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

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
USDC No. 2:03-CV-69

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 ('Iron-head') 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-54789-02, 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 (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 (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.

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. A panel of this court has already held that Canales satisfied the first prong, *Canales*, 765 F.3d at 569–70, and nothing has

[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 (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 (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.

demonstrated a reason that we would disturb the law of the case as to this point. Accordingly, we address the prejudice prong only.

"In assessing prejudice, we reweigh the evidence in aggravation against the totality of available mitigating evidence." *Wiggins*, 539 U.S. at 534. 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 (2011).

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 8–9, 19. 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. Rather, the Court focused solely on the reasonable-probability standard for prejudice, as first established in *Strickland v. Washington*, 466 U.S. 668, 694 (1984), and clarified that standard. *See Richter*, 562 U.S. at 111–12 (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)). Moreover, the Supreme Court's recent holding in *Andrus v. Texas* did not change the law on assessing prejudice. *See* 140 S. Ct. 1875, 1886

(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. *See* ROA.3220.

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

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 (2000), cases in which the Supreme Court found prejudice.[2] In *Wiggins*, the petitioner suffered similar childhood trauma. 539 U.S. at 535 (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, and lacked "a record of violent conduct that could have been introduced by the State to offset this powerful mitigating narrative," *id.*

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[2] We also conclude that Canales's mitigating evidence is unlike the evidence presented in *Rompilla v. Beard*, 545 U.S. 374 (2005), and *Porter v. McCollum*, 558 U.S. 30 (2009) (per curiam), two additional cases the dissenting opinion relies upon for its argument on this issue. *See* Dissenting Op. at 9–11, 18.

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 (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.

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. 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. 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 10–11, 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 (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).

at 537. Like Wiggins, the petitioner in *Williams* also had a "nightmarish childhood" and was "borderline mentally retarded."[3] 529 U.S. at 395–96 (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 (observing that 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

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[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 (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 13 & n.33. 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 (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. 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 (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 13. We are not. Rather, we conclude that Canales's mitigating evidence of an abusive childhood and mental illness does

seeking violence toward, including the murder of, those who testified against him.[6] *See Wong v. Belmontes*, 558 U.S. 15, 24–25 (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.

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 establish a "substantial" likelihood of a different

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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 16–17. 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 17 (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. It is thus of no moment whether aggravating evidence is new or was before the sentencing jury.

result, *Harrington*, 562 U.S. at 112. 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

[1] *Sears v. Upton*, 561 U.S. 945, 951 (2010).

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 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 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

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[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 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*, 138 S. Ct. 1080 (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).

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

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[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*, 139 S. Ct. 1843, 1849 (2019).

[7] *United States v. Kwai Fun Wong*, 575 U.S. 402, 409 (2015) (quoting *Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 153 (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 (2002) (holding that to ensure that states do not gain "unfair tactical advantages," a state's voluntary removal to federal court waives sovereign immunity).

economy against the petitioner's substantial interest in justice."[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

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

[13] *See, e.g.*, *Granberry v. Greer*, 481 U.S. 129, 132 (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 (1989) (quoting *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (plurality opinion)).

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 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

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[15] *Id.* at 319 (quoting *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring)).

[16] *Woodson*, 428 U.S. at 304.

[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-54789-02, 2008 WL 383804 (Tex. Crim. App. Feb. 13, 2008).

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

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

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[21] *Strickland v. Washington*, 466 U.S. 668, 694 (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.

[23] *Id.* at 693.

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

[25] *Buck v. Davis*, 137 S. Ct. 759, 765 (2017).

[26] *Andrus v. Texas*, No. 18-9674, 2020 WL 3146872, at *8 (U.S. June 15, 2020) (per curiam) (emphasis added) (quoting *Wiggins v. Smith*, 539 U.S. 510, 537–38 (2003)).

[27] *Wiggins*, 539 U.S. at 534.

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 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

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[28] *Sears*, 561 U.S. at 955.

[29] *See Andrus*, 2020 WL 3146872, at *8 n.6 ("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 (2000).

[31] *Id.* at 367–68.

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

[33] *Id.* at 368 (majority opinion).

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

[35] *Id.* at 369-70 (majority opinion).

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

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[36] *Id.* at 399.
[37] *Id.* at 398.
[38] 545 U.S. 374, 377–78 (2005).
[39] *Id.* at 383.
[40] *Id.* at 391–92.
[41] *Id.* at 393.

appraisal of Rompilla's culpability," the Court held that he was entitled to resentencing.[42]

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

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[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 (emphasis added). Contrary to the Majority's implication, the Court was addressing the "benign conception" of defense counsel, not the jury.

[43] *Porter v. McCollum*, 558 U.S. 30, 41 (2009).

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

[45] *Rompilla*, 545 U.S. at 393.

[46] *Porter*, 558 U.S. at 41 (quoting *Wiggins*, 539 U.S. at 535); *see, e.g.*, *Rompilla*, 545 U.S. at 390–93 (granting relief where additional mitigation evidence regarding the

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

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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 (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 (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 ("The judge and jury at Porter's original sentencing heard almost nothing that would humanize Porter[.]").

Court rejected in *Andrus,* observing that it has "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

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[48] *Andrus*, 2020 WL 3146872, at *8 n.6.

[49] *Wiggins*, 539 U.S. at 537–38.

[50] *Williams*, 529 U.S. at 399.

[51] *Harrington v. Richter*, 562 U.S. 86, 101 (2011).

[52] *Cullen v. Pinholster* comes closest, but there the Court applied AEDPA deference. 563 U.S. 170, 202 (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*, 2020 WL 3146872, at *8 n.6 (stating that *Williams* found "prejudice after applying AEDPA deference") (citing *Williams*, 529 U.S. at 399).

"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 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

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[53] *Williams*, 529 U.S. at 415–16 (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 (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").

[55] *Williams*, 529 U.S. at 368.

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

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[56] *Rompilla*, 545 U.S. at 377–78, 383. 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; *Rompilla* 545 U.S. at 393; *Wiggins*, 529 U.S. at 398.

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 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

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[58] *Wiggins*, 539 U.S. at 534; *see Andrus*, 2020 WL 3146872, at *8 n.6 (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*").

[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).

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,

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

[61] 558 U.S. 15, 24–25 (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 (quoting *Strickland*, 466 U.S. at 700).

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 "premeditated 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

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[64] *Williams*, 529 U.S. at 398.
[65] *Id.*
[66] *See Porter*, 558 U.S. at 42.
[67] *Id.*
[68] *Lockett v. Ohio*, 438 U.S. 586, 605 (1978); *id.* at 604 (quoting *Woodson*, 428 U.S. at 304).

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

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[69] *Penry*, 492 U.S. at 319 (emphasis omitted) (quoting *Brown*, 479 U.S. at 545).
[70] *Id.*; *Woodson*, 428 U.S. at 304.

citizens, laymen representing a cross-section of the community. The federal bench is no substitute. We bring an insular perspective, reflecting our unique 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.