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

APPENDIX

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evidence would have been sufficient to convict [the defendant] as charged in the indictment"). Here, Jane Doe 2 testified that she and Jane Doe 4 told Sanders that they were eighteen. The government has pointed to no evidence that contradicts her testimony or that otherwise indicates that Sanders knew that the two teenagers were minors. Thus, because there is no evidence to support the charge of the indictment that Sanders knew that the victims were minors, the district court, on remand, is directed to dismiss with prejudice the production of child pornography count against Sanders.

IV.

In this opinion we have held: Even if the district court erred in allowing the government to join Davis and Lagrone in the same indictment, that error was harmless. We therefore AFFIRM the convictions of Davis and Lagrone. We have further held that the district court impermissibly permitted the government to constructively amend the production of child pornography charge against Sanders. We therefore REVERSE and VACATE Sanders's conviction for the production of child pornography. As we have explained, there is no evidence in the record to support the indictment's charge that Sanders knew his victims were minors. This case is thus REMANDED for the district court to dismiss with prejudice the production of child pornography count against Sanders and for such further proceedings not inconsistent with this opinion.

AFFIRMED in part; REVERSED and VACATED in part; and REMANDED.

Anibal CANALES, Jr., Petitioner - Appellant

v.

Lorie DAVIS, Director, Texas Department of Criminal Justice, Correctional Institutions Division, Respondent - Appellee

No. 18-70009

United States Court of Appeals,
Fifth Circuit.

FILED July 21, 2020

Background: After affirmance, 98 S.W.3d 690, of state prisoner's murder conviction and death sentence, and dismissal of successive application for state habeas relief, 2008 WL 383804, the United States District Court for the Eastern District of Texas denied prisoner's petition for federal habeas relief. Prisoner appealed. The Court of Appeals, 765 F.3d 551, affirmed in part, reversed in part, and remanded. After an evidentiary hearing, the District Court, Rodney Gilstrap, Chief Judge, determined that prisoner was not prejudiced by counsel's deficient performance in investigating mitigation evidence for penalty phase. Prisoner appealed.

Holdings: The Court of Appeals, Haynes, Circuit Judge, held that in reweighing of aggravating evidence and available mitigating evidence for penalty phase, prisoner was not prejudiced by counsel's deficient performance.

Affirmed.

Higginbotham, Circuit Judge, filed a dissenting opinion.

1. Criminal Law ⚿1960, 1961

In assessing prejudice, as element of ineffective assistance of counsel, with respect to counsel's deficient performance in

investigating and presenting mitigating evidence for the penalty phase of a capital murder trial, the court reweighs the evidence in aggravation against the totality of available mitigating evidence. U.S. Const. Amend. 6.

2. Criminal Law ⚿1960, 1961

To determine whether a state prisoner was prejudiced, as element of ineffective assistance of counsel, by counsel's deficient performance in investigating and presenting evidence for the penalty phase of a capital murder trial in Texas, a federal habeas court asks whether under Texas's capital sentencing statute the additional mitigating evidence is so compelling that there is a reasonable probability that at least one juror could have determined that because of the prisoner's reduced moral culpability, death was not an appropriate sentence, and such a reasonable probability exists if the likelihood of a different result is substantial, not just conceivable. U.S. Const. Amend. 6; 28 U.S.C.A. § 2254.

3. Habeas Corpus ⚿486(5), 773

The determination, by a federal habeas court, of whether it is substantially likely that a state prisoner was prejudiced, as element of ineffective assistance of counsel, by counsel's deficient performance in investigating and presenting evidence for the penalty phase of a capital murder trial makes no distinction between cases that are reviewed de novo and cases that receive deference under the Antiterrorism and Effective Death Penalty Act (AEDPA). U.S. Const. Amend. 6; 28 U.S.C.A. § 2254.

4. Criminal Law ⚿1960, 1961

Defendant was not prejudiced, as element of ineffective assistance of counsel, by counsel's deficient performance, at penalty phase of capital murder trial, in failing to investigate and present additional evidence of defendant's childhood trauma, mental illness, and coercion in murdering another prisoner, i.e., defendant allegedly would have been murdered by a prison gang if he had not carried out prison gang's order; as aggravating evidence, defendant asked that prison gang murder a prisoner who cooperated with investigators and wrote postconviction letters opining that "what goes around, comes around" for prisoners who cooperate with investigators, and threatening to murder a sexual assault victim. U.S. Const. Amend. 6.

Appeal from the United States District Court for the Eastern District of Texas USDC No. 2:03-CV-69, James Rodney Gilstrap, U.S. District Judge

David Paul Voisin, Jackson, MS, Joseph J. Perkovich, Esq., Phillips Black, Inc., New York, NY, for Petitioner - Appellant.

Matthew Hamilton Frederick, Deputy Solicitor General, Office of the Solicitor General for the State of Texas, Tina J. Miranda, Assistant Attorney General, Office of the Attorney General, Financial Litigation & Charitable Trusts Division, Austin, TX, for Respondent - Appellee.

Before HIGGINBOTHAM, SOUTHWICK, and HAYNES, Circuit Judges.

HAYNES, Circuit Judge:

Petitioner Anibal Canales appeals the district court's denial of habeas relief on his claim for ineffective assistance of trial counsel. We AFFIRM.

I. Background

A. Factual Background

A prior panel of this Court has thoroughly reviewed the factual background of this case, which we only briefly summarize here. *See Canales v. Stephens*, 765 F.3d

551, 559–61 (5th Cir. 2014). Canales was a member of the Texas Mafia, a prison gang. *Id.* at 559. He and other members of the gang agreed to kill Larry Dickerson, and they did so in July 1997. *Id.* at 559–60. In 1998, Canales sent another Texas Mafia member, Bruce Innes, a letter confessing to Dickerson's murder. *Id.* at 560.

In November 1999, Canales was indicted for capital murder. *Id.* In February 2000, he sent another note to Innes. The district court described the letter: "[A]lthough written in code, [it] appeared to ask the gang to retaliate against Larry ('Ironhead') Whited because he believed Whited had informed prison authorities about his role in the killing" of Dickerson. *Id.* Canales sent a third letter to another inmate in April 2000. *Id.* at 561. He wrote that he had "been bummed a bit" due to his case and its outcome because of "snakes in the yard." *Id.* He wrote: "I'm a firm believer that what goes around, comes around!" *Id.* This letter was also introduced at trial. *Id.* The 1998 letter was used in the guilt phase and the 1999 and 2000 letters were used at the punishment phase to establish that Canales posed a threat of future dangerousness. *Id.* Canales was convicted of capital murder in state district court, and, based on the jury's answers to questions required by Texas law, the court sentenced him to death. *Id.*

B. Procedural History

The Texas Court of Criminal Appeals ("TCCA") affirmed Canales's conviction and sentence on direct appeal. *Canales v. State*, 98 S.W.3d 690 (Tex. Crim. App. 2003). The TCCA denied his first state habeas petition on the merits. *Ex parte Canales*, No. WR-54,789-01 (Tex. Crim. App. Mar. 12, 2003) (per curiam) (unpublished).

On November 29, 2004, Canales filed the present petition in federal district court, raising thirteen separate grounds for relief. The court stayed the proceedings so that Canales could present his unexhausted claims in state court. The TCCA dismissed his subsequent state application as an abuse of writ without reaching the merits of his claims. *Ex parte Canales*, No. WR-54,789-02, 2008 WL 383804 (Tex. Crim. App. Feb. 13, 2008).

Canales then returned to federal district court. Of relevance here, the district court dismissed Canales's claim that he received ineffective assistance of trial counsel in violation of *Wiggins v. Smith*, 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003), as procedurally defaulted. *Canales*, 765 F.3d at 559. But it granted Canales a certificate of appealability ("COA") on that claim, among others. *Id.* While Canales's case was on appeal, the Supreme Court decided *Trevino v. Thaler*, 569 U.S. 413, 133 S.Ct. 1911, 185 L.Ed.2d 1044 (2013). In *Trevino*, the Court held that, under Texas's procedural system, a defendant may defeat a procedural default to an ineffective assistance of counsel claim in federal court if the defendant shows that his counsel was ineffective in the initial collateral proceeding. 569 U.S. at 429, 133 S.Ct. 1911.

Based on *Trevino*, a panel of this court held that Canales had established cause to excuse the procedural default on his claim of ineffective assistance of trial counsel at sentencing. *Canales*, 765 F.3d at 571. The panel concluded that Canales's trial counsel's performance fell below an objective standard of reasonableness. *Id.* at 570. The panel also concluded that there was some potential merit to Canales's claim that he was prejudiced by the deficient performance. *Id.* at 570–71. Trial counsel had failed to hire a mitigation specialist, interview family members, or collect any records or historical information on Canales's life. *Id.* at 570. The panel remanded to the district court to determine the merits of Canales's

prejudice claim in the first instance. *Id.* at 571.

On remand, the State argued that the district court had "all the evidence it need[ed], without an evidentiary hearing," and that the facts were undisputed. The district court disagreed, concluding that Canales was entitled to funding for expert and investigative assistance. Canales's three experts interviewed over a dozen people; conducted clinical and neuropsychological tests on Canales; and reviewed medical, legal, and prison records. Each submitted an expert report to the district court.

The district court, after reweighing the new mitigating evidence against the aggravating evidence, held "that there is *no* reasonable probability that a juror would have found that the mitigating evidence outweighed the aggravating evidence." Thus, it denied Canales relief on his *Wiggins* claim. We granted Canales a COA on this claim. *Canales v. Davis*, 740 F. App'x 432, 433 (5th Cir. 2018) (per curiam).

II. Discussion

On appeal, Canales argues that the district court erred in its no-prejudice holding. The State argues that 28 U.S.C. § 2254(e)(2) bars consideration of Canales's new mitigating evidence. Alternatively, the State argues that that Canales's claim fails on the merits because he cannot demonstrate prejudice. If the new evidence were not admitted, affirmance would be very straightforward. But even assuming arguendo that we may consider Canales's new evidence, we hold that Canales fails on the merits of his *Wiggins* claim.[1]

To prevail on his *Wiggins* claim, Canales must show that his trial counsel's performance was deficient and that the deficiency prejudiced his defense. *Wiggins*, 539 U.S. at 521, 123 S.Ct. 2527. A panel of this court has already held that Canales satisfied the first prong, *Canales*, 765 F.3d at 569–70, and nothing has demonstrated a reason that we would disturb the law of the case as to this point. Accordingly, we address the prejudice prong only.

[1, 2] "In assessing prejudice, we reweigh the evidence in aggravation against the totality of available mitigating evidence." *Wiggins*, 539 U.S. at 534, 123 S.Ct. 2527. To determine whether Canales has made the requisite showing, we must ask whether under Texas's capital sentencing statute, "the additional mitigating evidence [is] so compelling that there [is] a reasonable probability that at least one juror could have determined that because of the defendant's reduced moral culpability, death [is] not an appropriate sentence." *Kunkle v. Dretke*, 352 F.3d 980, 991 (5th Cir. 2003) (internal quotation marks and citation omitted). Such a reasonable probability exists if "the likelihood of a different result [is] substantial, not just conceivable." *Harrington v. Richter*, 562 U.S. 86, 112, 131 S.Ct. 770, 178 L.Ed.2d 624 (2011).

1. It is highly questionable whether this case meets the Antiterrorism and Effective Death Penalty Act's difficult standards set forth in *Cullen v. Pinholster*, 563 U.S. 170, 186, 131 S.Ct. 1388, 179 L.Ed.2d 557 (2011). A twist is whether the *Trevino* analysis alters the *Pinholster* analysis in cases where the state habeas counsel failed to develop the record. Another twist is present in this case that is not usually present: the State failed to object to the new evidence under 28 U.S.C. § 2254(e)(2), only arguing it was unnecessary, not improper. *See, e.g., Holland v. Jackson*, 542 U.S. 649, 653, 124 S.Ct. 2736, 159 L.Ed.2d 683 (2004) (per curiam) (evaluating the State's argument that the Sixth Circuit's reliance on evidence not before the state trial court was improper under § 2254(e)). The State argues that the rule in this section is mandatory. We have not previously ruled whether this statute is waivable or forfeitable. Because we determine that, even with the additional evidence, Canales does not prevail, we will not address this point further here.

[3] The dissenting opinion takes the position that, when we review a federal habeas petition de novo, prejudice is satisfied when the new mitigating evidence "might have" influenced one juror. *See* Dissenting Op. at 421–22, 427. We disagree with this prejudice standard. When the Supreme Court established the substantial likelihood standard for evaluating prejudice in *Richter*, it made no distinction between cases that were reviewed de novo and those that received deference under the Antiterrorism and Effective Death Penalty Act. *See Richter*, 562 U.S. at 111–12, 131 S.Ct. 770. Rather, the Court focused solely on the reasonable-probability standard for prejudice, as first established in *Strickland v. Washington*, 466 U.S. 668, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), and clarified that standard. *See Richter*, 562 U.S. at 111–12, 131 S.Ct. 770 (establishing the substantial likelihood standard upon observing that "*Strickland* asks whether it is 'reasonably likely' the result would have been different" (quoting *Strickland*, 466 U.S. at 696, 104 S.Ct. 2052)). Moreover, the Supreme Court's recent holding in *Andrus v. Texas* did not change the law on assessing prejudice. *See* —— U.S. ——, 140 S. Ct. 1875, 1886, 207 L.Ed.2d 335 (2020) (per curiam). The Court rearticulated the prejudice inquiry—"whether there is a reasonable probability that at least one juror would have struck a different balance"—and remanded to the state court for consideration of the prejudice prong consistent with the articulated legal principle. *Id.* (internal quotation marks and citation omitted).

A. Aggravating Evidence

The State presented documentary evidence of Canales's prior convictions, which included: a five-year sentence for theft, a fifteen-year sentence for sexual assault, and a fifteen-year sentence for aggravated sexual assault.

The State also presented testimony of Suzanne Hartbarger, Canales's sexual assault victim, and Innes. Hartbarger testified that Canales approached her in a parking lot near her college. Canales told her he was a police officer investigating a drug sale, in which she had been named as a suspect. He informed her that she was going to jail and that he would drive her there. In the car, Hartbarger realized Canales was not a police officer. But when she told him that she was going to jump out of the car, Canales responded by telling her that he would "blow [her] away." After driving for some time, Canales stopped the car, walked her into the woods, and raped her. Innes testified that Canales wrote him a coded letter, thinking Innes was still a member of the Texas Mafia. In the letter, Canales asked Innes to arrange for the murder of another inmate, Larry Whited, whom Canales suspected of cooperating with investigators.

Lastly, the State introduced two letters that Canales sent to his fellow inmates after he was indicted for capital murder. *Canales*, 765 F.3d at 560–61. The first letter was the one Canales sent to Innes, asking the Texas Mafia to murder Whited. *Id.* at 560. The second letter was one that Canales sent to another inmate, sharing his thoughts on his capital murder case. *Id.* at 561. Canales wrote that his case was not looking good because a few inmates were "making matters worse with their mouths." *Id.* Canales expressed his belief "that what goes around, comes around" and that those who spoke will get "justice in the end." *Id.*

B. Mitigating Evidence

Canales's mitigating evidence in state court consisted of testimony stating 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. His new mitigating evidence consists of three experts' reports, which provide additional evidence of childhood trauma and mental illness and attempted to set a context for Canales's participation in Dickerson's murder, which we describe briefly below.

Canales and his younger sister, Elizabeth, were raised by their alcoholic mother, Janie Garcia. The new evidence describes abuse from Canales's stepfather, joinder at a young age in a gang which attacked him, and periods of homelessness. While living with his biological father, Canales continued to receive physical beatings. His father abandoned him when he was thirteen, and Canales was arrested for car theft and sent to juvenile detention. Due to early exposure to alcohol by his family, Canales became an alcoholic by age fourteen.

By eighteen, Canales went back to living with his mother, his siblings, and his mother's live-in boyfriend, John Ramirez, another sexual predator. Ramirez had Canales prosecuted for stealing a check from him, and Canales went to prison for the offense. Shortly after Canales received parole, he landed back in prison for two sexual offense convictions; Canales raped a young woman and sexually assaulted another. Back in prison, Canales joined the Texas Syndicate, a prison gang. He joined because "you have to get in to fit in."

After he was back on parole and working, Canales's mother suffered a brain aneurysm and lost all speech and motor functions. Canales was twenty-seven. Canales's situation deteriorated; he turned to drugs and alcohol, stopped reporting to his parole officer, and returned to prison when his parole was revoked.

Back in prison, Canales suffered a heart attack as well as mental illness, including post-traumatic stress disorder ("PTSD"). The Texas Syndicate learned of Canales's prior sex convictions and his former membership in the Latin Kings, and they "ordered a hit" on him. To protect himself, Canales joined the Texas Mafia, another prison gang that was chaired by his cellmate, Bruce Richards. As a new recruit, Canales was on probation and had to do whatever Richards said. Canales contends that he participated in the murder of Dickerson upon orders of the gang and would have been killed if he had not participated.

C. Weighing of the Evidence

[4] Canales offered three types of new mitigating evidence: (1) childhood trauma, (2) mental illness, and (3) coercion (i.e., evidence that Canales would likely have been killed by the Texas Mafia if he had refused to kill Dickerson and to write exaggerated notes about his role in the murder). He alleges that this mitigating evidence would provide the jury with context for his actions, such that there is a reasonable probability that a juror would have determined that the death penalty was inappropriate. We disagree. The new mitigating evidence does not have a substantial likelihood of a different result because it does not outweigh the aggravating evidence of Canales's two letters: (1) requesting that the Texas Mafia murder Whited for cooperating with investigators, and (2) opining that the inmates who were "making matters worse with their mouths" by speaking with investigators would likely get "justice in the end" because "what goes around, comes around." *See Canales*, 765 F.3d at 560–61.

In that regard, Canales's evidence is unlike the evidence presented in *Wiggins* or *Williams v. Taylor*, 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000), cases in which the Supreme Court found preju-

dice.[2] In *Wiggins*, the petitioner suffered similar childhood trauma. 539 U.S. at 535, 123 S.Ct. 2527 (noting that "Wiggins experienced severe privation and abuse ... while in custody of his alcoholic, absentee mother," "suffered physical torment, sexual molestation, and repeated rape [while] in foster care," and spent time homeless). But Wiggins also had "diminished mental capacities," *id.* at 535, 123 S.Ct. 2527, and lacked "a record of violent conduct that could have been introduced by the State to offset this powerful mitigating narrative," *id.* at 537, 123 S.Ct. 2527. Like Wiggins, the petitioner in *Williams* also had a "nightmarish childhood" and was "borderline mentally retarded."[3] 529 U.S. at 395–96, 120 S.Ct. 1495 (quotation omitted) (noting that Williams's "parents had been imprisoned for the criminal neglect of Williams and his siblings" and that he "had been severely and repeatedly beaten by his father"). The Supreme Court in *Williams* held that this childhood trauma and intellectual disability coupled with Williams's remorse created a reasonable probability that he was prejudiced.[4] *Id.* at 398, 120 S.Ct. 1495 (observing that

2. We also conclude that Canales's mitigating evidence is unlike the evidence presented in *Rompilla v. Beard*, 545 U.S. 374, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005), and *Porter v. McCollum*, 558 U.S. 30, 130 S.Ct. 447, 175 L.Ed.2d 398 (2009) (per curiam), two additional cases the dissenting opinion relies upon for its argument on this issue. *See* Dissenting Op. at 421–23, 426–27.

In *Rompilla*, the Court held that new mitigating evidence of an abusive childhood satisfied the prejudice prong of *Strickland* because it directly contradicted the evidence given at sentencing, which included evidence indicating that Rompilla came from a loving family. 545 U.S. at 378, 391–93, 125 S.Ct. 2456 (concluding that "[t]he accumulated entries would have destroyed the benign conception of Rompilla's upbringing and mental capacity defense counsel had formed" and created "a mitigation case that [bore] no relation to the few naked pleas for mercy actually put before the jury"). Here, there was no "benign conception" that Canales had a good childhood or normal mental capacity. *See id.* at 391, 125 S.Ct. 2456.

In *Porter*, the defendant argued that new mitigating evidence of his childhood abuse and military service, which caused him mental trauma, satisfied *Strickland*'s prejudice requirement. 558 U.S. at 33, 130 S.Ct. 447. The Supreme Court agreed, holding that the childhood abuse could explain Porter's behavior in his relationship with his ex-girlfriend, whom he murdered, the United States "has a long tradition of according leniency to veterans in recognition of their service," and the resulting trauma from his military experience could explain why he murdered his ex-girlfriend. 558 U.S. at 43–44, 44 n.9, 130 S.Ct. 447. Here, Canales's mitigating evidence of childhood abuse and mental illness does little to explain why he participated in the murder. The coercion evidence, discussed *infra* at pages 422–23, fails to counter his post-murder actions of sending letters seeking the murder of those who testified against him and threatening to murder his sexual assault victim. *Cf. Porter*, 558 U.S. at 32–33, 130 S.Ct. 447 (setting forth no evidence that Porter committed or threatened to commit violent felonies before or after the incident during which he murdered his ex-girlfriend and her boyfriend).

3. In 2014, the Supreme Court noted that its previous opinions used the term "mental retardation" but that the Court now "uses the term 'intellectual disability' to describe the identical phenomenon." *Hall v. Florida*, 572 U.S. 701, 704, 134 S.Ct. 1986, 188 L.Ed.2d 1007 (2014).

4. The dissenting opinion contends that the *Williams* Court held that even a subset of the [mitigating] evidence satisfied the prejudice prong. Dissenting Op. at 423–24 & n.64. Its contention comes from one line in *Williams*, which states: "[T]he graphic description of Williams' childhood, filled with abuse and privation, *or* the reality that he was 'borderline mentally retarded,' might well have influenced the jury's appraisal of his moral culpability." *Id.* (quoting *Williams*, 529 U.S. at 398, 120 S.Ct. 1495 (emphasis added)). But, in the quoted portion of *Williams*, the Court faulted the state court for not considering the mitigating evidence that was advanced at trial: Williams's confession, remorse, and cooperation. *Williams*, 529 U.S. at 398, 120 S.Ct.

Williams "turned himself in, alerting police to a crime they otherwise would never have discovered, expressing remorse for his actions, and cooperating with the police after that").

Here, there is no such remorse or lack of violent record.[5] The coercion evidence, whatever one thinks, is powerfully countered by Canales's two letters seeking violence toward, including the murder of, those who testified against him.[6] *See Wong v. Belmontes*, 558 U.S. 15, 24–25, 130 S.Ct. 383, 175 L.Ed.2d 328 (2009) (per curiam) (holding that the defendant's "cold, calculated" murder and "subsequent bragging about it would have served as a powerful counterpoint" to his new mitigating evidence of emotional instability, impulsivity, and neurophysiological impairment).[7] Canales also had previously threatened to murder his sexual assault victim. His mitigating evidence does not show that "his violent behavior was a compulsive reaction rather than the product of cold-blooded premeditation." *See Williams*, 529 U.S. at 398, 120 S.Ct. 1495.

In sum, we agree with the district court that there is no reasonable probability that a juror would have found that the mitigating evidence, both old and new, outweighed the aggravating evidence. The mitigating evidence is not "so compelling," *Kunkle*, 352 F.3d at 991 (quotation omitted), that it would tip the balance and

1495. It acknowledged that while the original mitigating evidence may have been insufficient to overcome the death penalty, that evidence may have ''influenced the jury's appraisal of his moral culpability'' had the jury been given evidence of Williams's childhood or mental illness. *Id.* The Court then held that Williams's ''entire postconviction record, *viewed as a whole and cumulative of mitigating evidence presented originally,* raised 'a reasonable probability that the result of the sentencing proceeding would have been different' if competent counsel had presented and explained the significance of all the available evidence.'' *Id.* at 399, 120 S.Ct. 1495 (emphasis added).

5. The dissenting opinion claims that we are discounting Canales's mitigating evidence of his abusive childhood and mental illness and are faulting it for ''not neatly aligning with the evidence in [*Williams* and *Wiggins*].'' Dissenting Op. at 423. We are not. Rather, we conclude that Canales's mitigating evidence of an abusive childhood and mental illness does little to strike the balance in Canales's favor because his aggravating evidence—prior convictions and threats of death—vastly outweighs it.

6. While the new mitigating evidence states that the Texas Mafia had Canales write notes to ''exaggerate [his] role in Dickerson's murder,'' it does not state that Canales was forced to write these letters. The dissenting opinion claims that ''a reasonable juror could conclude that the Texas Mafia ordered Canales to write [the two letters]'' because Canales was forced to write a letter by the Texas Mafia on a prior occasion. Dissenting Op. at 426. However, this claim is unwarranted. Canales attempted to discount these letters in his COA request before this court. *See Canales*, 765 F.3d at 571–72 (arguing that the State used one of these letters to unlawfully solicit incriminating evidence). He stated that Innes had asked him to write a confessional letter, *id.* at 573, but made no mention of the other letters. Had Canales been coerced to write these two letters, he should have mentioned it. We should not grant habeas relief on speculation.

7. The dissenting opinion argues that *Belmontes* is inapposite because the aggravating evidence of his cold murder and subsequent bragging was not before the jury but would have been had his new mitigating evidence been admitted. Dissenting Op. at 426 (stating that ''[t]he Court concluded that the new aggravating and mitigating evidence would cancel each other out''). However, the prejudice inquiry asks whether there is a reasonable probability that a juror with *all* mitigating and aggravating evidence before him or her would find that death was not an appropriate penalty. *See Wiggins*, 539 U.S. at 534, 123 S.Ct. 2527. It is thus of no moment whether aggravating evidence is new or was before the sentencing jury.

establish a "substantial" likelihood of a different result, *Harrington*, 562 U.S. at 112, 131 S.Ct. 770. Canales committed a cold and calculated gang-related murder, and he has a history of threatening and seeking murder. Accordingly, the district court correctly held that Canales has not proven prejudice and, therefore, is not entitled to federal habeas relief.

We AFFIRM.

PATRICK E. HIGGINBOTHAM, Circuit Judge, dissenting:

The State put it best: "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 him is he's a good artist." That sharp sarcasm of the prosecutor's jury argument had bite only because defense counsel left Andy Canales's story untold. The jury heard only of Canales's crimes and artistic abilities, not of a tragic childhood rife with violence, sexual abuse, poverty, neglect, and homelessness, nor of a man beset by PTSD, a failing heart, and the dangers of prison life.

All this evidence "might not have made [Canales] any more likable to the jury, but it might well have helped the jury understand" how he got there.[1] In my view, had the jury heard this evidence, there is a reasonable probability that at least one juror would have concluded that taking a second life was not warranted, leaving Canales to live out his life in prison such as it is. I respectfully dissent.

I

Canales and his younger sister were raised by their alcoholic mother, Janie Garcia, and abandoned by their father. When they did see their father, he was drunk or high on cocaine and was often violent. Chronically unemployed, he paid no child support, leaving Garcia and her children impoverished, frequently hungry, and occasionally homeless. Often Garcia and her children could not make the rent, forcing them to move constantly. By eighteen, Canales had attended 26 schools.

Over the course of his childhood, Canales both suffered and witnessed horrific violence and sexual assault. At six, he saw a man gunned down in the street. About that time, the violence came home when his mother married Carlos Espinoza. For the next six years, Espinoza physically and sexually abused Canales and his mother and younger sister. Espinoza regularly beat Canales, stripping him naked, dragging him by the ears, and then whipping him with a belt. Canales's sister recalled: "I remember seeing Andy [Canales] 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." During some of those naked beatings, Espinoza tried to rape Canales, who was still a child. His mother never intervened to protect him. Canales also witnessed Espinoza abusing and raping his pre-pubescent sister. When Canales tried to protect her, Espinoza beat him.

At eight, Canales started shining shoes and selling newspapers on the streets of Chicago to earn money for his family. There, he was forced to join the Latin Kings, a powerful gang in his neighborhood. At nine or ten, Canales was shot at during a drive-by shooting. At twelve, he was stabbed.

After his mother left his stepfather and moved to Texas, Canales was passed between his mother and father and experienced periods of homelessness. At thirteen or fourteen, Canales was sent to live with

1. *Sears v. Upton*, 561 U.S. 945, 951, 130 S.Ct. 3259, 177 L.Ed.2d 1025 (2010).

his father in Houston only to be abandoned there when his father moved to Laredo. Arrested at thirteen, Canales spent time in juvenile detention and was an alcoholic by fourteen. He later became addicted to heroin.

When Canales was sixteen, his mother moved in with another alcoholic and abusive boyfriend, John Ramirez. Ramirez sexually abused the women in the family and reported Canales for stealing a check from him. Canales's sister, Elizabeth, said, "I think John Ramirez wanted Andy [Canales] out of the way and that is why he pursued Andy's prosecution for the stolen check. He wanted access to my mom and Gabriela [Canales's half-sister] and me. Andy was protective of all of us." Canales went to prison for the stolen check and then later for two sexual assault convictions.

Paroled for these offenses, Canales started to build a life with help from a girlfriend. But when his mother suffered a brain aneurysm that left her without speech or motor function, Canales, "went off the deep end," gave into drugs, lost parole, and returned to prison.

At the time of the instant offense, Canales suffered from persistent depressive disorder, other mental illnesses, and complex PTSD for which he has never been treated. He also developed a life-threatening heart condition in prison, suffering three or four heart attacks. Placed on blood thinners that prevent normal clotting, Canales bruised easily and, if pricked, would bleed for hours. Because of his heart condition and the blood thinners, Canales presented as unable to defend himself, leaving him vulnerable to violence and exploitation. When the Texas Syndicate ordered a hit on Canales, he was desperate for protection. His cellmate, Bruce Richards, saved him by securing his admission to the Texas Mafia, another prison gang. He was now under the Texas Mafia's control, dependent on the gang to protect him from certain death at the hands of the Texas Syndicate. When the Mafia ordered the murder of Gary Dickerson, a prisoner blackmailing the gang, Canales complied. Then, when Richards ordered Canales and another inmate to write to Bruce Innes and exaggerate their role in Dickerson's murder, Canales again complied. Richards later explained: "If [Canales] refused to do what I told him[,] I would have sent him back to the Texas Syndicate, and he would be killed. I saved his life and he owed me."

II

The State urges that we cannot consider Canales's mitigation evidence at all pursuant to § 2254(e)(2), which bars petitioners who "fail[ ] to develop" the record in state court from introducing new evidence in federal court.[2] The State had asserted its § 2254(e)(2) objection before another panel of this Court, which declined to address it.[3] But on remand to the district court, the State did not raise the issue despite ample time and several opportunities.[4] To the

2. 28 U.S.C. § 2254(e)(2).

3. *Canales v. Stephens*, 765 F.3d 551, 571 n.2 (5th Cir. 2014).

4. In the district court, when Canales argued that § 2254(e)(2) did not bar the district court from holding an evidentiary hearing, the State failed to rebut the argument or even argue that the court could not admit new evidence. After the district court mistakenly denied Canales's request, he moved for reconsideration, presenting the State with another missed opportunity to raise (e)(2). The district court granted Canales's motion, and for the next twelve months, his witnesses conducted investigations and the district court considered the parties' various motions. After the close of discovery, the State argued in a 22-page brief that Canales's new mitigation evidence did

contrary, it participated fully in shaping the evidentiary record. Only now, after the district court has expended funding and manpower on this case, does the State seek to revive its objection. The Majority assumes *arguendo* that the evidence of mitigation never presented to the jury is now properly before us. No assumption is necessary given the State's admitted failure to raise this issue in the district court.

The State offers no explanation for its election to fully participate in the district court in the development of evidence. Instead, it contends that § 2254(e)(2) cannot be waived or, alternatively, can only be waived expressly. First, it analogizes the subsection to § 2254(d)(1), which is a standard of review and therefore cannot be "waive[d], concede[d], or abandon[ed]."[5] As § 2254(e)(2) provides no standard of review, the State's analogy does not persuade. Next, the State claims that (e)(2) cannot be waived because it contains mandatory language.[6] But as the Supreme Court has made clear, an objection based on a "mandatory" rule that is not timely raised is forfeited unless it is jurisdictional.[7] Section 2254(e)(2) merely sets the conditions under which a federal habeas court may hear new evidence.[8] It does not control the kinds of cases that a federal court may hear or the persons over whom a federal court may exercise authority. It may be forfeited.[9] I also see no basis for applying a heightened waiver standard to § 2254(e)(2). Congress knew how to require an express waiver;[10] it simply chose not to do so here. One may see AEDPA as protecting the sovereign role of the state, an expression of federalism. Yet so does the Eleventh Amendment—a protection enshrined in our Constitution—and it is settled that a state can by its litigation conduct relinquish its sovereign immunity.[11]

The State also argues that the Court should consider § 2254(e)(2) *sua sponte*. Such exercises of discretion are not automatic but "must in every case be informed by ... balancing the federal interests in comity and judicial economy against the petitioner's substantial interest in jus-

not establish prejudice—but nowhere did it claim that the district court was barred from reviewing that evidence.

5. *Ward v. Stephens*, 777 F.3d 250, 257 n.3 (5th Cir. 2015), *abrogated on other grounds by Ayestas v. Davis*, —— U.S. ——, 138 S. Ct. 1080, 200 L.Ed.2d 376 (2018); *see also Langley v. Prince*, 926 F.3d 145, 162 (5th Cir. 2019) (en banc) (holding that § 2254(d)(1) cannot be waived by the parties).

6. Even when a claim-processing rule is written in mandatory language, it is ''mandatory'' only in the sense that a court must enforce the rule if properly raised by a party. *Fort Bend Cty. v. Davis*, —— U.S. ——, 139 S. Ct. 1843, 1849, 204 L.Ed.2d 116 (2019).

7. *United States v. Kwai Fun Wong*, 575 U.S. 402, 409, 135 S.Ct. 1625, 191 L.Ed.2d 533 (2015) (quoting *Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 153, 133 S.Ct. 817, 184 L.Ed.2d 627 (2013)).

8. *Fort Bend*, 139 S. Ct. at 1849.

9. The State does not offer and I have not found any case holding that § 2254(e)(2) can never be waived. The Sixth Circuit's decision in *Moore v. Mitchell* comes closest, but its holding is cabined to cases where admitting new evidence would change the standard of review. 708 F.3d 760 (6th Cir. 2013).

10. *See, e.g.*, 28 U.S.C. § 2254(b)(3) (''A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, *expressly waives* the requirement.'') (emphasis added).

11. *Lapides v. Bd. of Regents of Univ. Sys. of Ga.*, 535 U.S. 613, 621, 122 S.Ct. 1640, 152 L.Ed.2d 806 (2002) (holding that to ensure that states do not gain ''unfair tactical advantages,'' a state's voluntary removal to federal court waives sovereign immunity).

tice."[12] The interest in comity wanes when a state participates in discovery and only raises an objection on appeal. So too when a state makes a tactical decision to develop the record but later objects to its consideration. Comity does not require federal courts to reward a state's carelessness or gamesmanship.[13] As the State offers no explanation for its failure here, comity offers it little aid. For the same reasons, judicial economy and the interest of justice are undermined by the failure to object until significant time had elapsed and the district court and parties had incurred substantial costs. The federal government alone incurred over $55,000 in direct expenses. We ought not allow the State to run from the evidence it participated in developing. We should conclude that the State has forfeited its objection under § 2254(e)(2).

III

A

In capital cases, "the fundamental respect for humanity underlying the Eighth Amendment" requires the jury to make an individualized assessment of whether death is warranted.[14] "[E]vidence about the defendant's background and character is relevant" to this assessment "because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse."[15] A process affording no significance to such evidence treats the convicted defendant "not as [a] uniquely individual human being[ ], but as [a] member[ ] of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death."[16]

Consistent with these constitutional requirements, a Texas jury may impose the death penalty only if it unanimously finds the absence of "sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment without parole rather than a death sentence be imposed."[17] In so doing, the jury must "tak[e] into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant."[18]

Contending that trial counsel presented almost no mitigating evidence, Canales asserts an ineffective assistance claim through § 2254. Because the state habeas court dismissed Canales's claim as successive,[19] AEDPA deference does not apply and we review *de novo* Canales's allegation

12. *Magouirk v. Phillips*, 144 F.3d 348, 360 (5th Cir. 1998).

13. *See, e.g., Granberry v. Greer*, 481 U.S. 129, 132, 107 S.Ct. 1671, 95 L.Ed.2d 119 (1987) (declining "to adopt a rule that would permit, and might even encourage, the State to seek a favorable ruling on the merits in the district court while holding [its] defense in reserve for use on appeal if necessary").

14. *Penry v. Lynaugh*, 492 U.S. 302, 316, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989) (quoting *Woodson v. North Carolina*, 428 U.S. 280, 304, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976) (plurality opinion)).

15. *Id.* at 319, 109 S.Ct. 2934 (quoting *California v. Brown*, 479 U.S. 538, 545, 107 S.Ct. 837, 93 L.Ed.2d 934 (1987) (O'Connor, J., concurring)).

16. *Woodson*, 428 U.S. at 304, 96 S.Ct. 2978.

17. TEX. CODE CRIM. PROC. ANN. art. 37.071. § 1(e)(1), (f) (West 2020).

18. *Id.* art. 37.071. § 1(e)(1).

19. *Ex parte Canales*, No. WR-54,789-02, 2008 WL 383804 (Tex. Crim. App. Feb. 13, 2008).

of ineffective assistance.[20] Having already shown cause, Canales need only show prejudice, "a reasonable probability that, but for [trial] counsel's unprofessional errors, the result of the proceeding would have been different."[21] A probability is reasonable if it is "sufficient to undermine confidence in the outcome."[22] A prisoner need not establish that "counsel's deficient conduct more likely than not altered the outcome in the case."[23]

As a Texas jury may impose the death penalty only by a unanimous vote, a petitioner raising an ineffective assistance claim must show that, but for counsel's deficiency, "there [is] a reasonable probability that at least one juror could have determined that because of the defendant's reduced culpability, death [is] not an appropriate sentence."[24] That is, there need only be a reasonable probability of one of the twelve jurors "harbor[ing] a reasonable doubt" that Canales deserved the death penalty.[25] This is settled. A six-justice majority of the Supreme Court recently made plain that the bar for showing prejudice in these circumstances is low: "[B]ecause [the defendant's] death sentence required a unanimous jury recommendation, prejudice here requires *only* 'a reasonable probability that at least one juror would have struck a different balance' regarding [his] 'moral culpability.' "[26]

"In assessing prejudice, we reweigh the evidence in aggravation against the totality of available mitigating evidence."[27] This is necessarily a "probing and fact-specific analysis,"[28] in which we look to Supreme Court precedent for guidance, while recognizing that it does not yield a mandatory list of mitigating facts for establishing prejudice.[29]

In *Williams v. Taylor*, Williams was sentenced to death for robbery and murder.[30] After Harris Stone refused to lend him a "couple of dollars," Williams killed Stone with a mattock.[31] "The murder . . . was just one act in a crime spree that lasted most of Williams's life."[32] In the

20. *See Roberts v. Thaler*, 681 F.3d 597, 603 (5th Cir. 2012).

21. *Strickland v. Washington*, 466 U.S. 668, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *see also Canales*, 765 F.3d at 569 (finding cause due to sentencing counsel's failure to "hire a mitigation specialist, interview family members or others who knew him growing up, or 'collect any records or any historical data on his life' ").

22. *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052.

23. *Id.* at 693, 104 S.Ct. 2052.

24. *Kunkle v. Dretke*, 352 F.3d 980, 991 (5th Cir. 2003) (internal quotation marks and citation omitted).

25. *Buck v. Davis*, ––– U.S. ––––, 137 S. Ct. 759, 765, 197 L.Ed.2d 1 (2017).

26. *Andrus v. Texas*, ––– U.S. ––––, ––––, 140 S.Ct. 1875, 207 L.Ed.2d 335 (2020) (per curiam) (emphasis added) (quoting *Wiggins v. Smith*, 539 U.S. 510, 537–38, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003)).

27. *Wiggins*, 539 U.S. at 534, 123 S.Ct. 2527.

28. *Sears*, 561 U.S. at 955, 130 S.Ct. 3259.

29. *See Andrus*, ––– U.S. at –––– n.6, 140 S.Ct. 1875 ("The concurring opinion [in the state court], moreover, 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.").

30. 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000).

31. *Id.* at 367–68, 120 S.Ct. 1495.

32. *Id.* at 418, 120 S.Ct. 1495 (Rehnquist, J., concurring in part and dissenting in part) (quoting *Williams v. Taylor*, 163 F.3d 860, 868 (4th Cir. 1998)).

months following that murder, Williams "brutally assaulted" an elderly woman, leaving her in a vegetative state.[33] He also "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."[34] Two expert witnesses also testified that "there was a 'high probability' that Williams would pose a serious continuing threat to society."[35] At sentencing, the jury learned that Williams sent the police an anonymous letter expressing remorse for killing Stone and assaulting the elderly woman. After the police traced the letter back to Williams, he confessed and cooperated with their investigation. Nevertheless, the jury concluded his remorse was not enough to overcome the significant aggravating evidence and sentenced him to death. Despite AEDPA deference and Williams's horrific crimes, the Supreme Court held that Williams was prejudiced by counsel's failure to introduce significant mitigating evidence and therefore entitled to a resentencing.[36] It explained that "the graphic description of Williams' childhood, filled with abuse and privation, or the reality that he was 'borderline mentally retarded,' might well have influenced the jury's appraisal of his moral culpability."[37]

In *Rompilla v. Beard*, Rompilla was sentenced to death for murdering James Scanlon. Rompilla beat Scanlon with a blunt object, stabbed him sixteen times in the neck and head, and set his dead body on fire—a murder by torture.[38] This was not Rompilla's first crime: He had also previously been convicted for assault and rape.[39] Despite his brutal crimes, the Court held that Rompilla was prejudiced by defense counsel's failure to uncover mitigation evidence that Rompilla's parents were alcoholics who fought violently and frequently beat him and his siblings. He also sustained brain damage and suffered extreme punishments, deprivation, and social isolation.[40] "This evidence," the Court held, "adds up to a mitigation case that bears no relation to the few naked pleas for mercy actually put before the jury [at sentencing]."[41] Because the mitigation evidence "might well have influenced the jury's appraisal of Rompilla's culpability," the Court held that he was entitled to resentencing.[42]

33. *Id.* at 368, 120 S.Ct. 1495 (majority opinion).

34. *Id.* at 418, 120 S.Ct. 1495 (Rehnquist, J., concurring in part and dissenting in part) (quoting *Williams*, 163 F.3d at 868); *see also id.* at 368, 120 S.Ct. 1495 (majority opinion).

35. *Id.* at 369-70, 120 S.Ct. 1495 (majority opinion).

36. *Id.* at 399, 120 S.Ct. 1495.

37. *Id.* at 398, 120 S.Ct. 1495.

38. 545 U.S. 374, 377–78, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005).

39. *Id.* at 383, 125 S.Ct. 2456.

40. *Id.* at 391–92, 125 S.Ct. 2456.

41. *Id.* at 393, 125 S.Ct. 2456.

42. *Id.* The Majority argues that this case offers Canales no assistance because Canales's jury, unlike Rompilla's, had "no 'benign conception' that Canales had a good childhood or normal mental capacity." In *Rompilla*, defense counsel failed to review materials provided by the prosecution, instead resting his mitigation statement on the defendant's own description of his childhood as normal. The Court concluded that if counsel had reviewed these materials, they "would have destroyed the benign conception of Rompilla's upbringing and mental capacity *defense counsel* had formed from talking with Rompilla." *Id.* at 391, 125 S.Ct. 2456 (emphasis added). Contrary to the Majority's implication, the Court was addressing the "benign conception" of defense counsel, not the jury.

B

Informed by these decisions, we turn to the mitigation evidence the jury in this case never heard. In short, the jury "heard almost nothing that would humanize [Canales] or allow them to accurately gauge his moral culpability."[43] Other than his crimes, the jury only knew that Canales was a gifted artist and a peacemaker in prison.[44] As a result—and it bears repeating—the prosecutor was able to argue in response: "Mitigating evidence folks—it is unbelievably sad—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 him is he's a good artist."

As in *Rompilla*, Canales's new mitigation evidence "adds up to a mitigation case that bears no relation to the few" pieces of evidence "actually put before the jury" at sentencing.[45] The jury did not learn that Canales had the "kind of troubled history" that the Supreme Court has repeatedly "declared relevant to assessing a defendant's moral culpability": a childhood plagued by poverty, neglect, addiction, sexual abuse, and persistent violence.[46] Nor did it learn that Canales's heart attacks and required medication left him vulnerable to the control of gang leaders, or that Canales would have been killed by a prison gang if he refused to assist in eliminating an enemy of the gang. Nor did it hear expert witness testimony that at the time of the offense, Canales suffered from complex PTSD that had not been treated. Nor did the jury hear from witnesses, such as Canales's sister or his former girlfriend, who would have humanized Canales and presented his good qualities.[47] For example, Canales's sister could have explained how, even as a child, Canales tried to protect her when her stepfather beat and sexually assaulted her. As she stated in her declaration:

> Andy was a throw away child. . . . He never had a chance. . . . If only my parents would have given Andy a little more attention, he could have grown up to have a family and a good life. He was always brave when I needed him to be. I will forever be grateful for that.

The Majority appears to frame the prejudice inquiry as a comparison of the facts here to the facts in *Wiggins* and *Williams*, faulting Canales's mitigating evidence for not neatly aligning with the evidence in those cases. This approach implicitly rests on the view that when assessing prejudice, we may go as far as *Wiggins* and *Williams* but no farther—a view the Supreme Court rejected in *Andrus*, observing that it has

43. *Porter v. McCollum*, 558 U.S. 30, 41, 130 S.Ct. 447, 175 L.Ed.2d 398 (2009).

44. *Canales*, 765 F.3d at 569.

45. *Rompilla*, 545 U.S. at 393, 125 S.Ct. 2456.

46. *Porter*, 558 U.S. at 41, 130 S.Ct. 447 (quoting *Wiggins*, 539 U.S. at 535, 123 S.Ct. 2527); *see, e.g.*, *Rompilla*, 545 U.S. at 390–93, 125 S.Ct. 2456 (granting relief where additional mitigation evidence regarding the defendant's abusive, impoverished childhood and alcohol-related causes of the defendant's juvenile incarcerations might have influenced the jury's evaluation of culpability); *Wiggins*, 539 U.S. at 535, 123 S.Ct. 2527 (recognizing the "powerful" mitigating effect of evidence that the defendant's childhood was rife with "severe privation and abuse," "physical torment, sexual molestation, and repeated rape"); *Williams*, 529 U.S. at 398–99, 120 S.Ct. 1495 (holding state court decision denying habeas relief was unreasonable, as new mitigation evidence, including "the graphic description of [the defendant's] childhood, filled with abuse and privation, or the reality that he was 'borderline mentally retarded,' might well have influenced the jury's appraisal of his moral culpability").

47. *See Porter*, 558 U.S. at 41, 130 S.Ct. 447 ("The judge and jury at Porter's original sentencing heard almost nothing that would humanize Porter[.]").

"never before equated what was sufficient in *Wiggins* with what is necessary to establish prejudice."[48] In *Wiggins*, the Court explained that it had granted relief in *Williams* despite weaker mitigating evidence and stronger aggravating evidence.[49] The Majority's effort to distinguish Canales's case from *Wiggins* truncates the necessary inquiry.

It is also significant that *Williams* did not attempt to cabin the array of prejudicial errors or otherwise corral their presentation. There, the Court, applying AEDPA deference, held the state habeas court's failure to find prejudice was not merely incorrect but also unreasonable.[50] That is, the evidence that Williams had been prejudiced was not a close call. It was so strong that no fair minded jurist could disagree.[51] It is also telling that although the Supreme Court has reversed lower court decisions granting habeas relief since *Williams*, the mitigation evidence in those cases did not approach the strength of the evidence in *Williams* or the strength of the evidence here.[52]

The Majority claims that Canales's mitigating evidence is "unlike the evidence presented in *Wiggins* or *Williams*." But its own account of these cases reveals the overwhelming similarities. Canales and Wiggins both suffered "severe privation and abuse ... while in custody of [an] alcoholic, absentee mother," "physical torment, sexual molestation, and repeated rape," and periods of homelessness. Similarly, Canales and Williams both had a "nightmarish childhood," coming from alcoholic families, receiving little schooling, and suffering neglect and severe and repeated beatings. In addition, both Canales and Williams had friends and family who could have testified that they had redeeming qualities.[53] Yet the Majority gives no weight to these parallels, focusing instead on mitigating factors present in those cases but not this one: remorse (present in *Williams*, but not *Wiggins*) and a lack of a violent record (present in *Wiggins*, but not *Williams*). In so doing, it "discount[s] to irrelevance the evidence of [an] abusive childhood," a practice the Supreme Court has characterized as "objectively unreasonable."[54]

The Majority's distinctions fail to move the needle. Comparing Canales to Wiggins, the Majority first criticizes Canales for having a record of violence. But it fails to acknowledge that the Supreme Court

48. *Andrus*, —— U.S. at —— n.6, 140 S.Ct. 1875.

49. *Wiggins*, 539 U.S. at 537–38, 123 S.Ct. 2527.

50. *Williams*, 529 U.S. at 399, 120 S.Ct. 1495.

51. *Harrington v. Richter*, 562 U.S. 86, 101, 131 S.Ct. 770, 178 L.Ed.2d 624 (2011).

52. *Cullen v. Pinholster* comes closest, but there the Court applied AEDPA deference. 563 U.S. 170, 202, 131 S.Ct. 1388, 179 L.Ed.2d 557 (2011). Plus, the Court expressly stated that *Rompilla* and *Williams* "offer[ed] no guidance," believing—mistakenly as to *Williams*—that those cases had "not appl[ied] AEDPA deference to the question of prejudice." *Id.*; *see Andrus*, —— U.S. at —— n.6, 140 S.Ct. 1875 (stating that *Williams* found "prejudice after applying AEDPA deference") (citing *Williams*, 529 U.S. at 399, 120 S.Ct. 1495).

53. *Williams*, 529 U.S. at 415–16, 120 S.Ct. 1495 (O'Connor, J., concurring) (faulting the state court for failing to consider the existence of "friends, neighbors and family of [Williams] who would have testified that he had redeeming qualities").

54. *Porter*, 558 U.S. at 41, 43, 130 S.Ct. 447 (holding it was unreasonable for the state habeas court to "discount" the mitigation evidence because the "kind of troubled history" involving abuse at the hands of a parent, alcoholism, and brain damage is "relevant to assessing a defendant's moral culpability").

granted Williams relief even though he had committed crimes more heinous than Canales's—a lifelong criminal spree, killing one man, stabbing another, "savagely beat[ing] an elderly woman" into a vegetative state, and setting a house on fire.[55] Similarly, Rompilla's murder by torture and convictions for rape and other violent felonies did not foreclose the Supreme Court's finding prejudice and ordering a resentencing.[56]

Next, comparing Canales to Williams, the Court faults Canales for failing to show remorse. But in *Williams*, the jury had already heard evidence of Williams's remorse when it sentenced him to death. It was not the remorse but defense counsel's failure to introduce other mitigating evidence, like Williams's horrifying childhood, that was prejudicial. The Supreme Court has never treated remorse as a signal marker for relief. Despite no finding of remorse in *Rompilla*, *Porter*, or *Wiggins*, the Supreme Court concluded that the defendants were entitled to relief.[57]

The Majority also declines to address the mitigating evidence present here but absent from *Williams*. A few of the difficulties in Canales's childhood but not Williams's bear mention: 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. No doubt Williams also had distinct childhood difficulties that cannot easily be equated with Canales's. But that 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.[58]

C

The Majority gives little weight to the evidence that Canales would have been murdered if he refused to assist in the killing or comply with the Texas Mafia's other orders. It appears to discredit the reach of Richards's sworn declaration, which states that Canales acted under threat of death. Richards was released from prison in 2012 and made his sworn declaration in 2016. The State failed to develop any evidence suggesting that Richards lied or even had a reason to lie. And in the eyes of the jury, Richards's credibility would have been enhanced when juxtaposed with that of Innes, a member of the prison cabal who turned for the State in exchange for a plea bargain. As it was, the jury heard only from Innes. The jury knew

55. *Williams*, 529 U.S. at 368, 120 S.Ct. 1495.

56. *Rompilla*, 545 U.S. at 377–78, 383, 125 S.Ct. 2456. Our Court has also granted relief in more severe cases. In *Walbey*, we granted relief even though the defendant had invaded a young woman's home, lay in wait for the woman to return, then bludgeoned her to death while the victim suffered for ten to fifteen minutes. After she died, he repeatedly stabbed her corpse with a butcher knife and barbecue fork. *See Walbey v. Quarterman*, 309 F. App'x 795 (5th Cir. 2009) (per curiam) (unpublished); *Walbey v. State*, 926 S.W.2d 307, 309 (Tex. Crim. App. 1996); *see also Gardner v. Johnson*, 247 F.3d 551, 554 (5th Cir. 2001) (granting relief where the defendant picked up two fourteen-year-old runaway hitchhikers and stabbed them multiple times, killing one and leaving the other wounded).

57. *Porter*, 558 U.S. at 41, 130 S.Ct. 447; *Rompilla*, 545 U.S. at 393, 125 S.Ct. 2456; *Williams*, 529 U.S. at 398, 120 S.Ct. 1495.

58. *Wiggins*, 539 U.S. at 534, 123 S.Ct. 2527; *see Andrus*, —— U.S. at —— n.6, 140 S.Ct. 1875 (reprimanding the state court for "assum[ing] that the prejudice inquiry ... turns principally on how the facts of [its] case compare to the facts in *Wiggins*").

nothing of Richards's testimony, defense counsel having failed to interview him.

Despite conceding that Richards and the Texas Mafia forced Canales to write the first letter, the Majority assumes he was free from their control when he wrote the other two letters.[59] But a reasonable juror could conclude that the Texas Mafia ordered Canales to write them. Having ordered Dickerson's murder, the prison gang had a strong motive to eliminate anyone suspected of cooperating with the State's investigation into the killing. Richards ordered Canales to write Innes, and, as even the State acknowledged, Canales would "do 'whatever it took' to retain" the Texas Mafia's protection. Canales's second letter also indicates that the Texas Mafia was participating in the efforts to kill Whited, a prisoner suspected of cooperating with the State. After requesting that Innes kill Whited, the letter states: "Now, I will also get with Mr. JR [the President of the Texas Mafia] on *the others who are involved* and can help get it [i.e., the efforts to kill Whited] all in order."[60]

The Majority also sees the coercion evidence to be "powerfully countered" by Canales's subsequent letters, citing *Wong v. Belmontes*.[61] There, if counsel had introduced additional mitigating evidence, the state would have countered with new aggravating evidence that Belmontes had committed another murder in cold blood and then bragged about it. The Court concluded that the new aggravating and mitigating evidence would cancel each other out and have no effect on the jury.[62] Here, there is only new mitigating evidence. The jury already learned about Canales's crimes, but never heard one word about the evidence that he acted under duress.[63] Ultimately, with competent counsel, the jurors could see his role in the killing and his subsequent boasting in a different light—as part of his continuing effort to appease the gang.

The Majority still urges that the coercion evidence is not enough because, unlike in *Williams*, it "does not show that '[Canales's] violent behavior was a compulsive reaction rather than the product of cold-blooded premeditation.' "[64] But Williams's "compulsive reaction" and the lack of premeditation were not central to the holding.[65] In *Porter*, the Supreme Court found that the defendant was prejudiced despite committing a murder that was "premedi-

59. The Majority claims that when "Canales attempted to discount these letters in his COA request," "[h]e stated that Innes had asked him to write a confessional letter but made no mention of the other letters." In Canales's first COA request, he asserted a *Massiah* claim, arguing that Innes improperly solicited letters on behalf of the State. But this claim has no bearing on whether Richards forced Canales to write letters to Innes. And even if it is relevant, the Majority is mistaken: Canales's COA request addressed two letters. *See* Brief for Appellant at 28, *Canales v. Stephens*, 765 F.3d 551 (5th Cir. 2014) (No. 12-70034) ("Bruce Innes, the State's primary witness, was acting as an undercover state agent when he solicited *two* powerfully inculpatory notes from Canales.") (emphasis added).

60. *Canales*, 765 F.3d at 560.

61. 558 U.S. 15, 24–25, 130 S.Ct. 383, 175 L.Ed.2d 328 (2009).

62. *Id.*

63. The Majority states that we must consider all of the evidence. True enough, but as *Strickland* observes, "This is not a case in which the new evidence 'would barely have altered the sentencing profile presented to the sentencing judge.' " *Porter*, 558 U.S. at 41, 130 S.Ct. 447 (quoting *Strickland*, 466 U.S. at 700, 104 S.Ct. 2052).

64. *Williams*, 529 U.S. at 398, 120 S.Ct. 1495.

65. *Id.*

tated in a heightened degree."[66] And it concluded that the state court's denial of relief was not merely mistaken but objectively unreasonable.[67] While it is true that Canales was under the control of a prison gang instead of a neurological defect, both men were driven to violence by forces outside their control: a compulsive reaction for Williams, the menace of certain death for Canales.

Properly represented, Canales has a substantial argument that he killed only under the threat of his own death, and he is entitled to offer the jury an understanding of how he got to where he was and why he did what he did. The evidence of his tragic childhood and the threats to his life would do both.

IV

Capital cases bifurcate guilt and punishment with both phases before a jury. These are separate inquiries, mandated by the unique gravity of "death by public authority" and "the fundamental respect for humanity underlying the Eighth Amendment."[68] The jury first determines whether the defendant committed the charged crimes. If guilt is found, the trial moves to the second stage, where the jury now asks, "Who is this person we have convicted?" At the least, the convicted defendant will be held accountable by a life sentence. But to determine if death is warranted, the jury requires a full accounting of the defendant's life, covering not only his crimes but also the forces that brought him to this day. This is no abstract watery-eyed inquiry. It is demanded by the mixed question of morality and fact posed to the jury. The jury must make "a reasoned moral response to the defendant's background, character, and crime."[69] But deprived of the defendant's life story, the jury cannot see the defendant as a "uniquely individual human being," let alone make a "reasoned moral response."[70] For that reason, we cannot count as just a system that tolerates failure to bring to the jury a substantial mitigation defense when one is available.

Here, incompetent counsel indisputably deprived Canales of the opportunity to give the jury insight into his harrowing background—the heart of his defense. The jury learned only that Canales was a good artist. It was never presented with the voluminous mitigating evidence now before this Court and could only assume that there was none, as the prosecution so powerfully argued. Had the jury heard this evidence, there is a reasonable probability at least one of its members would have found the death penalty unwarranted.

The decision to sentence a defendant to death is a difficult one that defies straightforward analogical reasoning, quibbling distinctions, and easy legal conclusions. To these eyes, it inevitably reflects a jury's gut-level hunch about what is just, given the totality of the circumstances. Such a decision is best left to the collective wisdom of a jury fully apprised of the facts. A reflection of the considered judgment of our constitutional system, the jurors are in the box as citizens, laymen representing a cross-section of the community. The federal bench is no substitute. We bring an insular perspective, reflecting our unique

66. *See Porter,* 558 U.S. at 42, 130 S.Ct. 447.

67. *Id.*

68. *Lockett v. Ohio,* 438 U.S. 586, 605, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978); *id.* at 604, 98 S.Ct. 2954 (quoting *Woodson,* 428 U.S. at 304, 96 S.Ct. 2978).

69. *Penry,* 492 U.S. at 319, 109 S.Ct. 2934 (emphasis omitted) (quoting *Brown,* 479 U.S. at 545, 107 S.Ct. 837).

70. *Id.*; *Woodson,* 428 U.S. at 304, 96 S.Ct. 2978.

training, professional values, and office—a perspective distinct from that of the accountant, the architect, and the physician, to say nothing of the taxi driver, the cashier, and the plumber. Able as federal judges may be, they live in a world distant from the realities of poverty with its attending consequences—inapt representatives of the cross-section of the community from which this judgment of basic morality is drawn.

As capital punishment has traveled its long and tortuous path, we have kept faith in the outcome of its attending adversarial process of trial by jury. We do so ever mindful that this process can be no better than the weakest leg of the courtroom—judge, prosecution, defense counsel. We cannot leave standing outcomes flawed by a failure of any of these legs. As the demand for the strength of this trinity is inherent in the task our government delegates to twelve citizens—a judgment discerning a blend of fact and morality—the mitigation case is the battleground of capital trials. Defense counsel here wholly failed in his duty to present such a case. Our adversarial system works only when it is adversarial. I dissent.

UNITED STATES of America, Plaintiff-Appellee,

v.

Michael Lee BOURQUIN, Defendant-Appellant.

No. 19-1465

United States Court of Appeals, Sixth Circuit.

Argued: December 3, 2019

Decided and Filed: July 17, 2020

Background: Defendant pled guilty in the United States District Court for the Eastern District of Michigan, Thomas L. Ludington, J., to maliciously conveying false information concerning attempt to kill, injure, or intimidate former federal prosecutor, and he appealed.

Holdings: The Court of Appeals, Donald, Circuit Judge, held that:

(1) government failed to present sufficient evidence to support four-level enhancement based on substantial expenditure of funds to respond to offense, and

(2) government was precluded from presenting additional evidence on remand to meet its burden in support of enhancement.

Vacated and remanded.

1. Criminal Law ⚿1134.75

Court of Appeals reviews district court's calculation of advisory Sentencing Guidelines as part of its obligation to determine whether district court imposed sentence that is procedurally unreasonable.

2. Criminal Law ⚿1139, 1158.34

Court of Appeals reviews district court's legal conclusions regarding application of Sentencing Guidelines de novo and any findings of fact for clear error.

3. Criminal Law ⚿1139

De novo standard of review applies when district court's application of Sentencing Guidelines involves mixed questions of law and fact.

4. Sentencing and Punishment ⚿322.5

Government bears burden of proving that sentencing enhancement applies by preponderance of evidence.

5. Constitutional Law ⚿4705

Due process requires that some evidentiary basis beyond mere allegation in

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

MARSHALL DIVISION

ANIBAL CANALES, JR., #999366, Petitioner, v. DIRECTOR, TDCJ-CID, Respondent.	§ § § § § § § § §	CIVIL ACTION NO. 2:03cv69

REPORT AND RECOMMENDATION
OF UNITED STATES MAGISTRATE JUDGE

Petitioner Anibal Canales, Jr., a death row inmate confined in the Texas prison system, brings this petition for a writ of habeas corpus challenging his capital murder conviction pursuant to 28 U.S.C. § 2254. The petition was referred for findings of fact, conclusions of law and recommendations for the disposition of the case.

Procedural History

Canales was sentenced to death in Bowie County, Texas, for the capital murder of Gary Dickerson, a fellow inmate. The conviction was affirmed on direct appeal. *Canales v. State*, 98 S.W.3d 690 (Tex. Crim. App.), *cert. denied*, 540 U.S. 1051 (2003). His initial application for a writ of habeas corpus filed in state court was denied on the merits. *Ex parte Canales*, No. WR-54,789-01 (Tex. Crim. App. March 12, 2003) (unpublished).

On November 29, 2004, Canales filed the present petition, raising thirteen separate grounds for relief. On March 23, 2007, the Court stayed the proceedings in order to give Canales the opportunity to present his unexhausted claims to the state court system. The Texas Court of Criminal Appeals ("TCCA") dismissed his subsequent state application as an abuse of the writ. *Ex parte Canales*, No. WR-54,789-02, 2008 WL 383804 (Tex. Crim. App. Feb. 13, 2008).

Canales returned to this Court. On August 24, 2012, the Court dismissed Canales's first, second, fifth, sixth, seventh, eighth, tenth, eleventh and twelfth claims with prejudice as procedurally defaulted and denied his third, fourth, ninth and thirteenth claims on the merits.

The United States Court of Appeals for the Fifth Circuit affirmed, in part, and reversed, in part, the decision of this Court. *Canales v. Stephens*, 765 F.3d 551 (5th Cir. 2014). The Fifth Circuit reversed this Court's decision regarding Canales's claim that he received ineffective assistance of counsel during sentencing. *Id.* at 559. This Court's decision regarding his remaining claims was affirmed. *Id.* The ineffective assistance of counsel during sentencing claim was remanded for further consideration in light of the Supreme Court's recent decisions in *Martinez v. Ryan*, 566 U.S. 1 (2012), and *Trevino v. Thaler*, 133 S. Ct. 1911 (2013).

Canales filed a brief regarding prejudice (Dkt. #222) on February 3, 2017. The Director filed a brief in response (Dkt. #228) on May 16, 2017. Canales filed a reply (Dkt. #229) on May 30, 2017.

Factual Background

The Fifth Circuit discussed the factual background of the offense as follows:

> On July 1, 1997, prison officials caught Larry "Dirty" Dickerson ("Dickerson"), an inmate at the Telford Unit of the Texas Department of Criminal Justice ("the Unit"), with contraband that belonged to another prison gang. Dickerson told another inmate, James Baker ("Baker"), that if Baker did not help him avoid retaliation from the gang whose contraband was stolen, Dickerson would tell prison officials about a large quantity of tobacco that was to be smuggled into the prison the next day.
>
> The next day, prison officials intercepted a shipment of contraband tobacco intended for Baker and the Texas Mafia, a prison gang. When the tobacco was intercepted, Dickerson was placed in administrative segregation. At his own request, he returned to the general population about a week later. Dickerson was found dead in his cell on July 11, 1997. Prison authorities initially concluded that Dickerson had died of natural causes. Only after conducting an autopsy did the State conclude that Dickerson had actually been strangled.
>
> The Texas Mafia had a financial stake in the intercepted contraband tobacco and arranged for Dickerson's murder. *See Canales,* 98 S.W.3d at 693. Canales, who was also an inmate in the Unit, was a member of the Texas Mafia. According to the magistrate judge's summary of the facts Canales and three other Texas Mafia members—William Speer ("Speer"), Jessie Barnes, and Michael Constantine—agreed to murder Dickerson. Canales and Speer went to Dickerson's cell, and while Canales held him down, Speer strangled him.

In 1998, Canales sent a letter to Bruce Innes ("Innes") in which he described Dickerson's murder and the Texas Mafia's interest in it. The letter was admitted into evidence at trial.

> Dirty [Dickerson] lit the smoke and we smoked. When the last hit was took he was down by the vent on his knee and Puff [Speer] behind and me at the door. Puff put the hold on him and I grabbed his arms. It went smooth! He lost consciousness right away and strugled (sic) for a little bit. I took the time to inform Him who we were and why he's going to die. Puff told him. . "Don't even fuck with the Texas–MAFIA in hell!!" Ha! Ha! Ha! Anyway . . . we made sure the dick sucker was dead and I declared the hit complete. We put his shit smelling ass in the top bunk and went quietly out the door. I went to the yard with minutes to spare!!

R. at 2355 (magistrate judge's summary of the facts) (alterations in original) (emphasis omitted).

Canales was indicted for capital murder in November 1999. In February 2000, he sent another letter to Innes. As the district court described the letter, "although written in code, [it] appeared to ask the gang to retaliate against Larry ("Iron-head") Whited because he believed Whited had informed prison authorities about his role in the killing." The district court also included the letter:

> Greetings, Sir . . As always, I come to you and all worthy with my utmost respects (sic)! I realize that I just recently sent you a letter but it has become imperative that I write you again, as you'll see . . First, I arrived at bowie county court on 2–7–00 and was arraigned for several charges. Mrs. Speers barnes and Constinetine were also there . . I must tell you that the worst has been done and its (sic) one of the charges (Main one actually) Glarinly (sic) absent was that iron headed fella.. He was not charged, which is good . . Eh? Seems that iron obes (sic) bend to the will of the state or not. I personally think so.
>
> Perhaps some effort can be used to throw that useless material to the scrap yard. . I can't stress how important this is. As you know Iron can be shaped into what you want it to look like and not in a good way sir!! If this can't be done then I'll need to ask for legal-assistance from other arenas . . And that's not to(sic) cool! Maximum effort Ace, Maximum!! Now, I will also get with Mr. JR on the others who are involved and can help get it all in order. Also, it's possible that a legal defense fund will be placed to help with council, (sic) legal material, clothes (for court) I'll have our attorney (who's a freeworld) get it together and put out flyers to all the best.
>
> We'll need ya'lls (sic) help fellas and I can't stress how important it is to file that writ of dismissal in this area on that pile of scrap! This in itself would be tremendous in assisting this legal case! That's how important it is . . . You take care fellas and put out the word that help is needed on this from all areas. . . . We continue the struggle,
>
> In solidarity
> Bigfoot..

R. at 2356–57 (emphasis omitted). This letter was also admitted into evidence at trial.

In April 2000, Canales wrote a third letter to another inmate, which read in part:

> Yeah bubba, I've been bummed a bit, just a small funk, no sweat . . A lot has to do with my case and its outcome or the way I see it. It's not good, and I've got a few making matters worse with their mouths! I was here with Tony Rice, I know him and his case and I know how it came about, I was in super seg with him there in 85 and then we were all on the same wing (L—Wing) in 86–87 and we got tight. I saw the downfall and how it came about and who was responsible! I've got snakes in the yard and it's getting worse from the crap coming outta the mouths of so-called homies. One dayroom call homeboy, and I'll get it all straight! Bet that! But what can I do? Nothink! Nada! Zero! Zip! 0! But, I'm a firm believer that what goes around, comes around! And that what you sow, you reap! So, I'll be content with justice in the end. TDC is not big, at all! So. . . . . .

R. at 2357. The State also introduced this letter into evidence at trial.

The 1998 letter was particularly important in the guilt phase, and the other two letters were used at punishment phase to help establish "future dangerousness," the special issue that led to his capital sentence. *Canales,* 98 S.W.3d at 699. The State also used several inmates as witnesses, including Innes (who allegedly started working as a State agent in 1999 or 2000), Richard Driver, Jr., and Doyle Hill.

Canales, 765 F.3rd at 559-61.

Punishment Evidence

1. State's Evidence

The State's evidence during the punishment phase of the trial consisted of documentary evidence, along with the testimony of Suzanne Hartbarger and Bruce Innis. The documentary evidence included the pen packets showing Canales's prior convictions. His prior convictions included a five year sentence for theft, *State v. Canales*, No. 84CR-0012 (290th Dist. Ct., Bexar County, Tex. April 23, 1984); a fifteen year sentence for sexual assault, *State v. Canales*, No. 83CR-3030 (290th Dist. Ct., Bexar County, Tex. March 12, 1984); and a fifteen year sentence for aggravated sexual assault, *State v. Canales*, No. 93-CR-2039-G (319th Dist. Ct., Nueces County, Tex. Jan. 6, 1995). The documentary evidence was admitted without objection. 12 RR 11.[1]

[1] "RR" refers to the reporter's record of the transcribed testimony during the trial, preceded by the volume number and followed by the page number. "CR" refers to the clerk's record on direct appeal, followed by the page number.

The victim of the Bexar County sexual assault testified that she was a student at San Antonio College at the time of the assault. Canales approached her in a parking lot near the college, showed her a badge, told her that he was a police officer, and said he was investigating a drug-sale in which she had been named. 12 RR 12-13. He told her that she was going to jail. She got out of her car, he got in the driver's side, and he said he would drive her to the jail. Rather than driving to the jail, Canales drove around. At some point in time, she realized that he was not a police officer. 12 RR 13. She told him that she was going to jump out of the car. 12 RR 14. He responded by telling her that he would "blow [her] away" if she jumped out of the car. *Id.* She believed that he might have a gun. After stopping the car, he walked her into the woods and raped her. 12 RR 16. She discussed the rape as follows:

> He raped me. He had intercourse with me, and at the time -- and at the time it was happening -- I had a cross in my hand and I was praying, 'To our Father' out loud so -- it happened to me, but I felt I was shielded by God, because when I looked at him as I was praying, I just saw like the devil in him.

12 RR 16. When he finished, he told her "you'd better not tell, or I'll kill you." 12 RR 17. He drove off in her car with her "car keys, address book, house keys, everything." *Id.* As for the effect of the rape, the victim made the following statement to the jury:

> It has made me bitter, and has weakened me, because I didn't think I would ever have to open up this door again, and I had to, and it has weakened me to somebody I don't want to be - didn't want to because, you know. It just made me a weaker person. I just feel weak, like I don't have any - I don't know how to explain it.

12 RR 17-18. On cross-examination, she testified that he called her house threatening to kill her if she testified against him. 12 RR 20.

Inmate Bruce Innis testified that Canales wrote to him shortly before the trial. Canales believed that Innis was still a member of the Texas Mafia prison gang, and he did not know that Innis was planning to testify against him. 12 RR 22. Innis testified that Canales had sent him a coded letter in which he asked Innis to arrange for the murder of inmate Larry Whited, whom Canales suspected of cooperating with investigators. 12 RR 23-25.

The record also shows that the victim of the aggravated sexual assault in the early 1990s did not testify. Among other reasons, it was explained that she did not communicate well in English. 12 RR 8.

2. Defense Evidence

The defense called seven witnesses on behalf of Canales, including inmates and officers, testifying that Canales was not troublesome and had an aptitude for art. The defense also elicited testimony that Canales's mother was dead and that he received few visits from family. It is noted that one inmate testified that he had seen Canales trying to stop inmates from fighting. 12 RR 56.

The docket sheet reveals that the jury started deliberating at 10:00 a.m. on November 1, 2000. CR at 12. A verdict was returned on that same day at 11:45. *Id.*

Discussion and Analysis

1. Procedural Requirements

The claim remanded for the Court's consideration concerns whether Canales received ineffective assistance of counsel at sentencing. In his federal habeas petition, Canales alleged that he received ineffective assistance of counsel because his attorneys failed to discharge their duty to conduct an investigation into his life, and thus failed to uncover powerful mitigating evidence. He argued that an effective investigation would have explained his desire to be part of a gang and uncovered evidence of his traumatic and neglectful childhood, his love and efforts to protect his sister, the love his family has for him, and the likelihood of mental disorders. The claim was based on *Wiggins v. Smith*, 539 U.S. 510 (2003). The Director argued that the claim was procedurally defaulted because Canales failed to raise the claim in his initial state habeas corpus proceedings. This Court stayed the present proceedings to give Canales the opportunity to present this and other unexhausted claims to the state court system for review. The TCCA dismissed Canales's subsequent application as an abuse of the writ pursuant to Tex. Code Crim. Proc. Art. 11.071 §5 (c). *Ex parte Canales*, 2008 WL 383804, at *1. Canales returned to this Court, which found that the *Wiggins* claim was procedurally barred and that Canales could not show actual innocence to avoid the default.

The resolution of this claim concerns complex procedural issues involving exhaustion of state remedies, procedural defaults and whether Canales can overcome the procedural default via *Martinez* and *Trevino*. The analysis of Canales's claims should begin with a discussion of the exhaustion requirement. State prisoners bringing petitions for a writ of habeas corpus are required to exhaust their state remedies before proceeding to federal court unless "there is an absence of available State corrective process" or "circumstances exist that render such process ineffective to protect the rights of the applicant." 28 U.S.C. § 2254(b)(1). In order to exhaust properly, a state prisoner must "fairly present" all of his claims to the state court. *Picard v. Connor*, 404 U.S. 270, 275 (1971). In Texas, all claims must be presented to and ruled upon the merits by the TCCA. *Richardson v. Procunier*, 762 F.2d 429, 432 (5th Cir. 1985). When a petition includes claims that have been exhausted along with claims that have not been exhausted, it is called a "mixed petition," and historically federal courts in Texas have dismissed the entire petition for failure to exhaust. *See, e.g., Galtieri v. Wainwright*, 582 F.2d 348, 355 (5th Cir. 1978) (en banc).

The exhaustion requirement, however, was profoundly affected by the procedural default doctrine that was announced by the Supreme Court in *Coleman v. Thompson*, 501 U.S. 722 (1991). The Court explained the doctrine as follows:

> In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.

Id. at 750. As a result of *Coleman*, unexhausted claims in a mixed petition are ordinarily dismissed as procedurally barred. *Fearance v. Scott*, 56 F.3d 633, 642 (5th Cir.), *cert. denied*, 515 U.S. 1153 (1995). *See also Finley v. Johnson*, 243 F.3d 215, 220 (5th Cir. 2001). Such unexhausted claims are procedurally barred because if a petitioner attempted to exhaust them in state court, they would be barred by Texas abuse-of-the-writ rules. *Fearance*, 56 F.3d at 642. The procedural bar may be overcome by demonstrating either cause and prejudice for the default or that a fundamental miscarriage of justice would result from the court's refusal to consider the claim. *Id.* (citing *Coleman*, 501 U.S. at 750-51). Dismissals pursuant to abuse of writ principles have regularly been upheld as a valid state

procedural bar foreclosing federal habeas review. *See Moore v. Quarterman*, 534 F.3d 454, 463 (5th Cir. 2008); *Hughes v. Quarterman*, 530 F.3d 336, 342 (5th Cir. 2008), *cert. denied*, 556 U.S. 1239 (2009); *Coleman v. Quarterman*, 456 F.3d 537, 542 (5th Cir. 2006), *cert. denied*, 549 U.S. 1343 (2007).

In the case at bar, the TCCA dismissed Canales's claim as an abuse of the writ without consideration of the merits of the claim pursuant to Tex. Code Crim. Proc. Art. 11.071 § 5(c). Until just recently, the claim would have undoubtedly been dismissed as procedurally barred in light of the decision by the TCCA dismissing it as an abuse of the writ. However, the Supreme Court opened the door slightly for a showing of cause and prejudice to excuse the default in *Martinez* and *Trevino*. In *Martinez*, the Supreme Court answered a question left open in *Coleman*: "whether a prisoner has a right to effective counsel in collateral proceedings which provide the first occasion to raise a claim of ineffective assistance at trial." 566 U.S. at 8 (citing *Coleman*, 501 U.S. at 755). The Court held:

> Where, under state law, claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding, a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance of counsel at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective.

Id. at 17.

The Supreme Court extended *Martinez* to Texas in *Trevino*. Although Texas does not preclude appellants from raising ineffective assistance of trial counsel claims on direct appeal, the Court held that the rule in *Martinez* applies because "the Texas procedural system - as a matter of its structure, design, and operation - does not offer most defendants a meaningful opportunity to present a claim of ineffective assistance of trial counsel on direct appeal." *Trevino*, 133 S. Ct. at 1921. The Court left it to the lower courts to determine on remand whether Trevino's claim of ineffective assistance of counsel was substantial and whether his initial state habeas attorney was ineffective. *Id.*

The Fifth Circuit subsequently summarized the rule announced in *Martinez* and *Trevino* as follows:

> To succeed in establishing cause to excuse the procedural default of his ineffective assistance of trial counsel claims, [petitioner] must show that (1) his underlying claims of ineffective assistance of trial counsel are "substantial," meaning that he "must

> demonstrate that the claim[s] ha[ve] some merit," *Martinez*, 132 S. Ct. at 1318; and (2) his initial state habeas counsel was ineffective in failing to present those claims in his first state habeas application. *See id.*; *Trevino*, 133 S. Ct. at 1921.

Preyor v. Stephens, 537 F. App'x 412, 421 (5th Cir. 2013), *cert. denied*, 134 S. Ct. 2821 (2014). "Conversely, the petitioner's failure to establish the deficiency of either attorney precludes a finding of cause and prejudice." *Sells v. Stephens*, 536 F. App'x 483, 492 (5th Cir. 2013), *cert. denied*, 134 S. Ct. 1786 (2014). The Fifth Circuit reaffirmed this basic approach in *Reed v. Stephens*, 739 F.3d 753, 774 (5th Cir.), *cert. denied*, 135 S. Ct. 435 (2014). The Fifth Circuit has also reiterated that a federal court is barred from reviewing a procedurally defaulted claim unless a petitioner shows both cause and actual prejudice. *Hernandez v. Stephens*, 537 F. App'x 531, 542 (5th Cir. 2013), *cert. denied*, 134 S. Ct. 1760 (2014). To show actual prejudice, a petitioner "must establish not merely that the errors at his trial created a *possibility* of prejudice, but that they worked to his *actual* and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." *Id.* (citations omitted) (emphasis in original).

2. Cause

The Fifth Circuit discussed the issue of cause in the present case as follows:

> We turn next to Canales's claim that he received ineffective assistance of trial counsel during the sentencing phase of his trial. Canales argues his trial counsel was ineffective because he failed to thoroughly investigate and present mitigation evidence. He also argues that the performance of his state habeas counsel fell below an objective standard of reasonableness. Canales's state habeas counsel did not conduct a mitigation investigation due to a misunderstanding of funding for habeas investigations: his state habeas counsel thought his funding was capped at $25,000, and so he only dedicated $2,500 to investigation—and most of that went to issues related to innocence. Both parties agree, however, that funding was not capped at $25,000.
>
> First, we agree with Canales that the performance of his state habeas counsel fell below an objective standard of reasonableness. The Supreme Court recently considered a similar situation in which trial attorney failed to request additional funding to replace an inadequate expert because of a mistaken belief about the amount of funding available. *Hinton v. Alabama,* —— U.S. ——, 134 S.Ct. 1081, 1088, 188 L.Ed.2d 1 (2014) (per curiam). The Court held that the trial lawyer's decisions "based not on any strategic choice but on a mistaken belief that available funding was capped [at a certain amount]" constituted deficient performance. *Hinton,* 134 S.Ct. at 1088–89. Similarly, Canales's state habeas counsel did not make a strategic choice to forego a mitigation investigation. Instead, he chose not to pursue that claim in any depth because he thought he could not receive any additional funding to pursue those claims. Accordingly, his performance fell below an objective standard of reasonableness.

Canales, 765 F.3d at 569. The Fifth Circuit went on to observe that the "question then becomes whether Canales can actually prove *prejudice* due to the deficient performance of his habeas counsel." *Id.* at 571 (emphasis in original). Thus, the case was remanded to this Court "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.*

3. Canales's New Mitigating Evidence

In order to give Canales the opportunity to prove prejudice, the Court approved his motions to retain Susan Herrero, Dr. Tora L. Brawley and Dr. Donna Maddox as experts. In his brief, Canales initially provided an overview of their findings. Their reports (Dkt. #220) reveal a family history of alcoholism, mental illness, and violence. Canales was born in Waukegan, Illinois on December 1, 1964. Canales's father suffered from alcoholism and drug abuse. He abandoned the family when Canales was 2 1/2 years old. His mother was left to live in poverty. She was an alcoholic and would beat her children. She often neglected them. There were times when the family was homeless. For a while, Canales lived with his maternal grandparents. His grandparents lived in poverty and were alcoholics. His mother married Carlos Espinoza in 1971. They lived in Chicago. His mother and Espinoza drank heavily. Espinoza physically and sexually abused Canales and his sister. Canales turned to the streets in order to make money to assist his family by shining shoes and selling newspapers at the young age of 8 or 9 years old. He subsequently joined the Latin Kings street gang. Gang leaders gave him alcohol before school. By 1974, Canales had been shot during a drive- by shooting. His sister, Elizabeth, recalled another incident where he was left all bloody in a ditch. His mother sent him to live with his father in Houston. His father subsequently moved to Laredo, but he did not take his son with him. Canales was abandoned in Houston. He was arrested at age 13 and spent time in juvenile detention. In 1978, his mother left Espinoza and moved the family, including Canales, to California. By age 18, Canales was living again in Houston with his mother, sisters, and John Ramirez, his mother's live-in boyfriend, another sexual predator. Canales was sent to prison for stealing a check from Ramirez. After being paroled, he was sent back to prison for two sexual assault offenses. While in prison, he joined the Texas Syndicate, a Latino prison gang.

Around 1992, after being paroled, Canales began dating Liz Hewitt, who lived at home and came from a close, normal Catholic family. Her parents welcomed him into the family and treated him as a son. His happiness came to an end, however, when his mother had an aneurysm, which caused her to lose speech and motor functions. Canales's life deteriorated, and he began using drugs. He was never the same, and his parole was revoked.

In 1995, Canales suffered the first of three or four myocardial infarctions and was placed on blood thinners and other medication. When the Texas Syndicate learned that he had a prior sexual assault conviction and had been a member of the Latin Kings, the gang placed a hit on him. Unable to defend himself because of his heart condition, Canales turned to another gang, the Texas Mafia. His cellmate, Bruce Richards, was in the Texas Mafia, and he arranged for Canales to transfer to that gang. The intercession by the Texas Mafia meant that Canales owed his life to the gang, and he was thus in a vulnerable position of being under their control. That was Canales's predicament at the time he murdered Gary Dickerson in 1997.

In addition to presenting an overview of the mitigating evidence that could have been offered during the punishment phase of the trial, Susan Herrero, a mitigation expert, provided a more in-depth analysis of Canales's life. She identified a number of significant factors impeding Canales's intellectual, cognitive, social, emotional and psychological development. These factors included prenatal exposure to alcohol and parental alcoholism, poverty and homelessness, neglect, parental rejection, abandonment, and physical and sexual abuse. Ms. Herrero observed that "parenting is modeled," and Canales grew up in an environment of alcoholics, who abused him. His step-father, Carlos Espinoza, beat him and tried to sexually assault him when he was just six years old.

Following his arrest but before sentencing, Canales lived with his cousin, Michele. Michele and her mother recalled Canales getting along well with Michele and her husband. Michele described Canales as a "good hearted person," and that he responded to the guidance and advice that she and her husband gave to him. Her mother described him as "a lost boy who just needed some guidance." Both Michele and her mother agreed that Ramirez pushed for Canales's prosecution to get him away from his family.

Ms. Herrero obtained evidence that Canales began drinking alcohol and smoking cigarettes when he was about nine or ten years old. Gang leaders gave him alcohol before school. He smoked marijuana while going to school in Houston. Drugs were readily available while he was confined in juvenile institutions. Ms. Herrero stated that he was an alcoholic by age fourteen. He was fired from a job working for a record company after he had an accident while driving the band members. He was reported being intoxicated and driving at 70 mph at the time of the accident.

Ms. Herrero observed that Canales's early school records reveal that he made progress and managed to remain in an appropriate grade level. Later records show that he was in sixth grade during the 1976-77 school year, when he should have been in the seventh grade. On October 28, 1978, he was in fifth grade in another school in Los Angeles, when he should have been in ninth grade. Other records show that he attended eighth grade in Houston in 1978-79. During that year, he was transferred to a seventh grade special education class for behavior disorder. He flunked out of Sam Houston High School on March 12, 1980. His Iowa Test of Basic Skills, administered in April 1975, while he was in fifth grade, revealed that he was reading on a third grade (3.0) level and his arithmetic was at a second grade (2.7) level. On October 13, 1976, his Wechsler Intelligence Scale for Children ("WISC") scores showed a Verbal Score of 85, a Performance Score of 101 and a Full Scale Score of 91. Later, at almost eighteen years of age at the Brownwood State School, he completed his GED. His scores were low in writing (16th percentile) and math (31st percentile).

Dr. Tora L. Brawley, a clinical psychologist, conducted an extended clinical interview and neuropsychological test battery, which uncovered mild deficits in frontal lobe functioning, in particular matrix reasoning and verbal fluency. The Court notes that she also found that his Full Scale IQ was 92 on the Wechsler Adult Intelligence Scale - Fourth Edition ("WAIS-IV") (Dkt. #220-2 at 2). She concluded that "Canales has had an improvement in overall cognitive functioning. He has been undergoing a good deal of 'self-teaching' during the 23 years of his incarceration. He appears to have benefitted significantly from the structured environment and the cessation of drug and alcohol use." *Id.* at 3.

Dr. Donna Maddox, a General and Forensic Psychiatrist, found that Canales has some problems with concentration and language as well as deficits in short term memory. She found that Canales suffered from Trauma and Stressor Related Disorder, consistent with PTSD. She came to the following conclusions from her evaluation:

1. Canales has a history of exposure to trauma beginning by latency age.
2. He has had multiple exposure to traumatic events during his life.
3. He meets the criteria for PTSD and developed a comorbid substance abuse and mood disorder.
4. Canales was incarcerated during his most recent offense.
5. At the time his health was poor.
6. Various documents note that his life had been threatened due to the nature of his prior charges and involvement in a gang.
7. He was suffering from mental illness at the time of his offense.
8. A recent study comparing prisoners who were involved in street gangs compared to prisoners who were not involved in street gangs reveal that prisoners who were involved in street gangs had more exposure to violence, symptoms of PTSD, paranoia, anxiety and forced behavioral control. Wood, Jane L. and Dennard, Sophie (2016) *Gang membership: links to violence exposure, paranoia, PTSD, anxiety and forced control of behavior in prison*. Psychiatry: Interpersonal and Biological Processes. ISSN 0033-2747. (In press)
9. Canales has never had treatment for his PTSD nor his mood symptoms.
10. Canales has a medical condition and prescribed medication (Metroprolol) which are associated with depression.

Dkt. #220-3 at 15-16.

In light of the reports provided by Susan Herrero, Dr. Tora L. Brawley, and Dr. Donna Maddox, Canales discusses how this new mitigation evidence could have been used to rebut the State's case for future dangerousness. He observes that the State's case during the penalty phase focused on his violent actions and threats while incarcerated and as a member of the Texas Mafia to establish future dangerousness. The case is made that the mitigating evidence of his mental illness, his life-threatening heart conditions and factors about gang life in the Texas prisons would have provided necessary context to understand the offense and to simultaneously diminish the strength of the State's case.

Canales places special emphasis on circumstances surrounding the murder of Gary Dickerson, particularly with respect to gang activities in the Texas prison system. He notes that he was a member of the Texas Syndicate gang while in prison in the mid-1980s. The Texas Syndicate gang included Mexicans, Whites and Chicanos. The Texas Mafia formed as a "cousin" to the Texas Syndicate. The

Texas Mafia had mostly white inmates and included many former Aryan Brotherhood gang members and other white supremacists. The Texas Mafia engaged in criminal money-making ventures such as selling tobacco and other contraband. The two gangs were close.

Canales returned to prison and became cellmates with Bruce Richards, a leader of the Texas Mafia. Canales was especially vulnerable after suffering a heart attack in 1995. He used nitroglycerine under his tongue. He bruised easily, and if he even pricked himself, he would bleed for hours. As a result, he avoided fights.

Around this time, Texas Syndicate leaders learned that Canales had been a member of the Latin Kings and had two prior sexual assault convictions. The Texas Syndicate ordered a hit on Canales. Canales confided in Bruce Richards about his problems with the Texas Syndicate. Because Richards had become friends with Canales, he decided to intervene. Richards approached the leader of the Texas Syndicate and offered to take Canales into the Texas Mafia. In turn, Richards owed the Syndicate a favor. This favor resulted in the murder of Gary Dickerson.

Gary Dickerson, another prisoner, learned about the tobacco-smuggling operation run by the Texas Mafia. He threatened to expose it if he did not receive payment. According to Richards, Dickerson was seen as a danger and had to be punished. After the Dickerson murder, Richards ordered Canales and Speers to write to Bruce Innes to exaggerate their role in the murder. Richards hoped to impress Innes to recruit him. Innes had money, and if he could recruit Innes, Richards could get his money. Richards also pointed out that Canales and Speers were new recruits and had to follow his orders. Richards explained: "If [Canales] refused to do what I told him I would have sent him back to the Texas Syndicate, and he would be killed. I saved his life and he owed me." Dkt. #220-1 at 72. Canales also understood that Doyle Hill, another leader of the largely white supremacist Texas Mafia, was after him. Facing danger from the Texas Syndicate and from a leader of the Texas Mafia and being "unable to fight a lick after his heart attack," "[Canales] was willing to do whatever it took to get these hits off of him to save his life." *Id.* at 76.

Canales argues that, in addition to providing context about the circumstances surrounding the offense, trial counsel could have presented expert evidence about the well-established security

measures for those sentenced to life imprisonment. According to Steve Martin, a former consultant with the Texas Attorney General's Office and a former Legal Counsel, General Counsel, and Executive Assistant with the Texas Department of Corrections, inmates receiving a life sentence are placed in the most secure housing, under security conditions "essentially identical to those on Texas' death row." Dkt. #7, Exhibit 30. Canales argues that a thorough investigation of his medical and psychological condition as well as an investigation of the context of the murders would have diminished the strength of the State's case and placed his involvement in the murder in a very different context.

4. Ineffective Assistance of Counsel

The standard for evaluating ineffective assistance of counsel claims was established by the Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1994). *Strickland* provides a two-pronged standard, and a petitioner bears the burden of proving both prongs. 466 U.S. at 687. Under the first prong, he must show that counsel's performance was deficient. *Id.* To establish deficient performance, he must show that "counsel's representation fell below an objective standard of reasonableness," with reasonableness judged under professional norms prevailing at the time counsel rendered assistance. *Id.* at 688. Under the second prong, the petitioner must show that his attorney's deficient performance resulted in prejudice. *Id.* at 687. To satisfy the prejudice prong, the habeas petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. An ineffective assistance of counsel claim fails if a petitioner cannot satisfy either the deficient performance or prejudice prong; a court need not evaluate both if he makes an insufficient showing as to either. *Id.* at 697. The *Strickland* standard applies to ineffective assistance of counsel claims in the context of *Martinez* and *Trevino*. *See Martinez*, 566 U.S. at 14.

Canales specifically argues that his attorneys were ineffective in failing to discharge their duty of conducting an investigation into his life; thus, they failed to uncover powerful mitigating evidence. The case law is abundantly clear that "in the context of a capital sentencing proceeding, defense counsel has the obligation to conduct a 'reasonably substantial, independent investigation' into

potential mitigating circumstances." *Neal v. Puckett*, 286 F.3d 230, 236-37 (5th Cir. 2002) (quoting *Baldwin v. Maggio*, 704 F.2d 1325, 1332-33 (5th Cir. 1983)), *cert. denied*, 537 U.S. 1104 (2003). *See also Woods v. Thaler*, 399 F. App'x 884, 891 (5th Cir. 2010), *cert. denied*, 563 U.S. 991 (2011). "Mitigating evidence that illustrates a defendant's character or personal history embodies a constitutionally important role in the process of individualized sentencing, and the ultimate determination of whether the death penalty is an appropriate punishment." *Riley v. Cockrell*, 339 F.3d 308, 316 (5th Cir.2003) (citation omitted), *cert. denied*, 543 U.S. 1056 (2005). In assessing whether counsel's performance was deficient, courts look to such factors as what counsel did to prepare for sentencing, what mitigation evidence he had accumulated, what additional "leads" he had, and what results he might reasonably have expected from those leads. *Neal*, 286 F.3d at 237. The reasonableness of counsel's investigation involves "not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." *Wiggins*, 539 U.S. at 527. "[C]ounsel should consider presenting . . . [the defendant's] medical history, educational history, employment and training history, family and social history, prior adult and juvenile correctional experience, and religious and cultural influences." *Id.* at 524 (citing ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases § 11.8.6, at 133 (1989)). The Supreme Court stressed in *Wiggins* that the "investigation into mitigating evidence should comprise efforts to discover *all reasonably available* mitigating evidence." *Id.* (emphasis in original). As was previously noted, the Fifth Circuit has already found that counsel's representation fell below an objective standard of reasonableness. *Canales*, 765 F.3d at 569.

The issue before the Court is prejudice. The Fifth Circuit remanded the case in order to determine "whether Canales can actually prove prejudice." *Canales*, 765 F.3d at 571. In reviewing the issue of prejudice at capital sentencing, courts must reweigh the quality and quantity of the available mitigating evidence, including that presented in post-conviction proceedings, against the aggravating evidence. *Williams v. Taylor*, 529 U.S. 362, 397-98 (2000); *Blanton v. Quarterman*, 543 F.3d 230, 236 (5th Cir. 2008), *cert. denied*, 556 U.S. 1240 (2009). "In evaluating that question, it is necessary to consider *all* the relevant evidence that the jury would have had before it if [the petitioner]

had pursued the different path - not just the mitigation evidence [the petitioner] could have presented, but also the . . . evidence that almost certainly would have come with it." *Wong v. Belmontes*, 558 U.S. 15, 20 (2009) (emphasis in original). After reweighing all the mitigating evidence against the aggravating, a court must determine whether the petitioner "has shown that, had counsel presented all the available mitigating evidence, there is a reasonable probability that a juror would have found that the mitigating evidence outweighed the aggravating evidence." *Gray v. Epps*, 616 F.3d 436, 442 (5th Cir. 2010) (quoting *Wiggins*, 539 U.S. at 534), *cert. denied*, 563 U.S. 905 (2011). "The likelihood of a different result must be substantial, not just conceivable." *Harrington v. Richter*, 562 U.S. 86, 112 (2011) (citing *Strickland*, 466 U.S. at 693). "[T]here is no prejudice when the new mitigating evidence 'would barely have altered the sentencing profile presented' to the decisionmaker." *Sears v. Upton*, 561 U.S. 945, 954 (2010) (citing *Strickland*, 466 U.S. at 700). The inquiry requires a court to engage in a "probing and fact-specific analysis." *Id.* at 955. The *Strickland* standard in analyzing the prejudice prong "necessarily requires a court to 'speculate' as to the effect of the new evidence - regardless of how much or how little mitigation evidence was presented during the initial penalty phase." *Id.* at 956.

In the present case, having reweighed all of the mitigating evidence against the aggravating evidence, the Court finds that the aggravating evidence far outweighs the mitigating evidence. The murder itself was cold and calculated. It was a heinous gang related murder of a prisoner by other prisoners. Gang leaders ordered Canales and others to kill the victim because the gang had a financial stake in contraband. Under Texas substantive law, the circumstances of the charged offense were sufficient to support an affirmative finding of future dangerousness. *White v. Dretke*, 126 F. App'x 173, 177 (5th Cir.), *cert. denied*, 546 U.S. 940 (2005). The aggravating evidence also revealed a habitual criminal, who had a conviction for theft and two convictions for sexual assault. The facts surrounding his Bexar County sexual assault conviction reveal that he threatened to kill the victim--at both the time of the rape and later while confined in jail awaiting trial. Furthermore, while waiting to go to trial in the present case, he asked inmate Bruce Innis to

arrange for the murder of inmate Larry Whited, whom Canales suspected of cooperating with investigators. The three letters written by Canales reveal a cold and callous murderer.

The mitigating evidence presented at trial showed that Canales was not troublesome and that he had an aptitude for art. There was testimony that his mother was dead and that he had few visits from family. One inmate testified that he had seen Canales try to stop inmates from fighting. The additional mitigating evidence presented during these proceedings show that Canales had prenatal exposure to alcohol and parental alcoholism, poverty and homelessness, neglect, parental rejection, abandonment, and physical and sexual abuse. His Full Scale IQ score on one test was 91 and 92 on another. He did not complete school, but completed his GED at Brownwood State School. The additional evidence delved further into his gang activities. At one time, he was a member of the Texas Syndicate, who placed a hit on him. He then joined the Texas Mafia and participated in the murder of Gary Dickerson. Prior to the murder, he had a heart attack and was dependent on the gang.

Canales argues that this additional evidence provides proper context to the circumstances surrounding the offense. The Director argues, in response, that the new mitigating evidence was "double-edged" and "[m]itigation, after all, may be in the eye of the beholder." *Martinez v. Cockrell*, 481 F.2d 249, 258 (5th Cir. 2007) (quoting *Burger v. Kemp*, 483 U.S. 776, 794 (1987)), *cert. denied*, 552 U.S. 1146 (2008). He further argues that even though the post-conviction evidence of poverty, abuse, and neglect is compelling, it does not outweigh the aggravating evidence in this case. In reply, Canales observes that the Fifth Circuit has rejected the notion that a case with substantial evidence in aggravation can never be mitigated. *Walbey v. Quarterman*, 309 F. App'x 795, 804 (5th Cir. 2009).

Viewed collectively, the reports presented by Ms. Herrero, Dr. Brawley and Dr. Maddox present a wealth of double-edged evidence, including evidence of gang violence, alcohol, drugs, and physical and sexual abuse. The Fifth Circuit has observed that evidence of "brain injury, abusive childhood, and drug and alcohol problems is all 'double-edged.' In other words, even if his recent claims about this evidence is true, it could all be read by the jury to support, rather than detract, from his future dangerousness claim." *Johnson v. Cockrell*, 306 F.3d 249, 253 (5th Cir. 2002), *cert. denied*,

538 U.S. 926 (2003). Canales's history of heart disease, while compelling, is also doubled-edged in that it contributed to his act of murdering the victim in order to be protected by the Texas Mafia.

Having reweighed all of the mitigating evidence, both old and new, against the aggravating evidence, the Court is of the opinion, and so finds, that there is *no* reasonable probability that a juror would have found that the mitigating evidence outweighed the aggravating evidence. The following conclusion by the Fifth Circuit is equally applicable to the present case: "the additional mitigating evidence was not so compelling, especially in light of the horrific facts of the crime, that the sentencer would have found a death sentence unwarranted." *Martinez*, 481 F.2d at 259. Canales has not proven prejudice. He has not shown that he is entitled to federal habeas corpus relief.

As a final matter, the Director appropriately argues that Canales's ineffective assistance of trial counsel claim remains procedurally barred in light of his inability to prove prejudice under *Coleman*. The Fifth Circuit held that "[t]o excuse the procedural default fully, Canales would then be required to prove that he suffered prejudice from the ineffective assistance of his trial counsel." *Canales*, 765 F.3d at 568 (citing *Martinez*, 566 U.S. at 18). Canales has not shown prejudice in order to excuse the procedural default. Overall, Canales has not shown prejudice under *Strickland* on the merits of his ineffective assistance of trial counsel claim and, concomitantly, has not shown prejudice in order to excuse the procedural default. Canales is not entitled to federal habeas corpus relief.

Certificate of Appealability

An appeal may not be taken to the court of appeals from a final order issued in a federal habeas corpus proceeding "unless a circuit justice or judge issues a certificate of appealability." 28 U.S.C. § 2253(c)(1)(A). Although Canales has not yet filed a notice of appeal, it is respectfully recommended that this Court, nonetheless, address whether he would be entitled to a certificate of appealability. *See Alexander v. Johnson*, 211 F.3d 895, 898 (5th Cir. 2000) (A district court may *sua sponte* rule on a certificate of appealability because "the district court that denies a petitioner relief is in the best position to determine whether the petitioner has made a substantial showing of a denial of a constitutional right on the issues before the court. Further briefing and argument on the very issues the court has just ruled on would be repetitious.").

A certificate of appealability may issue only if a petitioner has made a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). The Supreme Court fully explained the requirement associated with a "substantial showing of the denial of a constitutional right" in *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). In cases where a district court rejected a petitioner's constitutional claims on the merits, "the petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Id.*; *Henry v. Cockrell*, 327 F.3d 429, 431 (5th Cir. 2003). "When a district court denies a habeas petition on procedural grounds without reaching the petitioner's underlying constitutional claim, a COA should issue when the petitioner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Id.*

In this case, it is respectfully recommended that reasonable jurists could not debate the denial of Canales's § 2254 petition on procedural or substantive grounds, nor find that the issues presented are adequate to deserve encouragement to proceed. *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003) (citing *Slack*, 529 U.S. at 484). Accordingly, it is respectfully recommended that the Court find that Canales is not entitled to a certificate of appealability as to his claims.

Recommendation

It is accordingly recommended that the petition for a writ of habeas corpus be denied and the case be dismissed with prejudice. A certificate of appealability should be denied.

Within fourteen (14) days after receipt of the magistrate judge's report, any party may serve and file written objections to the findings and recommendations contained in the report.

A party's failure to file written objections to the findings, conclusions and recommendations contained in this Report within fourteen days after being served with a copy shall bar that party from *de novo* review by the district judge of those findings, conclusions and recommendations and, except on grounds of plain error, from appellate review of unobjected-to factual findings and legal conclusions accepted and adopted by the district court. *Douglass v. United Servs. Auto Ass'n.*, 79 F.3d

1415, 1430 (5th Cir. 1996) (*en banc*), *superseded by statute on other grounds*, 28 U.S.C. § 636(b)(1) (extending the time to file objections from ten to fourteen days).

SIGNED this 9th day of August, 2017.

ROY S. PAYNE
UNITED STATES MAGISTRATE JUDGE

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

ANIBAL CANALES, JR., #999366,	§	
	§	
Petitioner,	§	
	§	
VS.	§	**CIVIL ACTION NO. 2:03cv69**
	§	
DIRECTOR, TDCJ-CID,	§	
	§	
Respondent.	§	

ORDER OF DISMISSAL

Petitioner Anibal Canales, Jr., a death row inmate confined in the Texas Department of Criminal Justice, Correctional Institutions Division, filed the above-styled and numbered petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. He is challenging his Bowie County conviction and death sentence for capital murder.

On August 29, 2014, the United States Court of Appeals for the Fifth Circuit remanded Canales's claim that he received ineffective assistance of counsel during the sentencing phase of the trial. *Canales v. Stephens*, 765 F.3d 551, 559 (5th Cir. 2014). The claim was remanded for further consideration in light of the United States Supreme Court's recent decisions in *Martinez v. Ryan*, 566 U.S. 1 (2012), and *Trevino v. Thaler*, 569 U.S. ___, 133 S. Ct. 1911 (2013). The petition was referred to the Honorable Roy S. Payne, United States Magistrate Judge, who issued a Report and Recommendation (Dkt. #230) concluding that the petition should be denied. Canales has filed objections (Dkt. # 236). Having conducted a *de novo* review of the record and pleadings, the Court overrules Canales's objections, and adopts the Magistrate Judge's findings, conclusions, and recommendations for reasons set forth below.

Procedural History

Canales was sentenced to death for the capital murder of Gary Dickerson, a fellow inmate. The conviction was affirmed on direct appeal. *Canales v. State*, 98 S.W.3d 690 (Tex. Crim. App.), *cert. denied*, 540 U.S. 1051 (2003). His initial application for a writ of habeas corpus filed in state court was denied on the merits. *Ex parte Canales*, No. WR-54,789-01 (Tex. Crim. App. March 12, 2003) (unpublished).

On November 29, 2004, Canales filed the present petition, raising thirteen separate grounds for relief. On March 23, 2007, the Court stayed the proceedings in order to give Canales the opportunity to present his unexhausted claims to the state court system. The Texas Court of Criminal Appeals ("TCCA") dismissed his subsequent state application as an abuse of the writ. *Ex parte Canales*, No. WR-54,789-02, 2008 WL 383804 (Tex. Crim. App. Feb. 13, 2008).

Canales returned to this Court. On August 24, 2012, the Court dismissed Canales's first, second, fifth, sixth, seventh, eighth, tenth, eleventh and twelfth claims with prejudice as procedurally defaulted and denied his third, fourth, ninth and thirteenth claims on the merits. The Fifth Circuit remanded Canales's claim that he received ineffective assistance of counsel during the sentencing phase of the trial. *Canales*, 765 F.3d at 559. This Court's decision regarding his remaining claims was affirmed. *Id.*

Basis for Remand

The Fifth Circuit discussed the basis for remand as follows:

> We turn next to Canales's claim that he received ineffective assistance of trial counsel during the sentencing phase of his trial. Canales argues his trial counsel was ineffective because he failed to thoroughly investigate and present mitigation evidence. He also argues that the performance of his state habeas counsel fell below an objective standard of reasonableness. Canales's state habeas counsel did not conduct a mitigation investigation due to a misunderstanding of funding for habeas investigations: his state habeas counsel thought his funding was capped at $25,000, and so he only dedicated $2,500 to investigation—and most of that went to issues

> related to innocence. Both parties agree, however, that funding was not capped at $25,000.
>
> First, we agree with Canales that the performance of his state habeas counsel fell below an objective standard of reasonableness. The Supreme Court recently considered a similar situation in which trial attorney failed to request additional funding to replace an inadequate expert because of a mistaken belief about the amount of funding available. *Hinton v. Alabama*, —— U.S. ——, 134 S. Ct. 1081, 1088, 188 L.Ed.2d 1 (2014) (per curiam). The Court held that the trial lawyer's decisions "based not on any strategic choice but on a mistaken belief that available funding was capped [at a certain amount]" constituted deficient performance. *Hinton*, 134 S. Ct. at 1088–89. Similarly, Canales's state habeas counsel did not make a strategic choice to forego a mitigation investigation. Instead, he chose not to pursue that claim in any depth because he thought he could not receive any additional funding to pursue those claims. Accordingly, his performance fell below an objective standard of reasonableness.

Canales, 765 F.3d at 569. The Fifth Circuit went on to observe that the "question then becomes whether Canales can actually prove *prejudice* due to the deficient performance of his habeas counsel." *Id.* at 571 (emphasis in original). Thus, the case was remanded to this Court "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.*

Legal Standard

The claim remanded by the Fifth Circuit was not presented to the TCCA on direct appeal or in the initial state habeas corpus proceedings. It was one of the claims that Canales presented to the TCCA in his second application for a writ of habeas corpus, which was dismissed as an abuse of the writ pursuant to Tex. Code Crim. Proc. Art. 11.071 § 5 (c). *Ex parte Canales*, 2008 WL 383804, at *1. This Court accordingly dismissed the claim as procedurally defaulted.

The procedural default doctrine was announced by the Supreme Court in *Coleman v. Thompson*, 501 U.S. 722 (1991). The Court explained the doctrine as follows:

> In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the

> default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.

Id. at 750. Dismissals pursuant to abuse of writ principles have regularly been upheld as a valid state procedural bar foreclosing federal habeas review. *See Moore v. Quarterman*, 534 F.3d 454, 463 (5th Cir. 2008); *Hughes v. Quarterman*, 530 F.3d 336, 342 (5th Cir. 2008), *cert. denied*, 556 U.S. 1239 (2009); *Coleman v. Quarterman*, 456 F.3d 537, 542 (5th Cir. 2006), *cert. denied*, 549 U.S. 1343 (2007). The procedural bar may be overcome by demonstrating "cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrates that failure to consider the claims will result in a fundamental miscarriage of justice." *Coleman*, 501 U.S. at 750.

In the case at bar, the TCCA dismissed Canales's claim as an abuse of the writ without consideration of the merits of the claim pursuant to Tex. Code Crim. Proc. Art. 11.071 § 5(c). Until just recently, the claim would have undoubtedly been dismissed as procedurally barred in light of the decision by the TCCA dismissing it as an abuse of the writ. However, the Supreme Court opened the door slightly for a showing of cause and prejudice to excuse the default in *Martinez* and *Trevino*. In *Martinez*, the Supreme Court answered a question left open in *Coleman*: "whether a prisoner has a right to effective counsel in collateral proceedings which provide the first occasion to raise a claim of ineffective assistance at trial." 566 U.S. at 8 (citing *Coleman*, 501 U.S. at 755). The Court held:

> Where, under state law, claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding, a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance of counsel at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective.

Id. at 17.

The Supreme Court extended *Martinez* to Texas in *Trevino*. Although Texas does not preclude appellants from raising ineffective assistance of trial counsel claims on direct appeal, the Court held that the rule in *Martinez* applies because "the Texas procedural system - as a matter of its structure, design, and operation - does not offer most defendants a meaningful opportunity to present a claim of ineffective assistance of trial counsel on direct appeal." *Trevino*, 133 S. Ct. at 1921. The Court left it to the lower courts to determine on remand whether Trevino's claim of ineffective assistance of counsel was substantial and whether his initial state habeas attorney was ineffective. *Id.*

The Fifth Circuit subsequently summarized the rule announced in *Martinez* and *Trevino* as follows:

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

Preyor v. Stephens, 537 F. App'x 412, 421 (5th Cir. 2013), *cert. denied*, 134 S. Ct. 2821 (2014). "Conversely, the petitioner's failure to establish the deficiency of either attorney precludes a finding of cause and prejudice." *Sells v. Stephens*, 536 F. App'x 483, 492 (5th Cir. 2013), *cert. denied*, 134 S. Ct. 1786 (2014). The Fifth Circuit reaffirmed this basic approach in *Reed v. Stephens*, 739 F.3d 753, 774 (5th Cir.), *cert. denied*, 135 S. Ct. 435 (2014). The Fifth Circuit has also reiterated that a federal court is barred from reviewing a procedurally defaulted claim unless a petitioner shows both cause and actual prejudice. *Hernandez v. Stephens*, 537 F. App'x 531, 542 (5th Cir. 2013), *cert. denied*, 134 S. Ct. 1760 (2014). To show actual prejudice, a petitioner "must establish not merely that the errors at his trial created a *possibility* of prejudice, but that they

worked to his *actual* and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." *Id.* (citations omitted) (emphasis in original).

Discussion and Analysis

Canales is seeking relief pursuant to *Wiggins v. Smith*, 539 U.S. 510 (2003). The Supreme Court found that counsel's investigation into mitigating evidence "should comprise efforts to discover *all reasonably* available mitigating evidence." *Id.* at 524 (emphasis in original). The Fifth Circuit has already determined that counsel's representation fell below an objective standard of reasonableness on this issue. *Canales*, 765 F.3d at 569. The Fifth Circuit remanded the case in order to determine "whether Canales can actually prove prejudice." *Id*. at 571. In reviewing the issue of prejudice at capital sentencing, courts must reweigh the quality and quantity of the available mitigating evidence, including that presented in post-conviction proceedings, against the aggravating evidence. *Williams v. Taylor*, 529 U.S. 362, 397-98 (2000); *Blanton v. Quarterman*, 543 F.3d 230, 236 (5th Cir. 2008), *cert. denied*, 556 U.S. 1240 (2009). "In evaluating that question, it is necessary to consider *all* the relevant evidence that the jury would have had before it if [the petitioner] had pursued the different path - not just the mitigation evidence [the petitioner] could have presented, but also the . . . evidence that almost certainly would have come with it." *Wong v. Belmontes*, 558 U.S. 15, 20 (2009) (emphasis in original). After reweighing all the mitigating evidence against the aggravating, a court must determine whether the petitioner "has shown that, had counsel presented all the available mitigating evidence, there is a reasonable probability that a juror would have found that the mitigating evidence outweighed the aggravating evidence." *Gray v. Epps*, 616 F.3d 436, 442 (5th Cir. 2010), *cert. denied*, 563 U.S. 905 (2011).

1. State's Evidence During the Punishment Phase of the Trial

The State's evidence during the punishment phase of the trial consisted of documentary evidence, along with the testimony of Suzanne Hartbarger and Bruce Innis. The documentary evidence included the pen packets showing Canales's prior convictions. His prior convictions included a five year sentence for theft, *State v. Canales*, No. 84CR-0012 (290th Dist. Ct., Bexar County, Tex. April 23, 1984); a fifteen year sentence for sexual assault, *State v. Canales*, No. 83CR-3030 (290th Dist. Ct., Bexar County, Tex. March 12, 1984); and a fifteen year sentence for aggravated sexual assault, *State v. Canales*, No. 93-CR-2039-G (319th Dist. Ct., Nueces County, Tex. Jan. 6, 1995). The documentary evidence was admitted without objection. 12 RR 11.[1]

The victim of the Bexar County sexual assault testified that she was a student at San Antonio College at the time of the assault. Canales approached her in a parking lot near the college, showed her a badge, told her that he was a police officer, and said he was investigating a drug-sale in which she had been named. 12 RR 12-13. He told her that she was going to jail. She got out of her car, he got in the driver's side, and he said he would drive her to the jail. Rather than driving to the jail, Canales drove around. At some point in time, she realized that he was not a police officer. 12 RR 13. She told him that she was going to jump out of the car. 12 RR 14. He responded by telling her that he would "blow [her] away" if she jumped out of the car. *Id.* She believed that he might have a gun. After stopping the car, he walked her into the woods and raped her. 12 RR 16. She discussed the rape as follows:

> He raped me. He had intercourse with me, and at the time -- and at the time it was happening -- I had a cross in my hand and I was praying, 'To our Father' out loud so -- it happened to me, but I felt I was shielded by God, because when I looked at him as I was praying, I just saw like the devil in him.

[1]"RR" refers to the reporter's record of the transcribed testimony during the trial, preceded by the volume number and followed by the page number. "CR" refers to the clerk's record on direct appeal, followed by the page number.

12 RR 16. When he finished, he told her "you'd better not tell, or I'll kill you." 12 RR 17. He drove off in her car with her "car keys, address book, house keys, everything." *Id.* As for the effect of the rape, the victim made the following statement to the jury:

> It has made me bitter, and has weakened me, because I didn't think I would ever have to open up this door again, and I had to, and it has weakened me to somebody I don't want to be - didn't want to because, you know. It just made me a weaker person. I just feel weak, like I don't have any - I don't know how to explain it.

12 RR 17-18. On cross-examination, she testified that he called her house threatening to kill her if she testified against him. 12 RR 20.

Inmate Bruce Innis testified that Canales wrote to him shortly before the trial. Canales believed that Innis was still a member of the Texas Mafia prison gang, and he did not know that Innis was planning to testify against him. 12 RR 22. Innis testified that Canales had sent him a coded letter in which he asked Innis to arrange for the murder of inmate Larry Whited, whom Canales suspected of cooperating with investigators. 12 RR 23-25.

The record also shows that the victim of the aggravated sexual assault in the early 1990s did not testify. Among other reasons, it was explained that she did not communicate well in English. 12 RR 8.

2. <u>Defense Evidence During the Punishment Phase of the Trial</u>

The defense called seven witnesses in behalf of Canales, including inmates and officers. They testified that Canales was not troublesome and had an aptitude for art. The defense also elicited testimony that Canales's mother was dead and that he received few visits from family. It is noted that one inmate testified that he had seen Canales trying to stop inmates from fighting. 12 RR 56.

The docket sheet reveals that the jury started deliberating at 10:00 a.m. on November 1, 2000. CR at 12. A verdict was returned on that same day at 11:45. *Id.*

3. Canales's New Mitigating Evidence

In order to give Canales the opportunity to prove prejudice, the Court approved his motions to retain Susan Herrero, Dr. Tora L. Brawley and Dr. Donna Maddox as experts. In his brief, Canales initially provided an overview of their findings. Their reports (Dkt. #220) reveal a family history of alcoholism, mental illness, and violence. Canales was born in Waukegan, Illinois on December 1, 1964. Canales's father suffered from alcoholism and drug abuse. He abandoned the family when Canales was 2 1/2 years old. His mother was left to live in poverty. She was an alcoholic and would beat her children. She often neglected them. There were times when the family was homeless. For a while, Canales lived with his maternal grandparents. His grandparents lived in poverty and were alcoholics. His mother married Carlos Espinoza in 1971. They lived in Chicago. His mother and Espinoza drank heavily. Espinoza physically and sexually abused Canales and his sister. Canales turned to the streets in order to make money to assist his family by shining shoes and selling newspapers at the young age of 8 or 9 years old. He subsequently joined the Latin Kings street gang. Gang leaders gave him alcohol before school. By 1974, Canales had been shot during a drive-by shooting. His sister, Elizabeth, recalled another incident where he was left all bloody in a ditch. His mother sent him to live with his father in Houston. His father subsequently moved to Laredo, but he did not take his son with him. Canales was abandoned in Houston. He was arrested at age 13 and spent time in juvenile detention. In 1978, his mother left Espinoza and moved the family, including Canales, to California. By age 18, Canales was living again in Houston with his mother, sisters, and John Ramirez, his mother's live-in boyfriend, another sexual predator. Canales was sent to prison for stealing a check from Ramirez. After being paroled, he was sent back to prison for two sexual assault offenses. While in prison, he joined the Texas Syndicate, a Latino prison gang.

Around 1992, after being paroled, Canales began dating Liz Hewitt, who lived at home and came from a close, normal Catholic family. Her parents welcomed him into the family and treated him as a son. His happiness came to an end, however, when his mother had an aneurysm, which caused her to lose speech and motor functions. Canales's life deteriorated, and he began using drugs. He was never the same, and his parole was revoked.

In 1995, Canales suffered the first of three or four myocardial infarctions and was placed on blood thinners and other medication. When the Texas Syndicate learned that he had a prior sexual assault conviction and had been a member of the Latin Kings, the gang placed a hit on him. Unable to defend himself because of his heart condition, Canales turned to another gang, the Texas Mafia. His cellmate, Bruce Richards, was in the Texas Mafia, and he arranged for Canales to transfer to that gang. The intercession by the Texas Mafia meant that Canales owed his life to the gang, and he was thus in a vulnerable position of being under their control. That was Canales's predicament at the time he murdered Gary Dickerson in 1997.

In addition to presenting an overview of the mitigating evidence that could have been offered during the punishment phase of the trial, Susan Herrero, a mitigation expert, provided a more in-depth analysis of Canales's life. She identified a number of significant factors impeding Canales's intellectual, cognitive, social, emotional and psychological development. These factors included prenatal exposure to alcohol and parental alcoholism, poverty and homelessness, neglect, parental rejection, abandonment, and physical and sexual abuse. Ms. Herrero observed that "parenting is modeled," and Canales grew up in an environment of alcoholics, who abused him. His step-father, Carlos Espinoza, beat him and tried to sexually assault him when he was just six years old.

Following his arrest but before sentencing, Canales lived with his cousin, Michele. Michele and her mother recalled Canales getting along well with Michele and her husband. Michele described Canales as a "good hearted person," and that he responded to the guidance and advice that she and her husband gave to him. Her mother described him as "a lost boy who just needed some guidance." Both Michele and her mother agreed that Ramirez pushed for Canales's prosecution to get him away from his family.

Ms. Herrero obtained evidence that Canales began drinking alcohol and smoking cigarettes when he was about nine or ten years old. Gang leaders gave him alcohol before school. He smoked marijuana while going to school in Houston. Drugs were readily available while he was confined in juvenile institutions. Ms. Herrero stated that he was an alcoholic by age fourteen. He was fired from a job working for a record company after he had an accident while driving the band members. He was reported being intoxicated and driving at 70 mph at the time of the accident.

Ms. Herrero observed that Canales's early school records reveal that he made progress and managed to remain in an appropriate grade level. Later records show that he was in sixth grade during the 1976-77 school year, when he should have been in the seventh grade. On October 28, 1978, he was in fifth grade in another school in Los Angeles, when he should have been in ninth grade. Other records show that he attended eighth grade in Houston in 1978-79. During that year, he was transferred to a seventh grade special education class for behavior disorder. He flunked out of Sam Houston High School on March 12, 1980. His Iowa Test of Basic Skills, administered in April 1975, while he was in fifth grade, revealed that he was reading on a third grade (3.0) level and his arithmetic was at a second grade (2.7) level. On October 13, 1976, his Wechsler Intelligence Scale for Children ("WISC") scores showed a Verbal Score of 85, a Performance Score of 101 and a Full Scale Score of 91. Later, at almost eighteen years of age at the Brownwood

State School, he completed his GED. His scores were low in writing (16th percentile) and math (31st percentile).

Dr. Tora L. Brawley, a clinical psychologist, conducted an extended clinical interview and neuropsychological test battery, which uncovered mild deficits in frontal lobe functioning, in particular matrix reasoning and verbal fluency. The Court notes that she also found that his Full Scale IQ was 92 on the Wechsler Adult Intelligence Scale - Fourth Edition ("WAIS-IV") (Dkt. #220-2 at 2). She concluded that "Canales has had an improvement in overall cognitive functioning. He has been undergoing a good deal of 'self-teaching' during the 23 years of his incarceration. He appears to have benefitted significantly from the structured environment and the cessation of drug and alcohol use." *Id.* at 3.

Dr. Donna Maddox, a General and Forensic Psychiatrist, found that Canales has some problems with concentration and language as well as deficits in short term memory. She found that Canales suffered from Trauma and Stressor Related Disorder, consistent with PTSD. She came to the following conclusions from her evaluation:

1. Canales has a history of exposure to trauma beginning by latency age.
2. He has had multiple exposures to traumatic events during his life.
3. He meets the criteria for PTSD and developed a comorbid substance abuse and mood disorder.
4. Canales was incarcerated during his most recent offense.
5. At the time his health was poor.
6. Various documents note that his life had been threatened due to the nature of his prior charges and involvement in a gang.
7. He was suffering from mental illness at the time of his offense.
8. A recent study comparing prisoners who were involved in street gangs compared to prisoners who were not involved in street gangs reveals that prisoners who were involved in street gangs had more exposure to violence, symptoms of PTSD, paranoia, anxiety and forced behavioral control. Wood, Jane L. and Dennard, Sophie (2016) *Gang membership: links to violence exposure, paranoia, PTSD, anxiety and forced control of behavior in prison.* Psychiatry: Interpersonal and Biological Processes. ISSN 0033-2747. (In press)
9. Canales has never had treatment for his PTSD nor his mood symptoms.

10. Canales has a medical condition and prescribed medication (Metroprolol) which are associated with depression.

Dkt. #220-3 at 15-16.

In light of the reports provided by Susan Herrero, Dr. Tora L. Brawley, and Dr. Donna Maddox, Canales discusses how this new mitigation evidence could have been used to rebut the State's case for future dangerousness. He observes that the State's case during the penalty phase focused on his violent actions and threats while incarcerated and as a member of the Texas Mafia to establish future dangerousness. The case is made that the mitigating evidence of his mental illness, his life-threatening heart conditions and factors about gang life in the Texas prisons would have provided necessary context to understand the offense and to simultaneously diminish the strength of the State's case.

Canales places special emphasis on circumstances surrounding the murder of Gary Dickerson, particularly with respect to gang activities in the Texas prison system. He notes that he was a member of the Texas Syndicate gang while in prison in the mid-1980s. The Texas Syndicate gang included Mexicans, Whites and Chicanos. The Texas Mafia formed as a "cousin" to the Texas Syndicate. The Texas Mafia had mostly white inmates and included many former Aryan Brotherhood gang members and other white supremacists. The Texas Mafia engaged in criminal money-making ventures such as selling tobacco and other contraband. The two gangs were close.

Canales returned to prison and became cellmates with Bruce Richards, a leader of the Texas Mafia. Canales was especially vulnerable after suffering a heart attack in 1995. He used nitroglycerine under his tongue. He bruised easily, and if he even pricked himself, he would bleed for hours. As a result, he avoided fights.

Around this time, Texas Syndicate leaders learned that Canales had been a member of the Latin Kings and had two prior sexual assault convictions. The Texas Syndicate ordered a hit on Canales. Canales confided in Bruce Richards about his problems with the Texas Syndicate. Because Richards had become friends with Canales, he decided to intervene. Richards approached the leader of the Texas Syndicate and offered to take Canales into the Texas Mafia. In turn, Richards owed the Syndicate a favor. This favor resulted in the murder of Gary Dickerson.

Gary Dickerson, another prisoner, learned about the tobacco-smuggling operation run by the Texas Mafia. He threatened to expose it if he did not receive payment. According to Richards, Dickerson was seen as a danger and had to be punished. After the Dickerson murder, Richards ordered Canales and Speers to write to Bruce Innes to exaggerate their role in the murder. Richards hoped to impress Innes to recruit him. Innes had money, and if he could recruit Innes, Richards could get his money. Richards also pointed out that Canales and Speers were new recruits and had to follow his orders. Richards explained: "If [Canales] refused to do what I told him I would have sent him back to the Texas Syndicate, and he would be killed. I saved his life and he owed me." Dkt. #220-1 at 72. Canales also understood that Doyle Hill, another leader of the largely white supremacist Texas Mafia, was after him. Facing danger from the Texas Syndicate and from a leader of the Texas Mafia and being "unable to fight a lick after his heart attack," "[Canales] was willing to do whatever it took to get these hits off of him to save his life." *Id.* at 76.

Canales argues that, in addition to providing context about the circumstances surrounding the offense, trial counsel could have presented expert evidence about the well-established security measures for those sentenced to life imprisonment. According to Steve Martin, a former consultant with the Texas Attorney General's Office and a former Legal Counsel, General Counsel, and Executive Assistant with the Texas Department of Corrections, inmates receiving a life sentence

are placed in the most secure housing, under security conditions "essentially identical to those on Texas' death row." Dkt. #7, Exhibit 30. Canales argues that a thorough investigation of his medical and psychological condition as well as an investigation of the context of the murders would have diminished the strength of the State's case and placed his involvement in the murder in a very different context.

4. Ineffective Assistance of Counsel

The standard for evaluating ineffective assistance of counsel claims was established by the Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1994). *Strickland* provides a two-pronged standard, and a petitioner bears the burden of proving both prongs. 466 U.S. at 687. Under the first prong, he must show that counsel's performance was deficient. *Id.* To establish deficient performance, he must show that "counsel's representation fell below an objective standard of reasonableness," with reasonableness judged under professional norms prevailing at the time counsel rendered assistance. *Id.* at 688. Under the second prong, the petitioner must show that his attorney's deficient performance resulted in prejudice. *Id.* at 687. To satisfy the prejudice prong, the habeas petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. An ineffective assistance of counsel claim fails if a petitioner cannot satisfy either the deficient performance or prejudice prong; a court need not evaluate both if he makes an insufficient showing as to either. *Id.* at 697. The *Strickland* standard applies to ineffective assistance of counsel claims in the context of *Martinez* and *Trevino*. *See Martinez*, 566 U.S. at 14.

Canales specifically argues that his attorneys were ineffective in failing to discharge their duty of conducting an investigation into his life; thus, they failed to uncover powerful mitigating

evidence. The case law is abundantly clear that "in the context of a capital sentencing proceeding, defense counsel has the obligation to conduct a 'reasonably substantial, independent investigation' into potential mitigating circumstances." *Neal v. Puckett*, 286 F.3d 230, 236-37 (5th Cir. 2002) (quoting *Baldwin v. Maggio*, 704 F.2d 1325, 1332-33 (5th Cir. 1983)), *cert. denied*, 537 U.S. 1104 (2003). *See also Woods v. Thaler*, 399 F. App'x 884, 891 (5th Cir. 2010), *cert. denied*, 563 U.S. 991 (2011). "Mitigating evidence that illustrates a defendant's character or personal history embodies a constitutionally important role in the process of individualized sentencing, and the ultimate determination of whether the death penalty is an appropriate punishment." *Riley v. Cockrell*, 339 F.3d 308, 316 (5th Cir.2003) (citation omitted), *cert. denied*, 543 U.S. 1056 (2005). In assessing whether counsel's performance was deficient, courts look to such factors as what counsel did to prepare for sentencing, what mitigation evidence he had accumulated, what additional "leads" he had, and what results he might reasonably have expected from those leads. *Neal*, 286 F.3d at 237. The reasonableness of counsel's investigation involves "not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." *Wiggins*, 539 U.S. at 527. "[C]ounsel should consider presenting . . . [the defendant's] medical history, educational history, employment and training history, family and social history, prior adult and juvenile correctional experience, and religious and cultural influences." *Id.* at 524 (citing ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases § 11.8.6, at 133 (1989)). The Supreme Court stressed in *Wiggins* that the "investigation into mitigating evidence should comprise efforts to discover *all reasonably available* mitigating evidence." *Id.* (emphasis in original). As was previously noted, the Fifth Circuit has already found that counsel's representation fell below an objective standard of reasonableness. *Canales*, 765 F.3d at 569.

The issue before the Court is prejudice. The Fifth Circuit remanded the case in order to determine "whether Canales can actually prove prejudice." *Canales*, 765 F.3d at 571. In reviewing the issue of prejudice at capital sentencing, courts must reweigh the quality and quantity of the available mitigating evidence, including that presented in post-conviction proceedings, against the aggravating evidence. *Williams*, 529 U.S. at 397-98; *Blanton*, 543 F.3d at 236. "In evaluating that question, it is necessary to consider *all* the relevant evidence that the jury would have had before it if [the petitioner] had pursued the different path - not just the mitigation evidence [the petitioner] could have presented, but also the . . . evidence that almost certainly would have come with it." *Wong*, 558 U.S. at 20 (emphasis in original). After reweighing all the mitigating evidence against the aggravating, a court must determine whether the petitioner "has shown that, had counsel presented all the available mitigating evidence, there is a reasonable probability that a juror would have found that the mitigating evidence outweighed the aggravating evidence." *Gray*, 616 F.3d at 442. "The likelihood of a different result must be substantial, not just conceivable." *Harrington v. Richter*, 562 U.S. 86, 112 (2011) (citing *Strickland*, 466 U.S. at 693). "[T]here is no prejudice when the new mitigating evidence 'would barely have altered the sentencing profile presented' to the decisionmaker." *Sears v. Upton*, 561 U.S. 945, 954 (2010) (citing *Strickland*, 466 U.S. at 700). The inquiry requires a court to engage in a "probing and fact-specific analysis." *Id.* at 955. The *Strickland* standard in analyzing the prejudice prong "necessarily requires a court to 'speculate' as to the effect of the new evidence - regardless of how much or how little mitigation evidence was presented during the initial penalty phase." *Id.* at 956.

In the present case, having reweighed all of the mitigating evidence, both old and new, against the aggravating evidence, the Court finds that the aggravating evidence far outweighs the mitigating evidence. The murder itself was cold and calculated. It was a heinous gang related

murder of a prisoner by other prisoners. Gang leaders ordered Canales and others to kill the victim because the gang had a financial stake in contraband. Under Texas substantive law, the circumstances of the charged offense were sufficient to support an affirmative finding of future dangerousness. *White v. Dretke*, 126 F. App'x 173, 177 (5th Cir.), *cert. denied*, 546 U.S. 940 (2005). The aggravating evidence also revealed a habitual criminal, who had a conviction for theft and two convictions for sexual assault. The facts surrounding his Bexar County sexual assault conviction reveal that he threatened to kill the victim - at both the time of the offense and later while confined in jail awaiting trial. Furthermore, while waiting to go to trial in the present case, he asked inmate Bruce Innis to arrange for the murder of inmate Larry Whited, whom Canales suspected of cooperating with investigators. The three letters written by Canales reveal a cold and callous murderer.

The mitigating evidence presented at trial showed that Canales was not troublesome and that he had an aptitude for art. There was testimony that his mother was dead and that he had few visits from family. One inmate testified that he had seen Canales try to stop inmates from fighting. The additional mitigating evidence presented during these proceedings show that Canales had prenatal exposure to alcohol and parental alcoholism, poverty and homelessness, neglect, parental rejection, abandonment, and physical and sexual abuse. His Full Scale IQ score on one test was 91 and 92 on another. He did not complete school, but completed his GED at Brownwood State School. The additional evidence delved further into his gang activities. At one time, he was a member of the Texas Syndicate, who placed a hit on him. He then joined the Texas Mafia and participated in the murder of Gary Dickerson. Prior to the murder, he had a heart attack and was dependent on the gang.

Canales argues that this additional evidence provides proper context to the circumstances surrounding the offense. The Director argues, in response, that the new mitigating evidence was "double-edged" and "[m]itigation, after all, may be in the eye of the beholder." *Martinez v. Cockrell*, 481 F.3d 249, 258 (5th Cir. 2007) (quoting *Burger v. Kemp*, 483 U.S. 776, 794 (1987)), *cert. denied*, 552 U.S. 1146 (2008). He further argues that even though the post-conviction evidence of poverty, abuse, and neglect is compelling, it does not outweigh the aggravating evidence in this case. In reply, Canales observes that the Fifth Circuit has rejected the notion that a case with substantial evidence in aggravation can never be mitigated. *Walbey v. Quarterman*, 309 F. App'x 795, 804 (5th Cir. 2009).

Viewed collectively, the reports presented by Ms. Herrero, Dr. Brawley and Dr. Maddox present a wealth of double-edged evidence, including evidence of gang violence, alcohol, drugs, and physical and sexual abuse. The Fifth Circuit has observed that evidence of "brain injury, abusive childhood, and drug and alcohol problems is all 'double-edged.' In other words, even if his recent claims about this evidence is true, it could all be read by the jury to support, rather than detract, from his future dangerousness claim." *Johnson v. Cockrell*, 306 F.3d 249, 253 (5th Cir. 2002), *cert. denied*, 538 U.S. 926 (2003). Canales's history of heart disease, while compelling, is also doubled-edged in that it contributed to his act of murdering the victim in order to be protected by the Texas Mafia.

In his objections, Canales asserts that the Magistrate Judge wrongly dismissed virtually all of his new mitigation evidence as "double-edged." Canales mischaracterizes the Magistrate Judge's analysis. The analysis was not dismissive of the wealth of new evidence of gang violence, alcohol, drugs, and physical and sexual abuse. Such evidence was acknowledged and duly noted. Moreover, the Magistrate Judge further observed that the Director recognized that the evidence of

poverty, abuse and neglect was compelling. Nonetheless, the new mitigation evidence was correctly characterized as double-edged. The value of such evidence is "in the eye of the beholder." *Martinez*, 481 F.3d at 258. The Court finds that the objections on this issue lack merit.

Canales also argues in his objections that the Magistrate Judge misapplied the prejudice inquiry. He stresses that Texas is not a "weighing state," and he complains that the Magistrate Judge weighed the aggravating and mitigating factors. Canales has confused unrelated concepts. Arizona, for example, is a "weighing" system, in which the sentencer weighs the statutory aggravating factors against the non-statutory mitigating factors, and the burden of establishing the existence of aggravating factors lays on the prosecution. *Walton v. Arizona*, 497 U.S. 639, 643 (1990). Texas's capital sentencing scheme, on the other hand, makes it a "non-weighing state" in that it does not require the jury to "weigh" aggravating factors against mitigating factors. *Hughes v. Johnson*, 191 F.3d 607, 623 (5th Cir.1999), *cert. denied*, 528 U.S. 1145 (2000). In non-weighing states, "statutory aggravating factors serve principally to address the concerns of the Eighth Amendment - that is, the role of the statutory aggravators is to narrow and channel the jury's discretion by separating the class of murders eligible for the death penalty from those that are not." *Id.* (citation omitted). In Texas, the jury considers aggravating factors in the guilt-innocence phase of the trial where the defendant's eligibility for a death sentence is determined. *Woods v. Cockrell*, 307 F.3d 353, 359 (5th Cir. 2002). If eligibility for a death sentence is determined, then the case proceeds to the punishment phase of the trial. *Id.* During the punishment phase, the jury selects either death or life imprisonment. *Id.* The final question asks the jury "whether the defendant's mitigating evidence is sufficient to warrant the imposition of a life sentence rather than the death penalty." *Id.* "The amount of weight that the factfinder might give any piece of mitigating evidence is left to the range of judgment and discretion exercised by each juror." *Id.* (citation and

internal quotation marks omitted). Canales's objection focusing on Texas not being a weighing state reveals a basic misunderstanding of issues underlying weighing versus non-weighing states.

With respect to a *Wiggins* claim, on the other hand, a court determines prejudice by reweighing the quality and quantity of the available mitigating evidence, including that in post-conviction proceedings against the aggravating evidence. *Williams*, 529 U.S. at 398-98; *Blanton*, 543 F.3d at 236. After reweighing all the mitigating evidence against the aggravating, a court must determine whether the petitioner "has shown that, had counsel presented all the available mitigating evidence, there is a reasonable probability that a juror would have found that the mitigating evidence outweighed the aggravating evidence." *Gray*, 616 F.3d at 442. "The likelihood of a different result must be substantial, not just conceivable." *Harrington*, 562 U.S. at 112 (citing *Strickland*, 466 U.S. at 693). The Magistrate Judge did not err in applying the correct standard in evaluating prejudice with respect to a *Wiggins* claim.

Having reweighed all of the mitigating evidence, both old and new, against the aggravating evidence, the Court is of the opinion, and so finds, that there is *no* reasonable probability that a juror would have found that the mitigating evidence outweighed the aggravating evidence. The following conclusion by the Fifth Circuit is equally applicable to the present case: "the additional mitigating evidence was not so compelling, especially in light of the horrific facts of the crime, that the sentencer would have found a death sentence unwarranted." *Martinez*, 481 F.2d at 259. Canales has not proven prejudice. He has not shown that he is entitled to federal habeas corpus relief.

As a final matter, Canales's ineffective assistance of trial counsel claim remains procedurally barred in light of his inability to prove prejudice under *Coleman*. The Fifth Circuit held that "[t]o excuse the procedural default fully, Canales would then be required to prove that he

suffered prejudice from the ineffective assistance of his trial counsel." *Canales*, 765 F.3d at 568 (citing *Martinez*, 566 U.S. at 18). Canales has not shown prejudice in order to excuse the procedural default.

In conclusion, Canales has not shown prejudice under *Strickland* on the merits of his ineffective assistance of trial counsel claim and, concomitantly, has not shown prejudice in order to excuse the procedural default. Canales is not entitled to federal habeas corpus relief.

Certificate of Appealability

"A state prisoner whose petition for a writ of habeas corpus is denied by a federal district court does not enjoy an absolute right to appeal." *Buck v. Davis*, 137 S. Ct. 759, 773 (2017). Instead, under 28 U.S.C. § 2253(c)(1), he must first obtain a certificate of appealability ("COA") from a circuit justice or judge. *Id.* Although Canales has not yet filed a notice of appeal, the court may address whether he would be entitled to a certificate of appealability. *See Alexander v. Johnson*, 211 F.3d 895, 898 (5th Cir. 2000) (A district court may *sua sponte* rule on a certificate of appealability because "the district court that denies a petitioner relief is in the best position to determine whether the petitioner has made a substantial showing of a denial of a constitutional right on the issues before the court. Further briefing and argument on the very issues the court has just ruled on would be repetitious.").

A certificate of appealability may issue only if a petitioner has made a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). To make a substantial showing, the petitioner need only show that "jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). The Supreme Court recently emphasized that the COA inquiry "is not coextensive with merits analysis"

and "should be decided without 'full consideration of the factual or legal bases adduced in support of the claims.'" *Buck*, 137 S. Ct. at 773 (quoting *Miller-El*, 537 U.S. at 336). Moreover, "[w]hen the district court denied relief on procedural grounds, the petitioner seeking a COA must further show that 'jurists of reason would find it debatable whether the district court was correct in its procedural ruling.'" *Rhoades v. Davis*, 852 F.3d 422, 427 (5th Cir. 2017) (quoting *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012)).

In this case, reasonable jurists could not debate the denial of Canales's § 2254 petition on substantive or procedural grounds, nor find that the issues presented are adequate to deserve encouragement to proceed. Canales argues in his objections that he should receive a certificate of appealability, but the issues presented in this case on remand do not deserve encouragement to proceed. Accordingly, the Court finds that Canales is not entitled to a certificate of appealability as to his claims. It is accordingly

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

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

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

So Ordered this

Sep 27, 2017

RODNEY GILSTRAP
UNITED STATES DISTRICT JUDGE

Case: 18-70009 Document: 00515545717 Page: 1 Date Filed: 08/31/2020

United States Court of Appeals for the Fifth Circuit

No. 18-70009

ANIBAL CANALES, JR.,

Petitioner—Appellant,

versus

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

Respondent—Appellee.

Appeal from the United States District Court
for the Eastern District of Texas
USDC No. 2:03-CV-69

ON PETITION FOR REHEARING

Before HIGGINBOTHAM, SOUTHWICK, and HAYNES, *Circuit Judges*.

PER CURIAM:

IT IS ORDERED that the petition for panel rehearing is DENIED.

Case: 18-70009 Document: 00515545722 Page: 1 Date Filed: 08/31/2020

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE,
Suite 115
NEW ORLEANS, LA 70130

August 31, 2020

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 18-70009 Anibal Canales, Jr. v. Lorie Davis, Director
USDC No. 2:03-CV-69

Enclosed is an order entered in this case.

Sincerely,

LYLE W. CAYCE, Clerk

By: _____
Monica R. Washington, Deputy Clerk
504-310-7705

Mr. Matthew Hamilton Frederick
Ms. Tina J. Miranda
Mr. Joseph J. Perkovich
Mr. David Paul Voisin

Case: 18-70009 Document: 00515498383 Page: 1 Date Filed: 07/21/2020

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit

FILED
July 21, 2020

Lyle W. Cayce
Clerk

No. 18-70009

D.C. Docket No. 2:03-CV-69

ANIBAL CANALES, JR.,

Petitioner - Appellant

v.

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

Respondent - Appellee

Appeal from the United States District Court for the
Eastern District of Texas

Before HIGGINBOTHAM, SOUTHWICK, and HAYNES, Circuit Judges.

J U D G M E N T

This cause was considered on the record on appeal and was argued by counsel.

It is ordered and adjudged that the judgment of the District Court is affirmed.

PATRICK E. HIGGINBOTHAM, Circuit Judge, dissenting.

CODE OF CRIMINAL PROCEDURE

TITLE 1. CODE OF CRIMINAL PROCEDURE

CHAPTER 37. THE VERDICT

Art. 37.071. PROCEDURE IN CAPITAL CASE

Sec. 1. (a) If a defendant is found guilty in a capital felony case in which the state does not seek the death penalty, the judge shall sentence the defendant to life imprisonment or to life imprisonment without parole as required by Section 12.31, Penal Code.

(b) A defendant who is found guilty of an offense under Section 19.03(a)(9), Penal Code, may not be sentenced to death, and the state may not seek the death penalty in any case based solely on an offense under that subdivision.

Sec. 2. (a)(1) If a defendant is tried for a capital offense in which the state seeks the death penalty, on a finding that the defendant is guilty of a capital offense, the court shall conduct a separate sentencing proceeding to determine whether the defendant shall be sentenced to death or life imprisonment without parole. The proceeding shall be conducted in the trial court and, except as provided by Article 44.29(c) of this code, before the trial jury as soon as practicable. In the proceeding, evidence may be presented by the state and the defendant or the defendant's counsel as to any matter that the court deems relevant to sentence, including evidence of the defendant's background or character or the circumstances of the offense that mitigates against the imposition of the death penalty. This subdivision shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or of the State of Texas. The state and the defendant or the defendant's counsel shall be permitted to present argument for or against sentence of death. The introduction of evidence of extraneous conduct is governed by the notice requirements of Section 3(g), Article 37.07. The

court, the attorney representing the state, the defendant, or the defendant's counsel may not inform a juror or a prospective juror of the effect of a failure of a jury to agree on issues submitted under Subsection (c) or (e).

(2) Notwithstanding Subdivision (1), evidence may not be offered by the state to establish that the race or ethnicity of the defendant makes it likely that the defendant will engage in future criminal conduct.

(b) On conclusion of the presentation of the evidence, the court shall submit the following issues to the jury:

(1) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and

(2) in cases in which the jury charge at the guilt or innocence stage permitted the jury to find the defendant guilty as a party under Sections 7.01 and 7.02, Penal Code, whether the defendant actually caused the death of the deceased or did not actually cause the death of the deceased but intended to kill the deceased or another or anticipated that a human life would be taken.

(c) The state must prove each issue submitted under Subsection (b) of this article beyond a reasonable doubt, and the jury shall return a special verdict of "yes" or "no" on each issue submitted under Subsection (b) of this Article.

(d) The court shall charge the jury that:

(1) in deliberating on the issues submitted under Subsection (b) of this article, it shall consider all evidence admitted at the guilt or innocence stage and the punishment stage, including evidence of the defendant's background or character or the circumstances of the offense that militates for or mitigates against the imposition of the death penalty;

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

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

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

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

(2) The court shall:

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

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

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

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

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

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

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

(g) If the jury returns an affirmative finding on each issue submitted under Subsection (b) and a negative finding on

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

(h) The judgment of conviction and sentence of death shall be subject to automatic review by the Court of Criminal Appeals.

(i) This article applies to the sentencing procedure in a capital case for an offense that is committed on or after September 1, 1991. For the purposes of this section, an offense is committed on or after September 1, 1991, if any element of that offense occurs on or after that date.

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

ANIBAL CANALES, JR, **PETITIONER**

v. **Case No. 2:03-CV-69-JRG-RSP**

DIRECTOR, Texas Department of Corrections, Correctional Institutions Division, **RESPONDENT**

PETITIONER'S OBJECTIONS TO THE REPORT AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

Pursuant to Fed. R. Civ. Proc. 72, Petitioner, Anibal ("Andy") Canales, Jr., files these Objections to the Report and Recommendation of the United States Magistrate Judge, who concluded that Petitioner failed to show prejudice on his claim that trial counsel failed to develop and present mitigating evidence and that Petitioner is not entitled to a certificate of appealability. Doc 230. Pursuant to 28 U.S.C. § 636(b)(1), this Court "shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made." Such a review will establish that this Court should reject the Report and Recommendation of the Magistrate Judge.

In support of these Objections, Petitioner first summarizes the relevant procedural history, summarizes the evidence presented following a remand from the Fifth Circuit, and reviews the conclusions of the Magistrate Judge. Petitioner next examines the misapplication of precedent in the Report and Recommendation. Finally, and in the alternative, Petitioner explains why he is at least entitled to a certificate of appealability.

RELEVANT PROCEDURAL HISTORY

Applying *Trevino v. Thaler,* 133 S. Ct. 1911 (2012), the Fifth Circuit found that

Petitioner's prior state habeas counsel performed deficiently in not raising a challenge to trial counsel's failure to develop and present mitigating evidence at the penalty phase of his trial. *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.*

The panel remanded the case to this Court "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.* at 571. After obtaining limited funding,[1] Canales expanded the record with declarations from Donna Maddox, M.D., Tora Brawley, Ph.D., and mitigation investigator Susan Herrero. Numerous declarations and social history records were attached to Ms. Herrero's report. Doc 220-1, 220-2, 220-3. After reviewing briefing from Petitioner and Respondent, the Magistrate Judge recommended that relief be denied and that a certificate of appealability not issue. Doc 230.

SUMMARY OF MITIGATION EVIDENCE THE JURY NEVER HEARD

As even the Director recognized, "It would be difficult to refute Canales's assertion that the mitigation evidence counsel failed to present at trial paints a gripping picture of Canales's tragic, troubled childhood." Doc 228 at 17. The Director also noted that expert reports establish that Canales suffers from cognitive deficits, posttraumatic stress disorder, persistent depressive

[1] Canales sought, but was denied, additional funding for Ms. Herrero to complete her investigation and to permit Dr. Maddox to complete her psychiatric evaluation. Doc 209, 211.

disorder, and alcohol abuse disorder. *Id.* at 11.[2]

Petitioner discussed this extensive and compelling mitigation evidence in his brief and supporting documents. *See* Doc 220, 220-1, 220-2, 220-3. The Magistrate Judge also summarized this evidence:

> Canales's father suffered from alcoholism and drug abuse. He abandoned the family when Canales was 2 1/2 years old. His mother was left to live in poverty. She was an alcoholic and would beat her children. She often neglected them. There were times when the family was homeless. For a while, Canales lived with his maternal grandparents. His grandparents lived in poverty and were alcoholics. His mother married Carlos Espinoza in 1971. They lived in Chicago. His mother and Espinoza drank heavily. Espinoza physically and sexually abused Canales and his sister. Canales turned to the streets in order to make money to assist his family by shining shoes and selling newspapers at the young age of 8 or 9 years old. He subsequently joined the Latin Kings street gang. Gang leaders gave him alcohol before school. By 1974, Canales had been shot during a drive-by shooting. His sister, Elizabeth, recalled another incident where he was left all bloody in a ditch. His mother sent him to live with his father in Houston. His father subsequently moved to Laredo, but he did not take his son with him. Canales was abandoned in Houston. He was arrested at age 13 and spent time in juvenile detention. In 1978, his mother left Espinoza and moved the family, including Canales, to California. By age 18, Canales was living again in Houston with his mother, sisters, and John Ramirez, his mother's live-in boyfriend, another sexual predator. Canales was sent to prison for stealing a check from Ramirez. After being paroled, he was sent back to prison for two sexual assault offenses. While in prison, he joined the Texas Syndicate, a Latino prison gang.

Doc 230 at10.

Susan Herrero, a mitigation expert, identified significant factors that adversely affected Canales's intellectual, cognitive, social, emotional, and psychological development, including prenatal exposure to alcohol, parental alcoholism, poverty, homelessness, neglect, abandonment, and physical and sexual abuse. Doc 220 at 9-20; Doc 230 at 11.

Ms. Herrero also enumerated several consequences of Andy's traumatic life history. First, Andy's chaotic life disrupted his education. Although he made appropriate progress in his

[2] Respondent also states that Petitioner's experts diagnosed him with antisocial personality disorder. Doc 228 at 11. Petitioner's experts, however, did not reach that diagnosis. *Compare* Doc 221-1, 221-2, and 221-3.

early grades, having to cope with trauma in his home and the incredible instability of incessantly having to move and change schools took a toll. Due to his family instability, Andy attended 16 schools in Texas, including special education in Southwest ISD and Northeast ISD in San Antonio. He also attended two schools in Chicago, three schools in Wisconsin, and five schools in California. Doc 220-3 at 4.

Second, Andy began drinking and using drugs at a very young age. His mother's drinking made beer readily available, and adults turned a blind eye to his drinking. As Ms. Herrero points out, Andy was an alcoholic by age 14. Doc. 220-1 at 39. Andy also reported using LSD when he was 15 years old and using cocaine beginning when he was 16 years old. He also developed an addiction to heroin. Doc 220-3 at 8.

Third, Andy was vulnerable to gangs. The Latin Kings controlled the neighborhood he grew up in. Its method of operation included the forcible recruitment of young children to serve as runners, lookouts, or dupes who held drugs if the police came. Doc 220-1 at 40. The Latin Kings were associated with violence. In fact, when he was 6 years old, Andy witnessed a shooting that left one man dead. *Id.; see also* Doc 220-3 at 2.

Andy was forced into the Latin Kings gang when he was 9 years old and working shining shoes and selling newspapers. He was threatened with death if he refused to run errands. Doc 220-1 at 40. In 1974, when he was either in fourth or fifth grade, Andy was shot at during a drive-by shooting. Doc 220-3 at 3. His sister Elizabeth also recalls that Andy had to be taken by ambulance to a hospital. He may have been shot or stabbed by someone in the gang. *Id.*; 220-1 at 55. Shortly after this incident, Janie, Andy's mother, moved the family to California.

Fourth, Andy's background resulted in cognitive and psychological difficulties. In her evaluation of Andy, Dr. Donna Maddox found problems with concentration and language as well

as deficits in short term memory. Doc 220-3 at 11. In neuropsychological testing, Dr. Tora Brawley found mild deficits in frontal lobe functioning, particularly with regard to matrix reasoning and verbal fluency. Doc 220-2 at 3. Dr. Brawley also concluded that a structured environment has benefited Andy's overall cognitive functioning. He would have been more significantly impaired prior to incarceration. *Id.*

More significantly, Andy suffers from severe mental illness, primarily Posttraumatic Stress Disorder (PTSD) and Persistent Depressive Disorder. Dr. Maddox carefully tracked factors in Andy's life and experiences that align with the criteria for that Trauma and Stressor Related Disorder. Doc 220-3 at 14. 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. *Id.* at 15. Pre-traumatic risk factors include prior traumatic experience, lower socioeconomic status, lower education, and family dysfunction. *Id.* Andy 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.

Pretraumatic risk factors include the severity of the trauma, perceived life threat and interpersonal violence by a caregiver. *Id.* Again, Andy 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.[3] As Dr. Maddox points out, Andy'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. *Id.* at 16.

[3] After consulting with Dr. Fred Sautter, Ms. Herrero believes it is possible that Andy suffers from even more severe "Complex PTSD," because of his "extensive exposure to trauma beginning early in life and continuing into adolescence. Doc 220-1 at 34.

Dr. Maddox concluded as follows in her evaluation:

1. Mr. Canales has a history of exposure to trauma beginning by latency age.
2. He has had multiple exposures to traumatic events during his life.
3. He meets the criteria for PTSD and developed a comorbid substance abuse and mood disorder.
4. Mr. Canales was incarcerated during his most recent offense.
5. At the time his health was poor.
6. Various documents note that his life had been threatened due to the nature of his prior charges and involvement in a gang.
7. He was suffering from mental illness at the time of his offense.
8. A recent study comparing prisoners who were involved in street gangs compared to prisoners who were not involved in street gangs reveal that prisoner who were involved in street gangs had more exposure to violence, symptoms of PTSD, paranoia, anxiety and forced behavioral control. Wood, Jane L. and Dennard, Sophie (2016) *Gang membership: links to violence exposure, paranoia, PTSD, anxiety and forced control of behavior in prison.* Psychiatry: Interpersonal and Biological Processes. . ISSN 0033-2747. (In press)
9. Mr. Canales has never had treatment for his PTSD nor mood symptoms.
10. Mr. Canales has a medical condition and prescribed medication (Metoprolol) which are associated with depression.

Doc 220-3 at 15-16; Doc 230 at 13.

Despite experiencing extreme trauma, Andy remained a positive, likeable person. Around 1992, when he was on parole, he dated Liz Hewitt. Her parents welcomed him into the family and treated him as a son. Unfortunately, Andy's mother suffered an aneurysm, which caused her to lose speech and motor functions. Andy deteriorated and was never the same. Doc 220-1 at 46; Doc 220-1 at 87.

Finally, Andy presented evidence of his chronic heart disease and the role his life threatening medical condition played in the time leading to the capital offense. The Magistrate Judge summarized this evidence:

> In 1995, Canales suffered the first of three or four myocardial infarctions and was placed on blood thinners and other medication. When the Texas Syndicate learned that he had a prior sexual assault conviction and had been a member of the Latin Kings, the gang placed a hit on him. Unable to defend himself because of his heart condition, Canales turned to another gang, the Texas Mafia. His cellmate, Bruce Richards, was in the Texas Mafia, and he arranged for Canales to transfer

> to that gang. The intercession by the Texas Mafia meant that Canales owed his life to the gang, and he was thus in a vulnerable position of being under their control. That was Canales's predicament at the time he murdered Gary Dickerson in 1997.

Doc 230 at 10-11.

REVIEW OF THE MAGISTRATE JUDGE'S RECOMMENDATIONS

The Magistrate Judge recognized the immense difference between the scant mitigating evidence presented at trial and what was presented before this Court. At trial, the jury heard that "Canales was not troublesome and had an aptitude for art," had lost his mother, and was seen trying to break up fights in prison. Doc 230 at 6. Thus, the jury learned nothing of his life-long history of abuse and deprivation or about his medical condition.

Despite reviewing the compelling mitigating evidence, the Magistrate Judge determined that "the aggravating evidence far outweighs the mitigating evidence." Doc 230 at 17. The Report pointed out that the murder was cold and calculated and that the aggravating evidence showed that Canales was "a habitual criminal." Doc 230 at 17.

The Magistrate Judge also found the wealth of new evidence problematic for being "double-edged": "Viewed collectively, the reports presented by Ms. Herrero, Dr. Brawley, and Dr. Maddox present a wealth of double-edged evidence, including evidence of gang violence, alcohol, drugs, and physical and sexual abuse. . . . 'In other words, even if his recent claims about this evidence is true, it could all be read by the jury to support, rather than detract, from his future dangerousness claim.'" Doc 230 at 18 (quoting *Johnson v. Cockrell*, 306 F.3d 249, 253 (5th Cir. 2002)). The Magistrate Judge also found that "Canales' history of heart disease, while compelling, is also double-edged in that it contributed to his act of murdering the victim in order to be protected by the Texas Mafia." Doc 230 at 19.

The Magistrate Judge concluded his discussion of the merits of Petitioner's claim by

noting that "there is *no* reasonable probability that a juror would have found that the mitigating evidence outweighed the aggravating evidence." Doc 230 at 19. Finally, the Magistrate Judge recommended that Petitioner be denied a certificate of appealability. Doc 230 at 20.

SPECIFIC OBJECTIONS TO THE REPORT AND RECOMMENDATION

A. The Magistrate Judge Wrongly Dismissed Virtually All Mitigation Evidence as "Double-edged."

The Magistrate Judge characterized almost all of Canales's most compelling evidence as "double-edged." This broad and inaccurate categorization included childhood sexual and physical abuse, brain injury, drug and alcohol problems, and even Canales's life threatening heart disease. Doc 230 at 18-19.

Such dismissal of so-called "double-edged" evidence is inconsistent with the Supreme Court's treatment of the prejudice inquiry in an ineffective assistance of trial counsel claim. When conducting a prejudice analysis pursuant to *Strickland v. Washington,* 466 U.S. 668 (1984), a state court may not discount mitigation evidence because of its perceived aggravating aspects. For instance, in *Porter v. McCollum*, 558 U.S. 30, 42 (2009), the Supreme Court found it unreasonable for the state court to discount important mitigating evidence about the defendant's military record because it had aggravating components, including that the defendant had gone AWOL more than once.[4] In *Porter*, the capital habeas applicant had presented evidence that trial counsel's deficient sentencing investigation resulted in the omission from trial of mitigating information about, *inter alia*, the applicant's military service and childhood abuse. 558 U.S. at 34-35. In concluding that prejudice had not been established, the state court

[4] In *Porter*, the Supreme Court addressed the prejudice inquiry under 28 U.S.C. § 2254(d) to determine whether the state court's adjudication was "unreasonable." Because Canales did not receive merits review in state court of his ineffectiveness claim, this Court is not bound by the highly deferential standards in the habeas statute and must instead provide de novo review of his claim. *See, e.g., Hughes v. Quarterman,* 530 F.3d 336, 340-41 (5th Cir. 2008).

discounted the significance of this evidence because, in its view, it contained double-edged aspects, including that applicant had gone AWOL more than once. *Id*. at 43. The Supreme Court concluded that the state court's discounting of the applicant's military service in light of its potentially aggravating components was an unreasonable application of *Strickland*. *Id*. The Court observed that the aggravating components of the evidence were "consistent with" mitigation themes of the stress and mental and emotional toll placed on the applicant by his service and that the aggravating components "d[id] not impeach or diminish the evidence of his service." *Id*.

1. Under no circumstances could some of the mitigating evidence be considered "double-edged"

The Report's reliance on the alleged "double-edged" nature of Canales's mitigation evidence is even more far-fetched than the unreasonable treatment of mitigating evidence by the state court in *Porter*. First, some of Canales's evidence cannot be considered "double-edged" under any reasonable interpretation of the evidence. Andy Canales suffered extreme deprivation and abandonment by his parents. This neglect left him and his sisters vulnerable to sadistic and violent sexual predators. This is the quintessential type of evidence to elicit sympathy from at least one juror, and in no way can be construed in an aggravating manner.

Similarly, Canales presented expert evidence about the substantial and adverse psychological effect caused by his upbringing. Dr. Maddox explained that the trauma, including horrendous physical abuse in the home, caused Andy to have posttraumatic stress disorder and depression. For instance, Andy was only six years old when Carlos Espinoza, his step-father, beat him with belts and his fist. More ominously, Carlos often stripped Andy before beating him. Doc 220-1 at 26; Doc 220-1 at 54. Elizabeth, Andy's sister, graphically describes Carlos' violence toward Andy:

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.

Doc 220-1 at 26; Doc 7, Exhibit 17. Andy received the worst of the beatings because he did his best to protect Elizabeth. *Id.*

Carlos began sexually molesting Elizabeth when she around five years old. Doc 220-1. Andy witnessed Carlos rape his sister twice. Doc 220-3 at 2. The first time, Andy disclosed what he saw to his mother; on the second occasion, Carlos beat him after Andy revealed what happened. Doc 220-3 at 2.

Elizabeth courageously related the graphic details of one of the horrible rapes she endured, which occurred when she was physically ill:

> My most vivid memory I have of being molested was a time I was sick, I was having fevers. I went in to sleep with my Mom, and Carlos put me in between them, which I didn't want. My mom got up in the morning and left, and I woke up and Carlos was all over me. I was in my underwear, and Carlos started rubbing me and putting his hands all over me and having me rub him and all that, it was horrible. I was crying and crying, and he kept slapping me in the head to get me to stop. I finally did because I just kept getting slapped. And he had me sit on him, and then he flipped me over and he had my hands pinned above my head and he took my leg and was getting my underwear off.

Doc 220-1 at 29; Doc 7, Exhibit 17, at 2. On that occasion, Andy tried to rescue her:

> 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.

Id. When Andy was six years old, Carlos tried to rape him. Carlos also stripped Andy before he beat his stepson. Doc 220-1 at 30; Doc 220-3 (report of Dr. Maddox). It is inconceivable that Andy's childhood victimization would somehow count against him or that any juror could possibly view Andy's efforts to protect his sister as a fact to be used against him when deciding on the appropriate punishment.

2. The jury heard some of the "double-edged" evidence anyway; the mitigation aspect of this evidence would have provided jury with a better understanding and more sympathetic account for this evidence.

Second, the jury heard the details of the murder, including testimony about Canales's membership in a prison gang. Consequently, mitigation evidence that acknowledged what the jury already knew but that explained the factors that led to gang involvement would have been considered mitigating and not as additional evidence in aggravation. For instance, since the jury learned of gang involvement anyway, then evidence that Andy grew up in a gang-infested neighborhood and that gang members preyed on vulnerable children would have helped the jury better understand his circumstances. Similarly, evidence that older gang members provided Andy with alcohol and that alcohol abuse was common in his family would have made his subsequent alcoholism more understandable. As Dr. Maddox noted in her report, "prisoner[s] who were involved in street gangs had more exposure to violence, symptoms of PTSD, paranoia, anxiety and forced behavioral control. Doc 228-3 at 16 (citing Wood, Jane L. and Dennard, Sophie (2016), *Gang membership: links to violence exposure, paranoia, PTSD, anxiety and forced control of behavior in prison.* Psychiatry: Interpersonal and Biological Processes, ISSN 0033-2747. (In press)). Doc 220-3 at 15-16.

This same point also applies to Andy's life-threatening heart condition. The jury learned about the details of the offense, including the operation of the prison gang, regardless of what

kind of mitigating evidence the defense presented. As acknowledged by the Magistrate Judge, evidence of Andy's heart disease is "compelling." Doc 230 at 19. Since the jury already heard about Andy's involvement in the murder, evidence that would have given the jury an understanding of how vulnerable Andy was and why he believed his own life to be in danger could only have been mitigating and not "double-edged." Doc 230 at 13-14.

3. Mitigating evidence that presents the defendant as a whole person and provides a coherent mitigation theory cannot be dismissed as "double-edged"

Third, if all mitigating evidence, such as mental illness, substance abuse, or cognitive deficits could always be discounted because they are "double-edged," then it would be virtually impossible for anyone to prevail on a claim arising under *Wiggins*. In fact, the Supreme Court and other federal courts have recognized that the possibility that mitigation evidence might portray the defendant in a negative light does not detract from its value in presenting the defendant as a whole person. For instance, as the Supreme Court observed in *Sears v. Upton,*

> [T]he fact that along with this new mitigation evidence there was also some adverse evidence is unsurprising, given that counsel's initial mitigation investigation was constitutionally inadequate. Competent counsel should have been able to turn some of the adverse evidence into a positive – perhaps in support of a cognitive deficiency mitigation theory. In particular, evidence of Sears' grandiose self-conception and evidence of his magical thinking, were features, in another well-credentialed expert's view, of a "profound personality disorder." This evidence might not have made Sears any more likable to the jury, but it might well have helped the jury understand Sears, and his horrendous acts – especially in light of his purportedly stable upbringing.

Sears v. Upton, 561 U.S. at 951.

The Fifth Circuit has also recognized the value of mitigation evidence, despite its negative aspects. In *Adams v. Quarterman*, the court rejected the type of analysis contained in the Report:

> The State contends that the post-conviction affidavits are "double-edged,"

> and that if the affiants had so testified at trial, the State would have impeached any mitigating evidence with evidence of, *inter alia,* Adams's childhood thefts, teenage marijuana use, absence without leave from the Army, gang affiliation, and racist attitude. We recognize that the State may have followed such a strategy at the trial's punishment phase, but we cannot conclude that the aggravating effect of this evidence would have outweighed the mitigating evidence in a reasonable jury's minds.
>
> [. . . .]
>
> We conclude that Pickett's insufficient investigation prevented his discovery of substantial, readily available mitigating evidence of Adams's childhood abuse, neglect, and abandonment. A reasonable probability exists that, absent these errors (and even when considering the aggravating aspects of Adams's crime), a jury would have determined that "'the balance of aggravating and mitigating circumstances did not warrant death.'"

Adams v. Quarterman, 324 F. App'x 340, 352, 2009 WL 1069330 * 8 (5th Cir. 2009).

Other courts have reached similar conclusions. In *Thomas v. Horn*, 570 F.3d 105 (3rd Cir. 2009), the court found prejudice even though some of the petitioner's mental health history could have been used by the prosecution as evidence in aggravation:

> While we agree with the Commonwealth that some of Thomas' mental health history paints him in a negative light, we are not convinced that the death penalty is a *fait accompli* even if evidence of Thomas' mental health history were available at sentencing. Certainly, evidence that Thomas is a sadistic and dangerous sexual deviate who committed at least one prior act that bears resemblance to the crime in this case is not mitigating. Additionally, the quantity of aggravating evidence that the jury already did consider was significant. But Thomas' mental health history acts as a common thread that ties all this evidence together. A single juror may well have believed that this unifying factor explained Thomas' horrific actions in a way that lowered his culpability and thereby diminished the justification for imposing the death penalty.

Id. at 129.

In *Johnson v. Mitchell*, 585 F.3d 923 (6th Cir. 2009), the court found prejudice because in light of the new mitigating evidence, "a drastically different portrait of the petitioner emerge[d]." *Id.* at 945. The new evidence showed that the petitioner "endured hardships and traumatic experiences" and developed a personality disorder that helped

explain aspects of his conduct. There was evidence of cocaine abuse and a psychological report found that the petitioner could react to situations in emotional outbursts. *Id.* The court held that it was prejudicial for defense counsel not to present evidence of petitioner's personality disorder:

> [A]lthough not absolving him of responsibility for his crimes, [the disorder] helped explain why certain circumstances would be viewed by the petitioner in certain ways and would prompt certain abnormal responses. The jury might also have seen Johnson as an individual struggling to act appropriately in the face of paranoia and a distorted world view, a struggle that was only exacerbated by drug abuse. To hold in this case that serious consideration of such evidence could not have "change[d] the calculation the jury previously made when weighing the aggravating and mitigating circumstances of the murder," . . . is -- in our judgment -- to ignore reality.

Johnson, 585 F.3d at 945. *See also Correll v. Ryan*, 539 F.3d 938, 955 (9th Cir. 2008) (finding prejudice even though mitigating evidence would have opened the door to "damaging rebuttal" evidence, including escapes from mental health facilities and hostage taking situations; evidence could "have been used to support Correll's claims of dysfunctional upbringing and continuing mental disorder."); *Davidson v. State,* 453 S.W.3d 386, 405 (Tenn. 2014) (finding prejudice despite State's argument about "double-edged" mitigation because the new mitigating evidence "had great potential to help explain the invisible mental machinations that made him behave this way").

4. Treating mitigation evidence as "double-edged" results in a misapplication of the *Strickland* prejudice test.

Finally, the State's argument about the potential adverse impact of "double-edged" mitigation turns the *Strickland* prejudice test on its head. The question is not whether it is possible that some juror could have applied the mitigating evidence in a negative manner. Rather, the question is whether there is a reasonable probability that at least one juror would have declined to vote for a death sentence after hearing evidence

that both the Magistrate Judge and Director recognized as compelling.

Here, jurors were instructed that they should "consider mitigating evidence to be evidence that a juror might regard as reducing the defendant's moral blameworthiness." Court Record at 106. Here, there is certainly a reasonable probability that at least one of the jurors would have regarded this evidence in a mitigating manner and voted for a life sentence.

Because of trial counsel's deficient performance, the jury knew virtually nothing about Canales and or the terrible circumstances in his life that led to severe mental illness and cognitive impairments. As the Supreme Court explained in *Sears v. Upton,* adequate defense counsel would have used the type of evidence presented to this court to place Petitioner's conduct in context and help jurors understand how he came to be in the situation he was in. *Sears v. Upton,* 561 U.S. at 951. This new evidence, then, "might well have influenced the jury's appraisal of [Petitioner's] moral culpability" and led to a sentence less than death. *Wiggins v. Smith,* 539 U.S. at 538 (citation omitted).

B. The Magistrate Judge Misapplied the Prejudice Inquiry.

The Magistrate Judge recommended that relief be denied because "the aggravating evidence far outweighs the mitigating evidence." Doc 230 at 17. Here, however, the jury was not asked to weigh the aggravating evidence, primarily evidence of future dangerousness, against the mitigating evidence. The instructions at the penalty phase required the jury to answer whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society (the "future dangerousness special issue"). TEX. CODE CRIM. PROC. art. 37.071, § 2(b)(1); Court Record at 105. Second, the jury had to answer whether the defendant actually caused or intended to cause the death of the victim. Court Record

at 105. Finally, jurors had to answer whether, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, there are sufficient mitigating circumstances to warrant a life sentence (the "mitigation special issue"). *Id*., § 2(e); Court Record at 106. If the jury unanimously answered "yes" to future dangerousness and "no" to mitigation, then the trial court would have had to impose a death sentence. If any juror dissented on either question, the trial court would have been required to assess a life sentence. *Id*., § 2(g).

Texas is not a "weighing state," so a defendant's capital sentencing jury is not asked to weigh aggravating evidence against mitigating evidence when considering a capital sentence. *See Ex parte Gonzales*, 204 S.W.3d 391, 394 (Tex. Crim. App. 2006) ("Texas' capital sentencing scheme does not involve the direct balancing of aggravating and mitigating circumstances."); *Ex parte Davis*, 866 SW 2d 234, 239 (Tex. Crim. App. 1993) ("Unlike Florida, where *Strickland* arose, we do not have a capital sentencing scheme that involves the direct balancing of aggravating and mitigating circumstances."). Indeed, "[t]he issue of future dangerousness is completely independent of the [mitigation] special issue[.]" *Eldridge v. State*, 940 S.W.2d 646, 654 (Tex. Crim. App. 1996). Regardless of how much the record supports the future dangerousness finding, sufficient evidence of mitigation precludes a capital sentence. Moreover, Texas law imposes no burden of proof on any party with respect to the mitigation special issue. *Blue v. State*, 125 S.W.3d 491, 501 (Tex. Crim. App. 2003) ("neither party bears the burden of proof at punishment on the mitigating evidence special issue") (quoting *Basso v. State*, No. AP-73,672, slip op. at 36–37, 2003 WL 1702283 (Tex. Crim. App. Jan. 15, 2003)). Thus, a juror at a Texas capital trial could answer the mitigation special issue affirmatively even where very little mitigating evidence was offered.

As the Texas Court of Criminal Appeals has observed, by the time a jury begins considering the mitigation special issue, it has already answered the future dangerousness special issue affirmatively. *Prystash v. State*, 3 S.W.3d 522, 535 (Tex. Crim. App. 1999) ("The jury does not decide the mitigation special issue until after the State has proven the elements of capital murder and that the defendant is a future danger"). Thus, by the time a jury is considering the mitigation special issue, it has already answered affirmatively to the future dangerousness issue and its focus is strictly on the mitigation evidence. The aggravating components are therefore irrelevant to a *Strickland* prejudice analysis for a Texas capital trial.

At one point in the Report, the Magistrate Judge appeared to suggest that the ineffectiveness claim could not be prejudicial because of the evidence supporting a finding of future dangerousness. In quoting *Johnson v. Cockrell*, 306 F.3d 249 (5th Cir. 2002), the Magistrate Judge noted that the so-called "double-edged" evidence could "support, rather than detract, from his future dangerousness claim." Doc 230 at 18 (quoting *Johnson*, 306 F.3d at 253). As noted above, the future dangerousness question is distinct from the juror's question about mitigating evidence.

Furthermore, federal and state law provides that jurors are free to vote for a life sentence even if they answer the future danger issue in the affirmative. The Supreme Court addressed this very point in *Williams v. Taylor*, 529 U.S. 362 (2000). There, the Commonwealth presented evidence that Williams had prior convictions for armed robbery, burglary, grand larceny, and auto theft. In addition, it showed that Williams had attacked elderly victims on two separate occasions and that one of them was in a "vegetative state" and not expected to recover. *Id.* at 368. Furthermore, two experts testified for the State that there was a "high probability" that Williams "would pose a serious continuous threat to society." *Id.* When the case reached the

Fourth Circuit, that Court found the evidence that Williams was a future danger to society was "simply overwhelming." *Id*. at 374 (citing 163 F.3d 860, 868 (4th Cir. 1998)).

Even reviewing the case under the deferential provisions of the Antiterrorism and Effective Death Penalty Act ("AEDPA"), the Supreme Court found the state court's failure to find prejudice unreasonable. The Court found that "[m]itigating evidence unrelated to dangerousness may alter the jury's selection of penalty, even if it does not undermine or rebut the prosecution's death-eligibility case." *Id.* at 398. Thus, the Supreme Court recognized that "the graphic description of Williams' childhood, filled with abuse and privation, or the reality that he was 'borderline mentally retarded,' might well have influenced the jury's appraisal of his moral culpability." *Id.* (citing *Boyde* v. *California,* 494 U. S. 370, 387 (1990)). Here, where the AEDPA review does not apply, there is no question that Petitioner is entitled to relief.

C. The Magistrate Judge Erred in Not Recommending the Issuance of a Certificate of Appealabilty ("COA").

The Magistrate Judge concluded the recommendation by stating that "reasonable jurists could not debate the denial of Canales's § 2254 petition on procedural or substantive grounds, nor find that the issues presented are adequate to deserve encouragement to proceed." Doc 230 at 20 (citing *Miller-El v. Cockrell*¸ 537 U.S. 322, 327 (2003)). Given the unique facts of this case and the Magistrate Judge's questionable application of controlling law, this Court should grant a certificate of appealability on the question of whether he can show prejudice to overcome any procedural default and the related question about prejudice on the substance of his *Strickland* claim.

To receive a COA, a habeas petitioner must show "that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed

further.'" *Slack v. Daniel,* 529 U.S. 473, 484 (2000) (quoting *Barefoot v Estelle*, 463 U.S. 880, 893, n.4 (1983)). A COA does not require a showing that the appeal will succeed. *Miller-El*, 537 U.S. at 337; *see also Buck v. Davis*, 137 S. Ct. 759, 773 (2017) ("The COA inquiry, we have emphasized, is not coextensive with a merits analysis."). Furthermore, "[i]t is consistent with § 2253 that a COA will issue in some instances where there is no certainty of ultimate relief. Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail." *Id.* at 338; *Buck*, 137 S. Ct. at 774. "Any doubt whether to grant a COA is resolved in favor of the petitioner, and the severity of the penalty may be considered in making this determination." *Miller v. Johnson*, 200 F.3d 274, 280 (5th Cir. 2000).

There are a number of factors weighing heavily in favor of issuing a COA in this case even if the Court adopts the merits of the Report and Recommendation. First, the Fifth Circuit was aware of all of the aggravating evidence and evidence regarding the murder in this case and still found the ineffectiveness claim substantial, which in the context of a challenge to the performance of state habeas counsel is similar to the standard for the issuance of a COA. *See Martinez v. Ryan,* 132 S. Ct. 1309, 1318–19 (2012) (citing *Miller-El v. Cockrell,* 537 U.S. 322 (2003)). If the claim was substantial enough on the limited mitigation record before the Fifth Circuit, then it is certainly substantial enough for a certificate of appealability now that Petitioner has supplemented the record.

Second, a COA should issue because even the Magistrate Judge and the Director have recognized the compelling nature of Petitioner's mitigating evidence. *See, e.g.,* Doc. 228 at 11, 17. Given the significant amount of mitigating evidence presented during these proceedings compared with the absence of any trial evidence about Canales's background and mental health,

this issue is at least debatable.

Finally, this issue is at least debatable because the Magistrate Judge's resolution of the issue involved a questionable application of controlling precedent. The Supreme Court has expressly recognized that mitigation evidence cannot be disregarded as "double-edged" merely because the Magistrate Judge speculated that some juror could have viewed some of this evidence as a reason to vote for a death sentence rather than a life sentence. Additionally, it would be at least debatable were the Court to deny relief due to its treatment of Texas as a weighing state or because it focused narrowly on the question of future dangerousness.

CONCLUSION

Wherefore, for the foregoing reasons, the Court should reject the Report and Recommendation of the United States Magistrate Judge and find that Petitioner has shown prejudice to overcome the default and prevail on the merits of his ineffectiveness of trial counsel claim. In the alternative, the Court should grant an evidentiary hearing. Finally, even if the Court adopts the Report and Recommendation, Petitioner asks the Court to grant a COA.

Respectfully submitted on September 22, 2017.

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CERTIFICATE OF SERVICE

I certify that I have served the foregoing Motion via the Court's ECF system on Counsel for Respondent:

This the 22nd day of September 2017.

/s DAVID P. VOISIN

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Case No. 18-70009

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

ANIBAL CANALES, JR., Petitioner-Appellant

v.

LORIE DAVIS, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, Respondent-Appellee. _____

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS

PETITIONER-APPELLANT'S BRIEF ON APPEAL

THIS IS A DEATH PENALTY CASE

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CERTIFICATE OF INTERESTED PERSONS

Case No. 18-70009.

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal:

Anibal Canales, Jr., Petitioner-Appellant
Lorie Davis, Respondent-Appellee
Jack Carter, Bowie County, state court judge who presided at trial
Family of Gary Dickerson

Mr. Canales's prior counsel:
Paul Hoover, trial counsel
Jeff Harrelson, trial counsel
Troy Hornsby, state habeas counsel

Counsel for the State of Texas
Mark Mullin, trial prosecutor
Candace Norris, trial prosecutor

Counsel for Respondent-Appellee:
Tina Miranda

s/ Joseph J. Perkovich
Attorney of record for Anibal Canales, Jr.
Petitioner-Appellant

REQUEST FOR ORAL ARGUMENT

Petitioner-Appellant, Anibal Canales, Jr., respectfully requests oral argument in this capital case. The district court's decision, which is **not** subject to AEDPA[1] deference, concerns extensive new evidence developed upon the 2014 remand from the Court's ruling that trial counsel's performance in the penalty phase was deficient for failing to investigate and present available mitigating evidence. Oral argument will considerably assist the Court in evaluating the extensive new evidence bearing upon the adequacy of the district court's prejudice review, which treated that concededly compelling new evidence as "double-edged."

[1] Antiterrorism and Effective Death Penalty Act ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214, codified across 28 U.S.C. § 2244 *et seq*.

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STATEMENT OF JURISDICTION

The district court exercised jurisdiction over the matters addressed herein pursuant to 28 U.S.C. § 2254. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1291 and 2253. On September 27, 2017, the district court simultaneously denied relief and a certificate of appealability (COA). ROA.4520. The district court then denied a timely filed motion to alter or amend the judgment on January 26, 2018. ROA.4578. The notice of appeal was filed on February 21, 2018. ROA.4587. This Court granted Mr. Canales's COA application on the single issue described herein on October 22, 2017. Doc. 00514691721.

STATEMENT OF THE ISSUE

Whether the district court, upon remand, erred in concluding that Petitioner-Appellant was not prejudiced by his trial counsel's previously adjudged deficient performance in failing to develop and present mitigating evidence reasonably likely to show that "at least one juror would have struck a different balance" in the penalty phase. *Canales v. Stephens*, 765 F.3d 551, 571 (5th Cir. 2014) (quoting *Wiggins v. Smith*, 539 U.S. 510, 537 (2003)).

STATEMENT OF THE CASE

A. Procedural Background.

Mr. Canales's conviction and death sentence in the capital murder of Gary Dickerson was affirmed on direct appeal. *Canales v. State*, 98 S.W.3d 690 (Tex.Crim.App. 2003). 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).

Mr. Canales's federal habeas petition, filed November 29, 2004 in the Eastern District of Texas, ROA.24, was stayed to allow him to pursue a successive state habeas petition on his four unexhausted claims. ROA.850. After the successive state habeas petition was denied, *Ex parte Canale*s, No. WR-54,789-02, 2008 WL 383804 (Tex. Crim. App. Feb. 13, 2008), federal proceedings resumed. The district court denied relief accepting the recommendation of the magistrate judge, finding all but one of his claims procedurally defaulted, denying his shackling claim on the merits. ROA.3781-83. The district court found that Mr. Canales could not rely on the ineffective assistance of state habeas counsel to overcome the default. ROA.3869-70. During the pendency of the appeal, the Supreme Court decided *Trevino v. Thaler*, 569 U.S. 413 (2013), clarifying that the exception announced in *Martinez v. Ryan*, 566 U.S. 1 (2012), for excusing procedural defaults from ineffective assistance of initial

collateral review counsel applies to Texas cases.

This Court then applied *Trevino* in finding that state habeas counsel's performance "fell below an objective standard of reasonableness" in their failure to litigate trial counsel's failure to investigate and present mitigation evidence in the penalty phase based on their mistaken belief before trial that no investigation funding was available. *Canales v. Stephens*, 765 F.3d 551, 569-70 (5th Cir. 2014) (citing *Wiggins v. Smith*, 539 U.S. 510, 533 (2003)). In assessing whether Mr. Canales's underlying *Wiggins* claim was meritorious, this Court found "that Canales's trial counsel's performance was deficient during the sentencing phase." *Id*. at 559. It "reverse[d] the district court on Canales's claim that he received ineffective assistance of counsel during sentencing," and remanded on the question of prejudice after ruling thusly:

> Canales has not yet had the chance to develop the factual basis for this claim because, until *Trevino*, it was procedurally defaulted. While there is sufficient information before this Court for us to conclude that there is some merit to Canales's claim of ineffective assistance of counsel, we think the district court should address the prejudice question in the first instance.

Id. at 571.

In remanding the case, this Court further recognized the apparently vast gap between trial counsel's paltry penalty phase presentation and the truth:

> The jury did not hear *any* evidence regarding Canales's childhood, which was full of violence and privation. While there was certainly evidence to support a finding of future dangerousness, we are not convinced that evidence is enough to say that Canales's claim is not substantial. We are persuaded that the Supreme Court's decisions in *Williams v. Taylor*, 529 U.S. 362 (2000), and *Rompilla v. Beard*, 545 U.S. 374 (2005) show that Canales's claim has, at the very least, some merit.

Id. at 570.

On remand, Petitioner-Appellant, in pursuit of an evidentiary hearing, presented and briefed extensive new evidence developing the mitigating issues highlighted in this Court's opinion (*infra*). Despite the Respondent-Appellee's concession that the new mitigation evidence was "compelling," and relying heavily on the magistrate judge's report and recommendation, the district court dismissed the petition without an evidentiary hearing, ruling that much of the new mitigation evidence "was correctly characterized as double-edged," and could not therefore outweigh the aggravating evidence, "especially in light of the horrific facts of the crime," ROA.4538-40 (quotation omitted), which, as shown at trial, concerned Mr. Canales acting under orders of the Texas Mafia in restraining the victim's arms in order for another inmate to strangle him. *Canales v. State*, 98 S.W.3d 690, 693 (Tex. Crim. App. 2003).

Mr. Canales appeals, arguing the district court erred in deeming the new mitigation evidence "double-edged"—despite the fact that any aggravating edge

had already been presented to the jury—and in failing to conduct a full reweighing by considering the mitigating effect of the new evidence. After giving the district court this "prejudice question in the first instance" in 2014, *Canales*, 765 F.3d at 571, the Court now must simply determine whether the lower court has since erred: did the district court erroneously adopt the magistrate judge's view of the new mitigation evidence as entirely "double-edged" and thereby unconstitutionally jettison consideration of its mitigating effects in a proper reweighing—a reweighing that must conclude with a finding that it is reasonably likely "'at least one juror would have struck a different balance'" in the penalty phase if the jury had the benefit of Mr. Canales's full array of mitigating evidence. *Canales*, 765 F.3d at 570-71 (quoting Wiggins, 539 U.S. at 537).

B. Factual Background.

Mr. 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*, 98 S.W.3d at 693; ROA.4338. The murder was in retaliation for the victim's interference in the Texas Mafia's business dealings. *Canales*, 98 S.W.3d at 690. At sentencing, trial counsel, having conducted essentially no mitigation investigation, presented virtually nothing in mitigation. As this Court described it:

> By Canales's trial counsel's own admission, they did not conduct *any* mitigation investigation. A declaration from his trial counsel shows that trial counsel did not hire a mitigation specialist, interview family members or others who knew him growing up, or "collect any records or any historical data on his life." During sentencing, the only mitigation evidence his counsel presented was that he was "a gifted artist" and "a peacemaker in prison." Even the prosecutor noticed the dearth of any mitigating evidence, stating "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 him is that he's a good artist."

Id. at 569. Based on this, Mr. Canales was sentenced to death.

Mr. Canales first raised his *Wiggins* claim in his successive state habeas petition (which was ultimately dismissed as procedurally barred, *infra*). *Ex parte Canales*, 2008 WL 383804, at *1. State habeas counsel conducted no mitigation investigation "due to a misunderstanding of funding for habeas investigations: [Mr. Canales's] state habeas counsel thought his funding was capped at $25,000, and so he only dedicated $2,500 to investigation—and most of that went to issues related to innocence." *Canales*, 765 F.3d at 569. The state court dismissed his successive habeas as procedurally barred. *Ex parte Canales*, 2008 WL 383804, at *1.

Federal habeas counsel finally investigated the many red flags of substantial, compelling mitigation and, despite the lack of opportunity to develop the bases for the claim in the district court, *Canales*, 765 F.3d at 571, presented a provisional depiction of the deep and varied sources of mitigating evidence entirely ignored by

trial counsel. In finding trial counsel's performance deficient and remanding the case to the district court, this Court summarized some of the results:

> If Canales's trial attorneys had conducted a mitigation investigation, they would have discovered an extensive history of physical abuse, emotional abuse, and neglect. Canales's mother was an alcoholic who neglected her children, and his father was violent, angry, and irrational. After Canales's parents separated, his mother married a man who was physically abusive, beating Canales with a belt and fist and forcing him to strip naked prior to these beatings. Canales's step-father sexually abused his sister, and Canales attempted, in vain, to protect her. The family lived in poor housing, infested with flea and lice and located in "gang central." Canales's grandparents were also physically and verbally abusive. Eventually, Canales's mother left him with his father. The beatings then resumed, and Canales's father would beat him "until his father got tired." This led Canales to abuse drugs and alcohol, "hook[ ] up with the wrong people," and begin committing crimes. He lived in half-way houses for part of his teenage years. Canales's sister stated that the death of Canales's mother impacted Canales severely and that he "went off the deep end" after she passed away.

Id. at 569-70.

C. Nature And Quality Of The New Mitigation Evidence.

As this Court noted in 2014, the new mitigation evidence developed by federal habeas counsel's initial investigation effort, covered a wide range of topics going far beyond trial counsel's presentation merely that Mr. Canales was a peacemaker in prison and a good artist. After the Court's 2014 remand, federal counsel extensively developed and presented new mitigation evidence in the district court and, despite the lack of an evidentiary hearing, built an extensive,

powerful record in the district court of the range of penalty phase evidence that Mr. Canales's jury would have heard had he received the assistance of counsel required under the Sixth Amendment. ROA.4383-403. A full discussion of this new mitigation evidence is set forth in the COA application to this Court. Doc. 00514515500 at 5-37. In the place of a complete rehearsal of that compelling evidence, the following overview is offered here.[2]

The new evidence falls into two broad categories: evidence (i) rebutting future dangerousness addressing facts "already introduced [via] the aggravating 'edge' of [the State's evidence]," *Walbey v. Quarterman*, 309 F. App'x 795, 806 (5th Cir. 2009), and (ii) manifesting extensive childhood trauma and deprivation supplying a compelling, mitigating explanation of Mr. Canales's conduct, *see id.* at 802-03 (citing *Williams v. Taylor*, 529 U.S. 362, 397 (2000)). These interrelated categories show a repeated pattern of trauma and deprivation going a considerable distance to explaining Mr. Canales's individual vulnerability to the intense, existential pressures he felt at the Telford Unit leading up to the tragic killing of Mr. Dickerson.

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[2] In recognition of this Court's directive to "avoid repetition" with previously filings, the summary of the new mitigation evidence provided here is extremely abbreviated. It is prayed that the Court freely considers the gravity of the evidence marshalled in Mr. Canales's above-referenced, granted application for a COA (Doc. 00514515500 at 5-37), and that the abbreviated treatment herein in no way detracts from the force of that body of evidence.

As a child, all of Andy's primary caretakers were substance abusers. He and his siblings suffered persistent violence at the hands of their fathers and stepfathers, while their alcoholic mother failed to protect them. ROA.4383-93. Sexual and physical abuse was rampant—in Andy's immediate and extended family—especially when Andy's mother became involved with Carlos Espinoza, who was abusive to Andy's mother and viciously beat Andy and his younger sister. ROA.4394. Espinozo stripped Andy before whipping him with a belt, and molested both Andy and his sister Elizabeth, Andy's sister, recalls "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." ROA.4264.

Besides the on-going physical abuse, Andy and his sister were sexually molested by Espinoza. Elizabeth recalls Andy desperately trying to protect her even though as a young boy he was no match for a grown man. ROA.4267.

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.4386, 4400-01. Andy became an alcoholic by age 14, and soon thereafter had his first experiences in the criminal justice system in connection with John Ramirez, another abusive sexual predator his mother moved

in with. ROA.4386. Ramirez was happy to have Andy out of the picture because he stood as the primary barrier between Ramirez and his younger sister, Gabriela. ROA.4269-70, 4294. In prison, Andy joined the Texas Syndicate, a Latino prison gang, after he was exposed to prison violence. He thought that involvement ended when he was paroled.

Andy began rebuilding a stable life with the positive influence of his girlfriend, Liz Hewitt, and her family, but it all unraveled when Andy's mother suffered an aneurysm, causing her to lose her speech and motor functions. ROA.4386-87. Andy began using drugs and ended up back in prison in 1995 when his parole was revoked. ROA.4387.

Andy then experienced several heart attacks, and his poor health made him vulnerable to gang targeting such that he had to avail himself of the protection of a rival gang. Their protection put Andy in their debt, leading up to the Dickerson murder in 1997. ROA.4387.

At sentencing, the State focused on Andy's violent acts and threats in prison as a member of the Texas Mafia to show future dangerousness. ROA.4403. Andy'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 Andy then faced. Andy avoided fights because his heart medicines caused him to bruise

easily and prevent normal blood clotting so if cut, even superficially, he would bleed for hours. ROA.4404. But when Andy's former gang, the Texas Syndicate learned Andy was formerly a member of the Latin Kings and had two prior sex convictions, they targeted him. Andy's roommate, Bruce Richards, offered Andy the protection of the Texas Mafia, a cousin to the Aryan Brotherhood white supremacist gang. ROA.4404-05. The protection came with a price, however, and Andy 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. Repetition of these circumstances in the future is highly unlikely given that under a sentence of life without possibility of parole, Andy would be kept in enhanced custody status providing essentially the same degree of incapacitation as death row. ROA.4405.

Furthermore, mitigation expert Susan Herrero, ROA.4239-85; neuropsychologist, Dr. Tora L. Brawley, ROA.4327-29; and a general and forensic psychiatrist, Dr. Donna Maddox, ROA.4330-78, helped explain the causes and consequences of this abundant new mitigation evidence. For example, Ms. Herrero was able to track Andy's deteriorating school performance, as he was moved from school to school and in tandem with his traumatic home life. ROA.4273-75. Ms. Herrero also noted the effects of multi-generational violence in modeling parenting

styles. ROA.4262-66. Dr. Brawley administered neuropsychological testing and found evidence of frontal lobe functioning deficits especially with matrix reasoning and verbal fluency. ROA.4329. Dr. Donna Maddox, diagnosed Andy with Trauma and Stressor Related Disorder, consistent with PTSD. ROA.4341.

D. The District Court's Analysis.

The district court correctly noted that the sole question before it was whether the new mitigation evidence, taken with the evidence already presented at trial, would have raised a reasonable probability of a different sentencing outcome. The lower court's error with this "prejudice question in the first instance," *Canales*, 765 F.3d at 571, was not in the identification of the controlling constitutional precedent; rather, it was in its failure to apply the constitutional authority to the new evidence adduced on this Court's remand.

"A reasonable probability is a probability sufficient to undermine confidence in the outcome." ROA.4534 (quoting *Strickland v. Washington*, 455 U.S. 558, 694 (1994)). "In reviewing the issue of prejudice at capital sentencing, courts must reweigh the quality and quantity of the available mitigating evidence, including that presented in post-conviction proceedings, against the aggravating evidence." ROA.4536 (citing *Williams*, 529 U.S. at 397-98; *Blanton v. Quarterman*, 543 F.3d 230, 236 (5th Cir. 2008), *cert. denied*, 556 U.S. 1240 (2009)). The district court

failed to note that the prejudice standard means Mr. Canales's burden was to show it was reasonably probable that "at least one juror would have harbored a reasonable doubt" whether Mr. Canales deserved the death penalty. *Buck v. Davis*, 137 S. Ct. 759, 765 (2017); *accord Wiggins*, 539 U.S. at 537; *Canales*, 765 F.3d at 570-71; *Lewis v. Dretke*, 355 F.3d 364, 369 (5th Cir. 2003).

The district court recited that it conducted such an analysis: "In the present case, having reweighed all of the mitigating evidence, both old and new, against the aggravating evidence, the Court finds that the aggravating evidence far outweighs the mitigating evidence." ROA.4536. It recited what it treated as insurmountable aggravating circumstance, and then recited in brief, the bare facts of the new evidence leaving out many of the contextual connections. ROA.4526-27. It rejected that these facts could provide "proper context to the circumstances surrounding the offense" because it agreed with the Respondent-Appellee's argument that this evidence was all "double-edged" and could be taken as adding to the evidence in aggravation. ROA.4538.

The evidence, it said, was "a wealth of double-edged evidence, including evidence of gang violence, alcohol, drugs, and physical and sexual abuse." ROA.4538. It cited *Johnson v. Cockrell*, 306 F.3d 249, 253 (5th Cir. 2002), *cert denied*, 538 U.S. 926 (2003), for the proposition that all of this evidence could be

read by the jury to support future dangerousness. ROA.4538. Both the magistrate and the district court agreed with the Respondent-Appellant's concession that the new mitigation evidence was "compelling," but said since it was "double-edged," it did not outweigh the evidence in aggravation. ROA.4538. The only explanation it gave was that the compelling evidence of Mr. Canales's heart condition supported future dangerousness because it meant he would continue to be vulnerable to gang coercion, ROA.4538, ignoring the evidence that with a life sentence he would be in enhanced security, as he is now, under a death sentence, ROA.4472-73.

SUMMARY OF THE ARGUMENT

The Court's *de novo* review of the district court's erroneous denial of habeas relief by finding that Mr. Canales's deficiently performing counsel did not prejudice him in his penalty phase by failing to develop and present an array of compelling mitigation evidence is not subject to AEDPA deference. Thus the Court now should weigh directly the evidence submitted in pleadings to the district court upon its remand in *Canales v. State*, 765 F.3d 551, 571 (5th Cir. 2014).

The new evidence developed and submitted after the 2014 remand (i) rebuts future dangerousness addressing facts "already introduced [via] the aggravating 'edge' of [the State's evidence]," *Walbey v. Quarterman*, 309 F. App'x 795, 806

(5th Cir. 2009), and (ii) manifests extensive childhood trauma and deprivation supplying a compelling, mitigating explanation of Mr. Canales's conduct, *see id.* at 802-03 (citing *Williams v. Taylor*, 529 U.S. 362, 397 (2000)).

The district court globally failed to conduct the proper inquiry and yielded an unconstitutional result requiring reversal. With respect to the Texas special issue of future dangerousness,[3] the court failed to recognize that the State had already fully introduced the aggravating edge of the evidence relating to Mr. Canales's vulnerability, due to a severe heart condition, to prison gang coercion. The extensive evidence explaining Mr. Canales's circumstances would not have introduced any new aggravation and would have only served to assist his cause.

Further, the district court entirely failed to conduct the reweighing of the wealth of new mitigating evidence of chronic trauma, poverty, deprivation, extreme sexual depredation, and substance abuse in Mr. Canales's childhood against the State's aggravating evidence, employing the "brutality trumps" approach—*viz.*, the "stereotypical fall-back argument that the heinous and egregious nature of the crime would have ensured assessment of the death penalty." *Gardner v. Johnson*, 247 F.3d 551 (2001); *see Walbey*, 309 F. App'x at

[3] The district court further ignored that reweighing the evidence presents a question distinct from the question of future dangerousness and that the Supreme Court has repeatedly struck down schemes that limit the consideration of mitigation evidence to future dangerousness. *Penry v. Lynaugh*, 492 U.S. 302 (1989); *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 241 (2007).

804. This approach is roundly condemned and plainly unconstitutional—yet the district court embraced it in discarding meaningful consideration of the evidence rehearsed in the opinion under review. The district court nowhere discussed its exculpatory or any other effects that would redound toward mercy at sentencing.

Thus, the district court flouted this Court's order to determine whether it is reasonably likely that "'at least one juror would have struck a different balance.'" *Canales*, 765 F.3d at 571 (quoting *Wiggins*, 539 U.S. at 537); *see Buck v. Davis*, 137 S. Ct. 759, 765 (2017) (applying standard that "at least one juror would have harbored a reasonable doubt" in weighing effect of unconstitutional expert testimony on race and violence concerning future dangerousness).

ARGUMENT

I. LEGAL INQUIRY

A. Standard of Review.

In an appeal from denial of habeas relief, this Court reviews district court legal conclusions *de novo* and its fact findings for clear error. *Walbey v. Quarterman*, 309 F. App'x 795, 799 (5th Cir. 2009). This Court's remand was premised on affording Mr. Canales his first "chance to develop the factual basis for his claim." *Canales v. Stephens*, 765 F.3d 551, 571 (5th Cir. 2014). The remand

was limited to the question of prejudice, a mixed question of law and fact. *Id.* at 578; *Lewis v. Dretke*, 355 F.3d 364, 366 (5th Cir. 2003) ("As claims of ineffective assistance of counsel involve mixed questions of law and fact, they are reviewed *de novo*."); *see also United States v. Shepherd*, 880 F.3d 734, 740 (5th Cir. 2018) (in § 2255 cases where there are likewise no state court decisions to which deference can possibly be owed, "district court's determination concerning ineffective-assistance claims are reviewed de novo"); *Pape v. Thaler*, 645 F.3d 281, 287 (5th Cir. 2011) (review of state court denial of claims is *de novo* for "mixed questions of law and fact"); *but see Walbey*, 309 F. App'x at 799 (explaining only that the *Wiggins* inquiry—in that case, under AEDPA analysis pursuant to 28 U.S.C. § 2254(d)—concerns application of "governing legal rule").

B. AEDPA Does Not Govern This Court's *De Novo* Review Because The State Courts Did Not Address This Issue.

The Texas Court of Criminal Appeals ("TCCA") never adjudicated Mr. Canales's *Wiggins* claim on the merits. Instead, it disposed of the claim in his successive state habeas petition, the only time it was presented to the state courts, by finding it procedurally barred. There is no state court opinion to which this Court can possibly defer.

Even under the onerous AEDPA deference,[4] the record presently before this Court would compel reversal, as it is strongly analogous to that found in *Walbey*—a case governed by AEDPA. *Walbey,* 309 F. App'x at 799 (under AEDPA, the state court opinion can only be reversed if "the state court decision denying relief was 'contrary to' or 'an unreasonable application of[] clearly established Federal law, as determined by the Supreme Court of the United States.'") (modification in *Walbey*). Thus, the district court's penurious treatment of Petitioner-Appellant's new evidence, developed and advanced upon this Court's remand, dictates a clear resolution of the issue presented on this appeal.

Here, there was no state court adjudication on the merits of Mr. Canales's *Wiggins* claim generally or, of course, of *Wiggins* prejudice, the sole issue now presented to this Court. *Ex parte Canales*, No. WR-54,789-02, 2008 WL 383804 (Tex. Crim. App. Feb. 13, 2008) (citing Tex. Crim. Proc. Code Ann. § 11.071(5)(a) (West)) (summarily denying the claim citing state criminal procedural rule stating the "court may not consider the merits").

[4] Under AEDPA, this Court would have to determine that the state court decision "adjudicated on the merits in State court proceedings" "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or "was based on an unreasonable determination of the facts." 28 U.S.C. § 2254(d).

Walbey granted *Wiggins* relief despite the invocation of "double-edged" argument, and even under the deferential standard of AEDPA, ruling that the state court denial of the *Wiggins* claim was unreasonable under *Williams v. Taylor*, 529 U.S. 362 (2000). *Walbey*, 309 F. App'x at 805-06. *Walbey* explained that *Williams* addressed "double-edged evidence in the context of a performance inquiry, but subsequently [found] the failure to introduce the mitigating evidence which contained the double-edged evidence, prejudicial." *Id*. at 805 n. 46.[5]

Crucially, in *Walbey*—as is true for Mr. Canales—"[t]he state had already introduced the aggravating 'edge' of some of the evidence it now contends is double edged." *Id*. at 806. Even when evidence may contribute to evidence of future dangerousness, it may also be mitigating in helping the jury understand that "[the appellant's] actions could be explained (even though not justified of course)." *Id*. at 803. Thus, the *Walbey* Court did not merely disagree with the state court denial of relief. Under the deferential standard of AEDPA, *Walbey* concluded that the denial of relief was unreasonable under clearly established federal law. Here, the Court must entertain the district court's application of these same authorities to

[5] The Supreme Court cited, in addition to *Williams*, a fuller line of its opinions "establishing the importance of allowing juries to give meaningful effect to any mitigating evidence providing a basis for a sentence of life rather than death *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 241 (2007) (citing *Locket v. Ohio*, 438 U.S. 586 (1978); *Penry v. Lynaugh*, 492 U.S. 302,321 (1989); *Graham v. Collins*, 506 U.S. 461 (1993)).

the new evidence presented on remand on behalf of Mr. Canales. The far less demanding standard of review for Mr. Canales dictates that he obtain the result Mr. Walbey secured, *viz.*, reversal of the district court due to the underlying misapplication of the governing constitutional rule and a remand with instructions to grant a writ of habeas corpus. *Id.* at 806.

Lewis, 355 F.3d at 366, which also concerned a *Wiggins* claim but was subject to pre-AEDPA deference rules, sheds additional light on the profound implications for Mr. Canales's appellate review resulting from this procedural history devoid of state court consideration of the Sixth Amendment violation at bar. *Id*. at 366.[1] For Lewis, "[b]ecause the state court did not make any factual findings regarding these claims … , no deference is owed to the state court's resolution of the instant claims." *Id*. In *Lewis*, the district court erroneously disregarded new mitigation evidence related to childhood abuse. *Id*. at 369. In reviewing prejudice, *Lewis* drew from both *Williams* and *Wiggins*, which relied on "[m]itigating evidence of childhood abuse." *Id*. (citing *Williams*, 529 U.S. at 398; *Wiggins*, 539 U.S. at 535-36). *Lewis* concluded, "It is obvious to us that the level of abuse to which Lewis was exposed mandates the conclusion that, had this evidence been produced, it is quite likely that it would have affected the sentencing decision of at least one juror." *Id*. at 369. Especially given the lack of fact findings

to which it must defer, *Lewis* observed, "Although as a general proposition, we might remand for further fact finding by the district court, such a disposition would not be appropriate in this case." *Id*. It reversed, instructing the district court to grant the writ. *Id*. at 370.

In Mr. Canales's case, this Court has a freer hand than in either *Walbey* or *Lewis* because Petitioner-Appellant has simply had no state court adjudication of his *Wiggins* claim.

C. The Test For *Wiggins* Prejudice Is Whether It Is Reasonably Probable The New Mitigation Would Have Raised Doubt In At Least One Juror.

To prove he is entitled to relief under *Strickland* and *Wiggins*, Mr. 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). Texas law requires that before imposing a death sentence, capital jurors must find unanimously, after "taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant," that "sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment without parole rather than a death sentence" are absent. Tex. Code Crim. Proc. art. 37.071. §§ 1(e)(1), (f). This means Petitioner-Appellant needed to

show that but for trial counsel's failure to investigate and present the new mitigation evidence, "at least one juror would have harbored a reasonable doubt" whether Mr. Canales deserved the death penalty. *Buck*, 137 S. Ct. at 765 (applying standard to unconstitutional expert testimony on race and violence concerning future dangerousness); *accord Lewis*, 355 F.3d at 369 ("It is obvious to us that the level of abuse to which Lewis was exposed mandates the conclusion that, had this evidence been produced, it is quite likely that it would have affected the sentencing decision of at least one juror."); *Canales*, 765 F.3d at 570-71 ("[T]here is some merit to the notion that, had trial counsel's performance not be deficient during sentencing, 'at least one juror would have struck a different balance.'") (quoting *Wiggins*, 539 U.S. at 537).

II. THE NEW EVIDENCE WAS BROADLY, INHERENTLY MITIGATING AND NOT VULNERABLE TO MEANINGFUL DOUBLE-EDGED ANALYSIS.

A. This Court's 2014 Remand Opinion Finding Deficient Performance Recognized That Prejudice Was Likely.

In 2014, this Court remanded this case for the sole purpose of determining prejudice, *Canales*, 765 F.3d at 578, having already determined that Mr. Canales has shown cause to overcome the procedural default, and that determination included finding that Mr. Canales's underlying claim is "substantial," meaning Mr. Canales has shown his claim "has some merit." *Id*. at 568. "Based on these facts,

we hold that Canales's ineffective assistance of trial counsel claim has some merit." *Id*. at 570. In addition to finding trial counsel's performance deficient, the Court also conducted a preliminary assessment of prejudice, and concluded:

> Canales has shown that there is some merit to the claim that he was prejudiced by his trial counsel's deficient behavior during sentencing. The *only* mitigation evidence put forward during sentencing was that Canales was a gifted artist and a peacemaker in prison. The jury did not hear *any* evidence regarding Canales's childhood, which was full of violence and privation. While there was certainly evidence to support a finding of future dangerousness, we are not convinced that evidence is enough to say that Canales's claim is not substantial. We are persuaded that the Supreme Court's decisions in *Williams v. Taylor,* 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000), and *Rompilla v. Beard,* 545 U.S. 374, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005) show that Canales's claim has, at the very least, some merit. *See Rompilla*, 545 U.S. at 390–93, 125 S.Ct. 2456 (state court decision denying habeas relief was unreasonable where additional mitigation investigation regarding the defendant's abusive, impoverished childhood *and* alcohol-related causes of the defendant's juvenile incarcerations might have influenced the jury's evaluation of culpability); *Williams,* 529 U.S. at 398–99, 120 S.Ct. 1495 (state court decision denying habeas relief was unreasonable where new mitigation evidence, including "the graphic description of [the defendant's] childhood, filled with abuse and privation, or the reality that he was 'borderline mentally retarded,' might well have influenced the jury's appraisal of his moral culpability" despite the "strength of the prosecution evidence supporting the future dangerous aggravating circumstance"). Given all this, there is some merit to the notion that, had trial counsel's performance not been deficient during sentencing, "at least one juror would have struck a different balance." *See Wiggins,* 539 U.S. at 537, 123 S.Ct. 2527.

Id. at 570-71.

Frequently in *Wiggins* claim reviews, the court of appeals has bypassed deficiency analysis by finding no prejudice. *E.g., St. Aubin v. Quarterman*, 470 F.3d 1096, 1103 (5th Cir. 2006) ("Furthermore, 'a tactical decision not to pursue and present potentially mitigating evidence on the grounds that it is double-edged in nature is objectively reasonable, and therefore does not amount to deficient performance.'") (quoting *Rector v. Johnson,* 120 F.3d 551, 564 (5th Cir. 1997), *cert. denied,* 522 U.S. 1120 (1998)). The Court's adjudication of trial counsel's deficient performance, which includes the determination that counsel's lack of investigation could not have been strategic, strongly points to its prejudicial effect. The Court's very decision to remand the case strongly points to a likely finding of prejudice, as underscored in the opinion's language. The preliminary look at the reweighing suggests that taking the totality of the new evidence against existing aggravation will almost certainly yield a different result from taking only the fact that Mr. Canales was a peacemaker in prison and a gifted artist against the exact same evidence in aggravation.

B. The New Mitigation Evidence In This Case Was Not "Double-Edged."

1. Any aggravating "edge" was already before the jury, courtesy of the State's case against Mr. Canales, and the new evidence opened no door to further aggravation.

The district court expressly adopted the magistrate judge's "findings, conclusions, and recommendations" in his report and recommendation, ROA.4521, which characterized Mr. Canales's new evidence as "double-edged" in that "it could all be read by the jury to support, rather than detract, from his future dangerousness claim." *Johnson v. Cockrell*, 306 F.3d 249, 253 (5th Cir. 2002), *cert. denied*, 538 U.S. 926 (2003). ROA.4476-77. But any legitimately aggravating edge to the new mitigation had already been presented by the State and thus presented only a salutary change to the overall evidence bearing upon the future dangerousness special issue. *Walbey*, 309 F. App'x at 806 ("The state had thus already introduced the aggravating 'edge' of some of the evidence it now contends is double-edged."); *cf. St. Aubin*, 470 F.3d at 1103 ("[I]ntroducing St. Aubin's mental-health history as mitigating evidence would have opened the door for the State to introduce numerous violent incidents which had *not* been introduced during the guilt phase.").

The district court emphasized the implications of *Wong v. Belmontes*, 558 U.S. 15, 20 (2009), on weighing under *Williams v. Taylor* and the potential

negative consequences for a defendant resulting from new evidence: "it is necessary to consider *all* the relevant evidence that the jury would have had before it if [the petitioner] had pursued the different path—not just the mitigation evidence [the petitioner] could have presented, but also the … evidence that almost certainly would have come with it." ROA.4536. This point from *Wong*, however, is inapposite to evaluating the evidence in regard to Mr. Canales's future dangerousness; his new evidence explained the "aggravating edge" evidence that the State introduced, it did not open any doors to permit additional, potentially damaging evidence to "come with it," *Wong*, 558 U.S. at 20, as that evidence was already there courtesy of the State's case. Thus, there was no concern that placing the crime in its full context could have had anything but a mitigating effect.

At the guilt phase, the State introduced evidence of Mr. Canales's gang membership and gang information as evidence of the "combination" element of capital murder.[6] *Canales*, 98 S.W.3d 690, 696-97 (Tex.Crim.App. 2003), *cert denied* 540 U.S. 1051 (2003). The State's theory of the case was primarily that the murder was a gang retaliation for the victim's interference with the gang's business interests. *Id*. at 693. Had trial counsel presented evidence of Mr. Canales's serious

[6] The statute defines what would otherwise be simple murder as capital murder when "(5) the person, while incarcerated in a penal institution, murders another…with the intent to establish, maintain, or participate in a combination or in the profits of a combination." Tex. Penal Code Ann. § 19.03(5) (West).

heart condition that necessitated his accepting the protection of the Texas Mafia from threats to his life posed by the Texas Syndicate, the only new "edge" to such evidence would be mitigating. Like in *Walbey*, this evidence could help the jury understand Mr. Canales's actions (even though it would not excuse them), with a "reasonable probability that one juror would have voted for life in prison rather than death." *Walbey*, 309 F. App'x at 803, 806. Thus, the mitigating effect of introducing this evidence at sentencing comes with no *added* aggravation. *See id.* at 805 n.46 (citing *Williams*, 529 U.S. at 396 as a case "addressing double-edged evidence in the context of a performance inquiry, but subsequently finding the failure to introduce the mitigating evidence, which contained the doubled-edged evidence, prejudicial"). It did not open the door to any new aggravating evidence the jury had not already seen. In fact, it would have gone a long way to defusing the aggravating edge of the gang evidence, by showing that Mr. Canales was behaving under great duress.

2. The district court accepted Respondent-Appellee's unconstitutional categorical version of the "double-edged" argument, preempting actual weighing of the new evidence.

a. The district court categorically discredited the new mitigation evidence on the inaccurate premise that it created an aggravating effect.

The district court recited Respondent-Appellee's argument that the aggravation in this case was so great that no mitigation could possibly outweigh it, ROA.4538, thereby advancing the "stronger version" of the double-edged argument that the Fifth Circuit has previously held to be unconstitutional and simply "foreclosed by *Williams* [529 U.S. at 396]." *Walbey*, 309 F. App'x at 805. What properly remains with respect to any double-edged analysis is the "weaker version," which contemplates that mitigation may come with some aggravating effect that may or may not change the balance. *Id.*[7] While the proscribed "stronger

[7] Given that prejudice is measured as the reasonable probability that at least one juror would find the balance comes out the other way, the Respondent-Appellee must defend use of the strong version:

> Stated in this weak form, the underlying empirical proposition is undoubtedly true. However, stated in this weak form, no inference concerning prejudice is warranted. If, for example, only one juror in 100 took this view, it is unlikely that such a juror would sit on the defendant's jury. Thus, his or her views would be irrelevant to the assessment of prejudice.
>
> Given the structure of capital sentencing, a much stronger empirical claim would have to be made to justify an inference of no prejudice. Even if jurors were equally split about the net effect of a neglected kind of mitigation evidence, the double-edged sword conclusion would be unwarranted.

version" bypasses reweighing upon the faulty premise that "the unhelpful and aggravating" effect of the new evidence results in making "a stronger case for the death penalty," *id*. at 804, that facile treatment of the evidence runs afoul of the constitutional authorities.

As *Walbey* noted, *Williams* "address[ed] double-edged evidence in the context of a performance inquiry, but subsequently f[ound] the failure to introduce the mitigating evidence, which contained the double-edged evidence, prejudicial." *Id*. at 805 n.46. *Walbey* continued, explaining that the "double-edged" argument's weaker version, that the aggravating features of some mitigating evidence could overwhelm any mitigating effect, is not controversial, but neither is it the case here." *Id*. at 805. This is to say, what is called for is that an actual weighing of the evidence occur, rather than a bald assertion that weighing need not take place.

As for the matter of surmising how to assign relative weight to mitigation evidence, empirical research reflects that evidence generally understood to be mitigating in nature is not susceptible to yielding a net aggravating effect. Blume & Johnson, *supra* note 7, at 1502. In fact, the available empirical data has long

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John H. Blume & Sheri L. Johnson, *The Fourth Circuit's "Double-Edged Sword": Eviscerating the Right to Present Mitigating Evidence and Beheading the Right to the Assistance of Counsel*, 58 Maryland L. Rev. 1480, 1502 (1999).

provided "that failure to present significant psychologically based mitigating evidence is prejudicial." *Id*. One poll indicated that:

> [o]nly forty-seven percent of the population favor imposition of the death penalty on persons who were severely abused as a child; only fifty-five percent favor its imposition on persons who were under the influence of drugs or alcohol at that time of the offense. Most strikingly, in 1995, only nine percent of the population favored imposition of the death penalty on mentally retarded defendants.

Id. at 1503 (citing Samuel P. Gross, *Update: American Public Opinion on the Death Penalty—It's Getting Personal* 83 CORNELL L. REV. 1448, 1469 (1998)). Data collected by the Capital Jury Project supports this approach:

> Seventy-four percent of the surveyed capital jurors from South Carolina said that if the defendant were mentally retarded, they would be less likely to vote for the death penalty, and only three percent said that mental retardation would make them more likely to vote for the death penalty. A history of mental illness also influences far more of those jurors surveyed away from the death penalty (fifty-six percent) than toward it (three percent). Serious abuse as a child made thirty-seven percent less likely to impose the death penalty and only one percent more likely to do so. Even with respect to alcoholism, more than twice as many jurors were less inclined to impose the death penalty if the defendant were alcoholic (thirteen percent) than were more likely to impose it (five percent).

Id. at 1503-04 (citing Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What do Jurors Think?,* 98 Colum. L. Rev. 1538 (1998)).

b. Employing the "brutality trumps" approach, the district court side-stepped the mitigating quality of the new evidence.

The district court failed to engage in a meaningful consideration of the new evidence, brushing it aside as double-edged even while conceding its "compelling" quality. ROA.4538. The district court's nominal reweighing under *Wiggins* prejudice analysis did not seriously engage the actual new evidence. While the Order invoked the term "reweighing," it bypassed any meaningful review of the work each juror would have needed to do in weighing the totality of Mr. Canales's mitigation evidence.

The court began its prejudice analysis by concluding that "the aggravating evidence far outweighs the mitigating evidence." ROA.4536. It recited the evidence in aggravation, all of which was already presented to the jury at trial, ROA.4536-37, and found that the aggravating evidence supported future dangerousness. ROA.4537. It then recited the mitigating evidence, including the two facts the jury heard, that he was a peacemaker in prison and that he had an aptitude for art, and flatly summarized the voluminous new evidence.[8]

[8] The district court wrote:

> The additional mitigating evidence presented during these proceedings shows that Canales had prenatal exposure to alcohol and parental alcoholism, poverty and homelessness, neglect, parental rejection, abandonment, and physical and sexual abuse. His Full Scale IQ score on one test was 91 and 92 on another. He did not complete school, but completed his GED at Brownwood State School. The additional evidence delved further into his gang activities. At one time, he was a member of the Texas

The court paid special attention to the new evidence that showed the coercive circumstances of Mr. Canales's participation in the crime, characterizing it as "additional evidence [that] delved further into his gang activities." *Id*. It was dismissive of the argument that this evidence could help the jury understand those circumstances and accepted the Respondent-Appellant's argument that the new evidence going into Mr. Canales's gang activity was aggravating, and that the "evidence of poverty, abuse, and neglect" though "compelling…does not outweigh the aggravating circumstances in this case." ROA.4538.

The district court defended the magistrate judge's treatment of this evidence against the challenge that he wrongly dismissed the new evidence without properly weighing it: "The analysis was not dismissive of the wealth of new evidence of gang violence, alcohol, drugs, and physical and sexual abuse. Such evidence was acknowledged and duly noted." *Id*.

The district court, similarly recited and "duly noted" the new evidence, without once considering its mitigating effect. Although it recited that the aggravation far outweighs the evidence in mitigation, it never actually considered the new evidence as mitigating, adopting instead the view that "the new mitigation

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> Syndicate, who placed a hit on him. He then joined the Texas Mafia and participated in the murder of Gary Dickerson. Prior to the murder, he had a heart attack and was dependent on the gang.

ROA.4537.

evidence was correctly characterized as double-edged." ROA.4539. The court never considered that the aggravating effect of the new evidence, particularly Mr. Canales's involvement with the two competing gangs, was already presented to the jury and therefore the effect of the new evidence could only have been mitigating. The court did not consider whether any of the new evidence was evidence bearing on moral culpability or capable of explaining (without excusing) Mr. Canales's conduct, his particular vulnerabilities, or any reason to extend compassion and make it reasonably likely that at least one juror would believe Mr. Canales should be punished by a sentence less than death. It adopted Respondent-Appellee's opinion that the new mitigation evidence was "compelling," ROA.4538, without ever considering exactly what it compels.

The district court concluded "there is *no* reasonable probability that a juror would have found that the mitigating evidence outweighed the aggravating evidence." ROA.4540. The lower court then quoted *Martinez v. Quarterman*, 481 F.3d 249, 259 (5th Cir. 2007): "The following conclusion by the Fifth Circuit is equally applicable to the present case: 'the additional mitigating evidence was not so compelling, especially in light of the horrific facts of the crime, that the sentencer would have found a death sentence unwarranted.'" ROA.4540.

The district court thus found Mr. Canales's role in restraining a prisoner while another man strangled him to have been "horrific" like Virgil Martinez's crime of "four murders in which the victims were shot multiple times, requiring Martinez to reload [his firearm]." *Id.* at 255. The aggravation from a triggerman's quadruple-homicide is not commensurable to Mr. Canales's coerced role in the killing of prisoner Dickerson. Additionally, the district court's comparison to *Martinez* is problematic on the further basis that the prejudice analysis concerned the strategic decision of Martinez's trial counsel not to introduce evidence concerning an aspect of the defendant's temporal lobe epilepsy;[9] Mr. Canales's trial counsel utterly failed to investigate his background at all and thus was in no position to weigh whether to introduce such evidence. Mr. Canales's new evidence offers a rich picture of his life circumstances. Returning to *Martinez*'s language diminishing the mitigation evidence that Martinez's trial counsel strategically chose to withhold as "not so compelling, especially in light of the horrific facts of the crime," the Court must distinguish the extensive and rich quality of Mr. Canales's new evidence now under review. Mr. Canales's evidence draws upon, as

[9] Martinez's trial counsel had secured expert opinion that identified defendant's temporal lobe epilepsy as a potential explanation for the homicide in question. Trial counsel extensively weighed various factors concerning the issue and prospective expert testimony, ultimately making the strategic decision neither to conduct further investigation nor present expert evidence. *Id.* at 254-55.

phrased in the ABA Supplemental Guidelines (*infra*), the "diverse frailties of humankind" applicable to his particular life circumstances, and that body of new evidence is not simply eclipsed by the details of Dickerson's killing. *ABA Supplementary Guidelines for the Mitigation of Defense Teams in Death Penalty Cases*, 36 HOFSTRA L. REV. 677 (2008), ("ABA Supp. Guidelines") Guideline 1.1 at 679

The Fifth Circuit has discredited this sort of "stereotypical fall-back argument that the heinous and egregious nature of the crime would have ensured assessment of the death penalty." *Gardner v. Johnson*, 247 F.3d 551 (2001) (finding prejudice from State's introduction of psychiatric testimony about future dangerousness in violation of right against self-incrimination). *Walbey* referred to this as the "brutality trumps" argument, 309 F. App'x at 804, while applying it to penalty phase deficient performance of trial counsel with respect to failing to prepare a testifying expert. *Walbey* explained that the argument that the petitioner "suffered no prejudice because the brutality of his crime eclipses any mitigating evidence" was simply "a non-starter." *Id.* Incorporating the discussion from *Gardner*, *Walbey* discredited the approach employed in Mr. Canales's district court opinion now before this Court:

> First, that [brutality trumps] argument cannot prevail without eviscerating the Supreme Court-approved Texas "special issues"

> scheme. To permit a jury to impose the death sentence solely because the facts are heinous and egregious would be to return to the days of inflicting capital punishment based on emotion and revenge, supplanting altogether the questions of deliberateness and future dangerousness which make the Texas scheme constitutional. Second, in this particular case, the details of the crime, as horrific as they are on an absolute scale, are not significantly more egregious than those in [a case compared to which Walbey's crime is not significantly more egregious].

Id. at 804 (second alteration in *Walbey*).

Walbey next adapted *Gardner*'s point that "the details of the crime, as horrific as they are on an absolute scale, are not significantly more egregious than those in, [for example, *Vanderbilt v. Collins*, 994 F.2d 189 (5th Cir. 1993)]."[10] *Id.*

[10] Comparisons of the crimes in question in these three cases, *Walbey*, *Gardner*, and *Vanderbilt*, underscores that Mr. Canales's crime was comparatively far less aggravated than many others, including particular cases (*Walbey* and *Gardner*) wherein the Fifth Circuit rejected application of the "brutality trumps" approach:

In *Walbey*, the defendant invaded a young woman's home, lay in wait for the woman to come home, then killed her brutally causing her to suffer over at least 10 to 15 minutes by stabbing her numerous times with a butcher knife and a barbecue fork (one wound so deep into a bone that the knife could not be pulled out), before bludgeoning her to death with blows to the head by a fire extinguisher, and then maimed the body by stabbing her more times after she was dead. *Walbey v. State*, 926 S.W.2d 307, 309 (Tex. Crim. App. 1996).

In *Gardner*, 247 F.3d at 553-54, the defendant was convicted of capital murder in the course of a kidnapping for stabbing to death one of two 14-year-old runaway hitchhikers he abducted (the other, also stabbed multiple times was left for dead but survived). Gardner stabbed each of his victims multiple times and struck the decedent's head with a rock.

In *Vanderbilt*, 994 F.2d at 191-92, the defendant abducted a 16-year-old girl in handcuffs intending to rape her, but fatally shot her before accomplishing his goal. The State presented substantial additional aggravating evidence including that he previously kidnapped and sexually molested another young girl and expert testimony that he was "extremely well controlled, well-guarded, [and] extremely deliberate in his actions."

Walbey, a case controlled by AEDPA deference review—unlike Mr. Canales's, further noted that federal habeas applications from Texas's death row "[a]lmost without exception … arise from extremely egregious, heinous, and shocking facts.[11] But if that were all that is required to offset prejudicial legal error and convert it to harmless error, habeas relief … would virtually never be available, so testing for it would amount to a hollow judicial act." *Id.* at 804 (quoting *Gardner*, 247 F.3d at 563).

3. There is no principled basis for taking the new mitigation as aggravating.

a. The new mitigation would have supplied the jurors with multifarious reasons for punishment by a sentence less than death

There is no principled way of portraying the vast quantity of new mitigating evidence—including evidence of extensive childhood physical and sexual abuse, addiction, deprivation, neglect, poverty, and racism, as well as the context of the crime, *supra*—as other than purely mitigating.

Courts have wrestled with the idea that certain types of evidence is inherently double-edged—that its net effect is to tip the weighing of all the

[11] The facts concerning the murder at bar are deplorable but they hardly elevate to the most aggravated of murders. It is recognized, however, that other aggravating circumstances apart from the killing of Mr. Dickerson itself were in evidence and properly under consideration in the weighing on remand. *See, e.g.,* ROA.4462-63.

mitigation against the evidence in aggravation in the wrong direction. This Court has accepted in some instances that evidence of childhood abuse is double-edged," *Boyle v. Johnson*, 93 F.3d 180, 187-88 (5th Cir. 1996) (giving credence to the argument that it was strategic to forego evidence of physical abuse by the father because the jury might think, "like father, like son"), and elsewhere that such evidence is not. *Robertson v. Cockrell*, 325 F.3d 242, 254 (5th Cir. 2003).[12] *Motley v. Collins*, 18 F.3d 1223, 1235 (5th Cir. 1994), reasoned that evidence of intellectual disability and organic brain damage were categorically double-edged, but abuse suffered in childhood is not because it "indicate[s] that [the defendant] was subject to change and that [he] was *not unable to learn from his mistakes*."[13]

Here, there is no reasoned way to construe the effect of the new mitigation as tipping the scales in favor of death—especially considering the only evidence in mitigation presented to the jury was that Mr. Canales was a peacemaker in prison and a gifted artist. Some of the confusion arises, perhaps, from improper focus on Texas's second special issue on future dangerousness (see *infra)*. But the effect of

[12] *Abrogated by Tennard v. Dretke*, 542 U.S. 274 (2004) (abrogating numerous Fifth Circuit opinions due to use of a restrictive definition of what is constitutionally relevant mitigation that effectively limited relevent mitigation to evidence with some nexus to the crime).

[13] Similarly, this Court rejected the attempt by a district court to limit consideration of mitigation evidence by requiring a temporal nexus to the crime in assessing prejudice. *Lewis*, 355 F.3d at 369.

mitigation goes far beyond that one consideration. The *ABA Supplementary Guidelines* describe mitigation:

> Mitigation evidence includes, but is not limited to, compassionate factors stemming from the diverse frailties of humankind, the ability to make a positive adjustment to incarceration, the realities of incarceration and the actual meaning of a life sentence, capacity for redemption, remorse, execution impact, vulnerabilities related to mental health, explanations of patterns of behavior, negation of aggravating evidence regardless of its designation as an aggravating factor, positive acts or qualities, responsible conduct in other areas of life (e.g. employment, education, military service, as a family member), any evidence bearing on the degree of moral culpability, and any other reason for a sentence less than death.

ABA Supp. Guideline 1.1 at 679. Even assuming arguendo there is some aggravating edge the jury has not already seen, the mitigating edge must be fully considered. Here, the district court failed to do so. Although it recognized the new mitigation as "compelling," it failed to examine what about it was compelling, and to consider what effect it might have on jurors in deciding the ultimate sentencing question. As Justice Sotomayor argued, invoking the "double-edged" label should never truncate the full reweighing required by *Wiggins*:

> That truncated approach is in direct contravention of this Court's precedent, which has long recognized that a court cannot simply 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).

b. The district court's cynical use of "double-edged" would swallow the Sixth Amendment right protected by Wiggins.

The cynical use of "double-edged" whereby the failure to present virtually any and all evidence in mitigation is not prejudicial would completely swallow the rights protected by *Wiggins*.[14] Instead of asking whether there is a reasonable probability that one juror would have voted for a life sentence, the Respondent-Appellee would have the Court foreclose further inquiry into prejudice if there is any chance (however remote) that someone could perceive an aggravating side to some mitigating evidence. As noted, this Court has reversed denial of relief based on such cynical use in the district courts concerning the same types of mitigation in question in *Williams* and *Wiggins*. *See, e.g., Walbey*, 309 F. App'x at 806; *Lewis*,

[14] Blume & Johnson, *supra* note 7 at 1501, 1505, writing before *Wiggins*, similarly observed that the "the hard-boiled cynic['s]" imagining "some way in which this type of evidence really is 'double-edged'" "robs ineffective assistance of counsel doctrine of coherence." They observe that the rationales of *Strickland* do not support this approach. *Id*. at 1507. Instead, the practice:

> usurps the trial lawyer's function of choosing among strategies with a mechanical rule: No mitigation is as good as some mitigation-no matter how powerful the available mitigation, no matter how marginal the aggravating factors in the case, no matter how sympathetic the defendant. Following this line of reasoning, one might next ask: Is no lawyer as good as some lawyer? Lawyers themselves are also two-edged swords, sometimes helping defendants and sometimes harming them.

Id.

355 F.3d at 369; *Moore v. Johnson*, 194 F.3d 586 (5th Cir 1999); *Trevino v. Davis*, 829 F.3d 328 (5th Cir. 2016).

III. THE DISTRICT COURT'S AMORPHOUS, INCORRECT USE OF THE "DOUBLE-EDGED" CONCEPT UNCONSTITUTIONALLY PROHIBITS CONSIDERATION OF THE INDEPENDENT MITIGATING EFFECT OF THE NEW EVIDENCE.

A. The District Court's Analysis Violates The Foundational Post-*Gregg v. Georgia* Jurisprudence On Mitigation Leading To *Penry v. Lynaugh*.

To avoid unfettered jury discretion to "wantonly and freakishly" impose death, the foundational cases have required the guidance and limitation of discretion in the punishment phase by "focus[ing] the jury's attention on the particularized nature of the crime and the particularized characteristics of the individual defendant." *Gregg v. Georgia*, 428 U.S. 153, 206 (1976). The Court struck down statutory schemes that "prevent[] the sentencer in all capital cases from giving independent mitigating weight to aspects of the defendant's character and record and to the circumstances of the offense proffered in mitigation. *Lockett v. Ohio*, 438 U.S. 586, 605 (1978). Curtailing the jury's ability to give "independent mitigating weight" is unconstitutional because it "creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." *Id*.

Drawing on *Lockett* and *Eddings v. Oklahoma*, 455 U.S. 104 (1982), *Penry v. Lynaugh*, 492 U.S. 302 (1989),[15] found Texas's pre-1991 scheme constitutionally inadequate because "in the absence of appropriate jury instructions, a reasonable juror could well have believed that there was no vehicle for expressing the view that Penry did not deserve to be sentenced to death based upon his mitigating evidence." *Id*. at 328. Under that scheme, "if a juror concluded that Penry acted deliberately and was likely to be dangerous in the future, but also concluded that because of [the mitigating evidence] he was not sufficiently culpable to deserve the death penalty, that juror would be unable to give effect to that mitigating evidence under the instructions given in this case."[16] *Id*. at 326. The problem with the pre-1991 Texas scheme was that "[t]he jury was never instructed that it could consider the evidence offered by Penry as *mitigating* evidence and that it could give *mitigating effect* to that evidence in imposing sentence." *Id*. at 321 (emphasis added). The Court cited *Gregg* for the idea that while a jury's discretion to impose death must be guided, it must be permitted "'to dispense mercy on the

[15] *Abrogated, in part, by Atkins v. Virginia*, 536 U.S. 304 (2002) on the separate issue of whether the "mentally retarded" are categorically ineligible for the death penalty.

[16] The statute in question asked the jury three special issues, 1) whether the killed deliberately, 2) whether the defendant was a future danger, and 3) whether the defendant did not act act reasonably in response to provocation. "If the jury unanimously answers 'yes' to each issue submitted, the trial court must sentence the defendant to death." *Id*. at 310 (citing Tex. Code Crim. Proc. Ann., § 27.071(c)-(e) (West 1985).

basis of factors too intangible to write into a statute.'" *Id*. at 327 (quoting *Gregg*, 428 U.S. at 222 (White, J., concurring)). "'Thus, the sentence imposed at the penalty stage should reflect a reasoned *moral* response to the defendant's background, character, and crime.'" *Id*. at 319 (quoting *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring) (emphasis in *Brown*). As in *Lockett*, the scheme prohibited jurors from giving effect to the "independent mitigating weight" of the evidence.

After *Penry*, Texas amended the statute. 1991 Tex. Sess. Law Serv. Ch. 838 (West). By its plain language, the special issues now serve to rule out death before the jury reaches the step of considering whether the mitigation in light of the aggravation means the defendant should be sentenced to less than death. Tex. Crim. Proc. Code Ann. § 37.071 (West 2013). Only if jurors unanimously agree that the answer is "yes" to the future dangerousness special issue can the jury then proceed to answer the ultimate issue: "Whether, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant a sentence of life imprisonment without parole rather than a death sentence be imposed." § 37.01(e)(1).

While capital juries after *Penry* are now properly instructed, Mr. Canales's district court conducted reweighing of his new mitigation evidence as though, in effect, the jury's consideration was under the unconstitutional pre-*Penry* scheme. The court's use of the double-edged metaphor focused only on the effect the new evidence had on future dangerousness, as if the answer to that special issue were still enough to require imposition of death. The district court's analysis did not provide the hypothetical reasonable juror a vehicle for expressing the view that Mr. Canales did not deserve to be sentenced to death based upon his mitigating evidence. *Canales*, 765 F.3d at 570-71 (remanding on basis of "merit to the notion that, had trial counsel's performance not been deficient during sentencing, 'at least one juror would have struck a different balance.'") (quoting *Wiggins*, 539 U.S. at 537); *see Walbey*, 309 F. App'x at 803 (reversing under AEDPA upon finding "reasonable probability that one juror would have voted for life in prison rather than death."); *Buck*, 137 S. Ct. at 765 (applying standard that "at least one juror would have harbored a reasonable doubt" in weighing effect of unconstitutional expert testimony on race and violence concerning future dangerousness). The district court's misuse of double-edged functions to make the final question one solely about future dangerousness without considering the actual *mitigating effect* of the new evidence.

The correct analysis, as recited *supra*, requires reweighing the evidence to determine whether it is reasonably likely that "'at least one juror would have struck a different balance.'" *Canales*, 765 F.3d at 571 (quoting *Wiggins*, 539 U.S. at 537). This analysis requires considering whether at least one juror would have found the new evidence to bear "on the degree of moral culpability, [or] any other reason for a sentence less than death." ABA Supp. Guideline 1.1 at 679. As in the current statutory scheme, answering "yes" to future dangerousness is a threshold question, not the end of the analysis.

B. After *Penry*, The Supreme Court Still Corrected Attempts To Limit Consideration Of The Independent Mitigating Effect Of Evidence.

Abdul-Kabir v. Quarterman, 550 U.S. 233, 241 (2007), involved evidence proffered not to contradict the Texas's case for future dangerousness "but instead sought to provide an explanation for his behavior that might reduce his moral culpability." The high Court noted that Texas did not correct its statutory scheme following *Lockett* "until after our unanimous decision in *Hitchcock v. Dugger*, 481 U.S. 393 (1987), unequivocally confirmed the settled quality of the *Lockett* rule." *Id*. at 248. Relying on the line of cases including (but not limited to) *Hitchcock*, *Skipper v. South Carolina*, 476 U.S. 1 (1986), *Eddings*, 455 U.S. 104, and *Lockett*, 438 U.S. 586 (plurality opinion), the Court concluded that it is unconstitutional to prohibit consideration of the mitigating effect of this evidence. *Id*. at 249, 264-65.

And it is not enough simply to say the evidence has been presented; the jury must be permitted to give weight to the mitigating effect and therefore in habeas proceedings the reviewing court must evaluate what the jury would consider and determine whether but for the failure to investigate and present this evidence, at least one juror would have struck a different balance:

> The same principles originally set forth in earlier cases such as *Lockett* and *Eddings* have been articulated explicitly by our later cases, which explained that the jury must be permitted to "consider fully" such mitigating evidence and that such consideration "would be meaningless" unless the jury not only had such evidence available to it, but also was permitted to give that evidence meaningful, mitigating effect in imposing the ultimate sentence. *Penry I,* 492 U.S., at 321, 323, 109 S.Ct. 2934 (internal quotation marks omitted); *Graham*, 506 U.S., at 475, 113 S.Ct. 892 (acknowledging that a "constitutional defect" has occurred not only when a jury is "precluded from even considering certain types of mitigating evidence," but also when "the defendant's evidence [i]s placed before the sentencer but the sentencer ha[s] no reliable means of giving mitigating effect to that evidence").

Id. at 260. More generally, "Our cases following *Lockett* have made clear that when the jury is not permitted to give meaningful effect or a 'reasoned moral response' to a defendant's mitigating evidence—because it is forbidden from doing so by statute or a judicial interpretation of a statute—the sentencing process is fatally flawed." *Id*. at 264.

Like in *Abdul-Kabir* and the line of cases going back to *Lockett*, here, the district court's reweighing prevented consideration of independent mitigating

weight of the evidence and thereby created the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty.

IV. PETITIONER-APPELLANT'S MERITORIOUS *WIGGINS* CLAIM ESTABLISHES CAUSE AND PREJUDICE TO OVERCOME STATE POST-CONVICTION COUNSEL'S DEFAULT

This Court's remand order made clear that a finding of prejudice in the underlying *Wiggins* claim, in addition to showing Mr. Canales was entitled to relief, would complete the analysis showing Mr. Canales has overcome the procedural bar of claims denied in state court due to default of state procedural rules. *Canales*, 765 F.3d at 562-67, 569, 578.

Generally, claims denied in state court on adequate and independent state grounds may not be raised in federal habeas, and denial for the failure to meet state procedural rules qualifies as such adequate grounds. *Coleman v. Thompson*, 501 U.S. 722, 729-30 (1991). But an exception exists whereby "[a] federal court may consider the merits of a procedurally defaulted claim if the petitioner shows 'cause for the default and prejudice from a violation of federal law.'" *Canales*, 765 F.3d at 562 (quoting *Martinez v. Ryan*, 566 U.S. 1, 7 (2012)). Such cause exists when the state procedural default was the result of ineffective assistance of counsel at initial collateral review. *Martinez*, 566 U.S. at 9.

This Court held that Mr. Canales established the threshold showing required to establish cause by evincing that "his counsel in the initial-review collateral proceeding was deficient." *Canales*, 765 F.3d at 567-68, 569. Mr. Canales's state habeas counsel's performance "fell below an objective standard of reasonableness" because they "did not conduct a mitigation investigation due to a misunderstanding of funding." *Id*. at 569. But cause also required Mr. Canales to show that his underlying *Wiggins* claim has "some merit." *Id*. As set forth above, the Court concluded that "trial counsel's performance was deficient" because their decision not to investigate mitigation was not reasonable or the result of a reasoned decision, leaving as the last step to establishing cause the requirement that Mr. Canales establish prejudice by showing his claim was substantial. *Id*. at 570. Before remanding the matter, the Court's own assessment of Mr. Canales's case for prejudice was that it is substantial, noting that "there is some merit to the notion that, had trial counsel's performance not been deficient during sentencing, 'at least one juror would have struck a different balance.'" *Id*. at 570-71 (quoting *Wiggins*, 539 U.S. at 537).

Having established cause, the only thing remaining to overcome the procedural default is "whether Canales can actually prove *prejudice*." *Id*. at 571. Prejudice, for purposes of the *Martinez-Trevino* exception to procedural default

means "actual prejudice resulting from the alleged constitutional violation." *Davila v. Davis*, 137 S. Ct. 2058, 2065 (2017). Because Mr. Canales's underlying ineffectiveness of counsel claim is governed by *Strickland*, proving both the remaining prong of cause and prejudice to overcome procedural default, and that he is entitled to relief, Mr. Canales must prove "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Buck*, 137 S. Ct. at 765. This means, Mr. Canales's showing (explicated *supra*), that in light of the new mitigation evidence, at least one juror would have struck a different balance overcomes the procedural default in addition to showing he is entitled to relief.

CONCLUSION

For the foregoing reasons, Petitioner-Appellant respectfully requests this Court to reverse the district court's denial of his § 2254 petition for habeas corpus relief and remand the matter with instructions to grant such relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that I, Joseph J. Perkovich, have electronically served a copy of this document upon Respondent-Appellee's counsel by filing same with the United States Court of Appeals for the Fifth Circuit's Electronic Case Filing system on November 21, 2018.

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CERTIFICATE OF COMPLIANCE

Pursuant to 5th Cir. R. 32.2.7(c), the undersigned certifies this brief complies with the type-volume limitations of 5th Cir. R. 32.2.7(b) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f) this document contains 11,645 words.

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Case No. 18-70009

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

ANIBAL CANALES, JR., Petitioner-Appellant

v.

LORIE DAVIS, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, Respondent-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS

PETITIONER-APPELLANT'S REPLY BRIEF

THIS IS A DEATH PENALTY CASE

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PRELIMINARY STATEMENT

The sole issue raised in this appeal is whether the district court, upon remand, erred in concluding that Petitioner-Appellant was not prejudiced by his trial counsel's previously adjudged deficient performance in failing to develop and present mitigating evidence reasonably likely to show that "at least one juror would have struck a different balance" in the penalty phase and not voted for a death sentence. *Canales v. Stephens*, 765 F.3d 551, 571 (5th Cir. 2014) (quoting *Wiggins v. Smith*, 539 U.S. 510, 537 (2003)). Notwithstanding the clear terms of this Court's certificate of appealability, Respondent-Appellee's Brief injects a second issue, one already considered and rejected by this Court in the course of its 2014 remand. Perplexingly, Respondent-Appellee now argues that 28 U.S.C. § 2254(e)(2) prohibits the district court, and this Court,[1] from even considering new mitigation evidence developed by federal habeas counsel pursuant to investigative funding upon remand.

Despite Respondent-Appellee's distraction, the single issue before this Court, which is subject to *de novo* review, arises from the district court's failure to conduct adequate re-weighing of the evidence. Although the district court recited the evidence in mitigation, it dismissed it as "double-edged" without considering that

[1] *See* Pet. Br. at 13 n.4 ("In the district court, the Director did not invoke § 2254(e)(2) to bar Petitioner's new evidence.").

any aggravating edge already had been squarely before the jury. Furthermore, the district court's blinkered focus on the threshold special issue of future dangerousness diverted any meaningful consideration of the broad array of mitigating effects of the new evidence on the actual sentencing outcome, including reduced culpability for the crime, help understanding why Mr. Canales behaved as he did, and many other facts reasonably likely to lead a reasonable juror to find Mr. Canales sympathetic enough to vote for life. These two failings are interrelated. It is apparently the district court's fixation on future dangerousness, rather than the jury sentencing verdict—the actual outcome upon which prejudice analysis depends—that led the court to mischaracterize the compelling evidence in mitigation as "double-edged," ignoring its mitigating effect on the outcome.

Rather than sustaining engagement with the single issue before this Court, Respondent-Appellee has attempted to derail the bounded inquiry of the present COA with argument centered upon § 2254(e)(2) aimed at preempting the Court's review of the district court's determination of the new evidence with respect to cause and prejudice excusing procedural default in state court. This argument is not even properly before this Court and it is legally wrong. The Supreme Court has clearly established that Congress did not mean for § 2254(e)(2)'s "failed to develop" language to announce a no-fault rule. The provision does not apply at all to the analysis of prejudice to overcome a procedural bar (which is not itself a ground for

relief), and excluding new evidence as to an underlying *Strickland* claim would render any such claim raised under the *Martinez-Trevino* exception impossible to implement in every case, clearly a legal position antithetical to *Martinez* itself. *Martinez v. Ryan*, 566 U.S.1 (2012); *Trevino v. Davis*, 138 S. Ct. 1793 (2018).

REPLY

I. THE COMPELLING EVIDENCE IN MITIGATION DEMONSTRATES IT IS REASONABLY PROBABLE THAT AT LEAST ONE JUROR WOULD HAVE STRUCK A DIFFERENT BALANCE AND VOTED FOR LIFE.

The district court erred in failing to reweigh the new mitigating evidence in light of all the existing relevant evidence to determine whether, but for trial counsel's ineffectiveness, it is reasonably likely at least one juror would have struck a different balance and voted for life. Respondent-Appellee's brief fails to advance grounds for upholding the district court's improper fixation upon the threshold question of future dangerousness, a prerequisite finding to considering the ultimate sentencing question but not a finding dispositive of the prejudice question. Further, the district court's cynical invocation of the "double-edged sword" doctrine exacerbated its siloed approach to future danger. The district court thereby ignored the fact that any aggravating edge to Petitioner-Appellant's new evidence had already been before the jury and the opposing brief before this Court offers no defensible rationale for that fatal flaw in the court's decision below. By its pinched inquiry, the district court ignored the actual mitigating effect of the new mitigating evidence on the probable sentencing outcome. The faulty invocation of the "double-edge sword doctrine" resulted in the district court failing to make a valid finding on the question of prejudice.

A. *Wiggins* Reweighing Requires Consideration Of Any And All Mitigating Effects And Its Resulting Consequences For The Twelve Jurors' Individual Sentencing Decisions.

Upon this Court's remand, the district court erroneously cabined its inquiry within the future dangerousness question to the exclusion of meaningful consideration of the mitigating quality of the new evidence developed by federal habeas counsel. The district court thus broadly dismissed the new mitigation based solely on the assumption that the evidence supports future dangerousness. For example:

> Viewed collectively, the reports presented by Ms. Herrero, Dr. Brawley and Dr. Maddox present a wealth of double-edged evidence, including evidence of gang violence, alcohol, drugs, and physical and sexual abuse. The Fifth Circuit has observed that evidence of "brain injury, abusive childhood, and drug and alcohol problems is all 'double-edged.' In other words, even if his recent claims about this evidence is true, it could all be read by the jury to support, rather than detract, from his future dangerousness claim." *Johnson v. Cockrell*, 306 F.3d 249, 253 (5th Cir. 2002), *cert. denied*, 538 U.S. 926 (2003).

ROA.3230. Assuming arguendo the new mitigation evidence is "double-edged" because it supports a finding of future dangerousness, the district court erred in not meaningfully considering the effect this evidence would have on the actual outcome of sentencing, the ultimate question of whether the mitigating effect was sufficient to warrant life rather than death in Mr. Canales's particular case. This error is especially conspicuous in light of the remand opinion: "While there was certainly evidence to support a finding of future dangerousness, we are not convinced that

evidence is enough to say that Canales's claim is not substantial." *Canales*, 765 F.3d at 570.

Under Texas's scheme, when all twelves jurors agree on the penalty phase special issues, the jurors then moves on to consider the ultimate sentencing question of whether, when taking into account "the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant," the punishment should be death or life without possibility of parole. Tex. Crim. Proc. Code Ann. § 37.071(e); *see also, e.g., Saldano v. State*, 232 S.W.3d 77, 99 (Tex. Crim. App. 2007) (acknowledging that a hypothetical potential juror who indicated he would not consider any evidence in mitigation after the jury answered "yes" to the future dangerousness special issue would have to be struck for cause); *Williams v. State*, 273 S.W.3d 200, 219 (Tex. Crim. App. 2008) (although the jury must be allowed to consider all evidence in mitigation, "not all evidence of mitigating value is relevant to [the future dangerousness special issue]"); *cf. Williams v. Taylor,* 529 U.S. 362, 398 (2000) (graphic description of petitioner's childhood, abuse and privation may not have overcome a finding of future dangerousness but "might well have influenced the jury's appraisal of his moral culpability").

Since *Jurek v. Texas*, 428 U.S. 262 (1976), the special issue of future dangerousness has operated in the Texas statutory scheme as merely a threshold

question that must be found before the jury can consider whether death is appropriate in light of the mitigating evidence. Indeed, the very "constitutionality of the Texas procedures turns on whether the enumerated questions allow consideration of particularized mitigating factors." *Graham v. Collins*, 950 F.2d 1009 (5th Cir. 1992), quoted in *Graham v. Collins*, 506 U.S. 461 (1993). The Texas special issues allow for such consideration; Mr. Canales's district court, however, failed to entertain the new evidence's "particularized mitigating factors" that govern their deliberation after unanimity on the special issues under Tex. Crim. Proc. Code Ann. § 37.071(b). *Id.*

But the approach Respondent-Appellee advocates, like the mistaken path the magistrate judge and the district court had taken, effectively cordons off the new evidence, leaving it only for future dangerousness scrutiny. This approach fails to consider whether that new evidence makes it reasonably likely that "'at least one juror would have struck a different balance.'" *Canales*, 765 F.3d at 571 (quoting *Wiggins*, 539 U.S. at 537).

The opposition brief entirely ignores this fundamental aspect of the jury's inquiry, characterizing the weighing undertaking as the whole jury's determination rather than a collection of individual balancing exercises to be undertaken be each of the twelve jurors. The central question in *Wiggins* of whether the mitigating effect should be considered to cause "at least one juror to strike a different balance" is a

dramatically different process from the one implicit throughout Respondent-Appellee's argument, which suggests jury unanimity on the question is needed instead of an assessment of the probability of merely one of twelve jurors "strik[ing] a different balance." *Id.* Respondent-Appellee's mistaken orientation to this question cloaks the district court's faulty approach.

The basic result of the district court's mistaken approach shuts down the needed "vehicle" for the jury to consider factors indicating the defendant "did not deserve to be sentenced to death based upon his mitigating evidence." *Penry v. Lynaugh*, 492 U.S. 302, 328 (1989) (invalidating pre-1991 statute that made death decision dependent only on future dangerousness special issue).[2] Under Texas's pre-*Penry* statute, if the jury answered "yes" to future dangerousness, but also believed there was mitigation that meant the defendant did not deserve death, the jury simply "would be unable to give effect to that mitigating evidence." *Id*. at 326. The post-*Penry* statute is constitutional because the future dangerousness special issue serves only to rule out death, and death may not be imposed unless the jury considers all the mitigation and every single juror individually concludes that the defendant deserves death. *See* Pet. Br. at 43.

[2] *Abrogated, in part, by Atkins v. Virginia*, 536 U.S. 304 (2002) on the separate issue of whether the "mentally retarded" are categorically ineligible for the death penalty.

B. The District Court's Invocation Of The Double-Edged Sword Doctrine Frustrates The Mitigating Effect Of The New Evidence.

1. This Court Has Already Found The Deficient Performance Of Petitioner-Appellant's Trial Counsel; In Contrast, This Court's Double-Edged Precedents Do Not Include A Deficient Performance Finding.

Respondent-Appellee ignores the thrust of this Court's 2014 opinion in this case, which reversed the district court's finding on trial counsel's deficient performance and repeatedly recognized that—even without the benefit of factual development by Mr. Canales's counsel—Petitioner-Appellant's underlying *Wiggins* claim possessed merit: "Given all this, there is some merit to the notion that, had trial counsel's performance not been deficient during sentencing, 'at least one juror would have struck a different balance.'" *Canales*, 765 F.3d at 570-71 (quoting *Wiggins*, 539 U.S. at 537). Further, this Court explained the purpose of its remand: "While there is sufficient information before this Court for us to conclude that there is some merit to Canales's claim of ineffective assistance of counsel, we think the district court should address the prejudice question in the first instance." *Id.* at 571; Pet. Br. at 3, 22-23.

In this context, it is conspicuous that the opposing brief dedicated much of its argument to the "double-edged sword" doctrine's fundamental application to the first prong of *Strickland*, the deferential standard for assessing whether trial counsel's inaction or commissions fell within the broad spectrum of viable trial

strategy. Here, this Court has already determined that trial counsel's performance was deficient, and the decision to refrain from investigating and presenting mitigation—despite the many red flags calling for attention—based on the misapprehension that no funds were available, was not strategic. *Canales*, 765 F.3d at 569-70.

Overall, the "double-edged sword" doctrine cases Respondent-Appellee relies on are distinguishable. Some involved application of the doctrine to deficient performance only. *Mejia v. Davis*, 906 F.3d 307, 316 (5th Cir. 2018) ("Because we limit our analysis to deficient performance, we need not reach prejudice."); *Martinez v. Dretke*, 404 F.3d 878, 889 (5th Cir. 2005). Most of them applied it to both prongs simultaneously. *Brown v. Thaler,* 684 F.3d 482, 499 (5th Cir. 2012); *Clark v. Thaler*, 673 F.3d 410, 421, 423 (5th Cir. 2012); *Martinez v. Quarterman*, 481 F.3d 249, 255-56, 258 (5th Cir. 2007); *Johnson v. Cockrell*, 306 F.3d 249, 253 (5th Cir. 2002). None involved cases where deficient performance and cause for procedural default had already been found, leaving only the sole question of whether prejudice resulted from that deficiency. *See, e.g.*, *Gray v. Epps*, 616 F.3d 436, 449 (5th Cir. 2010).

2. The District Court's Erroneous Prejudice Decision Is Reviewed *De Novo.*

Respondent-Appellee fails to address the profound implications of this case's history in the state and federal courts. Mr. Canales's case is unique with respect to the nature of the inquiry before the district court upon this Court's remand and, now,

with regard to this Court's *de novo* review of the lower court's erroneous determination of the resulting *Wiggins* related claims. Pet. Br. at 16-20. "Because the state court did not make any factual findings regarding these claims . . . , no deference is owed to the state court's resolution of the instant claims." *Lewis v. Dretke*, 355 F.3d 364, 366 (5th Cir. 2002); Pet. Br. at 20. *Lewis*, a pre-AEDPA habeas action, offers guidance for the Court's review of the district court's superficial treatment—without an evidentiary hearing—of Mr. Canales's substantial *Wiggins* evidence. Namely, because there was no *Wiggins* evidence in state court and, of course, no state court decision on *Wiggins*, Mr. Canales's evidence was developed only upon this Court's remand. The Court thus reviews *de novo* the district court's treatment of the mixed questions of law and fact. Pet. Br. at 17; *Lewis*, 355 F.3d at 366; *see also United States v. Shepherd*, 880 F.3d 734, 740 (5th Cir. 2018). Yet Respondent-Appellee fails to address these implications and, instead, mobilizes a raft of AEDPA-derived precedent.

Clearly, there is no shortage of cases wherein this Court affirmed the denial of *Wiggins* relief resulting from the extremely deferential review of state court adjudications under AEDPA. The opposition brief has cited many of these examples. Res. Br. at 15-21. But these cases shed little light on the inquiry that the district court—with no state court adjudication on this issue and therefore *without* the extremely constrained review under AEDPA deference—was required to undertake

concerning Petitioner-Appellant's new evidence developed upon this Court's 2014 remand.

In the end, perplexingly, the district court relied on *Martinez v. Quarterman*, 481 F.3d at 259, quoting it for the point that "the additional mitigating evidence was not so compelling, especially in light of the horrific facts of the crime, that the sentencer would have found a death sentence unwarranted." ROA.3232, Pet. Br. at 33. Petitioner-Appellant's opening brief directly compared the facts in *Martinez*, an aggravated quadruple-murder case, to those in Petitioner-Appellant's case in which he restrained a fellow prisoner while another man strangled the victim. Pet. Br. at 34-35. But Respondent-Appellee has failed to address the chasm between the precedent relied on in the district court and Mr. Canales's case.

3. The New Evidence Is Not "Double-Edged" Because Any Aggravating Edge Was Already Before The Jury.

Further, the district court ignored the fact that any aggravating edge to the new evidence—*i.e.* Mr. Canales's gang involvement—was already fully before the jury. The opposition brief fails to reckon with this critical aspect of the case history and, as a result, fails to account for the signature feature of this case, namely that the effect of the new evidence was to precipitate whether that evidence's mitigating quality would have caused any single juror to strike a different balance. *Walbey v. Quarterman*, 309 F. App'x 795, 806 (5th Cir. 2009). In fact, the new evidence helps the jury understand some of the aggravating evidence in a sympathetic way by

showing Mr. Canales's involvement in the crime was coerced by mortal threats. There was good reason for the district court to concede the "compelling" nature of this new evidence (Pet. Br. at 31, 33), and that quality informs the proper conclusion that this evidence satisfied the *Wiggins* standard for a single juror striking a different balance.

The opposition brief ignores the implications of *Walbey* and *Gardner v. Johnson*, 247 F.3d 551 (5th Cir. 2001), leading Fifth Circuit precedents that Petitioner-Appellant has briefed at length with respect to their bearings upon a proper weighing of mitigation evidence. Pet. Br. at 14-16, 33-37. Instead, Respondent-Appellee asserts that "the purported mitigating evidence would not have led to a different result because Canales's new evidence would have accentuated the already significant evidence of his future dangerousness." Res. Br. at 22. This approach employs the improper "stereotypical fall-back argument that the heinous and egregious nature of the crime would have ensured assessment of the death penalty." *Gardner*, 247 F.3d at 563. Grudgingly, Respondent-Appellee concedes that the mitigating evidence "reduced the imbalance between the aggravating and mitigating evidence," while insisting that the new evidence must, but did not, outweigh the aggravating evidence. Res. Br. at 21.

For that point, Respondent-Appellee cites as her example *Gray v. Epps*, 616 F.3d at 442. Res. Br. at 14, 21. But close examination of *Gray* underscores the merit

in Mr. Canales's mitigation evidence and the need to reverse the district court decision at bar.

First, *Gray*, unlike this case, concerns federal review of the Mississippi Supreme Court's denial of the claim under the deferential AEDPA standard. *Gray*, 616 F.3d at 442 ("[W]e are not persuaded that the Mississippi Supreme Court's conclusion that the newly proffered evidence does not demonstrate prejudice is unreasonable."). As highlighted above, *de novo* review applies here.

Second, in *Gray* the question of deficient performance of trial counsel was a close enough matter that the Court declined to address it, opting instead to dispose of the case based on the prejudice analysis. *Id*. Here, this Court has already found that Mr. Canales's trial counsel was deficient for failing to investigate and present the "compelling" available evidence in mitigation and that his ineffective assistance of counsel claim (and thus, the prejudice prong) has "some merit." *Canales*, 765 F.3d at 569-70.

Third, and critically, the new evidence in *Gray* is not remotely commensurable to the wealth of compelling new evidence marshalled in Mr. Canales's remand. The gap between the evidence presented at Gray's trial and in his federal habeas court was not substantial. Here, the difference is between effectively no mitigation evidence at Mr. Canales's trial and extensive evidence developed once federal habeas counsel had been afforded basic investigative resources on remand to

the district court. Following the 2014 remand, Mr. Canales fully substantiated the initial indications of profound mitigation evidence that had been presented to this Court previously and upon which the Court had relied heavily. *Id.* at 570-71. Comparison of the record in *Gray* with the one at bar exposes the incommensurability of the cases.

Specifically, at Mr. Gray's trial, several family members and a local minister testified that, *inter alia*, they had known him for a great length of time (e.g., his entire life), they had never seen him behave violently, and that he was "a real nice young man." *Gray*, 616 F.3d at 442. Gray's mother testified that "[h]is parents' separation adversely affected his behavior at school" but that the principal would welcome him to stay in his office at length. His mother "asked the jury to give her son '[l]ife imprisonment rather than death.'" *Id.* at 443.

Gray's federal habeas counsel argued that, in addition to the foregoing penalty phase testimony, trial "counsel should have called the following witnesses: his three sisters [and] a teacher at Gray's school." *Id.*[3] Federal counsel also introduced social worker records from Gray's contact with the Weems Community Mental Health

[3] The Court noted that Gray did not provide an affidavit from two of the three sisters. Instead, federal counsel supplied affidavits from an investigator and a paralegal as to what those witnesses could have averred if they were to have testified but declined to state that they in fact would have testified at Gray's trial if asked. "This record, therefore, does not allow us to conclude that these two sisters would have testified as witnesses at Gray's trial." *Id.* at 443. (citations omitted). Gray's teacher's affidavit did not provide that she would have testified at trial and offered that he was enrolled in special education courses for several grades.

Center, which reflected that, while he exhibited violent behavior at school, "he had no developmental problems and had a 'normal childhood.'" The diagnosis was "Conduct Disorder, Socialized, Non-aggressive." *Id.* at 444.[4]

Federal counsel also secured a forensic psychologist to conduct neuropsychological testing and evaluation, which yielded expert findings that Mr. Gray lacked "significant emotional or psychological difficulties, although there are suggestions of current suspiciousness and hostility in his dealings with other people." *Id.* at 446-47. The Court noted that the new evidence contained "no evidence of abuse." *Id*. at 449.

In sum, Gray's less than tepid presentation in the federal district court does not remotely compare to the extensive breadth and depth of mitigation evidence in Mr. Canales's proceedings showing "a repeated pattern of trauma and deprivation going a considerable distance to explaining Mr. Canales's individual vulnerability to the intense, existential pressures he felt at the Telford Unit leading up to the tragic killing of Mr. Dickerson." Pet. Br. at 8. Specifically, the district court heard—and sidelined—extensive evidence of Mr. Canales's deeply troubling formative years:

> As a child, all of Andy's primary caretakers were substance abusers. He and his siblings suffered persistent violence at the hands of their fathers and stepfathers, while their alcoholic mother failed to protect them. ROA.3079-89. Sexual and physical abuse was rampant—in Andy's immediate and extended family—especially when Andy's

[4] Records from his return to the Center at age 16 showed the diagnosis became "Conduct Disorder, Aggressive." *Id*. at 444-45.

> mother became involved with Carlos Espinoza, who was abusive to Andy's mother and viciously beat Andy and his younger sister. ROA.3090. Espinoza stripped Andy before whipping him with a belt, and abused both Andy and his sister Elizabeth.

Id. at 8-9. As a boy, Mr. Canales and his sister were also sexually molested by Espinoza. Poverty and a chaotic, traumatic home life made Andy "especially vulnerable to coerced gang involvement as a young teenager. ROA.3082, 3096-97." *Id*. at 10. When Andy tried to leave the Texas Syndicate, he was targeted for retaliation, and in light of his physical infirmity following several heart attacks, he clung to the protection of a rival gang. *Id*. (citing ROA.3083).

Unlike in *Gray*, where the defendant acting alone kidnapped an elderly woman, stole "$1200, raped her, shot her twice with a shotgun, and ran over her with her vehicle," *Gray*, 626 F.3d at 447, Mr. Canales was coerced by his need for protection to participate in the murder by restraining the victim while another strangled him, *Canales v. State*, 98 S.W.3d 690, 693 (Tex. Crim. App. 2003). Even ignoring the procedural and standard of review differences, the factual basis for *Wiggins* reweighing in *Gray* is nothing like that in the present case. Respondent-Appellee has simply failed to answer Mr. Canales's submission on this vital element of the Court's *de novo* inquiry.

II. THE NEW EVIDENCE IS PROPERLY BEFORE THIS COURT.

A. This Court Already Rejected Appellee's § 2254(e)(2) Argument And Considered The New Evidence.

In ordering a remand for the sole issue of determining prejudice, this Court observed that it should not at that time conduct the analysis because "Canales has not yet had the chance to develop the factual basis for this claim because, until *Trevino,* it was procedurally defaulted." *Canales*, 765 F.3d at 571. Yet it found the new evidence already developed by habeas counsel was "sufficient information before this Court for us to conclude that there is some merit to Canales's claim of ineffective assistance of counsel." *Id*.

Respondent-Appellee previously argued before this Court that § 2254(e)(2) prohibits a hearing. *See* ROA.2741-42. This Court implicitly rejected the argument in finding the record sufficient to reach definite conclusions about the deficient performance of trial and initial state habeas counsel. With respect to the prejudice prong, the Court found "some merit" to the allegation that Petitioner was prejudiced by trial counsel's failure to prepare for the penalty phase. *Canales,* 765 F.3d at 570. If, as the Respondent-Appellee argues, § 2254(e)(2) bars the introduction of new evidence even if a petitioner shows cause for a default, then this Court could have stopped at that point, as the Director then urged, and decided the prejudice question based on the evidence before it at that time. Instead, it recognized Mr. Canales did

not have the opportunity to develop the facts to support a showing of prejudice and it thus remanded the case to the district court. *Id.* at 571.

B. The Magistrate Report & Recommendation And The District Court Opinion Under Review Are Explicitly Based On The New Evidence.

Following the remand, the Director did not contest the district court's authority to accept and consider new facts. Neither the magistrate's report and recommendation nor the district court's opinion relied on a refusal to consider the new evidence based on § 2254(e)(2). In fact, Petitioner-Appellant used funding authorized by the district court to obtain the expert and investigative services of a mitigation specialist, neuropsychologist, and psychiatrist. Both the magistrate judge and district court recited and purported to consider the new evidence. ROA.3160-65; ROA.3220-26.

C. Nothing In § 2254(e)(2) Or Established Case Law Provides That A District Court Is Barred From Considering New Evidence In Resolving A Claim Relying On *Martinez-Trevino* To Overcome A Default.

The district court's decision to consider new evidence was correct both under AEDPA and long-standing rules on how a petitioner may overcome a default. In *Cullen v. Pinholster,* 563 U.S. 170 (2011), the Supreme Court held that a federal court reviewing a habeas petition under 28 U.S.C. § 2254(d) must confine itself to the record before the state court. Section 2254(d), however, applies only to state court adjudications on the merits of claims. If the state court did not reach the merits

of a claim, then § 2254(d) does not apply. *Johnson v. Williams,* 568 U.S. 289, 302 (2013) ("The language of 28 U.S.C. § 2254(d) makes it clear that this provision applies only when a federal claim was 'adjudicated *on the merits* in State court.'") (emphasis in *Johnson*).

Likewise, the Supreme Court's interpretation of § 2254(e)(2) does not preclude fact development in federal court. In *Williams v. Taylor*, the Court rejected an argument that the "failed to develop" language in the opening clause of § 2254(e)(2) applied any time the facts concerning a claim were undeveloped in state court, regardless of fault. 529 U.S. at 431-32. Rather, the Court construed "failed" as used in (e)(2) in its customary and preferred sense as connoting "some omission, fault, or negligence on the part of the person who has failed to do something." *Id*. at 431. Accordingly, under *Williams*, whether (e)(2) applies depends on how fault for the failure to develop the factual basis of a claim is assigned. If the fault lies with the claimant, then (e)(2) applies; if it does not, (e)(2) does not apply. If (e)(2) does not apply, then a decision as to whether to hold a hearing is governed by Habeas Rule 8 and *Townsend v. Sain,* 372 U.S. 293 (1963), *modified by Keeney v. Tamayo-Reyes,* 504 U.S. 1 (1992) and § 2254(e)(2).[5]

[5] 28 U.S.C. § 2254(e)(2) does not control "when" a federal court may hold a hearing and does not undermine a court's discretion whether to hold one. Instead, it only defines certain conditions under which a federal court "may not" hold a hearing.

A petitioner may have the merits of an otherwise defaulted claim considered if he can show "cause" for the default. To show "cause," a petitioner must show some impediment to the raising or developing a claim. *Murray v. Carrier*, 477 U.S. 478, 488 (1986). That is to say, he must show that he is not at fault. Identical analysis applies to the development of facts. If petitioner can establish "cause" for not developing facts, § 2254(e) does not prevent the district court from considering new facts.

This Court has expressly rejected the proposition that § 2254(e)(2) poses an obstacle to developing a defaulted-but-excused claim:

> Any question regarding the "failed to develop" standard was put to rest by the Supreme Court in *Williams v. Taylor*, 529 U.S. 420 (2000). . . . In this case, [the habeas petitioner] establishes cause for overcoming his procedural default, he has certainly shown that he did not "fail to develop" the record under § 2254(e)(2). Accordingly, if the district court determines that [the habeas petitioner] has established cause and prejudice for his procedural default, it should proceed to conduct an evidentiary hearing on any claim for which cause and prejudice exists. It should then revisit the merits of any such claim anew.

Barrientes v. Johnson, 221 F.3d 741, 771 (5th Cir. 2000).

Prior to *Martinez* and *Trevino,* a habeas petitioner could not show cause for a default based on the deficient performance of state habeas counsel. *See Coleman v. Thompson,* 501 U.S. 722, 755 (1991). In *Martinez,* however, the Court created an equitable exception to the rule in *Coleman* and created the opportunity to overcome a default resulting from the performance of state habeas counsel. Because the

ineffectiveness of state habeas counsel may provide cause for a default, it cannot be said that a petitioner "fails to develop" facts if the lack of development occurred due to deficiencies in the performance of state habeas counsel.[6]

Despite these developments, Respondent-Appellee now asserts that *Martinez* should not change in any way the application of § 2254(e)(2); otherwise, the courts "would negate the statute." Res. Br. at 9. Similarly, the opposing brief asserts that Petitioner-Appellant is asking the court to "create equitable exceptions of congressional directives in federal statutes such as AEDPA." Resp. Br. at 10. This position misconstrues the effect of *Martinez. Martinez* does not change the operation of the statute. As the Supreme Court in *Williams* and this Court in *Barrientes* observed, a petitioner does not "fail to develop" facts if there is "cause" for the lack of fact development. *Martinez* did little more than expand the circumstances under which "cause" may be shown. *See also Davila v. Davis,* 137 S. Ct. 2058, 2065 (2017) (*Martinez* "announced a narrow, 'equitable ... qualification' of the [fault attribution] rule in *Coleman* that applies where state law requires prisoners to raise claims of ineffective assistance of trial counsel 'in an initial-review collateral proceeding,' rather than on direct appeal"). Because a habeas applicant who has established

[6] Respondent-Appellee focuses on cases such as *Holland v. Jackson,* 542 U.S. 649 (2004) (per curiam). *See* Res. Br. at 5-6. Those cases were decided before the Supreme Court modified the *Coleman* rule in *Martinez*. Not surprisingly, the Court in those older cases found that a petitioner cannot overcome the limits of § 2254(e)(2) because at that time, decisions taken by state habeas counsel were "chargeable to the client." 542 U.S. at 653.

Martinez cause is not at fault for the procedural default, he has also not "failed to develop" his claim for purposes of § 2254(e)(2).

The Supreme Court's decision in *Ayestas v. Davis,* 138 S. Ct. 1080 (2018), also undercuts the Director's position. Like Canales, Ayestas obtained a remand to district court following *Trevino.* In the district court, he sought funding to develop facts to support his claim. The decision in *Ayestas* involved the standard for applying 18 U.S.C. § 3599(f), the statute authorizing funding for prisoners seeking federal habeas relief. If, as the Respondent-Appellee suggests, § 2254(e)(2) imposes an insurmountable barrier to fact development, there would have been no need to entertain issues regarding the funding statute in the context of a case relying on *Trevino*.

Not surprisingly, this Court's recent decisions are consistent with its prior decision in Mr. Canales's case and recognize the implications when *Martinez* is used to show cause for a default. For instance, in *Trevino v. Davis*, 861 F.3d 545, 550 (5th Cir. 2017), *cert. denied*, 138 S. Ct. 1793 (2018), both the majority and the dissent agreed that the new evidence is to be considered in determining prejudice. *Id.* ("We review that evidence [prosecution's evidence in aggravation] along with all of the new evidence that Trevino has presented to determine whether the outcome of the punishment hearing was prejudiced."); *id*. at 554 (Dennis, J., dissenting) ("We therefore must measure the evidence of Trevino's crime and other aggravating

factors presented to the jury by the State against both the mitigation evidence adduced at trial and the significant new evidence, adduced in the federal habeas proceeding, which contextualizes his criminal history.").

Similarly, in *Washington v. Davis,* 715 F. App'x. 380, 386 (5th Cir. 2017), the petitioner appealed the denial of a hearing and discovery to develop claims defaulted by state habeas counsel following a remand from the Supreme Court. The Court's opinion echoed its decision in *Canales*:

> The evidence sought by Washington – pertaining to his state habeas counsel's efforts – is central to his attempt to overcome the procedural default in light of *Trevino.* And, notably, there has never been a state hearing on this issue, nor did Washington have a reasonable opportunity to discovery the information prior to his petition. After all, prior to *Trevino,* the Supreme Court had held that the ineffectiveness of habeas counsel's representation could not establish cause for a procedural default. *Coleman*, 501 U.S. at 757.

The Ninth Circuit agreed that § 2254(e)(2) does not bar fact development when a petitioner seeks to overcome a default pursuant to *Martinez/Trevino*:

> Section 2254(e)(2), however, does not bar a hearing before the district court to allow a petitioner to show "cause" under *Martinez*. When a petitioner seeks to show "cause" based on ineffective assistance of PCR counsel, he is not asserting a "claim" for relief as that term is used in § 2254(e)(2); indeed, such a claim of ineffective assistance of PCR counsel is not a constitutional claim. *See Martinez*, 132 S.Ct. at 1319–20. Instead, the petitioner seeks, on an equitable basis, to excuse a procedural default. *See id.* A federal court's determination of whether a habeas petitioner has demonstrated cause and prejudice (so as to bring his case within *Martinez'*s judicially created exception to the judicially created procedural bar) is not the same as a hearing on a constitutional claim for habeas relief.

> …
>
> Therefore, a petitioner, claiming that PCR counsel's ineffective assistance constituted "cause," may present evidence to demonstrate this point. The petitioner is also entitled to present evidence to demonstrate that there is "prejudice," that is that petitioner's claim is "substantial" under *Martinez*. Therefore, a district court may take evidence to the extent necessary to determine whether the petitioner's claim of ineffective assistance of trial counsel is substantial under *Martinez*.

Dickens v. Ryan, 740 F.3d 1302, 1321 (9th Cir. 2014); *see also Wilson v. Beard*, 426 F.3d 653, 665-66 (3d Cir. 2005) (because procedural default and § 2254(e)(2) are "analytically linked," an applicant who does not procedurally default a claim is not barred by § 2254(e)(2) from introducing new evidence).

Respondent-Appellee points to other decisions from this Court purportedly agreeing that § 2254(e)(2) bars fact development in the context of a claim involving *Trevino,* but the Director misreads those decisions. For instance, in *Ibarra v. Davis,* 738 F. App'x 814 (5th Cir. 2018), the Court cited § 2254(e)(2) in connection with an *Atkins* claim Ibarra sought to develop. *Id.* at 819 n.4. However, *Martinez* applies only to ineffective assistance of trial counsel, not other types of claims. Moreover, as the Court explained, Ibarra was "explicitly given a fair opportunity to present an *Atkins* claim" but "failed to offer admissible evidence of intellectual disability in the state court." *Id.* at 819. Thus, "reasonable jurists could not debate" that Ibarra's *Atkins* claim had no merit. *Id.* In contrast, *Martinez* plainly applies to Canales's

Wiggins claim, and this Court found it had sufficient merit to allow him to proceed in the district court.

The Director also points to *Segundo v. Davis,* 831 F.3d 345 (5th Cir. 2016), but it, too, is easily distinguishable. There, the Court did not find that § 2254(e)(2) barred fact development in connection with claims involving *Trevino*. Instead, it acknowledged "the decision to grant an evidentiary hearing rests in the discretion of the district court." *Id.* at 351. In that case, the district court was correct to deny a hearing because "Segundo does not raise a substantial claim of ineffective assistance of trial counsel and therefore cannot show that his procedural default is excused." *Id.* Of course, this Court already found Canales raised a substantial claim of trial counsel's ineffectiveness.

D. Barring New Evidence Would Make Federal Review Of Viable *Strickland* Claims Raised Under the *Martinez-Trevino* Exception Impossible and Violate Due Process

It appears Respondent-Appellee wants to have the Court render *Trevino* a dead letter. After pointing out that the Court already found Canales's state habeas counsel deficient, Respondent-Appellee asserts that "that conclusion necessarily means that state habeas-counsel was not diligent in developing the factual basis for Canales's mitigation-based trial-IAC claim." Res. Br. at 7; *see also id.* at 5. The absurdity of this position is plain. Respondent-Appellee believes the Supreme Court established a rule that would recognize if state habeas counsel performed deficiently

while at the same time using that same finding to bar evidence to establish prejudice. If this were the case, the Supreme Court would have had no reason to decide *Martinez* and *Trevino* as it did. If the petitioner would never be able to introduce evidence to show prejudice from the default, there would be no purpose to the equitable rule excusing it. "[W]ith respect to the underlying trial-counsel IAC "claim," given that the reason for the hearing is the alleged ineffectiveness of both trial and PCR counsel, it makes little sense to apply § 2254(e)(2)." *Detrich v. Ryan,* 740 F.3d 1237, 1247 (9th Cir. 2013).

Reaching such an absurd result would violate Mr. Canales's right to due process because it would deny him the opportunity to litigate his claim. *Crane v. Kentucky,* 476 U.S. 683, 690 (1983). "It is a proposition which hardly seems to need explication that a hearing which excludes consideration of an element essential to the decision" does not satisfy due process. *Bell v. Burson,* 402 U.S. 535, 542 (1971) (requiring process to consider the essential element of liability for suspending a driver's license). To provide Mr. Canales a meaningful opportunity to have his *Wiggins* claim heard, this Court should reject the Respondent-Appellee's invitation to reach the untenable conclusion that § 2254(e)(2) bars new evidence under these circumstances.

CONCLUSION

For the foregoing reasons, Petitioner-Appellant respectfully requests this

Court to reverse the district court's decision.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that I, Joseph J. Perkovich, have electronically served a copy of this document upon Respondent-Appellee's counsel by filing same with the United States Court of Appeals for the Fifth Circuit's Electronic Case Filing system on January 23, 2019.

s/ Joseph J. Perkovich
Counsel for Anibal Canales, Jr.
Petitioner-Appellant

CERTIFICATE OF COMPLIANCE

Pursuant to 5th Cir. R. 32.2.7(c), the undersigned certifies this brief complies with the type-volume limitations of 5th Cir. R. 32.2.7(b) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f) this document contains 6,482 words.

s/ Joseph J. Perkovich
Attorney for Anibal Canales, Jr.
Petitioner-Appellant

United States Court of Appeals

FIFTH CIRCUIT
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January 24, 2019

Mr. Joseph J. Perkovich
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No. 18-70009 Anibal Canales, Jr. v. Lorie Davis, Director
USDC No. 2:03-CV-69

Dear Mr. Perkovich,

We have reviewed your electronically filed brief and it is sufficient.

You must submit the 7 paper copies of your brief required by 5TH CIR. R. 31.1 within 5 days of the date of this notice pursuant to 5th Cir. ECF Filing Standard E.1.

Sincerely,

LYLE W. CAYCE, Clerk

By: _____
Monica R. Washington, Deputy Clerk
504-310-7705

cc: Mr. Matthew Hamilton Frederick
Ms. Tina J. Miranda
Mr. David Paul Voisin