NO. 20-7065
(CAPITAL CASE)

IN THE
Supreme Court of the United States

ANIBAL CANALES, JR., PETITIONER,

v.

BOBBY LUMPKIN, RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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QUESTIONS PRESENTED FOR REVIEW

1. For penalty phase ineffective assistance of counsel violations, has *Richter* "established a substantial likelihood standard for evaluating prejudice" that exceeds the *Wiggins* standard of a "reasonable probability that at least one juror would have struck a different balance" on whether to punish by death?

2. Did the Fifth Circuit's failure to "reweigh the evidence in aggravation against the totality of available mitigating evidence" conflict with *Wiggins* and *Andrus*?

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REPLY BRIEF FOR PETITIONER

Contrary to this Court's precedents, the Fifth Circuit has heightened the standard for proving prejudice when a capital defense attorney fails to investigate and present mitigating evidence at sentencing. While the majority decision at bar gestures to the "reasonable probability" standard recognized in *Strickland v. Washington*, 466 U.S. 668, 694 (1984), and *Wiggins v. Smith*, 539 U.S. 510 (2003), it misconstrues *Harrington v. Richter*, 562 U.S. 86 (2011), to have "established [a] substantial likelihood standard for evaluating prejudice," Pet. App. 5a, creating a split among the circuits. The majority then compounds its error by putting forward a "paint-by-numbers guide to prejudice," Pet. App. 17a (Higginbotham, J., dissenting), employing a siloed comparison of mitigation in this Court's precedent to the mitigating evidence here. This analysis contravenes this Court's command to "reweigh the evidence in aggravation against the *totality* of available mitigating evidence." *Wiggins*, 539 U.S. at 534 (emphasis added); *see also Andrus v. Texas*, 140 S. Ct. 1875, 1886 n.6 (2020). And under that novel test, none of Williams, Wiggins, Rompilla, Porter, Sears, or Andrus would have received relief.[1] Thus, it is no surprise that the majority denies Canales the relief that the *Williams* line of cases dictates. But if Petitioner's case does not satisfy *Wiggins*, it is hard to see what will. Petitioner's jury "heard only of [his] crimes and artistic abilities"—"not of [his] tragic childhood rife with violence, sexual abuse, poverty, neglect, and

[1] *Williams v. Taylor*, 529 U.S. 362 (2000); *Wiggins*, 539 U.S. 510; *Rompilla v. Beard*, 545 U.S. 374 (2005); *Porter v. McCollum*, 558 U.S. 30 (2009); *Sears v. Upton*, 561 U.S. 945 (2010); *Andrus*, 140 S. Ct. 1875.

homelessness, nor of a man beset by PTSD, a failing heart, and the dangers of prison life." Pet. App. 9a; Pet. 10-17. And if prejudice is found, Petitioner simply obtains his first opportunity to present his story—his *full* story—to a jury of his peers. If his petition prevails, Canales would obtain a jury to hear his case in mitigation before deciding whether to condemn him to death.

Tellingly, Respondent argues this Court should not grant review without even attempting to defend the majority's prejudice analysis. Opp. 12-16. Instead, Respondent principally justifies the decision below with a rationale that the panel studiously avoids: the district court's flawed treatment of the mitigation as a "double-edged sword." Respondent isolates Petitioner's vast mitigating evidence into three separate categories, then suggests that "each of these categories can be double-edged," Opp. 12, ignoring that any aggravating edge to the new mitigation evidence had already been presented to the jury. *See* Pet. App. 116a-117a, 126a-128a, 169a-174a. And Respondent's approach suffers from the same fundamental flaw as the majority's: "Such a blanket rule foreclosing a showing of prejudice because the new evidence is double edged flatly contradicts this Court's precedent," which requires courts to consider the totality of the evidence. *Peede v. Jones*, 138 S. Ct. 2360, 2361 (2018) (statement of Sotomayor, J.).

Petitioner's case is an optimal vehicle for this Court's review. Pet. 26. Crucially, AEDPA does not constrain review here. There was no state court adjudication of this claim, and the Fifth Circuit already determined there was cause to excuse the procedural default pursuant to *Trevino v. Thaler*, 569 U.S. 413 (2013),

because state habeas corpus counsel's performance was deficient, and that the underlying *Wiggins* claim "has some merit," *Canales v. Stephens*, 765 F.3d 551, 570-571 (5th Cir. 2014). Nor is deficient performance at issue: the Fifth Circuit had previously remanded for determination of the sole issue of prejudice. *Id.* at 571. This case directly presents an opportunity for this Court to clarify the prejudice standard for *Wiggins* claims. As decisions emanating from the Fifth Circuit demonstrate week after week, it is vitally necessary to take this opportunity.

There is neither a valid defense of the decision below nor any impediment to this Court's review. The petition for a writ of certiorari should be granted.

I. FAILING TO REWEIGH THE TOTALITY OF THE MITIGATING EVIDENCE, THE MAJORITY'S SILOED TREATMENT OF MITIGATION PERPETUATES THE DISTRICT COURT'S CATEGORICAL "DOUBLE-EDGED SWORD" RATIONALE, WHICH THE STATE NOW RELIES ON TO OPPOSE CERTIORARI.

Just last term this Court noted that it "ha[s] never before equated what was sufficient in *Wiggins* with what is necessary to establish prejudice." *Andrus*, 1480 S. Ct. at 1886 n.6. As Judge Higginbotham correctly points out, faulting Petitioner's mitigating evidence "for not neatly aligning with the evidence" in this Court's prior cases "truncates the necessary inquiry." Pet. App. 15a-16a.

Instead, Respondent argues the "primary reason" for denying review of the majority's decision is one not mentioned in that decision at all: that Petitioner's mitigating evidence fits into categories deemed "double-edged" in that the evidence "could just as easily be interpreted as 'aggravating.'" Opp. 12.[2] Respondent spends

[2] This draws from the district court's decision, which "characterized as double-edged" Petitioner's "wealth of new evidence" and then dismissed that evidence out of hand. Pet. App. 60a-61a.

more than three pages making the double-edged argument, resuscitating language from the district court opinion without once mentioning the majority's actual decision. *See* Opp. 12-15. Respondent, quite rightly, subsumes the majority's treatment of the evidence within the Fifth Circuit's dominant, persistent reliance on constitutionally infirm prejudice analysis.

Both of these rhetorical approaches foreclose analysis of the totality of the evidence. First, treating the mitigation cabined off into narrow categories, rather than in totality, employs a divide-and-conquer approach antithetical to this Court's prejudice analysis. *Wiggins*, 539 U.S. at 534. Additionally, treating the categories as readily comparable to those labels in precedent cases, the approach ignores the role and nature of mitigation: to focus the sentencing jury's attention on the "*particularized* characteristics of the individual defendant." *Gregg v. Georgia*, 428 U.S. 153, 206 (1976) (plurality opinion) (emphasis added); *see also Lockett v. Ohio*, 438 U.S. 586, 605 (1978) (plurality opinion) ("The need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual is far more important than in noncapital cases."). The proper inquiry is whether the new evidence would significantly "have altered the sentencing profile" presenting a different picture to the sentencing jury. *Porter*, 558 U.S. at 41 (quoting *Strickland*, 466 U.S. at 700); *see also Strickland*, 466 U.S. at 696 (the question is whether the new evidence would "alter[] the entire evidentiary picture").

Petitioner's brief before the Fifth Circuit found this treatment lacking largely for the same reasons stated here. *See* Pet. App. 123a-148a.

A. The Categorical Double-Edged Sword Analysis Fails to Re-weigh the Totality of Mitigating Evidence Against the Aggravating Circumstances.

1. This approach truncates the analysis.

Respondent, following the district court's approach, short-circuits the proper prejudice analysis[3] by lumping mitigation into categories, labeling those categories, and improperly comparing the individual categories to this Court's precedents. Opp. 12 ("Petitioner's new evidence falls into three basic categories: evidence of a traumatic childhood, evidence of mental disorders, and evidence of vulnerability and susceptibility to coercion. But each of these categories can be double-edged.").[4] It contravenes this Court's precedent, which requires "reweigh[ing] the evidence in aggravation against the totality of available mitigating evidence," *Wiggins*, 539 U.S. at 534, to assess whether there is a reasonable probability that one juror would have voted for a life sentence and instead simply asks if certain evidence "could" be double-edged. And it ignores the longstanding principle that "a court cannot simply

[3] Respondent's reformulation of the second question presented reveals a focus on "the totality of the *aggravating* evidence." Opp. i (emphasis added). This orientation would improperly divide up the totality of mitigating evidence and weigh each fragment against all of the aggravating evidence.

[4] The Fifth Circuit and district courts within it have long engaged in the practice of deeming types of mitigation categorically double-edged. *E.g., Williams v. Stephens,* 575 F. App'x 380, 386 (5th Cir. 2014) (father's death due to Agent Orange exposure and witnessing murder of friend); *Sells v. Stephens*, 536 F. App'x 483, 495 (5th Cir. 2013) (fetal alcohol syndrome-related deficiencies); *Martinez v. Quarterman*, 481 F.3d 249, 258 (5th Cir. 2007) (temporal lobe epilepsy); *Martinez v. Dretke*, 404 F.3d 878, 889 (5th Cir. 2005) (organic brain damage); *Ladd v. Cockrell*, 311 F.3d 349, 360 (5th Cir. 2002) (parental neglect in childhood); *Blue v. Cockrell*, 298 F.3d 318, 322 (5th Cir. 2002) (intellectual disability and other emotional problems related to severe child abuse); *Williams v. Cain*, 125 F.3d 269, 278 (5th Cir. 1997) (drug or alcohol addiction); *Trevino v. Stephens*, Civ. No. SA-01-CA-306-XR, 2015 WL 3651534, at *3 (W.D. Tex. June 11, 2015) (physical and emotional childhood abuse and neglect), *aff'd sub nom. Trevino v. Davis*, 861 F.3d 545 (5th Cir. 2017); *Sells v. Thaler*, Civ. No. SA-08-CA-465-OG, 2012 WL 2562666, at *62 (W.D. Tex. June 28, 2012) (fetal alcohol syndrome); *Hall v. Thaler*, No. EP-10-CV-135-FM, 2011 WL 13185739, at *54 (W.D. Tex. Dec. 20, 2011) ("horrific" childhood abuse, deprivation, and neglect).

conclude that new evidence in aggravation cancels out new evidence in mitigation; the true impact of new evidence, both aggravating and mitigating, can only be understood by asking how the jury would have considered that evidence in light of what it already knew." *Trevino v. Davis*, 138 S. Ct. 1793, 1794 (2018) (Sotomayor, J., dissenting from denial of certiorari).

Discounting vast mitigating evidence as double-edged abbreviates the full inquiry: "Where . . . new evidence presented during postconviction proceedings includes both mitigating and aggravating factors, a court still must consider all of the mitigating evidence alongside all of the aggravating evidence." *Id.* at 1794-1795. Merely focusing on the double-edged nature of new evidence "fail[s] to view the prejudice inquiry holistically. The requisite inquiry demands that courts consider the entirety of the evidence and reweigh it as if the jury had considered it all together in the first instance." *Id.* at 1797. This misguided approach treats categories of mitigation evidence as fungible and flatly equivalent, ignoring that this Court's precedents clearly require a case-specific analysis that relies on the particular facts pertaining to each defendant. *See, e.g.*, *Wiggins*, 539 U.S. at 534; *Williams*, 529 U.S. at 398; *Rompilla*, 545 U.S. at 393.[5]

Instead of allowing the court to "step into the shoes of the jury," *Trevino*, 138 S. Ct. at 1795, invoking the double-edged nature of Petitioner's evidence blunts its

[5] Just last week, the Texas Court of Criminal Appeals recognized as much: "[E]ven if the available mitigating evidence is 'double-edged' . . . that is also not dispositive of the analysis, and the evidence must be considered in the [prejudice] analysis." *Ex parte Garza*, No. WR-78,113-01, 2021 WL 1397860, at *4 (Tex. Crim. App. Apr. 14, 2021). The court held that "double-edged" evidence falls on a spectrum, such that "the evidence might contain a wealth of new information that is mitigating in nature, and present only minor, new aggravating circumstances," *id.* at *19—precisely the circumstances here.

mitigating edge. Take the most extreme example: evidence of Petitioner's abusive childhood, which is concededly "tragic" and "typically considered mitigating." Opp. 14. The jury never heard that, as a child, Petitioner suffered physical and sexual abuse at the hands of his stepfather and one of his mother's boyfriends; endured poverty, hunger, and periodic homelessness; witnessed a shooting at six (and was shot himself at nine or ten); and bounced around twenty-six schools by eighteen due to familial instability. *See* Pet. App. 9a-10a; Pet. 10-17. Yet Respondent's main takeaway is that "delving into Petitioner's background would have shown his perennial involvement with violent gangs . . . and his incessant criminal activity." Opp. 14; *but see* Pet. App. 9a (noting Petitioner was "forced" to join a gang at eight after he began shining shoes to earn money for his family).

2. This categorical use of double-edged sword doctrine draws no support from this Court's precedents.

To support its double-edged argument about Petitioner's childhood, Respondent relies on *Cullen v. Pinholster*, 563 U.S. 170, 201 (2011), and *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 255 (2007). *See* Opp. 14. Neither case is apposite. *Pinholster* never said that evidence of physical abuse was categorically double-edged. It instead turned on the fact that new evidence of abuse "largely duplicated the mitigation evidence at trial." *Pinholster*, 563 U.S. at 200. Incontrovertibly, that is not so here, where "[t]he jury heard only of Canales's crimes and artistic abilities." Pet. App. 9a.

And *Abdul-Kabir* merely quotes *Penry v. Lynaugh*, 492 U.S. 302, 324 (1989), which considered the inability to give full mitigating effect to "double-edged"

evidence in the context of Texas's special issue on future dangerousness. Yet *Penry's* point was that the Court found mitigating evidence such as intellectual disability or childhood abuse was two-edged under Texas's sentencing scheme then in effect because it could be used to support a finding of future dangerousness, but it failed to "provide a vehicle for the jury to give *mitigating effect"* to this evidence. *Id.* at 324 (emphasis added). This Court never suggested that the aggravating aspect of potentially double-edged evidence invariably outweighed its mitigating force. Using the two-edged sword to deny mitigating effect to Petitioner's evidence—as Respondent attempts to do—thus runs counter to precedent.

3. The double-edged sword analysis here ignores that any aggravating edge to the new mitigation was already before the jury.

Proper reweighing evaluates how the new evidence alters the "evidentiary picture" presented to the jury, *Strickland*, 466 U.S. at 696, to determine whether the new mitigation, taken with what was already presented, would raise "a reasonable probability that at least one juror would have struck a different balance" at sentencing. *Wiggins*, 539 U.S. at 537. Accordingly, it is improper to discount mitigation as double-edged when any aggravating edge of such evidence was already before the jury. *E.g., Walbey v. Quarterman*, 309 F. App'x 795, 806 (5th Cir. 2009); *Wackerly v. Workman*, 580 F.3d 1171, 1179 (10th Cir. 2009) (Gorsuch, J.).

Here, Respondent argues the new mitigation is double-edged because Canales's "family history, though tragic, also underscores his propensity for criminal violence," and the coercive circumstances of the crime show Canales's past involvement with prison gangs and his vulnerability to such coercion. Op. 12-14.

The so-called "overwhelming evidence" of aggravation, Opp. 16, is, in relation to any serious survey of capital cases, plainly not notably aggravating.[6] It primarily consists of two letters allegedly written by Petitioner. Setting aside the dubious attribution to Canales, the critical aspect for present purposes is that the aggravating edge of this scant evidence was already before the jury. Petitioner's "tragic childhood rife with violence, sexual abuse, poverty, neglect, and homelessness," on the other hand, was not. Pet. App. 9a; *see* Pet. 10-17. The jury was fully aware of Canales's longtime gang involvement as part of the case for the "combination" theory of guilt-phase liability. *Canales v. State*, 98 S.W.3d 690, 696 (Tex. Crim. App. 2003). What it lacked was any explanation: how his horrific childhood trauma led to his being forced to join a gang at a young age,[7] or how his later efforts to leave the gang, coupled with his physical condition, made him vulnerable to that coercion. Pet. 10-17.

B. The Majority Similarly Circumvents Constitutional Review of Penalty Phase Prejudice.

The majority's use of precedent, *see* Pet. 31-36, echoes the flawed labeling and categorizing in the district court's "double-edged sword" approach, Pet. App. 123a-147a. Both truncate the analysis in similar ways. Just as the district court used precedents to deem categories of mitigation evidence double-edged, the majority labels categories of mitigation and conjures differences between precedent and

[6] For several examples of "egregious" highly aggravated cases, *see Glossip v. Gross*, 576 U.S. 863, 905-907 (2015) (Thomas, J., concurring).

[7] The majority incorrectly states the mitigation evidence related to his childhood has no nexus to the crime. *Compare* Pet. App. 7a *with* Pet. 30, 34.

Petitioner's case based on the presence or absence of these labeled types rather than the totality of the evidence. This practice flies in the face of this Court's admonishment: "[W]e have never before equated what was sufficient in *Wiggins* with what is necessary to establish prejudice." *Andrus*, 140 S. Ct. at 1886 n.6.

C. Behind Both Approaches is an Unconstitutional and Factually False "Brutality Trumps" Presumption.

Automatically imposing a death sentence based on the aggravation without "the particularized consideration of relevant aspects of the character and record of each convicted defendant" violates the Eighth Amendment. *Woodson v. North Carolina*, 428 U.S. 280, 303 (1976) (plurality opinion); *see also* Pet. App. 132a-138a. The Fifth Circuit and Texas have recognized that the "brutality trumps" approach to capital sentencing is improper, though this unconstitutional orientation continues in practice. *Gardner v. Johnson*, 247 F.3d 551, 563 (5th Cir. 2001) (rejecting imposition of death "solely because the facts are heinous and egregious"); *Ex parte Garza*, 2021 WL 1397860, at *19.

This case—involving a "combination" theory of liability when Canales's coerced involvement did not entail personally killing the victim who was an unsympathetic prison gang competitor—is not nearly as aggravated as cases in which this Court has granted relief. *See* Pet. 32-33. For example, Williams brutally murdered a female victim with a mattock in just one act within a far larger crime spree, after which he "savagely beat an elderly woman" leaving her in a vegetative state before he "stole two cars, set fire to a home, stabbed a man during a robbery, set fire to the city jail, and confessed to having strong urges to choke other inmates

and to break a fellow prisoner's jaw." *Williams*, 529 U.S. at 418 (Rehnquist, C.J., concurring in part) (quotation omitted).

In order to defend the decision below, Respondent resorts to distorting it. Even so, the bottom-line constitutional defect cannot be escaped. Courts must "reweigh the evidence in aggravation against the totality of available mitigating evidence." *Wiggins*, 539 U.S. at 534. Forgoing this exercise by invoking the double-edged rhetoric shortchanges this Court's constitutional command.

II. THE MAJORITY RELIES ON A MORE BURDENSOME STANDARD FOR PREJUDICE THAN WHAT THIS COURT REQUIRES.

Respondent appears to agree with Petitioner that the majority relies on a new standard informed by *Richter*, but argues only that whatever *Richter* added was a minor gloss on the existing *Strickland* standard. Opp. 8. Respondent further argues that the petition should be denied because the majority applies the correct prejudice standard, which, concededly, was modified by this Court's decision in *Richter*. Opp. 6 ("That standard flows from this Court's decisions in *Strickland*, *Wiggins*, and *Richter*.").

Yet Respondent simultaneously denies that the majority views *Richter* as having set a new prejudice standard. Opp. 9 ("In *Richter*, this Court did not create a new test for establishing prejudice."). Wherever Respondent lands on this question, what the majority *says* is beyond controversy: "[T]he Supreme Court established the substantial likelihood standard for evaluating prejudice in *Richter* . . . ." Pet. App. 5a.

But *Richter* neither added new clarification nor established a new standard. *Richter*'s observation that a reasonable probability is one that is "not just conceivable" comes directly from *Strickland*. *Richter*, 562 U.S. at 112 (citing *Strickland*, 466 U.S. at 693 ("It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding.")). *Richter* did not abrogate this Court's pronouncement that "a defendant need not show that counsel's deficient conduct more likely than not altered the outcome of the case." *Strickland*, 466 U.S. at 693, *quoted in Richter*, 562 U.S. at 111-112.

The clash between the reasonable probability standard established in *Strickland* and the purported "substantial likelihood" standard the majority adopts from *Richter* is highlighted in the dispute over the dissent's use of a well-established synonym for reasonable probability—"might well have." Respondent joins the majority in incorrectly representing that the dissent employed a new, "artificially weakened" prejudice standard: "might have." Opp. 8; Pet. App. 5a.

First, this representation is textually false and perplexing in light of the fact that Canales has pointed out the majority's misattribution. Pet. for Rehearing (Doc. No. 00515530381) at 7 n.6. The term "might have" appears nowhere on the pages cited.[8] Second, the term that Judge Higginbotham actually employs, "might well have," Pet. App. 9a, 14a, 15a, is a well-established synonym for the *Strickland*

[8] The term appears *once* in the entirety of the dissenting opinion—in a parenthetical within a footnote characterizing the effect of certain evidence in *Rompilla* of "defendant's abusive, impoverished childhood and alcohol-related causes of the defendant's juvenile incarcerations." Pet. App. 15a. At oral argument, Judge Haynes seemed to deride the term, mischaracterizing it as "might could." Oral Argument at 24:52, *Canales v. Davis*, 966 F.3d 409 (5th Cir. 2020), available at https://www.ca5.uscourts.gov/OralArgRecordings/18/18-70009_3-13-2019.mp3.

reasonable probability standard, quoted from this Court. *E.g.*, *Williams*, 529 U.S. at 398; *Wiggins*, 539 U.S. at 525; *Rompilla*, 545 U.S. at 393; *Sears*, 561 U.S. at 951. Circuit courts, including the Fifth Circuit, also use this phrase. *E.g.*, *Apelt v. Ryan*, 906 F.3d 834, 840 (9th Cir. 2018); *Anderson v. Johnson*, 338 F.3d 382, 393 (5th Cir. 2003). At bottom, this Court has made clear, in a *Wiggins* claim, "[*Strickland*] prejudice inquiry 'necessarily require[s] a court to "speculate" as to the effect of the new evidence'" on the jury. *Andrus*, 140 S. Ct. at 1887 (quoting *Sears*, 561 U.S. at 956).

Further, Respondent incorrectly claims Petitioner argues for a different prejudice standard in de novo cases like this one. Opp. 9-10. Rather, Petitioner points out that while the underlying *Strickland* prejudice standard is the same, state court findings of no prejudice are subject to AEDPA deference. *Pinholster*, 563 U.S. at 202. This case presents an ideal—and very rare—vehicle for clarifying the prejudice standard without grappling with the effect of layered-on AEDPA deference because there is no state court opinion. *Wiggins*, 539 U.S. at 534 ("In this case, our review is not circumscribed by a state court conclusion with respect to prejudice, as neither of the state courts below reached this prong of the *Strickland* analysis.").

The Court should grant the petition in order to stem the development of this higher prejudice standard which improperly permits the federal court to substitute its judgment for that of the sentencing jury by denying the presentation to a jury of substantial "compelling" evidence in mitigation.

III. RESPONDENT'S § 2254(e)(2) ARGUMENT IS NOT PROPERLY BEFORE THIS COURT, AND CANNOT BE ADEQUATELY BRIEFED IN THIS REPLY.

Respondent argues that the AEDPA, 28 U.S.C. § 2254(e)(2), bars the new evidence in mitigation. Opp. 16-20. But as Respondent concedes, the Fifth Circuit did not, and could not, reach this question in affirming the district court's decision. Opp. 17. The record reflects that not only did the district court admit the introduction of the "compelling" new evidence in mitigation that was never presented to the sentencing jury, it also funded development of this very evidence upon remand from the circuit court in 2014 to do just that. Pet. App. 61a. What is more, Respondent "participated fully in shaping the evidentiary record." Pet. App. 11a. It is very late in the day to "allow the State to run from the evidence it participated in developing." Pet. App. 12a.

Even if this argument were properly before this Court, it would still be wrong. If Respondent prevailed on this point, it would mean in cases like Canales's, a person could be put to death when his colorable constitutional claim had never been presented in any court, contrary to this Court's reasoning in habeas corpus cases recognizing the need for equitable remedies to avoid such a situation. *See, e.g.*, *Martinez v. Ryan*, 566 U.S. 1, 10-11 (2012) (creating an equitable exception in federal habeas corpus to procedurally defaulted claims of ineffective assistance of trial counsel due to "counsel's errors in an initial-review collateral proceeding" because otherwise "no court will review the prisoner's claims"). Such an equitable exception is especially appropriate with respect to non-jurisdictional statutory

requirements. *Holland v. Florida*, 560 U.S. 631, 645 (2010) (providing for equitable tolling of AEDPA's non-jurisdictional statute of limitations).

However, if this Court deems this case somehow calls for re-examination of this reasoning,[9] Petitioner would respectfully request the opportunity to fully brief the issue, given that it was concededly not part of the decision below.

CONCLUSION

The petition for writ of certiorari should be granted and briefing and argument ordered. Alternatively, the Court should grant the petition, vacate the decision below, and summarily reverse it pursuant to the foregoing precedents. Due to the ineffective assistance of trial counsel, Mr. Canales's jury did not hear the welter of "compelling" evidence in mitigation introduced in federal court. Summary reversal would merely guarantee his constitutional right to present this evidence to a jury charged with determining his punishment.

[9] Respondent notes: "This issue is squarely presented in another petition for writ of certiorari pending before this Court." Opp. 17 n.2 (citing Pet. for Writ of Cert., *Shinn v. Jones*, No. 20-1009 (U.S. Jan. 20, 2021)).

Respectfully submitted,

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