No. _____

IN THE

Supreme Court of the United States

IVAN ABNER CANTU,
Petitioner,

VS.

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

PETITION FOR WRIT OF CERTIORARI

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THIS IS A CAPITAL CASE

CAPITAL CASE
QUESTION PRESENTED

A panel of the United States Court of Appeals for the Fifth Circuit denied a certificate of appealability (COA) to review the federal district court's summary dismissal of Petitioner Ivan Cantu's claims of trial counsel ineffectiveness, which the district court held procedurally barred because Cantu's appointed counsel failed to raise the claims in his first state habeas corpus application.

The question presented is as follows: Did the Fifth Circuit panel impose an improper and unduly burdensome COA standard that contravenes this Court's precedent and deepens two circuit splits when it denied Cantu a COA regarding the district court's holding – without an evidentiary hearing – that Cantu had failed to establish cause to excuse the procedural default of his claims of trial counsel ineffectiveness.[1]

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[1] Significantly, the Fifth Circuit's misapplication of the COA standard is at issue in another Texas capital case currently pending before this Court on certiorari review. *Buck v. Davis*, No. 15-8049, *cert. granted*, 136 S. Ct. 2409 (Jun. 6, 2016) (oral argument conducted Oct. 5, 2016).

LIST OF PARTIES

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PETITION FOR WRIT OF CERTIORARI

Petitioner Ivan Abner Cantu respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit denying a certificate of appealability, *Cantu v. Davis*, 2016 WL 695961 (5th Cir. Nov. 7, 2016), appears at **Appendix A** to the petition and is unpublished. The opinion of the United States District Court dismissing Cantu's petition for writ of habeas corpus as procedurally barred, *Cantu v. Director*, 2016 WL 3277246 (E.D. Tex. Jun. 15, 2016), appears at **Appendix B** to the petition and is likewise unpublished.

JURISDICTION

The United States Court of Appeals for the Fifth Circuit issued its opinion denying a certificate of appealability on November 7, 2016. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves a state criminal defendant's constitutional rights under the Sixth and Fourteenth Amendments to the United States Constitution. The Sixth Amendment provides in relevant part:

In all criminal prosecutions, the accused shall enjoy the right to . . . have

the Assistance of Counsel for his defense.

The Fourteenth Amendment provides in relevant part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

This case also involves the application of 28 U.S.C. § 2253(c), which states:

> (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from
>
> (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court;
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> ***
>
> (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

STATEMENT OF THE CASE

This case raises exceptionally important questions concerning application of this Court's holdings in *Martinez v. Ryan,* 132 S. Ct. 1309 (2012), and *Trevino v. Thaler,* 133 S. Ct. 1911 (2013). The panel erred in denying a COA regarding the district court's holding (without an evidentiary hearing) that Cantu had failed to establish cause to excuse the procedural default of his claims of trial counsel ineffectiveness.

I. State Trial Court Proceedings

In 2001, a Texas jury found Cantu guilty of the murders of his cousin James Mosqueda – a local drug dealer who sold in large quantities – and Mosqueda's fiancé Amy Kitchen in their North Dallas home. After a separate punishment hearing, the jury answered the statutory sentencing issues in such a way that a death sentence was imposed.

In preparation for trial, court-appointed trial counsel Matt Goeller and Don High failed to request the appointment of a defense investigator. This failure certainly hampered their ability to explore the complex facts and extensive cast of characters surrounding the commission of this offense. And, no doubt, their lack of an investigator was the reason they were unable to interview potential witnesses and obtain evidence apart from that provided by the State in discovery. Counsel also failed to seek the assistance of a DNA expert, a ballistics expert, a latent fingerprint examiner, a blood-spatter expert, or a medical examiner, all experts utilized by the State in the presentation of its case-in-chief. Counsel basically opted to take the State's case for guilt at face value to the detriment of their client. Thus, key facts concerning the offense were never explored.

The State's principal witness against Cantu was Amy Boettcher – Cantu's girlfriend at the time the crime was discovered – who even the prosecutor described

as a "doper" and a "lawbreaker[]" for whom he had no respect.[2] 41 RR 55.[3] Boettcher claimed that on November 3, 2000, the night before the bodies were discovered, Cantu spoke to Mosqueda over the phone and arranged to go to his house to talk to him. 35 RR 121. According to Boettcher, Cantu told her he was going to kill Mosqueda and Kitchen, but she did not believe him; he then left with a gun. *Id.* at 121, 124, 125. He came back to the apartment less than an hour later with his clothes bloody and his face swollen. 36 RR 57, 58. Cantu and Boettcher then returned to the Mosqueda house to search for money and drugs, but found nothing. 35 RR 129, 139. Then, according to Boettcher, they returned to their apartment and cleaned up, then drove Mosqueda's Corvette to downtown Dallas where they partied

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[2] Boettcher was never charged in connection with the murders, despite her claimed presence at the scene shortly after the crime. 36 RR 19-20, 31. She denied at trial that she had received any deal for her testimony; but after she testified at Cantu's trial, the State never sought revocation of her probation (though she was obviously in violation) and she was allowed to relocate to Arkansas without any further reporting requirements. 36 RR 19-20, 29-33, 44, 69-71, 94-95. Further, though the record reveals that the State initially planned to subject Boettcher to a polygraph examination and had made arrangements to do so, they ultimately declined to conduct the examination, giving as an excuse some vague assertion that her menstrual cycle could possibly affect the examination's validity. 36 RR 146.

[3] "CR" refers to the Clerk's Record of papers filed with the clerk's office during Cantu's state court trial, preceded by volume number and followed by page numbers.

"RR" refers to the Reporter's Record of transcribed trial proceedings of Cantu's state court trial, preceded by volume number and followed by page numbers.

"SHCR" refers to the Clerk's Record of papers filed with the clerk's office during Cantu's state habeas corpus proceeding, preceded by volume number and followed by page numbers.

"SX" refers to the numbered exhibits offered by the State and admitted into evidence at Cantu's state court trial; "DX" refers to the numbered exhibits offered by the defense and admitted into evidence at Cantu's state court trial.

into the early morning hours. 35 RR 127, 150-157. They returned to their apartment, slept for a few hours, then left in Cantu's car at about midday on November 4 for a preplanned trip to visit Boettcher's mother and stepfather in Arkansas. 35 RR 157-160. Boettcher did not tell her mother or stepfather (who was a retired police officer) or anyone else about the murders, and made no effort to call the police during their two-day stay in Arkansas, despite the fact that there were several times she was not with Cantu. 36 RR 19, 26, 27, 79-81. On November 7, Boettcher and Cantu returned to Dallas. 35 RR 168. On November 8, immediately after learning that Cantu had been arrested for capital murder and was in police custody, Boettcher called her stepfather in Arkansas, stating, "I'm scared to death they are going to kill me. Get me out of here." 35 RR 183; 36 RR 139. Once back in Arkansas, Boettcher agreed to testify against Cantu. 35 RR 196-198.

During a search of Cantu's and Boettcher's apartment on November 7, police found a box of .380 bullets and some keys, including the key to Amy Kitchen's Mercedes and a key that unlocked the door from the garage to the Mosqueda/Kitchen home; police also found a pair of jeans and some white socks in the kitchen trashcan. SX 105; SX 1; 33 RR 100, 102. Subsequent DNA testing indicated that the jeans and socks had Mosqueda's and Kitchen's blood on them. 37 RR 185, 186.

But trial counsel failed to scrutinize telephone records admitted into evidence

at trial showing that a long-distance telephone call was made from Cantu's apartment at 8:53 p.m. on November 4. *See* SX 119; 37 RR 57. This evidence indicated that someone else had access to Cantu's apartment long after he and Amy Boettcher had left for Arkansas, supporting the conclusion that Cantu was framed by rival drug dealers truly responsible for James Mosqueda's murder. But the jury did not hear this.

Likewise, trial counsel failed to cross-examine State's witnesses regarding toll tag records showing that James Mosqueda's Corvette was driven at 11:15 a.m. on November 4, possibly after Cantu and Boettcher had left for Arkansas. *See* SX 117, 188; 37 RR 41-53; 36 RR 25 (Boettcher's testimony that they left for Arkansas sometime between 11 a.m. and noon on November 4). Boettcher gave no explanation for this toll tag hit in her testimony; according to her testimony, the last time they drove the Corvette was about 6:30 that morning, when they arrived back at the apartment from downtown Dallas. 35 RR 158-159. At the very least, the discrepancy indicated that someone else besides Cantu could have driven the Corvette before it was discovered by law enforcement on November 5 in the parking lot of Cantu's apartment complex,[4] again supporting the conclusion that Cantu was set up as the fall

[4] Significantly, police conducting an emergency search of Cantu's apartment on the evening of November 4 did not see Mosqueda's Corvette, which according to State's witnesses was found the next day parked in close proximity to Cantu's apartment.

guy for a drug-business hit. But trial counsel failed to capitalize on these critical discrepancies in the State's case, discrepancies that would have seriously undermined the physical evidence relied upon by the State to corroborate the testimony of Amy Boettcher.

Trial counsel also failed to probe an obvious inconsistency between the testimony of two of the State's expert witnesses: medical examiner Dr. William Rohr and blood-spatter expert Paulette Sutton. Ms. Sutton opined, based on her examination of *photos* of the crime scene (she did not actually view the crime scene), that Amy Kitchen had been kicked or punched in the face with enough force to spray a large amount of blood over the wall behind the bed. 37 RR 212-215. But Dr. Rohr, who performed autopsies on the victims' bodies, apparently found no evidence of any injuries to the victims apart from the gunshot wounds (aside from a small contusion on James Mosqueda's right shoulder). *See* SX 157, 158, 159, 160. But trial counsel did not even cross-examine Dr. Rohr, 37 RR 130, and his examination of Ms. Sutton consisted of about a page and a half and did not touch upon her testimony's inconsistency with the autopsy reports. 37 RR 228-229.

Additionally, the lead detective in the case testified at trial that police had received an anonymous tip during the course of the investigation that Mosqueda had owed Mario Rojas, a rival drug dealer, a lot of money for drugs. 33 RR 186; 34 RR

119-121.

Finally, to further aggravate counsel's failure to effectively rebut the State's case, trial counsel stood in front of the jury during final argument at the guilt-innocence phase of trial and repeatedly conceded Cantu's complicity in the murders, arguing only that he was technically not guilty of capital murder. 41 RR 31 ("I didn't say he was innocent. I said he's not guilty of capital murder"), 33 ("I'm not saying he's innocent. He's not guilty of capital murder."), 43 ("there's nothing I can tell you that the murder of Amy Kitchens (sic) was not intentional"), 45 ("He's not innocent, but he's not guilty of capital murder"), 46 ("you're not saying he's innocent. You're saying . . . it's not capital murder"). And the State was quick to capitalize on counsel's concessions in its own closing argument. *See* 41 RR 55 ("His own attorney concedes it. I mean, his own attorney argued – it's already made him the killer. . . . You look at the killing that Mr. Goeller has already conceded, and you find some way one of those cases is not intentional.").

II. State Direct Appeal

On direct appeal, the Texas Court of Criminal Appeals affirmed Cantu's conviction and sentence in an unpublished opinion. *Cantu v. State*, No. 74,220, 2004 WL 3093156 (Tex. Crim. App. Jun. 30, 2004). Consistent with Texas law, Cantu was not permitted on appeal to challenge the effectiveness of the assistance that he

received from counsel at trial. *See Thompson v. State*, 9 S.W.3d 808, 813 n.5 (Tex. Crim. App. 1999).

III. State Habeas Corpus Proceedings

While Cantu's case was pending on direct review, attorney Jan Hemphill was appointed to represent Cantu on state habeas corpus review. Hemphill never met with Cantu to consult with him regarding what claims may have been available to raise in state collateral review. She failed to respond to Cantu's repeated requests to communicate with her before the state habeas application was filed. In fact, Hemphill met with Cantu only once during state habeas corpus proceedings, and that was to discuss having her removed as counsel (which did not happen).

Ultimately, Hemphill filed a state habeas application without ever having discussed it with Cantu – and the application only challenged the death sentence, not the conviction itself. The application omitted several potentially meritorious claims, including the claim that trial counsel rendered ineffective assistance by failing to investigate and present evidence of Cantu's actual innocence of the crime. Additionally, Cantu contacted both the State Bar of Texas and the convicting court in an attempt to call attention to state habeas counsel's failings and express his dissatisfaction with her handling of his case, but to no avail.

Without conducting an evidentiary hearing, the convicting court adopted word-

for-word the State's proposed findings of fact and conclusions of law and recommended the denial of habeas corpus relief. Appendix F. The Texas Court of Criminal Appeals adopted those findings and denied relief in another unpublished order. *Ex parte Cantu*, No. WR-63624-01, 2006 WL 120829 (Tex. Crim. App. Jan. 18, 2006).

IV. Federal Habeas Corpus Proceedings

Cantu, represented by new counsel, then filed a petition for writ of habeas corpus in the United States District Court for the Eastern District of Texas, in which he raised, for the first time, a claim that trial counsel rendered ineffective assistance at the guilt-innocence phase of trial. EROA at 35-131; EROA at 201-11 (supplemental memorandum of law)

The federal district court denied Cantu's request to abate the proceedings to allow him to raise the unexhausted ineffective-assistance claim in state court, opting instead to dismiss the claim as procedurally barred based on its conclusion that the state courts would now find the claims barred based on Texas' statutory prohibition on successive habeas corpus applications. EROA at 232-233; EROA at 250-52. The court also rejected Cantu's contention that the ineffective assistance of state habeas counsel constituted cause sufficient to overcome the procedural bar, relying upon circuit precedent holding that there is no constitutional right to effective assistance

of counsel on state collateral review. EROA at 252. The district court did, however, grant a certificate of appealability on the issue as well as Cantu's claim that he is actually innocent. EROA at 265-68.

On January 26, 2011, the United States Court of Appeals for the Fifth Circuit issued its opinion affirming the judgment of the district court. *Cantu v. Thaler*, 632 F.3d 157 (5th Cir. 2011). *See also* EROA at 272-302. The Fifth Circuit affirmed the district court's holding that Cantu's guilt-innocence phase ineffective-assistance claim was procedurally barred, again relying upon prior circuit precedent for the proposition that a criminal defendant has no right to the effective assistance of counsel on state habeas corpus review. 632 F.3d at 166.

On March 26, 2012, this Court granted Cantu's petition for writ of certiorari, vacated the Fifth Circuit's prior opinion denying habeas relief, and remanded the case for reconsideration in light of its opinion in *Martinez v. Ryan*, 132 S. Ct. 1309 (2012). EROA at 304. The Fifth Circuit then remanded the case to federal district court for consideration of the impact of *Martinez* in the first instance. EROA at 305-06. After multiple rounds of supplemental briefing, the federal district court,[5] on June 15, 2016,

[5] When the case was remanded to the district court in 2012, it was initially reassigned to the Honorable Richard Schell, due to the retirement of the Honorable T John Ward, who had presided over the original federal habeas corpus proceeding. EROA 307-08. Then on May 17, 2016, after Judge Schell took senior status, the case was reassigned once again to the Honorable Ron Clark, Chief of the Eastern District of Texas. EROA at 561. Judge Clark issued his opinion less than a month later, on June 15, 2016.

issued its memorandum opinion and order denying habeas corpus relief, dismissing the petition, and denying a certificate of appealability. Appendix B; EROA at 562-579. Cantu's application for certificate of appealability was denied by the Fifth Circuit on November 7, 2016. Appendix A.

REASONS FOR GRANTING THE WRIT

The panel's decision contravened this Court's precedent and deepened two circuit splits in a case raising exceptionally important questions concerning application of this Court's holdings in *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), *Trevino v. Thaler*, 133 S. Ct. 1911 (2013).

Cantu demonstrated cause sufficient to overcome the procedural default of his claims of trial counsel ineffectiveness at the guilt-innocence phase of trial, and the federal district court's contrary holding was at least debatable among jurists of reason. In denying Cantu a COA, the decision below continues the Fifth Circuit's "troubling" pattern of failing to follow this Court's COA precedent. *Jordan v. Fisher*, 135 S. Ct. at 2647, 2652 n.2 (2015) (Sotomayor, J., joined by Ginsburg and Kagan, JJ., dissenting from denial of certiorari). Significantly, the Fifth Circuit's misapplication of the COA standard is at issue in another Texas capital case currently pending before this Court on certiorari review. *Buck v. Davis*, No. 15-8049, *cert. granted*, 136 S. Ct. 2409 (Jun. 6, 2016) (oral argument conducted Oct. 5, 2016).

Additionally, the decision of the federal district court to dismiss the unexhausted claims based on the pleadings without conducting an evidentiary hearing was at least debatable among jurists of reason and warranted the granting of a certificate of appealability. The holding of the Fifth Circuit denying a COA on this issue is at odds with at least one other United States court of appeals. *See Detrich v. Ryan,* 740 F.3d 1237, 1247 (9th Cir. 2013), *cert. denied,* 134 S. Ct. 2662 (2014) (holding that, in deciding whether to excuse state-court procedural default, district courts should allow development of evidence relevant to answering *Martinez* questions); *Hill v. Glebe,* 654 Fed. Appx. 294 (9th Cir. 2016) (memorandum opinion not selected for publication). *See also Sasser v. Hobbs,* 735 F.3d 833, 853-54 (8th Cir. 2013) (remanding to district court in light of *Trevino*, holding that district court is authorized under 28 U.S.C. § 2254(e)(2) and required under *Trevino* to hold evidentiary hearing on the claims). *See* Rule 10(a), Rules of the Supreme Court (2013) (setting forth as a consideration governing review on certiorari that "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter").

For all these reasons, and those discussed more fully herein, certiorari should be granted.

I. Certiorari should be granted because the panel applied an incorrect and overly burdensome COA standard in reviewing the federal district court's summary dismissal of Cantu's claims as procedurally defaulted.

This Court's precedent is clear: A COA involves only a threshold analysis and preserves full appellate review of potentially meritorious claims. Thus, "a prisoner seeking a COA need only demonstrate 'a substantial showing'" that the district court erred in denying relief. *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003) (quoting *Slack v. McDaniel*, 529 U.S. at 473, 484 (2000), and 28 U.S.C. § 2253(c)(2)). This "threshold inquiry" is satisfied so long as reasonable jurists could either disagree with the district court's decision or "conclude the issues presented are adequate to deserve encouragement to proceed further." *Id.* at 327, 336. A COA is not contingent upon proof "that some jurists would grant the petition for habeas corpus. Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail." *Id.* at 338.

Cantu sought a COA on the following issues: (1) Whether the district court erred in dismissing Cantu's claims as procedurally defaulted; and (2) Whether the district court erred by dismissing Cantu's claims without conducting an evidentiary hearing. The showing made by Cantu in the court below at a minimum made a threshold showing that requires a COA. The panel's contrary conclusion is a direct

product of its failure to adhere to this Court's precedent. Instead of assessing the debatability of the district court's opinion, the panel improperly rejected Cantu's ineffectiveness claim on its merits.

In reviewing the facts and circumstances of Cantu's case, the Fifth Circuit panel "pa[id] lipservice to the principles guiding issuance of a COA," *Tennard v. Dretke*, 542 U.S. 274, 283 (2004), but actually held Cantu to a far more onerous standard. Specifically, the panel "sidestep[ped the threshold COA] process by first deciding the merits of [Cantu's] appeal, and then justifying its denial of a COA based on its adjudication of the actual merits," thereby "in essence deciding an appeal without jurisdiction." *Miller-El* , 537 U.S. at 336-37. As this Court stressed in *Miller-El*, the threshold nature of the COA inquiry "would mean very little if appellate review were denied because the prisoner did not convince a judge, or, for that matter, three judges, that he or she would prevail." *Miller-El*, 537 U.S. at 337. Yet that is precisely what the panel did here.

The Fifth Circuit's failure to apply the proper COA standard in this case is not an isolated error. This Court has twice corrected the Fifth Circuit's unduly restrictive approach to granting COAs. *See Tennard*, 542 U.S. at 283; *Miller-El*, 537 U.S. at 327. And just this past Term, three Justices noted that the Fifth Circuit continues its "troubling" pattern of failing to apply the threshold COA standard required by this

Court's precedent. *Jordan*, 135 S. Ct. at 2652 n.2 (2015) (Sotomayor, J., joined by Ginsburg and Kagan, JJ., dissenting from denial of certiorari).

The Fifth Circuit's troubling pattern has resulted in a demonstrable circuit split with respect to the application of the COA standard. As set forth by the petitioner in *Buck v. Davis*, 136 S. Ct. 2409, No. 15-8049 (a Texas capital § 2254 case in which this Court granted certiorari review on June 6, 2016, and heard oral argument on October 5, 2016), a review of electronically available capital § 2254 cases in the Fifth Circuit and two other nearby circuits (the Fourth and Eleventh) in the past five years, demonstrates a dramatic difference among the three circuits. In the Fifth Circuit, a COA was denied on all claims by both the district court and the court of appeals 59 percent of the time. By contrast, during that same period, a COA was denied on all claims by both the district court and court of appeals in only 6.25 percent of capital § 2254 cases in the Eleventh Circuit and 0 percent of such cases in the Fourth Circuit. *See* Petition for Writ of Certiorari filed by Petitioner Duane Buck, No. 15-8049, App. F. This stark disparity quantifiably demonstrates that the Fifth Circuit's application of the COA standard is significantly different from, and more burdensome than, that of the Fourth and Eleventh Circuits, which are more consistent with one another.

Certiorari is warranted on this issue.

II. Certiorari should be granted because, contrary to the panel's holding, reasonable jurists could debate whether the federal district court correctly concluded that Cantu failed to show cause sufficient to excuse the procedural default of his trial counsel ineffectiveness claims.

A. The *Martinez* exception applies to Texas cases.

In *Martinez v. Ryan*, this Court held that inadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial. 132 S. Ct. 1309, 1318 (2012) (citing *Coleman v. Thompson*, 501 U.S. 722 (1991)). The *Martinez* Court explained that, when "the first designated proceeding for a prisoner to raise a claim of ineffective assistance at trial" is a collateral attack on the judgment, it takes on special significance. 132 S. Ct. at 1315. Such "initial-review collateral proceedings," are "in many ways the equivalent of a prisoner's direct appeal as to the ineffective-assistance claim." *Id.* at 1315, 1317. And, because ineffective assistance of direct appeal counsel may excuse procedural default, the Court reasoned that there is a similar risk state prisoners will forfeit claims of ineffective trial counsel unless effectively represented in initial-review collateral proceedings. *Id.* at 1317. *Martinez* resolved this problem by holding that "[i]nadequate counsel in initial review proceedings may establish cause for a prisoner's procedural default[.]" *Id.* at 1315. Such cause exists if the collateral proceeding was actually the petitioner's first opportunity for state

court review of his ineffective-counsel claim.

The *Martinez* Court held that a petitioner demonstrates cause to excuse the procedural default of an ineffective-assistance-of-trial-counsel claim by showing:

> (1) that "appointed counsel in the initial-review collateral proceeding, where the claim should have been raised, was ineffective under the standards of *Strickland v. Washington*, 466 U.S. 668 [] (1984)"; and,
>
> (2) that "the underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that . . . [it] has some merit."

Martinez, 132 S. Ct. at 1318-19 (citing *Miller-el v. Cockrell*, 537 U.S. 322 (2003) (describing standard for certificate of appealability)).

This Court subsequently issued its opinion in another Texas death-penalty case, *Trevino v. Thaler*, 133 S. Ct. 1911 (2013), and laid to rest finally any attempts to distinguish the Arizona procedure at issue in *Martinez* from that in Texas. The Court held that a federal habeas court can excuse a defendant's procedural default, even if the state law – as in Texas – does not require that an ineffective assistance of trial counsel claim be raised in an initial collateral review proceeding. *Id.* at 1918-19. Thus, contrary to prior Fifth Circuit rulings, the *Martinez* exception to the procedural-default rule of *Coleman v. Thompson*, 501 U.S. 722, 729-730 (1991), does in fact apply to Texas cases.

The *Trevino* Court recognized that "[u]nlike 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?" *Trevino,* 133 S. Ct. at 1918 (emphasis in original). This Court answered this question in the negative, *id.* at 1918-19, specifically disagreeing with previous holdings of the Fifth Circuit that the differences between the Arizona and Texas procedures rendered the *Martinez* exception inapplicable in most if not all Texas cases.

As the *Trevino* Court finally concluded, "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*." *Id.* at 1921. The Court vacated the Fifth Circuit's judgment in Trevino's case and remanded the case for consideration of whether Trevino's claim of ineffective assistance of trial counsel is substantial or whether Trevino's initial state habeas attorney was ineffective. *Id.* at 1921.

B. Cantu's claims meet the *Martinez* standard, and the district court's contrary holding was at least debatable among jurists of reason.

Cantu demonstrated cause sufficient to overcome the procedural default of his claim of trial counsel ineffectiveness at the guilt-innocence phase of trial. The district court's contrary holding is at least debatable among jurists of reason, thus the Fifth Circuit panel erred in denying a COA on the issue.

1. Cantu's court-appointed state habeas counsel rendered ineffective assistance by failing to challenge trial counsel's performance at the guilt-innocence phase of Cantu's trial.

Cantu's attorney on state habeas rendered ineffective assistance under the *Strickland* standard by failing to interview Cantu and conduct an independent investigation of the facts of the offense, and, in turn, by failing to argue that trial counsel were ineffective for conceding Cantu's guilt rather than argue his innocence.

Shortly after Cantu was sentenced to death, while his case was pending on direct review, attorney Jan Hemphill was appointed to represent Cantu on state habeas corpus review. Hemphill never met with Cantu to consult with him regarding what claims may have been available to raise in state collateral review. She failed to respond to Cantu's repeated requests to communicate with her before the state habeas application was filed. In fact, Hemphill met with Cantu only once during state habeas corpus proceedings, and that was to discuss having her removed as counsel (which

did not happen).

Ultimately, Hemphill filed a state habeas application without ever having discussed it with Cantu – and the application only challenged the death sentence, not the conviction itself. The application omitted several potentially meritorious claims, including the claim that trial counsel rendered ineffective assistance by failing to investigate and present evidence of Cantu's actual innocence of the crime. This omission amounted to deficient performance; and absent such omission, there is a reasonable likelihood Cantu would have been granted relief. Court-appointed state habeas counsel Jan Hemphill utterly failed to provide reasonably adequate assistance of counsel during state habeas corpus proceedings.

Additionally, Cantu contacted both the State Bar of Texas and the convicting court in an attempt to call attention to state habeas counsel's failings and express his dissatisfaction with her handling of his case, but to no avail. He was, in essence, forced to acquiesce to the conduct of an attorney who refused to hear him out. Precedent teaches that, on state habeas corpus review, "[a]ttorney ignorance or inadvertence is not 'cause' [sufficient to overcome procedural default] because the attorney is the petitioner's agent when acting, or failing to act, in furtherance of the litigation, and the petitioner must bear the risk of attorney error." *Coleman v. Thompson*, 501 U.S. at 753 (citing *Murray v. Carrier*, 477 U.S. 478, 488 (1986)).

But under the circumstances presented in this case, state habeas counsel cannot truly be said to have acted as Cantu's agent.

The district court below, in rejecting Cantu's assertion that state habeas counsel was ineffective, merely stated that "[s]tate habeas counsel had access to the record, and the record revealed that the evidence of guilt was overwhelming." EROA at 575; Appendix B. This statement flies in the face of the statutory and professional requirements imposed upon state habeas counsel to conduct an independent, extra-record investigation of the case. Additionally, such a limitation on the duty of state habeas counsel would create "a serious danger" of weakening the *Martinez/Trevino* rule. *Trevino v. Davis*, 2016 WL 3710083, at *16 (5th Cir. Jul. 11, 2016).

> If state habaeas counsel is not subject to the same *Strickland* requirement to perform some minimum investigation prior to bringing the initial state habeas petition, the *Martinez/Trevino* rule would have limited utility (if any). . . . There is a serious danger . . . that a state trial counsel's failure to investigate . . . 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 [] claims for deficient investigation might be effectively unreviewable under *Martinez/Trevino*.

Id. at *16. Particularly where, as here, there was substantial evidence in the record – but not effectively utilized by trial counsel – supporting Cantu's claim that he did not commit the murders, Hemphill had a duty to conduct an independent, extra-record

investigation of the case. At the very least, she should have been on notice regarding the existence of binders containing evidence that had not been disclosed to the defense prior to or during trial, which the lead detective in the case referred to during cross examination. *See* 33 RR 186; 34 RR 119-121. But Hemphill did not even review these binders during her representation of Cantu.

Cantu was, in fact, deprived of the effective assistance of counsel in his "one and only appeal" available to challenge trial counsel's performance. Such ineffective assistance constitutes cause sufficient to excuse the procedural default of the underlying claim.

2. Cantu's underlying claim of ineffective assistance of trial counsel is substantial and has sufficient merit to satisfy the threshold showing of *Martinez*.

Finally, as to the second *Martinez* prong, Cantu's claim of trial-counsel ineffectiveness satisfies *Martinez*'s threshold showing of substantial merit. Cantu's trial attorneys – Matt Goeller and Don High – rendered constitutionally ineffective assistance by failing to conduct any significant investigation into the facts of the crime for which their client was accused. They failed to discover and effectively utilize several critical pieces of evidence that supported Cantu's unwavering insistence that he had no involvement in the murders of his cousin and his cousin's fiancé. In fact, during closing argument at the guilt-innocence phase of trial, counsel

repeatedly conceded Cantu's culpability for the murders. But no court has ever scrutinized the performance of Cantu's attorneys at the guilt-innocence phase of trial.

In reviewing claims of ineffective assistance of counsel, courts employ the two-prong inquiry articulated by this Court in *Strickland v. Washington*, 466 U.S. 668 (1984). The first prong, known as the deficient performance prong, requires the petitioner to demonstrate the trial counsel's representation fell below an objective standard of reasonableness under prevailing professional norms. *Strickland*, 466 U.S. at 688. In evaluating counsel's performance, this Court has long referred to the American Bar Association ("ABA") Standards for Criminal Justice as "guides to determining what is reasonable." *Rompilla v. Beard*, 545 U.S. 374, 387 (2005); *Wiggins v. Smith* 539 U.S. 510, 524 (2003); *Strickland*, 466 U.S. at 688. The second prong requires the defendant to demonstrate that he was prejudiced by the deficient performance of his attorney. To establish prejudice, a petitioner "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." *Strickland*, 466 U.S. at 694.

It is beyond cavil that trial counsel has a duty to conduct an independent investigation of the facts of the offense with which his client is charged.

> Counsel should conduct independent investigations relating to the guilt/innocence phase and to the penalty phase of a capital trial. Both investigations should begin immediately upon counsel's entry into the case and should be pursued expeditiously. The investigation for preparation of the guilt/innocence phase of the trial should be conduct regardless of any admission or statement by the client concerning facts constituting guilt. The investigation for preparation of the sentencing phase should be conducted regardless of any initial assertion by the client that mitigation is not to be offered. This investigation should comprise efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor.

ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (1989) (hereinafter, "ABA Guidelines"), 11.4.1(A-C) "Investigation." *See also* ABA Criminal Justice Standard 4-4.1(a). In furtherance of this duty to investigate, counsel are advised to utilize various sources including charging documents, the accused, potential witnesses, the police and prosecution, physical evidence, the scene, and expert assistance. ABA Guidelines 11.4.1(D). The ABA Guidelines advise specifically that "counsel should demand on behalf of the client all necessary experts for preparation of both phases of trial." ABA Guidelines 11.4.1 (Comment).

In spite of these admonishments, Cantu's trial counsel failed to even request the appointment of a defense investigator. This failure certainly hampered their ability to explore the complex facts and extensive case of characters surrounding the commission of the offense. And, no doubt, their lack of an investigator was the

reason they were unable to interview potential witnesses and obtain evidence apart from that provided by the State through discovery. Counsel also failed to seek the assistance of a DNA expert, a ballistics expert, a latent fingerprint examiner, a blood-spatter expert, or a medical examiner, all experts utilized by the State in the presentation of its case-in-chief. Counsel basically opted to take the State's case for guilt at face value to the detriment of their client. Thus, key facts concerning the offense were never explored.

Cantu was accused of the murders of his cousin James Mosqueda – a local drug dealer who sold cocaine in large quantities – and Mosqueda's fiancé Amy Kitchen in their North Dallas home. The State's principal witness against Cantu was Amy Boettcher – Cantu's girlfriend at the time the crime was discovered – who even the prosecutor described as a "doper" and a "lawbreaker" for whom he had no respect.[6] 41 RR 55. Boettcher claimed that on November 3, 2000, the night before the bodies were discovered, Cantu spoke to Mosqueda over the phone and arranged to go to his

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[6] Boettcher was never charged in connection with the murders, despite her claimed presence at the scene shortly after the crime. 36 RR 19-20, 31. She denied at trial that she had received any deal for her testimony; but after she testified at Cantu's trial, the State never sought revocation of her probation (though she was obviously in violation) and she was allowed to relocate to Arkansas without any further reporting requirements. 36 RR 19-20, 29-33, 44, 69-71, 94-95. Further, though the record reveals that the State initially planned to subject Boettcher to a polygraph examination and had made arrangements to do so, they ultimately declined to conduct the examination, giving as an excuse some vague assertion that her menstrual cycle could possibly affect the examination's validity. 36 RR 146.

house to talk to him. 35 RR 121. According to Boettcher, Cantu told her he was going to kill Mosqueda and Kitchen, but she did not believe him; he then left with a gun. *Id.* at 121, 124, 125. Boettcher claimed that Cantu came back to the apartment less than an hour later with his clothes bloody and his face swollen. 36 RR 57, 58. She claimed that she and Cantu then returned to the Mosqueda house to search for money and drugs, but found nothing. 35 RR 129, 139. Then, according to Boettcher, they returned to their apartment and cleaned up, then drove Mosqueda's Corvette to downtown Dallas where they partied into the early morning hours. 35 RR 127, 150-157. They returned to their apartment, slept for a few hours, then left in Cantu's car at about midday on November 4 for a preplanned trip to visit Boettcher's mother and stepfather in Arkansas. 35 RR 157-160. Boettcher did not tell her mother or stepfather (who was a retired police officer) or anyone else about the murders, and made no effort to call the police during their two-day stay in Arkansas, despite the fact that there were several times she was not with Cantu. 36 RR 19, 26, 27, 79-81. On November 7, Boettcher and Cantu returned to Dallas. 35 RR 168. On November 8, immediately after learning that Cantu had been arrested for capital murder and was in police custody, Boettcher called her stepfather in Arkansas, stating, "I'm scared to death they are going to kill me. Get me out of here." 35 RR 183; 36 RR 139. Once back in Arkansas, Boettcher agreed to testify against Cantu. 35 RR 196-198.

During a search of Cantu's and Boettcher's apartment on November 7, police found a box of .380 bullets and some keys, including the key to Amy Kitchen's Mercedes and a key that unlocked the door from the garage to the Mosqueda/Kitchen home; police also found a pair of jeans and some white socks in the kitchen trashcan. SX 105; SX 1; 33 RR 100, 102. Subsequent DNA testing indicated that the jeans and socks had Mosqueda's and Kitchen's blood on them. 37 RR 185, 185.

But trial counsel failed to scrutinize telephone records admitted into evidence at trial showing that a long-distance telephone call was made from Cantu's apartment *at 8:53 p.m.* on November 4. *See* SX 119; 37 RR 57. Contrary to the Director's arguments, the record does not support a claim that Cantu's mother placed the long-distance telephone call from Cantu's apartment. The telephone call was placed at 8:53 p.m., *not 8:37 p.m., as district court stated. See* EROA at 567. This critical error has been repeated in the Director's briefing and the holdings of the lower federal courts throughout these proceedings. The record shows that Dallas police had cleared and secured the apartment by 8:37 p.m. 32 RR 86-88, 97. Dallas police officer Steven Junger testified that he and another officer arrived at Cantu's apartment with Cantu's mother at about 8 or 8:15 p.m. on November 4. 32 RR 81. The officers entered the apartment at about 8:25 p.m., and after a quick sweep of the apartment they allowed Mrs. Cantu to enter. 32 RR 82. Officer Junger testified that he was inside the

apartment between five and ten minutes. 32 RR 102, 104, 107. And he was the last person to exit the apartment. 32 RR 86. Then he generated the incident report from his squad car at 8:37 p.m. 32 RR 97. While Officer Junger did state that Mrs. Cantu made a telephone call from the apartment, it was unclear from his testimony whether the call was made from the apartment's landline or from Mrs. Cantu's cell phone. 32 RR 84, 88. Further, according to Officer Junger's testimony, Mrs. Cantu made the call at about 8:30 p.m., more than twenty minutes before the long-distance call reflected on State's Exhibit 119. 32 RR 84. This evidence indicated that someone else had access to Cantu's apartment long after he and Amy Boettcher had left for Arkansas, *and* after police and Mrs. Cantu had vacated the apartment, supporting the conclusion that Cantu was framed by rival drug dealers truly responsible for James Mosqueda's murder.[7] But the jury did not hear this due to trial counsel's ineffectiveness.

Likewise, trial counsel failed to cross-examine State's witnesses regarding toll tag records showing that James Mosqueda's Corvette was driven at 11:15 a.m. on November 4, possibly after Cantu and Boettcher had left for Arkansas. See SX 117, 188; 37 RR 41-53; 36 RR 25 (Boettcher's testimony that they left for Arkansas

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[7] The lead detective in the case testified at trial that police had received an anonymous tip during the course of the investigation that Mosqueda had owed Mario Rojas, a rival drug dealer, a large sum of money for drugs. 33 RR 186; 34 RR 119-121.

sometime between 11 a.m. and noon on November 4). Boettcher gave no explanation for this toll tag hit in her testimony; according to her testimony, the last time they drove the Corvette was about 6:30 that morning, when they arrived back at the apartment from downtown Dallas. 35 RR 158-159. At the very least, the discrepancy indicated that someone else besides Cantu could have driven the Corvette before it was discovered by law enforcement on November 5 in the parking lot of Cantu's apartment complex,[8] again supporting the conclusion that Cantu was set up as the fall guy for a drug-business hit. But trial counsel failed to capitalize on these critical discrepancies in the State's case, discrepancies that would have seriously undermined the physical evidence relied upon by the State to corroborate the testimony of Amy Boettcher.

Trial counsel also failed to probe an obvious inconsistency between the testimony of two of the State's expert witnesses: medical examiner Dr. William Rohr and blood-spatter expert Paulette Sutton. Ms. Sutton opined, based on her examination of *photos* of the crime scene (she did not actually view the crime scene), that Amy Kitchen had been kicked or punched in the face with enough force to spray a large amount of blood over the wall behind the bed. 37 RR 212-215. But Dr. Rohr,

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[8] Significantly, police conducting an emergency search of Cantu's apartment on the evening of November 4 did not see Mosqueda's Corvette, which according to State's witnesses was found the next day parked in close proximity to Cantu's apartment.

who performed autopsies on the victims' bodies, apparently found no evidence of any injuries to the victims apart from the gunshot wounds (aside from a small contusion on James Mosqueda's right shoulder). *See* SX 157, 158, 159, 160. But trial counsel did not even cross-examine Dr. Rohr, 37 RR 130, and his examination of Ms. Sutton consisted of about a page and a half and did not touch upon her testimony's inconsistency with the autopsy reports. 37 RR 228-229.

Trial court further rendered deficient performance by failing to even interview Tawny Svihovec, Cantu's ex-girlfriend, at whose apartment police found the murder weapon and who apparently did not believe Cantu was involved in the murders (and who the State did not call as a witness); by failing to question State's witnesses regarding whether Cantu's face was swollen when they saw him during the early morning hours of November 4 in order to impeach Amy Boettcher's testimony to that effect; by failing to question State's witnesses who testified they saw Amy Boettcher wearing Amy Kitchen's engagement ring (on her left hand) regarding whether they also noticed any injury or swelling to that hand, which Amy Boettcher and other witnesses testified was the result of an assault by Cantu that took place the night before.

Trial counsel failed to capitalize on these critical discrepancies in the State's case, discrepancies that would have seriously undermined the physical evidence

relied upon by the State to corroborate the testimony of Amy Boettcher. Counsel basically opted to take the State's case for guilt at face value to the detriment of their client. Thus, keys facts concerning the offense were never explored.

But perhaps most harmful of all, trial counsel stood in front of the jury during final argument at the guilt-innocence phase of trial and repeatedly conceded Cantu's complicity in the murders, arguing only that he was technically not guilty of capital murder. 41 RR 31 ("I didn't say he was innocent. I said he's not guilty of capital murder"), 33 ("I'm not saying he's innocent. He's not guilty of capital murder."), 43 ("there's nothing I can tell you that the murder of Amy Kitchens (sic) was not intentional"), 45 ("He's not innocent, but he's not guilty of capital murder"), 46 ("you're not saying he's innocent. You're saying . . . it's not capital murder"). And the State was quick to capitalize on counsel's concessions in its own closing argument. *See* 41 RR 55 ("His own attorney concedes it. I mean, his own attorney argued – it's already made him the killer. . . . You look at the killing that Mr. Goeller has already conceded, and you find some way one of those cases is not intentional.").

It is true that an attorney's concession of his client's guilt at argument without that client's express consent does not automatically render counsel's performance deficient. *Florida v. Nixon*, 543 U.S. 175, 192 (2004). And in certain cases, it can be a valid strategic decision. *Id.* at 190-191. But for a trial strategy to be deemed

reasonable, it must be based on a thorough investigation. *Wiggins v. Smith*, 539 U.S. 510, 521-22 (2003). Trial counsel's decision to concede guilt was not based on a truly thorough investigation. In a case such as this, where there was ample evidence to argue in support of your client's innocence, or at least that reasonable doubt existed, such a concession certainly fell below the bounds of reasonably professional assistance.

Trial counsel's many failures amounted to deficient performance, and had trial counsel performed differently, there is a reasonable likelihood that at least one jury would have found a reasonable doubt as to Cantu's guilt and voted "not guilty." At the very least, this claim meets the threshold showing of substantial merit required by *Martinez* to necessitate merits review.

3. The lower federal courts erred in their analysis of the underlying claim of trial counsel ineffectiveness.

Contrary to the lower courts' conclusions, Cantu's claim of trial-counsel ineffectiveness satisfies *Martinez*'s threshold showing of substantial merit. The courts erred in their analysis in several significant respects.

As an initial matter, the district court's reliance on a contention in Mr. Goeller's state habeas affidavit that Cantu in fact admitted his guilt to trial counsel is unsound. *See* EROA at 566-67, 571, 572. First, the affidavit was submitted in

response to Cantu's state habeas claim that counsel rendered ineffective assistance *at the sentencing phase*. SHCR at 156, 158-159. Therefore, Mr. Goeller's claim that Cantu admitted guilt clearly exceeded the scope of the inquiry; the claim was gratuitous and utterly self-serving. Furthermore, due to state habeas counsel's complete failure to communicate effectively with Cantu, Cantu was never advised that trial counsel had even submitted an affidavit, much less that the affidavit contained a claim that he had admitted guilt. Cantu did not learn of the affidavit until he received a copy of it attached as an appendix to his federal habeas corpus petition. Thus, he has never had an opportunity to rebut the claim by trial counsel that he admitted his guilt, *a claim that he emphatically denies*. And perhaps most significantly, this portion of Mr. Goeller's affidavit was neither specifically credited nor relied upon by the state habeas judge in its findings of fact and conclusions of law. SHCR at 187-192. Under these circumstances, it was improper for the lower courts to credit the claim and rely upon it as a basis for denying Cantu's claim of ineffective assistance of counsel.

Moreover, the courts' prejudice analysis was faulty. The federal district court appeared to rely on the prior holdings of the federal district court (and the court of appeals) rejecting Cantu's claim of actual innocence to support its conclusion that Cantu has failed to establish *Strickland* prejudice. EROA at 565, 567-69, 573-574.

But in so holding, the district court improperly conflated the actual-innocence gateway standard of Texas law with the prejudice prong of the *Strickland* standard.[9]

As the district court noted, on original submission of this case in federal district court, in addition to arguing that the defaulted claim should have been reviewed on the merits due to the ineffectiveness of state habeas counsel (what has subsequently been dubbed the "*Martinez* exception"), Cantu also argued that a state remedy remained under Article 11.071 §5(a)(2) of the Texas Code of Criminal Procedure and thus sought a stay of federal proceedings to allow him to pursue that remedy. *See* EROA at 567-68. On original submission, the district court rejected Cantu's argument and denied a stay, concluding that if Cantu were to present the ineffective-assistance claim to the state court in a subsequent application, the state court would dismiss the claim as successive without addressing the merits. *Id.* Now, according to the district court, "[t]he actual innocence analysis employed by both this court and the Fifth Circuit is, in effect, the same analysis to employ with respect to the [*Martinez/Strickland*] prejudice prong." EROA at 574. But this reasoning was flawed.

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[9] The district court also held alternatively that Cantu is not entitled to relief under *Martinez* because such relief is foreclosed by the courts' prior consideration and rejection of Cantu's actual innocence claim. EROA at 576-77. This holding is flawed for the same reasons. Cantu's defaulted ineffective-assistance claim was never reviewed on the merits by either this Court or the district court.

These standards are at odds in at least two critical respects. First, the actual-innocence analysis of Article 11.071 §5(a)(2) does not take into account evidence that was part of the trial record. Rather, a gateway actual-innocence claim must be based on newly discovered evidence that was not in the record. Tex. Code Crim. Proc. Ann. art. 11.071 §5(a)(2); *see also Schlup v. Delo*, 513 U.S. 298, 324 (1995) (holding that, to mount credible claim of *innocence*, applicant must support allegations of constitutional error with reliable evidence that was not presented at trial). But Cantu's claim of trial counsel ineffectiveness relied in substantial part upon trial counsel's failure to argue and make effective use of evidence actually in the record – evidence which, while technically before the jury, was not capitalized on by trial counsel. And, of course, Cantu's claim also relied on counsel's failure to argue that he was actually innocent in light of this evidence and counsel's *concession* that Cantu was guilty of murder, neither of which were taken into account in the district court's actual-innocence analysis.

Second, the showing required to prove the prejudice prong of *Strickland* is not as stringent as that to prove "actual innocence" under Article 11.071 §5(a)(2). To meet the standard for filing a subsequent habeas corpus application under Article 11.071 §5(a)(2), Cantu was required to present "specific facts establishing that by a preponderance of the evidence, but for the violation of the United States Constitution

no rational juror could have found the applicant guilty beyond a reasonable doubt." Tex. Code Crim. Proc. Ann. art. 11.071 §5(a)(2)) (emphasis added). In contrast, to prove prejudice under *Strickland*, Cantu was required only to prove "a reasonable probability that *at least one juror would have refused to return a verdict of guilty.*" *Tenny v. Dretke*, 416 F.3d 404, 411 (5th Cir. 2005) (quoting *Soffar v. Dretke*, 368 F.3d 441, 479 (5th Cir. 2004)) (emphasis added).

There is a vast difference between having to prove that "no rational juror" could find you guilty and having to prove that "one juror" would decline to find you guilty. Cantu is not required to prove that he is actually innocent in order to prevail on his claim of ineffective assistance of trial counsel, though this is precisely what the lower courts held. This flawed reasoning undermined the federal district court's holding and necessitated the granting of COA. Certiorari review is therefore warranted.

III. Certiorari should be granted because it is at least debatable among jurists of reason that the district court erred by dismissing Cantu's claims without conducting an evidentiary hearing.

Finally, the district court's dismissal of Cantu's unexhausted claims of ineffective assistance of trial counsel without conducting an evidentiary hearing constituted error and warranted the granting of a certificate of appealability. The Fifth Circuit erred by failing to grant a COA on this issue.

The standard under which a federal court reviews a state court judgment for constitutional error is usually highly deferential. *See* 28 U.S.C. § 2254(d). But in the instant case, as in *Trevino*, "AEDPA deference does not apply . . . because the district court was not reviewing a state court decision on the merits of [Cantu's] claim but rather addressing the merits for the first time. Thus, AEDPA's deferential standard of review does not apply, and we review the merits de novo." *Trevino v. Davis*, 2016 WL 3710083, at *10. In the absence of any state court adjudication of the claims, the court below should have conducted an evidentiary hearing to resolve the disputed facts presented by Cantu's claims of trial and state habeas counsel ineffectiveness.

The Fifth Circuit panel's contrary holding is at odds with at least one other circuit. *See Detrich v. Ryan,* 740 F.3d 1237, 1247 (9th Cir. 2013), *cert. denied,* 134 S. Ct. 2662 (2014) (holding that, in deciding whether to excuse state-court procedural default, district courts should allow development of evidence relevant to answering *Martinez* questions); *Hill v. Glebe,* 654 Fed. Appx. 294 (9th Cir. 2016) (memorandum opinion not selected for publication). *See also Sasser v. Hobbs,* 735 F.3d 833, 853-54 (8th Cir. 2013) (remanding to district court in light of *Trevino*, holding that district court is authorized under 28 U.S.C. § 2254(e)(2) and required under *Trevino* to hold evidentiary hearing on the claims). *See* Rule 10(a), Rules of the Supreme Court (2013) (setting forth as a consideration governing review on certiorari that "a United

States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter").

As this Court noted in *Martinez v. Ryan*, ineffective assistance of counsel claims "often require investigative work" and "often turn[ ] on evidence outside the trial record." 132 S. Ct. at 1317. *See also Cullen v. Pinholster*, 131 S.Ct. 1388, 1400–01 (2011) (citing *Schriro v. Landrigan*, 550 U.S. 465, 473 (2007), for the proposition that "district courts, under AEDPA, generally retain the discretion to grant an evidentiary hearing" and noting that "[s]ection 2254(e)(2) continues to have force where § 2254(d)(1) does not bar federal habeas relief"); *Siripongs v. Calderon*, 35 F.3d 1308, 1310 (9th Cir.1994) ("In a capital case, a habeas petitioner who asserts a colorable claim to relief, and who has never been given the opportunity to develop a factual record on that claim, is entitled to an evidentiary hearing in federal court.").

Because pre-*Martinez* and pre-*Trevino* circuit precedent precluded any substantive review of either Cantu's underlying claim of trial-counsel ineffectiveness or his assertion of cause based on state-habeas-counsel ineffectiveness, Cantu has never had an opportunity to factually develop these claims. Therefore, the federal district court below should have conducted an evidentiary hearing regarding the performance of both state habeas counsel and trial counsel. And the Fifth Circuit panel erred in denying a COA on this issue. Certiorari review is therefore warranted.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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Date: 2-6-17

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16-70016

United States Court of Appeals
Fifth Circuit
FILED
November 7, 2016
Lyle W. Cayce
Clerk

IVAN ABNER CANTU,

Petitioner - Appellant

v.

LORIE DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent - Appellee

Appeal from the United States District Court
for the Eastern District of Texas
USDC No. 2:06-CV-166

Before CLEMENT, OWEN, and SOUTHWICK, Circuit Judges.

PER CURIAM:*

Ivan Cantu requests a certificate of appealability ("COA") to appeal the district court's dismissal of his petition for habeas corpus relief. Cantu brought a procedurally defaulted claim that his trial counsel was ineffective for failing to investigate and present evidence of his actual innocence. The district court

* 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.

held that Cantu did not establish cause to excuse the procedural default. We deny a COA.

I.

Cantu is on death row in Texas. He was convicted and sentenced to death in Texas state court for capital murder.[1] The Texas Court of Criminal Appeals affirmed his conviction and sentence and subsequently denied post-conviction relief.

Cantu sought habeas corpus relief in federal district court, raising for the first time a claim that trial counsel was ineffective for failing to investigate and present evidence of his actual innocence. The district court dismissed Cantu's petition, holding that this claim was procedurally defaulted. *Cantu v. Quarterman*, No. 2:06cv166, 2009 WL 728577, at *3-13 (E.D. Tex. Mar. 17, 2009) (denying six claims and dismissing seven others as procedurally defaulted). This court affirmed. *Cantu v. Thaler*, 632 F.3d 157, 166-67 (5th Cir. 2011). The Supreme Court vacated and remanded for consideration of *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), which was issued after this court's decision. *See Cantu v. Thaler*, 132 S. Ct. 1791 (2012). *Martinez* 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 initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective." 132 S. Ct. at 1320. In *Trevino v. Thaler*, 133 S. Ct. 1911, 1921 (2013), the Supreme Court extended *Martinez* to Texas cases. This court remanded to the district court to decide in the first instance the effect of *Martinez* on Cantu's contention that he had cause for the procedural default. *See Cantu v. Thaler*, 682 F.3d 1053, 1054 (5th Cir. 2012).

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[1] For a summary of the factual background, see our detailed opinion in *Cantu v. Thaler*, 632 F.3d 157 (5th Cir. 2011), *vacated*, 132 S. Ct. 1791 (2012).

On remand, the district court applied *Martinez* and held that Cantu failed to show cause to excuse the procedural default because he did not set forth a substantial claim of ineffective assistance of trial counsel or demonstrate that state habeas counsel was ineffective. *See Cantu v. TDCJ-CID*, No. 2:06-CV-166, 2016 WL 3277246, at *6-9 (E.D. Tex. June 15, 2016). The district court also denied a COA. *Id.* at *10. Cantu seeks a COA from this court.

II.

"[W]hen a habeas corpus petitioner seeks to initiate an appeal of the dismissal of a habeas corpus petition . . ., the right to appeal is governed by the certificate of appealability (COA) requirements . . . ." *Slack v. McDaniel*, 529 U.S. 473, 478 (2000). An "appeal may not be taken" from a final order in a habeas corpus proceeding without a COA. 28 U.S.C. § 2253(c)(1). A COA may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." *Id.* § 2253(c)(2). When a claim is dismissed as procedurally defaulted, the petitioner must show "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack*, 529 U.S. at 484. At the COA stage, "we only conduct a threshold inquiry into the merits of the claims" raised in the habeas petition. *Reed v. Stephens*, 739 F.3d 753, 764 (5th Cir. 2014).

III.

Cantu requests a COA on the following issues: "(1) [w]hether the district court erred in dismissing Cantu's claims as procedurally defaulted; and (2) [w]hether the district court erred by dismissing Cantu's claims without conducting an evidentiary hearing."

A.

Federal merits review of a procedurally defaulted claim is permitted when the petitioner is able to "demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law." *Hughes v. Quarterman*, 530 F.3d 336, 341 (5th Cir. 2008). Applying *Martinez* in the COA context, we have held that "to succeed in establishing cause, the petitioner must show (1) that his claim of ineffective assistance of counsel at trial is substantial—i.e., has some merit—and (2) that habeas counsel was ineffective in failing to present those claims in his first state habeas proceeding." *Garza v. Stephens*, 738 F.3d 669, 676 (5th Cir. 2013) (citing *Martinez*, 132 S. Ct. at 1318). To establish ineffective assistance of counsel, a petitioner must show that counsel's performance was deficient and that the petitioner was prejudiced by the deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). "The likelihood of a different result must be substantial, not just conceivable." *Harrington v. Richter*, 562 U.S. 86, 112 (2011).

Here, the district court properly held that Cantu failed to make either required showing under *Martinez*. First, as to trial counsel, the district court reviewed the record and determined that Cantu failed to show that his claim is substantial. As the district court found, given the overwhelming evidence of Cantu's guilt, trial counsel "set out a detailed, reasonable, and informed trial strategy of focusing on the future dangerousness special issue." 2016 WL 3277246, at *7. Under *Strickland*'s deficient performance prong, Cantu cannot overcome the strong presumption that counsel's strategy fell within the "wide range of reasonable professional assistance." 466 U.S. at 689.

Second, as to state habeas counsel, the district court noted that counsel had access to the state court record—which "revealed that the evidence of guilt was overwhelming"—and determined that counsel, after exercising professional judgment, was not required to raise every frivolous or futile

argument requested by Cantu. 2016 WL 3277246, at *8-9. On appeal, Cantu extensively points to Texas "statutory and professional requirements" regarding investigation into state habeas claims. But on federal habeas review, the issue is whether state habeas counsel was constitutionally ineffective under an objective reasonableness standard. *See Bobby v. Van Hook*, 130 S. Ct. 13, 16-17 (2009). As the district court determined, Cantu fails to meet that standard.

Based on our threshold inquiry, we conclude that reasonable jurists would not find it debatable that the district court was correct in holding that Cantu failed to establish cause to excuse the procedural default. As such, we must deny a COA. *See Slack*, 529 U.S. at 484.

B.

With respect to the denial of an evidentiary hearing, we have declined to hold that *Martinez* requires an opportunity for additional fact finding in support of cause and prejudice. *Segundo v. Davis*, 831 F.3d 345, 351 (5th Cir. 2016). Cantu's claims are based on the existing record, and the district court analyzed that record in reaching its decision. It is not debatable that the district court was within its discretion in declining to hold a hearing. *See Schriro v. Landrigan*, 550 U.S. 465, 474 (2007) ("[I]f the record refutes the applicant's factual allegations or otherwise precludes habeas relief, a district court is not required to hold an evidentiary hearing.").

IV.

The COA is denied.

Certified as a true copy and issued as the mandate on Nov 07, 2016

Attest: Lyle W. Cayce

Clerk, U.S. Court of Appeals, Fifth Circuit

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

IVAN A. CANTU, #999399,	§	
	§	
Petitioner,	§	
	§	CIVIL ACTION No. 2:06-CV-166
v.	§	
	§	JUDGE RON CLARK
DIRECTOR, TDCJ-CID,	§	
	§	
Respondent.	§	

MEMORANDUM OPINION AND ORDER OF DISMISSAL

Petitioner Ivan A. Cantu, a death row inmate confined in the Texas prison system, filed the above-styled and numbered petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. He is challenging his capital murder conviction and death sentence imposed by the 380th Judicial District Court of Collin County, Texas, in Cause Number 380-80047-01, in a case styled the *State of Texas vs. Ivan Abner Cantu.* The case was remanded by the Fifth Circuit for reconsideration, in light of new case law concerning whether Mr. Cantu received ineffective assistance of counsel at trial.

Mr. Cantu has not shown that either his state trial counsel or habeas counsel were deficient, or that any error deprived him of a fair trial. The evidence to which Mr. Cantu points is not new; it was presented at trial and a rational jury could still have found him guilty beyond a reasonable doubt. The court finds that Mr. Cantu's claim for habeas relief should be denied.

I. PROCEDURAL HISTORY OF THE CASE

Mr. Cantu was convicted by a jury in October 2001 for the November 4, 2000 murders of James Mosqueda and Amy Kitchen. Based on the jury's answers to the special issues required

by the Texas Code of Criminal Procedure Article 37.071, §§ 2(b) and 2(e), the trial court sentenced Mr. Cantu to death on October 26, 2001. Act of June 17, 1993, 73rd Leg., R.S., Ch. 781, § 1, 1993 Tex. Sess. Law Serv. 3060, 3060–61 (West) (amended 2005) (current version at TEX. CODE CRIM. PRO. ANN. art. 37.074, §§ 2(b), (e) (West 2006)). The Texas Court of Criminal Appeals affirmed the conviction. *Cantu v. State*, No. 74220, 2004 WL 3093156 (Tex. Crim. App. June 30, 2004) (not designated for publication). Mr. Cantu did not file a petition for a writ of certiorari.

Mr. Cantu filed an application for a writ of habeas corpus in the State trial court on May 24, 2004. The trial court issued findings of fact and conclusions of law recommending that relief be denied. The Texas Court of Criminal Appeals denied the application for a writ of habeas corpus "[b]ased upon the convicting court's findings and conclusions and [its] own review." *Ex parte Cantu*, No. WR-63624-01, 2006 WL 120829 (Tex. Crim. App. Jan. 18, 2006).

The present proceeding began on April 17, 2006. A petition for a writ of habeas corpus (Dkt. #9) was filed on January 18, 2007. Mr. Cantu also filed a memorandum of law in support of the petition (Dkt. #10). The Director filed a response (Dkt. #12) on June 15, 2007. Mr. Cantu filed a reply (Dkt. #13) on September 10, 2007. Mr. Cantu filed a supplemental memorandum of law (Dkt. #22) on December 22, 2008. On March 17, 2009, the Honorable T. John Ward, United States Judge for the Eastern District of Texas, denied Mr. Cantu's first, second, third, fourth, fifth and sixth claims, and dismissed his remaining claims as procedurally defaulted. *Cantu v. Quarterman*, No. 2:06cv166, 2009 WL 728577 (E.D. Tex. March 17, 2009). The ineffective assistance of counsel at trial claim that is the subject of the present opinion is claim number eight.

The Fifth Circuit affirmed the decision of this court. *Cantu v. Thaler*, 632 F.3d 157 (5th Cir. 2011). On March 26, 2012, the Supreme Court remanded the ineffective assistance of counsel at trial claim to the Fifth Circuit for further consideration in light of *Martinez v. Ryan*, 566 U.S. 1, 132 S. Ct. 1309 (2012). *Cantu v. Thaler*, 132 S. Ct. 1791 (2012). The Fifth Circuit, in turn, remanded the matter to this court in order that the court "may decide in the first instance the impact of *Martinez* on [Mr. Cantu's] contention that he had cause for his procedural default." *Cantu v. Thaler*, 682 F.3d 1053, 1054 (5th Cir. 2012). Due to the retirement of Judge Ward, the case was assigned to the Honorable Richard Schell, United States Judge for the Eastern District of Texas.

Pursuant to an order of the court, Mr. Cantu filed a brief in light of *Martinez* (Dkt. #48) on August 31, 2012. The Director, in turn, filed a brief (Dkt. #51) on September 27, 2012. Mr. Cantu filed a reply (Dkt. #52) on November 1, 2012. In the meantime, the Supreme Court issued a decision specifically finding that *Martinez* applies to Texas in *Trevino v. Thaler*, 569 U.S. ___, 133 S. Ct. 1911 (2013). Pursuant to an order of the court, Mr. Cantu filed a supplemental brief (Dkt. #56) on October 27, 2014. The Director filed a response (Dkt. #57) on November 10, 2014. Mr. Cantu filed a reply (Dkt. #58) on November 24, 2014. On May 17, 2016, after Judge Schell took senior status, this case was transferred to the undersigned.

II. FACTUAL BACKGROUND OF THE CASE

The opinion of the Fifth Circuit summarized the factual background of the case as follows:

> Cantu lived in an apartment with his girlfriend, Amy Boettcher, near where his cousin, James Mosqueda, lived with his fiancee, Amy Kitchen. According to Boettcher's testimony, Cantu called Mosqueda on the night of November 3, 2000 at approximately 11:30 p.m., and asked if he could come over to Mosqueda and Kitchen's house. Cantu then told Boettcher that he was going to their house to kill them, but Boettcher did not believe him. Cantu left his apartment with his gun and returned an hour later driving

> Kitchen's Mercedes. His face was swollen and a substance that looked like blood was on his jeans and in his hair. Cantu had Mosqueda's and Kitchen's identifications and keys. Cantu cleaned up, and Boettcher threw his bloody jeans into the trash. Cantu and Boettcher then went together to the victims' house in Kitchen's Mercedes. There, Boettcher saw both victims' bodies through the doorway to the master bedroom, while Cantu was searching the house for drugs and money. Cantu took the engagement ring that had belonged to Kitchen and gave it to Boettcher. Cantu and Boettcher left Kitchen's Mercedes parked in the garage and drove off in Mosqueda's Corvette. The couple later drove to Arkansas to visit Boettcher's parents, where they were when the bodies were discovered the following evening.
>
> Police found no evidence of forced entry at Mosqueda and Kitchen's house. Police spoke with Cantu's mother, then searched Cantu and Boettcher's apartment. Police obtained a search warrant to search the apartment a second time and found the bloody jeans, ammunition, a key to the victims' house, and a key to Kitchen's Mercedes. Police also found Cantu's gun at his ex-girlfriend's house where Cantu and Boettcher had stopped on the way home from Arkansas. Cantu's fingerprints were found on the gun's magazine, and Mosqueda's blood was found on the gun's barrel. Police arrested Cantu for the murders.

Cantu v. Thaler, 632 F.3d at 160.[1]

III. DISCUSSION AND ANALYSIS

A. PRIOR ANALYSIS

1. In 2009, this court rejected Mr. Cantu's claim on the merits and alternatively found that it was procedurally defective.

The analysis previously employed by this court and the Fifth Circuit in rejecting claim number eight should be considered in analyzing the claim again in light of *Martinez*. Mr. Cantu argued in the original petition that his trial counsel was ineffective for failing to investigate his claims of actual innocence. In his memorandum, he presented nothing more than a conclusory two paragraph claim. *See* Memorandum (Dkt. #10-2), page 38. He complained that trial counsel failed to retain a private investigator or interview potential witnesses who could exculpate him. He did not attach any evidence in support of the claim. Indeed, he admitted that he was seeking

[1] This factual summary is essentially the same as the factual summary of the Texas Court of Criminal Appeals. *Cantu v. State*, No. 74220, 2004 WL 3093156, at *1 (Tex. Crim. App. June 30, 2004) (not designated for publication).

to find such evidence and that he would submit it when such evidence became available. At that juncture in these proceedings, the ineffective assistance of counsel claim could have been summarily rejected since Mr. Cantu offered nothing other than conclusory allegations and bald assertions, which are insufficient to support a petition for a writ of habeas corpus. *See Miller v. Johnson*, 200 F.3d 274, 282 (5th Cir. 2000); *Koch v. Puckett*, 907 F.2d 524, 530 (5th Cir. 1990); *Ross v. Estelle*, 694 F.2d 1008, 1011–12 (5th Cir. 1983).

Although Mr. Cantu's initial Memorandum (Dkt. # 10) did not include any evidence that could prove exculpatory, it did have an affidavit from lead trial counsel, Mr. J. Matthew Goeller, which had been submitted during the State habeas corpus proceedings.[2] Mr. Goeller began his affidavit with a four page review of all of the evidence of guilt that he uncovered during his investigation. He then provided the following discussion as to his trial strategy:

> After I became familiar with the factual allegations against Mr. Cantu, [co-counsel] Mr. High and I discussed our initial opinions regarding our defense of the case. We interviewed Ivan Cantu on several occasions, both together, and separately, in order to get his input regarding the facts and to apprize him of the information we had obtained. Initially, Cantu had lied to us about the facts of the case and his involvement, taking the position that he knew nothing about the murders. Cantu thereafter changed his recollection of his involvement in the murders. Cantu refused to participate in any psychological mitigation strategies--Cantu wished to focus on the guilt/innocense [sic] stage, despite overwhelming evidence of his guilt in the murder of Mosqueda and Kitchen. Throughout my representation, Cantu displayed animosity toward myself and Mr. High because of strategy designed to defeat the "future dangerousness" special issue in the punishment phase of the trial. Cantu, despite his ultimate recognition of the evidence against him, continuously advanced his demand that "we try this case to obtain a not guilty." Cantu repeatedly questioned our punishment phase preparation, stating that our punishment phase strategy was premised on "losing" the guilt-innocense [sic] phase of the trial.

See Memorandum, Exhibit B (Dkt. #10-4), page 6.

In the remainder of the affidavit, Mr. Groeller provided a response to the claim that he was ineffective during the punishment phase of the trial.

[2] The state trial court had ordered Mr. Goeller to submit the affidavit in the state habeas proceeding and had overruled Mr. Goeller's objection to having to provide the affidavit.

Some of this information goes to both trial strategy and tactics as well as the punishment phase. Mr. Goeller describes the twenty-four motions he and Mr. High filed and obtained rulings on, their jury selection strategy of attempts to pick jurors who would be receptive to their mitigation arguments, and their presentation of a mitigation specialist, a psychologist to testify Mr. Cantu would not be dangerous in prison, and a convicted murderer who had become a minister.

In discussing his efforts to develop psychiatric-based mitigating evidence, Mr. Goeller stated that Mr. Cantu admitted to him "that he had indeed killed Mosqueda for 'ripping him off' on a drug deal, and Kitchen just happened to be at the Mosqueda home, and that '[he] didn't wish to leave any witnesses.'" *Id.* at 9.

On August 7, 2008, Judge Ward granted Mr. Cantu's motion to substitute counsel. (Dkt. # 20). Through this new counsel, Mr. Cantu subsequently filed a supplement to his memorandum of law (Dkt. #22). He claimed that had his attorneys conducted a reasonable investigation, they would have uncovered evidence of his innocence and that no rational juror could have found him guilty beyond a reasonable doubt. He contends that such investigation would have revealed the following:

> 1. A long distance telephone call was made from Mr. Cantu's apartment at 8:37 p.m. on November 4, 2000, yet he and Amy Boettcher had left for Arkansas between 11 a.m. and noon;
>
> 2. Toll tag records show that James Mosqueda's Corvette was driven at 11:15 a.m. on November 4, 2000, possibly after Cantu and Boettcher had left for Arkansas; and
>
> 3. Blood spatter expert Sutton testified that based upon her examination of photos of the crime scene that Amy Kitchen had been kicked or punched in the face with enough force to spray a large amount of blood over the wall behind the bed, but Dr. Rohr's report contains no notation of any injury to her head except the gunshot wound.

Mr. Cantu argued that this evidence was strong enough to entitle him to a stay and to file a successive application for post-conviction relief in State court.

Judge Ward's original memorandum opinion denying habeas relief initially discussed the merits of Mr. Cantu's claim number eight in order to determine whether the Texas Court of Criminal Appeals would refuse to consider the merits in a successive State application for post-conviction relief. (Dkt. # 30, pgs. 16–18). The court made the following findings:

> The Court finds that even with this evidence, a rational juror could have found beyond a reasonable doubt that Cantu was guilty of killing Mosqueda and Kitchen. The fact that another person had access to Cantu's house would not lead a rational person to disbelieve the evidence that he committed the murders. Similarly, a rational juror would likely conclude that it was Cantu himself who drove Mosqueda's car at 11:15 am on November 4, 2000, and that he left for Arkansas shortly thereafter. Finally, although Cantu is correct that Rohr's autopsy report does not mention that Kitchen suffered any facial trauma other than the gunshot wound, the trauma is clearly evident in the autopsy photos themselves. A rational juror would likely conclude that Dr. Rohr's autopsy report on Kitchen was less detailed than it could have been, not that Cantu did not kill her.
>
> The Court finds that it is entirely clear that the state court would refuse to consider the merits of this claim if it were presented in a successive state petition for post-conviction relief. Accordingly, the Court will treat this claim as if the state court refused to hear it on procedural grounds.

Cantu v. Quarterman, 2009 WL 728577, at *10.

Addressing Mr. Cantu's argument that the failure to present this claim at the state trial court was due to ineffective assistance of counsel, Judge Ward noted that "the Court has already rejected Cantu's actual innocence arguments in the context of the successive petition issue . . . ." *Cantu v. Quarterman*, 2009 WL 728577, at *11.

2. In 2011, the Fifth Circuit affirmed the denial of habeas relief on claim 8.

On appeal, the Fifth Circuit affirmed Judge Ward's decision and held that Mr. Cantu had not shown "how this evidence proves his innocence by a preponderance of the evidence." *Cantu v. Thaler*, 632 F.3d at 165.

The Court also affirmed Judge Ward's holding that the ineffective assistance of counsel claim was procedurally defaulted and that "the state court would clearly refuse to consider the merits of this claim if it were now presented in a successive state petition for post-conviction relief under § 5(a)(2)." *Id.* at 166.

B. ANALYSIS ON REMAND IN LIGHT OF *MARTINEZ*

1. *Martinez* and *Trevino* permit habeas review of some ineffective assistance of counsel claims from Texas courts.

When Judge Ward considered Mr. Cantu's Petition in 2009, there was no question that his eighth ground for relief was foreclosed as unexhausted and procedurally barred. However, in 2012 (after the Fifth Circuit had affirmed Judge Ward's ruling), the Supreme Court opened the door for a showing of cause and prejudice to excuse such a procedural default in *Martinez v. Ryan*, 566 U.S. ____, 132 S. Ct. 1309 (2012). In *Martinez*, the Supreme Court answered a question left open in *Coleman*: "whether a prisoner has a right to effective counsel in collateral proceedings which provide the first occasion to raise a claim of ineffective assistance at trial." 566 U.S. at ___, 132 S. Ct. at 1315. These proceedings were referred to as "initial-review collateral proceedings." *Id.* The Court held:

> 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 of counsel at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective.

Id. at ___, 132 S. Ct. at 1320.

The Supreme Court extended *Martinez* to Texas in *Trevino v. Thaler*, 569 U.S. __, 133 S. Ct. 1911 (2013). Although Texas does not preclude appellants from raising ineffective assistance of trial counsel claims on direct appeal, the Court held that the rule in *Martinez* applies because "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." *Trevino*, 569 U.S. at ___, 133 S. Ct. at 1921. The Court left it to the lower courts to determine on remand whether Trevino's claim of ineffective assistance of counsel was substantial and whether his initial State habeas attorney was ineffective. *Id.*

The Fifth Circuit has summarized the application of the rule announced in *Martinez* and *Trevino* as follows:

> To succeed in establishing cause to excuse the procedural default of his ineffective assistance of trial counsel claims, [petitioner] must show that (1) his underlying claims of ineffective assistance of trial counsel are "substantial," meaning that he "must demonstrate that the claim[s] ha[ve] some merit," *Martinez*, 132 S. Ct. at 1318; and (2) his initial state habeas counsel was ineffective in failing to present those claims in his first state habeas application. *See id.*; *Trevino*, 133 S. Ct. at 1921.

Preyor v. Stephens, 537 F. App'x 412, 421 (5th Cir. 2013). "Conversely, the petitioner's failure to establish the deficiency of either attorney precludes a finding of cause and prejudice." *Sells v. Stephens*, 536 F. App'x 483, 492 (5th Cir. 2013). The Fifth Circuit subsequently reaffirmed this basic approach in *Reed v. Stephens*, 739 F.3d 753, 774 (5th Cir. 2014).

The Supreme Court specified that the *Strickland*[3] standard applies in assessing whether counsel was ineffective. *Martinez,* 566 U.S. at ___, 132 S. Ct. at 1318. In order to show that counsel was ineffective, a petitioner must demonstrate the following:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that . . . counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Strickland, 466 U.S. at 687, 104 S. Ct. at 2064. To establish deficient performance, he must show that "counsel's representation fell below an objective standard of reasonableness," with

[3] *Stickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984).

reasonableness being judged under professional norms prevailing at the time counsel rendered assistance. *Id.* at 688, 104 S. Ct. at 2064. The standard requires the reviewing court to give great deference to counsel's performance, strongly presuming counsel exercised reasonable professional judgment. *Id.* at 690, 104 S. Ct. at 2066. To satisfy the prejudice prong, the habeas petitioner "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." *Id.* at 694, 104 S. Ct. at 2068. An ineffective assistance of counsel claim fails if a petitioner cannot satisfy either the deficient performance or prejudice prong; a court need not evaluate both if he makes an insufficient showing as to either. *Id.* at 697, 104 S. Ct. at 2069.

2. Mr. Cantu has not demonstrated ineffective assistance of counsel at the guilt/innocence stage of the trial.

The first issue for the court's consideration is whether Mr. Cantu's underlying claim of ineffective assistance of trial counsel is substantial, meaning that he must demonstrate that it has some merit. Mr. Cantu argues that his trial counsel was ineffective for failing to independently investigate the State's case for guilt. As previously described, Mr. Goeller's affidavit addressed this issue in detail. Counsel reviewed the evidence of guilt and concluded that it was overwhelming. *See* Memorandum, Exhibit B (Dkt. #10-4), page 6. Moreover, Mr. Cantu admitted to counsel that he had killed Mosqueda for "ripping him off" and that he killed Kitchen because she happened to be there and he did not want to leave any witnesses. *Id.* at 9. In light of the evidence of guilt known to trial counsel Mr. Goeller and Mr. High, they chose to focus on trying to defeat the future dangerousness special issue. *Id.* at 6.

The Supreme Court has stressed that "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices

made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Strickland,* 466 U.S. at 690–91, 104 S. Ct. at 2066. A decision not to investigate "must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Id.* at 691, 104 S. Ct. at 2066. In *Strickland*, the Supreme Court found that the decision to forego pursuing additional evidence was reasonable in light of the evidence known to counsel. *Id.* at 699, 104 S. Ct. at 2070–71. Counsel is not required to "pursue an investigation that would be fruitless, much less one that might be harmful to the defense." *Harrington v. Richter*, 562 U.S. 86, 108, 131 S. Ct. 770, 789–90 (2011). The Fifth Circuit has regularly approved of informed trial strategies foregoing additional investigations. *See, e.g., Ward v. Stephens*, 777 F.3d 250, 264–65 (5th Cir. 2015); *Hoffman v. Cain*, 752 F.3d 430, 446 (5th Cir. 2014); *Skinner v. Quarterman*, 576 F.3d 214, 220 (5th Cir. 2009); *Dowthitt v. Johnson*, 230 F.3d 733, 743 (5th Cir. 2000).

In the present case, Mr. Goeller has set out a detailed, reasonable, and informed trial strategy of focusing on the future dangerousness special issue. He and co-counsel Mr. High conducted a thorough investigation and arrived at the rational conclusion that the evidence of guilt was overwhelming. At some point this was confirmed when Mr. Cantu admitted that he had murdered the victims. The strategic choice to forego pursuit of ephemeral evidence of actual innocence was reasonable in light of the evidence known to trial counsel.

The allegations Mr. Cantu presents concerning trial counsels' ineffectiveness are not based on any new evidence that has been, or might reasonably have been, discovered. Rather there is a litany of criticism as to how evidence on the record might have been addressed differently on cross examination or in final argument. None of these complaints implicate any

tactical choice that is even close to being outside of the "wide range of reasonable professionally competent assistance." *See Strickland*, 466 U.S. at 690, 104 S. Ct. at 2066.

Mr. Cantu also complains that counsel conceded guilt in final argument, arguing only that he was technically not guilty of capital murder. 41 RR 31 ("I didn't say he was innocent. I said he's not guilty of capital murder."). The Fifth Circuit has regularly rejected ineffective assistance of counsel claims where attorneys employed a trial strategy conceding guilt. *Haynes v. Cain*, 298 F.3d 375, 382 (5th Cir. 2002) (partial concession of guilt was a strategy that "proved effective in avoiding the death penalty for their client"); *United States v. Jones*, 287 F.3d 325, 331 (5th Cir. 2002) ("counsel's tactic may have been the best available"); *Kitchens v. Johnson*, 190 F.3d 698, 704 (5th Cir. 1999) (conceding to murder and arguing in closing that the defendant had committed a "very brutal, a very savage murder, but [] not a capital murder . . ." was a valid strategic decision "in an effort to bolster his credibility with the jury"). In the present case, counsel's strategy was quite similar to the strategy employed in *Kitchens,* the last of these three cases. In that case, the Fifth Circuit stressed that counsel's closing argument was a strategic decision which "we will not second guess." *Kitchens*, 190 F.3d at 704.

This court will not second guess counsel's informed trial strategy. Overall, Mr. Cantu has not shown that the trial strategy employed by counsel was unreasonable. The court finds that Mr. Cantu has not demonstrated that trial counsel's performance was deficient regarding the issue of actual innocence.

Mr. Cantu likewise failed to satisfy the prejudice prong. Both this court and the Fifth Circuit analyzed the evidence presented by him that purportedly showed his innocence. The Fifth Circuit rejected the claim as follows:

> Cantu claims that his trial counsel rendered ineffective assistance by failing to investigate evidence of his factual innocence and present it at trial. In particular, he points to three

> factual inconsistencies that were admitted into evidence at trial: (1) telephone records indicated that someone made a phone call from Cantu's apartment on the night after the murder when he and Boettcher were in Arkansas; (2) toll tag records indicated that someone drove Mosqueda's Corvette at 11:15 a.m. on November 4, even though Boettcher claimed the last time they drove the car was at 6:30 a.m.; and (3) the State's blood-splatter expert testified, based on photos of the crime scene, that Kitchen had been kicked or punched in the face, while the doctor who performed the autopsies found no evidence of injuries to the victims apart from the gunshot wounds. Cantu does not specifically explain, however, how this evidence proves his innocence by a preponderance of the evidence, and the district court pointed out that there are rational explanations of these inconsistencies that reasonable jurors could accept[.]

Cantu v. Thaler, 632 F.3d at 165 (internal citations omitted). The opinion proceeded to quote Judge Ward's explanation, which was discussed at page seven of this memorandum.

The Fifth Circuit's opinion went on to reject Mr. Cantu's claim that his attorney's performance was deficient: (1) by failing to interview Mr. Cantu's ex-girlfriend, at whose apartment police found the murder weapon; (2) by failing to question State witnesses as to whether Mr. Cantu's face was indeed swollen and Boettcher's hand was indeed injured, as she testified; and (3) by conceding Mr. Cantu's culpability for the murders during closing argument. *Id.* at 166. "These claims, however, do not constitute 'reliable evidence,' let alone new evidence, and therefore also cannot support a *Schlup*[4] claim of actual innocence . . ." *Id.* Consequently, the issue of whether Mr. Cantu's evidence shows actual innocence has already been considered and rejected. The actual innocence analysis employed by both this court and the Fifth Circuit is, in effect, the same analysis to employ with respect to the prejudice prong. Mr. Cantu has not shown that any deficient representation on the part of his attorney with respect to this evidence resulted in prejudice.

In light of the foregoing, the court concludes that Mr. Cantu has not shown an underlying claim of ineffective assistance of counsel at trial that is substantial in order to establish cause to excuse the procedural default.

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[4] *Schlup v. Delo*, 513 U.S. 298, 115 S. Ct. 851 (1995).

3. Mr. Cantu has not demonstrated that State habeas corpus counsel was ineffective.

Under *Martinez* and *Trevino*, Mr. Cantu has the additional burden of establishing that his initial State habeas corpus counsel was ineffective for failing to present the claim of ineffective assistance of counsel at trial in his State application. But "petitioner's failure to establish the deficiency of either attorney precludes a finding of cause and prejudice." *Sells*, 536 F. App'x at 492. This court's finding that Mr. Cantu has not shown an underlying claim of ineffective assistance of counsel at trial that is substantial, standing alone, precludes a finding of cause and prejudice. Nonetheless, the court shall address the issue of ineffective assistance of habeas counsel since it has been developed by Mr. Cantu.

Mr. Cantu complains that his habeas counsel filed his application for a writ of habeas corpus in State court without discussing it with him. He added that counsel met with him only once. He complains that the application only challenged the death sentence, not the conviction itself. Mr. Cantu once again alleged that trial counsel rendered ineffective assistance by failing to investigate and present evidence of his actual innocence. He argued that the omission of this claim amounted to deficient performance; and absent such omission, there is a reasonable likelihood he would have been granted relief. But, State habeas counsel had access to the record, and the record revealed that the evidence of guilt was overwhelming. State habeas counsel was not required to raise frivolous or futile arguments. *See Johnson v. Cockrell*, 306 F.3d 249, 255 (5th Cir. 2002); *Koch*, 907 F.2d at 527 (both cases concerning frivolous or futile motions during trial).

In the context of direct appeals, the Supreme Court has stressed that an indigent defendant does not have a constitutional right to require counsel to press every nonfrivolous point requested by the client if counsel, exercising professional judgment, decides not to present

that point; instead, an appellate attorney's duty is to choose among potential issues, using professional judgment as to their merits. *Jones v. Barnes*, 463 U.S. 745, 751, 103 S. Ct. 3308, 3312 (1983). Mr. Cantu has not shown actual innocence and thus has not satisfied *Strickland*'s prejudice prong. The evidence before the court does not support a finding that State habeas counsel was ineffective for failing to present this particular claim of ineffective assistance of trial counsel.

Mr. Cantu has not shown that either his trial counsel or his initial State habeas counsel were ineffective in order to excuse the procedural default.

4. Alternatively, since this court and the Fifth Circuit previously considered and rejected Mr. Cantu's claim of actual innocence, reconsideration under *Martinez* is not warranted.

Alternatively, the petition should be denied for yet another reason advanced by the Director. He argues that Mr. Cantu has already received the relief available to him under *Martinez*. *See* Brief (Dkt. #57), pages 10-16. "A finding of cause and prejudice does not entitle the prisoner to habeas relief. It merely allows a federal court to consider the merits of a claim that otherwise would have been procedurally defaulted." *Martinez*, 566 U.S. at ___, 132 S. Ct. at 1320. Where a federal court has addressed the merits of an otherwise defaulted claim, the petitioner has arguably received all of "the relief available to him under *Martinez* and *Trevino*." *Preyor*, 537 F. App'x at 422.

More recently, the Fifth Circuit addressed this issue as follows: "As a practical matter, we also observe that although the district court did not review Reed's ineffective assistance claims under *Martinez*, the district court did review Reed's assertions of actual innocence, which included much of the evidence Reed relies on to show that his counsel acted deficiently." *Reed*, 739 F.3d at 774 n.11.

In the present case, Mr. Cantu is bringing an ineffective assistance of trial counsel claim as a vehicle for presenting an argument that he is actually innocent of the crime. He cites *Martinez* and *Trevino* in an effort to overcome the procedural default. Nonetheless, both Judge Ward and the Fifth Circuit considered and rejected his assertions of actual innocence. Judge Ward reviewed the evidence and arguments that Mr. Cantu's claims were not properly utilized before the state trial court to establish Mr. Cantu's actual innocence. Judge Ward found "that even with this evidence, a rational juror could have found beyond a reasonable doubt that Cantu was guilty of killing Mosqueda and Kitchen." *Cantu v. Quarterman*, 2009 WL 728577, at *10. As such, Mr. Cantu was not permitted to return to the Texas Court of Criminal Appeals because it was "entirely clear that the state court would refuse to consider the merits of this claim if it were presented in a successive state petition for post-conviction relief." *Id.*

The Fifth Circuit found that the "court was correct in its conclusion." *Cantu v. Thaler*, 632 F.3d at 166. So both this court and the Fifth Circuit rejected his claims based on actual innocence. Although his ineffective assistance of trial counsel claim was not reviewed under *Martinez*, both courts reviewed his assertions of actual innocence, which includes much of the evidence he relies on to show that his trial counsel was ineffective. Mr. Cantu has already been given all of the relief made available by *Martinez* and *Trevino*- a review of his actual innocence claim on the merits. No other relief is available. Mr. Cantu is not entitled to federal habeas corpus relief on this matter, and the petition should be denied.

IV. CERTIFICATE OF APPEALABILITY

An appeal may not be taken to the court of appeals from a final order in a federal habeas corpus proceeding "unless a circuit justice or judge issues a certificate of appealability." 28 U.S.C. § 2253(c)(1)(A). Although Mr. Cantu has not yet filed a notice of appeal, the court may

address whether he would be entitled to a certificate of appealability. *See Alexander v. Johnson*, 211 F.3d 895, 898 (5th Cir. 2000) (A district court may *sua sponte* rule on a certificate of appealability because "the district court that denies a petitioner relief is in the best position to determine whether the petitioner has made a substantial showing of a denial of a constitutional right on the issues before that court. Further briefing and argument on the very issues the court has just ruled on would be repetitious.").

A certificate of appealability may issue only if a petitioner has made a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). The Supreme Court fully explained the requirement associated with a "substantial showing of the denial of a constitutional right" in *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S. Ct. 1595, 1604 (2000). In cases where a district court rejected a petitioner's constitutional claims on the merits, "[t]he petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Id.*; *Henry v. Cockrell*, 327 F.3d 429, 431 (5th Cir. 2003). "When [a] district court denies a habeas petition on procedural grounds without reaching the petitioner's underlying constitutional claim, a COA should issue when the petitioner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack*, 529 U.S. at 484, 120 S. Ct. at 1604.

In this case, reasonable jurists could not debate the denial of Mr. Cantu's § 2254 petition on substantive or procedural grounds, nor find that the issues presented are adequate to deserve encouragement to proceed. *Miller-El v. Cockrell*, 537 U.S. 322, 327, 123 S. Ct. 1029, 1034 (2003) (citing *Slack*, 529 U.S. at 484). The court thus finds that Mr. Cantu is not entitled to a certificate of appealability as to his claims.

V. CONCLUSION

The record establishes that Mr. Cantu's trial counsel were well experienced and had a considered and rational trial strategy for presentation of a defense to avoid the death penalty in light of the overwhelming evidence of Mr. Cantu's guilt. There is no showing of any error or omission of state counsel at the trial or habeas phases that remotely approaches the *Strickland* standard for ineffective assistance of counsel. The evidence Mr. Cantu claims was not presented to the jury is in the trial record. Even considering that evidence, a rational juror could be convinced of Mr. Cantu's guilt beyond a reasonable doubt.

Having carefully considered the claim remanded by the Fifth Circuit, this court finds that Mr. Cantu has not shown that he is entitled to federal habeas corpus relief and his petition should be denied. It is accordingly

ORDERED that the petition for a writ of habeas corpus is **DENIED** and the case is **DISMISSED** with prejudice. It is further

ORDERED that a certificate of appealability is **DENIED**. It is finally

ORDERED that all motions not previously ruled on are **DENIED**.

So **ORDERED** and **SIGNED** this **15** day of **June, 2016.**

Ron Clark

Ron Clark, United States District Judge

No. _____

IN THE

Supreme Court of the United States

IVAN ABNER CANTU, *Petitioner*,

VS.

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

CERTIFICATE OF SERVICE

I certify that on the 6th day of February, 2017, I served the enclosed MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF CERTIORARI *IN FORMA PAUPERIS* and PETITION FOR WRIT OF CERTIORARI on Edward L. Marshall (edward.marshall@oag.texas.gov), and George A. d'Hemecourt (george.d'hemecourt@oag.texas.gov), Assistant Attorneys General, Criminal Appeal Division, Officer of the Texas Attorney General, P.O. Box 12548, Capitol Station, Austin, Texas 78711-2548, via electronic mail and first-class United States Postal Service in accordance with Sup. Ct. R. 29(3). All parties required to be served have been served. I am a member of the Bar of this Court.

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