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Joe Mario Trevino Clemency Petition

Joe Mario Trevino clemency petition from summer 1999. I have not preserved the cover sheets in my computer but the following text is what was filed first with the Texas Board of Pardons, with Governor George W. Bush, and later with Lt. Gov. Rick Perry. There were some modifications of the introductory text for each filing.

Ken Driggs

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I Procedural History

This crime and Mr. Trevino's arrest took place on January 17, 1983. He has remained in custody since that date. His Tarrant County trial took place in Criminal District Court No. 2 before Judge L. Clifford Davis on June 20 through July 3, 1984. The Texas Court of Criminal Appeals summarized the crime as follows:

On January 17, 1983, the body of eighty-year-old Blanche Miller was found inside her ransacked home. The victim had been strangled and raped. Numerous items were stolen during the offense including a television, a stereo, a radio and the victim's car. Appellant was convicted of this capital offense and his punishment was assessed at death.

Trevino v. State, 815 S.W.2d 592, 596 (Tex. Crim. App. 1991).

The Court of Criminal Appeals affirmed his conviction on June 12, 1991. Trevino v. State, 815 S.W.2d 592 (Tex. Crim. App. 1991) (attached as Exhibit A). On April 6, 1992 the Supreme Court granted certiorari with an opinion and remanded to the state courts. Trevino v. Texas, 503 U.S. 562 (1992) (attached as Exhibit B). The Court of Criminal Appeals on October 14, 1992 remanded to the Tarrant County trial court. Trevino v. State, 841 S.W.2d 385 (Tex. Crim.

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App. 1992).¹ A hearing was conducted in the trial court on January 6, 1993. The results of that hearing were affirmed by the Court of Criminal Appeals which then denied Mr. Trevino's Motion for Rehearing on May 26, 1993. Trevino v. State, 864 S.W.2d 499 (Tex. Crim. App. 1993).² On March 7, 1994, the Supreme Court denied his Petition for Certiorari concluding direct appeal. Trevino v. Texas, 510 U.S. 1185 (1994).³

The trial court set a July 20, 1994, execution date but withdrew it when Mr. Trevino filed his petition for state habeas corpus on July 18, 1994.⁴ The trial court issued proposed findings of fact and conclusions of law without an evidentiary hearing. The Court of Criminal Appeals adopted these and denied relief without a published opinion in 1996. The United States Supreme Court denied Mr. Trevino's Petition for Certiorari on March 17, 1997. Trevino v. State, 520 U.S. 1129 (1997).

On June 4, 1997, Mr. Trevino filed a federal habeas corpus

¹ Note the dissent by Judges Maloney. He would have ordered a new trial for Mr. Trevino at this point. 841 S.W.2d at 388.

² Judge Maloney renewed his earlier dissent and would have ordered a new trial for Mr. Trevino. 864 S.W.2d at 501.

³ This appellate back and forth on direct appeal concerned the State's use of its peremptory strikes to remove racial minorities from the trial jury, what criminal lawyers know as Batson violations.

⁴ Lee Ann Dauphinot was the trial court judge when Mr. Trevino initially filed for habeas relief. After her elevation to the District Court of Appeals in 1995 she was succeeded on the trial court bench by Wayne Salvant.

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petition under 28 U.S.C. § 2254 in the federal Northern District.

The petition was assigned to Judge John McBryde. On November 12, 1997, the District Court denied relief without an evidentiary hearing. The Fifth Circuit denied relief at Trevino v. Johnson, 168 F.3d 173 (5th Cir. 1999) (attached as Exhibit C)⁵.

Mr. Trevino never had an evidentiary hearing on any of his post-conviction issues.

Mr. Trevino's Petition for A Writ of Certiorari was filed in the United States Supreme Court on June 17, 1999, and Motion for Stay of Execution on July 19, 1999. Both are still pending as of this writing. See Supreme Court case no. 98-9936.

⁵ The primary issue in this opinion was whether Judge McBryde should have recused himself in response to a motion from Mr. Trevino's post conviction counsel, Art Brender. The recusal motion was based on the fact that Mr. Brender had been subpoenaed as a witness against Judge McBryde in removal proceedings against him, and whether this situation resulted in a bias against Mr. Trevino and his appeal. See In re: Matters Involving United States District Judge John H. McBryde, Under the Judicial Conduct and Disability Act of 1980, Nos. 95-05-372-0023 et al. (Jud. Council 5th Cir. Dec. 31, 1997, aff'd, No. 98-372-001 (Jud. Conf. U.S. Sept. 21, 1998). Judge Harold DeMoss dissented finding that Judge McBryde should have recused himself and that the case should have brought the same result as United States v. Anderson, 160 F.3d 231 (5th Cir. 1998) and United States v. Avilez-Reyes, 160 F.3d 258 (5th 1998) which involved almost identical recusal motions particular to Judge McBryde. 168 Fd.3d at 185-186.

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II Preliminary Statement

I want to be clear that nothing said on behalf of Mr. Trevino through this petition is intended in any way to detract from the tragedy of the death of Blanche Miller in her home on January 17, 1983. Every murder is a terrible thing, not only for the victims but their families and loved ones as well.

Every murder is likewise a terrible thing for the perpetrator and people who care about him as well. The execution of Mr. Trevino cannot bring Ms. Miller back to her family. Nor will they feel any better about this tragedy six months or longer after Mr. Trevino's execution if it takes place.

In this case the execution would be an act of revenge which refuses to recognize Mr. Trevino's humanity and the enormous hardships of his life which brought him to the tragedy of January 17, 1983. Mr. Trevino was a ward of the State through the majority of his childhood. While the State generated one of the most complete paper records I have ever seen in one of these cases, thoroughly documenting the toxic disaster that was substituted for his

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childhood, the State did nothing to raise him with the values and talents necessary to his becoming a productive adult.

Since August 1990 I have handled almost exclusively death penalty cases in the states of Texas, Florida, and now Georgia. I have probably been involved with 75 such cases at one level or another. I can say without hesitation that Mr. Trevino's early family experience, his childhood, and his experiences in the Texas child protection system are the most tragic I have ever encountered. This is a guy who literally never had a chance in life. Nearly all of his siblings have experienced unhappy marginal lives, nearly all frequented the criminal justice system. Two of Mr. Trevino's six brothers are serving lengthy prison sentences for murder and a third was killed in a Houston gang shooting.⁶ This indicates to me that it was not simply a matter of Mr. Trevino's singular, wilful desire to do wrong but rather has substantial roots in environmental and circumstantial factors.⁷

⁶ Mr. Trevino, TDCJ #767, is on death row. His oldest brother Amadore "Sony" Trevino, TDCJ #710202, is serving a 45 year sentence for murder and is at the Colefield Unit. Another older brother, Daniel "Danny" Trevino, TDCJ #478316, is serving a 35 year sentence for murder and is at the Darrington Unit.

⁷ I first worked on Mr. Trevino's case in the spring of 1994 as a senior staff attorney with the Texas Resource Center. I assisted Ft. Worth attorney Art Brender who has represented Mr. Trevino since his direct appeal and continues to represent him in the United States Supreme Court. Mr. Brender has been greatly assisted by attorney Jason Smith and paralegal Megan Gore in his office. My work on this petition and all other work since 1996 have been pro bono.

III What This Trial Jury Heard About Mr. Trevino's Youth

Mr. Trevino's 1984 jury returned a verdict mandating a death sentence after a very brief sentencing proceeding ending on July 3, 1984. The defense brought out a few small points on cross examination, presented just three brief witnesses of their own, and were frustrated in their effort to introduce a childhood psychological evaluation for the jury to consider. For whatever reason this jury heard almost nothing about his childhood and family circumstances.⁸

From the cross examination of a Texas Youth Commission Gatesville School security officer the jury heard that Mr. Trevino was from a "disruptive home" but the witness denied any knowledge of

⁸ During post conviction Mr. Trevino asserted that the documentary sources for a detailed account of his childhood were in the custody of the State and were not turned over to defense counsel following a timely demand in violation of Brady v. Maryland, 373 U.S. 83 (1963). Had this information been known to trial counsel and they not presented it to this jury that certainly would have been ineffective assistance of counsel. Lead counsel at Mr. Trevino's trial, John Bankston, died several years before post conviction began. Bankston's files materialized during post conviction and were in the custody of the trial court. They do not reflect that Bankston was ever aware of any of the relevant records. Bankston's second chair, J. R. Molina of Ft. Worth, survived but his files did not. However, he indicated he never saw the critical records even though the defense went to considerable lengths to secure them. Mr. Molina indicates that had the defense had these materials they certainly would have used them to tell Mr. Trevino's story to this jury.

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whether his father was abusive.⁹ He agreed that Mr. Trevino had a "tragic family life or background" ... "very poor family background".¹⁰ The witness also testified that Mr. Trevino was "at least an average student."¹¹

The defense put up few witnesses. A Board of Pardons and Paroles official testified on parole eligibility under a capital jury's life sentence.¹² Another witness was a former Texas death sentenced inmate whose conviction was reversed after two years. He described life on death row.¹³ Finally, defense counsel J. R. Molina took the stand to introduce some of Mr. Trevino's art work and a Dallas County Medical Examiner's autopsy which was apparently connected to some matter of residual doubt. Molina attempted to introduce a Harris County Department of Education psychological evaluation of Mr. Trevino as a 12-year-old¹⁴ but was frustrated by a

⁹ Witness Allen Wallace whose entire testimony is at S.F. Vol. 36, 770-780. See S.F. 36, 771-772.

¹⁰ S.F. 36, 780.

¹¹ S.F. 36, 774-775.

¹² General Counsel Charles E. Walker Jr., S.F. 36, 788-810.

¹³ James E. Whitmore, S.F. 36, 811-822.

¹⁴ The report in question appears to have been one prepared by Marie Lynn Sellers, M.Ed., dated January 24, 1975, attached as Exhibit D. [TYC 521-524]

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hearsay/authentication ruling.¹⁵

The entire punishment phase consists of just 60 pages of testimony to the jury.¹⁶ This jury was only told about the worst fifteen or twenty minutes of Mr. Trevino's life. They saw virtually nothing of the circumstances that effectively put him in Blance Miller's home on January 17, 1983.

¹⁵ S.F. 36, 834-838. This issue was appealed and the Court of Criminal Appeals ruled against Mr. Trevino. Trevino v. State, 815 S.W.2d 591, 596-598 (Tex.Crim.App. 1991), cert. granted with opinion, 503 U.S. 562 (1992).

¹⁶ S.F. 36, 764-784, 788-818, 823-833.

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IV What Mr. Trevino's Life Actually Was Like

Introduction

From his birth Mr. Trevino lived a life of grinding poverty, neglect, intellectual privation, physical abuse, and hopelessness. In particular, it was a childhood which made human attachments of any kind very difficult for him. One constant theme in his life has been a desperate search for adults with whom to form something like a loving, accepting, parental relationship. He often acted inappropriately because he never had the opportunity to learn appropriate conduct.

Jesse Trevino and Emma Gonzales Trevino were migrant agriculture workers. They moved to California in 1958 from Robstown, Texas. On July 25, 1962, they had their sixth son in Oroville, California, Jose Mario Trevino, Jr. He was the seventh child and sixth boy, to be followed by two sisters. From oldest to youngest the children were: Amos "Sonny" Trevino (DOB: 2/18/56), Rudy Trevino (DOB: 5/8/57), Jesse Trevino (DOB: 9/18/58), Albert Daniel "Danny" Trevino (DOB: 11/11/59), petitioner Joe Mario Trevino Jr., Evangeline

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"Vangie" Trevino (DOB: 2/3/60), Juanita "Janey" Trevino (DOB: 6/1/65), and Emma Jean Trevino (DOB: 6/1/66).

Mr. Trevino's father was an alcoholic who violently abused his wife and his children. His mother was a child herself when she began having children, the first when she was 16, the second when she was 18, the third when she was 19, and the fourth when she was 20.¹⁷ One Houston public school document later recorded that she had a sixth grade education. [HISD 16] Mr. Trevino's mother was herself abused, dependant, neglectful, overwhelmed, and completely unable to raise her eight children.

Mr. Trevino's Early Childhood

Houston Independent School District records indicate Mr. Trevino didn't walk until he was one-and-a-half-years old and didn't talk until he was three-and-a-half. [HISD 44]

One of Mr. Trevino's older brothers, Danny Trevino, would have told Mr. Trevino's jury the details of their early childhood had he been asked.¹⁸ In a 1995 affidavit he provided counsel Danny Trevino recalled:

We lived in California when I was young. Our house was

¹⁷ Emma Gonzales Trevino Saldana was born on February 20, 1939. She was eight years younger than her husband Jesse Trevino who was born in 1931.

¹⁸ Danny Trevino is an inmate in the Texas penal system. TDCJ #478316, serving a 35 year sentence for murder and presently assigned to the Darrington Unit. He was in the Darrington Unit at the time of Mr. Trevino's 1983 trial. No one spoke to him about testifying at the trial.

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right down the road from the farm where we all worked.

My father was very abusive and drunk all the time. In my opinion I hated his guts. He beat up my mother and all the children a lot. He considered us slaves in the orchards and worked us constantly there. We had to get up at five o'clock each morning to work. He didn't care if we missed school for work. If he didn't think we were working hard enough, he would throw big dirt clods at us. My father ran a cherry-picker and my uncle ran a tractor-spray. All the kids picked fruit. My father even made us work while the orchards were sprayed with chemicals. We got sprayed to.

My father would beat my mother. He beat us children mostly with a thin stick, sometimes a belt. We used to hide under the table from him. I can remember Joe being taken to the hospital after a beating on at least one occasion, but usually he wouldn't allow any of us to get treatment after he beat us. He didn't want anyone to report it. Once, my father came home drunk and on crutches. He picked up Joe, who was just a toddler, and threw him against the wall. I tried to stop him. He hit my mom as well as the rest of us.¹⁹

This was the last straw for my mother. She gathered up all of us children and we ran away to our cousins in San Francisco. She woke us up in the middle of the night to go. She was scared my father would find us, so we only stayed in California a couple of months. Then we stayed with some relatives and worked in Idaho.

We were in Idaho for only four or five months. It was mostly summertime and we picked potatoes for money. I was about 10 years old at the time. We lived with an Uncle on my mother's side. His house was out in the country and did not have gas or electricity. We worked like hell. I chopped fire wood. As soon as we raised enough money to travel, we went to Texas.

We went to Rubstown [sic]; The (Vailla) [sic] Texas first.

¹⁹ Other family members recall the incident but that Mr. Trevino was struck on the head by his father with the crutch. In any event, the result was an open wound in the head which was not treated by any medical personnel and which festered and reopened for years. Later Houston school records make reference to it, confirming the assault.

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We only lived there five or six months. Then we went to my grandmother's in Houston. This was my mother's mother. I was about 11 years old when we got to Houston. My mother's present home was the second and only home we ever lived in in Houston.

Danny Trevino affidavit dated June 1995, attached as Exhibit E.²⁰

Moving to Houston About 1969

Their mother's address at that time was 1814 ½ Decatur Street Houston, Texas. To the best of my knowledge she still resides at that address.

Though Mr. Trevino's parents had separated with his mother's escape from California a formal divorce would not come until February 1976.

Danny Trevino goes on to recall the family's life in Houston:

My mother is a very religious woman. She was very strict with us. She had to work two jobs in Houston to help support us and just sort of lost control of us. We raised ourselves and the streets raised us. The kids all spoke English most of the time, but our mother mostly spoke to us in Spanish.

We called my grandmother "Grandma Dynamite" because we never knew when she was going to get mad and explode on us. One time I broke my arm in her (my grandmother on my dad's side) washing machine and she wouldn't take me to the hospital. Luckily, my mother took me when she got home from work.

Everyone in my family was very abusive (not my sisters). My brothers were always fighting and beating up on each other. My Aunt Martha would keep us sometimes after school. She would yell at us all the time.

²⁰ Danny Trevino's affidavit is signed but not notarized. It was prepared by the undersigned after a lengthy interview with the affiant who then made a number of his own handwritten modifications on it, then was unable to return a notarized copy to me. The affidavit is completely consistent with the interviews, consistent with existing records, and consistent with interviews with other siblings.

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The neighborhood where I grew up in Houston was much worse then than it is now. Everyone had their own little group. My brother Joe was never in a gang.

Joe was lighter-skinned than the other boys in my family. We used to tease Joe that he was the milkman's son. Joe thinks no one in the family ever loved him. The boys in my family wouldn't let Joe hang out with them, only because we were doing our own thing. Joe would get mad about this, but he never was a fighter. Joe was just younger than me, and we were always close. We were also close to Jesse, because he was smarter!

Other than us, Joe was a loner. He never had any girlfriends that I know of, and he never really had any male friends that I know of either. He usually hung out in other neighborhoods.

All the boys used to huff paint except Rudy and glue to get high when my mother went to work. A lot of kids in our neighborhood used to huff. We would get high every day when my mother left for work. We would pool our money to go buy paint or glue and then sit around outside and get high. We used "Texas Shoe Shine" to get high, but it isn't sold anymore. I huffed for two or three years and then quit because I wasn't getting anything out of it. I'm sure it damaged my brain. ...

Joe learned huffing from me and my older brothers. He and Amos huffed the most and for the longest. Joe would just become a zombie when he was high on glue. He would just lay around and not respond or move. We also used other drugs. We also took Valiums, Quaas, and Yellow Jackets which we got from my Aunt's husband.

Joe and I were the only two boys ever placed in foster homes. We usually ended up taking the rap for what the other kids had done. I think my mother is the one who decided I should go to Boy's School. I was kind of rowdy and my mother had strict rules in the house. I don't think I was any worse than the other boys of my family, though. ...

Danny Trevino Affidavit.

School and Child welfare Records

In 1968 and again in 1969 Mr. Trevino enrolled in the first

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grade at Dow Elementary School in Houston. He was initially described as "Immature; works very slow. Talkative." His mother told his elementary school she "thinks Joe will be slow thruout [sic] school." Another school note says Mr. Trevino "[was] having a difficult time learning to read." [HISD 44]

A May 29, 1970, note by a his first grade teacher a Dow Elementary School reads:

I feel sorry for Joe[.] He does not get much sleep[.] He has to sleep on the floor at night with several children which might have caused bad behavior[.] Good attendance[.] a very slow learner - ...

Attached as Exhibit F [HISD 40].

By 1970 he was so obviously troubled and disruptive as a second grader that he was referred by school administrators for educational and psychological evaluation. His Dow Elementary School principal had observed the young Jose Trevino "continually disrupts [the] classroom," that he was "unhappy, sad, depressed," that he was "withdrawn - does not participate in activities - timid," that he "has few or no friends - cannot get along with others," that he was a "daydreamer (seems 'in a world of his own')." The principal observed that young Mr. Trevino's most severe problems were "emotional." [HISD 104-105]

A Confidential Psychoeducational Evaluation that followed portrays a pathetically disadvantaged youngster of age 8 years and 3 months. The report describes a filthy, hyperactive child with open

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oozing sores, an inability to control his drooling, constantly

repetitive motor and speech patterns, and with obvious neurological

impairments. The examiner went on to write:

He needed a great deal of reinforcement from the examiner. His figure drawings were tiny and condensed in size; they showed a rather rigid stance with a poor self image; they reflected rather strong feelings of inadequacy and inferiority. There is a great deal of need for security... All his figure drawings presented a rather helpless content. ... There were many signs of deep-seated emotional scars. The Bender Gestalt Test was quite indicative of some type of neurological involvement...

The examiner further wrote that young Jose Trevino was immature, lacked a normal attention span, that his thinking was "on the simple, primitive level," and that "He cannot do any type of complicated task." The examiner concluded her evaluation:

In summation then we have a young boy who has multiple handicaps, (1) a bilingual problem, (2) possible minimal cerebral dysfunction, (3) cultural deprivation, (4) learning blocks and (5) considerable amount of emotional overlay.

Psychological Impression: (2) Possible minimal cerebral dysfunction, (3) Learning disabilities due to visual motor and visual perceptual lag, (4) Cultural deprivation.

This examiner felt that young Mr. Trevino should have been treated with medications, enrolled in special education classes, and that his mother "enter parents and group psychotherapy." Attached as Exhibit G. [HISD 20-21, 99-100]²¹

²¹ I located two microfilm copies of this report, one rather smudged and hard to read but complete and a second clearer copy with some text blacked out. Both copies of the blacked out page are attached.

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Records indicate in 1971 the school requested a "neurological" evaluation. [HISD 104] No such completed neurological evaluation is disclosed by available records. Significantly, 1971 when he was only 9-years-old also brought the first record of his sniffing glue to get high. [CPS 24]

A January 4, 1972 "REPORT OF MEDICAL EXAMINATION" of Mr. Trevino, then about nine-and-a-half-years-old, was directed to the principal at Dow Elementary School. It included the following under "EMOTIONAL OBSERVATIONS":

When asked if he had three wishes, for what would he wish, he said he would like to learn, behave in school, and be dressed up clean at school. If he were going far away on a deserted island, he says that he would like to go with his friends. He says he likes to play "battleship" and "bingo." If he were an animal he says he would like to be a squirrel so that he could run when danger comes. He fights at school and at home. His mother says that Jose's father did not like him because he didn't want more children when Jose was born. The mother says that he likes to hang around with big boys.

Austin E. Hill, M.D., Director, School Health Services, REPORT OF MEDICAL EXAMINATION, January 4, 1972. Attached as Exhibit H. [HISD 16-17]

Houston Independent School District Special Services Committee on February 7, 1972, found then 9-year-old Jose Trevino to be "brain-injured" and approved him for special education classes. [HISD 06, 98]

He came to the attention of Child Protective Services for the first time in January 1972 with a neighbor's report of abuse and

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neglect.

Within a month he was again picked up for glue sniffing. [CPS 24, TYC 511] A month after that, on March 26, 1972, Mr. Trevino entered his first foster home. A lengthy report on his circumstances was written by a Houston child welfare worker three weeks after that. The report included the following:

Housing and Financial: Mrs. Trevino lives in a small, rundown, frame house in a poor, deteriorating neighborhood in the inner city close to busy Washington Avenue. There is little furniture in the house, the wallpaper is stained, peeling, and scribbled upon. Still, the house was swept and there were no signs of gross neglect when I visited. Mrs. Trevino receives AFDC grant of \$246/month and \$196 food stamps/month for \$74.00. She states that she is not presently working...

Other Agency Involvement and Assessments: There has been extensive involvement with the Trevino family by various agencies, all with very limited success. Juvenile Probation has handled all five boys. *Bob Husbands of Probation feels the neighborhood environment was very bad and difficult to overcome. He stated that Mrs. Trevino showed some concern and made some attempts to cope with the boys but her inability to properly supervise the children was more a lack of knowledge than neglect. However, he says Mrs. Trevino was very dependent and willing to let others take care of her family concerns while she ran around a lot...*

(NAME BLACKED OUT), has known the family for two years. She considers Mrs. Trevino very negligent in her maternal responsibilities, frequently out of the home, and inadequately caring for the feeding and clothing of the children...

Specific Background regarding Joe Trevino: Mrs. Trevino has stated that *the children's father was frequently physically abusive to herself and the children. He was said to have never accepted Joe as much as the other children and picked on him more than usual. One incident stands out. When Joe was four years old, his father hit him on the head with a crutch. For*

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fear of Mr. Trevino, Mrs. Trevino never got medical care for the injury. Apparently this old wound is easily irritated. Joe was also said to be something of an outsider within the family and hasn't gotten along with the other members. Mrs. Trevino said she "just can't understand him" regarding his truancy and his leaving home at times for a day or two when he will not be fed or clothed well...

The social worker concluded his report with the observation "Joe has grown up in an abusive atmosphere. He evidently learned such behavior." The child was not yet ten-years-old. See Exhibit I. [CPS 12-19]

Mr. Trevino then bounced through various foster homes and boy's ranches. An April 17, 1974, Child Protection Services transfer summary discussed Mr. Trevino's continuing problems, following in the footsteps of four older brothers already on probation, and his history of glue sniffing. [CPS 18-19]

In May 1974, when he was eleven, a Harris County Juvenile Court awarded "permanent managing conservatorship without termination of parental rights" to the State of Texas. The State of Texas took responsibility for raising him through its state agencies. [TYC 512]

In 1975 when Joe had completed the fifth grade and was 12-years-and-five-months old, Marie Lynn Sellers, M.Ed., prepared a psychological evaluation of him for the Harris County Department of Education. Testing revealed Mr. Trevino had a Full Scale IQ of 85 (79 verbal, 95 performance) and the estimated mental age of a ten-year-six-month-old child. The report again noticed what a

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dysfunctional, inadequate family he had been forced to grow up in.

Attached as Exhibit D.²² [TYC 521-524]

From this point Mr. Trevino was adrift, lighting only temporarily in a variety of boys ranches, foster homes, detention centers all over Texas, sometimes separated by his running away, perhaps stealing a car in the process.

In 1975 and 1976 he was in and around Windom and Honey Grove, Texas, first with the small Bartley-Woods Boys Home. During this period he stayed for six weeks in the home of a sympathetic local pastor and his wife, Bob and Nancy Lee. In a life with no significant adult influences the Lees would become enormously important to Mr. Trevino. He often tried to contact them and at least once ran to Bob Lee in Wichita Falls following an escape.

The Gatesville Boy's School

On September 3, 1976²³ he arrived at the Gatesville Boys School as the result of another attempt to run away by stealing an automobile. An intake report lists his history of drug use, alcohol, and solvents abuse to get high. Mr. Trevino had just turned 14 at the time.

A 1976 report shows him as testing with WISC Full Scale IQ of

²² This is the psychological report discussed in the direct appeal opinion. See Exhibit D.

²³ Other records reflect an August 30, 1976 admission date. [TYC 316]

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75 (62 verbal, 92 performance), again reflecting the steady decline in his IQ scores over the years. [TYC 316]

After nearly four years in a variety of State institutions, in 1977 Mr. Trevino was to spend a Christmas furlough with his mother and siblings in Houston. This visit was supposed to prepare him for release to a halfway house or to his mother. But 15-year-old Joe Trevino still wasn't sure he could deal with the dysfunctional family and the tough neighborhood he grew up in. He worried about this with a Gatesville psychiatrist, Dr. Stephen L. Mark:

Joe is very worried about how things will go. He said he does not really want to live in a halfway house but doesn't want to live at home and try to make it with his family. He has not lived with them for over four years. *He does not feel that anyone has his best interest at heart and he doesn't feel anyone listens to him when he tells them where he would like to live.*²⁴

Things went poorly. While home Mr. Trevino was caught intoxicated in a stolen car with a group of older boys.²⁵

The following summer, just before Mr. Trevino's 16th birthday, another Gatesville psychiatrist, Dr. James H. Smith, observed in a memorandum:

Joe has been here now for almost two years and I think he was considered for halfway house placement the other day, but from the way it sounds, he pretty much turned the halfway house

²⁴ Dr. Stephen L. Mark memo dated December 13, 1977. [TYC 121]

²⁵ Dr. Stephen L. Mark memo dated January 3, 1978. The memo also states Mr. Trevino was on anti-depressant medication. [TYC 119]

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down, which is not surprising for someone who is basically institutionalized. He is talking now about wanting to try to get out but I think he has just been here too long.²⁶

In spite of that observation Mr. Trevino was paroled in August 1978 but by December was revoked because of his continued acting out. A December 11, 1978 memorandum by his parole officer observed "[h]is mother hasn't been able to control him in at home, and his neighborhood is a high crime area, with a lot of negative peer pressure."²⁷

With his return to Gatesville another psychiatrist in December 1978 diagnosed Mr. Trevino as suffering from "Acute Brain Syndrome due to amphetamines and other chemical abuse."²⁸ An anti-psychotic

²⁶ Dr. James H. Smith memo dated July 20, 1978. [TYC 108]

²⁷ Juvenile parole officer Maura Crawley handwritten memorandum dated December 11, 1978. [TYC 57, 61, 180]

²⁸ In 1978 Dr. Charles L. Swan would have been making his diagnosis from the Diagnostic and Statistical Manual of Mental Disorders, Second Edition, of the American Psychiatric Association, commonly called the DSM-II. The DSM-II described the condition:

The organic brain syndrome is a basic mental condition characteristically resulting from diffuse impairment of brain tissue function from whatever cause. Most of the basic symptoms are generally present to some degree regardless of whether the syndrome is mild, moderate or severe.

DSM-II, at 22. The DSM-II goes on to list the symptoms as: (a) Impairment of orientation, (b) Impairment of memory, (c) Impairment of all intellectual functions such as comprehension, calculation, knowledge, learning, etc., (d) Impairment of judgment, and (e) Lability and shallowness of effect. Id.

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drug was prescribed.²⁹ See attached Exhibit J.

In February 1979 Mr. Trevino escaped from the Gatesville Boy's School and ran straight to Witchia Falls where he tried to connect with Bob and Nancy Lee.

A July 12, 1979 "Psychiatric Consultation Report" by Dr. William H. Lovejoy contains the following summary of Mr. Trevino's life to that point:

His past history is pretty dismal. At age seven years he was removed from his family and sent to a foster home because he was stealing various things, including automobiles and sniffing paint. He was in some half dozen different foster homes between the ages of seven and eleven. He was next sent to Cal Farley's Boys Ranch, where he stayed four months, and later he was sent to Great Plains Boys Ranch, staying there about six months. Some time after that he went to a halfway house in Houston and he remembers little about that. Then in 1976 he was sent to Gatesville State School and stayed there for two years, being released August 23, 1978. In between times he would go back home and invariably he would get into trouble with the law and be sent back to some time [sic] of placement outside the family. That he would get in trouble at home is hardly surprising. (SENTENCE BLACKED OUT but this likely was a comment on Mr. Trevino's older bothers who had records of serious violence.) The charges against them have included such things as auto theft, breaking and entering, robbery, aggravated assault, and attempted murder. The charges against Joe have usually been thefts of various sorts. He denied ever having run away from home or from any of his placements. He also denied any assaults or any type of violence. There is nothing in his record to contradict this.

²⁹ Dr. Charles L. Swan, "Medical Diagnosis and Treatment" dated December 18, 1978. [TYC 241, 272] Dr. Swan's handwriting is difficult to read but it appears he prescribed the anti-psychotic Thorazine for Mr. Trevino. Several other Gatesville records make reference to Mr. Trevino being administered Thorazine. I have not found any documents explaining what treatment objectives were expected with administration of this powerful drug.

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OPINION:

How well he will be able to hold to his resolution (to straighten out) I do not know, but he does seem to be definitely resolved and determined to do well. For the last two months here he has done acceptably and he intends to continue the good work. He is concerned about finishing his education, but feels that going to Gulf Coast Trade Center and to the Marines should take precedence. He has thought about getting a GED, but he would rather have the education and diploma.

It is my opinion that he is certainly not dangerous to himself or to anybody else. He may very well carry out the things that he has determined.

Attached as Exhibit K.³⁰ [TYC 107, 248, 360]

In February 1980, when Mr. Trevino was 17 and still at the Gatesville Boys School, his older brother Jesse Trevino was shot to death in a Houston gang conflict. He was devastated. Gatesville staff noted that he was "real down" and "critical of himself" as a result. All he could do was secure permission to call home for information. He had only learned of this after the February 13, 1980 Houston funeral.³¹

Mr. Trevino was discharged from Gatesville in May 1980. He became an adult with his 18th birthday on July 25. A May 13, 1980 Gatesville discharge document by Allen E. Wallace, who testified at

³⁰ Dr. Lovejoy's report appears at three locations in the TYC files I have collected. The clearest copy is unsigned. Both signed and unsigned copies are included in Exhibit J.

³¹ February 19, 1980 memorandum by L. Bell to Allen E. Wallace and February 20, 1980 memorandum by Wallace concerning a 30 minute interview with Mr. Trevino. [TYC 94-95]

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his sentencing phase, rather blandly states:

Joe has been in the institution for 17 months. It is felt that Joe has received maximum benefit from the institution. Joe will also reach majority age on 7/25/80.³²

Basically Mr. Trevino was dumped on a curb like a bag of trash. He had no job, no skills, the opposite of "family support," and no prospects. His childhood had been evenly divided between a terribly dysfunctional family and a variety of equally unsuccessful Texas child welfare facilities. The life thus far given Mr. Trevino had taught him nothing which would allow him to live as a productive adult.

A chart on one Child Protective Service document lists Mr. Trevino's "Substitute Care Placements" as follows:

³² May 13, 1980, discharge document by Allen E. Wallace. [TYC 146]

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<i>Date Placed</i>	<i>Name of Foster Home Or Institution</i>	<i>Address</i>	<i>Date Removed</i>
3-26-72	Roy Wilson Foster Home	Houston, Texas	3-30-72
3-30-72	Reese Thompson Foster Home	Houston, Texas	4-05-72
4-5-72	James Robinson Foster Home	Pasadena, Texas	
7-14-72	Great Plains Boy's Ranch	Pettit, Texas	6-30-74
6-30-74	Own Home Placement	Houston, Texas	1-9-75
1-9-75	Detention	Houston, Texas	
1-31-75	Dardin Hills Ranch	Dripping Springs, Texas	5-14-75
5-14-75	Century Evaluation	Houston, Texas	
5-19-75	AWOL		
6-75	Bartley-Woods	Windom, Texas	2-2-76
2-2-75	AWOL		
2-18-76	Bartley-Woods	Windom, Texas	4-30-76
5-4-76	Rev. Bob Lee - Free Home	700 N. 6th, Honey Grove, TX 75446	6-17-76
6-17-76	Boy's Country	Rt 1, Box 122, Hockley, TX	7-12-76
7-14-76	Detention		9-3-76
9-3-76	TYC (John Cason)	Terrace Cottage #4, Gatesville, TX 76528	
5-15-80	Own Home	1814 Decatur, Houston, TX 76528	
7-25-80	Independent living	Address unknown	

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Attached as Exhibit L. [CPS 02-03]

"Adulthood" and Prison

Given Mr. Trevino's experience to that point his quick involvement with the criminal justice system was assured. In the fall of 1980 he was convicted of two felony property crimes³³ in Houston and earned a five year prison sentence as a result. While in prison he began writing a strictly religious wheelchair-bound Ft. Worth area woman, Gladys Finley. She would later volunteer to let Mr. Trevino live in her home with his September 30, 1982 parole.

From his parole until this murder in January 17, 1983, Mr. Trevino struggled, but still lived more successfully than he was able to in his childhood. He held a series of minimum wage jobs and got along fairly well in the Finley household. Ms. Finley recalls that he kept to himself, was clean and quiet, and always treated she and her teenaged daughter with great respect.³⁴

Mr. Trevino had no contact with his biological family at this time. He was twenty-years-old at the time of his arrest on this crime.

³³ Both convictions were in the 182nd District Court of Harris County. He was convicted on a September 17, 1980, auto theft and the October 20, 1980, burglary of a business. He was apparently apprehended at or near the burglary. It is indicative of how pathetic his life had become that he apparently told a court intake officer at the time of the first arrest that he was not unemployed but was actually a college student at UCLA studying "paint and body."

³⁴ I personally interviewed Ms. Finley in her home on multiple occasions. Ms. Finley did not testify at the trial.

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Mr. Trevino on Death Row

Mr. Trevino has now resided on the Texas death row since July 10, 1984. He was two weeks shy of 22 when he arrived at the Ellis One Unit. He has lived there fifteen years without a major incident or violent act. On Sunday last Mr. Trevino marked his 37th birthday. He was working in the death row work program until it was shut down as the result of the Martin Gurule escape last November. He has successfully adapted to the intense structure of a prison setting.

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V Mr. Trevino's 1984 Jury Never Recommended a Death sentence

Mr. Trevino was sentenced under the old Texas law which was found defective in Penry v. Lynaugh, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989). His 1984 jury was never asked whether he should live or die as has been required for nearly a decade since Penry. In that time juries which answered yes to the statutory questions were then asked under Art. 37.071(2)(e), *Texas Code of Criminal Procedure*:

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

Had the jury had even a fraction of the real information about Mr. Trevino's life leading up to this crime it is highly likely that at least one juror would have been persuaded and a life sentence would have resulted.³⁵

³⁵ Then as now a unanimous jury was required for the imposition of a death sentence. Art. 37.071(2)(g), *Texas Code of Criminal Procedure*.

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VI Conclusion

Mr. Trevino is a human being, a person.

As with all human beings, including those who serve as Governor and on the Board of Pardons and Paroles, he was very much shaped by the family environment he was born into, his childhood and adolescent experiences, the lessons those experiences taught him, and his apparent brain damage.

This young man was literally cursed at birth. After enormous damage was done to him by his birth family and the deep poverty they existed in for the first seven years or so, the State of Texas stepped in and became his legal parent. He was raised by the State until he became an adult at which time the State simply dumped him back on the meanest streets of Houston. It is very hard to imagine how he could have achieved anything but the most marginal adult life after struggling through a childhood and adolescence such as this.

We as a society express enormous empathy for children who are physically and psychologically abused, neglected by their parents, who are taught lessons of violence and irresponsibility, who are

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poor, young people who rightfully deserve our concern. We know such children are at great risk.

But when such children grow up and as adults act out in precisely the ways that could be predicted we no longer want to extend that compassion we felt for the dirty and tearful eight or ten year old. We no longer see the child. What we are now willing to see makes us afraid. They populate our nightmares. *We want to kill them and deny that something might have been done to prevent tragedy or to acknowledge the burdens they brought to adulthood.* Now we want to cling to some free will fantasy and pretend that they acted as voluntary and free agents, that none of this logically follows from that childhood we despaired over.

We want to kill our societal failures.

Members of this Board are no doubt aware that Texas criminal justice does not enjoy an especially good reputation across the country. I have practiced criminal law in three other states, two of which are strong death penalty jurisdictions, and even in those jurisdictions Texas is viewed as something of a primitive in this area. Individuals employed or elected to various positions in the Texas criminal justice process may find it uncomfortable to acknowledge this perception, but it is a reality. The sheer number of executions, the anxiousness to carry them out no matter what the circumstances of the condemned, and what appears to other

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jurisdictions as a complete absence of compassion, contributes to this.³⁶

It is the accepted belief amongst the defense bar that members of this body are effectively under instructions not to grant clemency in capital cases, that the clemency process is completely a public relations exercise designed to improve the Texas image. Less than a year ago United States District Judge Sam Sparks called the procedures of this body "extremely poor and certainly minimal".³⁷ It would have to be candidly acknowledged that nothing seen in the Texas clemency process for the last decade brings that perception into question.

So what do we do with the Joe Mario Trevinos of our world? We can see they are damaged human beings. Largely through situations and forces out of their control they have become adults whose conduct we fear. Like Mr. Trevino they have been found responsible for terrible things. Certainly society has a right to be protected from such individuals and to expect punishment. Life in prison without the possibility of parole is the second most severe sanction our society

³⁶ See most recently a special issue of *The Champion*, the publication of the National Association of Criminal Defense Lawyers. "Death in Texas ... not even the pretense of fairness," *The Champion*, July 1999, pages 16-20, 23-26, 28-30, 37.

³⁷ Bruce Tomaso, "States grant clemency sparingly," *The Dallas Morning News*, January 10, 1999, page 35A. See also Evelyn Nieves, "Being in the Wrong Place at the Right Time," *The New York Times*, May 9, 1999, The Week In Review, pg. 5; Mike Ward, "Behind Closed Doors," *Austin American-Statesman*, June 27, 1999, page 1.

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can impose on offenders.

But to kill him is wrong.

If Texas takes the life of Mario Trevino in exchange for that of Blanche Miller it will not be an act the State or its citizens can be proud of. It would further acknowledge the total failure of the state child welfare system in the Trevino family. Mr. Trevino's execution will bring shame, if not now certainly at some future time when we are able to look beyond the politics and posturing, the primitive desire for revenge, and the myth of deterrence.

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VIII Prayer for Relief

Petitioner Trevino respectfully urges the Board of Pardons and Paroles to recommend to the Hon. George W. Bush, Governor, that he commute this death sentence to one of life without the possibility of parole.

In the alternative Mr. Trevino prays this body to recommend a temporary stay of sufficient duration to allow for a hearing on this petition for commutation.

In the further alternative Mr. Trevino prays this body to recommend to the Governor that he grant a reprieve of sufficient time to allow the United States Supreme Court to act on his Petition for Writ of Certiorari. As the Supreme Court is in summer recess and will not reconvene until the first of October Mr. Trevino would suggest that such reprieve be for a period of 120 day.

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Respectfully Submitted,

Ken Driggs
Texas Bar no. 00786864

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Attachment A:

Trevino v. State, 815 S.W.2d 592 (Tex.Crim.App. 1991)

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Attachment B:

Trevino v. Texas, 503 U.S. 562 (1992)

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Attachment C:

Trevino v. Johnson, 168 F.3d 173 (5th Cir. 1999)

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Attachment D:

Harris County Department of Education
psychological evaluation dated January 24, 1975

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Attachment E:

Affidavit of Albert Daniel "Danny" Trevino

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Attachment F:

First grade "Student Report" dated May 29, 1970

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Attachment G:

Psychoeducational Evaluation dated November 7, 1970

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Attachment H:

Report of Medical Examination by Dr. Austin E. Hill
dated January 4, 1972

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Attachment I:

Child Protective Services "Transfer Summary"
dated April 14, 1972

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Attachment J:

Dr. Charles Swan, December 18, 1978,
diagnosis of "Acute Organic Brain Syndrome"

This document is housed in the Capital Punishment Clemency Petitions (APAP-214) collection in the M.E. Grenander Department of Special Collections and Archives, University Libraries, University at Albany, SUNY.

Attachment K:

PSYCHIATRIC CONSULTATION REPORT
by Dr. William M. Lovejoy,
dated July 12, 1979

This document is housed in the Capital Punishment Clemency Petitions (APAP-214) collection in the M.E. Grenander Department of Special Collections and Archives, University Libraries, University at Albany, SUNY.

Attachment L:

SUBSTITUTE CHILD CARE RECORD
Undated