NO. _____
(CAPITAL CASE)

IN THE
Supreme Court of the United States

ANIBAL CANALES, JR., PETITIONER,

v.

LORIE DAVIS, RESPONDENT.

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

DAVID P. VOISIN
P. O. BOX 13984
JACKSON MS 39236
(601) 949-9486
david@dvoisinlaw.com

JOSEPH J. PERKOVICH
Counsel of Record
PHILLIPS BLACK, INC.
P.O. BOX 4544
NEW YORK, NY10163
(212) 400-1660
j.perkovich@phillipsblack.org

JOSEPH C. WELLING
100 N. TUCKER BLVD., STE 750
ST. LOUIS, MO 63101
(314) 629-2492
j.welling@phillipsblack.org

Counsel for Anibal Canales, Jr.

QUESTIONS PRESENTED (CAPITAL CASE)

In Mr. Canales's Texas capital habeas corpus case, the U.S. Court of Appeals for the Fifth Circuit first ruled in 2014 that his trial counsel rendered deficient penalty phase performance under the standard of a "reasonable probability that at least one juror would have struck a different balance." *Wiggins v. Smith,* 539 U.S. 510, 537 (2003), *quoted in Canales v. Stephens*, 765 F.3d 551, 570-71 (5th Cir. 2014). The case, which is *not* governed by 28 U.S.C. § 2254(d)(1) deference, returned to the district court for a de novo determination of prejudice. Despite the presentation of a welter of, as the district court admitted, "compelling" mitigating evidence that Petitioner's jury had not heard, the district court did not find prejudice.

In the decision below, a new Fifth Circuit panel affirmed the denial of prejudice in a 2-1 decision—also *not* governed by § 2254(d)(1) deference—by distinguishing the dissenting opinion's application of the foregoing *Wiggins* standard, and holding that *Harrington v. Richter*, 562 U.S. 86 (2011), "established a substantial likelihood standard for evaluating prejudice" that Petitioner did not meet. *Canales v. Davis*, 966 F.3d 409, 413 (5th Cir. 2020). The majority opinion below thereby articulates the Fifth Circuit's split from its sister circuits in interpreting *Richter* to have established a greater burden for petitioners than the longstanding Sixth Amendment standard for penalty phase relief recently restated in *Andrus v. Texas*, 590 U.S. __, 140 S. Ct. 1875, 1886 (2020) (per curiam). In assessing Petitioner's evidence, the panel majority, over vigorous dissent, failed to meaningfully consider the difference between what the jury heard and the ultimate "totality of available mitigating evidence." *Wiggins*, 539 U.S. at 534.

The questions presented are:

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*?

STATEMENT OF RELATED PROCEEDINGS

Canales v. Davis, No. 18-70009 (United States Court of Appeals for the Fifth Circuit) (order denying rehearing filed on Aug. 31, 2020; opinion and order affirming district court's judgment filed on July 21, 2020).

Canales v. Stephens, No. 12-70034 (United States Court of Appeals for the Fifth Circuit) (opinion and order reversing and remanding for determination of prejudice filed Aug. 29, 2014).

Canales v. Davis, No. 2:03-cv-00069-JRG-RSP (United States District Court for the Eastern District of Texas, (Order dismissing habeas petition filed Sept. 27, 2017; order dismissing habeas petition filed Aug. 24, 2012).

Ex Parte Canales, No. WR-54, 789–02 (Texas Court of Criminal Appeals) (order denying initial state habeas application filed Feb. 13, 2008).

Ex Parte Canales, No. 99F0506-005-B (Fifth Judicial District Court of Bowie County, Texas) (order dismissing subsequent state habeas application filed Dec. 31, 2003).

Ex Parte Canales, No. WR–54,789–01 (Texas Court of Criminal Appeals) (order denying initial state habeas application filed March 12, 2003).

Ex Parte Canales, No. 99F0506-005-A (Fifth Judicial District Court of Bowie County, Texas) (order denying application for writ of habeas corpus filed on March 12, 2003).

Canales v. Texas, No. 03-6044 (United States Supreme Court) (denial of petition for writ of certiorari to the Texas Criminal Court of Appeals filed Dec. 1, 2003).

Canales v. State, No. 73988 (Texas Court of Criminal Appeals) (affirming conviction and sentence on direct appeal filed on Jan. 15, 2003).

State v. Canales, No. 99F0506-005 (Fifth Judicial District Court of Bowie County Texas) (sentence imposed on Nov. 1, 2000).

PARTIES TO THE PROCEEDINGS BELOW

Petitioner Anibal Canales, Jr., was the habeas petitioner in the Eastern District of Texas, and the Appellant in the Fifth Circuit Court of Appeals.

Respondent is Lorie Davis, Director of the Texas Department of Criminal Justice, where Mr. Canales is incarcerated under a sentence of death.

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PETITION FOR A WRIT OF CERTIORARI

Anibal Canales, Jr. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The July 21, 2020, panel decision of the Court of Appeals affirmed, over a dissenting opinion by the Honorable Patrick E. Higginbotham, the United States District Court for the Eastern District of Texas decision denying Petitioner's habeas corpus petition. The majority and dissenting opinion are reported at 966 F.3d 409, and attached hereto as Petition Appendix (hereinafter "Pet.App.") A, 1a-20a. The August 31, 2020 opinion of the Court of Appeals denying panel rehearing is unpublished and attached hereto as Pet.App. D, 65a-66a.

JURISDICTION

The Court of Appeals entered its judgment on August 31, 2020. This Court has jurisdiction under 28 U.S.C. § 1254(1). On March 19, 2020, the Court extended the time within which to file a petition for a writ of certiorari to 150 days from the date of the lower court judgment.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense." U.S. Const. amend. VI.

The Fourteenth Amendment provides in relevant part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ." U.S. Const. amend. XIV, §1.

Title 28 U.S.C. § 2254(a) provides in relevant part "[A federal] district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." Section 2254(d) provides in relevant part, "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 in State court proceedings unless the adjudication of the claim . . . 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."

Texas Code of Criminal Procedure, Art. 37.071, requires juror unanimity to impose death. Its full text is reproduced in Appendix F. Pet.App. 68a-71a.

INTRODUCTION

The majority opinion below caricatures the dissenting opinion's application of the *Wiggins*, 539 U.S. 510, penalty phase standard as a "might have" "prejudice standard." Pet.App. 5a. The majority thereby alludes to the "might well have" threshold in *Wiggins* and other leading ineffective assistance of counsel cases of this Court since *Williams v. Taylor*, 529 U.S. 362 (2000), which Circuit Judge Higginbotham's impassioned dissent applies thoroughly in assessing the factual record in this litigation placing Mr. Canales's life in the balance.[1] The majority thus glibly minimizes the tectonic shift in the law that its opinion manifests.

That shift, namely, is to hold that *Richter* "established a substantial likelihood standard for evaluating prejudice." Pet.App. 5a. The majority does this by distinguishing a *Richter* standard from the dissent's reliance upon *Wiggins*, the longstanding standard firmly established in other circuits through the frequent application of the leading opinions of this Court on the Sixth Amendment right to the effective assistance of counsel in the penalty phase of capital trials.

The majority's rhetorical turn is further used to package the Fifth Circuit's trailblazing with *Richter*, masking it as though the Court of Appeals is hewing to this Court's current and well-established jurisprudence. The majority achieves this by pointing to the "recent holding in *Andrus v. Texas*," to emphasize that this Court "did not change the law on assessing prejudice" in its fresh revisiting of that very

[1] The dissent below repeatedly applies this threshold language to Petitioner's particular case, Pet.App. 14a, 15a, drawing from this Court's opinions in *Williams*, 529 U.S. at 398; *Wiggins*, 539 U.S. at 538; *Rompilla v. Beard*, 545 U.S. 374, 393 (2005); and *Sears v. Upton*, 561 U.S. 945, 951 (2010).

law. Pet.App. 5a. But *Andrus* did not mention *Richter* at all; it did apply *Wiggins*, however. *Andrus*, 140 S. Ct. at 1881, 1882, 1883, 1886, 1887. Thus, the majority opinion below employs this Court's recent articulation of the actual standard to somehow substantiate the Fifth Circuit's singular construction of *Richter* as having established a new standard.[2] The majority does this while it dissociates the dissent's *actual* application of the very standard *Andrus* applies in fortifying the *Wiggins* line of cases dictating the fulsome assessment of "whether there is a reasonable probability that at least one juror would have struck a different balance" upon reweighing all mitigating evidence against the aggravating evidence. Pet.App. 5a (quoting *Andrus*, 140 S. Ct. at 1886). This sleight of hand has dire consequences in this case, as it surely will for countless more, unless it is reviewed here.

Further, the majority's emphasis on its chimerical *Richter* standard serves to distract from its scant reckoning with the wide-ranging, profoundly mitigating evidence in the federal litigation. The majority concludes that Canales failed to show prejudice from the failure of his trial attorney to present any mitigation about his family; the violence, neglect, and poverty that pervaded his life; or evidence of duress he faced at the time of the offense. Pet.App. 8a-9a. But the dissent places the majority's anemic treatment of Canales's life history evidence in stark contrast,

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[2] In *Shinn v. Kayer*, 592 U.S. __, 141 S. Ct. 517, published December 14, 2020 (*infra* n.8), the Court once again considered trial counsel ineffectiveness in the penalty phase, summarily reversing the Ninth Circuit's reversal of the District of Arizona's denial of such relief. *Kayer* applied *Richter*'s holding in relation to the "fairminded" jurist standard under the deferential review pursuant to the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). *Richter*, 562 U.S. at 103, *cited in Kayer*, 141 S. Ct. at 522. *Infra* n.8. *Kayer* also considers *Richter*'s substantial likelihood language when addressing the underlying ineffectiveness claim under *Strickland*. *Id.* at 523. *Kayer* does not cite *Wiggins* nor use the foregoing standard from that line of cases.

explaining that his sentencing jury heard nothing of the powerful evidence about his impoverished, unstable childhood, alcoholic parents, attendance at no fewer than twenty-six schools before the age of eighteen, or his abandonment by his biological father. Pet.App. 9a-10a. No one told the jurors about his violent stepfather, who stripped him before beating him; likewise, no one informed the jury about sexual assaults committed by the stepfather against Canales and his sister, Elizabeth, when they were young or how Canales did his best to prevent his stepfather from assaulting his sister though he knew with certainty, he would face the man's wrath.

The jury did not learn Canales witnessed a shooting when he was six years old and was stabbed when he was twelve, or that gang members forced him into joining when he was only nine years old and vulnerable because he had little or no adult supervision. The jury heard nothing about the hunger he suffered, and how he sacrificed his own food for his sisters. Similarly, no mental health expert described the mental illness and neuropsychological deficits resulting from the difficulties Canales faced. Regarding the circumstances of the offense, jurors heard nothing about how his involvement in the offense stemmed from fear of the effect of medication for a life-threatening heart condition.[3]

Rather than weighing the totality of the mitigation evidence against the aggravating evidence to assess whether there was a reasonable probability that at

[3] Petitioner's extensive mitigating evidence and factors are described below. *Infra* section II.F.

least one juror would have voted for a life sentence, the majority simply labels categories of mitigation, then notes differences among these silos of evidence, however insignificant they may be. The decision below parsed the facts of Petitioner's case and those in decisions of this Court granting penalty phase relief, even though this Court had just emphasized that it had never required a petitioner to match the facts of prior cases. *See Andrus,* 140 S. Ct. at 1886 (This Court "never before equated what was sufficient in *Wiggins* [*v. Smith,* 539 U.S. 510, 537-38 (2003)], with what is necessary to establish prejudice"). At the same time, the panel majority ignored the vast similarities between Petitioner's case and other cases in light of the totality of evidence in mitigation.

At bottom, the dissent is blistering for clear reason. The majority opinion mishandles the established inquiry and fails to meaningfully reweigh the evidence concerning sentencing. Beyond that, it manifests the Fifth Circuit's divergence from the other circuits routinely entertaining capital litigation. The decision below is wrong and damaging and thus this Court should grant certiorari to remedy the split the Fifth Circuit has caused from the six other circuits (*infra*) that have adhered to the Court's well-developed standard for penalty phase ineffective assistance claims and *Richter*'s limited connection thereto.

STATEMENT OF THE CASE

A. Trial and initial state habeas proceedings.

Canales was convicted of capital murder for his role in the gang-related murder of Gary Dickerson in 1997 while an inmate at the Telford Unit of the Texas

Department of Criminal Justice. *Canales v. State*, 98 S.W.3d 690, 693 (Tex.Crim.App. 2003). The murder was in retaliation for the victim's interference in the Texas Mafia's business dealings. *Id.* at 690. The State highlighted an incriminating letter, obtained from Innes, allegedly written by Canales, containing a detailed description of the murder and a discussion of TM's interest. SR Exhibit 27. The jury convicted Canales on October 27, 2000. CR 12.

At the punishment phase, the State introduced a second letter allegedly written by Canales. This letter suggested that Canales was trying to organize a "hit" on Larry Whited, another TM member. SR4 Exhibit 25; SR 12:22 et seq. The State used this letter to establish Canales's future dangerousness. The State also called Suzanne Hartberger, whom Canales had been convicted of sexually assaulting, SR 12:10 et seq, and introduced the "pen packets" from Canales's 1984 convictions for felony sexual assault and felony theft of property and his 1995 conviction for aggravated sexual assault. SR 12:5-6.

The defense introduced testimony from several inmate witnesses that Canales was a "good guy," peaceable, and a good artist. SR 12:41-42; SR 12:55-56. Several Telford Unit employees testified that Canales was not a disciplinary problem as far as they knew. SR 12:65; SR 12:69; SR 12:72. No one testified about Canales's family history. As the prosecutor observed: "It's an incredibly sad tribute that when a man's life is on the line, about the only good thing we can say about

[4] SR citations are to the State Record on appeal in the Texas Court of Criminal Appeals, No. 73988. Citations are to exhibits by number or to the record by volume and page number.

him is he's a good artist." Pet.App. 9a. Canales's punishment phase lasted one day and the following morning he was sentenced to death. CR 12.5

The Texas Court of Criminal Appeals affirmed the conviction and death sentence. *Canales*, 98 S.W.3d at 693. His petition for writ of certiorari was denied, *Canales v. Texas*, 540 U.S. 1051 (2003), as was his first state habeas application, *Ex parte Canale*s, No. 54,789-01 (Tex.Crim.App. Apr. 5, 2003). In that first state habeas petition, Canales did not challenge trial counsel's performance regarding mitigating evidence.

B. Initial federal proceedings and state successive writ.

Following the denial of state habeas relief, Canales filed a petition for a writ of habeas corpus with the federal district court. Among the grounds for relief was a challenge to trial counsel's failure to develop and present mitigating evidence pursuant to *Wiggins v. Smith*, 539 U.S. 510 (2003). The district court stayed proceedings to permit Canales to exhaust state court remedies. The Court of Criminal Appeals dismissed the successive application as abuse of the writ. *Ex parte Canales,* No. WR-54,789-02 (Tex. Crim. App. 2008). Based on this decision, the district court found the *Wiggins* claim defaulted. ROA.3869-70.[6]

C. First Fifth Circuit decision.

While the case was on appeal to the Fifth Circuit, the Supreme Court held that Texas habeas petitioners could overcome defaults committed by initial state

[5] Clerk's Record on Appeal to Texas Court of Criminal Appeals.

[6] ROA citations are to the Record on Appeal in the Fifth Circuit, with page citations to the district court's page number in black in the header.

habeas attorneys. *Trevino v. Thaler*, 569 U.S. 413 (2012). Subsequently, the Court of Appeals determined that Petitioner's prior state habeas counsel failed to develop mitigating evidence due to a misunderstanding of the resources available for investigative and expert services and thus performed deficiently. *Canales v. Stephens,* 765 F.3d 551, 569 (5th Cir. 2014). The panel also found that Petitioner showed that the underlying *Wiggins* claim was "substantial." The Fifth Circuit noted that trial counsel did virtually no investigation into mitigating circumstances. "Considering all of the circumstances here, Canales's trial attorneys' performance was not reasonable. His trial counsel did not make a reasoned decision not to conduct a mitigation investigation." *Id.* at 570. The panel also found "some merit" to the allegation that Petitioner was prejudiced by trial counsel's failure to prepare for the penalty phase. *Id.* Consequently, the panel remanded the case to afford Canales his first "chance to develop the factual basis for his claim." *Canales*, 765 F.3d at 571. The panel also instructed the U.S. District Court for the Eastern District of Texas "to consider whether Canales can prove prejudice as a result of his trial counsel's deficient performance, and if so, to address the merits of his habeas petition on this claim." *Id.*

D. The district court on remand.

After the Fifth Circuit remanded the matter, Canales obtained funding from the district court and presented expert reports and numerous declarations from family members and friends. The district court failed to engage in a meaningful consideration of the new evidence presented, brushing it aside as "double-edged,"

even though it found the new evidence "compelling." Pet.App. 60a. Also, the new evidence added virtually no negative evidence to what the jury learned. The district court concluded Petitioner failed to establish prejudice to overcome the default and denied a certificate of appealability. ROA.4536-42.

E. The second Fifth Circuit proceedings.

The Fifth Circuit granted a certificate of appealability. *Canales v. Davis*, 740 Fed. App'x 432 (5th Cir. 2018). After briefing and oral argument, the panel, over dissent by Circuit Judge Higginbotham, affirmed the decision of the lower court. Pet.App. 1a-20a. A timely motion for rehearing was denied on August 31, 2020. Pet.App. 65a-66a.

F. Petitioner's mitigation evidence that his sentencing jury never heard.

Trial counsel did not contact, much less present evidence from, family members or experts who could explain the consequences of Canales's horrific upbringing. Competent investigation during federal habeas corpus proceedings yielded profoundly mitigating evidence of Canales's life history, creating the means for a radically different understanding of him in relation to his capital case. Circuit Judge Higginbotham's dissent captures the essence of this powerful evidence and its legal importance. Pet.App. 9a-20a.

Andy Canales was the oldest child of two alcoholic parents. His father, Anibal, Sr., abandoned Andy and his younger sister, Elizabeth, when Andy was very young. He left Chicago to return to Texas. Anibal, Sr. failed to pay any child support, which often left the family in dire straits.

Andy did not see his father much after Anibal left. When Andy and Elizabeth visited their father in Laredo, Texas, Anibal often left them with their grandmother. Anibal never had money for his children, but it seemed he always had money for alcohol and drugs. ROA.4257, 4293. He continued to be violent. Elizabeth recalled an incident when her father "almost beat Andy to death. . . It was one of the worst beatings ever." ROA.4293.

On another occasion when he was living in Houston, Anibal abandoned Andy, who was only thirteen years old. ROA.4260. Anibal did not inform Janie he was leaving Andy behind in Houston. When she learned Andy was in Houston, Janie decided to leave him there. ROA.4261. Abandoned by his parents, Andy turned to alcohol and drugs. Around this time, he was arrested for an incident involving a stolen car. ROA.4261.

After Anibal left, Andy's mother Janie then became involved with Carlos Espinoza, who was abusive to her and viciously beat Andy and his younger sister. ROA.79. Espinoza stripped Andy before whipping him with a belt and abused both Andy and his sister Elizabeth. Andy's sister recalls:

> Carlos used to beat Andy badly too. Andy didn't stand a chance with Carlos. Beatings were a regular thing at our house. He would drag Andy around by his ears. Carlos would beat Andy with a belt. He would beat Andy until he had welts all over his back, and butt, and arms and legs. We were always having to kneel in a corner for punishment. Andy had to strip sometimes to be beaten. Andy and I were always afraid we would do something wrong around him. I remember seeing Andy lying naked, curled up in a ball, and Carlos hitting him as hard as he could with the buckle end of the belt. Carlos would beat Andy until he had welts and bruises all over his body.

ROA.80.

Besides the on-going physical abuse, Espinoza molested both Andy and his sister. Elizabeth recalls a traumatic incident during which Espinoza sexually assaulted her. She was crying and Espinoza kept hitting her in the head. Andy discovered what was happening and tried to protect his sister. As she recalled:

> Andy was home—it must have been a Saturday morning—and he came in and started yelling, "I'm gonna tell, I'm gonna tell!" Carlos got off me and ran after Andy, and Andy dodged him, and came in and got me and we ran downstairs to the neighbors. I was naked, and I was bleeding from a busted lip and we were just trying to get them to call my mom. The neighbors knew what was going on, but they were the type, they just didn't want to know, didn't want to be involved. They finally got a hold of my Mom, and she came down and got me. She took me to my uncle Joe and aunt Bonnie's and we were there for a while. They didn't know what happened.

ROA.81, 4267. Janie's response was to cut Elizabeth's hair short to make her look like a boy. ROA.4267, 4298. For his part, Espinoza threatened to kill others in the family if Elizabeth ever told them about being molested. ROA.4292.

Eventually, Janie stood up to Carlos when he tried to get to Elizabeth after a night of drinking, and Janie stabbed him. Elizabeth remembers that he wore a "gauzy shirt," and she could see the blood seeping through the fabric. The next morning, she saw blood in the kitchen, on the porch, and on the stairs. ROA.258, 4268, 4292. Andy saw the stabbing as well. ROA.4332.

During her time with Espinoza, Janie drank heavily and often stayed out at bars, leaving Andy unsupervised. She also allowed her children to drink. ROA.4255, 4319, 4322. As a result of her alcoholism and the failure of Anibal to support his children, Andy and his sisters were sometimes homeless and had to go without food. ROA.4251-52, 4293, 4322. Elizabeth recalls Andy giving her his food when the

family had little to eat. ROA.4251.

After she and Espinoza separated, Janie became involved with John Ramirez, a sexually predatory heavy drinker who tried to prey on Andy's younger sister Gabriela. ROA.4269, 4294, 4299. Andy's presence in the home provided some protection against Ramirez. But later, Andy stole a check belonging to Ramirez. When Ramirez discovered Andy's transgression, he sought to prosecute him. Gabriela believed Ramirez used this incident to get Andy out of the way. ROA.4269, 4294. After Andy was out of the house, Ramirez came after Elizabeth. ROA.4272.

Elizabeth pointed out that she was molested and beaten by a number of her mother's other boyfriends. ROA.81-82, 258. She notes that Andy stayed around whenever possible to deter attacks. When Andy was out, Elizabeth often waited on the porch for him. *Id.*

Andy's childhood experiences had significant negative consequences, including educational setbacks, drug and alcohol use, gang membership, and cognitive difficulties and mental illness.

His education suffered because his family kept moving. He attended twenty-six schools in Texas, Chicago, Wisconsin, and California. ROA.4333. In two schools in Texas, he was placed in special education. *Id.*

Raised by alcoholics and frequently unsupervised, Andy began drinking at an early age. His mother paid a young babysitter with beer and cigarettes. When the babysitter was thirteen and Andy ten years old, they drank and smoked after Janie left for the evening. ROA.4277, 4318. When Andy was forced into a street gang

when he was nine years old, gang leaders provided Andy with alcohol in the morning before school. ROA.4277. He was an alcoholic by age fourteen. *Id.* He also used LSD, cocaine, and heroin. ROA.4337.

As a result of neglect, poverty, and abuse in the home, and a backdrop of anti-Hispanic racism that would impinge on his life in a variety of ways from several directions, Andy was especially vulnerable to coerced gang involvement as a young teenager. ROA.4278. Further, in prison, Andy joined the Texas Syndicate, a Latino prison gang, after he was exposed to prison violence. ROA.4243. He thought that involvement ended when he was paroled.

At some point in his early adulthood, Andy's circumstances stabilized briefly. He began to build a foundation for his life with the positive influence of his girlfriend, Liz Hewitt, and her family, but it unraveled when Andy's mother suffered an aneurysm, causing her to lose her speech and motor functions. ROA.4276. Andy began using drugs again and ended up back in prison in 1995 when his parole was revoked. ROA.4277.

In her evaluation of Canales, Dr. Donna Maddox found problems with concentration and language as well as deficits in short term memory. ROA.4340. In neuropsychological testing, Dr. Tora Brawley found mild deficits in frontal lobe functioning in particular with matrix reasoning and verbal fluency. ROA.4329. Dr. Brawley also concluded that a structured environment has benefited Canales's overall cognitive functioning, as he was more significantly impaired prior to incarceration. *Id.*

More important, Canales suffers from severe mental illness, primarily Posttraumatic Stress Disorder (PTSD) and Persistent Depressive Disorder. He has reported having a depressed mood for years and, as is expected, increased irritability, being short-tempered, and having low energy and poor concentration. ROA.4344.

Consistent with PTSD, Dr. Maddox carefully tracked factors in Canales's life and experiences that align with the criteria for that Trauma and Stressor Related Disorder. ROA.4343. The essential feature of the disorder is development of specific symptoms after exposure to a traumatic event. *Id.* Highest rates of PTSD are found among survivors of rape, military combat, and captivity. ROA.4344. Pre-traumatic risk factors include prior traumatic experience, lower socioeconomic status, lower education, and family dysfunction. *Id.* As described previously, Canales experienced many of the factors placing him at risk, including witnessing a shooting, being sexually assaulted, witnessing his sister being assaulted, and severe physical beatings.

Peritraumatic risk factors include the severity of the trauma, perceived life threat and interpersonal violence by a caregiver. *Id.* Again, Petitioner personally experienced extreme violence at the hands of his father and other men with whom his mother became involved. Additionally, when he was very young, he witnessed a shooting, and his early gang experience exposed him to additional violence and

trauma.[7] As Dr. Maddox pointed out, Canales's experience is consistent with that of other prisoners involved with street gangs in that all had more exposure to violence, symptoms of PTSD, paranoia, anxiety, and forced behavioral control. ROA.4345.

Trial counsel could have also used Petitioner's severe heart condition to provide some context to the crime thereby blunting some of the force of the aggravating evidence. At sentencing, the State focused on Canales's violent acts and threats in prison as a member of the Texas Mafia, to show future dangerousness. ROA.4406. Canales's particular vulnerability due to his heart condition would have undermined that case by placing his conduct in the proper context, showing the coercive pressures he then faced. Canales avoided fights because his heart medicines caused him to bruise easily and prevented normal blood clotting; when cut, even superficially, he would bleed for hours. ROA.4387, 4404. But when his former gang, the Texas Syndicate learned Canales was formerly a member of the Latin Kings and had two prior sex crime convictions, they targeted him. His roommate, Bruce Richards, offered him the protection of the Texas Mafia, a sort of cousin to the Aryan Brotherhood white supremacist gang. ROA.4387, 4404. The protection came with a price, however, and Richards stated that Canales was ordered, effectively under threat to his life, to participate in the Dickerson killing and to write letters exaggerating his role and the voluntariness of his involvement. ROA.4404-05. Repetition of these circumstances in the future is highly unlikely

[7] After consulting with Dr. Fred Sautter, Ms. Herrero believes it is possible that Canales suffers from even more severe "Complex PTSD," because of his "extensive exposure to trauma beginning early in life and continuing into adolescence. ROA.4272.

given that under a sentence of life without possibility of parole, Petitioner would be kept in enhanced custody status providing essentially the same degree of incapacitation as death row. ROA.4405.

REASONS FOR GRANTING THE PETITION

I. The Fifth Circuit's Use Of *Richter* Has Created A Split With Six Other Circuits

Richter chiefly concerns the operation of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), with respect to the review of state court adjudications under Supreme Court law. *Richter*, 562 U.S. at 100. It enunciated that AEDPA permits the reversal of a state court ruling when it "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fair-minded disagreement." 562 U.S. at 103, *quoted in Anaya v. Lumpkin*, 976 F.3d 545, 557 (5th Cir. 2020). Hundreds of Fifth Circuit decisions cite *Richter* in relation to this proposition, including its consideration of the "contrary to or involved an unreasonable application of" language from the statute. § 2254(d)(1)

But *Richter* also addressed the determination of an ineffective assistance of trial counsel claim applying *Strickland v. Washington*, 466 U.S. 668 (1984). *See generally Shinn v. Kayer*, 592 U.S. __, 141 S. Ct. 517, 523 (2020) (per curiam);[8] *see*

[8] Applying *Strickland*, *Kayer* explained,

> In the capital sentencing context, the prejudice inquiry asks "whether there is a reasonable probability that, absent the errors, the sentencer—including an appellate court, to the extent it independently reweighs the evidence—would have concluded that the balance of aggravating and mitigating circumstances did not warrant death."

also Buck v. Davis, 580 U.S. __, 137 S. Ct. 759, 782 (2017) (Thomas, J., dissenting) ("Prejudice exists only when correcting the alleged error would have produced a 'substantial' likelihood of a different result." (quoting *Richter*, 562 U.S. at 111-12)). It is in that respect, that the Fifth Circuit's divergence from other circuits regarding *Richter* has culminated in the decision below. The present decision, as noted, was *de novo* and thus in no way entailed AEDPA deference.

The Fifth Circuit routinely relies on *Richter* in adjudicating ineffective assistance claims, typically invoking its application to a petitioner's requirement to demonstrate that, but for trial counsel's deficient performance, a different trial outcome was "reasonably likely"—and reinforcing that that likelihood must be "substantial, not just conceivable." *Richter*, 562 U.S. at 112. *E.g.*, *Sheppard v. Davis*, 967 F.3d 458, 466 n.1 (5th Cir. 2020); *Adekeye v. Davis*, 938 F.3d 678, 683 (5th Cir. 2019); *King v. Davis*, 883 F.3d 577, 586 (5th Cir. 2018).

But, over time, the Circuit has accreted onerous modifying language to the substantial likelihood construction in *Richter*, fortifying it as an "intentionally difficult" or "heavy burden" requirement. *Gates v. Davis*, 648 F. App'x 463, 471 (5th Cir. 2016) ("intentionally difficult"); *United States v. Brito*, 601 F. App'x 267, 272 (5th Cir. 2015) ("heavy burden"); *United States v. Wines*, 691 F.3d 599, 604 (5th Cir. 2012) ("heavy burden"). The Fifth Circuit's build-up in this respect is unwarranted

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141 S. Ct. at 522-23 (quoting *Strickland*, 466 U.S. at 695). *Kayer* quoted *Richter* in further explanation of the *Strickland* standard: "A reasonable probability means a 'substantial,' not just 'conceivable,' likelihood of a different result." *Cullen v. Pinholster*, 563 U.S. 170, 189 (2011) (quoting *Richter*, 562 U.S. at 112))." *Id.* at 523.

Kayer applied *Strickland* to the underlying claims, but the review was pursuant to AEDPA deference under *Richter*'s "fairminded" jurist standard. *Id.* (citing *Richter*, 562 U.S. at 103).

from *Richter* itself, but perhaps stems from the coexistence within that single opinion of the impositions of both AEDPA deference *and* the deferential nature of Sixth Amendment review of the performance of counsel. *See, e.g., Charles v. Stephens*, 736 F.3d 380, 389 (5th Cir. 2013) (characterizing *Strickland* as an already high bar, made "all the more difficult" when the highly deferential AEDPA standard is overlain); *Sanchez v. Davis*, 936 F.3d 300, 307 (5th Cir. 2019), cert. denied, 140 S. Ct. 2529 (2020) (describing the "heavy burden" of proving a state-court's "no prejudice finding reflects an unreasonable application of *Strickland*"). Whatever the reason for this burdensome accumulation, it is unfounded in *Richter* itself or otherwise in this Court's related line of Sixth Amendment cases. In any event, it accounts for the emergence of the circuit split presently before the Court.

A. The decision below conflicts with this court's long-established standard for determining prejudice and the circuits that consistently apply it.

Cleaving itself away from six other courts of appeals, the Fifth Circuit has thus imposed a more onerous standard for petitioners than the *Strickland* penalty phase decisions since *Williams v. Taylor*, 529 U.S. 362 (2000), permit. In distinguishing a "substantial likelihood standard" that *Richter* is said to have "established," from the dissenting opinion's application of the longstanding *Wiggins* standard of a "reasonable probability that at least one juror would have struck a different balance," 539 U.S. at 537, the decision below manifests a split from the numerous circuit courts that have expressly continued to honor the holdings of *Williams*, *Wiggins, Rompilla*, *Sears*, and this Court's other cases in this line. Pet.App. 5a. As set forth herein, the decision marks a pointed divergence from the

developed law in the Fourth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits, which have expressly recognized *Richter*'s "substantial likelihood" reinforcement of the *Wiggins* "reasonable probability" standard.

In 2011, the Fourth Circuit seamlessly integrated *Richter*'s reinforcing language for *Strickland* analysis. In *Elmore v. Ozmint*, 661 F.3d 783 (4th Cir. 2011), the Court of Appeals had occasion to reverse the District of South Carolina's denial of guilt phase ineffectiveness concerning trial counsel's deficient investigation. The Fourth Circuit extensively invoked the penalty phase authorities of *Wiggins* and *Rompilla* with respect to investigative duties of capital counsel. The Court of Appeals also engaged *Richter*'s reinforcement of *Strickland*'s "reasonable probability" standard: "Properly applied, the totality-of-the-evidence standard results in only one reasonable conclusion: there is a reasonable probability—that is, a *substantial likelihood*—that, but for his lawyers' failure to investigate the State's forensic evidence, Elmore would have been acquitted in the 1984 trial." 661 F.3d at 780-81(emphasis added) (citing *Strickland*, 466 U.S. at 695; *Richter*, 562 U.S. at 112).

Further, *Elmore* also relied on *Rompilla*'s explanation of the evidentiary standard under the Sixth Amendment:

> [A]lthough we suppose it is possible that a jury could have heard it all and still have decided on the [guilty verdict], that is not the test. It goes without saying that the undiscovered ... evidence, taken as a whole, *might well have* influenced the jury's appraisal of [Elmore's] culpability, and the likelihood of a different result if the evidence had gone in is sufficient to undermine confidence in the outcome actually reached at [trial].

Id. at 871 (emphasis added) (quoting *Rompilla*, 545 U.S. at 393 (internal quotation marks and other alterations omitted in *Elmore*).[9]

The Seventh Circuit also has seamlessly incorporated *Richter*'s holding with respect to *Strickland* analysis into penalty phase claims adjudication. Reversing the Northern District of Indiana's denial of penalty phase relief under AEDPA, the Court of Appeals found prejudice where the lower court and state supreme court had not, noting, inter alia, that a "likelihood of a different outcome" must be shown, *Pruitt v. Neal*, 788 F.3d 248, 273 (7th Cir. 2015), and that it "must be substantial, not just conceivable." *Richter*, 562 U.S. at 112, *quoted in Pruitt*, 788 F.3d at 273. Further, the *Pruitt* court's factual findings respecting the "unrebutted testimony, from not one but three highly qualified health experts," dictated relief because of the determination that "there is a reasonable probability that this evidence might

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[9] After deciding *Elmore*, the Fourth Circuit applied *Richter* to *Strickland* analysis in affirming relief granted from capital trial counsel's ineffectiveness for failing to establish the petitioner's intellectual disability under *Atkins v. Virginia*, 563 U.S. 304 (2002). *Winston v. Pearson*, 683 F.3d 489 (4th Cir. 2012). *Winston* explained: "Once a petitioner has established deficient performance, he must prove prejudice—'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" 683 F.3d at 505 (quoting *Richter*, 562 U.S. at 104 (quoting *Strickland*, 466 U.S. at 693)). *Winston* further explained: "Pointing to some 'conceivable effect on the outcome of the proceeding' is insufficient to satisfy *Strickland*'s demanding test." *Id.* (quoting *Richter*, 562 U.S. at 104 (quoting *Strickland*, 466 U.S. at 693)). Further, *Winston* applied *Richter*'s explanation of the reasonable probability inquiry: "The likelihood of a different result must be substantial, not just conceivable." *Richter*, 562 U.S. at 112, *quoted in Winston*, 683 F.3d at 505.

Generally, the Fourth Circuit has perennially applied the *Williams* line of penalty phase ineffectiveness authorities fully, along with repeated recognition of *Richter*'s reinforcement of the weighing inquiry. Recently, in *Williams v. Stirling*, 914 F.3d 302, 319 (4th Cir. 2019), *cert. denied*, 140 S. Ct. 105 (2019), the Court of Appeals, in affirming the district court's award of habeas corpus relief, once again employed the "might well have" threshold coursing through this jurisprudence: "First, although the mitigation evidence may have been mixed, it was error for the state court to fail to 'entertain [the] possibility' that the mitigating [Fetal Alcohol Syndrome] evidence could have 'alter[ed] the jury's selection of penalty' because it 'might well have influenced the jury's appraisal of the [defendant's] moral culpability.'" 914 F.3d at 319 (quoting *Williams*, 529 U.S. at 397-98).

have affected the judge's and jury's assessment of Pruitt's moral culpability, and that they might have concluded that death was not warranted." *Id.* at 274 (citing *Williams*, 529 U.S. at 398 ("concluding that counsel's failure to investigate and present mitigating evidence at sentencing prejudiced the defendant where the undiscovered mitigating evidence 'might well have influenced the jury's appraisal of [the defendant's] culpability")).

The Eighth Circuit has fully integrated *Richter*'s application of *Strickland* into its penalty phase analysis. *Purkey v. United States*, 729 F.3d 860, 868 (8th Cir. 2013). In *Purkey*, the Court of Appeals "conclude[d] that it is not substantially likely that the jury would have returned a different sentence had Purkey's proffered evidence been presented to it." *Id.* (citing *Cullen v. Pinholster*, 563 U.S. 170 189 (2011) (quoting *Richter*, 562 at 112)). In applying the *Wiggins* standard, the Court of Appeals found the evidence in aggravation was "too overwhelming and the 'new' mitigating evidence too redundant for us to conclude that even 'one juror would have struck a different balance.'" *Id.* (quoting *Wiggins*, 539 U.S. at 537).

Going no further than *Richter* requires, the Ninth Circuit, too, has integrated its reinforcing language on *Strickland* into penalty phase ineffectiveness inquiry. *Andrews v. Davis*, 944 F.3d 1092, 1108 (9th Cir. 2019). Indeed, *Andrews* formulates the inquiry tautly, positing the *Wiggins* standard and immediately following the substantial likelihood requirement for the weighing exercise:

> In the context of the penalty phase of a capital case, it is enough to show "a reasonable probability that at least one juror" would have recommended a sentence of life instead of death." [*Wiggins*, 539 U.S. at 537.] The likelihood of

> that result must be "substantial, not just conceivable." *Richter*, 562 U.S. at 112.

Id.

The Tenth Circuit, in 2018, affirmed the denial of habeas corpus relief in the Western District of Oklahoma in *Postelle v. Carpenter*, 901 F.3d 1202 (10th Cir. 2018), applying the construal of both the *Wiggins* standard and *Richter* from its prior decisions. *Postelle* stated that *Strickland* prejudice requires the given petitioner to "demonstrate a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Grant v. Royal*, 886 F.3d 874, 905 (10th Cir. 2018) (quoting *Littlejohn v. Royal*, 875 F.3d 548, 552 (10th Cir. 2017)), *quoted in Postelle*, 901 F.3d at 1217. *Postelle* expanded, explaining that "the errors [at bar] must 'undermine our confidence in the outcome' of Postelle's sentencing." 901 F.3d at 1217 (quoting *Newmiller v. Raemisch*, 877 F.3d 1178, 1197 (10th Cir. 2017) (quoting *Strickland*, 466 U.S. at 694)). Further, *Postelle* applied the *Wiggins* jurisprudence via prior Tenth Circuit analysis, providing that "in a case such as this [governed by Okla. Stat. tit. 21, § 701.11], a single juror's choice to impose a sentence less than death meets that standard." *Id.* (citing *Littlejohn*, 875 F.3d at 553).[10] Concluding this analysis, *Postelle* emphasized that the petitioner must show from the foregoing inquiry that any resulting "likelihood of a different result must be substantial, not just

[10] *Littlejohn* states, in relevant part: "At the end of the day, '[i]f 'there is a reasonable probability that at least one juror would have struck a different balance'—*viz.*, that 'at least one juror would have refused to impose the death penalty'—prejudice is shown.'" 875 F.3d at 553 (quoting *Hooks v. Workman*, 689 F.3d 1148, 1202 (10th Cir. 2012) (citations omitted) (first quoting *Wiggins*, 539 U.S. at 537; then quoting *Wilson v. Sirmons*, 536 F.3d 1064, 1124 (10th Cir. 2008) (Hartz, J., concurring)).

conceivable." *Newmiller*, 877 F.3d at 1197 (quoting *Richter*, 562 U.S. at 112), *quoted in Postelle*, 901 F.3d at 1217.

The Eleventh Circuit, too, has correctly used *Richter* to reinforce the *Wiggins* standard for penalty phase claims. *DeBruce v. Comm'r, Alabama Dep't of Corr.*, 758 F.3d 1263 (11th Cir. 2014). In reversing the Northern District of Alabama and finding sentencing relief under AEDPA, the Court of Appeals applied *Richter*'s "substantial" "likelihood" in its reweighing of the evidence under the *Wiggins* standard and with reference to the aforementioned "might well have" threshold:[11]

> [T]he sentencing jury heard DeBruce's mother's falsely embellished testimony . . . [giving a] generalized description omitt[ing] the "particularized characteristics" of DeBruce's heavily disadvantaged background and upbringing, *Brownlee*, 306 F.3d at 1074 (internal quotation marks omitted), and did not even begin to explain the significance of DeBruce's mental impairments, all of which "might well have influenced the jury's appraisal of [DeBruce's] moral culpability," *Wiggins*, 539 U.S. at 538 (internal quotation marks omitted).

DeBruce, 758 F.3d at 1276.

Apart from the Fifth Circuit, the other courts of appeals simply have not interpreted *Richter* to have "established a substantial likelihood standard" with respect to the Sixth Amendment right to the effective assistance of counsel.[12]

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[11] While Alabama capital sentencing, prior to a 2017 amendment, permitted non-unanimous recommendations of death, new mitigation evidence under that framework possesses even greater significance. "We have recognized that prejudice is more easily shown in jury override cases because of the deference shown to the jury recommendation." *See Williams v. Allen*, 542 F.3d 1326, 1343 (11th Cir. 2008) (internal quotation marks, citations omitted) (reversing S.D. Ala. denial of petition, finding penalty phase ineffectiveness in jury recommendation of 9-3 for death).

[12] The Sixth Circuit has applied *Richter* in relation to guilt phase ineffectiveness claims but, unlike the foregoing circuits, it lacks a direct penalty phase application of *Richter* to the *Wiggins* standard. Be that as it may, just days after *Richter*'s publication in January 2011, the Sixth Circuit incorporated the decision's substantial likelihood construction of *Strickland*'s "reasonable probability" standard in affirming, under AEDPA, relief from a second-degree murder conviction due

Beyond the practices of federal circuits, *Richter* implicates the federal constitutional work of other courts of last resort in relation to "reasonable probability" inquiries under the right to effective assistance. *See, e.g.*, *In re Allen*, 99 A.3d 180, 190, 196 Vt. 498, 513 (Vt. 2014) (Dooley, J., dissenting) (in sentencing challenge denying postconviction relief, explaining "the majority's use of the term 'substantial likelihood' [from *Richter*] should not suggest a standard more rigorous than preponderance of the evidence. Indeed, it is a less rigorous standard than preponderance of the evidence. I agree with petitioner that the superior court in this case misstated the correct standard . . .").

B. This case is an optimal vehicle for addressing this important question also at the heart of two very recent summary reversals of this Court.

The majority opinion below crystallizes the Fifth Circuit's position on this vitally important issue in a manner that rests in conflict with six other circuits. The decision below leaves no ambiguity as to the Court of Appeals' construction of *Richter* in relation to "reasonable probability" under the *Strickland* line of cases emanating from *Williams*, 529 U.S. at 397-98.

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to the inadequate investigation of defense counsel. *Couch v. Booker*, 632 F.3d 241, 247 (6th Cir. 2011) (expressly finding that "'[t]he likelihood of a different result [is] substantial,' *Richter*, 562 U.S. at 112, 'confirming that the state court's contrary conclusion unreasonably applied *Strickland*.'"); *see also Booker v. McKee*, 460 F. App'x 567, 580 (6th Cir. 2012) (applying *Richter* to the *Wiggins* standard in denying prejudice). Further, *Couch* invoked *Wiggins*'s standard with respect to the State's theory of causation in the case, finding that the petitioner had satisfied it. *Couch*, 632 F.3d at 249 (reasoning that had the jury heard from a credible expert that the deceased's toxicity levels for alcohol, cocaine, cocaethylene, and marijuana presented the "most likely cause of death, 'at least one juror [might] have struck a different balance.'"). *Id.* (quoting *Wiggins*, 539 U.S. at 537).

In *Peoples v. Lafler*, 734 F.3d 503 (6th Cir. 2013), the Court of Appeals again found deficiency and prejudice in trial counsel's performance concerning a Michigan conviction. *Peoples* applied the *Wiggins* standard with reference to the substantial likelihood analysis in *Couch*, incorporating *Richter*, *supra*. 734 F.3d at 515 (quoting *Wiggins*, 539 U.S. at 523-28, *quoted in Lundgren v. Mitchell*, 440 F.3d 754, 770 (6th Cir. 2006)).

The application of the Court's penalty phase ineffective assistance of counsel authorities remains of great importance and obvious concern, as evidenced by the two per curiam summary reversals issued on the issue within the past eight months. *See Kayer*, 140 S. Ct. 141 (decided December 14, 2020, with Breyer, J., Sotomayor, J., and Kagan, J., dissenting) (reversing habeas corpus relief from the Ninth Circuit); *Andrus*, 140 S. Ct. 1875 (decided June 15, 2020, with dissenting opinion by Alito, J., joined by Thomas, J. and Gorsuch, J.) (reversing denial of relief from the Texas Court of Criminal Appeals, remanding for further consideration).

This case presents a clear opportunity for the Court to obtain full briefing and argument (and amicus support) on central features of the penalty phase ineffective assistance jurisprudence.

Critically, this federal habeas corpus litigation possesses the rarest of procedural features. First, it presents the constitutional questions from the Sixth and Fourteenth Amendments directly to the federal judiciary, owing no deference under AEDPA's §2254(d) strictures as a consequence of the absence of a state court adjudication and the presence in this litigation of cause and prejudice pursuant to *Trevino v. Thaler*, 569 U.S. 413, 429 (2012). *Canales v. Stephens*, 765 F.3d at 567. Second, the question of deficient performance is not in controversy anymore in this case, due to the 2014 panel decision deciding that question and remanding this case to the district court for fact development, *id.* at 571, which yielded the extensive development well chronicled in the dissenting opinion below, Pet.App. 9a-20a.

II. The Fifth Circuit's Failure In Reweighing The Totality Of Evidence Conflicts With This Court's Leading Authorities.

A. The majority opinion below contravenes this Court's standard that requires only a reasonable probability that just one juror would have struck a different balance regarding the penalty.

To prove he is entitled to relief under *Strickland* and *Wiggins*, Canales must prove "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Buck v. Davis*, 137 S. Ct. 759, 765 (2017). To make this determination, "the question is whether there is a reasonable probability that, absent the errors, the sentencer—including an appellate court, to the extent it independently reweighs the evidence—would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland*, 466 U.S. at 698.

Before imposing a death sentence, Texas capital jurors must unanimously find the absence of "sufficient mitigating circumstance or circumstances to warrant … a sentence of life imprisonment without parole rather than a death sentence," *after* "taking into consideration all the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant." Tex. Code Crim. Proc. art. 37.071. §§ 2(e)(1), (f); Pet.App. 70a. Thus, Canales has needed to show "only a reasonable probability that at least one juror would have struck a different balance regarding his moral culpability." Pet.App. 13a (quoting *Sears v. Upton,* 561 U.S. 945, 955 (2010)); *see also Wiggins,* 539 U.S. at 537.

The assessment to be undertaken "is necessarily 'a probing and fact-specific analysis.'" *Id.* (quoting *Sears*, 561 U.S. at 955). However, as the dissent cautions: "The decision to sentence a defendant to death is a difficult one that defies straightforward analogical reasoning, quibbling distinctions, and easy legal conclusions." Pet.App. 19a. Or as this Court has observed, capital sentencing involves a "reasoned moral response to the defendant's background, character, and crime." *Penry v. Lynaugh,* 492 U.S. 302, 328 (1989) (quoting *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring)). There is a "belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background or to emotion and mental problems, may be less culpable than defendants who have no such excuse." *Id.* at 319. This Court also observed that facts may be mitigating even if those facts do not make the defendant more likeable as long as if they help the sentencer understand how he came to be in the situation he is in. *Sears*, 561 U.S. at 951.

Here, the majority simply asserted with a certainty that the aggravating evidence outweighed the mitigating evidence as though it was the product of a carefully calibrated weighing that reached a definitive result. Pet.App. 6a. However, this Court has always understood the futility of such a calculus, emphasizing jurors make individualized sentencing decisions reflecting their own reasoned moral response to the mitigating evidence. In Texas, a death sentence must reflect the unanimous decision of twelve jurors, but nothing requires them to consider mitigating circumstances in the same way. *See Mills v. Maryland,* 486 U.S. 367

(1988). Reasonable jurors may disagree about the weight to assign various mitigating circumstances and about the ultimate decision. By accepting as a virtual certainty the overwhelming weight of the aggravating evidence, the majority failed to consider whether even a single juror could reasonably have weighed the evidenced differently.

The dissent observed that a capital sentencing decision should reflect the views of "laymen representing a cross-section of the community" rather than the "insular perspective" of federal judges who "live in a world distant from the realities of poverty with its attending consequences." Pet.App. 19-20. The majority's illusory confidence in its own reweighing creates the grave and unacceptable risk that trial counsel's failure to present this compelling mitigating evidence led to a sentencing determination unworthy of confidence.

B. The decision below flouts this Court's requirement to weigh the totality of the mitigating evidence against the aggravating evidence and to consider the possible effect of the evidence on a reasonable juror.

The majority's prejudice analysis is at odds with the required weighing of the totality of the mitigating evidence against aggravating evidence with awareness that society finds less culpable those with disadvantaged backgrounds or mental problems. The majority simply places the wealth of mitigation into three categories—childhood trauma, mental illness, and coercion—and claims the new mitigating evidence does not outweigh the aggravating evidence of the two threatening letters attributed to Canales. Pet.App. 6a. The conclusory finding does not reflect a "probing or fact specific analysis;" nor does it consider the possibility

that one reasonable juror could reasonably be swayed by the type of mitigating evidence this Court has repeatedly found to be significant.

Further, the Fifth Circuit's approach treats these categories of mitigation as wholly discrete, when in fact, the "totality of available mitigation" tells a single, interconnected story of Canales's life. This siloed treatment of the evidence leads the majority to the misapprehension that "the mitigating evidence of childhood abuse and mental illness does little to explain why he participated in the murder." Pet.App. 7a, n. 2.[13] The circumstances of Petitioner's childhood directly led to his being forced to join a gang at a young age, and it was his later struggle as a young adult to leave the gang, coupled with his physical disability that compelled him to accept the protection of his cell mate's gang, which established the coercive circumstances of the murder. This is apparent from a proper reweighing of the totality of the evidence.

The majority's approach also ignores the difference between what mitigation was presented to the jury and what would have been presented but for the deficient performance. Such comparisons lie at the heart of *Wiggins* reweighing. In this case, for example, the fact that the aggravating edge of any potentially "double-edged" mitigation was already before the jury and virtually no mitigating evidence was presented, shows that the *net effect* had to have pointed toward increased

[13] While this Court has made clear that the Fifth Circuit's practice of requiring a nexus to the crime for otherwise "inherently mitigating" evidence was unconstitutional, *Tennard v. Dretke*, 542 U.S. 274, 287 (2004), the compelling story of the childhood evidence in Mr. Canales case is both inherently mitigating, and part of a story with a direct nexus to the crime.

mitigation. *Walbey v. Quarterman*, 309 F. App'x 795, 806 (5th Cir. 2009). This is especially relevant to the letters introduced at the penalty phase.

The Fifth Circuit's compartmentalized, divide-and-conquer approach, ignores the "legal principle articulated in *Andrus*," which contemplates whether "the apparent 'tidal wave' of available mitigating evidence *taken as a whole* might have sufficiently influenced the jury's appraisal of [the petitioner's] moral culpability as to establish *Strickland* prejudice." *Andrus*, 140 S. Ct. at 1887 (emphasis added) (quotations and citations omitted).

C. The majority has done little more than compare discrete pieces of evidence in Petitioner's case to evidence in this Court's precedents.

The decision below substitutes a peculiar use of precedents for the proper prejudice analysis. Rather than weighing and considering whether a reasonable juror could have been persuaded to vote for a life sentence, the majority puts labels on categories of mitigation, then compares those labels to categories of evidence in Supreme Court cases, observing where such a label in a precedent was not matched in Canales's case. This Court, though, has "never before equated what was sufficient in *Wiggins* with what is necessary to establish prejudice." *Andrus v. Texas,* 140 S. Ct at 1886, n.6. As the dissent observes, "The decision to sentence a defendant to death is a difficult one that defies straightforward analogical reasoning, quibbling distinctions, and easy legal conclusions." Pet.App. 19a.

For instance, the majority points out that Canales, like Wiggins, suffered childhood trauma; however, it rules against Canales in part because Wiggins additionally had mitigation that the majority labeled as "diminished mental

capacities." Pet.App. 7a. Although diminished mental capacity may be a significant mitigating circumstance, its absence does not justify ignoring the strength of evidence of childhood trauma so severe that it resulted in mental illness.

In considering mitigating circumstances, a reviewing court cannot simply check off boxes and then numerically compare the number of such circumstances to the mitigating evidence in other cases. Treating "childhood trauma" as fungible based on the label alone, completely elides assessing the weight of the evidence of Canales's childhood trauma.

The majority's strained effort to distinguish *Williams v. Taylor* fares no better. It points out that Williams's childhood trauma and intellectual disability were coupled with his remorse, a factor absent from Canales's case. As the dissent highlights, evidence of remorse was offered at Williams's trial, but he was nevertheless sentenced to death. Pet.App. 17a. As this Court determined, it was trial counsel's failure to introduce evidence of childhood trauma and intellectual deficits that made the difference.

The dissent also highlights mitigating evidence present for Canales but absent in Williams's case: "At six, Canales witnessed a man get shot to death in the street and saw his stepfather rape his five-year old sister; that year his stepfather sexually abused him as well; at eight, he was forced into a gang; at ten, he was shot at in a drive-by shooting; and by twelve, he was stabbed." *Id.*

Despite highlighting differences in categories of mitigation, the majority also fails to factor in its comparison with the aggravating evidence in other case. For

example, as the dissent points out, the aggravating evidence in *Williams v. Taylor* was worse than the aggravating evidence in Canales's case. Williams murdered his victim with a mattock after she refused to lend him a couple of dollars. The murder was described as "just one act in a crime spree that lasted most of Williams's life." Pet.App. 13a-14a. Williams had prior convictions for armed robbery and larceny. After the murder, Williams brutally assaulted an elderly woman, leaving her in a vegetative state. Not finished, Williams "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." *Id.*

Even considering the great deference owed to a state court adjudication, this Court found the state court's conclusion of no prejudice unreasonable.[14] Here, Canales's adjudicated role in the crime was to hold the victim, a hardened criminal and not a particularly sympathetic victim, while another caused the death. Also, his limited role was coerced—he was acting under a very real threat of death. Canales's case is not remotely as aggravated as the precedent cases. The restricted focus on individual mitigating items without also considering the aggravating side of the ledger is starkly inconsistent with the obligation to "reweigh the evidence in aggravation against the totality of available mitigating evidence." *Wiggins,* 539 U.S. at 534).

[14] *See also Rompilla,* 545 U.S. at 378, 383 (finding prejudice even though Rompilla was convicted of felony murder committed by torture, had a history of violence and convictions for rape and assault); *Porter v. McCollum,* 558 U.S. 30 (2009) (per curiam) (finding prejudice despite defendant being convicted of two counts of first-degree murder, having a prior history, and a jury finding the premeditated murder was "especially heinous").

The majority's treatment of *Porter*, 558 U.S. 30, also illustrates the corrosive effect mechanistic comparisons of categories of evidence may have on the *Strickland* prejudice test. In *Porter,* trial counsel failed to present evidence of childhood abuse and military service, which caused mental trauma. *Id.* at 33. The majority distinguished Porter and Canales because of the tradition of leniency toward veterans and trauma from military experience could have explained the murder of Porter's ex-girlfriend. Pet.App. 7a, n.2. For Canales, in contrast, his evidence of abuse and mental illness does not explain his participation in the murder. *Id.*

Although there is no requirement to show a nexus between mitigation and the offense, *see Tennard v. Dretke*, 542 U.S. 274, 287 (2004), Canales showed how his "tragic childhood rife with violence, sexual abuse, poverty, neglect, and homelessness," helps explain how he came to be involved in gangs at a young age, leading up to his attempted renunciation of gang affiliation that failed only when his heart condition made him accept protection from his former gang.

Military service is respected, and society understands the psychological difficulties arising from military experience. However, it is just as true that horrific childhood trauma has an adverse effect on mental health. At a most vulnerable age, Canales suffered violence, sexual trauma, abandonment, and grinding poverty. These tragic experiences led to, among other severe challenges, his PTSD and major depressive disorder.

In straining to distinguish Canales's case from the facts in *Rompilla v. Beard,* 545 U.S. 374 (2005), the majority below points out that Rompilla's trial attorneys

presented a false "benign conception" of his family life. Pet.App. 7a, n. 2. This inaccurate "benign conception" of the family is the *only* basis the majority has had for distinguishing *Rompilla*.[15] The majority, however, overlooked the false impression Canales's jury would have drawn from the utterly negligible mitigation evidence it heard. Canales's jury heard only "that Canales did not cause trouble, had an aptitude for art, and received few visits from family, and that he had tried to stop inmates from fighting." Pet.App. 5a-6a.

The decision below fails to consider that the jurors would have reasonably inferred that the failure of Canales's family to visit him or testify on his behalf reflected their antipathy toward him and the crimes he committed. Nothing could have been further from the truth. Rather than being someone they avoided, Canales was dear to his sisters and others in his life. Andy's sister Elizabeth declared "He was always brave when I needed him to be. I will forever be grateful for that. I never understood why my parents treated him that way. It is something that will always stay with me. We love him, he is in our prayers." ROA.4254. Canales's Uncle José viewed Andy as his son. *Id.* "Today, José deeply regrets that he was not in a position to adopt Andy and his sister." *Id.* Canales's girlfriend, Liz Hewitt, and her family and welcomed him into their lives; Liz's mother was "fond of Andy" and "treated him like a son." ROA.4276. And Canales responded well to the loving

[15] As the dissent points out, the majority did not consider the great similarities between the mitigation in *Rompilla* and the mitigation for Canales. Pet.App. 14a (Rompilla had alcoholic parents who fought violently and frequently beat him and his siblings; he also suffered extreme punishments and deprivation).

family life for this brief time period, until his mother's aneurysm tragically unraveled that phase of his life. ROA.4276-77.

No doubt there are differences between the childhood experiences of Canales and the other petitioners discussed herein. However, as the dissent points out, the impossibility of easily equating those differing experiences "is precisely why we are instructed to 'reweigh' the evidence ourselves—to avoid the drift of precedent into a paint-by-numbers guide to prejudice." Pet.App. 17a. For these reasons, this Court should grant certiorari to address the Fifth Circuit's imposition of a flawed prejudice analysis contrary to this Court's precedents.

III. The Decision Below Is Wrong

It is difficult to improve upon the dissenting opinion's forceful excoriation of the majority's opinion now before this Court. Pet.App. 9a-20a. The Honorable Patrick E. Higginbotham's nearly four decades of esteemed service on the Court of Appeals (and before that on the U.S. District Court for the Northern District of Texas between 1975 and 1982), invests his opinion with not merely the gravity and authority of that tenure, but his vast experience scrutinizing the realities imbued in the work of juries charged with determining whether to impose the death penalty or to punish with death in prison. The majority opinion's discord with *Andrus*, notwithstanding the latter's publication shortly before the former in mid-2020, calls for close attention to the dissent's comparison of the two. The blinkered and rigid approach of the decision below contravenes this Court's key guidance.

The dissent marshals these constitutional authorities forcefully, quoting *Wiggins* for the instruction that prejudice is assessed by "reweigh[ing] the evidence in aggravation against the totality of available mitigating evidence," 539 U.S. at 534, which the majority did not do, and quoting *Sears* to explain that the inquiry is inherently a "probing and fact-specific analysis," 561 U.S. at 955, wherein the lower courts "look to Supreme Court precedent for guidance, while recognizing that it does not yield a mandatory list of mitigating facts for establishing prejudice." Pet.App. 13a. The dissent recognizes the direct application of *Andrus* to perhaps the central flaw of the majority's approach, which critiqued the state court decision before the Court for having "seemed to assume that the prejudice inquiry here turns principally on how the facts of this case compare to the facts in *Wiggins*. We note that we have never before equated what was sufficient in *Wiggins* with what is necessary to establish prejudice." Pet.App. 13a n. 29. But the decision below did just that in relation to Mr. Canales's extensive range of substantially mitigating evidence. This Court should recognize the importance of Circuit Judge Higginbotham's rationale and grant certiorari.

IV. Summary Reversal Would Be Warranted In This Case

While this case presents an excellent vehicle for the full presentation of the vital issues in question (*supra* § I.B), the Court may also deliver both clarity to this troubled legal position in the Circuit Court and, broadly, justice by summarily reversing Mr. Canales's penalty verdict. This Court has repeatedly advanced its jurisprudence in this area via per curiam summary reversal. Beyond the

aforementioned very recent instances of this approach, *viz.*, *Kayer* and *Andrus* (*supra*), the Court need look no further than to *Sears*, 561 U.S. 945, in 2010, and *Porter*, 558 U.S. 30, in 2009, for touchstone decisions on capital counsel's standard of care for penalty phase representation and the state and federal judiciaries' proper measure of prejudice under the Sixth Amendment's right to counsel.

Sears parallels Mr. Canales's case with respect to a prior determination of deficient penalty phase performance. *Sears*, 561 U.S. at 951-52 (for Sears, the determination came in the Georgia postconviction court). *Sears* thus similarly presented to this Court a decision below with a "surprising" conceptualization of the constitutional analysis "regarding whether counsel's facially inadequate mitigation investigation prejudiced" the petitioner. *Id.* at 952. On certiorari from the Supreme Court of Georgia, *id.* at 946, *Sears*, like the present Petitioner, also presented no issue of federal habeas court deference in directly applying this Court's constitutional jurisprudence pursuant to *Wiggins*.

Porter, in contrast, concerned a federal habeas corpus litigation from Florida, wherein the state supreme court had found no prejudice in George Porter, Jr.'s trial counsel's failure to investigate integral parts of his life history as a "veteran who was both wounded and decorated for his active participation in two major engagement during the Korean War." 558 U.S. at 30. After considering the evidence that Porter's wartime experience "unfortunately left him a traumatized, changed man," *id*, this Court found the Florida Supreme Court's conclusion that no prejudice had befallen Porter was unreasonable under § 2254(d)(1). *Id.* at 42. Upon the

Court's remand to the Court of Appeals, Porter's case ultimately returned to the state circuit court, *Porter v. Florida Attorney General*, No. 6:03-cv-1465-GAP-KRS, ECF No. 60 (M.D. Fla. Apr. 15, 2010) (remanding case to the Eighteenth Judicial Circuit Court, Brevard County), whereupon he was resentenced—presumably with the benefit of the evidence developed in his prior federal proceedings—and punished with a life sentence, which he apparently served until his death in February 2016. Florida Department of Corrections, Offender Network Information.[16]

CONCLUSION

The petition for writ of certiorari should be granted. Alternatively, the Court should summarily reverse the decision below.

Respectfully submitted,

DAVID P. VOISIN
P. O. BOX 13984
JACKSON MS 39236
(601) 949-9486
david@dvoisinlaw.com

JOSEPH J. PERKOVICH
Counsel of Record
PHILLIPS BLACK, INC.
P.O. BOX 4544
NEW YORK, NY10163-4544
(212) 400-1660
j.perkovich@phillipsblack.org

JOSEPH C. WELLING
100 N. TUCKER BLVD., STE 750
ST. LOUIS, MO 63101
(314) 629-2492
j.welling@phillipsblack.org

Counsel for Anibal Canales, Jr.

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[16] *See* http://prod.fdc-wpws001.fdc.myflorida.com/offenderSearch/detail.aspx?Page=Detail&DCNumber=110825&TypeSearch=IR.