NO. 20-7065
(CAPITAL CASE)

IN THE
Supreme Court of the United States

ANIBAL CANALES, JR., PETITIONER,

v.

BOBBY LUMPKIN, RESPONDENT.

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

SUPPLEMENTAL BRIEF PURSUANT TO RULE 15.8 IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

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

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

ADDITIONAL QUESTION PRESENTED FOR REVIEW

3. Under the *Martinez-Trevino* equitable rule, may federal relief arise from a trial counsel ineffectiveness claim in the state-court record but procedurally defaulted?

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SUPPLEMENTAL BRIEF

Pursuant to Rule 15.8, Petitioner presents this Supplemental Brief in the light of this Court's decision in *Shinn v. Ramirez*, 142 S. Ct. 1718 (2022). Unlike the prisoners in *Shinn*, Mr. Canales had presented in a successor state court petition the essential core of his mitigating evidence in support of his trial counsel ineffectiveness claim and thus, unlike the *Shinn* Respondents, plainly did not "fail[] to develop" the state court-record for his meritorious claim. 28 U.S.C. § 2254(e)(2).

Shinn crystalizes the need to grant this Petition for Writ of Certiorari in reaffirming the *Wiggins v. Smith* standard of a "reasonable probability that at least one juror would have struck a different [sentencing] balance," 539 U.S. 510, 537 (2003), while establishing, under the *Martinez-Trevino* equitable rule,[1] that grounds for the federal claim may arise from a state-court record procedurally defaulted under independent and adequate state grounds—as is the case for Canales and initially was so for Trevino.[2] *See generally*, Subsequent Application for a Writ of

[1] *Trevino v. Thaler*, 569 U.S. 413 (2013); *Martinez v. Ryan*, 566 U.S. 1 (2012).

[2] Initially, Trevino stayed his federal proceedings to exhaust his IATC claim before returning with it to his district court. *Infra* at 6-7. Upon remand following *Trevino v. Thaler*, Trevino presented entirely new, unexhausted evidence of, inter alia, his Fetal Alcohol Spectrum Disorder. *See Trevino v. Davis*, 829 F.3d 328, 331-32 (5th Cir. 2016). Trevino was ultimately adjudged not to have established prejudice from his trial counsel's failure to evince FASD. *Trevino v. Davis*, 138 S. Ct. 1793, 1794 (mem. Sotomayor, J., dissenting from denial of certiorari). However, that evidence was never before the state courts. In the light of *Shinn*, it would be inarguably unavailing now. In contrast, the evidence for Canales's *Wiggins* claim *is* in the extant state-court record, though the Court of Criminal Appeals declined review of its substance by finding it was procedurally defaulted.

Habeas Corpus, No.99F0506-005-B, CCA. No. WR-54,789-02 (May 21, 2007), Supp.App.201a-376a.[3]

Canales's trial counsel admitted to conducting no mitigation investigation, not even interviewing family members nor obtaining records,[4] and at sentencing phase presented testimony only that Canales was a "peacemaker in prison" and a "gifted artist." *Canales v. Stephens,* 765 F.3d 551, 569 (5th Cir. 2014). The prosecutor even commented to the sentencing jury that "it's in 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." Supp.App.235a. Initial collateral review counsel conducted no further mitigation investigation concededly for no strategic purpose, but rather on the incorrect belief that funding for mitigation investigation was unavailable. *Id.*

Following the denial of his initial state habeas petition in March 2003 (Pet. at 8), Canales was appointed new counsel, who filed a petition in the Eastern District of Texas, raising, among other grounds, trial counsel's failure to develop and present mitigating evidence, attaching to the petition declarations from trial counsel, ten family members and friends, clinical psychologist Frederick Sautter, Ph.D., and Steve Martin, a prison classifications expert. *See Canales v. Thaler*, 2:03-cv-00069-TJW, ECF No. 7 (E.D. Tex. Nov. 29, 2004). By March 2007, the

[3] The Supplemental Appendix continues pagination of the Petition Appendix filed with Mr. Canales's Petition for Writ of Certiorari. The Supplemental Appendix comprises the bulk of the state court record of the state successor litigation.

[4] Supp.App.383a.

district court stayed its proceedings to allow Canales to exhaust state court remedies. *See* Pet. at 8; ECF No. 31. Canales presented the same abundant mitigating evidence about his traumatic and neglectful childhood to the state courts.

As it had done in *Trevino*, the Court of Criminal Appeals deemed Canales's *Wiggins* successor litigation procedurally barred. Supp.App.666a-667a; *Canales*, 765 F.3d at 567; *compare Trevino*, 569 U.S. at 419. In turn, the district court denied, inter alia, Canales's exhausted *Wiggins* claim just prior to the publication of *Trevino*. *Canales*, 765 F.3d at 571. Upon review, the Fifth Circuit, "conclud[ing] that Canales's claim of ineffective assistance of trial counsel during sentencing is substantial," remanded the case in the light of *Trevino*, explaining that

> 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.

Canales v. Davis, 740 F. App'x 432, 432 (5th Cir. 2018). Upon remand to the district court in 2014, Canales augmented his extant state-court record already before the federal courts with declarations from mitigation investigator Susan Herrero, Donna Maddox, M.D., and Tara Brawley, Ph.D. ECF No. 220. The expert reporting relies, in part, on newly executed declarations refreshing the statements of a few of the witnesses from the earlier proceedings and two new witnesses (Bruce Richards, and

Liz Hewitt).[5] *E.g.*, ECF No. 220-1 at 1-10 (listing in Ms. Herero's reliance materials the set of 2004 declarations and the declarations obtained in 2016). The State did not object to any of the new mitigation evidence "despite ample time and several opportunities." Pet.App.10a. The district court, although finding the mitigation evidence "compelling," concluded that Petitioner failed to establish prejudice based on its theory that all the evidence functioned as a "double-edged sword" despite the fact that any aggravating edge to the new mitigation evidence was already before the jury or that it is implausible that jurors would invariably view evidence of vicious childhood physical abuse or sexual assault to be aggravating. Pet.App.61a-64a.

On appeal, Respondent argued that 28 U.S.C. § 2254(e)(2) barred consideration of evidence not presented to the state court. The majority rejected the State's theory that § 2254(e)(2) is unwaivable, but found it unnecessary to address whether the State had indeed waived the argument. Pet.App.4a, 11a. The majority affirmed the denial of the *Wiggins* claim, while studiously avoiding the entire thrust of its "double-edged" rationale. Pet.App.6a-8a. The majority, narrowly compared the facts in Canales's case with those in this Court's precedents, *Wiggins*, *Williams v. Taylor*, 529 U.S. 362 (2000), *Rompilla v. Beard*, 545 U.S. 374 (2005), and *Porter v. McCollum*, 558 U.S. 30 (2009), artificially distinguishing Canales's case from those touchstones because they contained different constellations of labelled categories of

[5] Bruce Richards was a Telford Unit inmate, and Ms. Hewitt is Canales's former girlfriend, but the evidence presented to the state court was sufficient to warrant relief. *See infra* Part III at p. 13-14.

evidence. *Id.* The majority thus avoided the totality of Canales's evidence while applying a new, higher prejudice standard it falsely insisted *Harrington v. Richter*, 562 U.S. 86, 112 (2011), announced. Pet.App.5a. As Judge Higginbotham observed in dissent, this Court has "never before equated what was sufficient in *Wiggins* with what is necessary to establish prejudice." Pet.App.16a (Higginbotham, J., dissenting) (citing *Andrus v. Texas,* 140 S. Ct. 1875, 1886 n.6 (2020)). Instead, clearly established federal law requires, "reweigh[ing] the evidence in aggravation against the totality of available mitigating evidence." Petition for Writ of Certiorari at 5-6, 10, 29-36 (characterizing the opinion at Pet.App.5a-9a).

This Petition followed, and has been before this Court apparently pending the May 23, 2022 decision in *Shinn*. In his Reply Brief, Canales argued that § 2254(e)(2) is not properly before this Court as it was not part of the district court or court of appeals decisions. Reply Brief at 19-20. Canales requested the opportunity to brief the issue, should this Court deem the issue relevant.

I. *SHINN V. RAMIREZ* REAFFIRMED THE *MARTINEZ-TREVINO* EQUITABLE RULE.

Shinn addressed a question that was not raised in *Martinez* or *Trevino*, *viz.,* "whether the equitable rule announced in *Martinez* permits a federal court to dispense with § 2254(e)(2)'s narrow limits because a prisoner's state postconviction counsel negligently failed to develop the state-court record. We conclude that it does not." *Shinn*, 142 S. Ct. at 1728. The Court rejected the proposed extension of *Martinez* "so that ineffective assistance of postconviction counsel can excuse a prisoner's failure to develop the state-court record under § 2254(e)(2),"

distinguishing that issue from the "judge-made" equitable rule that *Martinez* made to excuse a procedural default. *Id.* at 1736.

After *Shinn*, the primary equitable concern in *Martinez* plainly remains: "[I]f counsel's errors in an initial-review collateral proceeding do not establish cause to excuse the procedural default in a federal habeas proceeding, no court will review the prisoner's claims." *Martinez*, 566 U.S. at 10-11. While *Martinez* further noted that claims of ineffective assistance of trial counsel invariably require evidence outside the trial court record, *id.* at 12, it did not address the statutory evidentiary question taken up and answered in *Shinn*.

When, as here, the *Martinez-Trevino* rule applies because of the default caused by the ineffective assistance of initial collateral review counsel, and—also as here—the factual basis for the claim was subsequently presented in state court upon a stay of federal proceedings, then the federal courts must consider the evidence presented in the successive state proceedings.[6] *Shinn* has thus reinforced the necessity for the state-court record to include the bases for federal relief pursuant to *Martinez-Trevino*. Texas, along with 11 other states, plainly recognized this much in its amici curiae brief in support of the petition in *Shinn*:

> Moreover, evidence developed in state court for other purposes, such as to support a different claim or overcome a state procedural bar, can be considered in federal court to support a *Martinez*-excused ineffective-assistance claim consistent with section 2254(e)(2). *See, e.g., Apelt v. Ryan*, 878 F.3d 800, 825-34 (9th Cir. 2017) (considering evidence

[6] *See* ECF Nos. 31 (Order granting motion to stay federal proceedings and directing Petitioner to file a successor petition in state court within 60 days), 32 (Notice informing district court of termination of the state successor litigation), 32-1 (the CCA order), and the docket entry between ECF Nos. 36 and 37 ("Subsequent State Habeas Court Records received from AAG and sent to Pro Se Law Clerk for Death Penalty cases in the Tyler Division . . . (Entered: 07/07/2008)").

> presented in state court and rejected on state-law procedural grounds in conjunction with a claim excused by *Martinez*). *Trevino* itself was an example of this principle in action. Before that case reached this Court, Trevino discovered evidence which could support claims that he did not raise in initial state-habeas proceedings. 569 U.S. at 419. The district court stayed federal-habeas proceedings so Trevino could exhaust state remedies. *Id.* at 419-20. When Trevino returned to federal court, his ineffective-assistance claim and the evidence supporting it were incorporated in the state-court record and cognizable in federal-habeas proceedings (provided cause and prejudice existed to overcome procedural default). *See id.* at 420-21. That result is consistent with a faithful reading of section 2254(e)(2).

Brief for the States of Texas, Alabama, Arkansas, Florida, Indiana, Kentucky, Mississippi, Nebraska, Ohio, Oregon, South Carolina, and Utah as Amici Curiae in Support of Petitioners, *Shinn v. Ramirez*, No. 20-1009, at *16-17 (Feb. 26, 2021).[7]

II. THERE IS NO REASON TO FORGIVE RESPONDENT'S FORFEITURE OF § 2254(e)(2) AFFIRMATIVE DEFENSE.

In *Shinn*, Mr. Ramirez argued that Arizona "waived any objection to an evidentiary hearing on the merits of his habeas claim" and by having "made a strategic decision not to invoke § 2254(e)(2), Arizona waived its application to Mr. Ramirez's case." Brief for Respondents, *Shinn v. Ramirez*, 2021 WL 4197216 at *27-28 (U.S. Sept. 13, 2021). This Court declined to determine whether there was forfeiture of this issue, and, in a footnote, decided to forgive any forfeiture in part because "the Ninth Circuit passed upon § 2254(e)(2) when it ordered additional factfinding on remand" and in part because "deciding the matter now will reduce the likelihood of further litigation in a 30-year-old murder case." *Shinn*, 142 S. Ct.

[7] Available at https://www.supremecourt.gov/DocketPDF/20/20-1009/170181/20210226134023599_20-1009%20Amici%20Brief.pdf.

at at 1730 n.1 (citing *United States v. Williams*, 504 U.S. 36, 41 (1992); *Polar Tankers, Inc. v. City of Valdez,* 557 U.S. 1, 14 (2009)).

This Court has noted its discretion to forgive forfeiture, when it has all the necessary information before it, when the issue has been fully briefed by both parties, and "deciding the matter now will reduce the likelihood of further litigation." *Polar Tankers*, 557 U.S. at 14.

Even assuming arguendo § 2254(e)(2) is applicable, the Fifth Circuit here, in contrast to *Ramirez*, expressly did not decide the § 2254(e)(2) issue. Further, § 2254(e)(2) has been raised without the parties having had the opportunity to fully brief the question in the district court, the Fifth Circuit, or here where it was raised in an argument in opposition to certiorari. Furthermore, not only was there no objection to the introduction of this evidence in the district court, Respondent fully participated in the evidentiary development. As Judge Higginbotham opined, "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)." Pet.App.14a (Higginbotham, J., dissenting).

At bottom, the evidence necessitating the application of *Wiggins* was almost entirely in the state-court record prior to the 2014 remand from the Fifth Circuit. The majority's improper extension of *Richter,* Pet.App.5a, aimed at displacing *Wiggins* in adjudging prejudice for trial counsel ineffectiveness in capital sentencing remains founded upon the extensive lay witness evidence from the state-court record *sub judice*. Supp.App.380a-642a.

III. PETITIONER PRESENTED HIS MITIGATION EVIDENCE TO THE STATE COURTS.

An exact duplicate of the new evidence in mitigation attached to Canales's initial federal petition was submitted to the state court in the subsequent habeas application filed on May 21, 2007. *Compare* Supp.App.195-376a,382a-639a *with* ECF No. 7-3 at 2-3:[8]

Exhibit Number	Description	Amended Petition for Habeas Corpus (ECF No. 7-1) exhibit location	Descriptive References to the Exhibits Cited in Subsequent Habeas Application
1, Supp.App.382a-384a	Nov. 24, 2004 Affidavit of Jeff Harrelson, trial counsel, second chair	ECF No. 7-3 at 5-7	Supp.App.200a, 202a
2, Supp.App.386a	Nov. 23, 2004 Declaration of Tatman Ryder (law student intern who interviewed Paul Hoover, trial counsel, first chair)	ECF No. 7-3 at 8	Supp.App.200a, 202a
3, Supp.App.388a	Aug. 1, 2000 Hoover letter to trial court requesting Mr. Canales be moved to Telford Unit	ECF No. 7-3 at 9	Supp.App.201a
4, Supp.App.390a	Aug. 2, 2000 trial court letter to TDCJ requesting return to Telford Unit so defense attorneys may have "full access to him to prepare properly for trial"	ECF No. 7-3 at 10	Supp.App.201a
5, Supp.App.392a-398a	Jan. 15, 2002 Hoover timesheets	ECF No. 7-3 at 11-17	Supp.App.201a-202a

[8] ECF No. 7-3 at 2-3 is the index of exhibits attached to the federal petition. The federal versions of the exhibits themselves are cited in the table.

6, Supp.App.400a-408a	Jan. 14, 2002 Harrelson timesheets	ECF No. 7-3 at 18-26	Supp.App.201a-202a
16, Supp.App.448a	Anibal Canales, Jr., birth certificate	ECF No. 7-4 at 14	Supp.App.236a
17, Supp.App.450a-458a	Nov. 24, 2004 Declaration of older sister Elizabeth Canales Villareal	ECF No. 7-4 at 15-23	Supp.App.236a, 242a, 247a, 250a, 253a, 254a, 256a, 258a, 260a, 262a
18, Supp.App.460a-463a	Nov. 16, 2004 Declaration of maternal aunt Irene Garcia	ECF No. 7-4 at 24-27	Supp.App.237a, 239a, 2481-249a, 253a, 255a, 263a, 264a-265a
19, Supp.App.465a-470a	Nov. 16, 2004 Declaration of paternal uncle Jose Canales, Jr.	ECF No. 7-4 at 28-33	Supp.App.237a, 238a, 244a, 252a, 253a, 256a-257a, 263a, 266a
20, Supp.App.472a-479a	Oct. 14, 2004 Declaration of father's live-in girlfriend Elizabeth Velasco (in Spanish, with English translation dec. of Naomi F. Terr, Nov. 24, 2004)	ECF No. 7-4 at 34-41	Supp.App.237a, 239a, 242a-243a, 255a, 257a, 263a, 266a
21, Supp.App.481a-486a	Oct. 14, 2004 Declaration of half brother Aquiles Canales (in Spanish, with English translation dec. of Naomi F. Terr, Nov. 24, 2004)	ECF No. 7-4 at 42-47	Supp.App.237a, 239a-240a, 263a, 265a-266a
22, Supp.App.488a-489a	Nov. 22, 2004 Declaration of Hope Chacon, friend of mother	ECF No. 7-5 at 1-2	Supp.App.237a, 247a, 249a, 251a, 252a, 263a, 266a
23, Supp.App.491a-494a	Oct. 16, 2004 Declaration of maternal aunt, Dorothy Garcia Schiefelbein	ECF No. 7-5 at 3-6	Supp.App.237a, 240a-241a, 247a-248a, 263a, 264a-265a
24, Supp.App.496a-498a	Nov. 22, 2004 Declaration of maternal cousin, Vicki Cisneroz Young	ECF No. 7-5 at 7-9	Supp.App.237a, 249a, 251a, 263a

25, Supp.App.500a-501a	Nov. 22, 2004 Declaration of maternal cousin Michele Vallin	ECF No. 7-5 at 10-11	Supp.App.237a, 249a-250a, 251a, 252a-253a, 263a
26, Supp.App.503a-526a	School records	ECF No. 7-5 at 12-35	Supp.App.237a-238a
27, Supp.App.528a-630a	American Bar Association, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 HOFSTRA L. REV, 913 (2003)	ECF No. 7-5 at 36 to ECF No. 7-7 at 38	Sup.App.202a-210a, 232a, 236a, 272a n.9
28, Supp.App.632a-637a	Nov. 22, 2004 Declaration of younger sister, Gabriella Espinoza Rodriguez	ECF No. 7-7 at 39-44	Supp.App.261a, 262a, 263a
29, Supp.App.639a-642a	Dec. of Fred Sautter, Ph.D.	ECF No. 7-7 at 45-48	Supp.App.263a-264a

And the Subsequent Habeas Application used these exhibits to tell—nearly word-for-word—the same mitigation narrative presented in the initial federal petition. *Compare* Supp.App.200a-210a, 237a-274a *with* ECF No. 7-1 at 12-14, 43-81). Both document that factors unrelated to trial strategy led to the failure of trial counsel to conduct anything close to an adequate mitigation investigation. Supp.App.201a-204a; ECF No. 7-1 at 12-14.

Both narrate the story of Canales's horrific childhood, including poverty, neglect and abandonment at the hands of his alcoholic mother; exposure to violent, sexually abusive men in her life; and pressures to seek refuge in gang life as he was left to fend for himself as a child in violent, gang-ruled neighborhoods in which he had been stabbed and shot at by age 12. Supp.App.236a-259a; ECF No. 007-1 at 48-71. The extensive trauma to which he was subjected are well documented in heart-

breaking detail by numerous witnesses. Both document that Canales was protecting and loving toward other severely traumatized members of the family, even risking his personal safety to protect them. Canales's sister, Elizabeth, recalled Andy, who was just a boy, preventing their step-father from raping her, even though their step-father used to strip Andy naked and beat him with a buckle end of a belt. Supp.App.451a-452a. Andy also took responsibility for minor transgressions that would trigger their father's uncontrollable rage. Supp.App.454a. In short, even a minimal investigation would have quickly revealed evidence of his love for his family, and their love for him. Supp.App.260a-263a; ECF No. 007-1 at 71-74. Both the state successor and federal petition document, in lockstep, mental health issues including the fact that "Mr. Canales suffers from a trauma-related disorder." Supp.App.263a; ECF No. 007-1 at 74. The narration would show a point in time when Canales was on the verge of rising above the forces pushing him toward criminal life and becoming a success, and how that all came crashing down when his mother suffered an aneurysm and became completely incapacitated. The sweep of this evidence, which federal counsel presented to the state courts in successor litigation, was indeed "powerful mitigating evidence that would have served to remind the jury that Mr. Canales is human, capable of hope, loss, hard work, and deep sorrow." Supp.App.263a; ECF No. 7-1 at 74. It would have been a far cry from the pitiful trial evidence that he was a "gifted artist" and "peacemaker in prison."

Both further provided evidence that Canales could safely be incarcerated for life without significant risk. In addition to his very successful adaptation to prison

life, these documents also present evidence that a person sentenced to life for a capital murder conviction would be housed as securely as someone on death row. Supp.App.268a-269a; ECF No. 7-1 at 79.

Both pleaded the new mitigation evidence, using largely identical verbiage, and relying on extensive quotations from the same set of declarations.[9]

Upon resumption of federal habeas proceedings, Canales presented additional evidence relevant to *Wiggins* prejudice in the form of three expert reports predicated on the run of evidence earlier presented in the state successor and a set of additional declarations, most of them by the same declarants included in the set presented in the state successor. *See* ECF No. 220. This evidence provided additional context and opinion, but no significant new factual bases in support of prejudice. This is clear from Judge Higginbotham's treatment of the new mitigation evidence. His primary recitation of Canales's mitigation narrative is reflected in the federal petition[10] and the exhibits presented in state court. *See* Pet.App.9a-10a. He

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[9] For example, both use identical subheadings:

> An Effective Investigation Would Have Explained Mr. Canales' Desire To Be Part Of A Gang And Uncovered Ample Evidence Of Mr. Canales' 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;
>
> Mr. Canales' School Records Outline The Disruption and Chaos of his Childhood;
>
> Mr. Canales' Family;
>
> If Trial Counsel Had Conducted Any Investigation, They Would Have Uncovered Moving Evidence of Mr. Canales' Love For His Family, And Their Love For Him; and
>
> Mental Health Issues.

Supp.Appex.236a, 237a, 238a, 260a, 263a; ECF No. 007-1 at 48, 49, 50, 71, 74, respectively.

[10] The federal petition, with the identical set of exhibits shown in the table, was never amended. Rather, the three new expert reports came into the federal record by way of a notice filing. ECF No. 220. The district court accepted a supplement to the petition. ECF No. 121. But the supplement and

subsequently noted the jury never heard the story of "a childhood plagued by poverty, neglect, addiction, sexual abuse, and persistent violence" or of "Canales's heart attacks and required medication [that] left him vulnerable to the control of gang leaders." Pet.App.15a. Judge Higginbotham observes that the jury never heard from any of the relevant witnesses:

> 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. 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.

Id. This, again, is the story told through the evidence presented in the state successor. Judge Higginbotham follows this with a short quote from Canales's sister's 2016 declaration restating her extensive, detailed observations included in her original 9-page declaration in the state-court record:

> 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 be forever grateful for that.

Id. (quoting ECF No. 220-1 at 57-58 (alterations in Higginbotham)). The range of details evidencing the extreme parental neglect and beatings Canales suffered, plus his heroic efforts to protect his sisters from the predations of his mother's serial paramours, are set forth within the ten lay-witness declarations in the Court of Criminal Appeals' record. Further, Dr. Sautter's report therein also describes the

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attached exhibits did not address the *Wiggins* claim at all. *See id.* The new mitigation declarations were filed attached to Ms. Herrero's report. ECF No. 220-1 at 53-88.

many traumas Canales suffered and provides a preliminary opinion of PTSD (Supp.App.642a; *see also* ECF No. 220-1 at 34), which Dr. Maddox's 2016 psychiatric evaluation would confirm (ECF No. 220-3 at 1, 15-16).

The extant state-court record amply evidences prejudice under *Wiggins*, the firmly established standard here. This Court should not let stand the majority's troubling attempt to use *Richter* to impose a "substantial likelihood standard for evaluating prejudice," 562 U.S. at 112, an imposition strikingly in conflict with the clearly established federal law. Pet.App.5a.

CONCLUSION

The petition for writ of certiorari should be granted and full briefing and argument ordered. Alternatively, the Court should grant certiorari, vacate, and summarily reverse the decision below with instructions either to conduct *Wiggins* reweighing adhering to the clearly established federal law and consistent with *Shinn*'s restrictions on the consideration of evidence never before presented to the state court or to permit further review in state court.

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Respectfully submitted,

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