

No. 18-6471

**In the
Supreme Court of the United States**

ANTHONY CARDELL HAYNES,
Petitioner,

v.

LORIE 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*

REPLY BRIEF OF PETITIONER

CAPITAL CASE

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REPLY BRIEF OF PETITIONER

Respondent (“the Director”)’s Brief In Opposition (“BIO”) is based on assertions regarding the record, Mr. Haynes’s arguments, and the law that do not withstand scrutiny. This case, on remand from this Court, resulted in an opinion from a divided panel in the Fifth Circuit which, as the panel minority pointed out, is replete with factual and legal errors. *Haynes v. Davis*, 733 F. App’x 766, 771-776 (5th Cir. 2018) (Dennis, J, dissenting) (App. A 4-8). The Director’s BIO, repeating those errors, argues that Haynes failed to demonstrate extraordinary circumstances (BIO at 17-23); that the district court repeatedly held that Haynes’s ineffective assistance of trial counsel (“IATC”) claims were meritless and any attempt to contest that holding would be an impermissible successive petition (BIO at 23-29); that the Fifth Circuit

decision does not contravene *Gonzalez v. Crosby*, 545 U.S. 524 (2005) or *Buck v. Davis*, 137 S. Ct. 759 (2017) (BIO at 29-32); and that Haynes’s IATC claims are meritless (BIO at 32-37). These arguments are all unavailing and/or are contradicted by both the law and the record, as shown in Mr. Haynes’s petition and herein.

I. Introduction.

The underlying issue is whether, in the wake of the change in decisional law in *Martinez v. Ryan*, 566 U.S. 1 (2012) and *Trevino v. Thaler*, 569 U.S. 413 (2013), trial counsel failed to provide constitutionally adequate representation at the punishment phase of Haynes’ trial. *Strickland v. Washington*, 466 U.S. 668 (1984); *Wiggins v. Smith*, 359 U.S. 510 (2003). Also under consideration is whether Haynes has shown “exceptional circumstances” allowing the reopening of judgment under FED. R. CIV. P. 60(b)(6). This Court granted *certiorari* and remanded the case to the Fifth Circuit “for further consideration in light of *Trevino*.” *Haynes v. Thaler*, 133 S. Ct. 2764 (2013). Yet, as shown in Haynes’s petition, when the Fifth Circuit then remanded the matter to the district court, there was never any such “further consideration” as ordered by this Court, just repeated references to prior pre-*Trevino* “reviews” which likewise never dealt with the facts of the IATC claims, maintaining the fiction that there had been an actual prior merits review. *Haynes v. Stephens*, 2015 WL 6016831 (S.D. Tex. Oct. 14, 2015)(App. C).¹

The Director’s first argument, that Haynes has not shown “exceptional circumstances” (BIO at 17-23), is based on inapplicable precedent holding that the change in decisional law

¹ As Judge Dennis pointed out in his dissent, “as I have previously noted, though purporting to address the merits, the district court’s opinion denying Haynes habeas relief entirely failed to engage with the specifics of Haynes’s ineffective-assistance-of-counsel claim. *See Haynes v. Stephens*, 576 F. App’x 364, 366 (5th Cir. 2014) (Dennis, J., concurring).” *Haynes v. Davis*, 733 F. App’x at 772. (App. A 5).

under *Martinez/Trevino alone* does not justify relief. Yet Haynes does not solely rely on the change in law, but also on the specific merits of his IATC claims. Both the district court and the Fifth Circuit’s findings of no “exceptional circumstances” were made without examining the merits of the claims and hence they were in no position to make that determination. The Director’s second argument, that the district court has “repeatedly held that Haynes’s IATC claims are meritless” (BIO at 23-29), fails for the same reason, because there has never been any “merits review” by the district court, let alone repeated reviews, only a “facial review,” by its own admission.² The Director’s third argument, that the Fifth Circuit majority’s decision is not contravened by either *Gonzalez v. Crosby*, 545 U.S. 524 (2005) or *Buck v. Davis*, 137 S. Ct. 759 (2017) (BIO at 29-32) is also unavailing, as both cases explicitly reject the notion of “finality” in the context of Rule 60(b), and finality was a major basis of the Fifth Circuit’s holding. *Haynes v. Davis*, 733 F. App’x 766 at 770 (App. A 4).³ Despite an overwhelming abundance of mitigating evidence never presented to Haynes’s jury, in her fourth argument (BIO at 32-37) the Director argues that the IATC claims are meritless; that state habeas counsel was not ineffective and that the trial attorneys’ “strategy” was well-founded. None of these arguments are sound and they are contrary to the record.

² As the Fifth Circuit dissent points out, regarding the district court’s three-sentence “alternative merits review,” this Court “has rejected a similarly cursory alternative holding as insufficient to constitute review on the merits,” citing *Cone v. Bell*, 556 U.S. 449, 474-75 (2009). *Haynes*, 733 F. App’x at 772 (App. A 5) (Dennis, J., dissenting). Thus, *Cone* would also be implicated if the majority opinion is allowed to stand. The Director’s “repeated merits reviews” argument rests on these three sentences, issued prior to *Trevino*. See *Haynes v. Davis*, 773 F. App’x at 772 (App. A 5).

³ As noted by the Fifth Circuit dissent: “[t]he majority opinion repeatedly cites to finality interests, but this cannot overcome the strong showing in favor of reopening Haynes’s case.” *Haynes*, 733 F. App’x at 775 (App. A 8). “Finality” is also invoked by the Director. (BIO at 4, 18 n.6, 31).

II. Contrary to the Director's's Arguments, Haynes Has Shown "Extraordinary Circumstances" For Rule 60(b)(6) Purposes. (BIO Part I).

The Director's argument in Part I (BIO at 17-23) is that the change in the law in *Martinez* and *Trevino* does not constitute an "extraordinary circumstance" for purposes of the equitable application of Rule 60(b)(6), relying principally on *Adams v. Thaler*, 679 F.3d 312 (5th Cir. 2012) (BIO at 14, 18, 19, 28) and *Diaz v. Stephens*, 731 F.3d 370 (5th Cir. 2013). (BIO at 18-21). Yet, as Judge Dennis's earlier dissent in this case pointed out, "all that *Adams* held is that a change in decisional law may not constitute the kind of extraordinary circumstances that warrant relief under Rule 60 if it is the *sole* basis for such circumstances. *Adams* does not prevent consideration of Haynes's argument." *Haynes v. Thaler*, 489 F. App'x 770, 776 (5th Cir. 2012) (Dennis, J., dissenting) (emphasis in original). Haynes's additional "extraordinary circumstances" are discussed at length in Judge Dennis's dissent. *Id.* at 773-780.

As for *Diaz*, his circumstances were much weaker than Haynes's as *Diaz* presented only five declarations; he did not want his family to testify; his attorneys provided a declaration citing their strategy; and there was much aggravating evidence. *Diaz*, 731 F.3d at 373, 377; *Diaz v. Quarterman*, 239 F. App'x. 886, 888-890 (5th Cir. 2007).

The rest of the Director's argument is based on the false premise that Haynes's argument is limited to the change in decisional law. Indeed, the Director argues that since *Martinez* alone does not constitute "an extraordinary circumstance" then "the strength of the petitioner's argument has no relevance." (BIO at 20-21). This is obviously erroneous, as it would preclude any relief whatsoever in any case under *Martinez/Trevino*. And because "the district court failed to consider all the relevant factors and misevaluated the factors it did consider, *Haynes v. Davis*,

733 F. App'x at 771 (Dennis, J, dissenting) (App. A 5), neither that court nor the Fifth Circuit were in any position to evaluate Haynes's "extraordinary circumstances."

III. The Director's Arguments That "Haynes's IATC Claims Have Already Been Reviewed Alternatively On The Merits." (BIO Part II).

The centerpiece of the Director's BIO is the oft-repeated but false assertion that since "Haynes's IATC claims have already been reviewed alternatively on the merits," he has received all that *Martinez* can offer him. (BIO at 23-29).

Central to the Director's arguments in Part II of the BIO, and to the majority opinion in the Fifth Circuit, is that Court's holding that "whether 'there is merit in [Haynes'] claim' only becomes a relevant factor in the Rule 60(b) analysis if 'there was no consideration of the merits' below...Here, the district court reviewed the merits of Haynes' underlying IATC claim on multiple occasions." (*Haynes v. Davis*, 733 F. App'x at 769, quoting *Seven Elves v. Eskenazi*, 635 F.2d 396, 402 (5th Cir. 1981) (App. A 3). However, as the dissent points out, "the district court failed to consider all of the relevant factors and misevaluated the factors it did consider," (*Haynes v. Davis*, 733 F. App'x at 771 (App. A 5)) and "the district court's opinion denying Haynes habeas relief entirely failed to engage with the specifics of Haynes' ineffective-assistance-of-counsel claim." (*Id.* at 772 (App. A 5)).

The Director asserts that "this Court only remanded for further consideration in light of *Trevino*." (BIO at 23). Yet that was never done. The district court simply reiterated its original holding that "none of his claims facially command habeas relief" and "the court has already considered the merits and found no basis for federal habeas relief." *Haynes v. Stephens*, 2015 WL 6016831 (S.D. Tex. Oct. 14, 2015) at *2, *5 (App. C 2, 5). The original holding was that it was trial counsels' "strategy" to fail to interview or investigate the thirty-nine mitigating

witnesses when there was no strategic reason for that omission; held incorrectly that these witnesses were merely “cumulative;” that Haynes was only arguing that the trial attorneys’ penalty phase performance should have been “different” but not “better;”⁴ and used an incorrect standard to deny the IATC claims (the “substantial likelihood” *pre-Strickland* [*v. Washington*, 466 U.S. 668 (1984)] test of *United States v. Frady*, 456 U.S. 152, 172 (1982) rather than the “reasonable probability” test of *Strickland*, 466 U.S. at 694).⁵ Yet the Director (and the majority opinion) merely relies on these flawed and incorrect findings and holds that “Haynes has already received a more in-depth merits review of his claims than he was likely entitled from the district court.” (BIO at 23, citing *Haynes*, 733 F. App’x at 770) (App. A 4).

The Director’s argument that the district court “has repeatedly held that Haynes’s IATC claims are meritless” fails, because the district court itself has repeatedly admitted it has not addressed the merits of the IATC claims in its 2007 initial ruling: “[w]ithout addressing the individual basis for each unexhausted, factually dependant [sic] claim, the court notes that none of his arguments facially command habeas relief.” *Haynes*, 2007 WL 268374 at *9 [ROA.1633] (App. H 2). In its next ruling in 2012, the district court simply quoted that former ruling

⁴ The Fifth Circuit majority opinion also holds that “[t]he thrust of Haynes’ argument seems to be that there may have been a *better* mitigation strategy available to defense counsel. But this amounts to no more than a claim that a different strategy could have been ‘more effective.’” (*Haynes v. Davis*, 773 F. App’x at 770 (App. A 3)). Yet the failure to interview almost all of the 39 declarants (*see* App. G) could not have been “strategy” as defense counsel had no way of telling what the vast majority of them might say.

⁵ The district court’s 2007 “alternative merits ruling” in *Haynes v. Quarterman*, 2007 WL 268374 (S.D.Tex. Jan.25, 2007) is at ROA.1631-1634 (*See* App. H for relevant excerpt). *Strickland* explicitly disavowed the outcome-determinative standard (“we believe that a defendant need not show that counsel’s deficient conduct more likely than not altered the outcome in the case”), *Strickland*, at 693, as did *Porter v. McCollum*, 558 U.S. 30, 44 (2009) (*per curiam*) (“[w]e do not require a defendant to show “that counsel’s deficient conduct more likely than not altered the outcome” of his penalty proceeding, but rather that he establish “a probability sufficient to undermine confidence in [that] outcome.”)

verbatim. *Haynes v. Thaler*, 2012 WL 4739541 (S.D.Tex., Oct. 3, 2012)) at *2, *5 [ROA.2210-2211, 2216] (App. H). And in its latest 2015 holding, the district court once again simply quoted the 2007 holding verbatim without examining the individual claims or the evidence supporting them. *Haynes v. Stephens*, 2015 WL 60116831 (S.D.Tex. Oct. 14, 2015)) at *2. (App. C 2) Although the majority opinion holds that “as the district court has repeatedly noted, the merits of Hayes’ IATC claim are not particularly compelling,” *Haynes v. Davis*, 733 F. App’x at 769 (App. A 3), the district court was in no position to make that evaluation, as neither the claims nor any of the supporting evidence was afforded more than a “facial” review.

Because the claims were not “individually addressed” as to their facts by the district court, no real review ever took place, either factually or legally.⁶ This “review” failed to consider the individual equities of the case before it, as is necessary under Rule 60(b)(6). *Diaz v. Stephens*, 731 F.3d 370, 377-379 (5th Cir. 2013); *In re Osborne*, 379 F.3d 277, 283 (5th Cir. 2004). And the district court’s repeated explanation as to why such a factual review was unnecessary, that none of the claims “facially command habeas relief,” is simply incorrect and contrary to the record.⁷

Additionally, the majority opinion holds that Haynes is arguing only that “a different strategy could have been more effective,” which falls far short of the required showing that ‘but for counsel’s errors, the result of the proceeding would have been different.’” *Haynes v. Davis*,

⁶ Or even “facially,” as each claim, on its face, presented a viable constitutional theory of relief.

⁷ In fact, in its 2012 opinion the district court contradicted itself on this very point when it held that “Haynes’ pleadings present a *possibility* that the jury would have assessed his sentence differently had trial counsel called different witnesses.” *Haynes v. Thaler*, 2012 WL 4739541 at *5 (App. H) (emphasis in original). If they presented such a “possibility” then the claims should not have been summarily dismissed for not “facially command[ing] habeas relief.” *Haynes v. Quarterman*, 2007 WL 268374 at *9 (App. H).

733 F. App'x at 770 (App. A 3), quoting *Coble v. Quarterman*, 496 F.3d 430, 436 (5th Cir. 2007). As pointed out by the dissent:

The majority opinion once again misrepresents the relevant legal standard by suggesting that Haynes must establish that counsel's deficient performance necessarily altered the outcome of his case...In fact, Haynes' ultimate burden is only to show 'a probability sufficient to undermine confidence in that outcome.' *Porter v. McCollum*, 558 U.S. 30, 44...And his only burden at this stage is to show that his claim is substantial. *See Martinez*, 566 U.S. at 14...*Seven Elves*, 635 F.2d at 402.

(*Haynes v. Davis*, 733 F. App'x at 775 (Dennis, J, dissenting) (App. A 7)).

In addition to the 39 affidavits presented herein (at App. G) and previously, Haynes presented many separate penalty-phase IATC claims (Claims I(a); I(d); I(f) through I(j); Claims I(l) through I(o); I(q); I(u); I(s); I(u) and I(y)) in his original federal petition and in his Rule 60(b) motion in the district court and herein. As each IATC claim is "factually dependent," they naturally depended on their individual facts, as does any claim. Yet the facts underlying these individual IATC claims were not discussed by the district court, and the claims themselves were never even mentioned, just lumped together as a generic claim of ineffective assistance of trial counsel.

Haynes's 60(b)(6) motion in the district court presented these claims in detail in 20 pages of fact-pleading (motion at 13-31) [ROA.1943-1961] and it specified 12 separate failures of trial counsel at the punishment phase of the trial. [ROA.1953-1960]. The 39 declarations were all discussed in that motion (at 13-20) [ROA.1943-1950] as were the expert declarations. The Fifth Circuit determined that this is "substantial" evidence when it granted a COA. *Haynes v. Stephens*, 576 F. App'x 364, 365 (5th Cir. 2014). Yet all that happened in the district court in 2012 (*Haynes v. Thaler*, 2012 WL 4739541 (S.D. Tex. Oct. 3, 2012)) and 2015 (*Haynes v. Stephens*, 2015 WL 6016831 (S.D. Tex. Oct. 14, 2015)) was a repetition of its former non-

reviews of this evidence and these individual IATC claims. As previously noted, the district court's "merits reviews" were merits reviews in name only.

As to the Director's argument that attacking the district court's determination on the merits is an "impermissible successive habeas petition under 28 U.S.C. § 2244(b) (BIO at 27-29), and the Fifth Circuit's similar holding, *Haynes v. Davis*, 733 F. App'x at 769, the Fifth Circuit dissent points out,

even if the district court had engaged in some meaningful merits review, Haynes did not receive full consideration of his claim because, although he sought to appeal the district court's merits holding, this court did not grant review of that issue, instead denying a certificate of appealability on the ground that it was procedurally barred. *See Haynes v. Quarterman*, 526 F.3d 189, 194-196 (5th Cir. 2008).

Haynes v. Davis, 773 F. App'x at 772 (Dennis, J., dissenting) (App. A 5).

The district court's initial holding in 2007 was based on alternate grounds, but the Fifth Circuit addressed only one of them, the procedural bar. As Judge Dennis observes, "when a district court's judgment is based on alternative holdings and this court addresses only one of those holdings on appeal, the district court's ruling is only conclusive as to that holding." *Id.*, citing *Borst v. Chevron Corp.*, 36 F.3d 1308, 1314 n.11 (5th Cir. 1987); *Dow Chem. v. E.P.A.*, 832 F.2d 319, 323 (5th Cir. 1987).

Because the final judgment as to Haynes's ineffective-assistance-of-counsel claim rested solely on procedural grounds, the majority opinion's suggestion that our current review is constrained by 28 U.S.C. § 2244, which applies when a claim has been adjudicated on its merits, is unfounded.

Haynes v. Davis, 773 F. App'x at 772-773 (Dennis, J., dissenting).

IV. The Director's Argument That The Fifth Circuit's Decision Does Not Contravene *Gonzalez* or *Buck* Is Unavailing. (BIO Part III).

The Director's argument in Part III of her BIO, that the Fifth Circuit's decision does not contravene *Gonzalez* or *Buck* (BIO at 29-32) is flat wrong: both cases clearly hold that finality, a

main basis for the Fifth Circuit’s denial, is not a factor in the Rule 60(b) context. In *Gonzalez*, finality was a ground explicitly rejected by this Court “in the interpretation of a provision [Rule 60(b)] whose whole purpose is to make an exception to finality.” *Gonzalez v. Crosby*, 545 U.S. 524, 529 (2005). So too in *Buck*: “in this case, the State’s interest in finality deserves little weight.” *Buck*, 137 S. Ct. at 779.

The Director attempts to explain this away by asserting that “the Fifth Circuit did not make finality the determinative factor in its analysis” (BIO at 31), but in actuality it held that “finality is a particularly strong consideration in the habeas context.” *Haynes v. Davis*, 733 F. App’x at 770, citing *Diaz*, 731 F.3d at 376 n.1 (App. A 4). As the dissent observes, “[t]he majority opinion cites repeatedly to finality interests, but this cannot overcome the strong showing in favor of reopening Haynes’s case.” *Haynes v. Davis*, 733 F. App’x at 775 (Dennis, J., dissenting) (App. A 7).

V. The Director’s Argument That Haynes’s IATC Claims Are Meritless. (BIO Part IV).

In Part IV, the Director argues that Haynes’s underlying IATC claims have no merit. (BIO at 32-37). The argument basically repeats the district court’s prior flawed holdings in its “alternative merits review” where there was no actual merits review. Here again it should be noted that the Fifth Circuit, in granting a COA and remanding the matter to the district court, determined that Haynes’s IATC claims are substantial and not facially “meritless” as the Director argues and the Fifth Circuit held, *see Haynes*, 576 F. App’x 364-365, as the standard for a COA and *Martinez*-substantiality are essentially the same. *Miller-El v. Cockrell*, 537 U.S. 322, 336-338 (2003); *accord Tennard v. Dretke*, 542 U.S. 274, 276 (2004).

In Part IV(A) of her BIO, the Director asserts that Haynes does not qualify for *Martinez/Trevino* relief because his state habeas counsel was not ineffective. (BIO at 32-34). In

her first rationale the Director attempts to distinguish this case from *Martinez* by claiming that “Haynes’s state habeas counsel filed a state habeas application,” and “[u]nlike in the *Martinez* case, state habeas counsel did not fail to file or otherwise abandon his client.” (BIO at 33-34.) The state habeas attorney in *Martinez* filed a statement that no viable issues existed, *Martinez*, 566 U.S. at 6, but *Martinez* has never been limited to situations where no state petition was filed, as the Director asserts. Indeed, in *Martinez*, this Court held that there was no procedural bar for IATC claims in initial state habeas proceedings where there was “no counsel *or* counsel in that proceeding was ineffective.” *Martinez*, 566 U.S. at 17 (emphasis added).

Additionally, many of the Director’s arguments and/or the district court’s prior holdings regarding the merits of Haynes’s claims do not comport with the record, as the Fifth Circuit dissent previously noted:

First, Haynes's trial counsel presented very little in the way of mitigating evidence during the penalty phase of his trial. Yet Haynes has identified thirty-nine helpful witnesses, residents and members of his community, who would have testified on his behalf, for example, to his lack of future dangerousness, but whom his trial counsel never asked to testify. In fact, Haynes's trial counsel never investigated Haynes's life or community or attempted to contact many of these witnesses. In light of the breadth of the witnesses that Haynes's trial counsel failed to search for and in view of the ways in which these available witnesses, had they been asked to testify during the penalty phase, would likely have aided Haynes and rebutted the state's case, it is difficult to conclude that Haynes has not made a sufficient showing for a *Strickland* violation as to his trial counsel.

(*Haynes v. Thaler*, 489 F. App’x 770 at 775) (Dennis, J., dissenting).

The Director alleges that the initial state habeas counsel “filed a 57-page petition raising four points of error, including an IATC claim. (BIO at 33). In actuality, that petition [ROA.693-745] was egregiously deficient. The statement of facts and introduction comprised almost 20 pages. [ROA.693-711]. The first claim, an oft-rejected challenge to the constitutionality of the Texas mitigation special issue, comprised another 20 pages. [ROA.712-732]. The second claim,

also oft-rejected, regarding not informing the jury that failure to answer a special issue would result in a life sentence, was another 4 pages. [ROA.733-736]. There were two record-based claims of ineffective assistance of counsel and improper prosecutorial argument. [ROA.737-742]. As Judge Dennis has previously summarized:

Haynes's state habeas counsel filed Haynes's state habeas petition based solely on the trial record and without any extra-record investigation. Thus, Haynes's state habeas counsel failed to comport with the statutory duty Texas imposes on habeas attorneys to conduct a thorough extra-record investigation and identify factual issues that would warrant relief. *See* Tex. Code Crim. Proc. Art 11.071(3). Had he conducted even a minimal investigation of the trial record, the mitigation evidence that was presented, and the witnesses who could have been discovered, Haynes's state habeas counsel would have unearthed many of the helpful witnesses whose declarations Haynes's federal habeas counsel has compiled. Accordingly, Haynes has advanced arguments, which are supported with an impressive array of evidence, that his trial and state habeas counsel performed deficiently under *Strickland*.

Haynes v. Thaler, 489 F. App'x at 775 (Dennis, J. dissenting).

The Director repeatedly attempts to frame the issue as failure of initial state habeas counsel "to raise claims that Haynes now contends he should have." (BIO at 33, 34). This falls flat when one considers the blatantly deficient state petition [ROA.686-745] compared with the weight of the mitigating evidence presented by Haynes, as Judge Dennis previously pointed out:

These witnesses—family, friends, teachers, and neighbors of Haynes's—were prepared to offer evidence in mitigation of the crime; to speak to Haynes's good character; to testify to his low risk of future dangerousness; to explain, rebut, or discredit the evidence the state had put on; and to otherwise respond to the state's weak evidence at the penalty phase. Haynes had no criminal record, arrests, or prior convictions and was well liked among his family, friends, acquaintances, and teachers. Nonetheless, these thirty-nine witnesses were either never contacted by Haynes's trial counsel or never asked to testify on his behalf.

Haynes v. Thaler, 489 F. App'x at 773 (Dennis, J., dissenting).

There was nothing in these 39 affidavits that would have "possibly undermined counsels' well-chosen strategy," (BIO at 35-36), rather, the affidavits attested to Haynes's good character and behavior. Nor can the trial presentation be accurately termed a "well-chosen strategy" when

trial counsel failed to even investigate this evidence and these potential witnesses, let alone present them. This Court has repeatedly held that decisions made from ignorance or the failure to investigate can *never* be called “strategy.” *Rompilla v. Beard*, 545 U.S. 374 (2005); *Wiggins v. Smith*, 539 U.S. 510 (2003). Nor was it merely “cumulative of evidence already presented at trial” (BIO at 35) as the Director misrepresents.

The Director claims that “counsel settled on this defense,” and “counsels’ thorough investigation and subsequent strategy” has not been shown to be unsound. (BIO at 36). However, “[i]n fact, Haynes’s trial counsel never investigated Haynes’s life or community or attempted to contact many of these witnesses,” *Haynes v. Thaler*, 489 F. App’x at 775 (Dennis, J, dissenting); and “there is no basis in the record to conclude that counsel’s failure to present these witnesses resulted from a strategic decision when their principal mitigation theory seems to have been that Haynes was a good kid.” *Haynes*, 733 F. App’x at 774 (Dennis, J., dissenting) (App. A 6). Time and time again, this Court has counseled that the failure to investigate can never be termed “strategy.” For example, in both *Rompilla* and *Wiggins* this Court held that trial counsel were ineffective for failing to adequately investigate, despite considerable aggravating evidence. *Rompilla*, 545 U.S. at 381-387; *Wiggins*, 539 U.S. at 519-527. *See also Porter v. McCollum*, 558 U.S. 30 (2009)(failure to present mitigating evidence held to be prejudicial). Further, there is *absolutely nothing* in the record attesting to any strategic rationale from the trial defense attorneys for their failure to investigate the 39 potential witnesses. (*See App. G*)

The Director claims that the “State’s punishment evidence was simply too overwhelming for any alleged deficiency to have any prejudicial effect on Haynes’s defense.” (BIO at 36). The State’s evidence is summarized by the Director as follows:

Haynes unremorsefully confessed to knowingly murdering a police officer after a violent crime spree wherein he robbed three separate people at gunpoint. ROA.2198. Testimony was also presented concerning Haynes's explosive temper, drug dependence, and violent disposition, and that he had previously assaulted his three-year old sister, attempted to kill his dog, and attacked and threatened various members of the hospital staff where he was seeking help for his drug problem. ROA.2199. (*Id.*)

This is a serious distortion of the record.⁸ As Judge Dennis has pointed out,

federal habeas counsel has presented affidavits from dozens of Haynes's friends, family, and acquaintances, representing a veritable cross-section of Haynes's community. Affidavits from two of Haynes's ex-girlfriends, in addition to affirming Haynes's good character, describe how upset and remorseful Haynes was after the shooting. Other affidavits attest that Haynes was a 'good kid' and 'very respectable,' that he was not violent, and that he was not likely to be a future danger. Several affidavits state that Haynes was not hostile toward authority figures or police officers. An affidavit from Haynes's teacher avers that Haynes was among the best students in his school's ROTC program....In addition [there is] evidence of Haynes's history of mental-health problems and Attention Deficit Hyperactivity Disorder, Haynes's drug use at the time of the murder and his low risk of future violence.

Haynes v. Davis, 733 F. App'x at 774 (Dennis, J., dissenting) (App. A 6).

Haynes's un-presented mitigating evidence was plentiful, convincing, and readily-available (App. G). Compared to the State's weak and exaggerated case in aggravation, it would have made a difference.

⁸ Much of the Director's argument in Part IV(B) that Haynes's claims are "plainly meritless" (BIO at 35-36; repeated earlier in the "statement of the case" (BIO at 7-12), are factually incorrect. The defense's failure to impeach Col. Davis's testimony (BIO at 7) was actually one of Haynes' IATC claims, and Davis was only the titular head of the ROTC program; the real head, Sgt. Harris, liked Haynes. (App. G 4-5, 17-18, 23, 58). The aggravating circumstances were a minor incident at the school's nurse's office involving acting out but no violence, in which Haynes later befriended the investigating officer (28 RR 87-88), and a hearsay report regarding an alleged attempted assault at the hospital. (28 RR 147). The patently exaggerated characterization of the aggravating evidence is shown by the fact that Mr. Haynes so excelled in the high school ROTC program that he won acceptance into the Navy BOOST ("Broadened Opportunity for Officer Selection and Training") Program, which was limited to those who had performed exceptionally and who wanted to pursue a career in the Navy, and where he was enrolled until just a few weeks prior to his arrest. (*See* App. G for many declarations attesting to Haynes' desire to pursue a naval career).

One has only to compare the record of the arrest-free Haynes with that of the petitioners in *Wiggins*, *Rompilla* or *Williams v. Taylor*, 529 U.S. 420 (2000), replete with arrests, incarcerations, steadily escalating violence, and other indicia of a marked propensity for future acts of criminal violence. Yet all three were granted penalty phase relief.

Lastly, the Director asserts that *certiorari* review here is not worthy of this Court's consideration for "routine error correction" (BIO at 4), despite the fact that this is a capital case with a life at stake; that this Court has previously granted a stay of execution and *certiorari*; that this Court's order on remand was ignored by the district court and the Fifth Circuit; and that this case has resulted in multiple split opinions and dissents from the court below. Due to the lower courts' non-compliance with this Court's order on remand, this case is now even more worthy of this Court's attention than when *certiorari* was last granted in 2012.

VI. Conclusion.

Anthony Haynes, as detailed *supra* and in his petition, has shown that he is entitled to relief under FED. R. CIV. P. 60(b)(6) in light of this Court's holdings in *Martinez* and *Trevino* because he has shown that trial counsel failed to provide constitutionally adequate representation in the punishment phase of his trial.

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Respectfully Submitted,

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