3d 669 (5th Cir. 2013)*, suggests that FASD evidence could potentially be admissible in this case. In *Garza*, the petitioner raised a new argument in his second state habeas petition based on FASD. The state failed to request dismissal on procedural default grounds, but the district court dismissed the claim on its merits, as did this court, reasoning:

> Garza contends that trial counsel was ineffective in not investigating and introducing evidence of his possible fetal alcohol syndrome. But, as the district court observed, Garza fails to provide **[*352]** evidence that the underlying facts concerning such a syndrome were made known to trial counsel. Trial counsel had no leads to that effect. *None of the family members mentioned the mother's alcohol or drug abuse to trial counsel*; *in fact, the witnesses spoke favorably of her at the punishment phase.* Furthermore, such evidence was **[**55]** neither located in the TYC file, which contained three separate psychological evaluations of Garza, nor provided by Ferrell at any time. *Given trial counsel's investigation, and the lack of any evidence regarding the mother's substance use, it was entirely reasonable to not investigate the possible effects of fetal alcohol syndrome.* Accordingly, Garza cannot overcome the strong presumption that trial counsel's representation on this front fell within the wide range of reasonable professional assistance. *See Strickland, 466 U.S. at 689, 104 S. Ct. 2052*.[78]

Garza concerns the performance prong of *Strickland* rather than the prejudice prong, but it suggests that knowledge of a defendant's mother's substance abuse should at least cause the trial attorney to investigate further. Although the *Garza* panel would have excluded the evidence under those circumstances, this case is distinguishable. First, Trevino's claim is that his trial counsel did not conduct a constitutionally sufficient investigation in the first place. The district court noted in its 2009 opinion that a "wealth" of additional information

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[73] *Strickland, 466 U.S. at 694*.

[74] *Id.*

[75] *Brown, 684 F.3d at 491*.

[76] *2015 U.S. Dist. LEXIS 75400, 2015 WL 3651534 at *10* (citing *Sells v. Thaler, 2012 U.S. Dist. LEXIS 91521, 2012 WL 2562666 at *58)*.

[77] *Id.*

[78] *738 F.3d at 681* (emphasis added).

would have been discovered with "even the most minimal investigation into petitioner's background."[79] Second, even the **[**56]** single mitigation witness presented, Trevino's aunt, testified that Trevino's mother was an alcoholic and alluded to family problems.

It is worth examining more closely the FASD evidence Trevino seeks to develop further, especially the psychological report he has offered since it was completed in 2004: the April 16, 2004 Privileged and Confidential Forensic Psychological Evaluation by Dr. Rebecca A. Dyer, Ph.D., of Forensic Associates of San Antonio. Dr. Dyer's report sets out the foundation for her report at the outset:

> Based on reviews of his school records, interviews with his mother and family members, and information provided by Mr. Treviño, Mr. Futrell [one of Trevino's federal habeas attorneys] reported that there was evidence suggesting that Mr. Treviño has a history of fetal alcohol syndrome and possible cognitive limitations as a result of prenatal exposure to alcohol. Mr. Wolf interviewed the attorney who was the 'Lead Defense Counsel' at Carlos Treviño's Capital Murder trial--Mr. Mario Treviño (not related), who acknowledged that information regarding Carlos' childhood, including his pre-natal exposure to alcohol, was not explored or presented as potential mitigating factors **[**57]** in the punishment phase of Carlos' trial. In the affidavit provided by Attorney Mario Treviño to Carlos' habeas attorneys, Mario Treviño, indicated that the defense did not attempt to uncover mitigating evidence about Carlos Treviño's life, as "mitigation experts were not used very much at the time of the trial." It was requested that I evaluate Carlos Treviño regarding the possibility of fetal alcohol syndrome and the effects of prenatal alcohol exposure on his cognitive functioning at the time of the capital offense.
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> The opinions presented in this report are based on approximately twelve and a half hours of face-to-face contact with **[*353]** Mr. Treviño, all of which occurred at the Polunsky Unit of the Texas Department of Criminal Justice. During this time, I interviewed Mr. Treviño and I administered a comprehensive battery of psychological tests.

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), **[**58]** various sworn affidavits and statements (post-trial), and miscellaneous documents largely concerning psychological tests and correspondence (apparently all post-trial). Based on all of the above, Dr. Dyer wrote the following summary and opinion:

> Review of Mr. Trevino's history indicates a number of factors that likely had a negative impact on his cognitive, behavioral and emotional development. Most notable is his heavy prenatal exposure to alcohol. Prenatal exposure to alcohol has been associated in the literature with the development of Fetal Alcohol Syndrome (FAS), a term that was first coined in 1973. Fetal Alcohol Syndrome is diagnosed when there is apparent facial dysmorphology, growth restriction, and central nervous system and neurodevelopmental abnormalities, with or without confirmed prenatal exposure to alcohol. Additionally, extensive research has documented that individuals who were exposed to alcohol prenatally may present with some, but not all of the characteristics of FAS, which is described as being someone with Fetal Alcohol Effects (FAE). This term is frequently used to describe adults who were not identified with FAS as children, as longitudinal studies have found **[**59]** that as individuals age, some of the characteristic signs of FAS become less prominent, particularly the facial dysmorphology and growth restriction characteristics. However, studies have shown that individuals with signicant [sic] prenatal exposure to alcohol tend to demonstrate varying degrees of cognitive, academic, attentional and behavioral difficulties throughout child and adulthood.
>
> Based on my extensive interviews with Mr. Treviño, the results of a comprehensive battery of psychological tests, my interview with his mother, and my review of the documents associated with his medical, developmental, social and academic history, it is my opinion that Mr. Treviño presents with the characteristics of FAE. Though not clearly conclusive, his facial features include notable distinguishing eye characteristics. His stature is slightly below the norm for his age and ethnic group, although this finding is obviously a less distinguishing feature. His prenatal exposure to alcohol was significant, as was his low birth weight.

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[79] *678 F. Supp. 2d at 497*.

It is unfortunate that early childhood medical records are unavailable, although Mr. Treviño's mother admits that she largely neglected to obtain regular medical consultation **[**60]** and check-ups, as well as medical evaluation and treatment in the case of illness or what she determined to be minor, non-life threatening injuries. The results of the intellectual assessments indicate that Mr. Treviño 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 **[*354]** abuse, all characteristics that are present in Mr. Treviño'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 **[**61]** 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 upon the current forensic psychological assessment, it is my opinion that Mr. Treviño's history, his clinical presentation and the psychological test results are consistent with the characteristics of FAE. This finding does not indicate the presence of mental retardation. Based on my evaluation, Mr. Treviño'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 **[**62]** to Mr. Treviño'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. Treviño'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.* These findings are consistent with his description of his inability fully comprehend his attorney's explanation of the original plea offer of a life sentence ("forty-years"), his social awareness with regard to his assumption of loyalty toward his friends and family members, and his ability to confide in his attorneys with regard to his apprehensions and perceived sense of mistrust. Likewise, as his original defense attorneys apparently did not explore, develop or present any mitigating evidence regarding Mr. Treviño's prenatal, developmental, social and academic background at the time of his trial, they were unlikely aware of his deficits.

Further, according to **[**63]** my review of visitation records from the Bexar County Detention Center, Mr. Treviño was held, pending his capital murder trial, his original attorneys visited and conferred with him on very few occasions, for short periods of time. Such minimal contact, coupled with the failure to explore and develop mitigating evidence regarding Mr. Treviño history of FAE would have made it difficult for his original defense attorneys to effectively assist him in making appropriate decisions **[*355]** with regard to his defense. [emphasis added]

Thus, Dr. Dyer's report offers mitigating evidence that tends to counter at least some of the aggravating evidence offered by the state. The question under *Strickland*, of course, is not whether it offers *any* mitigating evidence at all, but whether that evidence, compared to the aggravating evidence, is weighty enough that it conceivably could have swayed at least one juror's vote.

The district court's own prior opinion in this case strongly suggests that FASD evidence, if properly developed and admitted, conceivably could have changed the result. As noted above, the district court

emphasized in both its 2009 and 2015 opinions that it considered the most aggravating factor **[**64]** to be Trevino's apparent lack of remorse:

> The latter point cannot be over-emphasized. Salinas' murder was particularly brutal and senseless. Yet Petitioner has consistently refused to acknowledge his role in her murder, even to his own trial counsel, claiming instead to have been "too stoned" to remember exactly what happened that evening. Petitioner's own affidavit, executed June 11, 2004, contains not even a scintilla of sincere contrition; instead Petitioner expresses hostility and blames his trial counsel for allegedly misrepresenting the terms of a proffered plea bargain for a life sentence without accepting any responsibility for his own rejection of the offer after it was accurately described to Petitioner.[80]

The possible FASD evidence in this case goes to the heart of that most aggravating evidence, as the district court itself opined at the very end of its 2009 opinion:

> Petitioner's third claim herein, *i.e.*, his complaint of ineffective assistance arising from his trial counsel's failure to adequately investigate petitioner's background and develop and present mitigating evidence during the punishment phase of his trial regarding petitioner's deprived and abusive childhood, **[**65]** was procedurally defaulted. Reasonable minds could not disagree on this point. Nonetheless, reasonable minds could disagree over whether petitioner has satisfied the "fundamental miscarriage of justice" exception to the procedural default doctrine in connection with this claim. Petitioner's federal habeas counsel has presented this Court with evidence suggesting petitioner suffers from the effects of Fetal Alcohol Syndrome, *including the inability to express remorse in a recognizable manner*. Furthermore, petitioner has presented this Court with evidence showing even the most minimal investigation into petitioner's background (through rudimentary interviews with family members and review of relevant school and medical records) would have revealed a wealth of additional mitigating evidence far more substantial that the superficial account of petitioner's childhood given by petitioner's lone witness during the punishment phase of trial. Under these circumstances, reasonable minds could disagree over whether petitioner has satisfied the fundamental miscarriage of justice exception to the procedural default doctrine with regard to his *Wiggins* claim, *i.e.*, petitioner's complaint that his **[**66]** trial counsel rendered ineffective assistance at the punishment phase of trial by failing to (1) adequately investigate petitioner's background and (2) discover, develop, **[*356]** and present available mitigating evidence.[81]

Thus, in its 2009 opinion, the district court drew the reasonable conclusion that the FASD evidence, if introduced, could tend to show that Trevino was unable "to express remorse in a recognizable manner," which the district court continues to characterize as the most aggravating factor. Indeed, evidence of Trevino's FASD could go to the very heart of that issue. Accordingly, reasonable jurists could not only debate the district court's dismissal on the pleadings of Trevino's FASD claim under the *Strickland* prejudice prong, but would agree that the court erred.

In sum, we conclude that reasonable jurists would not debate the district court's dismissal of his *Wiggins* claim pertaining to character witness testimony because, at a minimum, he has failed to show under *Strickland* that failure to discover and introduce that evidence prejudiced him in any way.

We also conclude that reasonable jurists would agree that Trevino has at least sufficiently pleaded an ineffective-assistance-of-trial-counsel **[**67]** claim pertaining to the failure to investigate and discover potential evidence of FASD on both the performance and prejudice prongs of *Strickland*, and that he sufficiently pleaded cause to excuse his procedural default under *Martinez/Trevino*. We are careful to note that his potential FASD evidence may go beyond the proposed expert testimony of Dr. Dyer or any other experts. Indeed, the FASD evidence may incorporate lay witness testimony, such as personal and family history interviews relevant to a possible FASD diagnosis, that might otherwise have been excluded as character witness testimony under this opinion.

D. Evidentiary Hearing

Finally, Trevino argues that the district court should have held an evidentiary hearing based on the court's

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[80] *Trevino v. Thaler, 678 F.Supp.2d at 471-72* (quoted in *Trevino, 2015 U.S. Dist. LEXIS 75400, 2015 WL 3651534 at *3*).

[81] *678 F. Supp. 2d at 497-98* (emphasis added).

own representation that it would hold some sort of hearing once Trevino filed his second amended petition. Neither Trevino nor the State cites any controlling case law, but the district court's decision is a classic discretionary decision. The district court's dismissal was based not on findings of fact but on the pleadings alone. No reasonable jurists would debate whether the district court had the authority to forego an evidentiary hearing, which **[**68]** would resolve disputed facts, before entering a decision based on the pleadings alone, which implies the absence of disputed facts (or at least implies that any such disputes must be resolved in the petitioner's favor). We therefore deny a COA on this issue.

IV. Conclusion

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.

[*357] We deny a COA on all other issues, including the proposed character witness testimony.[82]

COA GRANTED IN PART AND DENIED IN PART.

End of Document

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[82] We reiterate **[**69]** that Trevino's FASD evidence may incorporate lay witness testimony relevant to his potential FASD diagnosis that might otherwise have been excluded as character witness testimony.

APPENDIX C

***Trevino v. Stephens*, 2015 U.S. Dist. LEXIS 75400 (W.D. Tex 2015)**

Trevino v. Stephens

United States District Court for the Western District of Texas, San Antonio Division

June 11, 2015, Decided; June 11, 2015, Filed

CIVIL NO. SA-01-CA-306-XR

Reporter
2015 U.S. Dist. LEXIS 75400 *

CARLOS TREVINO, TDCJ No. 999235, Petitioner, v. WILLIAM STEPHENS, Director, Department of Criminal Justice, Correctional Institutions Division, Respondent.

Subsequent History: Certificate of appealability granted, in part, Certificate of appealability denied, in part *Trevino v. Davis, 829 F.3d 328, 2016 U.S. App. LEXIS 12745 (5th Cir. Tex., July 11, 2016)*

Affirmed by *Trevino v. Davis, 861 F.3d 545, 2017 U.S. App. LEXIS 11581 (5th Cir. Tex., June 27, 2017)*

Prior History: *Trevino v. Stephens, 740 F.3d 378, 2014 U.S. App. LEXIS 1131 (5th Cir. Tex., Jan. 21, 2014)*

Counsel: [*1] For Carlos Trevino, Petitioner: John J. Ritenour, Jr., LEAD ATTORNEY, The Ritenour Law Firm, PC, San Antonio, TX; Warren Alan Wolf, LEAD ATTORNEY, Law Office of Warren Alan Wolf, San Antonio, TX.

For Director - CID Douglas Dretke, William Stephens, Director TDCJ-CID, Respondents: Fredericka Sargent, LEAD ATTORNEY, Office of the Attorney General, Assistant Attorney General, Austin, TX.

Judges: XAVIER RODRIGUEZ, UNITED STATES DISTRICT JUDGE.

Opinion by: XAVIER RODRIGUEZ

Opinion

MEMORANDUM OPINION AND ORDER

Petitioner Carlos Trevino filed this federal habeas corpus action pursuant to *28 U.S.C. Section 2254* challenging his July 1997, Bexar County capital murder conviction and sentence of death. The facts and circumstances of the Petitioner's capital offense and the evidence presented during both phases of Petitioner's capital murder trial are set forth in detail in this Court's original opinion denying federal habeas corpus relief. *Trevino v. Thaler, 678 F.Supp.2d 445, 449-53 (W.D. Tex. 2009)*, *aff'd*, *449 F. App'x. 415 (5th Cir. Nov. 14, 2011)*, *vacated and remanded*, *569 U.S. 413, 133 S.Ct. 1911, 185 L.Ed.2d 1044 (2013)*.

Following remand to this Court by the Fifth Circuit, *Trevino v. Stephens, 740 F.3d 378 (5th Cir. 2014)*, this Court granted Petitioner's multiple requests for additional time to investigate and develop Petitioner's remaining claims for relief (*ECF nos. 118 & 138 & Text Orders issued April [*2] 29, 2014, May 5, 2014, and July 3, 2014)* 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 (*ECF nos. 127, 138, 149*). Petitioner filed his second amended federal habeas corpus petition on February 3, 2015 (*ECF no. 143*), asserting therein a single claim for relief, to wit, the argument that Petitioner's trial counsel rendered ineffective assistance by failing to adequately investigate Petitioner's background and present compelling mitigating evidence. For the reasons set forth herein, Petitioner is entitled to neither federal habeas corpus relief nor a Certificate of Appealability from this Court.

I. Procedural Background and the Fifth Circuit's Remand

On January 21, 2014, the Fifth Circuit remanded this cause to this Court with the following instructions:

In light of the Supreme Court's decision in *Trevino*

> v. Thaler, 569 U.S.413 , 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, 566U.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 at 378.

Petitioner **[*3]** now has been granted resources and time within which to develop his claim of ineffective assistance. Before denying federal habeas corpus relief initially, this Court twice stayed this federal habeas corpus action to permit Petitioner to return to state court to exhaust available state habeas corpus remedies on then-unexhausted claims. The first such stay was granted June 15, 2004. *ECF no. 36.* The Texas Court of Criminal Appeals dismissed Petitioner's second state habeas corpus application on state writ-abuse principles more than a year later. Ex parte Carlos Trevino, WR 48,153-02, 2005 Tex. Crim. App. Unpub. LEXIS 260, 2005 WL 3119064 (Tex. Crim. App. Nov. 23, 2005).

Petitioner then requested and, on August 2, 2006 this Court granted, a second stay in these proceedings to permit him to return to state court and exhaust available state habeas remedies on still more then-unexhausted claims. *ECF no. 54.* The Petitioner's federal habeas corpus counsel then filed a motion for appointment of counsel on Petitioner's behalf in state court. In an Order issued August 8, 2008, this Court attempted to break the state court log jam by requesting some ruling by the state court on Petitioner's then-pending motion. *ECF no. 61.* When the responsible state judicial officer made clear to **[*4]** Petitioner's federal habeas counsel that the state court would never rule on Petitioner's motion seeking legal representation, in an Order issued October 2, 2008, this Court lamented the delay of more than two years resulting from the state trial judge's intransigence and concluded no legitimate basis existed for continuing to hold this case in abeyance. *ECF no. 62.*

On December 8, 2008, Petitioner filed his first amended federal habeas corpus petition and asserted eight claims for relief, three of which consisted of ineffective assistance claims and a constructive ineffective assistance claim. More specifically, in his second, third, and sixth claims, Petitioner argued his trial counsel rendered ineffective assistance by failing to (1) discover and employ Seanido Rey's statement of June 12, 1996 during Petitioner's trial, (2) investigate, develop, and present mitigating evidence during the punishment phase of Petitioner's capital murder trial, (3) meaningfully convey the plea bargain offered to Petitioner by the prosecution, and (4) object on hearsay grounds to the inculpatory statements made by Petitioner recounted at trial by Juan Gonzales. This Court concluded that all four of these **[*5]** ineffective assistance complaints lacked merit. Trevino v. Thaler, 678 F.Supp.2d at 466-76. In the alternative, this Court concluded the second and third of these complaints (i.e., those contained in Petitioner's third claim in his first amended petition) were also procedurally defaulted. Id., at 467-71, 473-74.

In his fifth claim in his first amended petition, Petitioner argued he was constructively denied the effective assistance of counsel as a result, in part, of the state trial court denying Petitioner an evidentiary hearing on Petitioner's motion for new trial. This Court denied relief on the merits under the AEDPA, expressly finding the Texas Court of Criminal Appeals' rejection on the merits of this claim in the course of Petitioner's first state habeas corpus proceeding was neither contrary to, nor involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States, nor an unreasonable determination of the facts in light of the evidence presented in the Petitioner's first state habeas corpus proceeding. Id., at 480-91.

Thus, of the five claims of ineffective assistance (or constructive ineffective assistance) presented by Petitioner in his first amended federal habeas corpus petition, this **[*6]** Court concluded all five lacked merit under applicable federal law. Only two of those complaints of ineffective assistance were subject to alternative conclusions by this Court that they had also been procedurally defaulted, i.e., the two ineffective assistance complaints contained in Petitioner's third claim herein. The other three ineffective assistance claims were rejected on the merits by the state courts and this Court concluded those rejections were consistent with the deferential standard of review mandated by the AEDPA. Therefore, the Fifth Circuit's remand Order issued January 21, 2014 does not appear to pertain to this Court's disposition of Petitioner's ineffective assistance claims contained in Petitioner's

second, fifth, or sixth claims herein.[1] As best this Court can discern, the Fifth Circuit's remand Order is limited to this Court's disposition of those ineffective assistance claims which this Court held, in the alternative, to have been procedurally defaulted, i.e., the ineffective assistance complaints contained in Petitioner's original third claim herein.

With regard to Petitioner's complaint that his trial counsel failed to investigate Petitioner's background and present all then- available mitigating evidence, this Court originally concluded as follows:

> Alternatively, this Court independently concludes Petitioner's complaint about his trial counsel's failure to more thoroughly investigate Petitioner's background and to develop the "new" mitigating evidence identified in Petitioner's pleadings herein fails to satisfy the prejudice prong of the *Strickland* test. In making this conclusion, this Court must re-weigh the totality **[*8]** of Petitioner's proffered mitigating evidence, including Petitioner's "new" mitigating evidence, against the evidence in aggravation. *Wiggins v. Smith, 539 U.S. 510, 534, 123 S.Ct. 2527, 2542, 156 L.Ed.2d 471 (2003)* ("In assessing prejudice, we reweigh the evidence in aggravation against the totality of available mitigating evidence.").
>
> The evidence before the sentencing jury at Petitioner's capital murder trial was summarized in Sections I.E. and III.D.2. above. Petitioner's "new" mitigating evidence consists of double-edged evidence detailing Petitioner's history of childhood abuse and neglect (both physical and emotional), alcohol and narcotics abuse, spotty attendance and poor performance in school, Fetal Alcohol Syndrome, and ensuing tendency to exercise poor judgment. Despite the foregoing, however, Petitioner also furnishes a number of affidavits that describe Petitioner as a hard-working, nonviolent, loving father. This "new" mitigating evidence must also be weighed in the context of the other, uncontradicted, evidence now before this Court, which shows (1) Petitioner's callous comments regarding Salinas before and after her murder (including Petitioner's suggestion that Gonzales should participate in the sexual assault on Salinas and Petitioner's failure **[*9]** to object when Rey and Cervantes suggested the need to eliminate witnesses), (2) Petitioner's participation in the violent assault upon Salinas (*i.e.*, holding her down while others sexually assaulted her), (3) Petitioner's subsequent directive to Gonzales not to talk to police about the incident, (4) Petitioner's nonchalant demeanor immediately following the murder upon his return to the party at the Mata residence, (5) Petitioner's many tattoos reflecting his membership in a notorious prison gang, and (6) the complete and total absence of any indication the Petitioner has ever expressed sincere contrition or genuine remorse over Salinas' murder.
>
> The latter point cannot be over-emphasized. Salinas' murder was particularly brutal and senseless. Yet Petitioner has consistently refused to acknowledge his role in her murder, even to his own trial counsel, claiming instead to have been "too stoned" to remember exactly what happened that evening. Petitioner's own affidavit, executed June 11, 2004, contains not even a scintilla of sincere contrition; instead Petitioner expresses hostility and blames his trial counsel for allegedly misrepresenting the terms of a proffered plea bargain for **[*10]** a life sentence without accepting any responsibility for his own rejection of the offer after it was accurately described to Petitioner.
>
> Absent some indication the Petitioner has willingly accepted responsibility for his role in Salinas' brutal rape and murder, the evidence showing Petitioner's long history of alcohol and drug abuse, long history of criminal misconduct, and membership in violent street and prison gangs precludes this Court from finding this aspect of Petitioner's ineffective assistance claims herein satisfies the prejudice prong of *Strickland*. There is simply no reasonable probability that, but for the failure of Petitioner's trial counsel to present Petitioner's capital sentencing jury with the additional, double-edged, mitigating evidence now before this Court, the outcome of the

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[1] Likewise, nothing in the Fifth Circuit's remand Order appears to resurrect those wholly unexhausted ineffective **[*7]** assistance claims Petitioner raised for the first time in his response to respondent's Answer which this Court held were not properly before this Court in the Order denying Petitioner's motion to alter or amend judgment. *See Trevino v. Thaler, 2010 U.S. Dist. LEXIS 5476, 2010 WL 376416 (W.D. Tex. January 25, 2010)*(explaining that Petitioner presented many new factual allegations and new legal theories supporting his ineffective assistance claims as well as several completely new ineffective assistance claims for the first time in his response to Respondent's Answer and that these new legal theories and factual allegations were not properly before this court in Petitioner's federal habeas corpus proceeding).

> punishment phase of Petitioner's capital trial would have been different.

Trevino v. Thaler, 678 F.Supp.2d at 471-72 (*Footnotes omitted*).

With regard to Petitioner's complaint that his trial counsel failed to "meaningfully" convey the prosecutor's plea offer to Petitioner, this Court concluded as follows:

> Alternatively, this Court independently concludes this aspect of Petitioner's ineffective assistance claims herein fails to satisfy **[*11]** either prong of *Strickland*. Even assuming Petitioner's trial counsel erroneously described to Petitioner the details of the plea bargain offered by the prosecution, Petitioner admits he was accurately informed of the details of the plea bargain offered to him when Petitioner arrived at the District Attorney's Office *before Petitioner rejected same*. Thus, Petitioner's refusal to accept the plea bargain offered to him cannot be attributed to any deficiency in the performance of Petitioner's trial counsel. Furthermore, there was no duty imposed on Petitioner's trial counsel to convince or persuade Petitioner to accept the favorable terms of the plea bargain Petitioner's trial negotiated for Petitioner once Petitioner was accurately advised of the details of the plea bargain offered by the prosecution. Petitioner's assertion that he did not fully comprehend the consequences of rejecting the life sentence offered by the prosecution in its plea bargain proposal when he chose to reject that offer is incredible. The difference between receiving a life sentence with no chance of parole for at least forty years and receiving a sentence of death is self-evident. The decision to accept or reject **[*12]** the plea bargain in question belonged exclusively to Petitioner. He admits he was accurately informed of the details of the plea bargain offer before he rejected same. Petitioner alleges no specific facts showing he was mentally incompetent on the date he rejected the prosecution's offer of a life sentence. Under such circumstances, Petitioner's trial counsel was not obligated to "explain" the difference between a life sentence and a sentence of death to Petitioner.

Trevino v. Thaler, 678 F.Supp.2d at 474 (*Footnotes omitted*).

This Court's alternative conclusions with regard to the two complaints of ineffective assistance contained in Petitioner's third claim in his first amended petition herein set forth above did not rest on procedural default rulings either expressly made by the state courts or implied based on state writ-abuse principles. This Court's alternative conclusions concerning the lack of merit possessed by the ineffective assistance complaints contained in Petitioner's third claim in Petitioner's first amended petition herein are not impacted in any manner by either (1) the Supreme Court's holding in *Trevino v. Thaler, 569 U.S. 413, 133 S.Ct. 1911, 185 L.Ed.2d 1044 (2013)*, extending to Texas and other jurisdictions the new procedural rule announced in *Martinez v. Ryan, 566 U.S. 1, 132 S. Ct. 1309, 182 L. Ed. 2d 272 (2012)*, or (2) the Fifth Circuit's **[*13]** procedural rulings on procedural default matters contained in either *Trevino v. Thaler, 449 F. App'x. 415 (5th Cir. Nov. 14, 2011)*, or *Trevino v. Stephens, 740 F.3d 378 (5th Cir. 2014)*. To date, neither the Fifth Circuit nor the Supreme Court has rejected this Court's legal conclusions or factual findings underlying its determination that Petitioner's claims of ineffective assistance by his trial counsel asserted in his first amended petition lacked merit.

II. Application of *Martinez v. Ryan* to Petitioner's Latest Claim

The United States Supreme Court has recognized an equitable exception to the doctrine of procedural default where a federal habeas corpus petition can make a showing that his failure to exhaust available state remedies *on a federal constitutional claim of ineffective assistance by trial counsel* resulted from deficient performance on the part of the Petitioner's state habeas counsel. More specifically, the Supreme Court's holding in *Martinez v. Ryan, 566 U.S. 1, 132 S. Ct. 1309, 182 L. Ed. 2d 272 (2012)*, carved out of the Supreme Court's procedural default jurisprudence a narrow exception for *claims of ineffective assistance by trial counsel* which were not raised in a convicted criminal defendant's state habeas corpus proceeding because of the ineffective assistance of the defendant's state habeas counsel. *See Martinez v. Ryan, 566 U.S. at , 132 S. Ct. at 1315* ("Inadequate assistance of counsel **[*14]** at initial review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial). "Where, under state law, claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding, 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."

Martinez v. Ryan, 566 U.S. at , 132 S.Ct. at 1320.

In *Trevino v. Thaler, 569 U.S. 413, 133 S. Ct. 1911, 1912, 185 L. Ed. 2d 1044 (2013)*, the Supreme Court reaffirmed the narrow focus of its holding in *Martinez*: "In *Martinez v. Ryan, 566 U.S. 1, 1 , 132 S. Ct. 1309, 1320, 182 L. Ed. 2d 272*, this Court held that 'a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the [State's] initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective.'" Significantly, the Supreme Court remanded Petitioner's case to the Fifth Circuit for determination of whether Petitioner's claim of ineffective assistance by his trial counsel was substantial and whether Petitioner's initial state habeas counsel was ineffective. *Trevino v. Thaler, U.S. at , 133 S. Ct. at 1921* ("Likewise, we do not decide here whether Trevino's **[*15]** claim of ineffective assistance of trial counsel is substantial or whether Trevino's initial state habeas attorney was ineffective.").

Petitioner's second amended petition contains factual allegations regarding the performance of Petitioner's trial counsel, but includes very few specific factual allegations regarding the performance of Petitioner's first state habeas counsel, who filed a state habeas corpus application containing more than forty claims for relief on April 19, 1999 and questioned Petitioner's trial counsel during an evidentiary hearing held July 10, 2000.[2] *Trevino v. Thaler, 678 F.Supp.2d at 454-55.* While Petitioner relies heavily upon a 2004 affidavit from Petitioner's mother to support his allegations of ineffective assistance by Petitioner's *trial* counsel, at no point does Petitioner present any specific factual allegations, much less any competent evidence, showing Petitioner's mother was available or willing from 1997 to 2000 to furnish Petitioner's *state habeas* counsel with the same information about Petitioner's background as that contained in her 2004 statement. In fact, at least one of the "new" documents Petitioner presents to this Court suggests Petitioner's mother drank heavily on a daily basis during **[*16]** her pregnancy with Petitioner, continued drinking and began using drugs in the 1980's, and did not become sober until approximately 2006.[3] Likewise, while Petitioner furnished his federal habeas corpus counsels' investigator and Dr. Dyer with extensive new information regarding his own background, Petitioner does not allege any facts, much less furnish any evidence, showing he furnished (or was even willing to furnish) any of this "new" information to his state habeas counsel while said counsel was preparing and presenting Petitioner's first state habeas corpus application in the 1997-2000 time frame. Petitioner has failed to allege any specific facts in his second amended petition showing that any of the "new" mitigating information which forms the basis for Petitioner's latest ineffective assistance claim was reasonably available,

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[2] Petitioner does argue in conclusory fashion that his state habeas counsel filed a state habeas application which contained only record-based claims but, aside from **[*17]** Petitioner's latest complaint in his second amended petition that his trial counsel failed to investigate, develop, and present additional mitigating evidence, Petitioner identifies no potentially meritorious additional claims which he believes his state habeas counsel should have asserted. *Second Amended Petition*, at pp. 49-52. Significantly, Petitioner does not allege any specific facts showing the "new" mitigating evidence which forms the basis for the ineffective assistance claim contained in Petitioner's second amended petition was reasonably available to Petitioner's first state habeas counsel at the time of Petitioner's initial state habeas corpus proceeding. Petitioner alleges no facts showing that he or his mother or any other family member or other person possessing personal knowledge of Petitioner's background ever made Petitioner's first state habeas counsel aware of any of the new information about Petitioner's background contained in Petitioner's second amended petition. In fact, Petitioner's pleadings herein are bereft of any allegations that Petitioner communicated any information to his initial state habeas counsel about Petitioner's background.

[3] During Petitioner's **[*18]** capital murder trial, Petitioner's aunt testified without contradiction that Petitioner's mother was unable to attend Petitioner's trial due to alcohol problems. Statement of facts from Petitioner's state trial court proceedings (henceforth "S.F. Trial"), Volume XXIII, testimony of Juanita DeLeon, at pp. 135-36.

Petitioner presents this Court with a new but wholly unsigned document which appear to be a summary or notes from an interview by an unidentified person with Petitioner's mother which state, in part, that (1) Petitioner's mother began drinking at age sixteen, rapidly increased her consumption of alcohol until she was drinking eighteen to twenty-four beers daily, and continued to drink heavily and used marijuana while Petitioner inhaled spray paint and grew "out of control," and (2) her drinking grew worse in 1993, and (3) she did not become sober until 2006. Unsigned Interview notes from October 31, 2014 interview with Josephine Trevino, attached as Exhibit 31 to *Second Amended Petition*. Even if the foregoing is disregarded for lack of proper authentication, the fact remains Petitioner has failed to present this Court with any specific factual allegations, much less any evidence, showing his mother was **[*19]** available and willing to testify on Petitioner's behalf at Petitioner's 1997 capital murder trial.

through the exercise of due diligence, to Petitioner's first state habeas counsel in the 1997-2000 time period during which Petitioner's first state habeas corpus proceeding was fully litigated.

The Constitution does not require appellate counsel to raise every non-frivolous ground that might be pressed on appeal. *United States v. Fields, 565 F.3d 290, 294 (5th Cir.), cert. denied, 558 U.S. 914, 130 S. Ct. 298, 175 L. Ed. 2d 199 (2009).* Appellate counsel is not ineffective solely because of failure to present every ground urged by the defendant. *See Jones v. Barnes, 463 U.S. 745, 751, 103 S. Ct. 3308, 77 L. Ed. 2d 987 (1983)* ("Neither *Anders* nor any other decision of this Court suggests, however, that the indigent defendant has a constitutional right to compel appointed counsel to press nonfrivolous points requested by the client, if counsel, as a matter of professional judgment, decides not to present those points."). To prevail on a claim of ineffective assistance by appellate counsel, a petitioner must identify with specificity grounds for relief that he claims should have been included in his appellate brief and demonstrate a reasonable probability that, but for appellate counsel's failure to include those points of error, the defendant would have prevailed on appeal. *Smith v. Robbins, 528 U.S. 259, 285, 120 S. Ct. 746, 145 L. Ed. 2d 756 (2000).* The foregoing principles apply with equal force to assertions of ineffective assistance by a state habeas counsel.

Petitioner has failed to carry his burden under the *Martinez v. Ryan* standard **[*20]** of showing that his first state habeas corpus counsel rendered ineffective assistance during Petitioner's initial state habeas corpus proceeding. Petitioner's first state habeas corpus 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. Instead, Petitioner relies almost exclusively upon "new" information furnished by himself and his mother to Petitioner's federal habeas counsel and their experts without presenting any evidence showing that his mother was available and willing to furnish the same information to Petitioner's initial state habeas counsel. Petitioner alleges no specific facts showing that any of the "new" mitigating evidence which underlies his latest ineffective assistance claim was reasonably available to Petitioner's initial state habeas counsel during the 1997-2000 time frame in which Petitioner's initial state habeas corpus **[*21]** proceeding was litigated. Furthermore, for the reasons discussed below, Petitioner has also failed to allege specific facts which show Petitioner's assertion of ineffective assistance by his trial counsel (contained in Petitioner's second amended petition) is "substantial" within the meaning of the *Martinez v. Ryan* exception to the doctrine of procedural default. For the reasons discussed below, this Court concludes the Petitioner's ineffective assistance claim lacks sufficient arguable merit to warrant a Certificate of Appealability. There is no reasonable probability that, but for the failure of Petitioner's initial state habeas counsel to assert the same ineffective assistance claim contained in Petitioner's second amended petition herein, the outcome of Petitioner's initial state habeas corpus proceeding would have been any different.

III. Analysis of the Merits of Petitioner's Latest Ineffective Assistance Claim

A. Petitioner's Second Amended Petition

In his second amended petition, Petitioner claims that his trial counsel failed to investigate and present available compelling mitigating evidence at the punishment phase of his trial and that such failure deprived him of his *Sixth* and **[*22]** *Fourteenth Amendment* rights to the effective assistance of counsel.[4] Specifically, Petitioner argues that his trial

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[4] Petitioner presents a number of documents in support of his *Second Amended Petition* which Respondent correctly points out are not only inadequately authenticated, many are not even signed. Petitioner supported his first amended petition *(ECF no. 76)* with several sworn statements, a few of which are submitted once again as Exhibits 21-26 to Petitioner's *Second Amended Petition.* Unlike the sworn statements presented with Petitioner's first amended petition, the interview notes taken by an unidentified individual during interviews with Janet Torres, Jennifer DeLeon, Josephine Trevino, Juanita DeLeon, Mario Cantu, and Peter Anthony Trevino attached as Exhibits 29-34 to Petitioner's *Second Amended Petition* are neither signed by the purported interview subjects nor authenticated by a notary nor executed in a manner consistent with *28 U.S.C. Section 1746*. Given the fact those interview notes contain many comments about the appearance and demeanor of the interview subjects which would not normally be included in a witness statement, they appear to be exactly **[*24]** what Respondent alleges - hearsay within hearsay - and are unsigned and wholly unauthenticated. Likewise, the "report" submitted as Exhibit 35 to Petitioner's *Second Amended Petition* is not signed by any person who

counsel "conducted a de minimis investigation into Petitioner's social and family history, or gather available relevant records" and "failed to inquire into *any* area of Petitioner's life experiences, and did not meet with or talk to any of Petitioner's family members, educators,[5] social professionals, medical doctors or mental health experts prior to trial." Petitioner further argues that trial counsel only called one witness, Petitioner's aunt, and had only met her one time, just an hour prior to her trial testimony.[6] Petitioner complains that his trial counsel failed to retain a mitigation expert and never retained an expert in the field of prison gangs.[7] Petitioner further complains that his trial counsel failed to cross examine various prosecution witnesses, who testified as to Petitioner's juvenile and adult criminal records, and Petitioner's previous encounters with law enforcement officers.[8] Finally, although Petitioner complains that his trial counsel did not retain an expert to testify as to prison gangs and violence, Petitioner complains that his trial counsel failed to object to the **[*23]** testimony of an employee of the Institutional Division of the Texas Department of Criminal Justice, who provided testimony regarding gangs and gang violence.[9]

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purportedly prepared same and is not signed by the Petitioner himself, who apparently furnished the bulk of the information used to create same. This document, like the unsigned time line submitted as Exhibit 36, appears to be a summary of hearsay information furnished primarily by Petitioner and Petitioner's mother when neither was under oath and was prepared by someone whose identity is not clear from the face of those instruments nor from any accompanying affidavits. Ordinarily, the Petitioner's unsigned exhibits could not be considered by this Court for any purpose in this proceeding. Out of an abundance of caution, however, this Court will consider same so as to avoid the necessity of re-considering the merits of Petitioner's claims in the context of a Rule 59(e) motion should same be filed at a latter date with signed copies of the same exhibits attached thereto.

[5] Petitioner's educational records reflect that he repeated the second and third grades, failed the seventh and eighth **[*25]** grades and was expelled during his ninth grade for selling drugs. *Second Amended Petition*, at p. 36. Those record do not reveal, however, that Petitioner needed testing for any intellectual deficits or examination for any emotional or psychological problems. *Second Amended Petition*, Exhibits 27 & 40. Furthermore, contrary to the evidence presented during the punishment phase of Petitioner's 1997 capital murder trial, Petitioner's new witnesses and evidence assert that Petitioner was expelled from Sam Houston High School for dealing drugs, not that Petitioner simply dropped out of school.

[6] As correctly pointed out by Respondent, however, neither the trial testimony of Juanita DeLeon nor the statements or interview notes furnished by Petitioner in support of his *Second Amended Petition* establish that Ms. DeLeon's meeting with Petitioner's trial counsel at the Bexar County courthouse on the day she testified at Petitioner's trial was her first and only meeting with Petitioner's defense team prior to the day she testified.

[7] Petitioner faults his trial counsel for failing to obtain the services of an expert on prison conditions and procedures but offers no fact-specific allegations, much less **[*26]** an affidavit from an expert on that subject who was available and willing to testify at the time of Petitioner's capital murder trial, suggesting what type of potentially beneficial testimony such an expert might have been able to furnish at the punishment phase of Petitioner's 1997 capital murder trial. Complaints of uncalled witnesses are not favored, because the presentation of testimonial evidence is a matter of trial strategy and because allegations of what a witness would have testified are largely speculative. *Day v. Quarterman, 566 F.3d 527, 538 (5th Cir. 2009)*; *Coble v. Quarterman, 496 F.3d 430, 436 (5th Cir. 2007)*. Petitioner offers no specific factual allegations suggesting there was any expert on prison conditions or procedures available at the time of Petitioner's capital murder trial who could have presented any testimony beneficial to Petitioner's efforts to secure a life sentence. Nor does Petitioner suggest with any reasonable degree of specificity exactly what testimony such a witness could have furnished in 1997.

[8] Petitioner faults his trial counsel for failing to cross-examine more of the prosecution's punishment phase witnesses but does not allege any facts which either (1) identify exactly what areas of questioning his trial counsel should have undertaken or (2) suggest **[*27]** how cross-examination of the prosecution witnesses could have furnished any beneficial testimony. As with his complaints about an uncalled prison expert, Petitioner's complaints about the failure of his trial counsel to cross-examine all of the prosecution's punishment phase witnesses on unspecified subjects are conclusory and do not support a finding of ineffective assistance under *Strickland*. *See Day v. Quarterman, 566 F.3d at 540-41* (conclusory assertions of ineffective assistance during cross-examination and conclusory assertions trial counsel failed to examine medical records prior to trial failed to satisfy prejudice prong of *Strickland* analysis); *Collier v. Cockrell, 300 F.3d 577, 587 (5th Cir.)* (conclusory allegations of ineffective assistance do not raise a constitutional issue in a federal habeas corpus proceeding), *cert. denied*, ***537 U.S. 1084, 123 S. Ct. 690, 154 L. Ed. 2d 586 (2002)***.

[9] Petitioner does not identify with specificity any arguably legitimate grounds for challenging the admission of the trial testimony of prosecution expert Bob Morrill, who testified concerning the process within the Texas Department of Criminal Justice for confirming an inmate's gang membership

Further, Petitioner argues cryptically that his "previous involvement in the juvenile system would have revealed issues resolved and unresolved from his childhood." Also, "[a]mple evidence of childhood trauma at home ... should have been pursued, head injuries, black-outs, delusional stories, family troubles, drug and/or alcohol addiction [should have] put **[*29]** trial counsel on notice of mental and psychological issues that should have been investigated." Petitioner argues that his mother "drank heavily throughout his pregnancy" and that he only weighed four pounds at birth and remained in the neonatal intensive care unit for several weeks."[10] He also argues that from ages two to nine, he suffered from four different injuries to his head. While growing up, he was exposed to stabbings, drug use by his mother and other family members, and mental and physical abuse.

"To prevail on an ineffective assistance claim based upon uncalled witnesses, an applicant must name the witness, demonstrate that the witness would have testified, set out the content of the witness's proposed testimony, and show that the testimony would have been favorable." *Gregory v. Thaler, 601 F.3d 347, 352 (5th Cir.), cert. denied, 562 U.S. 911, 131 S. Ct. 265, 178 L. Ed. 2d 175 (2010).* "An applicant 'who alleges a failure to investigate on the part of his counsel must allege with specificity what the investigation would have revealed and how it would have altered the outcome of the trial.'" *Id.*

Petitioner asserts that trial counsel could have called various witnesses who would have offered **[*30]** supportive testimony (e.g., Janet Cruz, the mother of his two children; Mario Cantu, friend; Ruben Gonzalez, employer; Jennifer DeLeon, his sister).[11]

One of the experts recently retained opines that Petitioner "presents with characteristics of Fetal Alcohol Affect", and a "low average range of intellectual functioning."[12] She further opines that his "history of Fetal Alcohol Affect, along with his history of physical

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or the fact TDCJ officials determined Petitioner was a documented member of the Hermidad y Pistoleros Latinos gang. S.F. Trial, Volume XXIII, **[*28]** testimony of Bob Morrill, at pp. 90-132. Petitioner has offered no factual allegations, much less any evidence, in support of his *Second Amended Petition* suggesting there was anything factually inaccurate about Mr. Morrill's trial testimony. In fact, as he did with the Petitioner's juvenile probation officer, Petitioner's trial counsel utilized cross-examination of Mr. Morrill to elicit potentially beneficial testimony showing that (1) as a documented HPL member, Petitioner would be placed in administrative segregation, i.e., 23-hour lockup, if returned to the state prison system, (2) there were no records of any prison disciplinary proceeding having been brought against petitioner during Petitioner's prior state prison incarceration, and (3) Petitioner's gang information would be forwarded to state parole officials before Petitioner could be released on parole. *Id.*, at pp. 117-19, 131, 137.

[10] Petitioner alleges his birth records were destroyed. *Second Amended Petition*, at p. 30.

[11] As explained above, however, the latest set of documents submitted by Petitioner as Exhibits 29-34 are all unsigned and unauthenticated. The remaining documents submitted by Petitioner contain a mixed bag of evidence. More specifically, Janet Cruz's sworn statement (Exhibit 23 to the *Second Amended Petition*), states that, while Petitioner was a caring husband and father, her relationship with Petitioner deteriorated due to Petitioner's behavior when he was under the influence of alcohol. Cruz states "It was like there was two parts to him."

Mario Cantu states in Exhibit 24 to the *Second Amended Petition* that Petitioner was not a violent person but, instead, was a follower and a peaceful person. Ruben Gonzales, whose sworn statement appears as Exhibit 25 to the *Second Amended Petition*, echoes Cantu's comments, stating Petitioner was not a violent person, loved his children, and would not get into fights. Petitioner's sister Jennifer DeLeon furnished a sworn statement, Exhibit 26 to the *Second Amended Petition*, in which she states Petitioner **[*31]** felt left out during his childhood, often stuck up for their mother when their mother fought with Petitioner's step-father, and her father once threw Petitioner out of the house. These statements all tend to corroborate the trial testimony of Petitioner's aunt Juanita DeLeon regarding the Petitioner's difficult childhood and good character traits. S.F. Trial, Volume XXII, testimony of Juanita DeLeon, at pp. 135-41. They do not, however, offer anything truly "new" in terms of mitigating evidence.

[12] Report of Dr. Rebecca A. Dyer, May 6, 2004, Exhibit 22 to *Second Amended Petition.*

In addition, Petitioner's current mitigation expert, Linda Mockridge states in an unsigned report dated October 8, 2014 that "documents ... to support **[*32]** [evidence of fetal exposure to alcohol and Fetal Alcohol Syndrome] have now been destroyed. Two critical documents that are confirmed to be destroyed are the Labor and Delivery records for Josephine Trevino for the birth of Carlos, which usually include blood work and the physical state of the mother. The second document would be the birth records and Neo-natal stay for Carlos after the birth; these would document the AGPAR score, low birth weight, the premature birth and the struggle of the baby in the weeks following his birth." Exhibit 37 to *Second Amended Petition.* Ms. Mockeridge states that these records would have been available at the time of the trial, but she provides no evidentiary support for this conclusion.

and emotional abuse" contributed to his "inability to make appropriate decisions."[13] She opines that this may also have contributed to Petitioner rejecting the plea offer made to him that would have spared him from the death sentence.

Another expert opines that based on his preliminary assessment, Petitioner suffers from "8 domains" of poor "cognitive functioning," (i.e., academics, verbal and visuospatial memory, visuospatial construction, processing speed, executive functioning, communication skills, daily living skills and socialization skills).[14] This expert states that although his assessment is a "critical **[*33]** component in the FASD diagnostic process," the diagnosis of FASD must be made by a medical doctor.[15] According to this expert, yet unexamined is whether Petitioner's "FASD has resulted in an organic brain disorder."[16] In summary, Petitioner argues that, had the "jury been able to consider [Petitioner's] mixed up and unexplainable turbulent and chaotic life history on the mitigating side of the scale, there is unquestionably a reasonable probability that at least one juror would have struck a different balance."

B. The Respondent's Answer

The State responds that the Petitioner has procedurally defaulted on his claim of ineffective assistance of trial counsel and this Court has already considered the merits of the claim in its previous order, and that merits determination was not found to be inadequate or incorrect by either the Fifth Circuit or the United States Supreme Court. *(ECF no. 147 citing this Court's original Memorandum Opinion and Order at pp. 52-55)*. Alternatively, the State argues that the Petitioner continues to fail to establish that his trial counsel rendered deficient **[*34]** performance and prejudice within the meaning of the dual prongs of *Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)*.

The State also relies heavily upon the un-controverted evidence heard by the jury during the punishment phase. *Trevino v. Thaler, 678 F.Supp.2d at 452-53*. Prior to this murder, Petitioner was arrested for evading arrest, carrying a weapon, and possessing marijuana. He was placed on probation. While on probation he was arrested for burglary of a building and burglary of a vehicle. He was placed on intensive supervision. The jury heard evidence that Petitioner had prior convictions for unlawful possession of a weapon, driving while intoxicated, evading arrest and unauthorized use of a motor vehicle. The jury also heard of the Petitioner's membership in the La Hermidad y Pistoleros Latinos (HPL) gang. HPL's rules and regulations were read to the jury, along with the membership oath that requires members to "promise under oath and a decree and punishment of death to be true and firm, [and] to comply by the ruling imposed by the Brotherhood...."[17]

The State also notes that evidence concerning Petitioner's turbulent childhood, alcoholic mother, poor performance **[*35]** in school and involvement in drugs and street crime was presented to the jury. The jury heard that Petitioner and his siblings were raised in a poor, high-crime neighborhood by a single mother, whose only source of income was welfare. The jury also heard that Petitioner was a teenage father. The State points out that, in closing argument at the punishment phase of trial, Petitioner's trial counsel was able to point to potentially mitigating evidence before the jury, arguing the following:

> You heard his - - Mr. Trevino as you heard has come from a pretty harsh background. His father has been nonexistent. His mother couldn't even come up here to talk to you, to ask for her son's life. She's an alcoholic. How much of a chance did he have? He's been in trouble. He's been out on the streets. His probation officer said he lived in a very rough neighborhood. Yeah, he's committed a few crimes but if you look at them, they are not the signs of an evil person. There's no evil in those crimes that they brought up to you. Yeah, they are criminal. Possession of marijuana, unlawfully carrying a weapon, maybe a criminal trespass, taking a car. Fine. Okay. They are there. Is that an evil person that **[*36]** does that? No. It's some kid that's lost, wandering around in the neighborhood. On those facts they want you to condemn him to death. That's unfair. The other party, the one that's uncharged, he's walking out there right now. Is that

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[13] May 6, 2004 Report of Dr. Rebecca A. Dyer, Exhibit 22 to *Second Amended Petition*, at p. 17.

[14] Unsigned, e-mail Report dated January 14, 2015 of Dr. Paul Connor, Exhibit 37 to *Second Amended Petition*.

[15] *Id.*

[16] *Id.*

[17] Statement of Facts from Petitioner's trial court proceedings (henceforth "S.F. Trial"), Volume XXIII, testimony of Bob Morrill, at pp. 106, 110-12.

fair?[18]

The State further argues that much of the "new" evidence proffered by Petitioner in support of his second amended petition is "double-edged" in nature. The State is correct.[19]

With regard to Jennifer De Leon's unsigned statement, she indicates that when they lived in a housing project Petitioner was "respected" and "no one messed with us."[20] She further described Petitioner as "always high" from sniffing spray paint.[21]

Janet Cruz, the mother of one of Petitioner's two children, gave a sworn statement stating that her relationship with the Petitioner deteriorated "because **[*38]** of the way he treated me when he was under the influence of alcohol" and that there were two sides to Petitioner's personality.[22]

Petitioner's former girlfriend Janet Torres gave an unsigned statement in which she described Petitioner as "always jealous," "angry," "violent," and "impulsive" even when not drunk or on drugs, and she stated he wanted "full control" over her.[23] Torres states Petitioner told his friends that they could not look at Torres or he would beat the "crap" out of them.[24] She states that Petitioner pulled a gun on her and her father on one occasion for "no reason" and held a gun to her face on another occasion when she told him she wanted to leave him.[25] When Torres left him, she was forced to return because Petitioner threatened to kill her if she "went with another man."[26] She stated that, on another occasion, Petitioner became violent, hit his head into hers, and put a knife to her throat when she refused to have sex and then attempted to rape her anally.[27] Torres also states that Petitioner often struck his brother Peter for no reason.[28]

Mario Cantu stated in his unsigned interview notes that once Petitioner joined HPL, Petitioner became more violent and had a gun all the time.[29]

Petitioner's half-brother Peter Trevino acknowledged in his unsigned interview notes that Petitioner smoked marijuana, "did spray paint," and stole cars.[30] Rather than a passive follower, Peter described Petitioner as a "magnet [who] drew people to him."[31] He further acknowledged that Petitioner couldn't control his temper, hit women, and struck him many times for no

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[18] The full closing statement given by Petitioner's trial counsel at the punishment phase of trial appears at S.F. Trial, Volume XXIV, at pp. 22-40.

[19] The Affidavit of Ann Matthews and accompanying Social History of Petitioner, collectively submitted as Exhibit 20 to Petitioner's *Second Amended Petition*, includes information suggesting Petitioner began abusing alcohol and marijuana in 1986 (around age 12), was expelled from high school in 1991 (around age 17), and, as his family grew, Petitioner moved to injecting cocaine and smoking crack. None of the foregoing potentially damaging information was communicated to Petitioner's capital sentencing jury during the punishment phase of Petitioner's trial. On the contrary, Petitioner's trial counsel elicited testimony on cross-examination from prosecution witness and Petitioner's **[*37]** former juvenile probation officer Lorraine Reagan that Petitioner's father was absent from the home during the time Petitioner was on juvenile probation, his parents divorced at some point, his family depended upon AFDC payments and lived in a high crime area, he associated with undesirable characters, he had trouble in school and eventually dropped out, but Petitioner was nonetheless a responsible probationer who followed the rules and completed community service. S.F. trial, Volume XXIII, testimony of Lorraine Reagan, at pp. 30-36. Ms. Reagan also testified on direct examination that Petitioner followed the rules and participated in substance abuse counseling while on juvenile probation. *Id.*, at pp. 24-25.

[20] Unsigned Interview notes from November 15, 2014 interview of Jennifer DeLeon, Exhibit 30 to *Second Amended Petition*, at p. 3.

[21] *Id.* at p. 4.

[22] Sworn Statement of Janet Cruz, Exhibit 23 to *Second Amended Petition*, at pp. 1-2.

[23] Unsigned Interview notes from November 15, 2014 interview **[*39]** of Janet Trorres, Exhibit 29 to *Second Amended Petition*, at pp. 2-6.

[24] *Id.*, at p. 2.

[25] *Id.*, at pp. 2-3.

[26] *Id.*, at p. 3.

[27] *Id.*, at p. 5.

[28] *Id.*, at p. 2.

[29] Unsigned Interview notes from November 14, 2014 interview with Mario Cantu, Exhibit to *Second Amended Petition*, at pp. 1-2.

[30] Unsigned Interview notes from November 24, 2014 interview with Peter Anthony Trevino, Exhibit 34 to *Second Amended Petition*, at pp. 1-2.

[31] *Id.*, at p. 1.

reason.[32]

Finally, this Court has previously noted the double-edged nature of a diagnosis of Fetal Alcohol Syndrome or Fetal Alcohol Effects.[33] This Court has also noted that a diagnosis of Fetal Alcohol Syndrome or Fetal Alcohol Effects or Fetal Alcohol Spectrum Disorder was not within the mainstream of psychological diagnosis and treatment **[*40]** at the time of Petitioner's 1997 capital murder trial.[34]

In sum, the "new" evidence presented by Petitioner, while admittedly containing some mitigating aspects (particularly those concerning Petitioner's mother's alcoholism and the likelihood Petitioner suffers from Fetal Alcohol Spectrum Disorder), also contains a plethora of information which would have assisted the prosecution in obtaining an affirmative answer to the Texas capital sentencing scheme's future dangerousness special issue.

C. The Applicable Standard of Review

Petitioner has presented this **[*41]** Court with a considerable number of new affidavits, statements, and other documents in support of his claim for relief in his second amended petition which Petitioner has never presented to any state court. Petitioner's newest claim of ineffective assistance is unexhausted. *28 U.S.C. §2254(b) (2)*, however, empowers a federal habeas court to deny an unexhausted claim on the merits. *Pondexter v. Quarterman, 537 F.3d 511, 527 (5th Cir. 2008)*, *cert. denied*, *555 U.S. 1219, 129 S. Ct. 1544, 173 L. Ed. 2d 671 (2009)*; *Moreno v. Dretke, 450 F.3d 158, 166 (5th Cir. 2006)*, *cert. denied*, *549 U.S. 1120, 127 S. Ct. 935, 166 L. Ed. 2d 717 (2007)*.

Because no state court has ever addressed the merits of the ineffective assistance claim contained in Petitioner's second amended petition, this Court's review of that federal constitutional claim is necessarily *de novo*. *See Porter v. McCollum, 558 U.S. 30, 39, 130 S. Ct. 447, 175 L. Ed. 2d 398 (2009)* (holding *de novo* review of the allegedly deficient performance of Petitioner's trial counsel was necessary because the state courts had failed to address this prong of *Strickland* analysis); *Rompilla v. Beard, 545 U.S. 374, 390, 125 S. Ct. 2456, 162 L. Ed. 2d 360 (2005)* (holding *de novo* review of the prejudice prong of *Strickland* was required where the state courts rested their rejection of an ineffective assistance claim on the deficient performance prong and never addressed the issue of prejudice).

D. Ineffective Assistance of Counsel Claims - Generally

To establish ineffective assistance of counsel, a petitioner must show that counsel's representation **[*42]** fell below an objective standard of reasonableness, and to establish prejudice he must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Williams v. Taylor, 529 U.S. 362, 390-91, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000)*(*citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)*).

A few highlights from *Strickland* should be noted. "Counsel also has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." *Strickland, 466 U.S. at 688*. "Prevailing norms of practice as reflected in American Bar Association standards" are mere guides. *Id.*

In addition, the Court provided the following cautionary remarks:

> Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. *Cf. Engle v. Isaac, 456 U.S. 107, 133-134, 102 S. Ct. 1558, 1574-1575, 71 L.Ed.2d*

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[32] *Id.*, at pp. 1-2.

[33] "[P]ursuit of a defense at the punishment phase of petitioner's trial premised upon petitioner suffering from fetal alcohol syndrome or fetal alcohol effects would have amounted to an admission by petitioner's trial counsel that petitioner would, in fact, pose a substantial risk of future violent conduct." *Sells v. Thaler, 2012 U.S. Dist. LEXIS 91521, 2012 WL 2562666, *58 (W.D. Tex. June 28, 2012)*, *CoA denied*, *536 F. App'x 483 (5th Cir. July 22, 2013)*, *cert. denied*, ***__ U.S. __, 134 S. Ct. 1786, 188 L. Ed. 2d 612 (2014)***.

[34] "[A]s of the date of petitioner's capital murder trial, i.e., 2002, 'fetal alcohol syndrome'" and 'fetal alcohol effects' were terms only just beginning to find acceptance among the mainstream within the mental health community. *Sells v. Thaler, 2012 U.S. Dist. LEXIS 91521, 2012 WL 2562666, *59 (W.D. Tex. June 28, 2012)*. Neither term appears in the 2000 edition of the DSM—IV—TR." *Garza v. Thaler, 909 F.Supp.2d 578, 647 (W.D. Tex. 2012)*, *CoA denied*, *738 F.3d 669 (5th Cir. 2013)*, *cert. denied*, ***____U.S. ___, 134 S. Ct. 2876, 189 L. Ed. 2d 839 (2014)***.

> 783 (1982). A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective **[*43]** at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." *See* Michel v. Louisiana, supra, 350 U.S., at 101, 76 S. Ct., at 164. There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way.

Strickland, 466 U.S. at 689.

Nevertheless, trial counsel must make a reasoned decision not to conduct a mitigation investigation. Canales v. Stephens, 765 F. 3d 551, 570 (5th Cir. 2014). Further, "[d]efense attorneys in capital cases have an obligation to conduct a thorough investigation of the defendant's background." Loden v. McCarty, 778 F. 3d 484, 497 (5th Cir. 2015). "Such an investigation requires that defense counsel interview witnesses and request relevant records, such as school, medical, or military service records." *Id.* "Further, when such interviews or records suggest pertinent avenues for investigation, the defense attorney must follow up on those leads." *Id.*

E. No Deficient Performance

In this case trial counsel attempted to find family members "that could give us some idea as to where or **[*44]** how Mr. Trevino grew up. What was going on in his life. What were the circumstances, you know, regarding his past. And we tried to find them, but really, I don't think we came up with any witnesses. We tried to contact his mother as best we could. She was from out of the city."[35] Trial counsel retained an investigator to track down the Petitioner's education records.[36] Contrary to the suggestions contained in Petitioner's latest petition, Petitioner's trial counsel was not wholly inattentive to developing mitigation evidence. Trial counsel interviewed Petitioner's stepfather. Petitioner failed to assist his trial counsel in identifying any family members or others who may have provided mitigating testimony.[37] *See* 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 choices made by the defendant and on information supplied by the defendant. In particular, what investigation decisions are reasonable depends critically on such information. For example, when the facts that support a certain potential line of defense are generally known to **[*45]** counsel because of what the defendant has said, the need for further investigation may be considerably diminished or eliminated altogether. And when a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable. In short, inquiry into counsel's conversations with the defendant may be critical to a proper assessment of counsel's investigation decisions, just as it may be critical to a proper assessment of counsel's other litigation decisions.").

Although Petitioner complains that "new" information regarding his troubled **[*46]** childhood, alcoholic mother, low birth weight, and allegedly non-existent neonatal care were not investigated by his trial counsel, these allegations were raised by Petitioner's mother, Josephine Trevino, in a sworn statement dated March 25, 2004. Petitioner had the opportunity to fully develop and present this Court with this same information long before this Court's 2009 decision denying Petitioner's first amended federal habeas corpus petition.[38]

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[35] Statement of Facts from Petitioner's state habeas corpus evidentiary hearing, held July 10, 2000 (henceforth "S.F. State Habeas Hearing"), Testimony of Mario Trevino, at pp. 41-42. Petitioner's trial counsel also testified without contradiction during Petitioner's state habeas corpus hearing that Petitioner's mother was aware of the Petitioner's trial but she refused to communicate with Petitioner's defense counsel. *Id.*, at pp. 42-43. Petitioner has not alleged any facts showing this testimony was in any way factually inaccurate.

[36] *Id.*, at p. 43.

[37] *Id.*, at p. 43.

[38] Petitioner filed his original federal habeas corpus petition March 14, 2002. *(ECF no. 10).* Petitioner **[*47]** filed his first amended petition on December 8, 2008 *(ECF no. 76).*

Much of Petitioner's "new" mitigating evidence could and should have been presented to this Court in the context of this Court's resolution of the claims contained in Petitioner's first amended petition but which does not clearly indicate whether

Moreover, Ms. Trevino acknowledges in that affidavit that she did not have an address or telephone number during the time of Petitioner's trial.[39] More importantly, at no point in her sworn statement or more recent interview, does Josephine Trevino state that she was available and willing to testify during Petitioner's 1997 capital murder trial as to the same matters set forth in her sworn statement and interview notes. Accordingly, it is difficult to understand how trial counsel could reasonably be blamed for not locating Ms. Trevino prior to Petitioner's 1997 capital murder trial and presenting potentially mitigating evidence from this witness.

There is no competent evidence presented showing that, prior to the punishment phase, Petitioner's trial counsel was aware of the mother's excessive use of alcohol during her pregnancy with Petitioner or of any evidence then-existing which showed Petitioner was born prematurely, had a low birth weight, or required neonatal care. *See Garza v. Stephens, 738 F. 3d 669, 681 (5th Cir. 2013)* (holding allegation of failure to investigate and introduce evidence of possible Fetal Alcohol Syndrome did not satisfy deficient performance prong of *Strickland* analysis because there was no showing any of the defendant's family had made trial counsel aware of the defendant's mother's abuse of alcohol while she was pregnant with the defendant). The rampant speculation in several of the reports generated by Petitioner's experts and investigators regarding the information which might have been contained in Petitioner's neonatal and juvenile medical records is exactly that - speculation.

This Court has carefully considered the new evidence presented in support of Petitioner's second amended petition and concludes Petitioner has failed to carry his burden of establishing the performance of Petitioner's trial counsel fell below an objective level **[*49]** of reasonableness. In other words, this Court finds the performance of Petitioner's trial counsel, viewed in the context of the information available through the exercise of due diligence to said counsel prior to Petitioner's 1997 capital murder trial, did not fall below an objective level of reasonableness. Petitioner has failed to carry his burden of satisfying the deficient performance prong of the *Strickland* analysis.

F. No Prejudice

In evaluating prejudice in the context of the punishment phase of a capital trial, a federal habeas court must re-weigh all the evidence in aggravation against the totality of available mitigating evidence (had the Petitioner's trial counsel chosen a different course). *Wong v. Belmontes, 558 U.S. 15, 20, 130 S. Ct. 383, 175 L. Ed. 2d 328 (2009)*; *Wiggins v. Smith, 539 U.S. 510, 534, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003)*. *Strickland* does not require the State to "rule out" or negate a sentence of life in prison to prevail; rather, it places the burden on the defendant to show a "reasonable probability" that the result of the punishment phase of a capital murder trial would have been different. *Wong v. Belmontes, 558 U.S. at 27*. The prejudice inquiry under *Strickland* requires evaluating whether 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* **[*50]** . "The likelihood of a different result must be substantial, not just conceivable." *Brown v. Thaler, 684 F. 3d 482, 491 (5th Cir. 2012)(citing Harrington v. Richter, 562 U.S. 86, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011)), cert. denied, 568 U.S. 1164, 133 S. Ct. 1244, 185 L. Ed. 2d 190 (2013).*

Federal habeas corpus petitioners asserting claims of ineffective assistance based on counsel's failure to call a witness satisfy the prejudice prong of the *Strickland* analysis only by naming the witness, *demonstrating the witness was available to testify and would have done so*, setting out the content of the witness' proposed testimony, and showing the testimony would have been favorable to a particular defense. *Woodfox v. Cain, 609 F.3d 774, 808 (5th Cir. 2010)*; *Day v. Quarterman, 566 F.3d 527, 538 (5th Cir. 2009)*.

Petitioner argues that his trial counsel "conducted a de minimis investigation into Petitioner's social and family history, or gather available relevant records" and "failed to inquire into any area of Petitioner's life experiences, and did not meet with or talk to any of Petitioner's family members, educators, social professionals, medical

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the information contained therein was available to Petitioner's trial counsel at the time of Petitioner's 1997 capital murder trial. For instance, the affidavit of Ann Matthews and Social History report attached as Exhibit 20 to Petitioner's second amended petition is dated January 13, 2004. The Social History Report prepared by Ms. Matthews states it is based upon information received from Petitioner and his family members and, in part, upon a psychological assessment performed in 1998. Nowhere in her Report, however, does Ms. Matthews suggest any of the information upon which she relied to prepare her Report was available at the time of Petitioner's trial.

[39] "But when Carlos' trial happened, none of his lawyers ever got in touch with me, and I didn't have an address or a telephone number to contact, so they could talk to me." Sworn Statement of Josephine Trevino dated March 25, **[*48]** 2004 at p. 3.

doctors or mental health experts prior to trial." As indicated above, trial counsel did interview and present Petitioner's aunt as a trial witness. She did provide, albeit in a cursory fashion, the facts that Petitioner's mother was an alcoholic and Petitioner's family lived on welfare in public housing. Trial counsel could have presented **[*51]** some additional testimony from the individuals he now identifies but, in addition to noting that Petitioner was raised in a very troubled household and neighborhood, and that he was kind and caring at times, these individuals also have described Petitioner as a man quickly prone to angry and violent outbursts.

Trial counsel could have secured Petitioner's educational records, but those records merely reflect poor grades, attendance issues, no indication for the need for special education classes, no medical issues, and that Petitioner was expelled from school. By Petitioner's mother's own account, she rarely took her children to receive medical treatment; accordingly, it is uncertain what, if any, medical records could have been secured by trial counsel. With regard to Petitioner's birth records, there is no indication (other than a hearsay statement by Ms. Mockridge) that Petitioner's hospital records have been destroyed and there is no competent evidence before the Court to establish that Petitioner's neonatal medical records were available to trial counsel during the punishment phase.

Petitioner relies heavily on the claim that he may be suffering from Fetal Alcohol Effects or Fetal **[*52]** Alcohol Syndrome or Fetal Alcohol Spectrum Disorder and that his trial counsel failed to develop this theory. To establish this theory, however, trial counsel needed medical records. As stated above, there is no competent evidence before the Court to establish that those medical records were available to Petitioner's trial counsel for use during the punishment phase or Petitioner's 1997 trial. Alternatively, Petitioner argues that his mother should have been located so that she could have testified to the amount of alcohol she consumed during the pregnancy. But by the mother's own admission she did not have any physical address or telephone number during Petitioner's trial. Accordingly, in the absence of Petitioner or his family members assisting his trial counsel in locating his mother (assuming she wanted to be located), trial counsel was not deficient in the performance of his duties. Petitioner has provided no competent evidence to suggest that Petitioner's mother could have been readily located at the punishment phase portion of trial.

This case is very different than *Williams v. Taylor, 529 U.S. 362, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000)*. In *Williams*, "Williams turned himself in, alerting police to a crime they otherwise would never have discovered, **[*53]** expressing remorse for his actions, and cooperating with the police after that. While this, coupled with the prison records and guard testimony, may not have overcome a finding of future dangerousness, the graphic description of Williams' childhood, filled with abuse and privation, or the reality that he was 'borderline mentally retarded,' might well have influenced the jury's appraisal of his moral culpability." *Id. at 398*. Likewise, this case is different than *Rompilla v. Beard, 545 U.S. 374, 125 S. Ct. 2456, 162 L. Ed. 2d 360 (2005)*. In *Rompilla*, trial counsel failed to examine a file which he knew portions of the contents was going to be used by the prosecution. Had trial counsel reviewed the file, he would have discovered "test results that the defense's mental health experts would have viewed as pointing to schizophrenia and other disorders, and test scores showing a third grade level of cognition after nine years of schooling." *Id. at 391*.

Petitioner's trial counsel focused on an argument that Petitioner's past criminal history did not reflect a history that indicated future dangerousness. Although trial counsel could have expounded in greater detail the poor economic conditions in which Petitioner was raised, the lack of parental emotional and physical support, **[*54]** and the poor to non-existent mothering that Petitioner encountered from womb to trial, as the Fifth Circuit has noted a capital defendant's disadvantaged background, though, can be a "double-edged' sword that "also might suggest [Petitioner], as a product of his environment, is likely to continue to be dangerous in the future. " *Ladd v. Cockrell, 311 F.3d 349, 360 (5th Cir. 2002)*.

The facts of Petitioner's capital offense were particularly brutal. A teenage girl was abducted, violently sexually assaulted, and fatally stabbed; after which Petitioner helped dispose of her possessions and informed others he had "learned how to use a knife in prison." *Trevino v. Thaler, 678 F.Supp.2d at 449-52*. The evidence presented during the punishment phase of Petitioner's capital murder trial showed Petitioner had a lengthy history of criminal activity, both as a juvenile and adult, and Petitioner had been out of prison for only a few weeks before he participated in his capital offense. *Id., at 452-53*. There was also no evidence before the jury showing Petitioner had ever demonstrated any sincere remorse or genuine contrition for this offense.

The defense presented evidence during the punishment

phase of Petitioner's trial showing Petitioner's father was largely absent during Petitioner's childhood, Petitioner's **[*55]** mother had alcohol problems, Petitioner's family was on welfare during his childhood, Petitioner was a loner in school and dropped out of school and went to work for his mother's boyfriend, and Petitioner was the father of one child and was good with children. As explained above, the vast majority of Petitioner's "new" evidence is double-edged in nature or merely reaffirms the evidence of Petitioner's difficult childhood that was actually presented to Petitioner's capital sentencing jury. Moreover, nowhere in any of the new sworn statements or new interview notes Petitioner presents in support of his second amended petition are there any statements indicating any of those witnesses were available and willing to testify during Petitioner's 1997 capital murder trial. *See* Woodfox v. Cain, 609 F.3d at 808 (holding petitioner complaining of uncalled witness must show the witness was available and willing to testify to satisfy the prejudice prong of *Strickland)*; Day v. Quarterman, 566 F.3d at 538 (holding the same). Having re-weighed the "new" mitigating evidence together with the mitigating evidence actually presented to Petitioner's jury at trial against (1) the facts and circumstances of Petitioner's offense and (2) Petitioner's history of violent criminal **[*56]** and antisocial behavior detailed in Petitioner's new evidence, this Court finds there is no reasonable probability that, but for the failure of Petitioner's trial counsel to more fully investigate Petitioner's background, develop, and present any of the "new" evidence contained in Petitioner's second amended petition and the exhibits accompanying same, the jury's answers to any of the Texas capital sentencing scheme's special issues would have been any different. In fact, as explained above, much of this "new" evidence would likely have assisted the prosecution in obtaining an affirmative answer to the future dangerousness special issue. Petitioner's ineffective assistance claim in his second amended petition fails to satisfy the prejudice prong of the *Strickland* analysis.

IV. Request for an Evidentiary Hearing

Where a federal habeas corpus petitioner's claims lack merit on their face, further factual development is not necessitated. *See* Register v. Thaler, 681 F.3d 623, 627-30 (5th Cir. 2012) (recognizing District Courts possess discretion regarding whether to allow factual development, especially when confronted with claims foreclosed by applicable legal authority). "In cases where an applicant for federal habeas relief is not barred from **[*57]** obtaining an evidentiary hearing by *28 U.S.C. § 2254(e)(2)*, the decision to grant such a hearing rests in the discretion of the district court." Richards v. Quarterman, 566 F.3d 553, 562 (5th Cir. 2009) (quoting Schriro v. Landrigan, 550 U.S.465, 468, 127 S. Ct. 1933, 167 L. Ed. 2d 836 (2007)). "In determining whether to grant a hearing, under Rule 8(a) of the habeas Court Rules 'the judge must review the answer [and] any transcripts and records of state-court proceedings... to determine whether an evidentiary hearing is warranted.'" Richards v. Quarterman, 566 F.3d at 562-63 (*quoting* Hall v. Quarterman, 534 F.3d 365, 368 (5th Cir.2008) (*in turn quoting* Schriro, 550 U.S. at 473)). In making this determination, courts must consider whether an evidentiary hearing could "enable an applicant to prove the petition's factual allegations, which, if true, would entitle the applicant to federal habeas relief." Richards v. Quarterman, 566 F.3d at 563 (*quoting* Schriro, 550 U.S. at 474).

Petitioner has failed to allege specific facts which, if proven, would entitle Petitioner to federal habeas corpus relief in this cause. Petitioner is not entitled to an evidentiary hearing before this Court on his second amended petition.

V. Certificate of Appealability

Under the AEDPA, before a petitioner may appeal the denial of a habeas corpus petition filed under *Section 2254*, the petitioner must obtain a CoA. Miller-El v. Cockrell, 537 U.S. 322, 335-36, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003); 28 U.S.C. §2253(c) (2). Likewise, under the AEDPA, appellate review of a habeas petition is limited to the issues on which a CoA is granted. *See* Crutcher v. Cockrell, 301 F.3d 656, 658 n.10 (5th Cir. 2002) (holding a CoA is granted on an **[*58]** issue-by-issue basis, thereby limiting appellate review to those issues); Lackey v. Johnson, 116 F.3d 149, 151 (5th Cir. 1997) (holding the scope of appellate review of denial of a habeas petition limited to the issues on which CoA has been granted). In other words, a CoA is granted or denied on an issue-by-issue basis, thereby limiting appellate review to those issues on which CoA is granted. Crutcher v. Cockrell, 301 F.3d at 658 n.10; 28 U.S.C. §2253(c) (3).

A CoA will not be granted unless the petitioner makes a substantial showing of the denial of a constitutional right. Tennard v. Dretke, 542 U.S. 274, 282, 124 S. Ct. 2562, 159 L. Ed. 2d 384 (2004); Miller-El v. Cockrell, 537 U.S. at 336; Slack v. McDaniel, 529 U.S. 473, 483,

120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000); *Barefoot v. Estelle, 463 U.S. 880, 893, 103 S. Ct. 3383, 77 L. Ed. 2d 1090 (1983)*. To make such a showing, the petitioner need *not* show he will prevail on the merits but, rather, must demonstrate that reasonable jurists could debate whether (or, for that matter, agree) the petition should have been resolved in a different manner or that the issues presented are adequate to deserve encouragement to proceed further. *Tennard v. Dretke, 542 U.S. at 282*; *Miller-El v. Cockrell, 537 U.S. at 336*. This Court is required to issue or deny a CoA when it enters a final Order such as this one adverse to a federal habeas petitioner. *Rule 11(a), Rules Governing Section 2254 Cases in the United States District Courts*.

The showing necessary to obtain a CoA on a particular claim is dependent upon the manner in which the District Court has disposed of a claim. "[W]here a district court has rejected the constitutional claims on the merits, the showing required to satisfy *§2253(c)* is straightforward: **[*59]** The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Miller-El v. Cockrell, 537 U.S. at 338* (*quoting Slack v. McDaniel, 529 U.S. at 484*); *accord Tennard v. Dretke, 542 U.S. at 282*. In a case in which the petitioner wishes to challenge on appeal this Court's dismissal of a claim for a reason not of constitutional dimension, such as procedural default, limitations, or lack of exhaustion, the petitioner must show jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right *and* whether this Court was correct in its procedural ruling. *See Slack v. McDaniel, 529 U.S. at 484* (holding when a district court denies a habeas claim on procedural grounds, without reaching the underlying constitutional claim, a CoA may issue only when the petitioner shows that reasonable jurists would find it debatable whether (1) the claim is a valid assertion of the denial of a constitutional right and (2) the district court's procedural ruling was correct).

In death penalty cases, any doubt as to whether a CoA should issue must be resolved in the petitioner's favor. *Avila v. Quarterman, 560 F.3d 299, 304 (5th Cir.), cert. denied, 558 U.S. 993, 130 S. Ct. 536, 175 L. Ed. 2d 350 (2009)*; *Bridgers v. Dretke, 431 F.3d 853, 861 (5th Cir. 2005), cert. denied, 548 U.S. 909, 126 S. Ct. 2961, 165 L. Ed. 2d 959 (2006)*. Nonetheless, a CoA is not automatically granted in every death penalty habeas case. *See Miller-El v. Cockrell, 537 U.S. at 337* ("It **[*60]** follows that issuance of a COA must not be *pro forma* or a matter of course.").

While it might be possible to argue with this Court's application of the deficient performance prong of the *Strickland* test to Petitioner's complaint of ineffective assistance by his trial counsel, reasonable minds could not disagree over this Court's conclusion that Petitioner's complaint of ineffective assistance by his trial counsel fails to satisfy the prejudice prong of *Strickland*. Likewise, reasonable minds could not disagree that Petitioner failed to allege any specific facts showing that his initial state habeas counsel rendered ineffective assistance during Petitioner's initial state habeas corpus proceeding sufficient to satisfy the prejudice prong of *Strickland* and the initial hurdle to merits review of an otherwise procedurally defaulted claim under the test in *Martinez v. Ryan*.

This Court independently reviewed the entire record from Petitioner's trial, direct appeal, and multiple state habeas corpus proceedings and concludes once again that Petitioner's ineffective assistance complaint premised upon "new" mitigating evidence fails to satisfy either prong of the *Strickland* analysis. Viewed in **[*61]** the light most favorable to the jury's verdict, the evidence of Petitioner's guilt was overwhelming. At the punishment phase of Petitioner's trial, the jury was furnished with information concerning Petitioner's extensive criminal history. The new evidence presented by Petitioner consists of proposed testimony from Petitioner's family and friends showing (as did the evidence at Petitioner's trial) that Petitioner suffered from an abused and neglected childhood, bereft of positive parental influence, and typified by instability and a wholesale lack of nurturing by his family. That same evidence, however, also depicts Petitioner as a highly violent individual who abused alcohol and drugs from any early age, became sexually active and impregnated two different women while he was still a teenager, and joined a violent street gang as a youth. Petitioner's proposed new evidence showing he suffers from Fetal Alcohol Syndrome or Fetal Alcohol Spectrum Disorder is likewise double-edged in nature and unsupported by any showing that evidence of Petitioner's mother's abuse of alcohol while she was pregnant with Petitioner was reasonably available at the time of Petitioner's 1997 capital murder **[*62]** trial (due to the unavailability of Petitioner's mother at that time due to her continued alcohol and drug abuse and the unavailability of Petitioner's neonatal medical records). Petitioner has alleged no specific facts showing he or his mother (or any of the other individuals who have furnished sworn statements herein) were available and willing to testify during Petitioner's 1997 capital murder trial (or during Petitioner's initial state habeas corpus proceeding)

about Petitioner's background or his mother's history of alcohol abuse. Petitioner is not entitled to a CoA on either his *Martinez v. Ryan* argument or his *Strickland* claim.

Accordingly, it is hereby **ORDERED** that:

1. All relief requested in Petitioner's second amended federal habeas corpus petition, filed February 3, 2015*(ECF no. 143)*, is **DENIED**.

2. Petitioner is **DENIED** a Certificate of Appealability on all claims herein.

3. Petitioner's request for an evidentiary hearing is **DENIED**.

4. All other pending motions are **DISMISSED AS MOOT**.

SIGNED this 11th day of June, 2015.

/s/ Xavier Rodriguez

XAVIER RODRIGUEZ

UNITED STATES DISTRICT JUDGE

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APPENDIX D

***Trevino v. Thaler*, 133 S.Ct. 1911 (2013)**

Trevino v. Thaler

Supreme Court of the United States

February 25, 2013, Argued; May 28, 2013, Decided

No. 11-10189

Reporter
133 S. Ct. 1911 *; 185 L. Ed. 2d 1044 **; 2013 U.S. LEXIS 3980 ***; 569 U.S. 413; 81 U.S.L.W. 4336; 24 Fla. L. Weekly Fed. S 220; 2013 WL 2300805

CARLOS TREVINO, Petitioner v. RICK THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION

Subsequent History: On remand at, Remanded by *Trevino v. Stephens, 740 F.3d 378, 2014 U.S. App. LEXIS 1131 (5th Cir. Tex., Jan. 21, 2014)*

Prior History: [***1] ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Trevino v. Thaler, 449 Fed. Appx. 415, 2011 U.S. App. LEXIS 22873 (5th Cir. Tex., 2011)

Disposition: *449 Fed. Appx. 415*, vacated and remanded.

Case Summary

Procedural Posture

A Texas court found petitioner death row inmate's ineffective assistance of trial counsel (IATC) claim was procedurally defaulted for failure to raise it in initial state postconviction proceedings. On the inmate's federal habeas petition, the district court held the procedural default was an independent and adequate state ground barring federal review. The U.S. Court of Appeals for the Fifth Circuit affirmed. Certiorari was granted.

Overview

Texas did not expressly require IATC claims be raised on initial collateral review. Texas law on its face appeared to permit (but not require) that the claim be raised on direct appeal. But Texas procedure made it virtually impossible for appellate counsel to adequately present an IATC claim on direct review, as the trial record often failed to contain the necessary substantiating information. A motion-for-new-trial was often inadequate because of time constraints and the lack of the trial record being transcribed at that point. In Texas, a writ of habeas corpus issued in state collateral proceedings ordinarily was essential to gathering the facts necessary to evaluate IATC claims. As a systematic matter, Texas did not afford meaningful review of an IATC claim. Where a state procedural framework, by reason of its design and operation, made it highly unlikely in a typical case that a defendant would have a meaningful opportunity to raise an IATC claim on direct appeal, a procedural default would not bar a federal habeas court from hearing a substantial IATC claim if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective.

Outcome

The Fifth Circuit's judgment finding that procedural default of the ineffective assistance of trial counsel claim was an independent adequate state ground barring the federal review was vacated and the case was remanded for further proceedings. 5-4 Decision; 2 Dissents.

LexisNexis® Headnotes

Constitutional Law > ... > Fundamental Rights > Criminal Process > Assistance of Counsel

Criminal Law & Procedure > ... > Exceptions to Default > Cause & Prejudice Standard > Exceptions

HN1[] Criminal Process, Assistance of Counsel

Lack of counsel on collateral review might excuse defendant's state law procedural default. A procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the State's initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective.

Criminal Law & Procedure > ... > Jurisdiction > Cognizable Issues > Threshold Requirements

HN2[] Cognizable Issues, Threshold Requirements

In general, if a convicted state criminal defendant can show a federal habeas court that his conviction rests upon a violation of the United States Constitution, he may well obtain a writ of habeas corpus that requires a new trial, a new sentence, or release.

Criminal Law & Procedure > Habeas Corpus > Independent & Adequate State Grounds > Adequate & Independent Principle

Criminal Law & Procedure > ... > Exceptions to Default > Cause & Prejudice Standard > Exceptions

HN3[] Independent & Adequate State Grounds, Adequate & Independent Principle

A conviction that rests upon a defendant's state law "procedural default" (for example, the defendant's failure to raise a claim of error at the time or in the place that state law requires), normally rests upon an independent and adequate state ground. And where a conviction rests upon such a ground, a federal habeas court normally cannot consider the defendant's federal constitutional claim. At the same time, the doctrine barring procedurally defaulted claims from being heard is not without exceptions. A prisoner may obtain federal review of a defaulted claim by showing cause for the default and prejudice from a violation of federal law.

Constitutional Law > ... > Fundamental Rights > Criminal Process > Assistance of Counsel

Criminal Law & Procedure > ... > Exceptions to Default > Cause & Prejudice Standard > Exceptions

Criminal Law & Procedure > ... > Jurisdiction > Cognizable Issues > Ineffective Assistance of Counsel

HN4[] Criminal Process, Assistance of Counsel

A "narrow exception" should modify the unqualified statement that an attorney's ignorance or inadvertence in a postconviction proceeding does not qualify as cause to excuse a procedural default. Ineffective assistance of counsel on direct appellate review could amount to "cause," excusing a defendant's failure to raise (and thus procedurally defaulting) a constitutional claim. Where the State consequently channels initial review of this constitutional claim to collateral proceedings, a lawyer's failure to raise an ineffective-assistance-of-trial-counsel claim during initial-review collateral proceedings, could deprive a defendant of any review of that claim at all.

Constitutional Law > ... > Fundamental Rights > Criminal Process > Assistance of Counsel

Criminal Law & Procedure > ... > Exceptions to Default > Cause & Prejudice Standard > Exceptions

Criminal Law & Procedure > ... > Jurisdiction > Cognizable Issues > Ineffective Assistance of Counsel

Criminal Law & Procedure > ... > Exceptions to Default > Cause & Prejudice Standard > Proof of Cause

HN5[] Criminal Process, Assistance of Counsel

A federal habeas court is allowed to find "cause," thereby excusing a defendant's procedural default, where (1) the claim of ineffective assistance of trial counsel was a "substantial" claim; (2) the "cause" consisted of there being "no counsel" or only "ineffective" counsel during the state collateral review proceeding; (3) the state collateral review proceeding

was the "initial" review proceeding in respect to the ineffective-assistance-of-trial-counsel claim; and (4) state law requires that an ineffective assistance of trial counsel claim be raised in an initial-review collateral proceeding.

Constitutional Law > ... > Fundamental Rights > Criminal Process > Assistance of Counsel

Criminal Law & Procedure > ... > Exceptions to Default > Cause & Prejudice Standard > Exceptions

Criminal Law & Procedure > ... > Jurisdiction > Cognizable Issues > Ineffective Assistance of Counsel

HN6 **Criminal Process, Assistance of Counsel**

Where the state procedural framework, by reason of its design and operation, makes it highly unlikely in a typical case that a defendant will have a meaningful opportunity to raise a claim of ineffective assistance of trial counsel on direct appeal, 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.

Lawyers' Edition Display

Decision

[1044]** Procedural default held not to bar federal habeas corpus court from hearing substantial claim of ineffective assistance of counsel at trial, where state procedural framework typically made meaningful opportunity to raise ineffective-assistance claim on direct appeal highly unlikely.

Summary

Procedural posture: A Texas court found petitioner death row inmate's ineffective assistance of trial counsel (IATC) claim was procedurally defaulted for failure to raise it in initial state postconviction proceedings. On the inmate's federal habeas petition, the district court held the procedural default was an independent and adequate state ground barring federal review. The U.S. Court of Appeals for the Fifth Circuit affirmed. Certiorari was granted.

Overview: Texas did not expressly require IATC claims be raised on initial collateral review. Texas law on its face appeared to permit (but not require) that the claim be raised on direct appeal. But Texas procedure made it virtually impossible for appellate counsel to adequately present an IATC claim on direct review, as the trial record often failed to contain the necessary substantiating information. A motion-for-new-trial was often inadequate because of time constraints and the lack of the trial record being transcribed at that point. In Texas, a writ of habeas corpus issued in state collateral proceedings ordinarily was essential to gathering the facts necessary to evaluate IATC claims. As a systematic matter, Texas did not afford meaningful review of an IATC claim. Where a state procedural framework, by reason of its design and operation, made it highly unlikely in a typical case that a defendant would have a meaningful opportunity to raise an IATC claim on direct appeal, a procedural default would not bar a federal habeas court from hearing a substantial IATC claim if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective.

Outcome: The Fifth Circuit's judgment finding that procedural default of the ineffective assistance of trial counsel claim was an independent adequate state ground barring the federal review was vacated and the case was remanded for further proceedings. 5-4 Decision; 2 Dissents.

Headnotes

HABEAS CORPUS §113 > INEFFECTIVE ASSISTANCE -- PROCEDURAL DEFAULT -- EXCUSE > Headnote: ***LEdHN[1]*** [1]

Lack of counsel on collateral review might excuse defendant's state law procedural default. A procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the State's initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective. (Breyer, J., joined by Kennedy, Ginsburg, Sotomayor, and Kagan, JJ.)

HABEAS CORPUS §46.5 > CONSTITUTIONAL VIOLATION

> Headnote:
LEdHN[2][⬇] [2]

In general, if a convicted state criminal defendant can show a federal habeas court that his conviction rests upon a violation of the United States Constitution, he may well obtain a writ of habeas corpus that requires a new trial, a new sentence, or release. (Breyer, J., joined by Kennedy, Ginsburg, Sotomayor, and Kagan, JJ.)

HABEAS CORPUS §27 > PROCEDURAL DEFAULT -- STATE GROUNDS -- CAUSE AND PREJUDICE > Headnote:
LEdHN[3][⬇] [3]

A conviction that rests upon a defendant's state law "procedural default" (for example, the defendant's failure to raise a claim of error at the time or in the place that state law requires), normally rests upon an independent and adequate state ground. And where a conviction rests upon such a ground, a federal habeas court normally cannot consider the defendant's federal constitutional claim. At the same time, the doctrine barring procedurally defaulted claims from being heard is not without exceptions. A prisoner may obtain federal review of a defaulted claim by showing cause for the default and prejudice from a violation of federal law. (Breyer, J., joined by Kennedy, Ginsburg, Sotomayor, and Kagan, JJ.)

HABEAS CORPUS §47 > PROCEDURAL DEFAULT -- EXCUSE -- INEFFECTIVE ASSISTANCE > Headnote:
LEdHN[4][⬇] [4]

A "narrow exception" should modify the unqualified statement that an attorney's ignorance or inadvertence in a postconviction proceeding does not qualify as cause to excuse a procedural default. Ineffective assistance of counsel on direct appellate review could amount to "cause," excusing a defendant's failure to raise (and thus procedurally defaulting) a constitutional claim. Where the State consequently channels initial review of this constitutional claim to collateral proceedings, a lawyer's failure to raise an ineffective-assistance-of-trial-counsel claim during initial-review collateral proceedings, could deprive a defendant of any review of that claim at all. (Breyer, J., joined by Kennedy, Ginsburg, Sotomayor, and Kagan, JJ.)

[1046]**

HABEAS CORPUS §113 > PROCEDURAL DEFAULT -- EXCUSE -- INEFFECTIVE ASSISTANCE > Headnote:
LEdHN[5][⬇] [5]

A federal habeas court is allowed to find "cause," thereby excusing a defendant's procedural default, where (1) the claim of ineffective assistance of trial counsel was a "substantial" claim; (2) the "cause" consisted of there being "no counsel" or only "ineffective" counsel during the state collateral review proceeding; (3) the state collateral review proceeding was the "initial" review proceeding in respect to the ineffective-assistance-of-trial-counsel claim; and (4) state law requires that an ineffective assistance of trial counsel claim be raised in an initial-review collateral proceeding. (Breyer, J., joined by Kennedy, Ginsburg, Sotomayor, and Kagan, JJ.)

HABEAS CORPUS §47 > PROCEDURAL DEFAULT -- INEFFECTIVE ASSISTANCE > Headnote:
LEdHN[6][⬇] [6]

Where the state procedural framework, by reason of its design and operation, makes it highly unlikely in a typical case that a defendant will have a meaningful opportunity to raise a claim of ineffective assistance of trial counsel on direct appeal, 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. (Breyer, J., joined by Kennedy, Ginsburg, Sotomayor, and Kagan, JJ.)

Syllabus

[1047] [*1912]** In *Martinez v. Ryan, 566 U.S. 1, 17, 566 U.S. 1, 132 S. Ct. 1309, 182 L. Ed. 2d 272, 278, 288*this Court held that "a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the [State's] initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective." *Martinez* regarded a prisoner from Arizona, where state procedural law required the prisoner to raise the claim

during his first state collateral review proceeding. *Ibid.* This case regards a prisoner from Texas, where state procedural law does not require a defendant to raise his ineffective-assistance-of-trial-counsel claim on collateral review. Rather, Texas law appears to permit a prisoner to raise such a claim on direct review, but the structure and design of the Texas system make it virtually impossible for a prisoner to do so. The question presented in this case is whether, despite this difference, the rule set out in *Martinez* applies in Texas.

Petitioner Trevino was convicted of capital murder in Texas state court and sentenced to death after the jury **[***2]** found insufficient mitigating circumstances to warrant a life sentence. Neither new counsel appointed for his direct appeal nor new counsel appointed for state collateral review raised the claim that Trevino's trial counsel provided ineffective assistance during the penalty phase by failing to adequately investigate and present mitigating circumstances. When that claim was finally raised in Trevino's federal habeas petition, the District Court stayed the proceedings so Trevino could raise it in state court. The state court found the claim procedurally defaulted because of Trevino's failure to raise it in his initial state postconviction proceedings, and the federal court then concluded that this failure was an independent and adequate state ground barring the federal courts from considering the claim. The Fifth Circuit affirmed. Its decision predated *Martinez,* but that court has since concluded that *Martinez* does not apply in Texas because *Martinez*'s good-cause exception applies only where state law says that a defendant must initially raise his ineffective-assistance-of-trial-counsel claim in initial state collateral review proceedings, while Texas law appears to permit a defendant **[***3]** to raise that claim on direct appeal.

Held: Where, as here, a State's procedural framework, by reason of its design and operation, makes it highly unlikely in a typical case that a defendant will have a meaningful opportunity to raise an ineffective-assistance-of-trial-counsel claim on direct appeal, the exception recognized in *Martinez* applies. *Pp. ___ - ___, 185 L. Ed. 2d, at 1051-1057.*

(a) A finding that a defendant's state law "procedural default" rests on "an independent and adequate state ground" ordinarily prevents a federal habeas court **[*1913]** from considering the defendant's federal constitutional claim. *Coleman v. Thompson, 501 U.S. 722, 729-730, 111 S. Ct. 2546, 115 L. Ed. 2d 640.* However, a "prisoner may obtain federal review of a defaulted claim by showing cause for the default and prejudice from a violation of federal law." *Martinez, supra, at 10, 132 S. Ct. 1309, 182 L. Ed. 2d 272, 283.* In *Martinez,* the Court recognized a "narrow exception" to *Coleman*'s statement "that an attorney's ignorance or inadvertence in a **[**1048]** postconviction proceeding does not qualify as cause to excuse a procedural default." *566 U.S., at 9, 132 S. Ct. 1309, 182 L. Ed. 2d 272, 278, 282.* That exception allows a federal habeas court to find "cause" to excuse such default where (1) the ineffective-assistance-of-trial-counsel claim was a "substantial" claim; **[***4]** (2) the "cause" consisted of there being "no counsel" or only "ineffective" counsel during the state collateral review proceeding; (3) the state collateral review proceeding was the "initial" review proceeding in respect to the "ineffective-assistance-of-trial-counsel claim"; and (4) state law requires that the claim "be raised in an initial-review collateral proceeding." *Id., at 14, 17, 132 S. Ct. 1309, 182 L. Ed. 2d 272, 288. Pp. ___ - ___, 185 L. Ed. 2d, at 1051-1053.*

(b) The difference between the Texas law--which in theory grants permission to bring an ineffective-assistance-of-trial-counsel claim on direct appeal but in practice denies a meaningful opportunity to do so -- and the Arizona law at issue in *Martinez*--which required the claim to be raised in an initial collateral review proceeding -- does not matter in respect to the application of *Martinez. Pp. ___ - ___, 185 L. Ed. 2d, at 1053-1057.*

(1) This conclusion is supported by two characteristics of Texas' procedures. First, Texas procedures make it nearly impossible for an ineffective-assistance-of-trial-counsel claim to be presented on direct review. The nature of an ineffective-assistance claim means that the trial record is likely to be insufficient to support the claim. And a motion for a new trial to develop the record is usually inadequate **[***5]** because of Texas rules regarding time limits on the filing, and the disposal, of such motions and the availability of trial transcripts. Thus, a writ of habeas corpus is normally needed to gather the facts necessary for evaluating these claims in Texas. Second, were *Martinez* not to apply, the Texas procedural system would create significant unfairness because Texas courts in effect have directed defendants to raise ineffective-assistance-of-trial-counsel claims on collateral, rather than on direct, review. Texas can point to only a few cases in which a defendant has used the motion-for-a-new-trial mechanism to expand the record on appeal. Texas suggests that there are other mechanisms by which a prisoner can expand the record on appeal, but these

mechanisms seem special and limited in their application, and cannot overcome the Texas courts' own well-supported determination that collateral review normally is the preferred procedural route for raising an ineffective-assistance-of-trial-counsel claim. Respondent also argues that there is no equitable problem here, where appellate counsel's failure to bring a substantial ineffective-assistance claim on direct appeal may constitute cause **[***6]** to excuse the procedural default, but respondent points to no case in which such a failure by appellate counsel has been deemed constitutionally ineffective. *Pp. ___ - ___, 185 L. Ed. 2d, at 1053-1056*.

(2) The very factors that led this Court to create a narrow exception to *Coleman* in *Martinez* similarly argue for applying that exception here. The right involved--adequate assistance of trial counsel--is similarly and critically important. In both instances practical considerations--the need for a new lawyer, the need to expand the trial court record, and the need for sufficient time to develop the **[*1914]** claim--argue strongly for initial **[**1049]** consideration of the claim during collateral, not on direct, review. See *Martinez, 566 U.S., at 13, 132 S. Ct. 1309, 182 L. Ed. 2d 272, 277*. In both instances failure to consider a lawyer's "ineffectiveness" during an initial-review collateral proceeding as a potential "cause" for excusing a procedural default will deprive the defendant of any opportunity for review of an ineffective-assistance-of-trial-counsel claim. See *id., at 11, 132 S. Ct. 1309, 182 L. Ed. 2d 272*. Thus, for present purposes, a distinction between (1) a State that denies permission to raise the claim on direct appeal and (2) a State that grants permission but denies a fair, meaningful opportunity **[***7]** to develop the claim is a distinction without a difference. *Pp. ___ - ___, 185 L. Ed. 2d, at 1056-1057*.

449 Fed. Appx. 415, vacated and remanded.

Counsel: Warren A. Wolf argued the cause for petitioner.

Andrew S. Oldham argued the cause for respondent.

Judges: Breyer, J., delivered the opinion for the Court, in which Kennedy, Ginsburg, Sotomayor, and Kagan, JJ., joined. Roberts, C. J., filed a dissenting opinion, in which Alito, J., joined, post. p.___. Scalia, J., filed a dissenting opinion, in which Thomas, J., joined, post. p.___.

Opinion by: BREYER

Opinion

Justice **Breyer** delivered the opinion of the Court.

In *Martinez v. Ryan, 566 U.S. 1, 132 S. Ct. 1309, 182 L. Ed. 2d 272 (2012)*, we considered the right of a state prisoner to raise, in a federal habeas corpus proceeding, a claim of ineffective assistance of trial counsel. In that case an Arizona procedural rule required a defendant convicted at trial to raise a claim of ineffective assistance of trial counsel during his first state collateral review proceeding — or lose the claim. The defendant in *Martinez* did not comply with the state procedural rule. But he argued that the federal habeas court should excuse his state procedural failing, on the ground that he had good "cause" for not raising the claim at the right time, namely that, not only he lacked effective counsel during trial, but also lacked effective counsel during his first state collateral **[***8]** review proceeding.

We held that *HN1*[↑] *LEdHN[1]*[↑] [1] lack of counsel on collateral review might excuse defendant's state law procedural default. We wrote:

> "[A] procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the [State's] initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective." *Id., at 17, 132 S. Ct. 1309, 182 L. Ed. 2d 272, 278, 288*).

At the same time we qualified our holding. We said that the holding applied where state procedural law said that "claims of ineffective assistance of trial counsel *must* **[*1915]** be raised in an initial-review collateral proceeding." *Ibid.* (emphasis added).

In this case Texas state law does not say "must." It does not on its face *require* a defendant initially to raise an ineffective-assistance-of-trial-counsel claim in a state collateral review proceeding. Rather, that law appears at first glance to permit (but not require) the defendant initially to raise a claim of ineffective assistance of trial counsel on direct appeal. The structure and design of the Texas system in actual operation, however, make it "virtually impossible" for an ineffective assistance claim to be presented **[**1050]** on **[***9]** direct review. See *Robinson v. State, 16 S.W.3d 808, 810-811 (Tex. Crim. App. 2000)*. We must now decide whether the *Martinez*

exception applies in this procedural regime. We conclude that it does.

I

A Texas state court jury convicted petitioner, Carlos Trevino, of capital murder. After a subsequent penalty-phase hearing, the jury found that Trevino "would commit criminal acts of violence in the future which would constitute a continuing threat to society," that he "actually caused the death of Linda Salinas or, if he did not actually cause her death, he intended to kill her or another, or he anticipated a human life would be taken," and that "there were insufficient mitigating circumstances to warrant a sentence of life imprisonment" rather than death. 449 Fed. Appx. 415, 418 (CA5 2011). The judge consequently imposed a sentence of death.

Eight days later, the judge appointed new counsel to handle Trevino's direct appeal. App. 1, 3. 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* ***[***10]*** *trial counsel had been constitutionally ineffective during the penalty phase of the trial court proceedings. Id.*, at 12-24.

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. *Id.*, at 25-26, 321-349. 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. Id.*, at 321-349; 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 **[***11]** 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. App. 438, 456-478. 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, **[*1916]** 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. *Id.*, at 285-291.

[1051]** 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 **[***12]** 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. *Id.*, at 66-67.

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, *id.*, at 27-28; and the Federal District Court then denied Trevino's ineffective-assistance-of-trial-counsel claim, *id.*, at 78-79. 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 **[***13]** the federal habeas court from considering the ineffective-assistance-of-trial-counsel claim. *Id.*, at 131-132. 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. Although the Circuit decided Trevino's case before this Court decided *Martinez*, the Fifth Circuit's reasoning in a later case, Ibarra v. Thaler, 687 F. 3d 222 (2012), makes clear that the Fifth Circuit would have found that *Martinez* would have made no difference.

That is because in *Ibarra* the Circuit recognized that *Martinez* had said that its good-cause exception applies where state law says that a criminal defendant *must* initially raise his claim of ineffective assistance of trial counsel in initial state collateral review proceedings. 687 F. 3d, at 225-226. Texas law, the Circuit pointed out, does not say explicitly that the defendant *must* initially raise the claim in state collateral review proceedings. Rather Texas law on its face appears **[***14]** to *permit* a criminal defendant to raise such a claim on direct appeal. Id., at 227. And the Circuit held that that fact means that *Martinez* does not apply in Texas. 687 F. 3d, at 227. Since the Circuit's holding in *Ibarra* (that *Martinez* does not apply in Texas) would similarly govern this case, we granted certiorari here to determine whether *Martinez* applies in Texas.

II

A

We begin with *Martinez*. We there recognized the historic importance of **[**1052]** federal habeas corpus proceedings as a method for preventing individuals from being **[*1917]** held in custody in violation of federal law. Martinez, 566 U.S., at 8–15, 132 S. Ct. 1309, 182 L. Ed. 2d 272. See generally Preiser v. Rodriguez, 411 U.S. 475, 484-485, 93 S. Ct. 1827, 36 L. Ed. 2d 439 (1973). ***HN2***[↑] ***LEdHN[2]***[↑] [2] In general, if a convicted state criminal defendant can show a federal habeas court that his conviction rests upon a violation of the Federal Constitution, he may well obtain a writ of habeas corpus that requires a new trial, a new sentence, or release.

We similarly recognized the importance of federal habeas corpus principles designed to prevent federal courts from interfering with a State's application of its own firmly established, consistently followed, constitutionally proper procedural rules. Martinez, supra, at 9, 132 S. Ct. 1309, 182 L. Ed. 2d 272. **[***15]** Those principles have long made clear that ***HN3***[↑] ***LEdHN[3]***[↑] [3] a conviction that rests upon a defendant's state law "procedural default" (for example, the defendant's failure to raise a claim of error at the time or in the place that state law requires) normally rests upon "an independent and adequate state ground." Coleman, supra, at 729-730, 111 S. Ct. 2546, 115 L. Ed. 2d 640. And where a conviction rests upon such a ground, a federal habeas court normally cannot consider the defendant's federal constitutional claim. *Ibid.*; see Martinez, 566 U.S., at 9, 132 S. Ct. 1309, 182 L. Ed. 2d 272.

At the same time, we pointed out that "[t]he doctrine barring procedurally defaulted claims from being heard is not without exceptions. A prisoner may obtain federal review of a defaulted claim by showing cause for the default and prejudice from a violation of federal law." Id., at 10, 132 S. Ct. 1309, 182 L. Ed. 2d 272, 283. And we turned to the issue directly before the Court: whether Martinez had shown "cause" to excuse his state procedural failing. Id., at 15, 132 S. Ct. 1309, 182 L. Ed. 2d 272.

Martinez argued that his lawyer should have raised, but did not raise, his claim of ineffective assistance of trial counsel during state collateral review proceedings. Id., at 7, 132 S. Ct. 1309, 182 L. Ed. 2d 272. He added **[***16]** that this failure, itself amounting to ineffective assistance, was the "cause" of, and ought to excuse, his procedural default. Id., at 10, 132 S. Ct. 1309, 182 L. Ed. 2d 272, 292. But this Court had previously held that "[n]egligence on the part of a prisoner's *postconviction* attorney does *not* qualify as 'cause,'" primarily because a "principal" such as the prisoner, "bears the risk of negligent conduct on the part of his agent," the attorney. Maples v. Thomas, 565 U.S. 266, 280–281, 132 S. Ct. 912, 181 L. Ed. 2d 807, 821 (2012) (quoting Coleman, supra, at 753-754, 111 S. Ct. 2546, 115 L. Ed. 2d 640; emphasis added). Martinez, in effect, argued for an exception to *Coleman*'s broad statement of the law.

We ultimately held that ***HN4***[↑] ***LEdHN[4]***[↑] [4] a "narrow exception" should "modify the unqualified statement in Coleman that an attorney's ignorance or inadvertence in a postconviction proceeding does not qualify as cause to excuse a procedural default." Martinez, 566 U.S., at 9, 132 S. Ct. 1309, 182 L. Ed. 2d 272, 282. We did so for three reasons. First, the "right to the effective assistance of counsel at trial is a bedrock principle in our justice system. . . . Indeed, the right to counsel is the foundation for our adversary system." Id., at 12, 132 S. Ct. 1309, 182 L. Ed. 2d 272, 284-285.

[1053]** Second, ineffective assistance of counsel on *direct* ***[***17]*** *appellate review* could amount to "cause," excusing a defendant's failure to raise (and thus procedurally defaulting) a constitutional claim. *Ibid.*. But

States often have good reasons for initially reviewing claims of ineffective assistance of trial counsel during state collateral proceedings rather than on direct appellate review. *Id., at 13, 132 S. Ct. 1309, 182 L. Ed. 2d 272*. That is because review of such a claim normally requires a different attorney, because it **[*1918]** often "depend[s] on evidence outside the trial record," and because efforts to expand the record on direct appeal may run afoul of "[a]bbreviated deadlines," depriving the new attorney of "adequate time . . . to investigate the ineffective-assistance claim." *Ibid.*

Third, where the State consequently channels initial review of this constitutional claim to collateral proceedings, a lawyer's failure to raise an ineffective-assistance-of-trial-counsel claim during initial-review collateral proceedings, could (were *Coleman* read broadly) deprive a defendant of any review of that claim at all. *Martinez, supra, at 11, 132 S. Ct. 1309, 182 L. Ed. 2d 272*.

We consequently read *Coleman* as containing an exception, allowing **[***18]** *HN5*[↑] *LEdHN[5]*[↑] [5] a federal habeas court to find "cause," thereby excusing a defendant's procedural default, where (1) the claim of "ineffective assistance of trial counsel" was a "substantial" claim; (2) the "cause" consisted of there being "no counsel" or only "ineffective" counsel during the state collateral review proceeding; (3) the state collateral review proceeding was the "initial" review proceeding in respect to the "ineffective-assistance-of-trial-counsel claim"; and (4) state law *requires* that an "ineffective assistance of trial counsel [claim] . . . be raised in an initial-review collateral proceeding." *Martinez, supra, at 14, 17, 132 S. Ct. 1309, 182 L. Ed. 2d 272, 278, 288*.

B

Here state law differs from that in *Martinez* in respect to the fourth requirement. Unlike Arizona, Texas does not expressly *require* the defendant to raise a claim of ineffective assistance of trial counsel in an initial *collateral review* proceeding. Rather Texas law on its face appears to permit (but not require) the defendant to raise the claim on *direct appeal*. Does this difference matter?

1

Two characteristics of the relevant Texas procedures lead us to conclude that it should *not* make a difference in respect to the application of *Martinez*. **[***19]** First, Texas procedure makes it "virtually impossible for appellate counsel to adequately present an ineffective assistance [of trial counsel] claim" on direct review. *Robinson, 16 S.W.3d, at 810-811*. As the Texas Court of Criminal Appeals itself has pointed out, "the inherent nature of most ineffective assistance" of trial counsel "claims" means that the trial court record will often fail to "contai[n] the information necessary to substantiate" the claim. *Ex parte Torres, 943 S.W.2d 469, 475 (1997)* (en banc).

As the Court of Criminal Appeals has also noted, a convicted defendant may make a motion in the trial court for a new trial in order to develop the record on appeal. See *Reyes v. State, 849 S.W.2d 812, 816 (1993)*. And, in principle, the trial court could, in connection **[**1054]** with that motion, allow the defendant *some* additional time to develop a further record. *Ibid.* But that motion-for-new-trial "vehicle is often inadequate because of time constraints and because the trial record has generally not been transcribed at this point." *Torres, supra, at 475*. See *Tex. Rule App. Proc. 21.4* (2013) (motion for a new trial must be made within 30 days of sentencing); *Rules 21.8(a), (c)* (trial **[***20]** court must dispose of motion within 75 days of sentencing); *Rules 35.2(b), 35.3(c)* (transcript must be prepared within 120 days of sentencing where a motion for a new trial is filed and this deadline may be extended). Thus, as the Court of Criminal Appeals has concluded, in Texas "a writ of habeas corpus" issued in state collateral proceedings ordinarily "is essential to gathering the facts necessary to . . . evaluate . . . [ineffective-assistance-of-trial-counsel] claims." *Torres, [*1919] supra, at 475*. See *Robinson, supra, at 810-811* (noting that there is "not generally a realistic opportunity to adequately develop the record for appeal in post-trial motions" and that "[t]he time requirements for filing and presenting a motion for new trial would have made it virtually impossible for appellate counsel to adequately present an ineffective assistance claim to the trial court").

See also *Thompson v. State, 9 S.W.3d 808, 813-814, and n. 6 (Tex. Crim. App. 1999)* ("[I]n the vast majority of cases, the undeveloped record on direct appeal will be insufficient for an appellant to satisfy the dual prongs of *Strickland*"; only "[r]arely will a reviewing court be provided the opportunity to make its **[***21]** determination on direct appeal with a record capable of providing a fair evaluation of the merits of the claim . . ."); *Goodspeed v. State, 187 S.W.3d 390, 392 (Tex. Crim. App. 2005)* (similar); *Andrews v. State, 159 S.W.3d 98, 102-103 (Tex. Crim. App. 2005)* (similar); *Ex parte Brown, 158 S.W.3d 449, 453 (Tex. Crim. App.*

2005) (per curiam) (similar); Jackson v. State, 973 S.W.2d 954, 957 (Tex. Crim. App. 1998) (per curiam) (similar). See also 42 G. Dix & J. Schmolesky, Texas Practice Series §29:76, pp. 844-845 (3d ed. 2011) (hereinafter Texas Practice) (explaining that "[o]ften" the requirement that a claim of ineffective assistance of trial counsel be supported by a record containing direct evidence of why counsel acted as he did "will require that the claim . . . be raised in postconviction habeas proceedings where a full record on the matter can be raised").

This opinion considers whether, as a systematic matter, Texas affords meaningful review of a claim of ineffective assistance of trial counsel. The present capital case illustrates why it does not. The trial court appointed new counsel for Trevino eight days after sentencing. Counsel thus had 22 days to decide whether, **[***22]** and on what grounds, to make a motion for a new trial. She then *may* have had an additional 45 days to provide support for the motion but *without the help of a transcript* (which did not become available until much later—seven months after the trial). It would have been difficult, perhaps impossible, within that time frame to investigate Trevino's background, determine whether trial counsel had adequately done so, and then develop evidence about additional mitigating background circumstances. See Reyes, supra, at 816 ("[M]otions for new trial [must] be supported by affidavit . . . specifically showing the truth of the grounds of attack").

[1055]** Second, were *Martinez* not to apply, the Texas procedural system would create significant unfairness. That is because Texas courts in effect have directed defendants to raise claims of ineffective assistance of trial counsel on collateral, rather than on direct, review. As noted, they have explained why direct review proceedings are likely inadequate. See *supra,* at ___. They have held that failure to raise the claim on direct review does not bar the defendant from raising the claim in collateral proceedings. See, *e.g.*, Robinson, supra, at 813; Ex parte Duffy, 607 S.W.2d 507, 512-513 (Tex. Crim. App. 1980) **[***23]** (overruled on other grounds by Hernandez v. State, 988 S.W.2d 770 (Tex. Crim. App. 1999)). They have held that the defendant's decision to raise the claim on direct review does not bar the defendant from also raising the claim in collateral proceedings. See, *e.g.*, Lopez v. State, 343 S.W.3d 137, 143 (Tex. Crim. App. 2011); Torres, 943 S.W. 2d, at 475. They have suggested that appellate counsel's failure to raise the claim on direct review does not constitute "ineffective assistance of counsel." See Sprouse v. State, No. AP-74933, 2007 Tex. Crim. App. LEXIS 1862, 2007 WL **[*1920]** 283152, *7 (Tex. Crim. App., Jan. 31, 2007) (unpublished). And Texas' highest criminal court has explicitly stated that "[a]s a general rule" the defendant "should *not* raise an issue of ineffective assistance of counsel on direct appeal," but rather in collateral review proceedings. Mata v. State, 226 S.W.3d 425, 430, n. 14 (2007) (internal quotation marks omitted). See Robinson, 16 S.W. 3d, at 810 ("[A] post-conviction writ proceeding, rather than a motion for new trial, is the preferred method for gathering the facts necessary to substantiate" an ineffective-assistance-of-trial-counsel claim).

The criminal bar, not surprisingly, has taken this strong judicial **[***24]** advice seriously. See Guidelines and Standards for Texas Capital Counsel, 69 Tex. B. J. 966, 977, Guideline 12.2(B)(1)(d) (2006) ("[S]tate habeas corpus is the first opportunity for a capital client to raise challenges to the effectiveness of trial or direct appeal counsel"). Texas now can point to only a comparatively small number of cases in which a defendant has used the motion-for-a-new-trial mechanism to expand the record on appeal and then received a hearing on his ineffective-assistance-of-trial-counsel claim on direct appeal. Brief for Respondent 35-36, and n. 6 (citing, *inter alia*, State v. Morales, 253 S.W.3d 686, 689-691 (Tex. Crim. App. 2008); Robertson v. State, 187 S.W.3d 475, 480-481 (Tex. Crim. App. 2006)). And, of those, precisely one case involves trial counsel's investigative failures of the kind at issue here. See Armstrong v. State, No. AP-75706, 2010 Tex. Crim. App. Unpub. LEXIS 37, 2010 WL 359020 (Tex. Crim. App., Jan. 27, 2010) (unpublished). How could federal law deny defendants the benefit of *Martinez* solely because of the existence of a theoretically available procedural alternative, namely direct appellate review, that Texas procedures render so difficult, and in the typical case all but **[***25]** impossible, to use successfully, and which Texas courts so strongly discourage defendants from using?

Respondent argues that Texas courts enforce the relevant time limits more flexibly than we have suggested. Sometimes, for example, an appellate court can abate an appeal and remand the case for further record **[**1056]** development in the trial court. See Cooks v. State, 240 S.W.3d 906 (Tex. Crim. App. 2007). But the procedural possibilities to which Texas now points seem special, limited in their application, and, as far as we can tell, rarely used. See 43A Texas Practice §50:15, at 636-639; 43B *id.*, §56:235, at 607-609. *Cooks*, for example, the case upon which respondent principally relies, involved a remand for further record

development, but in circumstances where the lower court wrongly failed to give a defendant new counsel in time to make an ordinary new trial motion. 240 S.W.3d, at 911. We do not believe that this, or other, special, rarely used procedural possibilities can overcome the Texas courts' own well-supported determination that collateral review normally constitutes the preferred—and indeed as a practical matter, the only—method for raising an ineffective-assistance-of-trial-counsel **[***26]** claim.

Respondent further argues that there is no equitable problem to be solved in Texas because if counsel fails to bring a substantial claim of ineffective assistance of trial counsel *on direct appeal*, the ineffectiveness of *appellate* counsel may constitute cause to excuse the procedural default. See Murray v. Carrier, 477 U.S. 478, 106 S. Ct. 2639, 91 L. Ed. 2d 397 (1986). But respondent points to no case in which such a failure by appellate counsel has been deemed constitutionally ineffective. And that lack of authority is not surprising given the fact that the Texas Court of Criminal Appeals has directed defendants to bring such claims on collateral review.

[*1921] 2

For the reasons just stated, we 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 **[***27]** of that exception here.

The right involved — adequate assistance of counsel at trial — is similarly and critically important. In both instances practical considerations, such as the need for a new lawyer, the need to expand the trial court record, and the need for sufficient time to develop the claim, argue strongly for initial consideration of the claim during collateral, rather than on direct, review. See Martinez, 566 U.S., at 13, 132 S. Ct. 1309, 182 L. Ed. 2d 272; see also Massaro v. United States, 538 U.S. 500, 505, 123 S. Ct. 1690, 155 L. Ed. 2d 714 (2003). In both instances failure to consider a lawyer's "ineffectiveness" during an initial-review collateral proceeding as a potential "cause" for excusing a procedural default will deprive the defendant of any opportunity at all for review of an ineffective-assistance-of-trial-counsel claim. See Martinez, supra, at 11, 132 S. Ct. 1309, 182 L. Ed. 2d 272.

Thus, for present purposes, a distinction between (1) a State that denies permission to raise the claim on direct appeal and (2) a State that in theory grants permission but, as a matter of procedural design and systemic operation, denies a meaningful opportunity to do so is a distinction without a difference. In saying this, **[**1057]** we do not (any more **[***28]** than we did in *Martinez*) seek to encourage States to tailor direct appeals so that they provide a fuller opportunity to raise ineffective-assistance-of-trial-counsel claims. That is a matter for the States to decide. And, as we have said, there are often good reasons for hearing the claim initially during collateral proceedings.

III

For these reasons, we conclude that ***HN6***[↑] ***LEdHN[6]***[↑] [6] where, as here, state procedural framework, by reason of its design and operation, makes it highly unlikely in a typical case that a defendant will have a meaningful opportunity to raise a claim of ineffective assistance of trial counsel on direct appeal, our holding in *Martinez* applies:

> "[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." 566 U.S., at 17, 132 S. Ct. 1309, 182 L. Ed. 2d 272, 278, 288).

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. Brief for Respondent 58-60. We leave that matter to be determined on remand. Likewise, **[***29]** 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.

It is so ordered.

Dissent by: ROBERTS; SCALIA

Dissent

Chief Justice **Roberts**, with whom Justice **Alito** joins, dissenting.

In our federal system, the "state courts are the principal forum for asserting constitutional **[*1922]** challenges to state convictions." *Harrington v. Richter, 562 U.S. 86, 103, 562 U.S. 86, 131 S. Ct. 770, 178 L. Ed. 2d 624, 632, 641 (2011)*. "Federal courts sitting in habeas," we have said, "are not an alternative forum for trying . . . issues which a prisoner made insufficient effort to pursue in state proceedings." *Williams v. Taylor, 529 U.S. 420, 437, 120 S. Ct. 1479, 146 L. Ed. 2d 435 (2000)*. This basic principle reflects the fact that federal habeas review "'intrudes on state sovereignty to a degree matched by few exercises of federal judicial authority.'" *Richter, supra, at 103, 131 S. Ct. 770, 178 L. Ed. 2d 624, 641* (quoting *Harris v. Reed, 489 U.S. 255, 282, 109 S. Ct. 1038, 103 L. Ed. 2d 308 (1989)* (Kennedy, J., dissenting)).

In order to prevent circumvention of the state courts and the unjustified intrusion on state sovereignty **[***30]** that results, we have held that "a state prisoner [who] fails to exhaust state remedies . . . [or] has failed to meet the State's procedural requirements for presenting his federal claims" will not be entitled to federal habeas relief unless he can show "cause" to excuse his default. *Coleman v. Thompson, 501 U.S. 722, 732, 750, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991)*. There is an exception to that rule where "failure to consider the claims will result in a fundamental miscarriage of justice," *ibid.*; that exception is not at issue here.

[1058]** Cause comes in different forms, but the one relevant here is attorney error. We recognized in *Coleman* that "[w]here a [habeas] petitioner defaults a claim as a result of the denial of the right to effective assistance of counsel, the State, which is responsible for the denial as a constitutional matter, must bear the cost of any resulting default." *Id., at 754, 111 S. Ct. 2546, 115 L. Ed. 2d 640*. But we simultaneously recognized that "[a] different allocation of costs is appropriate in those circumstances where the State has no responsibility to ensure that the petitioner was represented by competent counsel." *Ibid.* In that situation, we held, "it is the petitioner who must bear the burden of a failure to follow state **[***31]** procedural rules." *Ibid.* Because the error in *Coleman* occurred during state postconviction proceedings, a point at which the habeas petitioner had no constitutional right to counsel, the petitioner had to bear the cost of his default. *Id., at 757, 111 S. Ct. 2546, 115 L. Ed. 2d 640*.

Last Term, in *Martinez* v. *Ryan*, we announced a "narrow exception" to *Coleman*'s "unqualified statement . . . that an attorney's ignorance or inadvertence in a postconviction proceeding does not qualify as cause to excuse a procedural default." *566 U.S. 1, 9, 132 S. Ct. 1309, 182 L. Ed. 2d 272, 278, 282 (2012)*). In *Martinez*, Arizona law did not allow defendants to raise ineffective assistance of counsel claims on direct appeal; they could *only* raise such claims in state collateral proceedings. *Id., at 6, 132 S. Ct. 1309, 182 L. Ed. 2d 272*. We held that while Arizona was free to structure its state court procedures in this way, its "decision is not without consequences for the State's ability to assert a procedural default in later proceedings." *Id., at 13, 132 S. Ct. 1309, 182 L. Ed. 2d 272, 285*. "By deliberately choosing to move trial-ineffectiveness claims outside of the direct-appeal process, where counsel is constitutionally guaranteed, the State significantly diminishes prisoners' ability to file such **[***32]** claims." *Ibid.* Thus, "within the context of this state procedural framework," attorney error would qualify as cause to excuse procedural default if it occurred in the first proceeding at which the prisoner was "allow[ed]" to raise his trial ineffectiveness claim. *Id., at 13, 16, 132 S. Ct. 1309, 182 L. Ed. 2d 272, 285*.

We were unusually explicit about the narrowness of our decision: "The holding in this case does not concern attorney **[*1923]** errors in other kinds of proceedings," and "does not extend to attorney errors in any proceeding beyond the first occasion the State allows a prisoner to raise a claim of ineffective assistance at trial." *Id., at 16, 132 S. Ct. 1309, 182 L. Ed. 2d 272, 287*. "Our holding here addresses only the constitutional claims presented in this case, where the State barred the defendant from raising the claims on direct appeal." *Id., at 17, 132 S. Ct. 1309, 182 L. Ed. 2d 272, 287*. In "all but the limited circumstances recognized here," we said, "[t]he rule of *Coleman* governs." *Id., at 16, 132 S. Ct. 1309, 182 L. Ed. 2d 272, 287*.

This aggressively limiting language was not simply a customary nod to the truism that "we decide only the case before us." *Upjohn Co. v. United States, 449 U.S. 383, 396, 101 S. Ct. 677, 66 L. Ed. 2d 584 (1981)*. It was instead an important part of **[***33]** our explanation for why "[t]his limited qualification to *Coleman* does not implicate the usual concerns with upsetting reliance interests protected by *stare decisis* principles." *Martinez, supra, [**1059] at 15, 132 S. Ct. 1309, 182 L. Ed. 2d 272, 286*. The fact that the exception was clearly

delineated ensured that the *Coleman* rule would remain administrable. And because States could readily anticipate how such a sharply defined exception would apply to various procedural frameworks, the exception could be reconciled with our concerns for comity and equitable balancing that led to *Coleman*'s baseline rule in the first place. See *Coleman, supra, at 750-751, 111 S. Ct. 2546, 115 L. Ed. 2d 640*. The States had a clear choice, which they could make with full knowledge of the consequences: If a State "deliberately cho[se] to move trial-ineffectiveness claims outside of the direct-appeal process" through a "decision to bar defendants from raising" them there, then—and only then—would "counsel's ineffectiveness in an initial-review collateral proceeding qualif[y] as cause for a procedural default." *Martinez, 566 U.S., at 13, 16–17, 132 S. Ct. 1309, 182 L. Ed. 2d 272*.

Today, with hardly a mention of these concerns, the majority throws over the crisp limit we made so explicit **[***34]** just last Term. We announced in *Martinez* that the exception applies "where the State barred the defendant from raising the claims on direct appeal." *Id., at 17, 132 S. Ct. 1309, 182 L. Ed. 2d 272, 287*. But today, the Court takes all the starch out of its rule with an assortment of adjectives, adverbs, and modifying clauses: *Martinez*'s "narrow exception" now applies whenever the "state procedural framework, by reason of its design and operation, makes it highly unlikely in a typical case that a defendant will have a meaningful opportunity" to raise his claim on direct appeal. *Ante, at ___, 185 L. Ed. 2d, at 1057*.

The questions raised by this equitable equation are as endless as will be the state-by-state litigation it takes to work them out. We are not told, for example, how meaningful is meaningful enough, how meaningfulness is to be measured, how unlikely highly unlikely is, how often a procedural framework's "operation" must be reassessed, or what case qualifies as the "typical" case. Take just this last example: The case before us involved a jury trial (hardly typical), a capital conviction (even less typical), and—as the majority emphasizes—a particular species of ineffectiveness claim that depends on time-consuming investigation **[***35]** of personal background and other mitigating circumstances. *Ante, at ___, 185 L. Ed. 2d, at 1054*. Yet the majority holds it up, apparently, as a case that is typical in the relevant sense, saying that "[t]he present capital case illustrates" the "systematic" working of Texas's procedural framework. *Ibid.*

Given that the standard is so opaque and malleable, the majority cannot describe the exception applied here as narrow, and does not do so. Gone are the repeated words of limitation that characterized **[*1924]** the *Martinez* opinion. Gone too is the clear choice that *Martinez* gave the States about how to structure their criminal justice systems. Now, the majority offers them a gamble: If a State allows defendants to bring ineffectiveness claims both on direct appeal and in postconviction proceedings, then a prisoner *might* have to comply with state procedural requirements in order to preserve the availability of federal habeas review, *if* a federal judge decides that the state system gave the defendant (or enough other "typical" defendants) a sufficiently meaningful opportunity to press his claim.

[1060]** This invitation to litigation will, in precisely the manner that *Coleman* foreclosed, "'frustrate both the States' sovereign power **[***36]** to punish offenders and their good-faith attempts to honor constitutional rights.'" *501 U.S., at 748, 111 S. Ct. 2546, 115 L. Ed. 2d 640* (quoting *Engle v. Isaac, 456 U.S. 107, 128, 102 S. Ct. 1558, 71 L. Ed. 2d 783 (1982)*). In what I suspect (though cannot know) will be a broad swath of cases, the Court's approach will excuse procedural defaults that, under *Coleman*, should preclude federal review. But even in cases where federal courts ultimately decide that the habeas petitioner cannot establish cause under the new standard, the years of procedural wrangling it takes to reach that decision will themselves undermine the finality of sentences necessary to effective criminal justice. Because that approach is inconsistent with *Coleman*, *Martinez* itself, and the principles of equitable discretion and comity at the heart of both, I respectfully dissent.

Justice Scalia, with whom Justice Thomas joins, dissenting.

I dissent for the reasons set forth in my dissent in *Martinez v. Ryan, 566 U.S. 1, 566 U.S. 1, 132 S. Ct. 1309, 182 L. Ed. 2d 272 (2012)*. That opinion sought to minimize the impact of its novel holding as follows:

> "Our holding here addresses only the constitutional claims presented in this case, where the State barred the defendant from raising the claims on direct appeal." *Id., at 17, 132 S. Ct. 1309, 182 L. Ed. 2d 272, 287*.

I **[***37]** wrote in my dissent:

> "That line lacks any principled basis, and will not last." *Id., at 19, n. 1, 132 S. Ct. 1309, 182 L. Ed. 2d 272, 289*.

The Court says today:

> "Texas law on its face appears to permit (but not require) the defendant to raise the claim on direct appeal. Does this difference matter?" "[W]e can find no significant difference between this case and *Martinez*." *Ante, at ___. ___. 185 L. Ed. 2d, at 1053, 1056* (emphasis removed).

References

U.S.C.S., *Constitution, Amendment 6*

28 Moore's Federal Practice § 671.07 (Matthew Bender 3d ed.)

L Ed Digest, Habeas Corpus §§47, 113

L Ed Index, Habeas Corpus

Requirement, in federal habeas corpus proceedings, of showing of cause and prejudice with respect to relief from state criminal conviction or sentence--Supreme Court cases. *120 L. Ed. 2d 991*.

When is attorney's representation of criminal defendant so deficient as to constitute denial of federal constitutional right to effective assistance of counsel--Supreme Court cases. *83 L. Ed. 2d 1112*.

Noncompliance with state procedural rule as constituting "adequate state ground" for denial of relief so as to preclude Supreme Court review of federal question. *24 L. Ed. 2d 837*.

Accused's right to counsel under the Federal Constitution--Supreme Court cases. 93 L. Ed. 137, *2 L. Ed. 2d 1644*, *9 L. Ed. 2d 1260*, *18 L. Ed. 2d 1420*.

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APPENDIX E

***Trevino v. Stephens*, 740 F. 3d 378,**
2014 U.S. App. LEXIS 1131 (5th Cir. 2014)

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Trevino v. Stephens

United States Court of Appeals for the Fifth Circuit

January 21, 2014, Filed

No. 10-70004

Reporter
2014 U.S. App. LEXIS 1131 *; 740 F.3d 378; 2014 WL 223590

CARLOS TREVINO, Petitioner-Appellant, v. WILLIAM STEPHENS, Director, Texas Department of Criminal Justice, Correctional Institutions Division, Respondent-Appellee.

Subsequent History: On remand at, Writ of habeas corpus denied, Certificate of appealability denied, Request denied by, Motion dismissed by, As moot *Trevino v. Stephens, 2015 U.S. Dist. LEXIS 75400 (W.D. Tex., June 11, 2015)*

Prior History: **[*1]** Appeal from the United States District Court for the Western District of Texas.

Trevino v. Thaler, 133 S. Ct. 1911, 185 L. Ed. 2d 1044, 2013 U.S. LEXIS 3980 (U.S., 2013)

Counsel: For CARLOS TREVINO, Petitioner - Appellant: Warren Alan Wolf, Law Office of Warren Alan Wolf, San Antonio, TX; John Joseph Ritenour, Jr., Esq., Ritenour Law Firm, P.C., San Antonio, TX.

For WILLIAM STEPHENS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, Respondent - Appellee: Andrew S. Oldham, Deputy Solicitor General, Office of the Attorney General, Office of the Solicitor General, Austin, TX; Fredericka Searle Sargent, Assistant Attorney General, Office of the Attorney General, Postconviction Litigation Division, Austin, TX.

Judges: Before DAVIS, SMITH, and DENNIS, Circuit Judges.

Opinion

ON REMAND FROM THE SUPREME COURT OF THE UNITED STATES

PER CURIAM:

In light of the Supreme Court's decision in *Trevino v. Thaler, 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, 132 S. Ct. 1309, 182 L. Ed. 2d 272 (2012)*. **[*2]** 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.

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APPENDIX F

***Trevino v. Thaler*, 449 Fed. Appx. 415,**
2011 U.S. App. LEXIS 22873 (5th Cir. 2011)

Trevino v. Thaler

United States Court of Appeals for the Fifth Circuit

November 14, 2011, Filed

No. 10-70004

Reporter
449 Fed. Appx. 415 *; 2011 U.S. App. LEXIS 22873 **

CARLOS TREVINO, Petitioner v. RICK THALER, Director, Texas Department of Criminal Justice, Correctional Institutions Division, Respondent

Notice: PLEASE REFER TO *FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1* GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

Subsequent History: US Supreme Court certiorari granted by, in part, Motion granted by *Trevino v. Thaler, 133 S. Ct. 524, 184 L. Ed. 2d 337, 2012 U.S. LEXIS 8391 (U.S., 2012)*

Vacated by, Remanded by *Trevino v. Thaler, Dir., Tex. Dep't of Crim. Justice, Corr. Insts. Div., 2013 U.S. LEXIS 3980 (U.S., May 28, 2013)*

Prior History: **[**1]** Appeal from the United States District Court for the Western District of Texas. USDC No. 5:01-CV-306.

Trevino v. Thaler, 678 F. Supp. 2d 445, 2009 U.S. Dist. LEXIS 119672 (W.D. Tex., 2009)

Case Summary

Procedural Posture

Appellant prison inmate was convicted in state court of capital murder and sentenced to death, but the inmate contended that a statement exculpating the inmate was not disclosed by the prosecution and that counsel failed to present mitigating evidence during the penalty phase. The inmate appealed the order of the U.S. District Court for the Western District of Texas which denied the inmate's petition for a writ of habeas corpus.

Overview

The inmate contended that the prosecution failed to disclose a statement by a participant in the criminal incident that another party actually murdered the victim, and that the failure to present mitigating evidence of the defendant's troubled childhood and substance addictions constituted ineffective assistance of counsel. The appellate court first held that the failure to produce the exculpatory statement was not prejudicial since the prosecution produced an accurate summary of all of the statements of the participant and, in any event, the exculpatory statement was not material since a final statement of the participant retracted the exculpatory statement and expressly implicated the inmate in the murder of the victim. Further, notwithstanding the volume of mitigating evidence of the inmate's abusive childhood and struggles with alcohol and illegal substances, or its potential effect on the jury's discretion to impose the death penalty, the evidence bore no relationship to the inmate's eligibility for the death penalty based on actual innocence since it would not affect the jury's finding of the aggravating circumstance that the inmate represented a continuing threat to society.

Outcome

The order denying the inmate's habeas corpus petition was affirmed.

LexisNexis® Headnotes

Criminal Law & Procedure > Habeas Corpus > Appeals > Certificate of Appealability

HN1[] Appeals, Certificate of Appealability

Under the Antiterrorism and Effective Death Penalty Act, before an appeal may be entertained, a prisoner who was denied habeas relief in a district court must first seek and obtain a certificate of appealability (COA). *28 U.S.C.S. § 2253(c)(1)*. The prisoner is entitled to a COA only if he can make a substantial showing of the denial of a constitutional right. To meet this standard, the prisoner must demonstrate that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that issues presented were adequate to deserve encouragement to proceed further.

Criminal Law & Procedure > Habeas Corpus > Appeals > Certificate of Appealability

Criminal Law & Procedure > ... > Standards of Review > Contrary & Unreasonable Standard > General Overview

Criminal Law & Procedure > ... > Review > Standards of Review > Presumption of Correctness

HN2[] Appeals, Certificate of Appealability

In making an inquiry concerning a certificate of appealability, an appellate court must consider that Antiterrorism and Effective Death Penalty Act (AEDPA) requires a district court to defer to a state court's resolution of prisoner's claims, except in limited circumstances. Under AEDPA, federal courts may not grant habeas relief with respect to a claim adjudicated on the merits in state court unless that adjudication: (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings. *28 U.S.C.S. § 2254(d)(1)-(2)*. The appellate court must presume that the state court's factual findings are correct unless the prisoner meets his burden of rebutting that presumption by clear and convincing evidence.

Criminal Law & Procedure > ... > Procedural Defenses > Exhaustion of Remedies > Satisfaction of Exhaustion

HN3[] Exhaustion of Remedies, Satisfaction of Exhaustion

Absent special circumstances, a federal habeas petitioner must exhaust his state remedies by pressing his claims in state court before he may seek federal habeas relief. *28 U.S.C.S. § 2254(b)(1)*. Special circumstances permitting federal courts to review a claim before it has been exhausted in state court include: (1) when there is an absence of available state corrective process; or (2) when circumstances exist that render such process ineffective to protect the federal habeas petitioner's rights. *§ 2254(b)(1)(B)(i)-(ii)*.

Criminal Law & Procedure > ... > Appeals > Standards of Review > Clear Error Review

Criminal Law & Procedure > ... > Appeals > Standards of Review > De Novo Review

HN4[] Standards of Review, Clear Error Review

In reviewing an issue on which a district court granted a certificate of appealability in a habeas corpus petition, an appellate court reviews the district court's findings of fact for clear error and its conclusions of law de novo, applying the same standards to the state court's decision as did the district court.

Criminal Law & Procedure > ... > Discovery & Inspection > Brady Materials > Brady Claims

HN5[] Brady Materials, Brady Claims

There are three basic elements to a Brady claim: (1) the evidence must be favorable to the accused, either because it is exculpatory or because it may be used as impeachment evidence; (2) the evidence must have been suppressed by the state; and (3) the evidence must be material. Evidence is material, i.e., prejudicial, when there exists a reasonable probability that had the evidence been disclosed the result at trial would have been different.

Criminal Law & Procedure > ... > Discovery &

Inspection > Brady Materials > Brady Claims

HN6[⬇] **Brady Materials, Brady Claims**

Inadmissible evidence may be material if it somehow leads to other exculpatory evidence; the key is still whether the disclosure of the evidence would have created a reasonable probability that the result of the proceeding would have been different.

Evidence > ... > Hearsay > Credibility of Declarants > Impeachment

HN7[⬇] **Credibility of Declarants, Impeachment**

See *Fed. R. Evid. 806*.

Constitutional Law > ... > Fundamental Rights > Criminal Process > Assistance of Counsel

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Tests for Ineffective Assistance of Counsel

HN8[⬇] **Criminal Process, Assistance of Counsel**

To prove ineffective assistance of counsel, a defendant must generally show (1) that his counsel's performance was deficient; and (2) that this deficiency prejudiced the defendant.

Criminal Law & Procedure > Habeas Corpus > Independent & Adequate State Grounds > Adequate & Independent Principle

Criminal Law & Procedure > ... > Order & Timing of Petitions > Procedural Default > General Overview

HN9[⬇] **Independent & Adequate State Grounds, Adequate & Independent Principle**

A claim is procedurally defaulted when a state court clearly and expressly bases its dismissal of a claim on a state procedural rule and that rule provides an independent and adequate ground for dismissal. When such a dismissal based on independent and adequate state law grounds has occurred, a federal court does not reach the merits of the federal habeas claim.

Criminal Law & Procedure > Habeas Corpus > Independent & Adequate State Grounds > Adequate & Independent Principle

Criminal Law & Procedure > ... > Order & Timing of Petitions > Procedural Default > General Overview

HN10[⬇] **Independent & Adequate State Grounds, Adequate & Independent Principle**

Texas's abuse of the writ doctrine is a valid state procedural bar foreclosing federal habeas review.

Criminal Law & Procedure > ... > Exceptions to Default > Actual Innocence & Miscarriage of Justice > Miscarriage of Justice

Criminal Law & Procedure > Sentencing > Capital Punishment > Mitigating Circumstances

Criminal Law & Procedure > ... > Exceptions to Default > Actual Innocence & Miscarriage of Justice > Proof of Innocence

HN11[⬇] **Actual Innocence & Miscarriage of Justice, Miscarriage of Justice**

To satisfy the "miscarriage of justice" test, a habeas corpus petitioner must supplement his constitutional claim with a colorable showing of actual innocence. In the context of the sentencing phase of a capital murder trial, a showing of actual innocence is made when the petitioner shows by clear and convincing evidence that, but for constitutional error, no reasonable juror would have found petitioner eligible for the death penalty under applicable law. This "actual innocence" inquiry, thus, must be carefully focused on mitigating evidence related to the legal factors that render a capital defendant eligible for a death sentence.

Criminal Law & Procedure > Sentencing > Capital Punishment > Mitigating Circumstances

Criminal Law & Procedure > ... > Exceptions to Default > Actual Innocence & Miscarriage of Justice > Proof of Innocence

HN12[⬇] **Capital Punishment, Mitigating Circumstances**

When a claim of actual innocence contests a sentence

of death, a habeas petitioner's claim must tend to negate not just the jury's discretion to impose a death sentence but the petitioner's very eligibility for that punishment. That is, a habeas petitioner who is unquestionably eligible for the sentence received can never be actually innocent of the death penalty. This is so because late-arriving constitutional error that impacted only a jury's sentencing discretion is not sufficiently fundamental as to excuse the failure to raise it timely in prior state and federal proceedings. The actual innocence requirement must, then, focus on those elements that render a defendant eligible for the death penalty, and not on additional mitigating evidence that was prevented from being introduced as a result of a claimed constitutional error. Thus, if the petitioner is eligible for the death penalty, the actual-innocence inquiry does not take into account the entire universe of potential mitigating evidence that a defendant may seek to present that could have affected a jury's discretion to impose the death penalty.

Criminal Law & Procedure > Sentencing > Capital Punishment > Aggravating Circumstances

HN13 **Capital Punishment, Aggravating Circumstances**

A criminal defendant's eligibility for the death penalty requires jury to convict the defendant of murder and find one aggravating circumstance (or its equivalent) at either the guilt or penalty phase.

Criminal Law & Procedure > Sentencing > Capital Punishment > Aggravating Circumstances

Criminal Law & Procedure > Sentencing > Capital Punishment > Mitigating Circumstances

HN14 **Capital Punishment, Aggravating Circumstances**

In Texas's capital sentencing scheme, the second special question permits a jury to make an individualized determination of a defendant's moral culpability by considering the circumstances of his offense as well as his character and background. *Tex. Code Crim. Proc. Ann. art. 37.071*, § 2(e)-(f) (2011).

Counsel: For CARLOS TREVINO, Petitioner - Appellant: Warren Alan Wolf, Law Office of Warren Alan Wolf, San Antonio, TX; John Joseph Ritenour, Jr., Esq., Ritenour Law Firm, P.C., San Antonio, TX.

For RICK THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, Respondent - Appellee: Fredericka Searle Sargent, Assistant Attorney General, Office of the Attorney General, Postconviction Litigation Division, Austin, TX.

Judges: Before DAVIS, SMITH, and DENNIS, Circuit Judges.

Opinion by: W. EUGENE DAVIS

Opinion

[*416] W. EUGENE DAVIS, Circuit Judge. *

Petitioner Carlos Trevino was convicted of capital murder in Texas state court and sentenced to death. The district court denied each of Trevino's eight claims for habeas relief, but granted a certificate of appealability ("COA") pursuant to *28 U.S.C. § 2253(c)* on three of these issues. Trevino now petitions this court to issue COAs authorizing appeal from the district **[**2]** court's denial of habeas corpus relief regarding the five issues on which the district court denied COA. Because reasonable jurists would not find it debatable that the district court correctly rejected these five claims, we DENY Trevino's petition for COA regarding these issues. We further address the three issues on which the district court did grant COA. Finding these claims without merit, we AFFIRM the district court's denial of relief on these grounds.

I.

A.

We summarize the key facts and procedural background recited at length by the district court. *Trevino v. Thaler, 678 F. Supp. 2d 445, 449-55 [*417] (W.D. Tex. 2009)*. The body of 15-year old Linda Salinas was discovered in Espada Park in San Antonio Texas on June 10, 1996. The San Antonio Police Department began an investigation into Salinas's death. Following the investigation, on April 8, 1997, a Bexar

* Pursuant to ***5TH CIR. R. 47.5***, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in ***5TH CIR. R. 47.5.4***.

County, Texas grand jury indicted Trevino on a charge of capital murder for intentionally and knowingly causing the death of Linda Salinas by cutting and stabbing her with a deadly weapon while in the course of committing and attempting to commit the aggravated sexual assault of Salinas. Trevino rejected the state's subsequent **[**3]** plea offer and chose to go to trial.

Testimony at Trevino's trial established that on the evening of June 9, 1996, he accompanied Santos Cervantes, Bryan Apolinar, Seanido "Sam" Rey, and Juan Gonzales (Trevino's cousin), on a trip in Apolinar's car to a store to buy beer for a party they had been attending. Cervantes enticed 15-year old Linda Salinas to get into Apolinar's car with the assurance Apolinar would take Salinas to a nearby fast-food restaurant.

Instead of driving to the restaurant, Apolinar drove the group to Espada Park, where Cervantes, Apolinar, and Rey sexually assaulted Salinas while she unsuccessfully struggled to escape. Gonzales testified as the prosecution's key witness regarding the following: (1) Gonzales saw Trevino hold Salinas down while Rey raped her; (2) at one point, Trevino urged Gonzales to rape Salinas, but Gonzales refused; (3) Gonzales overheard Apolinar, Cervantes, and Trevino discuss their mutual desire not to leave any witnesses behind; (4) Gonzales heard Rey say "we don't need no witnesses" and heard Cervantes repeat the same comment, then heard Trevino reply "we'll do what we have to do"; (5) at that point, Gonzales returned to the group's vehicle; **[**4]** (5) when the others returned, Gonzales noticed that Cervantes and Trevino had blood on their shirts.

Gonzales further testified that following the incident, during the group's ensuing drive away from the scene, Cervantes made a comment that it was "neat" or "cool" about how Trevino had "snapped" Salinas's neck, and also made a comment about a knife. Trevino responded with the comments "I learned how to kill in prison" and "I learned how to use a knife in prison." Gonzales also testified that, after the incident, Trevino told Gonzales not to say anything to the police. Further, Gonzales testified that when he asked Cervantes why he killed the girl, Cervantes responded "mind your own business." Gonzales additionally testified that while he never saw Trevino or anyone else with a knife at the scene of the murder, Gonzales had seen Cervantes with a knife a few days before Salinas's murder and, two days after the murder, Cervantes told Gonzales he had broken the knife and thrown it into a river.

Salinas's body was discovered in Espada Park the day after the murder. According to expert testimony at Trevino's trial, an autopsy revealed (1) Salinas suffered two stab wounds to the left side of **[**5]** her neck, one of which was fatal; (2) Salinas sustained soft tissue damage in her vaginal area and at her anal opening; (3) Salinas sustained no internal injuries to her neck other than those caused by the two stab wounds, and there was no physical evidence anyone had attempted to "snap" her neck; and (4) there were scratches on Salinas's legs and fresh bruises on her breasts.

Other evidence during the guilt/innocence phase of Trevino's trial included testimony from forensic and DNA experts establishing (1) the examination of a pair of blue women's shorts and a pair of white **[*418]** women's panties found at the crime scene, both identified by Linda Salinas's mother as belonging to Linda, revealed the presence of polyester and cotton fibers which were consistent with a pair of slacks owned by Trevino; and (2) a blood stain found on Linda Salinas's white panties contained a mixture of the DNA from at least two persons, with DNA testing eliminating as possible sources of the DNA all but Salinas and Trevino from among those identified by Gonzales as present at the scene. [1]

The jury returned a guilty verdict. During the punishment phase of trial, the prosecution presented evidence regarding Trevino's culpability and future dangerousness, including his former arrests and his admitted membership in a violent street gang. As mitigating evidence, the defense presented Trevino's aunt, who testified generally that she knew Trevino to be a good person and that he had experienced certain difficulties in his life, including the absence of his father and his mother's alcohol problems.

The jury returned its verdict at the punishment phase of trial, finding (1) that Trevino would commit criminal acts of violence in the future which would constitute a continuing threat to society; (2) Trevino actually caused the death of Linda Salinas or, if he did not actually cause her death, he intended to kill her or another, or he anticipated a human life would be taken; and (3) there were insufficient mitigating circumstances to warrant a sentence of life imprisonment. In accordance **[**7]** with

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[1] The state's expert testified that 1 of every 2,684 members of the southwestern United States Hispanic population has the same **[**6]** DNA profile identified on the panties and that the DNA evidence did no more than rule out as possible sources of the blood the other individuals present at the scene except for Trevino and Salinas.

the jury's verdict, the state trial court imposed a sentence of death.

Trevino directly appealed his conviction and sentence, asserting 19 claims for relief. The Texas Court of Criminal Appeals affirmed his conviction and sentence. *Trevino v. State, 991 S.W.2d 849 (Tex. Crim. App. 1999)*. While his direct appeal was still pending, Trevino filed an application for state habeas corpus relief in which he urged 46 grounds for relief. The state habeas trial court held an evidentiary hearing during which Trevino's former trial counsel testified in part that (1) the defense contacted Gonzales prior to trial and knew what testimony he would give; (2) Trevino never denied participating in the offense and admitted he was present when Salinas was killed; (3) when defense counsel pressed Trevino about the facts of the offense, Trevino responded he was too stoned at the time of the offense to recall details; and (4) Trevino never denied saying "I learned to kill in prison." The state habeas trial court denied the habeas corpus application. The Texas Court of Criminal Appeals adopted the state habeas trial court's findings and conclusions and denied Trevino's state habeas corpus application. **[**8]** *Ex parte Carlos Trevino*, WR-48,153-01 (Tex. Crim. App. April 4, 2001).

On March 14, 2002, Trevino filed his original petition for federal habeas corpus relief in the district court, asserting four claims for relief. He subsequently filed, and the district court granted, an unopposed motion for stay, seeking leave to return to state court and explore a potential mental retardation claim, as well as other unexhausted claims.

Trevino then filed his second state habeas corpus application, asserting new claims that (1) his trial counsel rendered ineffective assistance by failing to adequately investigate, develop, and present available mitigating evidence during the punishment **[*419]** phase of trial; and (2) the Supreme Court's holding in *Atkins v. Virginia, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002)* precludes his execution because he suffers from fetal alcohol syndrome. The Texas Court of Criminal Appeals dismissed Trevino's second state habeas corpus application pursuant to the Texas writ-abuse statute in an unpublished, per curiam order. *Ex parte Carlos Trevino, WR-48,153-02, 2005 Tex. Crim. App. Unpub. LEXIS 260, 2005 WL 3119064 (Tex. Crim. App. November 23, 2005)*.

Thereafter, Trevino filed, and the district court granted, another motion for **[**9]** stay in which Trevino sought to return to state court and exhaust a new claim based on his federal habeas counsel's discovery in the state's files of a written witness statement dated June 12, 1996 given by Rey indicating that Cervantes, not Trevino, stabbed the victim.

Trevino then filed a motion for appointment of counsel in state court, seeking legal representation in connection with this new claim. However, for over two years the state judicial officers either failed or refused to appoint counsel for Trevino to pursue this claim, despite entreaties from the district court. The district court then lifted the stay and federal proceedings resumed.

B.

On December 8, 2008, Trevino filed his amended petition for federal habeas corpus relief, in which he asserted eight claims for relief. The district court denied relief on all claims, but granted COA on three of these claims. Trevino now appeals the district court's rejection of those three claims. Trevino also seeks COAs to authorize appeal of the claims on which the district court denied COA.

Trevino's primary assertion in the current appeal is that prosecutors failed to disclose Rey's June 12, 1996 written statement which suggested that **[**10]** Santos Cervantes stabbed Salinas and that this nondisclosure violated Trevino's constitutional rights pursuant to *Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963)*.

The record evidence indicates that this June 12, 1996 statement was the second of three signed, written statements Rey gave to police on June 12 and 13, 1996 during the investigation of Salinas's death. A report created by Detective Charles Gresham summarized all of the witness statements made during the investigation, including Rey's three statements.

In his first statement made on June 12, 1996, Rey essentially denied any involvement in the crime. Gresham's report accurately summarizes this first statement. When Gresham confronted Rey with contradictory testimony from witnesses, Rey made a second statement the same day. In the pertinent part of this second statement, Rey stated that he and his friends drove with the victim from the store to Espada Park where Santos Cervantes took the victim into the woods by himself and then returned alone about 15 minutes later. According to Gresham's summary, when Rey asked Santos Cervantes where the girl was, "Santos told him he killed her." The full written statement is lengthier **[**11]** and includes more detail. This second statement forms the basis for Trevino's *Brady*

claim on this petition.

On June 13, 1996, Gresham obtained arrest warrants for Rey and Trevino. After being taken into custody, Rey made a third signed, written statement to the police on June 13. This third statement reads in pertinent part as follows:

> This is the third statement I have given to the police. Everything I have said in my second statement about how the girl Linda ended up in the car is true. . . . **[*420]** We got to the park. Santos [Cervantes] and the girl got out of the car and went down the hill. I stayed on the top of the hill where we parked the car. Me, Bryan [Apolinar], Thate [Gonzales], and Carlos [Trevino] stayed with the car for about five minutes. All of use went down to where Santos [Cervantes] was. When I got to where Santos [Cervantes] and Linda were Linda had he[r] pants down to her ankles and her shirt was up. I could see her breasts she did not have her bra on . . . . Santos [Cervantes] was having sex with Linda . . . . After Santos [Cervantes] finished, I think Carlos [Trevino] had sex with her. Carlos [Trevino] had sex with her about ten seconds. I had sex with Linda next. I only **[**12]** went about ten seconds. After me Thate [Gonzales] had sex with Linda. He went about ten seconds. Bryan [Apolinar] had sex with Linda next he went about a minute. Santos [Cervantes] had sex with Linda again. Carlos [Trevino] and Bryan [Apolinar] at the same time told me and Thate [Gonzales] to go up and look out. Santos [Cervantes] was still having sex with Linda. Up to this point I did not see anyone hit Linda. No one yelled at her that I know of. Thate [Gonzales] and me went back up the hill to the car. Thate [Gonzales] and me got in the car. We both got in the back. They were down there about five minutes, Santos [Cervantes], Bryan [Apolinar] and Carlos [Trevino]. Thate [Gonzales] and me were wondering what was taking so long. All three of them came up the hill. I asked what happened Carlos [Trevino] said they killed her that they cut her throat. Santos [Cervantes] said they cut her throat, we killed her[.] I asked how they said we cut her throat. Carlos [Trevino] said don't tell anybody. Carlos [Trevino] started to brush his shoes off with his hand, I saw they had blood on them.

(underlined emphasis added). Gresham's report included an accurate summary of Rey's third statement. The **[**13]** summary contained the following description of the most relevant part of Rey's third statement:

> Seanido [Rey] stated Santos [Cervantes], Bryan [Apolinar], and Carlos [Trevino] then returned to the car and when he asked Carlos [Trevino] what had happened he was told they had cut her throat. He reported he observed Carlos [Trevino] brushing his shoes off with his hand and he could see there was blood on them. [2]

[*421] Following the trial of this case, Rey pleaded guilty to murder and is currently serving a 50-year sentence. In connection with his guilty plea, Rey stipulated to the facts contained in Gresham's police report and his witness statements, all three of which were attached to his stipulation. *See State v. Rey*, No. 97-CR-1717C (290th Dist. Ct., Bexar County, Tex. Mar. 25, 1998) (factual **[**15]** stipulations and attached exhibits). [3]

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[2] According to Gresham's report, Rey's third statement was largely consistent with Apolinar and Cervantes' statements. Gresham summarized Apolinar's statement as follows:

> Bryan [Apolinar] reported Carlos [Trevino] started jerking on her and he could tell he was trying to break her neck. Bryan [Apolinar] stated at this time he couldn't handle it any more and he walked back to the car. He stated about a minute later they all come back up the slope except Linda [Salinas] and he could see Carlos [Trevino] had blood all over him that he was wiping off with a shirt. Bryan [Apolinar] stated he could also see Carlos [Trevino] had a knife that he was also wiping off and that no one else had blood on them.

Apolinar was convicted of sexually assaulting Salinas. In upholding Apolinar's conviction, **[**14]** the Texas Court of Appeals took note of Apolinar's statement that he witnessed Trevino "stab the victim." *Apolinar v. Texas, No. 04-99-00644-CR, 2000 Tex. App. LEXIS 5465, 2000 WL 1210922, *1 (Tex. Ct. App. Aug. 16, 2000)* (unpublished).

Cervantes pleaded guilty to Salinas's murder. Gresham's summary of Cervantes's statement contains a similar description of the crime:

> He reported he then see Carlos [Trevino] grab up Linda and he had her by the neck with both arms and was pushing with them. Santos [Cervantes] stated Carlos [Trevino] put her down and Sam [Rey] put his foot on her neck and told her 'don't move bitch.' Santos [Cervantes] stated he could hear gurgling noises coming from Linda while this was going on. He stated he then saw Sam [Rey] move his foot and Carlos [Trevino] grabbed Linda [Salinas] up by the hair and stabs her twice.

[3] This appeal has been complicated by the fact that Trevino's counsel placed Rey's second written statement into the record, but Rey's third written statement inexplicably does not appear

At some point during the instant action, Trevino's federal habeas counsel discovered Rey's second June 12, 1996 written statement. The full, signed statement had been kept in one of the state's separate files and, thus, had not been previously turned over to Trevino's lawyers. Nevertheless, the original prosecutors in Trevino's case have provided affidavits in connection with this action asserting that they provided Trevino's trial counsel with a copy of Gresham's entire report before trial, including Gresham's summary of Rey's three statements. Trevino's two trial attorneys, Gus Wilcox and Mario Trevino, have provided counter-affidavits stating that they do not recall ever seeing **[**17]** Gresham's summaries of Rey's statements.

However, the record of Trevino's first state habeas proceeding is inconsistent with the affidavits of Trevino's attorneys. During that proceeding, Wilcox and Mario Trevino both gave testimony strongly suggesting that they had evaluated the witness statements in Gresham's report. Mario Trevino testified that he had been given access to statements of the prosecution's potential witnesses, as well as various police reports, and that he was aware of at least "two guys that gave statements that were pointing the finger to Mr. Trevino." Wilcox went further and testified that because he knew that *all* of the state's potential witnesses would inculpate Trevino, Wilcox had adopted a trial strategy of not calling any witnesses while instead relying on cross-examination in an attempt to create a reasonable doubt. The potential witness list that prosecutors provided to Trevino's attorneys prior to trial included Rey. [4]

[*422] On this petition, Trevino relies on Rey's second written statement to argue that if that statement had been disclosed, the defense could have shown that Cervantes, rather than Trevino, killed the victim. Trevino asserts that the alleged nondisclosure of the entire written statement had a prejudicial effect at both the guilt and sentencing stages of his trial in violation of his rights under *Brady*.

Trevino has also **[**19]** raised various other claims, including a claim that his trial counsel failed to effectively investigate and present available mitigating information during the sentencing phase of Trevino's trial. As discussed further below on a claim-by-claim basis, the district court rejected each of Trevino's claims for relief.

II.

HN1[↑] Under the Antiterrorism and Effective Death Penalty Act ("AEDPA"), "[b]efore an appeal may be

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in the record on appeal. The district court, therefore, did not have the benefit of reviewing Rey's third written statement. Nevertheless, all three of Rey's signed, written statements appear in the record of Rey's murder case in Bexar County district court. The existence and the content of these statements are beyond dispute and, moreover, our review of Trevino's *Brady* claim is *de novo*. Therefore, we take judicial notice of Rey's third written statement. *See Brown v. Lippard, 350 F. App'x 879, 883 n.2 (5th Cir. 2009)* (taking judicial notice of state courts records outside the record on appeal). This is consistent with our routine practice in *habeas* appeals of taking judicial notice of all related proceedings brought by the appellant, including state proceedings, "even when the prior state case is not made a part of the record on appeal." *See Moore v. Estelle, 526 F.2d 690, 694 (5th Cir. 1976)*. If we failed to take judicial notice of Rey's third written statement, **[**16]** the court's understanding of the record evidence would be incomplete. *See id.* ("For a proper understanding of protracted litigation we may draw upon the records of all the preceding cases."). 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.

[4] The following exchange with Wilcox took place at the state habeas proceeding:

> Q. [W]hat theory of or what defensive posture did you decide to take in front of the jury at guilt/innocence?
>
> A. Well, I think what we were hoping to be able to somehow **[**18]** to do, is somehow show that he was merely present and did nothing to commit the crime.
>
> Q. In order to do it through a witness, you would have had to call one of the State's potential witnesses, right?
>
> A. Well, right. That's part of the problem. So, I mean, I was going to - - We would try and develop that through cross-examination at best, really. That's what we were going to have to do.
>
> Q. Because, correct me if I'm wrong, but if you would have called any of those witnesses, they would have put your client at the scene, right?
>
> A. That's right.
>
> Q. And hence corroborated the witnesses called by the State; correct?
>
> A. Well, yeah.
>
> Q. So you made a strategic decision to try to present a case of reasonable doubt through the cross examination of the State's witnesses?
>
> A. That's basically it.

entertained, a prisoner who was denied habeas relief in the district court must first seek and obtain a COA . . . ." *Miller-El v. Cockrell, 537 U.S. 322, 335, 123 S. Ct. 1029, 1039, 154 L. Ed. 2d 931 (2003)*; *28 U.S.C. § 2253(c)(1)*. Trevino is entitled to a COA only if he can make "a substantial showing of the denial of a constitutional right." *Miller-El, 537 U.S. at 336, 123 S. Ct. at 1039* (citing *§ 2253(c)(2)*). To meet this standard, Trevino must demonstrate "that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that issues presented were adequate to deserve encouragement proceed further." *Id.* (internal quotations and citations omitted); *accord Tennard v. Dretke, 542 U.S. 274, 288, 124 S. Ct. 2562, 2572, 159 L. Ed. 2d 384 (2004)*.

HN2[↑] In **[**20]** making a COA inquiry, we must consider that AEDPA required the district court to defer to the state court's resolution of Trevino's claims, except in limited circumstances. *Foster v. Quarterman, 466 F.3d 359, 365 (5th Cir. 2006)*. Under AEDPA, federal courts may not grant habeas relief with respect to a claim adjudicated on the merits in state court unless that adjudication (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings. *28 U.S.C. § 2254(d)(1)-(2)*; *see also Penry v. Johnson, 532 U.S. 782, 792, 121 S. Ct. 1910, 1918, 150 L. Ed. 2d 9 (2001)*. We "must presume that the state court's factual findings are correct unless [Trevino] meets his burden of rebutting that presumption by clear and convincing evidence." *Reed v. Quarterman, 555 F.3d 364, 368 (5th Cir. 2009)* (citing *28 U.S.C. § 2254 (e)(1)*).

[*423] *HN3*[↑] "[A]bsent special circumstances, a federal habeas petitioner must exhaust his state remedies by pressing his claims in state **[**21]** court before he may seek federal habeas relief." *Orman v. Cain, 228 F.3d 616, 619-20 (5th Cir. 2000)*; *28 U.S.C. § 2254(b)(1)*. Special circumstances permitting federal courts to review a claim before it has been exhausted in state court include (1) when there is an absence of available state corrective process; or (2) when circumstances exist that render such process ineffective to protect the federal habeas petitioner's rights. *28 U.S.C. § 2254(b)(1)(B)(i)-(ii)*.

HN4[↑] In reviewing an issue on which the district court granted COA, "we review the district court's findings of fact for clear error and its conclusions of law *de novo*, applying the same standards to the state court's decision as did the district court." *Busby v. Dretke, 359 F.3d 708, 713 (5th Cir. 2004)*.

III.

We first address the five issues on which the district court denied COA.

A.

Trevino first argues that the state violated his constitutional rights under *Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963)* by failing to disclose Rey's second written statement dated June 12, 1996. He contends that had the state properly disclosed this statement, he likely could have established reasonable doubt regarding his guilt.

Because the state **[**22]** courts never effectively addressed the merits of this issue or dismissed it as procedurally defaulted, the district court reviewed this claim *de novo* pursuant to *28 U.S.C. § 2254(b)(1)*. [5] The district court determined that unresolved questions of fact exist as to whether the government suppressed or properly disclosed Rey's statement, but concluded that the statement did not meet *Brady's* materiality requirement with regard to the guilt/innocence phase of the trial. On our own *de novo* review, we agree with the district court regarding the statement's lack of materiality.

HN5[↑] There are three basic elements to a *Brady* claim: (1) the evidence must be favorable to the accused, either because it is exculpatory or because it may be used as impeachment evidence; (2) the evidence must have been suppressed by the state; and (3) the evidence must be "material." *Banks v. Dretke,*

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[5] The district court explained that when Trevino's federal habeas counsel discovered Rey's statements, the district court stayed its proceedings to allow Trevino to pursue the *Brady* claim in state court. The state authorities, however, failed or refused to appoint counsel for Trevino, despite explicit entreaties from the district court. The district court held that the state's failure or refusal to appoint counsel rendered the state process "ineffective" to protect Trevino's constitutional rights, pursuant to ***28 U.S.C. § 2254(b)(1)***, thus permitting the district court to review the claim without it having first been adjudicated **[**23]** in state court. *See Trevino, 678 F. Supp. 2d at 458*. We agree that, under the circumstances, the district court was authorized under ***28 U.S.C. § 2254(b)(1)*** to review the claim *de novo*.

540 U.S. 668, 691, 124 S. Ct. 1256, 1272, 157 L. Ed. 2d 1166 (2004). Evidence is "material," i.e., prejudicial, when there exists a "reasonable probability" that had the evidence been disclosed the result at trial would have been different. Banks, 540 U.S. at 698-99, 124 S. Ct. 1276; see also Miller v. Dretke, 404 F.3d 908, 913-16 (5th Cir. 2005).

1.

As an initial matter, although the district court did not resolve the factual issues **[*424]** surrounding whether the state suppressed Rey's second written statement, the record evidence strongly indicates that the prosecution did not suppress the statement. [6] Given the evidence discussed above indicating that the prosecution disclosed Gresham's accurate summary of Rey's three statements to Trevino's **[**24]** attorneys prior to trial, this should have put defense counsel on notice that Rey had made one statement to police suggesting that Cervantes stabbed the victim. The onus was then on Trevino's lawyers to request a copy of the full statement. *See generally* Rector v. Johnson, 120 F.3d 551, 558 (5th Cir. 1997) (failure to discover material evidence must not be the result of the lack of due diligence). Regardless, even assuming that the state failed to properly disclose Rey's second written statement, this statement does not meet the requisite standard of materiality for the following reasons.

2.

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 [7] to suggest that Cervantes **[**25]** was solely responsible for Salinas's murder, the prosecution undoubtedly would have introduced Rey's third statement. [8] 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. Rey's third statement contains the following testimony: (1) Trevino raped Salinas; (2) Trevino, Cervantes, and Apolinar were present when Salinas was killed; (3) when Trevino, Cervantes, and Apolinar returned to the car without Salinas, Rey "asked what happened [and] Carlos [Trevino] said they killed her that they cut her throat"; (4) Trevino had blood on his shoes; and (5) Trevino said "don't tell anybody."

In the extremely unlikely event that Rey had attempted to testify at Trevino's trial to the facts contained in his second statement, the prosecution would have undoubtedly impeached Rey with his third statement to the police. Accordingly, it is very clear that even if Trevino's counsel had been permitted to use Rey's second written statement at trial, this would have failed to benefit Trevino. To the contrary, admission of Rey's written statements would have been extremely damaging to Trevino's interests.

[*425] 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 **[**27]** had been disclosed. In fact, quite the opposite is true—it is almost certain that the outcome would have been the same.

3.

Additionally, we note our agreement with the district court that the evidence presented at Trevino's trial supports the jury's verdict of conviction under Texas's law of the parties. [9] As explained, Rey's written

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[6] The state argued that Rey's written statement was available to the defense under the state's "open-file" policy. The district court held that it need not resolve the factual issues regarding whether the state had suppressed the statement given the district court's conclusion that the statement was not material.

[7] Rey's second written statement would likely have been inadmissible hearsay. *See* **FED. R. EVID. 801(c)**; Tex. R. Evid. 801(d). In this circuit, HN6[↑] inadmissible evidence may be material under *Brady* if it somehow leads to other exculpatory evidence; the key is still "whether the disclosure of the evidence **[**26]** would have created a reasonable probability that the result of the proceeding would have been different." Felder v. Johnson, 180 F.3d 206, 212 (5th Cir. 1999).

[8] *See, e.g.*, Fed. R. Evid. 806 (HN7[↑]) "When a hearsay statement . . . has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness . . . .); *accord* Tex. R. Evid. 806

[9] Such law, according to the instruction given to the jury, provides, *inter alia*, the following:

> [A] person is criminally responsible as a party to an

statements cast no doubt on the substantial, uncontroverted evidence presented during the guilt/innocence phase of the trial supporting the conclusion that Trevino acted with intent to commit the offense and aided or attempted to aid other members of the group in commission of Salinas's murder. 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.

Jurists of reason cannot find the district court's denial of Trevino's *Brady* claim on these grounds debatable. *See Miller, 404 F.3d at 916* (denying COA in capital murder case regarding suppression of evidence that defendant had not shot the victim because "uncontroverted, overwhelming evidence" showed that defendant participated in the crime and was, thus, guilty under Texas's law of the parties). We, therefore, affirm the district court's denial of a COA on this issue.

B.

We next turn to Trevino's request for COA regarding the district court's denial of his claim for ineffective assistance of counsel during the guilt/innocence phase of trial based on his counsel's failure to discover Rey's **[**29]** second written statement. It is clear that this argument fails for the same reasons described above.

HN8[↑] To prove ineffective assistance of counsel, Trevino must generally show (1) that his counsel's performance was deficient; and (2) that this deficiency prejudiced the defendant. *Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2059, 80 L. Ed. 2d 674 (1984)*. Trevino cannot show prejudice based on his counsel's failure to uncover Rey's second written statement for the same reasons that he cannot show that the statement was material under *Brady*. The record evidence suggests, moreover, that because Trevino's attorneys had access to Gresham's accurate summaries of all three of Rey's witness statements, they appreciated the import of Rey's third statement. The record demonstrates that Trevino's attorneys reasonably believed all of the state's potential witnesses—including Rey—would inculpate Trevino if called to testify. This is why **[*426]** Trevino's attorneys did not attempt to call Rey or any other witnesses. Nothing in the record remotely suggests that disclosure of the full text of Rey's second written statement would have changed this strategic calculation made by Trevino's attorneys, particularly **[**30]** in light of Rey's third statement. Jurists of reason cannot debate the district court's conclusion on this issue. Therefore, we affirm the district court's denial of a COA regarding this issue.

C.

We next consider Trevino's argument that a COA should issue regarding the district court's rejection of Trevino's claim that his trial counsel failed to investigate and develop mitigating evidence during the sentencing phase of trial. The district court held that this claim was procedurally defaulted because Trevino failed to raise it during his first state habeas proceeding, which resulted in dismissal by the Texas Court of Criminal Appeals on the basis of Texas's "abuse of the writ" doctrine when Trevino presented the issue in his second state habeas suit. *See Texas Code of Crim. P. Ann. Art. 11.071 § 5(c)* (2011).

HN9[↑] A claim is procedurally defaulted when a state court clearly and expressly bases its dismissal of a claim on a state procedural rule and that rule provides an independent and adequate ground for dismissal. *Coleman v. Thompson, 501 U.S. 722, 729, 111 S. Ct. 2546, 2553-54, 115 L. Ed. 2d 640 (1991)*. When such a dismissal based on independent and adequate state law grounds has occurred, we do not reach **[**31]** the merits of the federal habeas claim. *Id.*

The district court rightly observed that we have expressly held *HN10*[↑] "Texas's abuse of the writ doctrine is a valid state procedural bar foreclosing federal habeas review." *Coleman v. Quarterman, 456 F.3d 537, 542 (5th Cir. 2005)*; *accord Hughes v. Quarterman, 530 F.3d 336, 342 (5th Cir. 2008)*. Moreover, we recently addressed a "perfunctory" dismissal order by the Texas Court of Criminal Appeals—similar to the order dismissing Trevino's second state habeas petition—that cited *Article 11.071, Section 5 of the Texas Code of Criminal Procedure* in dismissing a claim for ineffective assistance of counsel,

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> offense if the offense is committed by his own conduct, or by the conduct of another for which he is criminally responsible, **[**28]** or both. Each party to an offense may be charged with commission of the offense. . . A person is criminally responsible for an offense committed by the conduct of another if acting with intent to promote or assist the commission of the offense he solicits, encourages, directs, aids or attempts to aid the other person to commit the offense.

See Trevino, 678 F. Supp. 2d 445 (quoting and explaining the instructions given to the jury regarding Texas's law of parties); *see also TEX. PENAL CODE § 7.02* (2011).

without further explanation. Balentine v. Thaler, 626 F.3d 842, 849-57 (5th Cir. 2010) (panel rehearing). We held that this dismissal order could not be read as having reached the merits of the federal claim, but rather must be viewed as resting on independent and adequate state law grounds for purposes of procedural default. Id. Accordingly, we agree with the district court that Trevino's claim for ineffective assistance of counsel, which the Texas Court of Criminal Appeals dismissed on abuse-of-writ grounds under Section 5 of Article 11.071 of the **[**32]** Texas Code of Criminal Procedure, was dismissed on independent and adequate state grounds and is, thus, procedurally defaulted. Reasonable jurists cannot disagree with the district court's procedural ruling in this regard. We, therefore, affirm the district court's denial of COA for this claim. [10]

D.

We also affirm the district court's denial of COA regarding Trevino's claim that the factors in Texas's capital sentencing scheme—such as "future dangerousness"—are vaguely defined and fail to properly channel the jury's discretion. As **[*427]** the district court correctly held, we have repeatedly rejected similar arguments. *See, e.g.*, Leal v. Dretke, 428 F.3d 543, 553 (5th Cir. 2005) **[**33]** (citing numerous cases rejecting vagueness challenges to the terms of Texas's capital sentencing scheme). Because jurists of reason cannot debate that the district court correctly held that this claim has no merit under binding precedent, we affirm the district court's denial of a COA.

E.

Finally, we affirm the district court's denial of a COA regarding Trevino's argument that Texas procedure unconstitutionally prevented the trial court from informing the jury of the effect of a hung jury during Trevino's sentencing. The district court noted first that Trevino raised this same claim during his direct appeal in state court and during his first state habeas proceeding; the Texas courts rejected the claim. The district court also correctly explained that the Supreme Court and this court have rejected similar claims numerous times. *See* Jones v. United States, 527 U.S. 373, 382, 119 S. Ct. 2090, 2098, 144 L. Ed. 2d 370 (1999) (holding that the *Eighth Amendment* does not require a capital sentencing jury to be instructed regarding the effect of a "breakdown in the deliberative process"). [11] Reasonable jurists cannot debate the district court's disposition of this issue. Thus, we affirm the district court's denial **[**34]** of a COA on this ground.

IV.

We next consider the three claims on which the district court granted COA.

A.

The district court granted COA on Trevino's *Brady* claim regarding the prosecution's alleged suppression of Rey's second written statement during the punishment phase of his trial. Trevino argues that had the prosecution disclosed Rey's second written statement, it is reasonably probable that the jury would not have sentenced him to death. For substantially the same reasons that we reject this claim with regard to the guilt/innocence phase of trial, we hold that the government's alleged suppression of Rey's second written statement was not material to the punishment phase of Rey's trial under *Brady*.

Admission of Rey's written statements at the sentencing phase of trial would not have tended to prove that Trevino lacked culpability in the stabbing death of Salinas. As explained, Rey **[**35]** contradicted all of the salient facts of his second written statement in the third written statement he made to the police after his arrest. Subsequently, Rey pleaded guilty to Salinas's murder, stipulating to the truth of his third statement. Whatever probative value the second written statement may have had, therefore, was negated by Rey's third statement and, later, by his guilty plea. As such, a reasonable jury could not have given Rey's second statement any credence during sentencing.

Accordingly, Rey's second written statement was not material to Trevino's sentence because there is no "reasonable probability" that the prosecution's disclosure of the statement would have changed the outcome of the sentencing phase of Trevino's trial.

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[10] The district court granted COA on the issue of whether Trevino could meet the "fundamental miscarriage of justice" exception to the procedural default of his ineffective-assistance claim, and we will address that issue separately below.

[11] *See also* Turner v. Quarterman, 481 F.3d 292, 300 (5th Cir. 2007) (recognizing that precedent precludes any argument that the ***Eighth Amendment*** or the ***Due Process clause of the Fourteenth Amendment*** requires a Texas capital sentencing jury to be informed of the effect of failure to reach a unanimous verdict).

[*428] B.

The district court granted COA regarding Trevino's claim that he received ineffective assistance of counsel based on his trial attorneys' failure to discover and present Rey's second written statement during the sentencing phase of trial. Trevino argues that such failure meets the standard for prejudice established by the Supreme Court. *See Strickland, 466 U.S. at 687, 104 S. Ct. at 2064*. This claim has no merit for the reasons stated above. The record **[**36]** evidence clearly shows that Rey's second statement had no materiality and that, accordingly, Trevino's attorneys' alleged failure to seek out the full statement and attempt to present it to the jury did not prejudice Trevino's interests during sentencing under the meaning of *Strickland*.

C.

Finally, the district court granted COA regarding Trevino's claim that it would be a "fundamental miscarriage of justice" if Trevino were not permitted to pursue his claim that his trial counsel failed to investigate and present compelling mitigating evidence at the sentencing phase of trial. As explained above, we agree with the district court that Trevino's ineffective-assistance claim regarding his counsel's alleged failure to discover and use "new," potentially mitigating evidence is procedurally barred under Texas's abuse-of-writ doctrine. Thus, the only issue on which the district court granted COA is whether Trevino's claim qualifies for the narrow exception to the prohibition on habeas review of procedurally barred claims when there exists a "fundamental miscarriage of justice." *Coleman v. Thompson, 501 U.S. 722, 749-50, 111 S. Ct. 2546, 2564-65, 115 L. Ed. 2d 640 (1991)*.

HN11[↑] To satisfy the "miscarriage of justice" **[**37]** test, a petitioner must supplement his constitutional claim with a colorable showing of "actual innocence." *Sawyer v. Whitley, 505 U.S. 333, 335-36, 112 S. Ct. 2514, 2519, 120 L. Ed. 2d 269 (1992)*. In the context of the sentencing phase of a capital murder trial, the Supreme Court has held that a showing of actual innocence is made when a petitioner shows by clear and convincing evidence that, but for constitutional error, no reasonable juror would have found petitioner *eligible* for the death penalty under applicable law. *Id. at 346-48, 112 S. Ct. at 2523*. This "actual innocence" inquiry, thus, must be carefully focused on mitigating evidence related to the legal factors that render a capital defendant eligible for a death sentence. *Rocha v. Thaler, 619 F.3d 387, 405 (5th Cir. 2010)*. We recently explained this actual-innocence inquiry at length:

> *HN12*[↑] When a claim of actual innocence contests a sentence of death, the habeas petitioner's claim must tend to negate not just the jury's discretion to impose a death sentence but the petitioner's very eligibility for that punishment. That is, a habeas petitioner who is unquestionably eligible for the sentence received can never be actually innocent of the death penalty. **[**38]** This is so because late-arriving constitutional error that impacted only a jury's sentencing discretion is not sufficiently fundamental as to excuse the failure to raise it timely in prior state and federal proceedings. The actual innocence requirement must, then, focus on those elements that render a defendant eligible for the death penalty, and not on additional mitigating evidence that was prevented from being introduced as a result of a claimed constitutional error.

Id. at 405 (internal quotations and citations omitted). Thus, if a defendant is eligible for the death penalty, the actual-innocence inquiry does not take into account the **[*429]** entire universe of potential mitigating evidence that a defendant may seek to present that could have affected a jury's discretion to impose the death penalty. *Id.* [12]

The "new" mitigating evidence on which Trevino relies relates primarily **[**39]** to his difficult, abusive childhood and his struggles with alcohol and illegal substances. [13]

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[12] *See also Haynes v. Quarterman, 526 F.3d 189, 195 (5th Cir. 2008)* ("The 'actual innocence' requirement must focus on those elements that render a defendant eligible for the death penalty, and not on additional mitigating evidence that was prevented from being introduced as a result of claim of constitutional error.").

[13] As described by the district court, this "new" mitigating evidence can be summarized as follows:

> (1) the petitioner's mother was an emotionally unstable, physically abusive alcoholic who abused alcohol throughout her pregnancy with petitioner; (2) petitioner weighed only four pounds at birth and required considerable hospital care during his first few weeks of life; (3) for the rest of his life, petitioner suffered from the deleterious effects of Fetal Alcohol Syndrome, as well as **[**40]** his mother's physical and emotional abuse; (4) petitioner 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; (5) petitioner was exposed to alcohol and drug abuse

The subject matter of this evidence is somewhat cumulative of the testimony of Trevino's aunt, who testified that Trevino had experienced difficulties involving the absence of his father and his mother's alcohol problems. But 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 had 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.

The evidence presented during the guilt/innocence phase of trial, combined with the evidence presented during the sentencing phase, rendered Trevino legally eligible for the death penalty. Trevino became eligible for the death penalty during the sentencing phase on the jury's affirmative answer to the special question asking whether Trevino represented a continuing threat to society. *See* Tex. Code Crim. P. Art. 37.071 § 2(b) (2011). [14] The potential mitigating evidence Trevino discusses would **[**41]** have had no appreciable effect on the jury's decision regarding this future dangerousness question.

Ample evidence was presented during the guilt/innocence phase of trial entitling the jury to determine that Trevino represented a continuing threat to society. Much of the testimony arrayed against Trevino indicated future dangerousness, including Gonzales's testimony that Trevino made callous, menacing comments following Salinas's murder such as "I learned how to use a knife" and "I learned how to kill in prison." The prosecution also presented additional evidence regarding Trevino's future dangerousness such as Trevino's past convictions for various crimes, **[*430]** including unlawful possession of a handgun; his membership in a notorious street gang; and tattoos indicating that he closely identified himself with this gang.

None of the new mitigating evidence Trevino discusses—which **[**42]** relates primarily to the circumstances of his childhood—would have been relevant to the jury's consideration of Trevino's future threat to society. As the district court pointed out, if anything, this type of mitigating evidence is "double-edged," in that it could just as easily be interpreted to support the conclusion that Trevino represents a future danger as it could be interpreted to undermine such a conclusion.

Furthermore, Trevino's argument that this new mitigating evidence would have rendered him ineligible for the death penalty pursuant to the jury's second special question at the sentencing phase is without merit. *HN14*[↑] In Texas's capital sentencing scheme, the second special question permits the jury to make an individualized determination of the defendant's moral culpability by considering the circumstances of his offense as well as his character and background. *See* Tex. Code Crim. P. Art. 37.071 § 2(e)-(f) (2011). This question implicates the jury's discretion to impose the death penalty and, thus, is viewed as a "selection" issue rather than an "eligibility" issue in the parlance of the Supreme Court's death-penalty jurisprudence. *See* Tuilaepa, 512 U.S. at 971-73, 114 S. Ct. at 2634-35. **[**43]** As with other "actual innocence" claims that we have rejected, Trevino's argument simply "reduces to an assertion that mitigating evidence could have influenced the jury's discretion in considering a sentence of death; he does not argue that this evidence would have rendered him ineligible for the death penalty." Rocha, 619 F.3d at 405. [15]

Accordingly, Trevino fails to satisfy the actual-innocence standard. The "fundamental miscarriage of justice" exception to the prohibition against habeas review of procedurally barred claims, therefore, does not apply to Trevino's claim regarding ineffective assistance of counsel.

> from an early age and began abusing both alcohol and marijuana himself before he reached age twelve; (6) petitioner became involved in street gangs and street crime by age twelve; (7) petitioner experienced a lifetime of adversity, disadvantage, and disability; (8) petitioner attended school irregularly and performed poorly in school; and (9) petitioner suffers from impaired cognitive abilities.

Trevino, 678 F. Supp. 2d at 467.

[14] *HN13*[↑] A criminal defendant's eligibility for the death penalty requires the jury to "convict the defendant of murder and find one 'aggravating circumstance' (or its equivalent) at either the guilt or penalty phase." Tuilaepa v. California, 512 U.S. 967, 972, 114 S. Ct. 2630, 2634-35, 129 L. Ed. 2d 750 (1994) (internal citation omitted).

[15] *See also* Haynes, 526 F.3d at 195 ("The evidence that was allegedly not presented during Haynes's sentencing deals exclusively with mitigating evidence and this evidence does not show that Haynes was actually innocent of a death-eligible offense.").

V.

For **[**44]** the foregoing reasons, we conclude that a COA is not warranted for any of the five issues that Trevino has raised on this petition; moreover, the district court correctly denied relief on the three claims on which the district court granted COA. Accordingly, we AFFIRM the district court's order denying habeas relief to Trevino.

Dissent by: DENNIS

Dissent

DENNIS, Circuit Judge, dissenting.

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, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (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, 104 S. Ct. 2052, 80 L. Ed. 2d 674 [*431] (1984)*. **[**45]** 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 **[**46]** 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 **[**47]** 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. Accordingly, I respectfully dissent.

I.

Carlos Trevino was convicted by a Texas jury of the June 9, 1996, sexual assault and murder of Linda Salinas in San Antonio, and sentenced to death. The state's case at the guilt-innocence phase of Trevino's trial hinged on the testimony of Juan Gonzales. He testified that Trevino and three other young men, Santos Cervantes, Sienido (Sam) Rey, and Bryan Apolinar picked up Salinas at a gas station and drove her to Espada Park where they sexually assaulted her; that Cervantes alone had lured Salinas into the car; that Gonzales had seen Cervantes with a knife before

Salinas' murder and Cervantes told Gonzales that he **[**48]** had disposed of the knife after Salinas' murder; that Gonzales heard Cervantes say something about a knife in the car after Salinas was killed; and that **[*432]** Gonzales believed Cervantes killed Salinas. Gonzales also testified that after the sexual assault, he heard Cervantes and Apolinar say, "we don't need no witnesses," and Trevino say, "we'll do what we have to do"; that he left before Salinas was stabbed, but shortly afterwards, he saw blood on Trevino and Cervantes; and that as the five men drove away from the park, Cervantes said it was "cool" or "neat" how Trevino had "snapped" Salinas' neck, and Trevino responded that he had "learned how to kill in prison." The prosecutor relied heavily on Gonzales' testimony about Trevino's statement in the car to argue to the jury that Trevino was the actual killer. At the sentencing phase of the trial, the state again rested its case heavily on Gonzales' testimony that after Salinas' murder Trevino said that he had "learned how to kill in prison."

On March 25, 1998—nearly nine months after Trevino's conviction—Rey pleaded guilty to murder and received a fifty-year sentence. [1] On May 5, 1998, Cervantes pleaded guilty to capital murder and received **[**49]** a life sentence. [2] Apolinar went to trial and was convicted of aggravated sexual assault. [3] Gonzales, the only one of the group who testified against Trevino, was not charged.

During his federal habeas proceedings, Trevino's counsel uncovered a sworn, written statement that Sam Rey gave to Detective Barry Gresham, the lead detective investigating Salinas' murder, on June 12, 1996, three days after Salinas was killed. That statement, which is attached to Trevino's federal habeas petition, reads in its entirety [4]:

> My name is Seanido **[**50]** Rey I was born on 07-29-75. I am 20 years old. I live at 1131 San Fernando with my sister the phone number is 226-0391.
> I have already given Det. Gresham a statement, but I would now like to tell the truth of what really happened on last Sunday night.
>
> Everything I said was true about what happened up to the part when we were at the Pic Nic. While we were there I saw a girl talking on the telephone. Santos was talking to her. Det. Gresham showed me a picture of a girl and this was the same girl I saw on the telephone. I signed and dated this photograph. When I went to the car the girl Det. Gresham told me was named Linda came also she was with Santos. We all got in the car with Linda. Linda was in the front right seat sitting in Santo's lap. [Bryan [5]] was driving the car and I was sitting in the back of the **[*433]** car in the middle. Carlos was sitting to the right of me and [Juan [6]] was on my left. When we left the store Linda and Santos was kissing. [Bryan] went to Mission Rd. and went towards Military Hwy. We then went by a park called Espada. Before we got to the park I saw Santos throw a bra to [Bryan] that Linda had taken off. [Bryan] threw the bra out of the car before we stopped. [Bryan] **[**51]** then parked the car in a parking lot. The whole time we were driving out there Santos and Linda were making out. When we stopped the car Santos and Linda got out. I saw they were holding hands. I knew that he was going to have sex with her. I saw them walking towards the woods. I saw they walked down toward the creek. We all got out and was standing against the car listening to the radio. I never heard any noise

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[1] *See State v. Rey*, No. 97-CR-1717C (290th Dist. Ct., Bexar Cnty., Tex. Mar. 25, 1998) (criminal docket sheet entry); *see also* Tex. Pen. Code § 19.02.

[2] *See State v. Cervantes*, No. 97-CR-1717B (290th Dist. Ct., Bexar Cnty., Tex. May 5, 1998) (criminal docket sheet entry); *see also* Texas Pen. Code § 12.31 ("An individual adjudged guilty of a capital felony in a case in which the state does not seek the death penalty shall be punished by imprisonment in the Texas Department of Criminal Justice for . . . life without parole.").

[3] *See* Apolinar v. State, No. 04-99-00644-CR, 2000 Tex. App. LEXIS 5465, 2000 WL 1210922 (Tex. Crim. App. Aug. 16, 2000) (unpublished); *see also* Tex. Pen. Code § 19.03.

[4] The statement is quoted as it appears in the record, including any orthographic irregularities.

[5] Rey referred to the owner of the car as "Jason" in his first statement to Det. Gresham and in this statement. In a later statement he "stated [that] he had been confused about the name of the driver of the car and remembered now the driver's name is Bryan not Jason." In order to avoid confusion, I have changed "Jason" in Rey's quoted statement to "[Bryan]."

[6] In several of the suspects' statements, Juan Gonzales was referred to as "Thatie" or "Tati." *See* Trevino v. Thaler, 678 F. Supp. 2d 445, 460 (W.D. Tex. 2009). **[**53]** Again, to avoid confusion, I have changed "Thatie" in Rey's quoted statement to "[Juan]."

> coming from the creek. About ten or fifteen minutes later Santos came back from the creek. I think when all this was happening was about 10:30 or so at night but I didn't look at a watch. When Santos comes back up the creek I asked him where the girl was at. He told me "Fuck that bitch, she didn't want to give it up so I stabbed her". I asked him why he did that and I don't remember what he said. Everybody else was close when he said this and I think they heard him also. We then just all get back into the car and leave. We then went to Santo's friends house. On the way everbody was quiet and was not talking about what happened. Santo's friends house is on S. Flores street somewhere but I'm not sure where. When we get to the house Santos tells us to just be quiet about what **[**52]** had happened. I was just in shock about what had happened and didn't say anything. The house is gang house and there was alot of guys and girls there just hanging out. We just drank beer and hung out. We stayed there to about 3:00 in the morning and then [Bryan] took me [Juan] and Carlos back to Carlos's house. [Bryan] and Santos then left they didn't say where they were going. I don't know Santos last name but I have agreed to take you to the house that we picked him up at. This guy named [Bryan] is a friend of [Juan] I don't know his last name or where he lives.
>
> I have read the above statement and It's true and correct.

Also attached to Trevino's federal habeas petition are affidavits from Trevino's two trial attorneys in which they swore that they had never seen this written statement by Rey before Trevino's trial. One of the attorneys swore that Rey's statement "was never produced or shown to us" before Trevino's trial; and the other attorney swore, "I do not recall seeing . . . the June 12, 1996 statement of Seanido Rey prior to 2006, and certainly never saw [it] prior to trial in June 1997."

The habeas record in this case also includes a report by Det. Gresham, dated a little more than a month after the crime. The report details Det. Gresham's investigation of Salinas' murder, and includes a summary of three purported statements by Rey. Det. Gresham's summary of Rey's purported first statement says that Rey "read the statement he had given me and signed it," indicating that a separate written statement existed. The summary of Rey's purported second statement provides a brief recapitulation of the sworn, written statement reproduced above, but **[*434]** does not include the rich detail of Rey's written statement. For **[**54]** instance, Det. Gresham's summary leaves out critical facts, such as Rey's statement that "[o]n the way [to Santos' friend's house] ever[y]body was quiet and was not talking about what happened," which contradicts Gonzales' testimony that Trevino had made incriminating statements during that car ride. There is also nothing in Det. Gresham's report that suggests that Rey swore to, and signed a separate, full written statement—as opposed to simply giving Det. Gresham an oral statement. Det. Gresham's summary of Rey's purported third statement contradicts parts of Rey's second statement and includes inculpatory allegations against Trevino. As with Det. Gresham's summary of Rey's purported second statement, the summary of Rey's purported third statement in no way indicates that a separate, written statement existed. Attached to Trevino's federal habeas petition are affidavits from Trevino's trial attorneys in which they swore that they could not remember having seen Det. Gresham's report before Trevino's trial.

Trevino raised two claims for habeas relief based on Rey's second written statement: (1) The state's failure to disclose this statement violated *Brady*; and, (2) if the state did not **[**55]** in fact suppress this statement, Trevino's trial counsel's failure to uncover it and utilize it violated Trevino's right to the effective assistance of counsel under *Strickland.* These two contentions share an overlapping element: materiality of the evidence. *See Brady, 373 U.S. at 87* (suppressed evidence must be "material"); *Strickland, 466 U.S. at 694* (explaining that a claim of ineffective assistance of counsel requires a showing of "prejudice," and that "the appropriate test for prejudice finds its roots in the test for materiality of exculpatory information not disclosed to the defense by the prosecution"); *see also Youngblood v. West Virginia, 547 U.S. 867, 869-70, 126 S. Ct. 2188, 165 L. Ed. 2d 269 (2006)*. In *United States v. Bagley*, the Supreme Court expressly adopted "the *Strickland* formulation of the . . . test for materiality" for *Brady* claims. *473 U.S. 667, 682, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985)* (opinion of Blackmun, J.); *see Cone v. Bell, 556 U.S. 449, 129 S. Ct. 1769, 1783, 173 L. Ed. 2d 701 (2009)*. Therefore, Trevino must make the same showing of the materiality of Rey's second statement for his *Brady* claim and for his *Strickland* claim. That is, Trevino must show that Rey's statement "could reasonably be taken to put the whole case in such a different light as to **[**56]** undermine confidence in the verdict." *Kyles v. Whitley, 514 U.S. 419, 435, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995)*.

The district court concluded that Trevino failed to show that Rey's statement was material and therefore denied

habeas relief for both phases of Trevino's trial without reaching the other component of either the *Brady* or *Strickland* claims—whether the statement was suppressed under *Brady* or whether Trevino's trial counsel's performance was objectively unreasonable under *Strickland*. Therefore, the only issue before us on Trevino's *Brady* and *Strickland* claims is whether Rey's statement is material.

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 **[*435]** that it can take judicial notice of Rey's third (June 13th) statement, and give credit **[**57]** to it in lieu of Rey's second (June 12th) statement. In my view, that course is not supported by precedent or authority.

II.

To conclude that Rey's second statement is not material, the majority takes judicial notice of a third written statement by Rey, which the majority has produced *sua sponte* from a state court record for a different case to which Trevino was not a party. The majority reasons that "[i]f Trevino's lawyers had been successful in introducing Rey's second statement" to question Trevino's guilt, then "the prosecution undoubtedly would have introduced Rey's third statement" to undermine that defense; and, likewise, that if "Rey had attempted to testify at Trevino's trial to the facts contained in his second statement, the prosecution would have undoubtedly impeached Rey with his third statement to the police." Majority Op. 14-15. The majority's reliance on Rey's third statement is a significant error because (A) the parties have never had an opportunity to litigate the significance or veracity of that statement; (B) the credibility determinations that the majority draws from that statement are not the proper subject of judicial notice; and (C) even assuming *arguendo* that **[**58]** we could take judicial notice of Rey's third statement, it would not necessarily prevent the defense counsel in a hypothetical retrial from effectively using Rey's second statement as tending to exculpate Trevino and challenge the credibility of the state's witnesses against him in the guilt and penalty phases of his capital murder trial.

A.

The majority *sua sponte* produced Rey's third written statement, without any request or agreement by the parties, from a state court record of a different case to which Trevino was not a party. It was not part of the record before the district court, as the majority acknowledges, Majority Op. 9 n.3, nor was it ever once mentioned by the parties below or on appeal. For all we know, neither Trevino nor the state's attorneys in Trevino's criminal trial nor in his habeas proceedings has even seen or been informed of this statement. It certainly stands to reason that if the state's attorneys in Trevino's case had been aware of this statement, as the majority's argument presupposes, then they would have relied upon it in responding to Trevino's habeas petition; but they did not. As such, the parties have never litigated the admissibility or relevance of **[**59]** that statement to Trevino's *Brady* and *Strickland* claims.

B.

The majority contends that we can *sua sponte* take judicial notice of the statement. Majority Op. 9 n.3. However, that is not allowed by *Federal Rule of Evidence 201*, which governs judicial notice in the district courts as well as in the courts of appeals. *See Fed. R. Evid. 201(f)* ("Judicial notice may be taken at any stage of the proceeding."); *see also* 21B Charles Alan Wright & Kenneth W. Graham, Jr., *Federal Practice and Procedure* § 5110.1, at 299 (2d ed. 2005) ("*Rule 201(f)* does not distinguish between taking judicial notice on appeal and appellate review of the trial court judicial notice. . . . [It] places the appellate court under the same limitations as the trial judge whether the appellate court is reviewing trial court notice or noticing facts for the first time."); 1 Jack B. Weinstein, *Weinstein's Federal Evidence § 201.32* (2011) ("Because *Rule 201* authorizes the taking of judicial notice 'at any stage of the proceeding,' judicial notice **[*436]** may be taken by an appellate court. . . . However, appellate courts are still subject to the limitations imposed by *Rule 201* on the types of facts that may be judicially noticed and **[**60]** the procedures for noticing them.").

Rule 201 provides, in relevant part:

> **(a) Scope of rule.** This rule governs only judicial notice of adjudicative facts.

> **(b) Kinds of facts.** A judicially noticed fact must be one 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.
>
> **(c) When discretionary.** A court may take judicial notice, whether requested or not.
>
> **(d) When mandatory.** A court shall take judicial notice if requested by a party and supplied with the necessary information.
>
> **(e) Opportunity to be heard.** A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.
>
> **(f) Time of taking notice.** Judicial notice may be taken at any stage of the proceeding.

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 **[**61]** 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* **[**62]** 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 **[*437]** 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 **[**63]** it was true . . . .").

The majority's *sua sponte* course of taking judicial notice here also conflicts with *Rule 201*'s requirement that the parties be heard on the court's taking judicial notice, and it will not prevent another round of litigation regarding Rey's third statement. Instead, as the majority concedes, *see* Majority Op. 9 n.3, it will put the parties in the untenable position of litigating an issue of fact in a petition for rehearing in an appellate court. [7] *Rule 201* entitles the parties "upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed." *Fed. R. Evid. 201(e); see also id.* advisory committee note (1972) ("Basic considerations of procedural fairness demand an opportunity to be heard on the propriety of taking judicial notice and the tenor of the matter noticed."). This rule applies in the appellate courts as much as it does in the district courts. *See* Wright & Graham, *supra*, § 5110.1, at 299-300 ("[T]he appellate court must follow the procedures in *Rule 201(e)* in giving

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[7] The majority offers the following placebo: "[W]e afford [Trevino] the right to raise any objections he **[**65]** may have by means of a petition for rehearing, which objections we will consider filed before our opinion issued." Majority Op. 9 n.3. I fail to understand what effect this has as Trevino unquestionably has the right to raise "each point of law or fact that [he] believes the court has overlooked or misapprehended" in a petition for rehearing. ***Fed. R. App. P. 40***. This does not alleviate, however, the problem of litigating a fact issue for the first time in a petition for rehearing in an appellate court.

the parties an opportunity to be heard."); Weinstein, *supra* ("[A]ppellate courts are still subject to the limitations imposed **[**64]** by Rule 201 on the types of facts that may be judicially noticed and the procedures for noticing them. . . . An appellate court contemplating original judicial notice should notify the parties so that the propriety of taking notice and the tenor of the matter to be noticed can be argued. If oral argument has already been completed, the court should, at a minimum, afford the parties an opportunity to submit supplemental briefs." (footnote omitted) (quoting Massachusetts v. Westcott, 431 U.S. 322, 323 n.2, 97 S. Ct. 1755, 52 L. Ed. 2d 349 (1977), as saying, "The parties were given an opportunity to comment on the propriety of our taking notice of the license, and both sides agreed that we could properly do so."). Rule 201 also provides that "[i]n the absence of prior notification, the request may be made after judicial notice has been taken." Fed. R. Evid. 201(e). The majority has not given the parties an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed, and therefore, they will be forced to litigate this issue for the first time in a petition for rehearing.

Finally, the majority's only supporting authorities for taking judicial notice of Rey's third statement are inapposite. The majority cites Brown v. Lippard, 350 F. App'x 879 (5th Cir. 2009) (unpublished), but *Brown* is nothing like this case. There, we took judicial notice merely of a "docket entry establishing the existence of the 2001 transcript" of a court proceeding. Id. at 882 n.2. Here, the majority takes judicial notice of facts that are subject to reasonable dispute, and are not analogous to the fact that a court docket entry exists. Nor is the majority's reliance on Moore v. Estelle, 526 F.2d 690 (5th Cir. 1976), any more persuasive. There, we said quite plainly that we will "take **[**66]** judicial notice of *prior habeas proceedings brought by this **[*438]** appellant in connection with the same conviction.*" Id. at 694 (emphasis added). Of course, Sam Rey's state court criminal proceedings are not "prior habeas proceedings brought by [Carlos Trevino] in connection with [Trevino's] conviction." *Id.* Indeed, the majority concedes this point when it describes "our routine practice in *habeas* appeals" as "taking judicial notice of all related proceedings *brought by the appellant*, including state proceedings, even when the prior state case is not made a part of the record on appeal." Majority Op. 9 n.3 (emphasis added) (internal quotation marks omitted). Therefore, the majority has provided no relevant authority for its *sua sponte* decision to take judicial notice of facts outside of the record on appeal in this case and contained in a record in a state court proceeding for a different case of a different defendant.

C.

Assuming *arguendo* that the majority lawfully could take judicial notice of Rey's third statement, the existence of that statement does not prevent defense counsel from arguing that the state's suppression of Rey's second written statement casts a different light on Trevino's **[**67]** capital murder trials so as to undermine confidence in those proceedings. Rey's third written statement shows that Rey was not even present when Salinas was killed and, therefore, could not credibly say who stabbed Salinas. Nor it does it contradict the portion of Rey's second statement in which he said that nobody, including Trevino, said anything in the car following Salinas' murder. *See* Majority Op. 7-8 (quoting Rey's third written statement). Therefore, Rey's second statement would stand unchallenged in contradicting the critical aspect of Gonzales' testimony that in the car after Salinas' murder, Cervantes said it was "cool" or "neat" how Trevino had "snapped" Salinas' neck, and that Trevino responded that he had "learned how to kill in prison."

III.

For these reasons, the fair and proper course would be for the majority to vacate the judgment and remand this case to the district court to consider all of Rey's statements and any additional evidence relevant thereto, and to determine whether all of that evidence undermines confidence in Trevino's capital murder guilt and penalty trials. It is clear that on the record before the district court, Rey's second statement is material—otherwise, **[**68]** 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. Moreover, as I explain *infra* in Part IV.A, Trevino's trial attorneys could have put Rey's second statement to good use to cast doubt on his guilt, and the record before us is insufficiently developed for us to decide whether Rey's third statement actually would have eviscerated defense counsel's every use of Rey's second statement in Trevino's guilt and death penalty trials. Therefore, in my view, it is necessary to remand this case because now that Rey's third statement has been produced, the parties should be allowed an opportunity to litigate the significance of that statement,

specifically, whether it undermines the materiality of Rey's second statement, and the district court should reconsider this case in light of those arguments and all of the available relevant evidence.

When the Eleventh Circuit was confronted with a similar situation—i.e., whether to consider extrarecord evidence that may have been significant in **[**69]** resolving the habeas petitioner's claim—that court **[*439]** remanded to the district court to first find the necessary facts. *See Ross v. Kemp, 785 F.2d 1467, 1477 (11th Cir. 1986)*. In contrast, the majority simply assumes the facts that it thinks the district court would have found after a full and fair hearing, providing no authority for its course of action, and plainly stepping beyond the bounds of its limited authority to judicially notice certain kinds of facts under *Federal Rule of Evidence 201*. The majority's course is unfair for the resolution of a highly controversial issue based on uncertain evidence from murky and questionable, self-interested recollections of death penalty defendants. I would instead follow the course taken by the Eleventh Circuit and remand this case to the district court to allow the parties to litigate the issues given rise to by the state's apparent suppression of Rey's second and third statements.

IV.

In concluding that Rey's second statement was not material the majority also errs, in my view, by (A) reasoning that Rey's second statement "would likely have been inadmissible," and ignoring the substantial use that Trevino's trial attorneys could have made of **[**70]** that statement even without admitting it into evidence; (B) purporting to make a factual finding that the state did not suppress Rey's statement, a finding which is the subject of a factual dispute that the district court expressly left unresolved; (C) concluding that Rey's statement was not material because "the evidence presented at Trevino's trial supports the jury's verdict of conviction under Texas's law of the parties." Majority Op. 14-17.

A.

The majority mistakenly asserts that "Rey's [second] written statement would likely have been inadmissible." Majority Op. 14 n.7. This is perplexing considering that the majority expressly acknowledges that "inadmissible evidence may be material under *Brady*." *Spence v. Johnson, 80 F.3d 989, 1005 n.14 (5th Cir. 1996)* (citing *Sellers v. Estelle, 651 F.2d 1074, 1077 n.6 (5th Cir. 1981)*; *see* Majority Op. 14 n.7 (citing *Felder v. Johnson, 180 F.3d 206, 212 (5th Cir. 1999)*). Indeed, this court has often "reaffirm[ed] that 'inadmissible evidence may be material under *Brady*.' Thus, **[**71]** we ask only the general question whether the disclosure of the evidence would have created a reasonable probability that the result of the proceeding would have been different." *Felder, 180 F.3d at 212* (citations omitted) (quoting *Spence, 80 F.3d at 1005 n.14*); *see also United States v. Brown, 650 F.3d 581, 2011 WL 3524412, at *5 & n.12 (5th Cir. 2011)* ("The suppressed evidence need not be admissible to be material under *Brady*; but it must, somehow, create a reasonable probability that the result of the proceeding would be different." (citing *Felder, 180 F.3d at 212*)); *Spence, 80 F.3d at 998, 1005 n.14* (same); *Sellers, 651 F.2d at 1077 n.6* (same); *Martinez v. Wainwright, 621 F.2d 184, 188 (5th Cir. 1980)* (holding that evidence was material even if it "were held to be hearsay and not admissible" because "it at least would have provided the defense the ability to contact the appropriate" people to gather the evidence in admissible form). Moreover, in *Wiggins v. Smith, 539 U.S. 510, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003)*, the majority of the Supreme Court squarely rejected Justice Scalia's dissenting view that because undiscovered mitigation evidence was likely inadmissible under state law during the punishment phase **[**72]** of a capital murder trial, it was not material under *Strickland*. *See 539 U.S. at 536*; *id. at 554-57* (Scalia, J., dissenting). Writing for seven members of the Court, Justice O'Connor explained, "had **[*440]** the jury been confronted with this considerable mitigating evidence, there is a reasonable probability that it would have returned with a different sentence. *In reaching this conclusion*[]"—that the evidence was material under *Strickland*—"*we need not, as the dissent suggests, make the state-law evidentiary findings that would have been at issue at sentencing.*" *Id. at 536* (majority opinion) (emphasis added) (citation omitted).

In *Sellers*, under extremely similar circumstances as this case, we also rejected the contention that evidence must be admissible to be material under the *Brady-Strickland* standard. *651 F.2d at 1077 n.6*. There, the suppressed police reports included a written statement of a friend of Santos Cantera, which alleged that Cantera had told him that Cantera was the actual killer. *Id. at 1075-77*. The lower court held that the evidence was immaterial in part because this statement was inadmissible. *Id. at 1076, 1077 n.6*. We held that "[s]uch a conclusion [was] unwarranted," and **[**73]** explained why the written statement of Cantera's friend, although

apparently inadmissible, was still material: "First, by enabling the defense to examine [the suppressed evidence], Sellers may have been able to produce witnesses whose testimony or written statements may have been admissible. *Martinez v. Wainwright, 621 F.2d 184 (5th Cir. 1980)*. Second, the evidence . . . suppressed was material to the preparation of [Sellers] defense, regardless of whether it was intended to be admitted into evidence or not." *Sellers, 651 F.2d at 1077 n.6*; *see also Spence, 80 F.3d at 998* ("The district court concluded that the undisclosed evidence was not material because under Texas law it would not have been admissible at trial. The Fifth Circuit has expressly found otherwise in *Sellers v. Estelle*," *651 F.2d 1074 (5th Cir. 1981)*.).

For substantially similar reasons, Rey's second statement would have been extremely useful to Trevino's trial attorneys regardless of whether it was admissible. First, Rey's second statement may have led Trevino's counsel to call Rey to testify in contradiction to Gonzales' testimony, particularly his testimony about the statements Trevino allegedly made in the car after **[**74]** Salinas was killed. *See Kyles, 514 U.S. at 445-46* (discussing the possibility of defense counsel calling "as an adverse witness" an alternative suspect whose statements had been suppressed); *Sellers, 651 F.2d at 1077 n.6*; *Martinez, 621 F.2d at 188* ("If the [suppressed] rap sheet were held to be hearsay and not admissible to prove the [state's witness's] prior convictions, it at least would have provided the defense the ability to contact the appropriate penal facilities to acquire an official record which would have been admissible."). This, in fact, is exactly what Trevino's trial counsel swore that he would have done with Rey's written statement: "I would have definitely used it . . . to further discredit Juan Gonzales . . . ." Thus, the majority is simply mistaken that "[n]othing in the record remotely suggests that disclosure of the full text of Rey's second statement would have changed th[e] strategic calculation made by Trevino's attorneys." Majority Op. 17. The majority's only reason for why this does not make Rey's second statement material is based on its mistaken reliance on Rey's third statement. [8] **[*441]** Second, Rey's second statement was important to the preparation of Trevino's **[**75]** defense, regardless of whether it was intended to be admitted into evidence or not. *See Sellers, 651 F.2d at 1077 n.6*. As the Court explained in *Kyles*, competent counsel "could have examined [Det. Gresham] to good effect on [his] knowledge of [Rey's out-of-court] statement[] and so have attacked the reliability of the investigation." *514 U.S. at 446*. [9] That is, competent counsel could have used Rey's second statement to cast particular aspersion on Cervantes as the only person culpable for Salinas' murder, and to show that Det. Gresham's investigation focused on Trevino, despite Rey's statement exculpating Trevino; and that Det. Gresham never pursued a more rigorous investigation of Cervantes, despite Rey's statement that inculpated only Cervantes. Again, Trevino's trial counsel swore he would have used Rey's statement for this exact purpose, "in the cross-examination of [D]etective Gresham to show the jury that Santos Cervantes and not . . . Trevino[] stabbed and killed [Salinas]"; which again contradicts the majority's assertion that "[n]othing in the record remotely suggests that disclosure of the full text of Rey's second statement would have changed th[e] strategic calculation **[**76]** made by Trevino's attorneys." Majority Op. 17. The majority does not address the impact that undermining the investigation would have had on the jury's assessment of the evidence.

"In any event, contrary to the [majority's] assertion, it appears that [Rey's second statement] may have been admissible under [Texas] law." *Wiggins, 539 U.S. at 536*. If Det. Gresham had used Rey's second statement to refresh his memory before testifying at Trevino's trial

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[8] The majority concludes that "[i]n the extremely unlikely event that Rey had attempted to testify at Trevino's trial to the facts contained in his second statement, the prosecution would have undoubtedly impeached Rey with his third statement," Majority Op. 15; by which the majority seems to mean that in their view, the jury would have certainly believed the contents of Rey's third statement and not his live testimony to the contrary. However, as I explained in Part II.B, this credibility determination is based on taking judicial notice of Rey's third statement, and such a credibility determination is not a kind of fact that may be judicially noticed. *See Fed. R. Evid. 201(b)* (Providing for judicial notice of 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.").

[9] There would be no hearsay problem in using **[**77]** Rey's statement to attack the credibility of Det. Gresham's investigation since "'[h]earsay' is a statement . . . offered in evidence to prove the truth of the matter asserted." *Tex. R. Evid. 801(d)*. Rey's statement would not have been offered into evidence, and it would not have been used to prove the truth of the matter asserted in the statement, but to show that Det. Gresham's investigation was unreliable because it was not thorough, impartial and objective.

then Trevino would have been "entitled . . . to introduce in evidence those portions which relate to the testimony of the witness." *Tex. R. Evid. 612*. Of course, Trevino's attorneys were unable to ask Det. Gresham whether he had used Rey's second written statement to refresh his memory because they were unaware of its existence. Therefore, the majority is mistaken that Rey's second statement was inadmissible.

B.

The majority also mistakenly contends that "the **[**78]** record evidence strongly indicates that the prosecution did not suppress [Rey's second] statement." Majority Op. 14. However, as the majority admits, whether the state suppressed the statement turns on a factual dispute that the district court did not resolve. Majority Op. 14 n.6. [10] Also, the majority fails to **[*442]** appreciate that in addition to a *Brady* claim, Trevino has raised a *Strickland* claim based on Rey's second statement, *viz.*, if the statement was not suppressed, then his attorneys were constitutionally ineffective in failing to discover the statement. Therefore, even *if* Rey's second statement was not suppressed, there still exists another unresolved factual question of whether Trevino's attorneys' failure to discover the statement rendered their performance constitutionally deficient.

Moreover, in resolving this factual dispute, the majority seriously errs in its assessment of the evidence regarding the state's suppression of Rey's second statement: (1) The majority ignores the record evidence that Trevino's trial attorneys swore in affidavits that Rey's second statement "was never produced or shown to us" before Trevino's trial, and that, "I . . . certainly never saw [Rey's statement] prior to trial in June 1997." (2) The majority is mistaken that Det. Gresham's report "should have put defense counsel on notice that Rey had made [a] statement to police to police suggesting that Cervantes stabbed the victim" and that "[t]he onus was then on Trevino's lawyers to request a copy of the full statement." Majority Op. 14. Nothing in Det. Gresham's report suggests **[**80]** that there was a separate, written and signed statement by Rey exculpating Trevino. If anything, Det. Gresham's report suggests just the opposite: Det. Gresham's report includes a summary of Rey's first statement, and notes that Rey "signed the statement." (R. at 385). However, there is no such indication in the report that Rey signed his *second* statement, the statement that is at the heart of this appeal. Nothing in Det. Gresham's report should have alerted Trevino's attorney to the existence of a second, written statement. (3) The state does not even contend that it disclosed Rey's second statement. *See* Resp't Br. 26 (Rey's second "statement itself may not have been in the State's file . . . ."). In sum, if anything, the record evidence indicates that the prosecution suppressed Rey's second statement.

C.

Finally, the majority errs by concluding that Rey's second statement was not material because "the evidence presented at Trevino's trial supports the jury's verdict of conviction under Texas's law of the parties." Majority Op. 16. [11] The majority reasons that "Rey's written statements cast no doubt on the substantial, uncontroverted evidence presented during the guilt/innocence phase **[**81]** of the trial supporting the conclusion that Trevino acted with intent to commit the offense and aided or attempted to aid other members of the group in commission of Salinas's murder." Majority Op. 16. This is clearly incorrect. Rey's second statement fully exculpates Trevino of any involvement in the rape and murder of Salinas, and thus absolves Trevino of criminal responsibility for her killing, even under Texas' law of the parties. Moreover, Rey's second statement casts doubt on Gonzales' crucial testimony that Trevino made incriminating **[*443]** statements after Salinas' murder, which would have been significant for the jury's determination of whether Trevino was guilty under Texas' law of the parties, that is, whether he "intended to kill [Salinas] or anticipated that a human life would be taken."

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[10] *See Trevino, 678 F. Supp. 2d at 459-60* ("There are many unresolved factual disputes before this Court concerning precisely what documentation was made available to [Trevino's] trial counsel by the prosecution before and during [Trevino's] capital murder trial. More specifically, there appears to be a genuine issue of material fact regarding whether . . . Rey's statement, which indicated Cervantes **[**79]** admitted to Rey that he stabbed Salinas, was ever made available to [Trevino's] trial counsel. It is unnecessary to resolve these disputes because, having reviewed the evidence from both phases of [Trevino's] trial, this Court concludes Rey's statement does not satisfy the 'materiality' prong for purposes of *Brady* analysis."); *see also id. at 466-67* (addressing only the prejudice prong of Trevino's *Strickland* claim).

[11] Texas' law of the parties doctrine is codified in *Texas Penal Code § 7.02*.

This case is distinguishable from *Miller v. Dretke, 404 F.3d 908 (5th Cir. 2005)*, another case charged under Texas' law of the parties cited by the majority. Majority Op. 16. In *Miller*, there was "uncontroverted, overwhelming evidence of [the defendant's] involvement in th[e] conspiracy [to commit a robbery] and the nature **[**82]** of the robbery" and the alleged *Brady* evidence merely suggested that the other participant in the robbery, and not the defendant, actually shot the victims. *404 F.3d at 916*. Here, by contrast, there was disputed and weak circumstantial evidence that Trevino participated in the assault on Salinas, and the *Brady* evidence indicates that Trevino did not participate in *any* aspect of the crime, not just that someone other than Trevino committed the murder. Therefore, even under Texas' law of the parties, Rey's second statement would have been critical to defense counsel to cast doubt on Trevino's culpability.

IV.

In my view, the majority has fallen into error by taking judicial notice of Rey's third statement and unproven facts related to that statement; and improperly assessing the credibility and weight of those statements, without their surrounding facts and circumstances, and other evidence in this case, in order to render judgment in favor of the state. Now that Rey's third statement has been produced, I would remand this case to the district court to allow the parties an opportunity to litigate the significance of that statement, and consider all of Rey's statements and additional evidence **[**83]** relevant thereto to determine whether all of that evidence undermines confidence in Trevino's capital murder trials. For these reasons, I respectfully dissent.
