No. 20-7065

In the Supreme Court of the United States

ANIBAL CANALES, JR., PETITIONER

v.

BOBBY LUMPKIN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION
(CAPITAL CASE)

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

The Fifth Circuit affirmed the district court's denial of habeas relief because Petitioner's new evidence could not establish a "substantial" "likelihood of a different result" when weighed against the rest of the aggravating evidence. *Harrington v. Richter*, 562 U.S. 86, 111–12 (2011). The questions presented are:

1. Whether this Court should grant review to correct alleged errors in the Fifth Circuit's straightforward application of *Richter*'s "substantial likelihood" test.

2. Whether the district court and the Fifth Circuit erred in weighing Petitioner's new evidence against the totality of the aggravating evidence to determine that Petitioner was not entitled to habeas relief.

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INTRODUCTION

Petitioner maintains that both the district court and the Fifth Circuit erred in supposedly disregarding his newly presented evidence as double-edged, and for applying the standard for prejudice as explained in *Harrington v. Richter* too strictly. 562 U.S. 86, 111–12 (2011). As an initial matter, the courts should not have considered this new evidence at all because it was categorically barred by 28 U.S.C. § 2254(e)(2) of the Antiterrorism and Effective Death Penalty Act (AEDPA). *See Williams v. Taylor*, 529 U.S. 420, 428 (2000). But in any event, Petitioner is wrong for at least two reasons. First, the Fifth Circuit faithfully applied the proper test for prejudice under *Strickland v. Washington*, 466 U.S. 668, 696 (1984), as applied in *Wiggins v. Smith*, 539 U.S. 510 (2003), and as expounded upon in *Richter*. That is, whether the new evidence, weighed against the entirety of the aggravating

evidence, creates a "substantial" "likelihood of a different result." *Richter*, 562 U.S. at 111–12. Second, neither the district court nor the Fifth Circuit disregarded Petitioner's new evidence. Those courts properly weighed that new evidence against the aggravating evidence in the record and determined that Petitioner failed to carry his burden to show a substantial likelihood that the new evidence made a difference in the result. As a result, the Court should deny the petition.

STATEMENT

I. Gary "Dirty" Dickerson was found dead on his bunk in the Texas Department of Criminal Justice's Telford Unit in July 1997. *See* 9.RR.66:13–70:11, 120:14–124:25; ROA.63.[1] Ten days earlier, prison officials caught Dickerson with contraband currency. SHCR.56 (citing 9.RR.154). That currency belonged to another group of prisoners. 9.RR.154. Dickerson told another inmate, James Baker, that if Baker did not help him avoid retaliation from that group, he would tell prison officials about a sizable quantity of tobacco that was to be smuggled into the prison the next day for Baker and the Texas Mafia prison gang. SHCR.57 (citing 9.RR.153, 155, 208). Prison officials intercepted the tobacco the next day. SHCR.56 (citing 9.RR.142, 146, 148, 151, 162). Once intercepted, Dickerson was removed from the general population for six days. SHCR.57 (citing 9.RR.153, 155, 208).

Anibal Canales, Jr. (Petitioner) was also an inmate in the Telford Unit. He joined the Texas Mafia prison gang while serving a fifteen-year sentence for aggravated sexual as-

[1] "RR" refers to the state-court reporter's record. "SHCR" refers to the clerk's record in Petitioner's initial state-habeas application. "ROA" refers to the record on appeal in the Fifth Circuit.

sault. *See, e.g.*, 9.RR.317:25–318:10; 10.RR.6:11–20, 136:20–24. When the Texas Mafia's tobacco was intercepted, Petitioner and three other gang members agreed to kill Dickerson. The day Dickerson returned to the general population, Petitioner and another gang member went to Dickerson's cell, and while Petitioner pinned him down, the other inmate strangled him to death. SHCR.57–58 (citing 9.RR.208, 243, 245). Petitioner later sent a letter to Bruce Innes, another Texas Mafia gang member, boasting about killing Dickerson. 9.RR.27, 32; 13.RR State's Ex. 27; ROA.3153.

A grand jury indicted Petitioner and three others in November 1999 based on their role in Dickerson's murder. SHCR.1. Between his indictment and his conviction, Petitioner sent two other letters. The first letter, again sent to Innes, asked (in coded language) the Texas Mafia to retaliate against another inmate, Larry Whited, because Petitioner believed Whited told prison authorities about his role in Dickerson's murder. 13.RR State's Ex. 25; ROA.3153. The second letter contained cryptic language and veiled threats of future retaliation against those who testified against him; he stated that he was "bummed a bit" because of his case due to "snakes in the yard," and that he firmly believed "what goes around, comes around." 13.RR State's Ex. 29; ROA.3154. These three letters were introduced as evidence at his trial. ROA.3153–54.

The jury found Petitioner guilty of capital murder in November 2000. SHCR.18. Based on the jury's answers to special issues under Texas Code of Criminal Procedure article 37.0711, SHCR.18–19, the court sentenced him to death, SHCR.20. The Texas Court of Criminal Appeals affirmed Petitioner's conviction and sentence on direct appeal in January 2003, *see Canales v. State*, 98 S.W.3d 690 (Tex. Crim. App. 2003), and this Court denied his petition for a writ of certiorari later that year, *see Canales v. Texas*, 540 U.S. 1051 (2003).

Petitioner also filed a petition for writ of habeas corpus in state court, raising ninety-seven issues for review, which the CCA denied. *Ex parte Canales*, No. 54,789-01 (Tex. Crim. App. Apr. 5, 2003).

II. Petitioner filed his first federal habeas petition in November 2004, raising thirteen claims. *See Canales v. Stephens*, 765 F.3d 551, 561 (5th Cir. 2014) (*Canales I*). Petitioner filed a motion to stay so he could exhaust new claims and present new evidence, which the district court granted. *Id.* Petitioner returned to state court and presented, among other claims, his ineffective-assistance claims. *Ex parte Canales*, No. WR-54,789-02, 2008 WL 383804, at *1 (Tex. Crim. App. Feb. 13, 2008) (per curiam) (citing *Wiggins v. Smith*, 539 U.S. 510 (2003)). The CCA dismissed the petition as an abuse of the writ. *Id.* (citing Tex. Code Crim. Proc. art. 11.071).

Petitioner then returned to federal court. This time, he presented a claim for ineffective assistance of trial counsel under *Wiggins*. *See Canales v. Davis*, 966 F.3d 409, 411 (5th Cir. 2020) (*Canales II*). The district court dismissed the claim as procedurally defaulted but granted a certificate of appealability on that claim and others. *Id.* While on appeal, this Court decided *Trevino v. Thaler*, which allowed Texas inmates to rely on their state-habeas counsel's ineffectiveness to establish cause to excuse a procedural default on ineffective-assistance-of-trial-counsel claims. 569 U.S. 413, 429 (2013). The Fifth Circuit, post-*Trevino*, concluded that Petitioner had established "cause" to excuse the procedural default on his sentencing ineffective-assistance claim but remanded to determine whether Petitioner could establish "prejudice." *Canales I*, 765 F.3d at 571.

III. On remand, the district court allowed Petitioner to expand the state-court record and adduce additional evidence to establish "prejudice," and it provided him funding for

expert and investigative assistance. *Canales II*, 966 F.3d at 412. Petitioner hired three experts who conducted interviews, performed medical examinations, and reviewed Petitioner's medical, legal, and prison records. *Id.* Each expert produced a report to the district court. This new evidence fell into three basic categories: evidence of a traumatic childhood, evidence of mental disorders, and evidence of vulnerability and susceptibility to coercion. *Id.* at 413–14.

The district court reweighed that new evidence against the aggravating evidence in the record. *Id.* at 413. Among that evidence was testimony from Petitioner's sexual-assault victim, who detailed how Petitioner posed as a police officer, threatened to kill her, then took her into the woods and brutally raped her. *Id.* The other evidence included the letters Petitioner wrote after he was indicted, in which he tried to arrange for the murder of another inmate whom he suspected of cooperating with investigators; he also expressed "that what goes around, comes around," and that those who told investigators about Petitioner's role in killing Dickerson would get "justice in the end." *Id.* The district court, reviewing that evidence together with the new mitigating evidence, concluded "that there is *no* reasonable probability that a juror would have found that the mitigating evidence outweighed the aggravating evidence." *Id.* at 412. Thus, it denied Petitioner's *Wiggins* claim. *Id.* The Fifth Circuit granted Petitioner a certificate of appealability on that claim. *Canales v. Davis*, 740 F. App'x 432, 433 (5th Cir. 2018) (per curiam).

IV. The Fifth Circuit affirmed the district court's dismissal of Petitioner's *Wiggins* claim. *Canales II*, 966 F.3d at 416–17. Even accepting the previous panel's conclusion that Petitioner's trial counsel performed deficiently, *id.* at 411, the court held that Petitioner's

new mitigating evidence could not outweigh the aggravating evidence to establish a "substantial" "likelihood of a different result," *id.* at 414, as required to establish prejudice under *Richter*, 562 U.S. at 112. While the dissent advocated for an approach that prejudice was satisfied if new mitigating evidence "might have" influenced one juror, the majority concluded that the standard announced in *Richter* was the applicable standard. *Canales II*, 966 F.3d at 413. The court did not address whether Petitioner's newly proffered mitigation evidence was categorically barred by 28 U.S.C. § 2254(e)(2) because it determined that Petitioner's *Wiggins* claim failed even with the additional evidence. 966 F.3d at 412. Thus, the Fifth Circuit affirmed. Now Petitioner, over twenty years since his conviction, asks this Court to reverse these holdings.

REASONS FOR DENYING THE PETITION

I. The Fifth Circuit Applied the Correct Standard to Determine Prejudice.

The Fifth Circuit properly applied the standard for determining whether trial counsel's deficiency prejudiced Petitioner. That standard flows from this Court's decisions in *Strickland*, *Wiggins*, and *Richter*. Nevertheless, Petitioner characterizes the Fifth Circuit's decision as a "tectonic shift" in the standard for evaluating prejudice under *Wiggins*. Pet. 3. His theory is that the Fifth Circuit misapplied *Richter* to make prejudice harder to prove under *Wiggins*. He also attempts to conjure a circuit split between the Fifth Circuit and six other circuits. All of these arguments rest on mischaracterizations of *Richter* and the decision below. Properly understood, the Fifth Circuit faithfully applied this Court's test for evaluating prejudice. The Court should deny the petition.

A. The Fifth Circuit applied the test that Petitioner endorses but arrived at a conclusion that he disputes.

To establish a *Wiggins* claim, a habeas petitioner must prove that (1) trial counsel performed deficiently at the punishment phase, and (2) the deficiency prejudiced the petitioner's defense. *Wiggins*, 539 U.S. at 521 (citing *Strickland*, 466 U.S. at 687). To determine prejudice, a reviewing court must "reweigh the evidence in aggravation against the totality of available mitigating evidence." *Id.* at 534. Once reweighed, the court must determine whether the petitioner has shown that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* (quoting *Strickland*, 466 U.S. at 694).

Petitioner argues that the Fifth Circuit misapplied that standard by incorporating what this Court said in *Richter* about what amounts to a "reasonable probability." But that argument ignores what the Fifth Circuit actually said. Properly understood, the Fifth Circuit applied the test that Petitioner endorses; it just arrived at a different conclusion than he prefers. As a result, this case does not warrant the Court's review.

1. Petitioner argues that the Fifth Circuit applied a more difficult "substantial likelihood standard" rather than the test announced in *Wiggins*. Pet. 24. The Fifth Circuit did no such thing. First, the court noted that, as with *Strickland*, Petitioner had to establish "that his trial counsel's performance was deficient and that the deficiency prejudiced his defense." *Canales II*, 966 F.3d at 412 (citing *Wiggins*, 539 U.S. at 521). Because a previous panel determined Petitioner's counsel was deficient, it turned to the prejudice prong. *Id.* To establish prejudice, the court explained, Petitioner had to show "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." *Id.* (alteration in original) (quoting *Kunkle v. Dretke*, 352 F.3d 980, 991 (5th Cir. 2003) (cleaned up)). Importantly, the court noted in the very next sentence: "Such a reasonable probability exists if 'the likelihood of a different result [is] substantial, not just conceivable.'" *Id.* (alteration in original) (quoting *Richter*, 562 U.S. at 112). Properly understood, the court "seamlessly integrated" the language from *Richter* in precisely the way that Petitioner suggests is appropriate. Pet. 19–25. That is, the "substantial likelihood" language describes what amounts to a "reasonable probability" of a different result. *Richter*, 562 U.S. at 104, 111–12.

2. Petitioner also claims that the Fifth Circuit abandoned this Court's pronouncement in *Wiggins* that it is enough "that at least one juror would have struck a different balance." *Wiggins*, 539 U.S. at 537. But that misreads the opinion and misunderstands the disagreement between the majority and the dissent. First, as noted above, the Fifth Circuit explicitly relied on language from its own precedents that mirrors the language in *Wiggins*. *Compare Canales II*, 966 F.3d at 412 ("a reasonable probability that at least one juror could have determined" that a lesser sentence was appropriate (quoting *Kunkle*, 352 F.3d at 991)), *with Wiggins*, 539 U.S. at 537 ("a reasonable probability that at least one juror would have struck a different balance"). Second, Petitioner animates a minor disagreement between the majority and dissent below. The majority did not hold that *Wiggins*'s "might have" language was inapplicable. *Canales II*, 966 F.3d at 413. Rather, it was contrasting the dissent's interpretation of the "might have" language, which artificially weakened the "reasonable probability" standard for prejudice that this Court set out in *Strickland*, applied in *Wiggins*, and expounded upon in *Richter*. *See id.* at 413, 415 & n.4.

Thus, Petitioner's arguments that the Fifth Circuit adopted a harsher standard are unavailing. The court applied the established reasonable-probability standard from *Wiggins*, incorporating this Court's explanation of what amounts to a "reasonable probability" from *Richter*—that the "likelihood of a different result" be "substantial, not just conceivable." *Richter*, 562 U.S. at 112. There is no reason for this Court to intervene.

3. Petitioner (and amici) seem to contend that *Richter*'s language describing the standard for establishing prejudice should not carry over into the sentencing-phase context. To the extent Petitioner argues that it is improper to incorporate *Richter*'s substantial-likelihood language into *Wiggins* claims, that argument too suffers from a misreading of *Richter*.

In *Richter*, this Court did not create a new test for establishing prejudice. *Id.* at 111. Rather, the Court provided yet another explanation of the standard set out in *Strickland*. *Id.* at 111–12 (quoting *Strickland*, 466 U.S. at 693, 696, 697). Noting that "*Strickland* asks whether it is 'reasonably likely' the result would have been different," *id.* at 111 (quoting *Strickland*, 466 U.S. at 696), the Court went on to differentiate between "*Strickland*'s prejudice standard and a more-probable-than-not standard," explaining that the difference was "slight and matters 'only in the rarest case," *id.* at 112 (quoting *Strickland*, 466 U.S. at 693, 697). At that point, the Court noted: "The likelihood of a different result must be substantial, not just conceivable." *Id.* (citing *Strickland*, 466 U.S. at 693). The Court applied that same test in *Wiggins*, 539 U.S. at 521 ("We established the legal principles that govern claims of ineffective assistance of counsel in [*Strickland*]."). So when *Richter* explained what *Strickland* meant, it equally illustrated how to establish prejudice under *Wiggins*.

The standard for prejudice does not, as Petitioner suggests (Pet. 18–19), apply differently when the reviewing court approaches the claim de novo. As the Fifth Circuit noted,

when this 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 [AEDPA]." *Canales II*, 966 F.3d at 413. As the court then noted, it was applying the same standard that this Court applied in *Andrus v. Texas*, 140 S. Ct. 1875 (2020) (per curiam), which "rearticulated the prejudice inquiry—'whether there is a reasonable probability that at least one juror would have struck a different balance.'" *Canales II*, 966 F.3d at 413 (quoting *Andrus*, 140 S. Ct. at 1886). The court thus applied precisely the test that Petitioner endorses. Review by this Court is not warranted.

B. The decision below does not create a circuit split.

Petitioner argues that the Fifth Circuit's decision created a stark split with six other circuits. For the reasons discussed above, it did not. The decision below did precisely what Petitioner says every other circuit has done correctly: it "seamlessly integrated *Richter*'s reinforcing language for *Strickland* analysis." *See* Pet. 20.

Petitioner points to decisions from the Fourth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits. But each of these courts phrased the law just like the Fifth Circuit did here. The Fourth Circuit phrased *Strickland*'s "reasonable probability" standard as follows: "[T]here is a reasonable probability—that is, a substantial likelihood" of a different result, and that "taken as a whole," the new evidence "might well have influenced the jury's appraisal of [petitioner's] culpability." *Elmore v. Ozmint*, 661 F.3d 783, 869–71 (4th Cir. 2011). The Seventh Circuit said the petitioner had to show a "likelihood of a different outcome," and that the likelihood "must be substantial, not just conceivable." *Pruitt v. Neal*, 788 F.3d 248, 273 (7th Cir. 2015). The Eighth Circuit concluded that new evidence did not make it "substantially likely that the jury would have returned a different sentence," so it

could not conclude that "even 'one juror would have struck a different balance.'" *Purkey v. United States*, 729 F.3d 860, 868 (8th Cir. 2013) (quoting *Wiggins*, 539 U.S. at 537). The Ninth, Tenth, and Eleventh Circuits all framed the test similarly. *See, e.g.*, *Andrews v. Davis*, 944 F.3d 1092, 1108 (9th Cir. 2019) (en banc) ("a reasonable probability that at least one juror" would have recommended a lesser sentence, and that likelihood had to be "substantial"); *Grant v. Royal*, 886 F.3d 874, 905 (10th Cir. 2018) (same); *DeBruce v. Comm'r, Ala. Dep't of Corr.*, 758 F.3d 1263, 1267 (11th Cir. 2014) (same). According to Petitioner, these courts got it right, and the Fifth Circuit got it wrong.

But the Fifth Circuit's articulation of the prejudice standard is indistinguishable from that of the circuits that Petitioner cites. The court first stated that its task was to "reweigh the evidence in aggravation against the totality of available mitigating evidence." *Canales II*, 966 F.3d at 412 (quoting *Wiggins*, 539 U.S. at 534). Then, importantly, the court said that Petitioner must show "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." *Id.* (alterations in original) (quoting *Kunkle*, 352 F.3d at 991). The court *then* noted that "reasonable probability" means "the likelihood of a different result [is] substantial, not just conceivable." *Id.* (alteration in original) (quoting *Richter*, 562 U.S. at 112).

The Fifth Circuit's approach, then, is the same as every other circuit to address it. Petitioner elides the fact that the court noted a "substantial" likelihood is necessary only after stating that "at least one juror could have" recommended a lesser sentence. *Id.* Indeed, the language is almost identical to the Ninth Circuit's approach—which Petitioner says "formulate[d] the inquiry tautly," Pet. 22—stating first that "it is enough to show 'a reasonable

probability that at least one juror' would have recommended" a lesser sentence, followed by the requirement that the "likelihood of that result must be 'substantial, not just conceivable." *Andrews*, 944 F.3d at 1108 (quoting *Richter*, 562 U.S. at 112; *Wiggins*, 539 U.S. at 537).

Thus, Petitioner's attempt to conjure a circuit split fails. The court below applied the tests laid out by this Court in *Strickland*, *Wiggins*, and *Richter*. This Court should deny the petition.

II. The Fifth Circuit and District Court Properly Reweighed the Aggravating and Mitigating Evidence and Reached the Correct Result.

Because the Fifth Circuit properly applied this Court's precedent, there is no jurisprudential concern, and Petitioner merely asks this Court to correct an alleged error in the outcome. But the courts below properly reweighed the evidence, concluding that the mitigating evidence did not outweigh the aggravating evidence. This Court need not intervene.

A. The primary reason the lower courts did not err is that all of Petitioner's new "mitigating" evidence could just as easily be interpreted as "aggravating." This Court has expressly noted that the weight of proffered mitigation evidence is reduced if it may "undercut" the petitioner's case. *Cullen v. Pinholster*, 563 U.S. 170, 202 (2011); *id.* at 201 (citing *Atkins v. Virginia*, 536 U.S. 304, 321 (2002) as "recognizing that mitigating evidence can be a 'two-edged sword' that juries might find to show future dangerousness").

Petitioner's new mitigation evidence falls into three basic categories: evidence of a traumatic childhood, evidence of mental disorders, and evidence of vulnerability and susceptibility to coercion. But each of these categories can be double-edged. And his family history, though tragic, also underscores his propensity for criminal violence. In any case, whatever

mitigating effect this evidence may have does not outweigh the aggravating evidence in this case. The evidence, including Petitioner's newly introduced evidence, shows that Petitioner poses a specific and demonstrated threat of future dangerousness in the prison environment—a threat that arises out of the very evidence on which Petitioner relies for mitigation.

Take, for instance, Petitioner's new evidence that he was vulnerable and susceptible to coercion. ROA.2972, 3014. Though Petitioner attempts to paint this evidence as mitigating, a life sentence in prison would subject him to the same gang-related coercion that allegedly caused him to commit capital murder in the first place. Evidence of coercion is not necessarily double-edged; a defendant may commit a crime in response to an extraordinary threat that is not likely to be repeated. But when the threat that supposedly motivated a defendant's criminal behavior is virtually certain to be repeated, evidence of coercion tends to demonstrate a risk of future dangerousness. *See, e.g.*, *Clark v. Thaler*, 673 F.3d 410, 423 (5th Cir. 2012) (finding unpresented mitigation evidence "double-edged" where it "might suggest [that the defendant], as a product of his environment, is likely to continue to be dangerous in the future." (alteration in original) (internal citations and quotations omitted)). And it is hard to imagine how a jury would view Petitioner as "vulnerable" when, even after being put in prison for two different violent rapes (including threatening to murder at least one of his rape victims), he maintained gang membership, participated in a gang-related murder, gloated about the murder with no remorse, *see* ROA.3153, solicited his gang to commit another murder on his behalf, ROA.3153, then went on to suggest further violence against other inmates who cooperated with the State, ROA.3154 ("[W]hat you sow, you reap! So, I'll be content with justice in the end. TDC is not big, at all!").

Or consider the evidence of Petitioner's tragic upbringing. This Court has said that even though such evidence is typically considered mitigating, it can have a double-edged effect. *See Pinholster*, 563 U.S. at 201 ("The new evidence relating to [a petitioner]'s family—their more serious substance abuse, mental illness, and criminal problems—is also by no means clearly mitigating, as the jury might have concluded that [petitioner] was simply beyond rehabilitation." (internal citation omitted)); *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 255 (2007) (recognizing that evidence of "mental retardation and childhood abuse" can function as a "two-edged sword," because it "may diminish [a petitioner's] blameworthiness for his crime even as it indicates that there is a probability that he will be dangerous in the future." (quoting *Penry v. Lynaugh*, 492 U.S. 302, 324 (1989), *abrogated on other grounds by Atkins*, 536 U.S. 304). In this case, delving into Petitioner's background would have shown his perennial involvement with violent gangs—as opposed to the state's aggravation evidence, which only noted his membership in a gang at a certain point in his life—and his incessant criminal activity. Evidence of his criminal behavior and gang activities could then be weighed as additional aggravating evidence. *Wong v. Belmontes*, 558 U.S. 15, 20 (2009) (per curiam). Petitioner's specific mitigation evidence sharply distinguishes this case from those where the history of abuse was found not to be double-edged based on the defendant's ability to change. *E.g.*, *Motley v. Collins*, 18 F.3d 1223, 1235 (5th Cir. 1994). As the Fifth Circuit noted, Petitioner provided no evidence of his own remorse. *Canales II*, 966 F.3d at 416 (contrasting *Williams v. Taylor*, 529 U.S. 362, 398 (2000)). Furthermore, the fact that he fell back into gang crime and violence even after all negative influences were removed from his life, ROA.3082–83, could have suggested to the jury that he was unredeemable.

The last category—Petitioner's mental illness and drug abuse—would have had little to no mitigating effect. Evidence of Petitioner's alleged mental illness and history of drug abuse was at least as likely to hurt his punishment case as to help it. *See Penry*, 492 U.S. at 324; *Chanthakoummane v. Stephens*, 816 F.3d 62, 72 (5th Cir. 2016). The Fifth Circuit has correctly recognized that such evidence is double-edged. *Druery v. Thaler*, 647 F.3d 535, 541–42 (5th Cir. 2011) (concurring with the trial court's finding that even if petitioner had credible evidence of a diagnosed mental health issue, such evidence would be double edged because it "could indicate that [Petitioner]'s violent behavior was of a permanent nature . . . suggesting he could be a future threat to those in prison"); *see also Martinez v. Quarterman*, 481 F.3d 249, 258 (5th Cir. 2007). A rational jury would be justified in finding that any reduction in Petitioner's moral culpability based on mental illness was offset or outweighed by the attendant risk of future dangerousness. Petitioner does not explain how evidence of his mental condition or drug use would have affected the balance or why his life's circumstances would have made the jury substantially likely to return a life sentence.

Because Petitioner's new mitigating evidence could have just as easily hurt him in the eyes of the jury, his arguments that both the district court and Fifth Circuit erred are without merit.

B. Petitioner's tack at this stage is to characterize the Fifth Circuit's reweighing of the evidence as robotic and formulaic. Pet. 29–32. That claim lacks merit. Petitioner's complaint appears to be that the majority gave weight to the aggravating evidence presented to the jury, while the dissent gave it none. In reality, the majority properly laid out all the evidence—both mitigating and aggravating—and then explained why the new evidence could

not outweigh the overwhelming evidence that Petitioner would be a danger to those around him in the future. *Canales II*, 966 F.3d at 414–17.

Of particular importance to the majority were the two letters that Petitioner sent during his trial. *Id.* at 414. The first letter, sent after his indictment for the capital murder of fellow inmate Gary Dickerson, requested that his fellow Texas Mafia gang members kill *another* inmate for implicating Petitioner in Dickerson's murder. *Id.* The second included Petitioner's complaints about inmates who were "making matters worse with their mouths," and that they would get "justice in the end" because "what goes around, comes around." *Id.* After contrasting that evidence with the evidence presented in *Wiggins* and *Williams*, the court concluded that Petitioner's violent record and his lack of remorse outweighed any potential mitigating effect of the new evidence. *Id.* at 416. Not only had Petitioner murdered an inmate in prison, then tried to coordinate the murder of another inmate, he had previously threatened to murder his sexual-assault victim. *Id.* The Fifth Circuit aptly summed up the evidence after reweighing it: "[Petitioner] committed a cold and calculated gang-related murder, and he has a history of threatening and seeking murder." *Id.* at 417.

Petitioner's claim that this analysis was robotic is really just a complaint that neither the district court nor the Fifth Circuit agreed with him. But the overwhelming aggravating evidence leads only to that conclusion. Petitioner's claim that the Fifth Circuit erred would not justify this Court's review in any event, but it is also incorrect.

III. AEDPA Bars the New Evidence Upon Which Petitioner Relies to Support His *Wiggins* Claim.

As Petitioner concedes, his ineffective-assistance claim depends on evidence gathered years after his original state-habeas proceeding. *See* Pet. 10–17. But Petitioner's claim was

procedurally defaulted, and it was only excused because of the negligence of his state-habeas counsel. As a result, AEDPA precludes Petitioner from relying on any of this new evidence in federal habeas proceedings to win relief on his *Wiggins* claim.[2] The Fifth Circuit avoided resolving this issue, instead assuming that it could consider the new evidence and then rejecting Petitioner's claim on the merits. *Canales II*, 966 F.3d at 412. But it noted that if "the new evidence were not admitted, affirmance would be very straightforward." *Id.* AEDPA bars Petitioner's newly presented evidence. That is a sufficient reason why the Court should deny the petition.

Section 2254(e)(2) "restricts the discretion of federal habeas courts to consider new evidence when deciding claims that were not adjudicated on the merits in state court." *Pinholster*, 563 U.S. at 186. Section 2254(e)(2)'s bar on new evidence is triggered if the habeas petitioner "has failed to develop the factual basis of a claim in State court proceedings." That opening clause is met if the petitioner "was at fault for failing to develop the factual bases for his claims in state court." *Bradshaw v. Richey*, 546 U.S. 74, 79 (2005) (per curiam). And this Court has held multiple times when addressing section 2254(e)(2)'s bar on new evidence that Congress intended the word "failed" in "failed to develop," 28 U.S.C. § 2254(e)(2), to mean a "lack of diligence, or some greater fault, attributable to the prisoner *or the prisoner's counsel*." *Williams*, 529 U.S. at 432 (emphasis added); *accord Holland v. Jackson*, 542 U.S. 649, 652–53 (2004) (per curiam) (applying section 2254(e)(2) to an ineffective-assistance-of-trial-counsel claim).

[2] This issue is squarely presented in another petition for writ of certiorari pending before the Court. *See* Pet. for Writ of Cert., *Shinn v. Jones*, No. 20-1009 (U.S. Jan. 20, 2021).

To overcome procedural default, Petitioner asserted (and the Fifth Circuit agreed) that his state-habeas counsel was ineffective for failing to raise the *Wiggins* claim in his initial state-habeas proceeding. *Canales I*, 765 F.3d at 569–70. That necessarily means that state-habeas counsel was not diligent in developing the factual basis for Petitioner's *Wiggins* claim. And under *Williams* and *Holland*, counsel's lack of diligence means that Petitioner "failed to develop" the claim for purposes of § 2254(e)(2). Thus, Petitioner is barred from relying on new evidence.

Nothing in *Martinez v. Ryan*, 566 U.S. 1 (2012), alters this conclusion. *Martinez* created a "narrow exception" to the court-created rules of procedural default, allowing state prisoners to pursue a substantial ineffective-assistance-of-trial-counsel claim if state-habeas counsel unreasonably failed to raise that claim in state court. *Id.* at 9. In modifying the court-created rules of procedural default, *Martinez* did not purport to change AEDPA's independent statutory bar on what evidence federal habeas courts may consider. In no event did *Martinez* overrule any part of *Williams* or *Holland*: This Court in *Martinez* concluded that its holding raised no stare decisis concern. *Id.* at 15. And *Davila v. Davis* later confirmed that "[e]xpanding the narrow exception announced in *Martinez* would unduly aggravate the 'special costs on our federal system' that federal habeas review already imposes." 137 S. Ct. 2058, 2070 (2017). So *Williams* and *Holland* remain the controlling precedent on the meaning of "failed" in section 2254(e)(2).

Nor can *Martinez* be used to undermine section 2254(e)(2). "The rules for when a prisoner may establish cause to excuse a procedural default are elaborated in the *exercise of*

the Court's discretion." *Martinez*, 566 U.S. at 13 (emphasis added). But congressional directives in federal statutes like AEDPA are not subject to discretionary elaboration by courts. As this Court recently explained in *Ross v. Blake*:

> No doubt, judge-made . . . doctrines, even if flatly stated at first, remain amenable to judge-made exceptions. . . . But a statutory exhaustion provision stands on a different footing. There, Congress sets the rules—and courts have a role in creating exceptions only if Congress wants them to. For that reason, mandatory exhaustion statutes . . . establish mandatory exhaustion regimes, *foreclosing judicial discretion*.

136 S. Ct. 1850, 1857 (2016) (emphasis added); *see also Williams*, 529 U.S. at 436–37 (describing section 2254(e)(2) as an exhaustion requirement).

Before AEDPA, this Court had developed equitable rules outlining what evidence federal-habeas courts could consider in resolving claims undeveloped in state court—specifically, the cause-and-prejudice rules from the procedural-default context. *See Keeney v. Tamayo-Reyes*, 504 U.S. 1, 6 (1992). But in AEDPA, Congress pointedly eliminated that judicially developed cause-and-prejudice standard and replaced it with section 2254(e)(2), which "raised the bar" for federal-habeas petitioners seeking to introduce new evidence. *Williams*, 529 U.S. at 433.

This Court's interpretation of section 2254(e)(2) in *Williams*, unlike the decision in *Martinez*, involved no equitable judgment; the Court gave effect to what "Congress intended." *Id.* And *Williams* concluded that section 2254(e)(2) codified the rule that state-habeas counsel's lack of diligence is attributed to the petitioner. *Id.* at 437, 439–40. *Williams* reached this conclusion because, when Congress enacted AEDPA in 1996, Congress would have understood—relying on this Court's 1991 and 1992 decisions in *Coleman* and

Keeney—that any lack of diligence by state-habeas counsel would be attributed to the petitioner under "well-settled principles of agency law." *Coleman v. Thompson*, 501 U.S. 722, 754 (1991); *see Davila*, 137 S. Ct. at 2065. This Court applied *Coleman*'s rule to this very context in *Keeney*, when it disallowed new evidence based on post-conviction "counsel's negligent failure to develop the facts." *Keeney*, 504 U.S. at 4; *see id.* at 7–11.

When Congress "raised the bar" in AEDPA, it could not have intended a weaker rule than the one adopted in *Keeney* just a few years earlier. Thus, *Williams* held that "the opening clause of § 2254(e)(2) codifies *Keeney*'s threshold standard of diligence." *Williams*, 529 U.S. at 434. So section 2254(e)(2)'s trigger—"the applicant has failed to develop the factual basis of a claim in State court proceedings"—uses "fail[]" just as *Keeney* did: as including "attorney error." *Keeney*, 504 U.S. at 10 n.5; *see Williams* 529 U.S. at 432–34.[3]

As a result, Petitioner cannot rely on the newly presented mitigation evidence to support his *Wiggins* claim because he did not diligently develop the record in state-habeas proceedings. The very condition for overcoming his procedural default—ineffective assistance of state-habeas counsel—is the same condition that triggers section 2254(e)(2)'s bar on new evidence. Because Petitioner cannot possibly establish prejudice without new evidence, his *Wiggins* claim must fail.

[3] There are many record-based ineffective-assistance-of-trial-counsel claims for which *Martinez* will still do work under a faithful application of section 2254(e)(2). *See Davila*, 137 S. Ct. at 2067–68. To take a few examples: claims based on trial counsel's failure to object to inadmissible evidence, trial counsel's request for an incorrect jury instruction, or per se ineffective assistance of counsel under *United States v. Cronic*, 466 U.S. 648 (1984). The rule adopted in *Martinez* saves these claims, for which no new evidence may be needed.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 2021