No. _____

IN THE SUPREME COURT OF THE UNITED STATES

ERICK DANIEL DAVILA,
Petitioner,

-v-

LORIE DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION,
Respondent.

On petition for writ of certiorari to the
United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

Mr. Jonathan Landers
2817 West T.C. Jester Blvd
Houston, TX 77018

Phone: 713-685-5000
Fax: 713-685-5020

Jonathan.landers@gmail.com

Mr. Seth Kretzer
The Lyric Center
440 Louisiana Street, Suite 200
Houston TX 77002
Phone: 832-460-1714
Phone: 713-343-7210
Fax: 713-224-2815
seth@kretzerfirm.com

Appointed CJA Counsel of
Record for Petitioner

QUESTIONS PRESENTED FOR REVIEW (CAPITAL CASE)

1. **DOES THE RULE ESTABLISHED IN *MARTINEZ V. RYAN*, 132 S.CT. 1309 (2012) AND *TREVINO V. THALER,* 133 S. CT. 1911, 1921 (2013), THAT INEFFECTIVE STATE HABEAS COUNSEL CAN BE SEEN AS CAUSE TO OVERCOME THE PROCEDURAL DEFAULT OF A SUBSTANTIAL INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL CLAIM, ALSO APPLY TO PROCEDURALLY DEFAULTED, BUT SUBSTANTIAL, INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL CLAIMS?**

2. **IN LIGHT OF *HURST V. FLORIDA*, 136 S. CT. 616, 622 (2016), MUST TEXAS' SECOND PUNISHMENT SPECIAL ISSUE, WHICH IS A NECESSARY FINDING FOR A SENTENCE OF DEATH, BE DECIDED BY THE JURY BEYOND A REASONABLE DOUBT?**

PARTIES TO THE PROCEEDINGS BELOW

This petition stems from a habeas corpus proceeding in which the Petitioner, Erick Daniel Davila, was the Petitioner before the United States District Court and the Petitioner-Appellant before the United States Court of Appeals for the Fifth Circuit. Mr. Davila is an inmate sentenced to death and is in the custody of Lorie Davis, Director of the Texas Department of Criminal Justice, Institutional Division ("Director"). The Director and his predecessors were the Respondents before the United States District Court and the Respondent-Appellees before the United States Court of Appeals for the Fifth Circuit.

RULE 29.6 STATEMENT

Petitioner is not a corporate entity.

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The Fifth Circuit denied Davila's certificate of appealability and all other relief in an unpublished (revised) decision on May 31, 2016. The decision is cited as *Davila v. Davis*, No. 15-70013, 2016 WL 3171870; 2016 U.S. App. LEXIS 9681 (5th Cir. 2016) and is attached as Appendix A. The Petition for Rehearing *En Banc* was denied by form order on June 28, 2016. The District Court entered its Memorandum and Order denying all requested relief on April 21, 2015. The citation to this Memorandum and Order is *Davila v. Stephens*, 2015 WL 1808689; 2015 U.S. Dist. LEXIS 51854 (N.D. Tex. 2015) and it is attached as Appendix B.

The state habeas court adopted the prosecution's proposed "Findings of Fact and Conclusions of Law" recommending all claims be denied for lack of merit. The Texas Court of Criminal Appeals adopted the same, noted that two of the three claims were also defaulted, and denied habeas corpus relief. *Ex parte Davila*, No. WR-75,356-01, 2013 WL 1655549; (April 17, 2013) (unpublished). This Court denied certiorari. *Davila v. Texas*, 134 S. Ct. 784 (December 9, 2013). The trial court's Findings of Fact and Conclusions of Law are attached as Appendix C.

In 2011, the Texas Court of Criminal Appeals affirmed Davila's conviction and sentence on direct appeal. *Davila v. State*, No. AP-76,105, 2011 WL 303265; 2011 Tex. Crim. App. Unpub. LEXIS 43 (Tex. Crim. App. 2011) (Jan. 26, 2011) (Appendix D) and this Court denied certiorari, 132 S. Ct. 258 (Oct. 3, 2011).

STATEMENT OF JURISDICTION

The Circuit Court's amended decision was filed May 31, 2016, and Davila's timely filed Petition for Rehearing En Banc was denied on June 28, 2016. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1254(1), 2253.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment to the United States Constitution provides that:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury . . . nor be deprived of life, liberty, or property, without due process of law. . . .

The Sixth Amendment to the United States Constitution provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed; . . . to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

The Eighth Amendment to the United States Constitution provides, in pertinent part:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted[.]

The Fourteenth Amendment to the United States Constitution provides, in pertinent 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.

28 U.S.C. § 2254(d) provides, in pertinent part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits on State court proceedings unless the adjudication of the claim--
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> >
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

Texas Code of Criminal Procedure article 37.071 establishes the sentencing procedure for death penalty cases and provides, in pertinent part:

> Section 2
>
> (b) On conclusion of the presentation of the evidence, the court shall submit the following issues to the jury:
>
> > (1) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and
>
> . . .
>
> (c) *The state must prove each issue submitted under Subsection (b) of this article beyond a reasonable doubt*, and the jury shall return a special verdict of "yes" or "no" on each issue submitted under Subsection (b) of this Article.
>
> (d) The court shall charge the jury that:
>
> > (1) in deliberating on the issues submitted under Subsection (b) of this article, it shall consider all evidence admitted at the guilt or innocence stage and the punishment stage, including evidence of the defendant's background or character or the circumstances of the offense that militates for or mitigates against the imposition of the death penalty;

(2) it may not answer any issue submitted under Subsection (b) of this article "yes" unless it agrees unanimously and it may not answer any issue "no" unless 10 or more jurors agree; and

(3) members of the jury need not agree on what particular evidence supports a negative answer to any issue submitted under Subsection (b) of this article.

(e)(1) The court shall instruct the jury that if the jury returns an affirmative finding to each issue submitted under Subsection (b), it shall answer the following issue:

Whether, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment without parole rather than a death sentence be imposed.

(2) The court shall:

(A) instruct the jury that if the jury answers that a circumstance or circumstances warrant that a sentence of life imprisonment without parole rather than a death sentence be imposed, the court will sentence the defendant to imprisonment in the Texas Department of Criminal Justice for life without parole; and

(B) charge the jury that a defendant sentenced to confinement for life without parole under this article is ineligible for release from the department on parole.

(f) The court shall charge the jury that in answering the issue submitted under Subsection (e) of this article, the jury:

(1) shall answer the issue "yes" or "no";

(2) may not answer the issue "no" unless it agrees unanimously and may not answer the issue "yes" unless 10 or more jurors agree;

(3) need not agree on what particular evidence supports an affirmative finding on the issue; and

(4) shall consider mitigating evidence to be evidence that a juror might regard as reducing the defendant's moral blameworthiness.

(g) If the jury returns an affirmative finding on each issue submitted under Subsection (b) and a negative finding on an issue submitted under Subsection (e)(1), the court shall sentence the defendant to death. If the jury returns a negative finding on any issue submitted under Subsection (b) or an affirmative finding on an issue submitted under Subsection (e)(1) or is unable to answer any issue submitted under Subsection (b) or (e), the court shall sentence the defendant to confinement in the Texas Department of Criminal Justice for life imprisonment without parole.

(*emphasis added*)

STATEMENT OF THE CASE

On April 6, 2008, Erick Davila shot at a gang rival multiple times but missed. Sadly, the bullets he fired hit and killed a grandmother and young girl. The defense argued that Davila only intended to shoot his rival, and therefore was not guilty of capital murder (as multiple intents to kill were necessary for a capital murder conviction). Although the jury seized upon this argument, as shown by questions submitted to the court during deliberations, the jury was improperly instructed as to Texas's transferred intent law in the capital murder context, and Davila was convicted.

I. GUILT AND INNOCENCE, A QUESTION OF INTENT, AND AN ERRONEOUS JURY CHARGE.

In Texas, a person can be found guilty of capital murder for intentionally killing more than one person during the same criminal transaction. Tex. Penal Code § 19.03(a)(7)(A). However, one must have the specific intent to commit two murders to be guilty of this offense; it is not enough that a person attempted to murder a single person, and accidently killed two. *See Roberts v. State*, 273 S.W.3d 322, 330 (Tex. Crim. App. 2008).

Davila's defense counsel argued from the start that the most important issue for the jury would be intent. 14 RR 16. Specifically, in their opening statement, defense counsel asked the jury to pay close attention to whether or not "Erick had the specific intent to kill these two folks, intentionally or knowingly." *Id.* at 17. The defense theme continued through closing, when defense counsel once again argued

that Erick was attempting to shoot only his rival, Jerry Stevenson, with whom he'd had previous confrontations. *See, e.g.*, 20 RR 22.

A. The shooting

On April 6, 2008, 47-year-old Annette Stevenson hosted a birthday party for her granddaughter Nautica at her residence in the Village Creek Apartments[1] in Fort Worth, Texas. 14 RR 19–21; 15 RR 42–44. Nautica's sister, brothers and several of their young cousins and friends attended the party. 14 RR 20–22; 15 RR 40, 43–44. Annette's son, Jerry Stevenson, his five-year-old daughter, Queshawn, and his three-year-old son were also in attendance. 14 RR 21, 24; 15 RR 44, 48, 54–55. Jerry Stevenson (a.k.a. Dunna, or Big Boy Dooney) was the only adult male at the house. 15 RR 42–43.

The Village Creek Apartments were known as "Blood" territory. *See*, *e.g.*, 14 RR 189. Indeed, Davila was a member of the Truman Street Bloods gang. 16 RR 54–64. As for Jerry Stevenson, he testified that he was not a gang member, but that he hung around many gang members. 15 RR 92–95. Specifically, he had friends who were Polywood Crips. *Id.* at 72. Stevenson recognized that the house where he lived (the scene of the shooting), was probably identified as a Crip house. *Id.* at 92–95. He further acknowledged that it could lead to problems when Crips and Bloods lived in the same area of town. *Id.*

There had been trouble just a few weeks before the shooting. Jerry Stevenson, Little Garry (Stevenson's nephew), and Jeremy (Stevenson's brother) were at

[1] The Village Creek Apartments consist of blocks of small single family homes or townhomes.

Stevenson's mother's house when two other men arrived and an altercation broke out. *Id.* at 73-75. At one point, one of the two men had threatened to shoot Garry. *Id.* at 75. Jerry Stevenson intervened and separated the parties. *Id.* at 75–76. He recognized one of the two men arguing with his cousin as "Mike-Mike," but he did not recognize the other person. *Id.* at 76–77. However, a security guard working at complex did recognize Davila as one of the men arguing with Stevenson. 19 RR 77–78. Stevenson also admitted that the men he was arguing with were associated with the Bloods gang. 15 RR 76–77.

On the evening of April 6, there was another birthday party going on in the apartment complex. 14 RR 55, 122–23, 241. Yvonne Watts, who lived one street over was hosting a party for her daughter. 14 RR 241. Kent Reed, his wife Arlette Keys, her 15-year-old brother Eghosa Ogierumwense, and Arlette's mother, Charlene Ogierumwense, along with several other teenagers and children, celebrated inside and outside the Watts' residence. 14 RR 55, 59–60, 122–23, 126, 240–42.

At approximately 7:30 p.m., Kent, Arlette, and Eghosa saw a black Mazda drive up and briefly stop on Luther Court. 14 RR 61, 68–69, 123–25, 242–43; 16 RR 53–56. All three watched as Davila exited from the vehicle carrying a rifle. 14 RR 61–65, 127–28, 242–44; 16 RR 71–72, 110–11, 123–31; 18 RR 140–42. Another individual moved into the driver's seat and sped away.[2] 14 RR 61, 140. Davila walked past Kent and Eghosa toward the home of a woman known as "Miss Sheila," where he stopped

[2] This person was Garfield Willis Thompson, whose capital murder charge was ultimately dismissed when he plead to a different aggravated robbery.

briefly before proceeding in the direction of the birthday party on Anderson Street. 14 RR 63, 66, 76, 130–40, 246.

Eghosa followed Davila. *Id.* at 132–34. He testified that he watched Davila stop at the corner of a house across the street from 5701 Anderson. *Id.* at 134–136. There were children outside of the house, Granny (Annette Stevenson) was on the porch, and Dooney (Jerry Stevenson) was outside. *Id.* at 136–37. Eghosa initially saw a red beam from the rifle shinning on Dooney, at which point Dooney turned around and went into the house. *Id.* at 138. Then Davila started shooting the gun. *Id.* There were women and children outside when Davila started shooting, but Eghosa never saw the beam on any of them. *Id.* Davila then ran to the middle of the street, shot again, and jumped in a car and drove off. *Id.* at 140–141. On cross examination, Eghosa explained that after Dooney walked into the house, the shooter started shooting at the house. *Id.* at 157. Shots were going everywhere. *Id.*

Annette and Queshawn Stevenson had both been fatally shot. 14 RR 142–43; 18 RR 265–78. Cashmonae, Nautica, Brianna Scott, and Sheila Moblin all suffered non-life-threatening injuries. 14 RR 26–28; 15 RR 257, 259.

B. Davila's Clinically Bad Eyesight

To support the lack of intent defense trial counsel introduced evidence showing that Davila had extremely poor eyesight. Davila was not wearing glasses at the time of the shooting. 14 RR 120. His girlfriend explained that he did not have glasses at the time of shooting, but that he needed them. 16 RR 97. An optometrist who evaluated him confirmed Davila's poor eyesight. 19 RR 91–92, 97–99. Specifically, the

prescription for Davila's right eye was 20/140, and 20/80 for the left eye. *Id.* The shooting had taken place at distances of 84 feet and nearly 100 feet from the house. 15 RR 152, 19 RR 124.

C. The jury seized on the "single intent" argument, but was given an improper jury charge virtually ensuring a capital murder conviction.

After the close of evidence, in the guilt and innocence phase, the court held the customary charge conference with the parties. 19 RR 137–159. All agreed that Davila was entitled to an instruction for the lesser included charge of murder. *Id.* at 141–43. The court instructed the jury on the lesser included offenses of murder for both Queshawn Stevenson and Annette Stevenson. *CR* at 1923–29. The defense also requested a manslaughter charge, which was given over an objection from the state. 19 RR 147–48; CR at 1923–1929.

The state never requested a transferred intent instruction as allowed by Texas Penal Code § 6.04. 19 RR 137–159. The jury was given the following instruction related to capital murder:

> Now, If you find from the evidence beyond a reasonable doubt, that Erick Daniel Davila, In Tarrant County, Texas, on or about the 6th day of April 2008, did intentionally or knowingly cause the death of an individual, Queshawn Stevenson, by shooting her with a deadly weapon, to wit: a firearm, and did Intentionally or knowingly cause the death of an Individual, Annette Stevenson, by shooting her with a deadly weapon, to wit: a firearm, and both murders were committed during the same criminal transaction, then you will find the defendant guilty of the offense of capital murder.

CR at 1924 (Appendix E). The charge was given to the jury at the beginning of the day on February 19, 2009. *Id.*

In the middle of the afternoon, after the jury had been deliberating for four hours, the jury sent the following note to the judge: "In a capital murder charge, are you asking us did he intentionally murder the specific victims, or are you asking us did he intend to murder a person and in the process took the lives of 2 others." *Id.* at 1931 (Appendix E). The judge responded with a misleading instruction, which did not clarify that Davila must have intended to kill two distinct people before he could be convicted of capital murder.

The Court gave the following additional charge:

> A person is nevertheless criminally responsible for causing a result if the only difference between what actually occurred and what he desired, contemplated or risked is that: a different person was injured, armed, or otherwise affected.

CR at 1933 (Appendix E). The defense objected to giving the jury this charge, but the objection was overruled. 20 RR 53. After receiving the incorrect charge, the jury quickly returned a guilty verdict for capital murder. CR at 1934 (Appendix E).

Davila's direct appellate counsel failed to raise this incorrect jury charge argument on direct appeal.

D. Direct appeal counsel failed to raise the jury charge claim.

Had Davila's appellate counsel raised the charge error claim on direct appeal his conviction would have been reversed. In Texas, "[t]he manner in which appellate courts analyze jury charge error is prescribed in article 36.19 of the Code of Criminal Procedure." *Heins v. State*, 157 S.W.3d 457, 460 (Tex. App.—Houston [14th Dist.] 2004, no pet.). A reviewing court first determines whether error exists in the charge, and then must determine whether the error caused harm sufficient to require

reversal. *Id.* If error was properly preserved "charging error will be affirmed only if no harm has occurred." *Murphy v. State*, 44 S.W.3d 656, 665–66 (Tex. App.—Austin 2001). As explained above, error existed in the charge because it permitted the jury to convict Davila even if the jurors believed that he intended only to harm Jerry Stevenson.

Clearly, an erroneous jury charge that precludes a defendant's sole defense harms a defendant. As *any harm at all* from this charging error would have required reversal, Davila's case would have been reversed had this issue been raised on appeal.

However, even if the objection lodged by defense counsel was not sufficient to specifically cover the charging error, relief would still have been granted. In Texas, failure to properly preserve jury charge error does not preclude review, but changes the degree of harm necessary for reversal. *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985)). If the charging error was not preserved at the trial court level, a greater degree of harm, egregious harm, is required. *Id.* The egregious harm standard is met in cases like Davila's, where the jury charge error goes "to the basis of the case and vitally affect[s] appellant's defensive theory." *Heins v. State*, 157 S.W.3d 457, 461 (Tex. App.—Houston [14th Dist.] 2004, no pet.) (citing *Almanza*, 686 S.W.2d at 172). The jury's note and the timing of its verdict shows that its decision clearly hinged on the requisite intent. The harm of this charging error—going directly to the sole defensive issue—was magnified by the fact that the jury immediately relied upon it to find Davila guilty.

Davila's appellate counsel was ineffective for failing to raise this jury charge error on direct appeal. Further, because the outcome of appeal is called into question by counsel's failure to raise this issue, Davila definitively establishes that he was palpably harmed by his appellate counsel's deficient performance.

E. State writ counsel failed to raise the ineffective assistance of appellate counsel claim.

Davila's state writ attorney, David Richards, failed to timely file a writ. Writ CR at 358–60. Luckily, the Texas Court of Criminal Appeals permitted an additional 180 days to file. *Id.* at 361–62. Counsel filed an 18–page writ on August 29, 2011, merely appending a mitigation report compiled by Mitigation Investigator Toni Knox.

On July 2, 2012, the trial court held a hearing on a *Wiggins* ineffective assistance of counsel claim. *See* 2 Writ-RR 1. According to an affidavit from Toni Knox, Richards did not contact her concerning the hearing until late June 2012. ROA.312-314. When they spoke on the phone on June 24, Richards did not have a copy of her report. *Id.* Knox did not feel Richards was prepared for the hearing. *Id.*

The first time that Knox met with Richards was on the date of the hearing. *Id.* They met for one hour, much of which was spent with Knox speaking with the prosecutors while Richards ordered lunch. *Id.* Knox believed that Richards was not familiar with her report, and that he made no effort to call any of the potential mitigation witnesses she had discovered. *Id.* She believed that Richards had been having health issues around the time he was working on Davila's writ, and that his impairment diminished his ability to represent Davila. *Id.*

Davila asserts that Richards was ineffective for not raising a clearly meritorious claim ineffective assistance of appellate counsel claim.

F. Federal Habeas

Davila's federal petition raised the ineffective assistance of appellate counsel claim. Although this claim was not raised in Davila's state writ, Davila argued that any potential procedural default should be excused because the principles of *Trevino* and *Martinez* apply straightforwardly to ineffective assistance of appellate counsel claims defaulted on account of ineffective state habeas counsel. ROA.475-481; ROA 223-227.

The revised Panel Opinion issued May 31, 2016, explained that the *Martinez/Trevino* exception does not apply to ineffective assistance of appellate counsel claims under Fifth Circuit authority:

> The district court rejected Davila's argument that *Martinez v. Ryan*, ––U.S. ——, 132 S.Ct. 1309, 182 L.Ed.2d 272 (2012), and *Trevino v. Thaler*, —— U.S. ——, 133 S.Ct. 1911, 185 L.Ed.2d 1044 (2013), should extend to excuse ineffective assistance of appellate counsel claims that are defaulted due to state habeas counsel's ineffectiveness. We have addressed this possible extension of *Martinez* in at least one precedent, where we wrote that if the petitioner was "suggest[ing] that his ineffective-assistance-of-appellate-counsel claims also should be considered under *Martinez*, we decline to do so." *Reed v. Stephens*, 739 F.3d 753, 778 n.16 (5th Cir. 2014). We do not interpret the court's declining to consider the issue to have been based on discretion.
>
> . . .
>
> In light of this controlling precedent from our court, reasonable jurists at least in this circuit would not debate the district court's conclusion that this claim of error arising from the response to the jury note was

> procedurally defaulted because Davila failed to exhaust it in state court proceedings.

Davila v. Davis, 15-70013, 2016 WL 3171870, at 4 (5th Cir. May 26, 2016)

II. DAVILA HAS CONSISTENTLY ARGUED THAT TEXAS' SENTENCING SCHEME VIOLATES THE SIXTH AMENDMENT.

A necessary finding for a sentence of death is that there are not "sufficient mitigating . . . circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed." CR at 1936 (Appendix F); Tex. Crim. Proc. Code Ann. § art. 37.071(e)(1). As this finding is a necessary component for a sentence of death the Sixth Amendment requires that the finding be made by a jury and beyond a reasonable doubt, however, no burden of proof is assigned to this finding. Davila first made this argument by pre-trial motion, which was denied by the trial court. CR at 74-77.

The issue was then raised before and summarily denied by the Texas Court of Criminal Appeals: "In his fourteenth point of error, appellant asserts that the trial judge erred in overruling his motion to instruct the jury that the State bears the burden of proof concerning the lack of mitigating evidence. We have repeatedly rejected this argument." *Davila v. State*, AP-76,105, 2011 WL 303265, at *10 (Tex. Crim. App. Jan. 26, 2011).

Davila raised the issue once again in his Federal Writ of Habeas Corpus, and the Fifth Circuit upheld the District Court's denial of the claim:

> Davila argues that Article 37.071 is unconstitutional under the Sixth Amendment because it does not place the burden on the State to prove

> a lack of mitigating evidence beyond a reasonable doubt under *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), and *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). This claim was rejected by the Texas Court of Criminal Appeals. The district court rejected relief on this claim based on our precedent. *See Rowell v. Dretke*, 398 F.3d 370, 378 (5th Cir. 2005).
>
> Davila, in a letter directing us to recent relevant authority, cites to the decision in *Hurst v. Florida*, —— U.S. ——, 136 S.Ct. 616, 193 L.Ed.2d 504 (2016). There, the Supreme Court held that Florida's capital sentencing scheme violated *Ring*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556. Under the Florida scheme, a jury makes an advisory verdict while the judge makes the ultimate factual determinations necessary to sentence a defendant to death. *Hurst*, 136 S.Ct. at 621–22. The Court held that procedure was invalid because it "does not require the jury to make the critical findings necessary to impose the death penalty." *Id.* at 622. Davila recognizes that Texas does require jurors to make all factual determinations necessary for a death sentence. His argument is that the scheme is unconstitutional because jurors do not have to find the absence of mitigating circumstances beyond a reasonable doubt. Our precedent precludes this claim. *Rowell*, 398 F.3d at 378. Reasonable jurists would not debate the district court's resolution, even after *Hurst*. *See Avila v. Quarterman*, 560 F.3d 299, 315 (5th Cir. 2009).

Davila v. Davis, 15-70013, 2016 WL 3171870, at *8 (5th Cir. May 26, 2016)

ARGUMENT: REASONS FOR GRANTING RELIEF

I. DOES THE RULE ESTABLISHED IN *MARTINEZ V. RYAN*, 132 S.CT. 1309 (2012) AND *TREVINO V. THALER*, 133 S. CT. 1911, 1921 (2013), THAT INEFFECTIVE STATE HABEAS COUNSEL CAN BE SEEN AS CAUSE TO OVERCOME THE PROCEDURAL DEFAULT OF A SUBSTANTIAL INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL CLAIM, ALSO APPLY TO PROCEDURALLY DEFAULTED, BUT SUBSTANTIAL, INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL CLAIMS?

A. *Martinez* and *Trevino* apply to procedurally defaulted ineffective assistance of appellate counsel claims.

The Ninth Circuit has stated the issue squarely: "The Court in *Martinez* did not distinguish between trial-counsel and appellate-counsel IAC." *Nguyen v. Curry*, 736 F.3d 1287, 1293 (9th Cir. 2013). Professors Hertz and Liebman concur:

> Although *Martinez* concerned a claim of ineffective assistance of trial counsel, and thus the Court's discussion was limited to claims of this sort . . . the Court's reasoning logically extends to other types of claims that, as a matter of state law or of factual or procedural circumstances, could not be raised before the postconviction stage.

Randy Hertz & James S. Liebman, *Federal Habeas Corpus Practice and Procedure* § 26.3[b] (6th ed. Supp. 2013).

Indeed, Justice Scalia recognized as much in *Martinez* when he explained that ineffective assistance of appellate counsel claims, as well as *Brady* claims and those of newly discovered exculpatory evidence, are indistinguishable from ineffective trial counsel claims for the purposes of the new exception:

> [N]o one really believes that the newly announced 'equitable' rule will remain limited to ineffective-assistance-of-trial-counsel cases. There is not a dime's worth of difference in principle between those cases and many other cases in which initial state habeas will be the first opportunity for a particular claim to be raised . . .

Martinez, 132 S. Ct. at 1321 (Scalia, J., dissenting).

That *Martinez* and *Trevino* necessarily apply to ineffective assistance of appellate counsel claims is not surprising based upon the reasoning behind those decisions. This is because, as the District Court recognized, such claims "do not exist to be raised on appeal" and "are logically raised, as Davila asserts, in state habeas proceedings." ROA.540.

The principles underlying *Martinez* lead to the conclusion that ineffective assistance of state habeas counsel establishes cause for a failure to raise an ineffective appellant counsel claim at the state court level. This Court has identified three factors which compel the conclusion that ineffective state habeas counsel excuses a procedural default for the failure to raise ineffective trial counsel claims. "First, the right to the effective assistance of counsel at trial is a bedrock principle in our justice system . . . Indeed, the right to counsel is the foundation for our adversary system." *Trevino v. Thaler*, 133 S. Ct. 1911 at 7 (U.S. 2013) (quotations omitted). Second, taking into account that ineffective counsel on direct appeal is cause, it only makes sense that ineffective assistance of habeas counsel should be cause for claims that cannot be raised on direct appeal. *Id.* Third, where a state channels review of certain claims into collateral proceedings, the lawyer's failure to raise those claims at the state habeas level could deprive a person of any review at all. *Id.* at 7-8.

All three factors apply straightforwardly to ineffective appellate counsel claims. This Court held over thirty years ago that "[a] first appeal as of right therefore is not adjudicated in accord with due process of law if the appellant does not have the effective assistance of an attorney." *Evitts v. Lucey*, 469 U.S. 387, 396 (1985). Indeed,

Evitts v. Lucey was decided upon the intersection of the Due Process Clause found in the Fourteenth Amendment and the Sixth Amendment's right to effective counsel. 105 S.Ct. 830, 835-36 (1985). It is hard to imagine two more "bedrock principles" in our criminal justice system than Due Process and the Right to Counsel. Surely the legal parameter, to say nothing of desideratum, that we do not convict a man, or in this case, kill a man without due process of law is a bedrock principle in America. Second, seeing as ineffective assistance of appellate counsel is cause to excuse a procedural default, and seeing as it is literally impossible for someone other than state habeas counsel to raise this issue in the first instance,[3] it only makes sense that ineffectiveness of habeas counsel should excuse a petitioner's failure to raise his ineffective appellate counsel claim in state habeas proceedings. Indeed, if ineffectiveness of state habeas counsel is not cause, then quite literally, no court would ever be able to review even the most powerful ineffective appellate counsel claim when state habeas counsel failed to raise the claim. The rationale behind *Martinez* and *Trevino* apply straightforwardly to finding cause and prejudice in the instant case.

This was the same analysis used by the Ninth Circuit when they decided that *Martinez* and *Trevino* necessarily apply to ineffective assistance of counsel claims. *Nguyen v. Curry*, 736 F.3d 1287 (9th Cir. 2013).

[3] The state record shows that the briefing for the initial writ was filed on July 28, 2010, that the Court of Criminal Appeals denied the direct appeal on January 26, 2011, and that the state writ was not filed until August 29, 2011.

B. A Circuit-Split Has Arisen

Following *Martinez*, the circuit courts have split on the extension of *Martinez* and *Trevino* to defaulted ineffective assistance of appellate counsel claims: The Fifth, Sixth, Seventh, Eighth, and Tenth Circuits held that *Martinez* cannot be used to excuse ineffective assistance of appellate counsel claims in addition to ineffective trial counsel claims. *Long v. Butler*, 809 F.3d 299, 315 (7th Cir. 2015); *Reed v. Stephens*, 739 F.3d 753, 778 n.16 (5th Cir. 2014); *Hodges v. Colson*, 727 F.3d 517, 530-31 (6th Cir. 2013); *Banks v. Workman*, 692 F.3d 1133, 1147-48 (10th Cir. 2012) (same); *Dansby v. Norris*, 682 F.3d 711, 728-29 (8th Cir. 2012) (same), *rev'd on other grounds*, 133 S. Ct. 2767 (2013).

By contrast, as previously noted, the Ninth Circuit held that *Martinez* can be used to excuse the default of ineffective assistance of appellate counsel claims. *Nguyen v. Curry*, 736 F.3d 1287, 1289-90 (9th Cir. 2013). It should also be noted that the Supreme Court denied certiorari to address the Ninth Circuit's extension of *Martinez*. *Hurles v. Ryan*, 135 S. Ct. 710 (2014).[4]

C. This Court should grant certiorari.

This Court should grant Davila's petition for certiorari because the Fifth Circuit's decision is "in conflict with the decisions of another United States court of appeals" on the same issue. Sup. Ct. R. 10(a). The question of whether or not

[4] The cert petition is available at 2014 WL 4075964. The first question presented was: "can post-conviction counsel's ineffectiveness provide cause to excuse the procedural default of an ineffective-assistance-of-appellate-counsel claim, or is Martinez limited to excusing only the default of a claim of ineffective assistance of trial counsel?"

ineffective state habeas counsel's performance can be seen as cause to overcome the procedural default of a substantial ineffective assistance of appellate counsel claim is also "an important question of federal law that has not been, but should be, settled by this Court." Sup. Ct. R. 10(c). Indeed, without this Court's guidance petitioners in the Fifth Circuit who were denied effective representation both on direct appeal and during their initial collateral proceedings will literally have no forum to raise substantial claims of ineffective assistance of appellate counsel.

II. IN LIGHT OF *HURST V. FLORIDA*, 136 S. CT. 616, 622 (2016), MUST TEXAS' SECOND PUNISHMENT SPECIAL ISSUE, WHICH IS A NECESSARY FINDING FOR A SENTENCE OF DEATH, BE DECIDED BY THE JURY BEYOND A REASONABLE DOUBT?

Davila could only be sentenced to death after the jury unanimously agreed on two punishment "special issues." TEX. CODE CRIM. PROC. art. 37.071 § 2 (b)–(g); Appendix F (Punishment Phase Jury Instructions). Unless the jury unanimously agreed on these special issues the trial court was required to sentence Davila to life in prison. *Id.* at § 2 (g). The constitutional deficiency is that the jury was not required to make the second finding beyond a reasonable doubt.

The recent decision *Hurst v. Florida*, 136 S. Ct. 616, 622 (2016) makes clear that the holding of *Apprendi*: "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt," applies to Texas' second special issue. 530 U.S. 466, 490. However, the Fifth Circuit and the Texas Court of Criminal Appeals have repeatedly rejected this argument based upon the fiction that Texas' special issues are not

prerequisites to a sentence of death. *See, e.g., Allen v. Stephens*, 805 F.3d 617 at 628 (5th Cir. 2015) ("[T]hrough the guilt-innocence phase, 'the state was required to prove beyond a reasonable doubt every finding prerequisite to exposing [the defendant] to the maximum penalty of death.'"); *Allen* v. State, 108 S.W.3d 281, 285 (Tex. Crim. App. 2003) (("Nothing the jury or judge decided during the punishment phase could have enhanced appellant's sentence beyond the prescribed range."). Texas and the Fifth Circuit refuse to recognize that the Sixth Amendment's guarantees apply to "each fact necessary to impose a sentence of death." *Hurst*, 136 S. Ct. at 619.

A. Texas' Capital Sentencing Scheme.

To be eligible for the death penalty in Texas a person must be convicted of murder committed in one of several specifically defined ways. *See* Tex. Pen. C. § 19.03, § 12.31. Jurors make the eligibility decision in the guilt/innocence phase of trial. *Id.* However, after a finding of guilt, but prior to the answering of the statutory special issues, the maximum punishment Davila could receive was life in prison.

Before a defendant may be sentenced to death in Texas, the jury must answer statutory special issues in a certain way. *See* TEX. CODE CRIM. PRO. art. 37.071 (Art. 37.071). Based on the jury's answer to the special issues the defendant will be sentenced to life in prison or death. *Id.* In Davila's case, only two special issues were submitted to the Jury. *See* CR at 1936-38 (Jury Instructions, also Included as Appendix F.). Pursuant to Art. 37.071, sec. 2(b), the jury was first asked the following question: "Do you find from the *evidence beyond a reasonable doubt* that there is a probability that the defendant would commit criminal acts of violence that would

constitute a continuing threat to society?" *Id.* at 1938 (Appendix F)(*emphasis added*). The jury was instructed that they could not answer this special issue "yes" unless they agreed unanimously and beyond a reasonable doubt. *Id.* at 1936 (Appendix F); *See* Tex. C. Crim. P. Art. 37.071(d)(2).

If the first special issue is answered in the affirmative the jury is instructed to answer the second special issue: "Taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, do you find that there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentenced be imposed?" CR at 1938; See also Art. 37.071(e)(1). This special issue was adopted to meet the Eighth Amendment requirement that jurors in death penalty cases be allowed to consider all mitigation evidence when considering the death penalty. *See Penry v. Lynaugh*, 492 U.S. 302 (1989).

Importantly, Davila could only be sentenced to death *after* the jury unanimously agreed on both "special issues." TEX. CODE CRIM. PROC. art. 37.071 § 2 (b)–(g). Absent both findings, the trial court was required to sentence Davila to life in prison. TEX. CODE CRIM. PROC. art. 37.071 (g). The constitutional deficiency is that the jury was not required to make this second finding beyond a reasonable doubt.

B. *Apprendi*, *Ring,* and *Hurst* require a finding that Texas' capital punishment scheme violates the Sixth and Fourteenth Amendments.

In *Apprendi*, this Court considered a New Jersey statute which permitted a judge to add a "hate crime" enhancement upon finding, by a preponderance of the evidence, that the crime was motivated by racial animus. 530 U.S. at 469-470. This Court held New Jersey's "hate crime enhancement" unconstitutional because it permitted a judge, acting alone and using only a preponderance standard, to enhance the possible punishment for a crime outside the normal statutory range. The Court drew on its earlier statement in *United States v. Jones*, 526 U.S. 227, 243 n.6 (1999), that "under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." The Court dismissed New Jersey's argument that the hate-crime finding was merely a "sentencing factor" as semantics: "Merely using the label 'sentence enhancement' to describe the [finding] surely does not provide a principled basis" for treating it differently than the substantive elements of the crime. *Id*. at 476.

In *Ring v. Arizona,* 122 S. Ct. 2428 (2002), this Court applied *Apprendi* in the capital sentencing context. The Court drew a simple rule from *Apprendi*: "If a State makes an increase in a defendant's authorized punishment contingent on a finding of fact, that fact-no matter how the State labels it-must be found by a jury beyond a reasonable doubt." *Id* at 2430 (*citing Apprendi,* 530 U.S. at 482-83).

The Court accordingly struck down the Arizona statute which permitted a judge alone to make fact findings essential to the imposition of the death penalty. *Apprendi* and *Ring* teach that courts must look not to the "form" but the "effect" of statutory aggravating factors. The *Ring* Court stressed that there was simply no difference between a substantive element of the offense and a "sentencing factor," so long as that sentencing factor served to elevate the maximum permissible punishment. *Id.* at 2441. Therefore, a "sentencing factor" which makes the defendant eligible for a more severe punishment than "the maximum authorized by a guilty verdict standing alone" is simply "the functional equivalent of an element of a greater offense" and therefore must be proven in accordance with the procedures developed for ensuring a fair and impartial decision as to the defendant's guilt. *Id.* at 2443 (quoting *Apprendi ,* 530 U.S. at 494 n.19).

Under *Ring* and *Apprendi,* both of the factual findings set out in TEX. CODE CRIM. PROC. art. 37.071 are not mere sentencing factors. When a defendant is convicted of capital murder in Texas the maximum punishment authorized by law is life imprisonment. *Id.* For this reason, the maximum sentence based solely on a finding of guilt in a capital murder trial is life in prison. *See Blakely v. Washington*, 542 U.S. 296, 303 (2004) ("Our precedents make clear, however, that the "statutory maximum" for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*") If the State seeks death, it must prove future dangerousness, and must also prove that the defendant's mitigation facts are insufficient to justify a life

sentence and both findings must be made by a jury beyond a reasonable doubt. *Hurst v. Florida*, 136 S. Ct. 616, 619 (2016).[5]

Under the Texas scheme, the jury must answer the mitigating special issue *in order to determine whether or not a death sentence will be imposed*. Although its subject matter is "mitigation," what is important, as this Court emphasized, is the "effect" of the fact-finding, not its form.[6] Functionally, the mitigation special issue operates precisely like an element of the crime – that is to say, it determines what sentence the defendant will receive. It must be determined by a process that meets relevant Constitutional standards, and *Ring Apprendi,* and *Hurst* hold that this includes a jury that is convinced beyond a reasonable doubt. *See also Sullivan v.*

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[5] The idea that *Apprendi* applies to all findings necessary for a sentence of death was further cemented in *Hurst v. Florida* where this Court held that the "Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death." 136 S. Ct. 616, 619 (2016). Of course, the Sixth Amendment does not only require that jury make all necessary findings, it also requires that the finding be made beyond a reasonable doubt. *Id.* at 621 (The Sixth Amendment "in conjunction with the Due Process Clause, requires that each element of a crime be proved to a jury beyond a reasonable doubt.").

[6] The fact that the mitigation special issue is mandated by the Eighth Amendment does not remove it from the Fifth and Sixth or Fourteenth Amendment analysis:

> The notion "that the Eighth Amendment's restriction on a state legislature's ability to define capital crimes should be compensated for by permitting States more leeway under the Fifth and Sixth Amendments in proving an aggravating fact necessary to a capital sentence ... is without precedent in our constitutional jurisprudence."

Ring v. Arizona, 536 U.S. 584, 606 (2002). *See also Ring,* 536 U.S. at 612 (Scalia, J. Concurring) ("*[W]hether or not* the States have been erroneously coerced into the adoption of "aggravating factors," wherever those factors exist they must be subject to the usual requirements of the common law, and to the requirement enshrined in our Constitution, in criminal cases: they must be found by the jury beyond a reasonable doubt.).

Louisiana, 508 U.S. 275, 278 (1993) (The Due Process Clause and the Sixth Amendment require the beyond a reasonable doubt standard be used in state as well as federal proceedings.).

C. Delaware's Supreme Court agrees that all necessary findings, even those related to weighing mitigation, must be found by a jury beyond a reasonable doubt.

After this Court's decision in *Hurst* the Delaware Superior Court certified five questions to the Delaware Supreme Court in order to determine whether Delaware's capital sentencing scheme is constitutional. *See State v. Rauf,* 1509009858, 2016 WL 320094 (Del. Super. Jan. 25, 2016). One of those five questions is relevant to the issue presented here:

> If the finding that the aggravating circumstances found to exist outweigh the mitigating circumstances found to exist must be made by a jury, must the jury make that finding unanimously and beyond a reasonable doubt to comport with federal and state constitutional standards?

Id. Shortly thereafter, the Delaware Supreme Court accepted the certified questions, Del. Supr. No. 39, 2016, and the Superior Court stayed "all trials, penalty hearings, and applications asking [the] Court to declare Delaware's capital sentencing scheme unconstitutional." *Administrative Directive of the President Judge of the Superior Court of the State of Delaware,* Feb. 1, 2016, No.2016–2. On August 2, 2016, the Delaware Supreme Court decided that *Hurst* and its progeny require that all findings necessary for a death sentence be found by a jury and beyond a reasonable doubt. *Rauf v. State*, 39, 2016, 2016 WL 4224252, at *36 (Del. Aug. 2, 2016).

Specifically relevant here is the Court's answer to the Fourth Certified Question:

> If the finding that the aggravating circumstances found to exist outweigh the mitigating circumstances found to exist must be made by a jury, must the jury make that finding unanimously and beyond a reasonable doubt to comport with federal constitutional standards?
>
> **Yes**. We answer question four in the identical manner in which we have answered question two.

Id. at 2. After a detailed and precise history of our countries strong preference for jury control over capital punishment, and of the more recent and sometimes confounding death penalty jurisprudence, Chief Justice Strine concluded as follows:

> There is no circumstance in which it is more critical that a jury act with the historically required confidence than when it is determining whether a defendant should live or die. If, as a majority of us have concluded, the Sixth Amendment requires a jury to make all the necessary factual determinations relevant to a capital defendant's fate, there is no reason to depart from the long-standing beyond a reasonable doubt standard when the jury is making the crucial fact-laden judgment of whether the defendant should be executed.[303] Put simply, the Sixth Amendment right to a jury includes a right not to be executed unless a jury concludes unanimously that it has no reasonable doubt that is the appropriate sentence.

Id. at *36.

Davila asks this Court to intervene to ensure that Texas juries also conclude unanimously and beyond a reasonable doubt that death is the appropriate sentence.

D. The Fifth Circuit and Texas fail to recognize that both special issues are a prerequisite to a finding of death.

Historically, the Fifth Circuit has held Texas' capital sentencing procedure to be constitutional because "a finding of mitigating circumstances reduces a sentence from death, rather than increasing it to death." *Blue v. Thaler*, 665 F.3d 647, 669 (5th Cir. 2011) (citation omitted). This is the same basis relied upon by the Texas Court of Criminal Appeals in denying similar *Apprendi* claims. *See, e.g., Allen*, 108 S.W.3d at 285.

This reasoning "overlooks *Apprendi*'s instruction that 'the relevant inquiry is one not of form, but of effect.'" *Ring v. Arizona*, 536 U.S. 584, 604 (2002) (*citing Apprendi*, 530 U.S. at 494). *Hurst* makes it abundantly clear that *Apprendi*'s holding applies to *any finding necessary for sentence of death*. And Delaware's recent decision in *Rauf* shows that *Hurst*, *Ring,* and *Apprendi* apply to any necessary finding, even if it involves mitigation.

The relevant test for applying *Apprendi* is whether or not the finding in question is a necessary prerequisite to a sentence of death. *Hurst v. Florida*, 136 S. Ct. 616, 622 (2016). If a certain finding must be made prior to a death sentence being imposed, then *Apprendi* applies and the finding must be made by the jury beyond a reasonable doubt. *Id.*[7] Because Texas' second special issue must be decided in the

[7]. In *Hurst* the analysis was straightforward:

> As with Timothy Ring, the maximum punishment Timothy Hurst could have received without any judge-made findings was life in prison without parole. As with Ring, a judge increased Hurst's authorized punishment based on her own

negative prior to a sentence of death being imposed, that finding must be made by a jury beyond a reasonable doubt. Texas' ruling is contrary to clearly established federal law because the state court confronted a set of facts materially indistinguishable from those in *Ring* and nevertheless arrived at a different result. *See Williams v. Taylor*, 529 U.S. 362, 405 (2000) (discussing the standards of 28 U.S.C. 2254(d)). Further, Texas' decision was an unreasonable application of clearly established federal law because although the Court of Criminal Appeals correctly identified the governing legal rule it applied the rule unreasonably in Davila's case. *Id.* at 407-08.

E. Appellate courts are split about whether the Sixth Amendment applies to the selection phase of capital trials.

Multiple jurisdictions have recently commented on whether or not a defendant is entitled to the protection of the Sixth Amendment during the selection phase of a capital trial.

The Alabama Court of Criminal Appeals makes a distinction between aggravating factors and mitigation factors when applying *Apprendi*. *Ex parte State*, CR-15-0619, 2016 WL 3364689, at *8 (Ala. Crim. App. June 17, 2016). The Court believes that because the jury in Alabama must find an aggravating factor beyond a reasonable doubt, that any further findings only decrease the potential sentence and

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> fact-finding. In light of *Ring,* we hold that Hurst's sentence violates the Sixth Amendment.

Hurst v. Florida, 136 S. Ct. 616, 622 (2016).

therefore additional findings may be made by a judge. Indeed, that Court specifically found that the weighing of mitigation is not effected by the *Hurst* decision. *Id.* ("Whether the aggravating circumstances outweigh the mitigating circumstances is not a finding of fact necessary to make a capital defendant eligible for the death penalty but is a 'moral or legal judgment' guiding the trial court's discretion in determining 'whether a defendant eligible for the death penalty should in fact receive that sentence.'") Interestingly, a few days before the *Ex parte State* ruling, this Court had granted certiorari, vacated a judgment, and remanded a case back to the Court of Criminal Appeals "for further consideration in light of *Hurst v. Florida*, 136 S.Ct. 616, 193 L.Ed.2d 504 (2016)." *Kirksey v. Alabama*, 136 S. Ct. 2409, 195 L. Ed. 2d 777 (2016); *see also Wimbley v. Alabama*, 136 S. Ct. 2387, 195 L. Ed. 2d 760 (2016) (same); *Brooks v. Alabama*, 136 S. Ct. 708, 193 L. Ed. 2d 812 (2016) (J. Sotomayor concurring in denial of certiorari but noting that the decisions upholding Alabamas capital scheme were overruled by *Hurst.*)

The Supreme Court of Ohio agrees that *Ring*, *Apprendi*, and *Hurst* only apply to the eligibility phase of a capital trial, and that the subsequent weighing process can therefore be performed by a judge. *State v. Belton*, 2016-Ohio-1581, ¶ 59 ("Because the determination of guilt of an aggravating circumstance renders the defendant eligible for a capital sentence, it is not possible to make a factual finding during the sentencing phase that will expose a defendant to greater punishment.") Ohio relies upon the same logic as Texas and believes that "if a defendant has already been found to be death-penalty eligible, then subsequent weighing processes for

sentencing purposes do not implicate *Apprendi* and *Ring*. Weighing is not a fact-finding process subject to the Sixth Amendment, because '[t]hese determinations cannot increase the potential punishment to which a defendant is exposed as a consequence of the eligibility determination.'" *Id.* at ¶ 60. Texas and Ohio both overlook the fact that absent a finding that aggravating factors outweigh mitigating factors the maximum sentence is life in prison.

California, like Texas, takes the position that the Sixth Amendment does not require the jury to find that the aggravating factors outweigh the mitigating factors beyond a reasonable doubt. *See, e.g., People v. Rangel*, 62 Cal. 4th 1192, 1234, 367 P.3d 649, 681 (2016). *See also United States v. Sampson,* 486 F.3d 13, 32 (1st Cir. 2007) (discussing the federal death penalty scheme and ruling that the weighing of aggravating and mitigating evidence is not a finding, but a process, and therefore no burden of proof is required.)

The State of Missouri however sides with Delaware and believes that the weighing of aggravating and mitigating evidence (along with other necessary findings) are "factual findings that are prerequisites to the trier of fact's determination that a defendant is death-eligible." *See State v. Whitfield*, 107 S.W.3d 253, 261 (Mo. banc 2003); *see also McLaughlin v. Steele*, 4:12CV1464 CDP, 2016 WL 1106884, at *27 (E.D. Mo. Mar. 22, 2016) (discussing the Missouri death penalty scheme and finding that the petitioner was entitled to habeas relief where his death sentence by state court judge was based on findings of fact not made by jury in violation of his Sixth Amendment right to jury trial).

F. This Court should grant the petition for writ of certiorari

This Court should grant the petition for writ of certiorari because the Texas Court of Criminal Appeals and the Fifth Circuit have repeatedly decided an important question of federal constitutional law in way that conflicts with this Court's relevant decisions in *Apprendi, Ring*, and *Hurst*. Sup. Ct. R. 10(c). Further, the decisions of Texas' Court of Criminal Appeals and the Fifth Circuit are now at odds with those of the Supreme Courts of Delaware and Missouri. Sup. Ct. R. 10(a), (b). This Court should grant certiorari to establish whether or not the Sixth Amendment applies to the selection phase of capital trials.

CONCLUSION

This Court should grant the petition and order merits review.

Respectfully submitted this 22nd day of September 2016.

By: 

Seth Kretzer
Member, Supreme Court Bar

Mr. Jonathan Landers
2817 West T.C. Jester Blvd
Houston, TX 77018

Phone: 713-301-3153
Fax: 713-685-5020

Jonathan.landers@gmail.com

Mr. Seth Kretzer
The Lyric Center
440 Louisiana Street, Suite 200
Houston TX 77002
Phone: 832-460-1714
Phone: 713-343-7210
Fax: 713-224-2815
seth@kretzerfirm.com

Appointed CJA Counsel of
Record for Petitioner

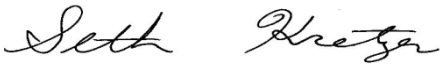
CERTIFICATE OF MAILING

I hereby certify that, on the 22nd day of September 2016, this pleading was served on the Court via mail courier.

Seth Kretzer

CERTIFICATE OF SERVICE

I hereby certify that, on the 22nd day of September 2016, a true and correct copy of this petition and appendices was sent to AAG Katherine Hayes in the Office of the Texas Attorney General.



Seth Kretzer