

United States Court of Appeals for the Fifth Circuit

No. 25-70010

United States Court of Appeals
Fifth Circuit

FILED

September 15, 2026

Lyle W. Cayce
Clerk

JUAN RAUL NAVARRO RAMIREZ,

Petitioner—Appellant,

versus

ERIC GUERRERO, *Director, Texas Department of Criminal Justice,
Correctional Institutions Division,*

Respondent—Appellee.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 7:18-CV-386

Before STEWART, HAYNES, and HIGGINSON, *Circuit Judges.*

STEPHEN A. HIGGINSON, *Circuit Judge:*

Juan Raul Navarro Ramirez, a Texas death-row inmate, seeks a certificate of appealability (COA) to appeal the district court's denial of his 28 U.S.C. § 2254 federal habeas corpus petition. He raises two claims on appeal: first, that his trial counsel was constitutionally ineffective for failing to move his juvenile mental-health records into evidence under the business-records hearsay exception; second, that the state trial court erred in admitting his recorded confession because it was involuntary. Because

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Ramirez has not shown that reasonable jurists could debate the district court's resolution of either claim, we DENY his application.

I.

A jury convicted Ramirez of capital murder in 2004 for his role in a multi-victim robbery homicide in Hidalgo County, Texas, involving two competing gangs—locally known as the “Edinburg massacre.”¹ The case against him rested, in part, on his own recorded confession, given following a custodial interrogation. In the recorded confession, Ramirez admitted that he was a member of a gang, that he had agreed to participate in a robbery of another gang (to steal their drugs), and that he had been handed a “cuerno de chivo,” wiped of fingerprints, before the robbery because “there might be some people in there . . . , so you gotta put them down.” An investigator testified that “cuerno de chivo” refers to “an AK-47, which uses 7.62 by 39 caliber bullets” and that forensics confirmed the bullets recovered from the scene and one victim's body were 7.62 by 39 caliber. Following a thirteen-day trial, the jury found Ramirez guilty of capital murder after a day of deliberation.

Ramirez contends that the jury heard little about his background at sentencing, despite an extensive juvenile Texas Youth Commission (TYC) record documenting depression, PTSD, and suicide attempts starting at around age ten, because his trial counsel never admitted them through the

¹ The jury found Ramirez guilty of two counts of capital murder. On direct appeal, however, the Texas Court of Criminal Appeals (TCCA) held—and the State conceded—that only one count could stand because of double jeopardy. *Ramirez v. State*, No. AP-75,167, slip op. at 10–12, 2007 WL 4375936 (Tex. Crim. App. Dec. 12, 2007) (not designated for publication). The TCCA otherwise affirmed the jury's conviction and the trial court's death sentence. *Id.* at 1.

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business-records exception to hearsay.² The jury sentenced Ramirez to death.

The district court, with the assistance of a 164-page Report and Recommendation (R&R) prepared by the magistrate judge, denied Ramirez’s 400-page federal habeas petition, which asserted 19 claims, each with multiple subclaims. The district court also denied a COA. Ramirez now asks us for a COA on only two claims.

II.

A petitioner may appeal the denial of federal habeas relief only if he first obtains a COA under 28 U.S.C. § 2253(c)(1). *Gonzales v. Davis*, 924 F.3d 236, 241 (5th Cir. 2019) (per curiam). To do so, he must make “a substantial showing of the denial of a constitutional right.” § 2253(c)(2); *see also Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). When the petition was denied on substantive grounds, the petitioner must show “that jurists of reason could disagree with the district court’s resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.” *Miller-El*, 537 U.S. at 327. When the petition was denied on procedural grounds, the petitioner must show “that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right *and* that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (emphasis added). The petitioner bears the burden of showing his entitlement to a COA. *Id.* at 483 (delineating “what the habeas applicant must show to satisfy the requirements of § 2253(c)”).

² Ramirez was under the supervision of TYC from ages fourteen to eighteen.

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III.

First, Ramirez seeks a COA on Claim 1, his ineffective assistance of counsel claim. He argues that his trial counsel was ineffective for failing to move his juvenile TYC records into evidence under the Texas Rule of Evidence 803(6) business-records exception. According to Ramirez, the State had already authenticated the records as admissible, but counsel instead relied on an expert witness whose testimony was excluded on hearsay grounds pursuant to Texas Rule of Evidence 705(d).³

That was not the theory presented in Ramirez’s operative habeas petition. There, Claim 1 alleged that counsel failed to investigate Ramirez’s mental-health, intellectual, developmental, and psycho-social history in the first place. Ramirez concedes as much. He acknowledges that Claim 1 “has evolved throughout the pendency of [his] federal habeas proceedings” and that it “no longer relies on proof of a failed mitigation investigation. Instead, it focuses on trial counsel’s ignorance of a point of law”

Ramirez first presented that new theory in his combined reply to the State’s answer, response to the State’s motion for summary judgment, and cross-motion for summary judgment. When the magistrate judge did not adjudicate his “ignorance-of-the-law-based ineffectiveness claim,” Ramirez sought reconsideration. The district court declined to reconsider, explaining that the business-records theory was first raised “in his reply to Respondent’s Answer and Response to Motion For Summary Judgment and

³ TEX. R. EVID. 705(d) (“If the underlying facts or data would otherwise be inadmissible, the proponent of the opinion may not disclose them to the jury if their probative value in helping the jury evaluate the opinion is outweighed by their prejudicial effect. If the court allows the proponent to disclose those facts or data the court must, upon timely request, restrict the evidence to its proper scope and instruct the jury accordingly.”).

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Cross-Motion for Summary Judgment” and that “[s]imply, ‘new legal theories and/or factual issues raised for the first time in a reply brief need not be considered on federal habeas review.’ If Petitioner had intended to raise those arguments in his reply brief as a ground for habeas relief, he should have sought leave to amend his petition.” See *United States v. Cervantes*, 132 F.3d 1106, 1111 (5th Cir. 1998) (holding in a habeas case that a district court did not abuse its discretion in declining to consider an issue first raised in a reply brief where the movant did not seek leave to amend).⁴

Ramirez does not challenge that ruling on appeal. Indeed, he acknowledges that “the magistrate judge [did not] adjudicate [h]is ignorance-of-the-law-based ineffectiveness claim . . .”⁵ and that “the factual and legal basis of this claim” was presented “in his Cross-Motion for Summary Judgment.” Yet he asks us to consider the merits of his new theory while ignoring that the district court declined to consider it because it was raised too late. Because Ramirez does not engage the actual basis for the procedural ruling below, he has not shown “that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.” *Slack*, 529 U.S. at 484. We therefore deny a COA on Claim 1.

⁴ Ramirez did not subsequently seek leave to amend, despite his habeas petition’s express reservation of “his right to amend [h]is petition” and its promise that, “[a]t the appropriate time during these proceedings, Ramirez will present any additional claims, along with complete factual and procedural histories and more thorough briefing on his claims through amendment to the petition.”

⁵ Elsewhere, however, and confoundingly, Ramirez suggests that the magistrate judge did, in fact, adjudicate “this claim” by finding it “unexhausted” and “that Ramirez had not proven the ineffectiveness of state habeas counsel to overcome the claim’s default”—citing the magistrate judge’s analysis of Claim 1(A) at ROA.3386–3387, 3391–3392. Ramirez is mistaken. Claim 1(A) alleged that his state trial counsel was ineffective for failing to investigate Ramirez’s alleged neurodevelopmental disabilities, brain damage, and mental illness. In other words, Claim 1(A) had nothing to do with trial counsel’s failure to apprehend the business-records exception to hearsay.

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Second, Ramirez seeks a COA on Claim 4(H), which alleged that the state trial court erred by admitting his recorded interrogation statement because it was not knowing, intelligent, and voluntary. Ramirez claimed that he had taken Rohypnol pills on the morning of his arrest and that he agreed to waive his rights and give an audiotaped statement because he “wanted to go back to sleep.” The state trial court held a suppression hearing at which Ramirez and the interrogating officers testified. Ramirez maintained that he had taken Rohypnol and that he “couldn’t make decisions correctly” because he was “intoxicated.” The officers testified that Ramirez was “very cooperative,” did not appear to be intoxicated, and never complained that he was tired or sleepy. The state trial court declined to suppress the confession, crediting the officers’ testimony over Ramirez’s. The TCCA affirmed. State habeas efforts likewise failed. *Ex parte Ramirez*, Nos. WR-71,401-01 & WR-71,401-02, 2015 WL 6282336, at *1 (Tex. Crim. App. Oct. 14, 2015) (not designated for publication).

Ramirez then raised the voluntariness claim in federal court. The magistrate judge found the claim exhausted, in relevant part, and denied it on the merits, consistent with the State’s motion for summary judgment. The magistrate judge found that Ramirez’s “federal habeas claim—like his mirroring state habeas claim—depends on the notion that his testimony at the suppression hearing should be credited over that of the [officers]. Petitioner thus fails to show that he is entitled to relief under AEDPA’s⁶ standards.”

In his objections to the magistrate judge’s R&R, however, Ramirez presented additional evidence and, based on that evidence, advanced a new exhaustion theory. He pointed to a declaration from codefendant Marcial

⁶ AEDPA refers to the Antiterrorism and Effective Death Penalty Act of 1996.

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Bocanegra, which was already in the record but had been offered in support of different claims, and a newly presented, updated report from false-confession expert Dr. Deborah Davis. Bocanegra was the first codefendant arrested, and his original statement to police implicated an unnamed person he called “Lenny”—conduct the State later attributed to Ramirez at trial. In his post-trial declaration dated March 8, 2019, Bocanegra stated that he, not Ramirez, was “Lenny.” Dr. Davis’s updated report—she had previously submitted a report in 2013 state habeas proceedings—concluded that Ramirez had an enhanced vulnerability to suggestion and interrogative pressure, citing brain damage worsened by childhood adversity and a functional cognitive age well below his chronological age at the time of his arrest.

Ramirez argued for the first time in his objections that, considered together, this evidence rendered Claim 4(H) significantly different from the claim presented to the state court and therefore *unexhausted*.⁷ The district court adopted the magistrate judge’s R&R without addressing Ramirez’s “new” evidence or his new exhaustion argument.

Ramirez’s submission of new evidence with his objections was not, standing alone, procedurally improper. A district judge has discretion under

⁷ Ramirez’s incentive for arguing that this new evidence renders Claim 4(H) unexhausted, rather than simply additional support for an already-adjudicated claim, is that unexhausted claims are not entitled to AEDPA deference under 28 U.S.C. § 2254(d), which applies only to claims “adjudicated on the merits in State court proceedings.” Establishing that the state court never adjudicated the claim as now presented would permit de novo review rather than the deferential review that § 2254(d) otherwise requires. *Salazar v. Dretke*, 419 F.3d 384, 395 n.19 (5th Cir. 2005). Because Ramirez likely cannot return to state court to exhaust this theory without running afoul of Texas’s bar on successive habeas applications, he would also need to excuse the resulting procedural default, which he attempts to do by invoking the actual-innocence gateway of *Schlup v. Delo*, 513 U.S. 298 (1995).

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28 U.S.C. § 636(b)(1)(C)⁸ to consider such evidence. *Freeman v. County of Bexar*, 142 F.3d 848, 851–52 (5th Cir. 1998). But Ramirez did more than offer additional evidence in support of the claim considered by the magistrate judge. He used that evidence to advance an entirely new theory of exhaustion—namely, that the claim the magistrate judge had found exhausted and denied on the merits was materially different from the claim presented to the state courts. That theory would have changed the procedural posture of Claim 4(H) and required the district court to consider an issue the magistrate judge had not addressed. *Supra* note 7.

Ramirez now renews that same theory on appeal, arguing that “[r]easonable jurists could find” Claim 4(H) “unexhausted” and faulting the district court for “ignoring [his] arguments that new evidence presented in support of this claim fundamentally strengthened it and thus rendered it unexhausted.” But issues raised for the first time in objections to an R&R are not properly before the district court. *United States v. Armstrong*, 951 F.2d 626, 630 (5th Cir. 1992); *Finley v. Johnson*, 243 F.3d 215, 219 n.3 (5th Cir. 2001) (recognizing in a habeas case that “[w]e have held that issues raised for the first time in objections to the report of a magistrate judge are not properly before the district judge”). Because Ramirez’s exhaustion theory was not properly before the district court, “this court will not address” it. *Armstrong*, 951 F.2d at 630.⁹ Ramirez has not shown that reasonable jurists could debate the district court’s resolution of Claim 4(H).

⁸ 28 U.S.C. § 636(b)(1)(C) (“The judge may also receive further evidence or recommit the matter to the magistrate judge with instructions.”).

⁹ To be sure, we have held that “[a]n issue raised for the first time in objections to a magistrate judge’s report may be construed as a motion to amend a complaint or petition.” *Morrison v. Johnson*, 214 F.3d 1350, 2000 WL 634644, at *1 (5th Cir. 2000) (table decision); *see also United States v. Riascos*, 76 F.3d 93, 94 (5th Cir. 1996) (“The district court may construe an issue raised for the first time in an objection to a magistrate judge’s report

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IV.

For the foregoing reasons, Ramirez's application for COA is DENIED.

and recommendation as a motion to amend complaint. . . . We review the district court's failure to allow such an amendment for abuse of discretion.""). That rule does not assist Ramirez. He has been represented by counsel throughout his federal habeas proceedings, already amended his petition once as a matter of right, and does not argue that the district court abused its discretion by declining to grant further leave to amend Claim 4(H).

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HAYNES, *Circuit Judge*, dissenting:

Movant, Juan Raul Navarro Ramirez, moves for a certificate of appealability (“COA”) to appeal the dismissal of his 28 U.S.C. § 2254 petition. I believe that Ramirez has met the low threshold required to grant his COA application. Because I would grant a COA on both of his claims, I respectfully dissent.

I.

The standard for issuing a COA is not high—it is a mere threshold inquiry, not a full merits analysis. *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003) (holding that 28 U.S.C. § 2253(c) “forbids” full consideration of the underlying factual or legal bases of the claim at issue). To qualify for a COA, a movant must make “a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). “When the district court denies a habeas petition on procedural grounds without reaching the prisoner’s underlying constitutional claim, a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

I am not addressing whether Ramirez would ultimately succeed. Instead, I am looking at the COA which is a low threshold. It “would mean very little if appellate review were denied because the prisoner did not convince a judge, or, for that matter, three judges, that he or she would prevail.” *Miller-El*, 537 U.S. at 337. Indeed, importantly, “in capital cases, doubts as to whether a COA should issue must be resolved in favor of the petitioner.” *Clark v. Johnson*, 202 F.3d 760, 764 (5th Cir. 2000).

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II.

Here, Ramirez was convicted of capital murder under the Texas “law of parties” (Texas Penal Code §§ 7.01 and 7.02) for his role in a robbery homicide when he was eighteen years old. The primary evidence used to convict him was a confession placing him at the scene of the crime and ballistics evidence showing that bullets recovered from the scene matched the type of weapon that Ramirez confessed to bringing there. A co-defendant to the crime, Marcial Bocanegra, initially attributed the actions that Ramirez confessed to—tying up one of the victims and hitting them with a frying pan—to a person named “Lenny.” Bocanegra never identified Ramirez as Lenny and in 2013, he explicitly noted that Ramirez was not Lenny. In 2019, in a sworn declaration, Bocanegra admitted that he, himself, was Lenny.

At sentencing, the jury heard very little about Ramirez’s background, despite an extensive juvenile Texas Youth Commission (“TYC”) record documenting depression, PTSD, and suicide attempts starting at around age ten, because his trial counsel never got the materials in front of them. Because the TYC report was not properly admitted into evidence by Ramirez’s trial counsel, the defense expert was prohibited from testifying about its contents and consequently the jury was not allowed to consider this potentially mitigating evidence when recommending the death penalty for Ramirez.

III.

The district court, with the assistance of a 164-page report and recommendation (“R&R”) prepared by the magistrate judge, denied his 400-page habeas petition, which asserted 19 claims, each with multiple

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subclaims. The district court also denied a COA. Ramirez now asks this court for a COA on only two claims:

Claim 1: Trial counsel’s failure to present and explain all readily available mitigating evidence was constitutionally deficient and prejudicial to the outcome of Ramirez’s sentencing proceeding.

Claim 4(H): Ramirez’s Fifth, Sixth, and Fourteenth Amendment rights were violated when the trial court failed to suppress Ramirez’s involuntary statements derived from his police interrogation.

A.

First, Ramirez seeks a COA on Claim 1, his ineffective assistance of trial counsel (“IATC”) claim. He argues that his trial counsel was ignorant of the evidentiary rules governing the capital sentencing proceedings and failed to present and explain all readily available mitigating evidence, including Ramirez’s TYC report, to the jury. The magistrate judge divided Ramirez’s IATC claim into two sub-claims: sub-claim 1A was IATC for failing to investigate and present mitigating evidence of his mental impairments, and sub-claim 1B was IATC for failing to investigate and present mitigating evidence of his psycho-social history. *Ramirez v. Lumpkin*, No. 7:18-CV-386, 2024 WL 4509123, at *45–46, *50 (S.D. Tex. May 31, 2024), *report and recommendation adopted in part, rejected in part*, No. 7:18-CV-0386, 2024 WL 4491822 (S.D. Tex. Oct. 15, 2024). The magistrate judge, in his R&R, held that “[s]ub-claim 1A is unexhausted due to state habeas counsel’s withdrawal of its substance—or any issues concerning his ostensible mental impairments—from State Claim 1 [sub-claim 1A’s state counterpart] during the state habeas proceedings.” *Id.* at *46. The magistrate judge did not conduct a merits analysis of sub-claim 1A. The district judge adopted the magistrate judge’s R&R and held that Ramirez had not proven

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the ineffectiveness of state habeas counsel to overcome this procedural default. *Id.* at *50.

While an unexhausted claim is ordinarily barred from review, the Supreme Court has allowed federal courts to consider the unexhausted claim if the petitioner's state habeas counsel was ineffective for not raising the claim in the first place. *See Trevino v. Thaler*, 569 U.S. 413 (2013); *Martinez v. Ryan*, 566 U.S. 1 (2012). Here, reasonable jurists could disagree with the district court's procedural ruling that Ramirez did not meet his burden under *Martinez* and *Trevino* to prove that his state habeas counsel was ineffective for failing to raise this IATC claim. An important point is that throughout his state court proceedings, he alleges that he had an ineffective lawyer so some of this was not raised, which is the point.

Under *Martinez*, a petitioner must show that: (1) "state habeas counsel's deficient performance prejudiced him under *Strickland*" and (2) "the underlying IATC claim is 'substantial,' meaning it 'has some merit.'" *Tong v. Lumpkin*, 90 F.4th 857, 865 (5th Cir. 2024) (first citing *Martinez*, 566 U.S. at 14; and then citing *Trevino*, 569 U.S. at 423).

Under the first prong, Ramirez's state habeas counsel should have known that not presenting the TYC records to the jury was fatal to Ramirez's mitigation defense. Some things were raised in the state habeas but failure to raise everything about this argument during state habeas proceedings fell below professional standards for effective counsel and prejudiced Ramirez. Brad Levenson, Ramirez's lead counsel in his state habeas proceedings noted that state habeas counsel "inexplicably" failed to present trial counsel's evidentiary blunder. He could not "conceive of an objectively reasonable basis for [state habeas counsel's] failure to identify trial counsel's evidentiary error and its consequences." Moreover, Ramirez's co-defendant and a "captain and leader" of the gang, Humberto Garza, was granted relief in his

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state habeas proceedings due to his trial counsel's failure to present similar TYC evidence of his troubled youth. *See Ex parte Garza*, 620 S.W.3d 801, 809–10, 823–26 (Tex. Crim. App. 2021). Both facts evince that counsel's decision to withdraw this claim during the state habeas proceedings was not strategic; rather, it amounted to deficient performance by counsel that prejudiced Ramirez and denied him state habeas relief that his similarly situated co-defendant was granted.

For the second prong, Ramirez presents this court with substantial evidence about his troubled youth that the jury never had the opportunity to consider due to his trial counsel's ignorance of the hearsay rules. To show prejudice, "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." *Canales v. Davis*, 966 F.3d 409, 412 (5th Cir. 2020) (citation modified). Trial counsel's ignorance of the law led to the exclusion of large amounts of evidence bearing on Ramirez's psychological history and mental health that could have led jurors to determine that death was not an appropriate sentence. At this juncture, the court need not conclusively decide the merits of the underlying IATC claim, only that it is "substantial" and "has some merit." *Tong*, 90 F.4th at 865. Given the prejudicial effect of the exclusion of potentially mitigating information from the jury's consideration, Ramirez's underlying IATC claim is substantial and has some merit.

Therefore, reasonable jurists could debate the district court's holding that Ramirez did not meet his burden under *Martinez* and *Trevino* to show that his state habeas counsel was ineffective for failing to raise a substantial claim of trial counsel ineffectiveness. Accordingly, a COA should have been issued on Claim 1.

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B.

Second, Ramirez seeks a COA on Claim 4(H), which alleges that the state trial court erred by admitting his recorded interrogation statement because it was not knowing, intelligent, and voluntary.

Although Ramirez already exhausted this claim in his state and federal proceedings, Ramirez adds new evidence that arguably creates an unexhausted version of his trial court error claim and opens the *Schlup* actual innocence “gateway” to overcome his procedural default. *See Schlup v. Delo*, 513 U.S. 298, 316 (1995).¹ Because I think we should grant the first COA and because he did raise some of this matter in the state court, I think it is appropriate to grant this COA even with the additional information that is very important: a sworn declaration from his codefendant, Bocanegra, regarding the identity of “Lenny” and an updated expert mental health report from Dr. Deborah Davis explaining why Ramirez was particularly vulnerable to making a false confession.

Bocanegra had originally identified a person named “Lenny” as the individual who tied up one of the victims and hit them with a frying pan—the same actions Ramirez confessed to. Years later, in 2019, Bocanegra confessed that he is the person described as “Lenny,” and “the actions that [he] attributed to ‘Lenny,’” were actually committed by him (Bocanegra).

¹ That Ramirez first raises this argument in his objection to the magistrate judge’s R&R does not end the matter. “The district court may construe an issue raised for the first time in an objection to a magistrate judge’s report and recommendation as a motion to amend complaint. We review the district court’s failure to allow such an amendment for abuse of discretion.” *United States v. Riascos*, 76 F.3d 93, 94 (5th Cir. 1996) (per curiam) (citation omitted). Given the nature of the penalty in a capital case, I would have found that the district court abused its discretion in not construing Ramirez’s objection as a motion to amend. *Cf. Clark*, 202 F.3d at 764 (“[I]n capital cases, doubts as to whether a COA should issue must be resolved in favor of the petitioner.”).

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Next, excerpts from Dr. Davis's updated findings include that: *first*, "although [Ramirez] was born with brain damage, this was accelerated by his postnatal adversities[,] making his functional age and abilities far below those implied by his biological age." *Second*, "[f]eatures of the childhood of Mr. Ramirez have been clearly associated with [the] four bases of vulnerability [to interrogative influence and false confession]." *Third*, "the *degree* of [Ramirez's] impairment is much greater than previously documented." *Fourth*, "[i]t is more than clear that Mr. Ramirez's intellectual functioning and impairments in executive and neuropsychological functioning would place him at significant risk in police interrogation." *Fifth*, "even in the absence of a learning disability, life histories such as that of Mr. Ramirez have been shown to be predictive specifically of false confession[.]" *Sixth*, "the existing impairments afflicting Mr. Ramirez were exacerbated by his condition during interrogation."

Taken together, the former evidence and the new evidence casts doubt on the veracity of Ramirez's confession—the primary evidence used against him—and his role in the events that took place. In light of this, it is more likely than not that no reasonable juror would have granted a death penalty in this arena. Accordingly, a COA should be issued on Claim 4(H).

* * *

Because I would grant a COA on both claims, I respectfully dissent.